MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Marcus Z. Barber,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

August 31, 2022

Court of Appeals Case No. 22A-CR-258

Appeal from the Vanderburgh Circuit Court

The Honorable Celia M. Pauli, Magistrate

Trial Court Cause No. 82C01-2107-F4-3772

Weissmann, Judge.

[1] Finding the search of Marcus Barber's car was a valid inventory search of an impounded vehicle, the trial court denied his motion to suppress. Based on the lack of evidence in the record to support impoundment of the car, we cannot agree with the court's finding. Therefore, we reverse the trial court's denial of Barber's motion to suppress.

Facts

[2] Shortly after midnight in a high crime area in Evansville, a police officer stopped Barber's car for an improperly colored license-plate light. Because Barber took an entire block to slowly stop his car, the officer called for back-up and asked all five of the vehicle's occupants to exit the vehicle. No one had a valid driver's license, and one of the passengers had an outstanding parole warrant. The officer conducted an inventory search of the car and called for a tow truck.

[3] The officer located a syringe on the back seat and a firearm inside the driver's console. Having been classified as a serious violent felon, Barber is not permitted to possess a gun. After discovering the weapon, officers advised Barber that his car would be towed and impounded. Barber convinced officers instead to allow his sister to retrieve the car before the tow truck arrived.

[4] The State charged Barber with unlawful possession of a firearm by a serious violent felon, a Level 4 felony, carrying a handgun without a license, as a Level 5 felony, and operating a motor vehicle without ever receiving a license, a Class C misdemeanor. Barber unsuccessfully moved to suppress the evidence of the

firearm seized during the traffic stop. The trial court then granted Barber's motion to certify its order for interlocutory appeal, and this Court accepted jurisdiction.

Discussion and Decision

[5] Barber argues the State improperly performed an inventory search because there was minimal evidence that the State needed to impound the vehicle. We agree.

I. Standard of Review

[6] We deferentially review a trial court's denial of a defendant's motion to suppress, construing conflicting evidence in the manner most favorable to the ruling. *Robinson v. State*, 5 N.E.3d 362, 365 (Ind. 2014). Although we do not reweigh the evidence, we will "consider any substantial and uncontested evidence favorable to the defendant." *Id.* (citing *Holder v. State*, 847 N.E.2d 930, 935 (Ind. 2006)). However, to the extent the motion raises constitutional issues, our review is *de novo*. *Campos v. State*, 885 N.E.2d 590, 596 (Ind. 2008).

II. Fourth Amendment

[7] The Fourth Amendment to the United States Constitution protects our legitimate expectations of privacy in our persons, homes, and belongings and protects us from unreasonable searches and seizures. *Taylor v. State*, 842 N.E.2d 327, 330 (Ind. 2006). Generally speaking, the State needs a warrant to conduct a search. *See Fair v. State*, 627 N.E.2d 427, 430 (Ind. 1993) (internal citations omitted). Without a warrant, the State must show that an exception to the

warrant requirement existed. *Whitley v. State*, 47 N.E.3d 640, 645 (Ind. Ct. App. 2015), *trans. denied*. The "'inventory exception'" allows police to search a *lawfully impounded* car if the search is designed to produce an inventory of the car's contents. *Fair*, 627 N.E.2d at 430 (internal citation omitted) (emphasis added). Under this exception, no warrant is needed because when the police impound a car, they perform an administrative or caretaking function in a non-criminal context. *See id.* at 430-31.

i. The State Failed to Justify Towing the Car as Part of its Community-Caretaking Function

[8] Impoundment is reasonable if authorized by statute or the police's discretionary community-caretaking function. *Wilford v. State*, 50 N.E.3d 371, 375 (Ind. 2016). Because neither Barber nor the State contends that the inventory search was authorized by statute, we focus on whether the search was reasonable pursuant to the police's community-caretaking function.

[9] Discretionary impoundment "is an exercise of the police community-caretaking function in order to protect the car and community from hazards." *Id.* at 375. "Community safety often requires police to impound vehicles because they are abandoned and obstruct traffic, create a nuisance, or invite thieves and vandals." *Id.* (citing *Fair*, 627 N.E.2d at 431-33). "Indeed, besides enforcing criminal laws, police aid those in distress, combat actual hazards, prevent potential hazards . . . and provide an infinite variety of services to preserve and protect community safety." *Id.* (internal quotations and citation omitted).

