IN THE COURT OF APPEALS OF THE
STATE OF OREGON

STATE OF OREGON,
*Plaintiff-Respondent,*
*v.*
GREGORY JAMES CLELAND,
*Defendant-Appellant.*

Marion County Circuit Court
15CR45171; A161362

Claudia M. Burton, Judge.

Argued and submitted September 26, 2017.

Sarah De La Cruz, Deputy Public Defender, argued the cause for appellant. With her on the brief was Ernest G. Lannet, Chief Defender, Criminal Appellate Section, Office of Public Defense Services.

Christopher A. Perdue, Assistant Attorney General, argued the cause for respondent. With him on the brief were Ellen F. Rosenblum, Attorney General, and Benjamin Gutman, Solicitor General.

Before Lagesen, Presiding Judge, and DeVore, Judge, and James, Judge.

LAGESEN, P. J.

Affirmed.

James, J., concurring.

**LAGESEN, P. J.**

Defendant appeals from a judgment of conviction for possession of methamphetamine, ORS 475.894, and menacing, ORS 163.190. He seeks reversal of the conviction for possession, assigning error to the trial court's denial of his motion to suppress the evidence of the methamphetamine. The methamphetamine was discovered during an inventory search of defendant's belongings after the Salem Police arrested him for menacing. Defendant contends that the search was not authorized by the Salem Police Department's inventory policy and violated Article I, section 9, of the Oregon Constitution, for that reason. Alternatively, defendant argues that the Salem Police Department's inventory policy is unconstitutionally overbroad and that the search violated Article I, section 9, for that reason. Accepting the trial court's supported factual findings and reviewing for legal error, *State v. Ehly*, 317 Or 66, 75, 854 P2d 421 (1993), we affirm.

We state the facts—which are few—in accordance with the trial court's explicit and implicit findings. The search at issue was conducted under a provision of the Salem Police Department's inventory policy. The pertinent part of the policy states:

> "A. An inventory of personal property found during the search of any subject taken into police custody shall include the opening of any closed containers found in the possession of the subject in police custody under the following circumstances:
>
> > "1. The closed container is designed for holding U.S. currency, coins, and/or other valuables, including but not limited to, purses, coin purses, wallets, fanny packs, backpacks, briefcases, and jewelry pouches[.]"

The policy further explains that its purpose, among other things, is to "[i]dentify and protect the property while it is in police custody" and to "[r]educe or eliminate false claims against the police for damage to or loss of the property." Applying that policy, Salem Police Officer Adams opened a hard, black, nylon case that he found in defendant's backpack

upon defendant's arrest.[1] From its outward appearance, the case looked to be a container for holding a small external computer hard drive or a small video game console, such as a Nintendo Game Boy.

In denying defendant's motion to suppress, the trial court concluded that the search of the case was authorized by the policy because, from an objective standpoint, it appeared to be "designed for" holding small electronics. The court reasoned that small electronics are "valuables" under our en banc decision in *State v. Johnson*, 153 Or App 535, 958 P2d 887, *rev den*, 327 Or 554 (1998), in which we upheld an inventory search of a briefcase on the ground that a briefcase is the type of container that typically contains "articles like money, credit cards, valuable papers, a lap top computer or a calculator." *Id.* at 542. The court rejected defendant's alternative argument that the policy was unconstitutionally overbroad because it gives officers too much discretion as to what closed containers to search, such that searches conducted under it violate Article I, section 9. Defendant challenges both components of the court's ruling on appeal.

As to whether the search was authorized by the policy, the policy, by its terms, requires the search of any closed container "designed for" holding valuables. The policy does not define the term "valuables," but it does include a short list—"U.S. currency, coins"—and also includes examples of types of containers that can be searched for "valuables," including "fanny packs, backpacks, [and] briefcases." Although cases for small electronics are not on the list, the list is not exclusive. We conclude that cases for small electronics fall within the scope of "closed containers" designed for holding "other valuables." This is consistent with the policy's stated purpose—to protect property and to guard against false claims for damage or loss of property. Given their typical expense, small electronics represent a category of property that has the potential to subject police to claims for loss or damage, as we recognized in *Johnson*. *Id*. For that reason, the trial court correctly concluded that the search of the case was authorized by the Salem Police Department's policy.

[1] There is no dispute as to whether Adams permissibly opened the backpack.

