

**FILED: May 16, 2012**

IN THE COURT OF APPEALS OF THE STATE OF OREGON

STATE OF OREGON,  
Plaintiff-Respondent,

v.

DAVID BRIAN TAYLOR,  
Defendant-Appellant.

Umatilla County Circuit Court  
CFH090187

A144468

Daniel J. Hill, Judge.

Argued and submitted on February 28, 2012.

Eric Johansen, Senior Deputy Public Defender, argued the cause for appellant. With him on the briefs was Peter Gartlan, Chief Defender, Office of Public Defense Services.

Justice J. Rillera, Assistant Attorney General, argued the cause for respondent. With her on the brief were John R. Kroger, Attorney General, and Mary H. Williams, Solicitor General.

Before Ortega, Presiding Judge, and Sercombe, Judge, and Edmonds, Senior Judge.

SERCOMBE, J.

Reversed and remanded.

1                   SERCOMBE, J.

2                   Defendant was convicted of possession of methamphetamine, ORS  
3 475.894. He appeals, assigning error to the trial court's denial of his motion to suppress  
4 evidence found in a closed container--a cigarette box--during a warrantless search of his  
5 person. The trial court concluded that, although the search was unlawful, the evidence  
6 was nevertheless admissible because the police inevitably would have discovered it  
7 pursuant to a valid jail inventory policy. Defendant argues that the inventory policy at  
8 issue would not have permitted the search of his cigarette box and that, in any event, the  
9 policy is constitutionally infirm. We conclude that the inventory policy violates Article I,  
10 section 9, of the Oregon Constitution.<sup>1</sup> Accordingly, we reverse and remand.

11                   The relevant facts are undisputed. Defendant was arrested on suspicion of  
12 domestic assault. The arresting officer handcuffed defendant and searched his pockets  
13 for weapons. The officer found a cigarette box, which he seized and handed to a second  
14 officer. That officer opened the cigarette box and discovered what he suspected, and  
15 defendant admitted, was methamphetamine.

16                   Defendant was charged with possession of a controlled substance. Before  
17 trial, he moved to suppress the evidence found during the warrantless search of the

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<sup>1</sup> Article I, section 9, provides:

"No law shall violate the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable search, or seizure; and no warrant shall issue but upon probable cause, supported by oath, or affirmation, and particularly describing the place to be searched, and the person or thing to be seized."

1 cigarette box, arguing that it had been obtained in violation of Article I, section 9. The  
2 state argued that the search was justified as a valid "search incident to arrest."  
3 Alternatively, the state argued that the evidence inevitably would have been discovered  
4 during an inventory of defendant's property at the Umatilla County Jail. The applicable  
5 inventory policy provided, in relevant part:

6           **POLICY**: It shall be the policy of the Umatilla County Jail (UCJ)  
7 to ensure that all arrestee/inmate personal property is received, inventoried,  
8 stored, and released in a safe, secure and systematic manner, in accordance  
9 with the law. This policy ensures the safety of the facility through effective  
10 weapons and contraband control[ ] and establishes authority to conduct  
11 inventories of the personal possessions of arrestees during pre-booking, the  
12 booking process, or lodging at UCJ. The purpose of this policy is to  
13 inventory the property of the arrestee to protect private property, reduce or  
14 prevent false claims for lost or stolen property, and protect people and  
15 property from any hazardous condition or instrument which may be with an  
16 arrestee's personal property.

17           **DEFINITIONS**:

18           **Contraband**: Any item which presents a safety and/or security  
19 concern to the UCJ, staff, or arrestee shall be considered contraband.

20           **Personal Property**: Includes, but [is] not limited to, all clothing,  
21 jewelry, and money.

22           "\* \* \* \* \*

23           **PROCEDURE**:

24           **Processing and/or Lodging**: When an arrestee is brought to the  
25 UCJ for processing and/or lodging *all personal property shall be*  
26 *inventoried. Property shall be searched to ensure no weapons, drugs, or*  
27 *contraband items* are brought into the UCJ and authorized property is  
28 properly stored. Any item which may cause concern for the safety and/or  
29 security of the UCJ, staff, or arrestee/inmate shall be considered contraband  
30 and may be confiscated.