[10] An inventory search must not be a pretext for conducting a warrantless investigatory search. *Id.* Therefore, to prove the decision to impound a vehicle was reasonable, the State must show: (1) consistent with objective standards of sound policing, the police believed the vehicle posed a threat or harm to the community or was itself imperiled; and (2) the police's decision to impound the vehicle adhered to established departmental routine or regulation. *Id.* at 375-76.

ii. The Record Lacks Evidence That Sound Policing Permitted Officers to Impound the Car

[11] Barber argues that the decision to impound the vehicle was unreasonable—and, therefore, the vehicle did not need to be towed—because there was "[n]o evidence . . . that the vehicle was impeding traffic or blocking the street in a manner that posed a threat or harm to the community or the vehicle." Appellant's Br. p. 10.

[12] Barber is correct that the record is thin concerning the rationale for towing the car. The State presented testimony that the stop occurred around 1 a.m. in a high crime area, which could be read to imply a risk that the car could be vandalized. But without more, we cannot ascertain whether there was a true risk to the vehicle. As far as the threat of harm to the community, the record lacks any evidence of the car's resting location. We cannot tell whether the car was parked on a busy highway or on a residential street. That the officer referred to Barber's stopping time as about a "block," implies the stop occurred in a residential neighborhood. Tr. Vol. II p.10.

[13] Given the lack of details from this record, we cannot find that the officer's decision to impound the vehicle was reasonable. There was no evidence that the officer believed, consistent with objective standards of good policing, that the vehicle "posed some threat or harm to the community or was itself imperiled." *See Fair*, 627 N.E.2d at 433.

iii. The Record Lacks Evidence Concerning Departmental Regulation

[14] We also cannot conclude that the officer's decision to impound the vehicle was consistent with "established departmental routine or regulation." *Id.* While we do not require evidence of the department's written procedure, we do require more than conclusory testimony from an officer. *Wilford*, 50 N.E.3d at 376. An officer's testimony provides adequate evidence of the department's impoundment procedure if "it outlines the department's standard impound procedure and specifically describes how the decision to impound adhered to departmental policy or procedure—as opposed to an officer's generalized assertion[.]" *Id.* at 377 (internal quotations omitted).

[15] The State failed to present any evidence of departmental policy. Instead, Officer John Forston explained he decided to have the vehicle towed because "no one in the car had a [driver's] license." Tr. Vol. II, p. 8. Though Officer Forston also testified to the Evansville Police Department's guidelines governing the purpose and scope of inventory searches, he did not testify to, nor did the State present any evidence of, a written police department policy that showed there was a "standardized impoundment procedure." *Wilford*, 50 N.E.3d at 377 (internal

quotation marks and citations omitted). And no evidence was presented that described how the decision to impound the vehicle adhered to departmental procedure. *See id.* Officer Forston acknowledged an arrestee can request someone retrieve his/her car in lieu of impoundment and "we will try to accommodate that because I know it can be a financial burden to have a vehicle towed on someone, so we try to keep that from happening in certain situations." Tr. Vol. II, p. 15. This evidence supports Barber's notion that impoundment was not necessary because his sister was able to retrieve the car.

[16] On this record, we cannot find the decision to impound the vehicle complied with official police policy. Because the State presented no evidence that the impoundment complied with an established police departmental routine or regulation, the inventory search violated Barber's Fourth Amendment protection from unreasonable search and seizure. *See Fair*, 627 N.E.2d at 435.[1]

[17] The trial court's order denying Barber's motion to suppress is reversed. We remand with instructions to grant Barber's motion to suppress.

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[1] Barber also argued that the inventory search of the vehicle was invalid because the vehicle was never towed to an impoundment lot. While searching a car before it reaches an impoundment lot can "raise a question about whether [the search] was conducted in good faith[,]" a search at the scene is permissible. *Fair v. State*, 627 N.E.2d 427, 436 (Ind. 1993). Also, given our ruling that the State failed to prove a valid inventory search, we do not address Barber's scope-of-the-search argument. And because we hold that the inventory search was unreasonable under the Fourth Amendment, we need not independently decide whether it violated Article I, § 11 of the Indiana Constitution. *See Taylor v. State*, 842 N.E.2d 327, 334 (Ind. 2006).

[18] Reversed and remanded.

Robb, J., and Pyle, J., concur.