As to whether the policy is unconstitutionally overbroad for giving officers too much discretion as to what containers to search, defendant correctly points out that the lack of a definition of "valuables" means that officers necessarily have some discretion to determine what constitutes a valuable and, thus, some discretion as to whether to conduct a search. However, our case law establishes that the level of discretionary judgment involved in determining what constitutes a valuable does not render an inventory policy unconstitutionally overbroad under Article I, section 9. We repeatedly have explained that a "requirement that officers open every closed container that is designed or objectively likely to contain valuables serves as the constitutionally necessary constraint on the exercise of individual officers' discretion." *State v. Hite*, 266 Or App 710, 720, 338 P3d 803 (2014) (citing *State v. Mundt/Fincher*, 98 Or App 407, 413-14, 780 P2d 234, *rev den*, 308 Or 660 (1989)); *see also State v. Guerrero*, 214 Or App 14, 19-21, 162 P3d 1048 (2007) (discussing cases). In so doing, we have recognized—at least implicitly—that "valuables" represent a category of property with sufficiently clear boundaries to impose the constitutionally required limitation on officer discretion. To conclude otherwise would run contrary to our reasoning in the above cases. For that reason, the trial court did not err in rejecting defendant's argument that the inventory policy was unconstitutionally overbroad.

Affirmed.

**JAMES, J.,** concurring.

In this case, involving the inventory search of an opaque container, the majority affirms the decision of the trial court upholding the search, relying on *State v. Johnson*, 153 Or App 535, 958 P2d 887, *rev den*, 327 Or 554 (1998). 289 Or App at ___. I cannot find fault with that reasoning. I concur that our decision in *Johnson* does support the proposition that the search here was lawful.

However, the majority could reverse the trial court, relying on *State v. Keller*, 265 Or 622, 629, 510 P2d 568 (1973) and *State v. Atkinson*, 298 Or 1, 7, 688 P2d 832 (1984), although doing so would require us to disavow

much of our subsequent application of those cases. In that instance, I would also concur, because *Keller* and *Atkinson* support the proposition that the search was *un*lawful. And therein lies the problem. If this court's jurisprudence were an art museum, our decisions on inventory searches would surely hang in the impressionists wing, where patrons are not encouraged to inquire too closely, lest the illusion of a coherent picture be dispelled. How, and why, this came to be is worth examining.

Although its origins can be traced farther back, the modern inventory exception to the Fourth Amendment's warrant preference derives from *South Dakota v. Opperman*, 428 US 364, 369, 96 S Ct 3092, 49 L Ed 2d 1000 (1976). There, the Court grounded the exception in a tripartite policy rationale: "the protection of the owner's property while it remains in police custody, *** the protection of the police against claims or disputes over lost or stolen property, *** and the protection of the police from potential danger." *Id.* at 369. *See Illinois v. Lafayette*, 462 US 640, 643, 103 S Ct 2605, 77 L Ed 2d 65 (1983) (applying the *Opperman* policy rationale to inventory searches of personal items at booking).

In *Colorado v. Bertine*, 479 US 367, 107 S Ct 738, 93 L Ed 2d 739 (1987), the Court clarified that, to be reasonable under the Fourth Amendment, an inventory search had to be performed in accord with "reasonable police regulations relating to inventory procedures administered in good faith." *Id.* at 374. Discretion of where to search was permissible, so long as "the exercise of police discretion *** is exercised according to standard criteria and on the basis of something other than suspicion of evidence of criminal activity." *Id*. at 375. This includes the opening of closed containers during the inventory search, regardless of appearance. As the Court noted,

> "When a legitimate search is under way, and when its purpose and its limits have been precisely defined, nice distinctions between *** glove compartments, upholstered seats, trunks, and wrapped packages *** must give way to the interest in the prompt and efficient completion of the task at hand.
>
> "*****

> "A single familiar standard is essential to guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront."

*Id.* (citations and internal quotation marks omitted).

Three years after *Bertine*, the Court made explicit that the Fourth Amendment does not require any particular treatment of closed containers in an inventory policy. So long as the inventory policy is "not [a] ruse for a general rummaging in order to discover incriminating evidence," closed containers could be categorically searched, ignored, or approached on a case by case basis:

> "Thus, while policies of opening all containers or of opening no containers are unquestionably permissible, it would be equally permissible, for example, to allow the opening of closed containers whose contents officers determine they are unable to ascertain from examining the containers' exteriors. The allowance of the exercise of judgment based on concerns related to the purposes of an inventory search does not violate the Fourth Amendment."

*Florida v. Wells*, 495 US 1, 4, 110 S Ct 1632, 109 L Ed 2d 1 (1990).

For purposes of Article I, section 9, of the Oregon Constitution, inventory searches have received different treatment. In *Atkinson*, the court grounded the exception in the same tripartite policy rationale as *Opperman*. 298 Or at 7. With respect to the first two parts of the rationale, the protection of the owner's property while it remains in police custody and the protection of the police against claims or disputes over lost or stolen property, the court largely tracked *Opperman*. *Id.* However, *Atkinson* departs from *Opperman* on the third rationale—officer safety. There, *Atkinson* noted that "[r]eliance on this reason must have a concrete basis in specific circumstances; it may not simply be assumed as a basis of a general precautionary practice." *Id.* at 8.