1                    "Property of Arrestee--Pre-Booking Process: *Personal property*  
2                    *from the arrestee's pockets[ ] (money, wallet, etc.)[,]* *outer clothing, purses,*  
3                    *jewelry, belts, or other items deemed appropriate shall be removed,*  
4                    *inventoried, searched, and documented* on the Property Receipt Form and  
5                    safely stored. Officer and arrestee will sign the Property Receipt Form,  
6                    noting the confiscation of property taken."

7 (Numbering omitted; underscoring and boldface in original; emphasis added.)

8                    The trial court rejected the state's first argument but agreed that, in any  
9 event, the jail inventory policy would have authorized the search of the cigarette box.

10 The court concluded that,

11                    "[w]hile it might be better that the policy clearly state that closed containers  
12                    will be examined for contraband or dangerous things or substances, the  
13                    policy essentially states such, and is constitutional and eliminates any  
14                    arguable discretion that the corrections officers could have in inventorying  
15                    and logging an inmate's property. The evidence found, the  
16                    methamphetamine in the cigarette packet, otherwise obtained in violation of  
17                    a defendant's rights under Article I, section 9, are admissible as the state has  
18                    demonstrated \* \* \* that police would have used certain proper and  
19                    predictable investigatory procedures \* \* \* that would inevitably have  
20                    resulted in discovery of the evidence at issue."

21 Defendant subsequently entered a conditional guilty plea, reserving the right to appeal the  
22 denial of his motion to suppress.

23                    On appeal, defendant argues that the inventory policy would not have  
24 authorized a search of his cigarette box and that, if it did, the policy would not meet the  
25 constitutional requirements set forth in *State v. Atkinson*, 298 Or 1, 688 P2d 832 (1984).  
26 As to the latter argument, defendant contends that the policy does not eliminate officer  
27 discretion about which containers to search and, in effect, allows an officer to  
28 indiscriminately rummage through an arrestee's property. Furthermore, to the extent that

1 the policy explicitly or implicitly authorizes searching closed containers for dangerous  
2 property, such as "weapons, drugs, or contraband items," defendant argues that the policy  
3 goes beyond the permissible purposes of an inventory under *Atkinson*.

4           The state responds that the policy requires a booking officer to "search" all  
5 personal property for weapons, drugs, and contraband. Thus, in the state's view, an  
6 officer has no discretion regarding what property to search--the officer must search all  
7 personal property, including closed containers, that "he or she reasonably believes  
8 contains weapons, drugs, or contraband items." The state argues that that policy "is not  
9 overly broad in scope because [it] is limited to property that could reasonably contain  
10 weapons, drugs, and contraband items. \* \* \* [T]he scope is rationally related to the  
11 purpose of keeping the jail facility safe."

12           Under Article I, section 9, a warrantless search is *per se* unreasonable  
13 unless it is conducted pursuant to a recognized exception to the warrant requirement.  
14 [State v. Connally](#), 339 Or 583, 587, 125 P3d 1254 (2005). Here, there is no contention  
15 that a "recognized exception" justified the warrantless search of defendant's cigarette box  
16 at the time of his arrest.<sup>2</sup> Rather, the only issue presented is whether the evidence  
17 obtained as a result of that unlawful search inevitably would have been discovered,  
18 absent the unlawful police conduct, pursuant to a valid jail inventory policy. See [State v.](#)  
19 [Hall](#), 339 Or 7, 25, 115 P3d 908 (2005) (state may establish that illegally obtained

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<sup>2</sup> The state does not contend on appeal that the search was justified as a valid "search incident to arrest."

1 evidence is admissible by proving that "the police inevitably would have obtained the  
2 disputed evidence through lawful procedures even without the violation of the  
3 defendant's rights under Article I, section 9"). For the state to prevail on an inevitable  
4 discovery theory, it must establish, "by a preponderance of the evidence: (1) that certain  
5 proper and predictable investigatory procedures would have been utilized in the instant  
6 case, and (2) that those procedures inevitably would have resulted in the discovery of the  
7 evidence in question." *State v. Miller*, 300 Or 203, 226, 709 P2d 225 (1985), *cert den*,  
8 475 US 1141 (1986).