Perhaps because of this rejection of a categorical officer safety rationale, Article I, section 9, jurisprudence also rejects the categorical treatment of containers as expressed in *Bertine* and *Wells*. *Atkinson* held that, to be valid, the

"inventory must be conducted pursuant to a properly authorized administrative program, designed and systematically administered so that the inventory involves no exercise of discretion by the law enforcement person directing or taking the inventory. " 298 Or at 10. *Atkinson* went on to hold that, as a general rule, an inventory policy complying with Article I, section 9, cannot authorize the police to open closed containers; in the classic example, the police must inventory a closed fishing tackle box as "one fishing tackle box." *Id.* (quoting *Keller*, 265 Or at 626).

Following *Atkinson*, the treatment of closed container inventory searches under Article I, section 9, can be delicately described as conflicted. In *State v. Ridderbush*, 71 Or App 418, 426, 692 P2d 667 (1984), tacking true to the course set by *Atkinson*, we held that, as a general rule, police must inventory property by its outward appearance and may not open a closed, opaque container in order to inventory its contents.

But five years later, in *State v. Mundt/Fincher*, 98 Or App 407, 780 P2d 234, *rev den*, 308 Or 660 (1989), we announced an exception to that rule where an inventory policy required the counting or recording of "cash, checks and other items of value typically found in a wallet or purse." 98 Or App at 413. In *Mundt/Fincher*, the applicable inventory policy required the officers to "'[i]ndicate the breakdown of all cash and negotiable checks by coin, currency, and checks.'" *Id.* (quoting the inventory policy). We upheld that policy, despite *Atkinson* and *Ridderbush*, by claiming, without much explanation, that "[n]either a wallet nor a purse is a 'closed, opaque container.'" *Mundt/Fincher*, 98 Or App at 412.

In understanding how Oregon's inventory exception jurisprudence has evolved, it is critical to recognize the importance of *Mundt/Fincher.* Only by making that essential foundational holding—that wallets and purses were not closed, opaque containers—were we able to avoid the clear dictate of *Atkinson* that discretion to open such containers was impermissible. Yet, in large part, our inventory cases subsequent to *Mundt/Fincher* rely on language that followed that essential holding, where we said:

> "Because wallets or purses are primarily intended to be used to store valuables, it may be important to discover what is in them, both to protect the owner's property and to prevent the assertion of false claims against the police. Both are legitimate purposes for inventories of impounded property. Although other containers may also hold valuable property, wallets and purses are uniquely designed for that purpose."

*Mundt/Fincher*, 98 Or App at 412 (citations omitted).

But that language is a red herring. The first part is just a reiteration of the underlying policy rationales supporting inventory searches. The second part is *dicta* at best, distraction at worst. The fact that a container is "designed" for holding valuables is neither a distinction recognized by *Atkinson* or *Keller*, nor the basis of our holding in *Mundt/Fincher*. The true basis of our decision in *Mundt/Fincher,* the only way we could reach that result under *Atkinson*'s clear mandate, was to categorically classify a wallet and a purse as something other than a closed container. By categorizing a wallet or a purse as *per se* not a closed container, the issue became a simple one of discretion. "The guidelines obviously were phrased generally to require inventory of every type of container designed or objectively likely to contain money or valuables, including wallets." *Mundt/Fincher*, 98 Or App 413 (emphasis omitted). As a result, we held, the officers did not have discretion whether to inventory the contents of a wallet. *Id.* at 414.

Within a decade, however, the actual holding of *Mundt/Fincher* was passed over and our decisions turned on whether a container was "designed" to hold valuables. In *State v. Bean*, 150 Or App 223, 229, 946 P2d 292 (1997), *rev den*, 327 Or 448 (1998), we held that a Gresham policy authorized the opening and inventorying of the contents of a fanny pack. There, we expanded upon *Mundt/Fincher*, which had dealt with items normally associated with holding currency, to holding that fanny packs were containers "intended primarily to store valuables" in a general sense, and, therefore, excepted from the *Atkinson* prohibition. *Bean*, 150 Or App at 229.

The culmination of this strange line of reasoning comes in *Johnson*. There, we applied the same principle to

a briefcase that, we noted, could function very much like a wallet or a purse, and could hold articles such as "money, credit cards, valuable papers, a lap top computer, or a calculator." *Johnson*, 153 Or App at 542. Such a container was, thus, neither closed nor opaque:

> "Similarly, the briefcase and the coin purse in this case are not 'closed, opaque containers' because they are typically used to store valuables in the same way as a purse or a wallet."