9 In this case, there was evidence that, had the police not seized and searched  
10 defendant's cigarette box following his arrest, the cigarette box would have been  
11 transported with him to jail and subjected to the jail's inventory procedures. Nonetheless,  
12 the state failed to show that those procedures would have been "proper and predictable,"  
13 because the Umatilla County Jail inventory policy authorizing those procedures is  
14 unconstitutional.

15 The purpose of an inventory is to itemize property that lawfully comes into  
16 the administrative custody of the police. *Atkinson*, 298 Or at 8; [State v. Guerrero](#), 214 Or  
17 App 14, 18, 162 P3d 1048 (2007). That situation most commonly arises when police  
18 impound an automobile, *see Atkinson*, 298 Or 1 (automobile inventory), or when a person  
19 is being booked into a custodial facility, *see Guerrero*, 214 Or App 14 (jail inventory);  
20 *State v. Perry*, 298 Or 21, 688 P2d 827 (1984) (civil detoxification hold).

21 "The police need to determine the nature of the property that they are  
22 holding for three principal reasons: (1) protection of the person's property

1 while it is in police custody; (2) reduction or elimination of false claims  
2 against the police for lost property; and (3) protection against possible  
3 injury from impounded but uninventoried property. *Atkinson*, 298 Or at 7-  
4 8. None of those purposes involves searching for evidence of a crime."

5 *Guerrero*, 214 Or App at 18. Importantly, reliance on the third justification for an  
6 inventory--the possible danger to police or others from impounded but uninventoried  
7 property--"must have a concrete basis in specific circumstances; it *may not simply be*  
8 *assumed as a basis of a general precautionary practice.*" *Atkinson*, 298 Or at 8  
9 (emphasis added); *see id.* at 7-8 (suggesting that an inventory for the safety of police  
10 would be permissible where, for instance, the owner of an impounded vehicle is affiliated  
11 with a group suspected of bombing).

12 In addition, *Atkinson* identified certain constitutional limitations on police  
13 inventories. As relevant here, an inventory "must be conducted pursuant to a properly  
14 authorized administrative program, designed and systematically administered so that the  
15 inventory involves no exercise of discretion by the law enforcement person directing or  
16 taking the inventory." *Id.* at 10. Moreover, the scope of the inventory must be limited so  
17 that objects are "scrutinized only to the extent necessary to complete the inventory." *Id.*  
18 Consistently with that principle, we have since held that, "as a general rule, an inventory  
19 policy cannot authorize the police to open closed containers; in the classic example, the  
20 police must inventory a closed fishing tackle box as 'one fishing tackle box.'" *Guerrero*,  
21 214 Or App at 18 (citations and some internal quotation marks omitted); *see also* [State v.](#)  
22 [Keady](#), 236 Or App 530, 533, 237 P3d 885 (2010) ("Generally, police officers cannot  
23 open closed, opaque containers to inventory their contents."). However, we have

1 recognized an exception to that general rule where an inventory policy requires an officer  
2 to inventory items of value. In that circumstance, we have determined that the policy  
3 implicitly requires an officer to open containers--such as wallets, purses, and fanny  
4 packs--that are uniquely designed or objectively likely to hold valuables, and that such a  
5 policy is constitutional. *See Guerrero*, 214 Or App at 19-21 (discussing cases). We have  
6 not extended that exception to containers that are objectively likely to contain weapons,  
7 drugs, or other contraband.<sup>3</sup>

8 Defendant contends that the Umatilla County Jail inventory policy is  
9 invalid to the extent that it authorizes the inspection of property--particularly the interior  
10 of closed containers--for the purpose of finding weapons, drugs, or other contraband. In  
11 other words, defendant questions whether security or safety concerns can validly justify a  
12 jail inventory--a procedure in which most property, including closed containers, will be  
13 confiscated and stored in a place inaccessible to the arrestee. We need not decide that  
14 question in this case.<sup>4</sup> Even assuming that a jail inventory policy could constitutionally

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<sup>3</sup> Indeed, such an exception might swallow the limitations on inventories.