*Id*. at 540.

*Mundt*/*Fincher* and *Johnson* are judicial alchemy, whereby this court transmuted objects that, to all common-sense observation were both closed and opaque, into objects that were treated, legally, as being the opposite: open and transparent. This brings us to the situation we find ourselves in today. Under our case law, a search conducted pursuant to an inventory policy can permit the opening of some closed containers, but not all. And whether a container can be validly opened is dependent upon the subjective assessment of whether that container is reasonably "designed" to hold valuables, as opposed to whether that container "could" hold valuables. *State v. Cordova*, 250 Or App 397, 402, 280 P3d 1036 (2012). Briefcases, wallets, purses, fanny packs, and backpacks have been held permissible. In contrast, boxes, tackle boxes, and steamer trunks could not be opened. Coin purses found within a larger purse could be opened, but cosmetic bags were prohibited.

No attempt has been offered by this court to tie those varying results to the purported policy rationales underlying the warrant exception. What makes an inventory search "reasonable" under Article I, section 9, is purportedly its noninvestigatory purpose in securing and accounting for the valuable possessions of citizens, and to protect law enforcement against claims of loss. The distinctions we have created do little to further those goals, however. As any Oregon fisherman can attest, the contents of a tackle box can be very valuable indeed, yet an inventory search of it is prohibited. Whereas a clearly closed and opaque fanny pack is rendered open and transparent, lest we fail to account for the bottle of water and the tube of Chapstick.

Further, if a foundational requirement for a valid inventory search under Article I, section 9, as expressed by *Atkinson*, is "no exercise of discretion" by law enforcement, our closed container jurisprudence injects discretion, rather than removes it. 298 Or at 10. The policy at issue in this case, like many policies around Oregon, calls for the opening of closed containers "designed" to hold "other valuables." That creates two points of discretion.

First, the officer must exercise discretion in determining what is, or is not, an "other valuable." Here, the officer made the discretionary determination that a personal electronic item is an "other valuable." The fact that we now approve of that determination after the fact does not render it nondiscretionary. Rather, it simply means that this court, too, views personal electronics as valuables.

But in so doing, we offer no fixed standard of value. Is a $10 thumb drive an electronic device so as to constitute an "other valuable?" The inventory policy does not guide the officer, who will thus be forced to make a discretionary determination of value—a determination that some future court will adjudicate on a case-by-case basis. That is not a systematized policy that can be equally and universally applied. Rather, it is a policy of discretion, where what is worthy of inventory is determined by the subjective evaluation of the officer conducting the inventory—precisely what *Atkinson* prohibited.

Second, under this policy, once the officer exercises discretion to determine whether something is of value, he must then exercise discretion to determine if the closed and opaque container is one that is reasonably "designed" to contain the valuable. As we describe above, "[f]rom its outward appearance, the case looked to be a container for holding a small external computer hard drive or a small video game console, such as a Nintendo Game Boy." 289 Or App at ___. On this record, it appears that neither the officer, nor this court, knows precisely what the container was designed to hold. It is apparently sufficient that it is designed to hold *some* electronic device.

Finally, the incongruity of our case law in this area is brought into sharp focus by one aspect of this case. When

it comes to electronic storage devices, like a hard drive, the value of the storage device itself is eclipsed by the true locus of value: *the data*. *See, e.g.*, *State v. Mansor*, 279 Or App 778, 792, 801, 381 P3d 930 (2016), *rev allowed*, 360 Or 752 (2017) ("[P]ersonal electronic devices are more akin to the 'place' to be searched than to the 'thing' to be seized and examined."). Looking at the external black box of a hard drive tells one nothing about the value of the object, because the value of the object is determined by its invisible digital contents.

In holding that an inventory search of a closed, opaque container designed to hold a hard drive is permissible, when examining the physical hard drive tells one nothing about its internal value, whereas inventorying a steamer trunk, or a tackle box, is *im*permissible, when doing so would actually reveal their contents and value, our case law has reached discordance. This discord does not serve the purposes of Article I, section 9; citizens are left with an uncertain expectation of their privacy rights, and law enforcement is left with uncertain clarity as to what is, or what is not, a valid inventory search.

Despite these concerns, however, the majority is correct that our case law in this area supports the search in this case. To hold otherwise would require that this court disavow many of its prior decisions in this area. "[T]he principle of *stare decisis* means that the party seeking to change a precedent must assume responsibility for affirmatively persuading us that we should abandon that precedent." *State v. Ciancanelli*, 339 Or 282, 290, 121 P3d 613 (2005). Neither party has asked us to do so here, and it would be inappropriate to approach that task *sua sponte*. Accordingly, I must concur.