<sup>4</sup> We recognize that security may be a valid justification for administrative searches in contexts where property would otherwise remain accessible to persons entering the secure portion of a facility. *See, e.g., State v. Coleman*, 196 Or App 125, 127, 100 P3d 1085 (2004), *rev den*, 338 Or 16 (2005) (limited search for safety of detainees in "controlled waiting room" of police station); *Smith v. Washington County*, 180 Or App 505, 43 P3d 1171, *rev den*, 334 Or 491 (2002) (courthouse security screening); *see also U.S. v. McCarty*, 648 F3d 820 (9th Cir 2011) (airport screening searches are constitutionally reasonable administrative searches under the Fourth Amendment to the United States Constitution where properly limited in extent and intensity). Of course, those searches must still be reasonable in relation to their purpose. *Weber v. Oakridge School District 76*, 184 Or App 415, 437, 56 P3d 504 (2002), *rev den*, 335 Or 422 (2003).



1 authorize the opening of containers for the purpose of finding dangerous contraband, the  
2 inventory policy in this case is, in any event, unconstitutional.

3           The policy is silent regarding closed containers. However, it provides that  
4 property "shall be searched to ensure no weapons, drugs, or contraband items are brought  
5 into the UCJ." It also provides that "[p]ersonal property from the arrestee's pockets \* \* \*  
6 or other items deemed appropriate shall be removed, inventoried, searched, and  
7 documented." The state argues that both of those provisions explicitly require an officer  
8 to "search," and therefore implicitly require him or her to open and inventory, the  
9 contents of all containers that the officer reasonably believes contain contraband, which  
10 would include defendant's cigarette box. According to the state, that requirement  
11 eliminates officer discretion and is sufficiently related to the purpose of keeping the jail  
12 facility safe. We disagree.

13           The policy is not, in fact, limited to opening only those containers that are  
14 objectively likely to contain contraband. *See Guerrero*, 214 Or App at 19 (stating general  
15 rule that "police must inventory property by its outward appearance"). Instead, the policy  
16 requires an officer to search property that he or she "deem[s] appropriate," without regard

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In the jail inventory context, it is not apparent how the purpose of safety would be served by allowing officers to open closed, opaque containers to look for contraband where those containers can be seized, inventoried by their outward appearance, and placed securely in storage. *See State v. Lippert*, 317 Or 397, 404, 856 P2d 634 (1993) (in the context of civil detoxification holds, "this court has held that Article I, section 9, \* \* \* is violated when officers conduct a search of closed, opaque containers \* \* \* that do not announce their contents and that are not going to be placed \* \* \* into the secured portion of the detoxification facility").

1 to whether that search will further the security of the facility. Rather than confining  
2 police discretion to the opening of containers uniquely designed or objectively likely to  
3 contain contraband, the policy gives wide latitude to an implementing officer to decide  
4 which closed containers to look inside and what degree of scrutiny to apply to any given  
5 piece of property. Indeed, by its very terms, it authorizes not just an itemization of  
6 property but a "search," inviting officers to engage in a probable cause inquiry that is  
7 appropriate in the investigation of a crime but not in the context of an inventory. That  
8 grant of discretion is improper and renders the policy invalid. *See, e.g., State v. Willhite*,  
9 110 Or App 567, 574, 824 P2d 419 (1992) (policy that was so general that officers could  
10 look anywhere entailed "precisely the kind of individual discretion" that an inventory is  
11 supposed to preclude); [State v. Eldridge](#), 207 Or App 337, 142 P3d 82 (2006) (similar).

12 In the same vein, the policy is defective because it contains no complete  
13 and meaningful limitation on the scope of the inventory. It effectively authorizes a  
14 search of all property, including any closed container, regardless of what the container is  
15 objectively likely to hold. *See, e.g., State v. Williams*, 227 Or App 453, 457, 206 P3d 269  
16 (2009) ("An inventory policy that requires police to open all closed containers, regardless  
17 of whether they are likely to contain valuables, is overbroad."); [State v. Kay](#), 227 Or App  
18 359, 206 P3d 208 (2009) (inventory policy permitting an officer to open all closed  
19 containers was too broad to satisfy constitutional constraints). Thus, the policy goes  
20 beyond the constitutional limitations of Article I, section 9, and, therefore, is invalid. The  
21 evidence should have been suppressed.

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Reversed and remanded.