[Cite as *State v. Robinson*, 2009-Ohio-6395.]

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY

STATE OF OHIO	:	
	:	Appellate Case No. 23175
Plaintiff-Appellee	:	
	:	Trial Court Case No. 2008-CRB-4557
v.	:	
	:	(Criminal Appeal from
RAY I. ROBINSON	:	Dayton Municipal Court)
	:	
Defendant-Appellant	:	
	:	

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O P I N I O N

Rendered on the 4th day of December, 2009.

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FAIN, J.

{¶ 1} Defendant-appellant Ray I. Robinson appeals from his conviction and sentence for Improperly Handling a Firearm in a Motor Vehicle, in violation of R.C. 2923.16(C), following a no-contest plea. Robinson contends that the trial court erred in overruling his motion to suppress evidence. Robinson contends that: (1) the

Dayton Police Department tow policy, which authorized the towing and inventory search of his vehicle, gives police officers too much discretion whether to tow a vehicle when arresting its driver; and (2) the police officer's search of a locked bag found in the trunk of the vehicle was unlawful.

{¶ 2} We conclude that Robinson abandoned his argument that the Dayton Police Department tow policy authorizing the tow and inventory search of his car gives too much discretion to the police officer, when Robinson failed to make that argument in his closing argument at the suppression hearing, and even conceded that the officer's entry into the trunk of the car was proper. We further conclude that when the officer looked into a bag in the trunk, he had probable cause to search the bag, due to an odor of marijuana emanating from the bag. Under *Michigan v. Thomas* (1982), 458 U.S. 259, 102 S.Ct. 3079, 73 L.Ed.2d 750, no warrant is required to conduct a search in an automobile for which probable cause exists, even when the automobile is going to be towed to a police controlled lot. Although the officer's search of the bag in the trunk was in violation of the Dayton Police Department's tow policy, there was an independent basis for the search, and the violation of the tow policy is not a violation of the Fourth Amendment's restriction against unreasonable searches and seizure; therefore, the exclusionary rule does not apply. Consequently, the judgment of the trial court is Affirmed.

I

{¶ 3} Dayton police officers Jason Barnes and Craig Coleman, while patrolling in a marked cruiser late one March morning in 2008, stopped the car

Robinson was driving for making a right turn without signaling. Robinson does not challenge the propriety of the stop.

{¶ 4} A computer inquiry disclosed that Robinson's license was suspended. The officers decided to arrest Robinson for driving with a suspended license, and to have the car towed. The Dayton Police Department tow policy authorizes, but does not require, the towing of a vehicle when the driver is arrested. Barnes testified that under the policy he has discretion whether to order a tow when the driver of a vehicle is arrested, and that sometimes he orders a tow, and sometimes he does not.

{¶ 5} Because the car was going to be towed, an inventory search was required to be conducted. In accordance with his invariable practice, Barnes first searched and inventoried the cabin. He then opened the trunk, using Robinson's key. The trunk contained various items, including a black cloth, over-the-shoulder bag, which was locked by means of a small padlock through the holes in two zippers used to open and close the bag. Barnes noticed a strong odor of marijuana in the trunk, but could not initially determine where, in particular, it was coming from.

{¶ 6} When Barnes turned his attention to the black cloth bag, he picked it up. It was heavier than he had expected. It was at this time that Barnes determined that the strong odor of marijuana was emanating from the bag.

{¶ 7} Although Barnes testified that he would have taken the bag to the property room based on the odor of marijuana, alone, he decided to take a look inside the bag. He was able to separate the zippers one or two inches, despite the padlock joining them. Using a flashlight, he saw bags of marijuana and a handgun inside the bag. The contents of the bag were itemized and "tagged into" the

property room.

{¶ 8} Robinson was arrested and charged with Improperly Handling a Firearm in a Motor Vehicle, in violation of R.C. 2923.16(C), a misdemeanor. It appears that there were felony drug charges, arising out of this incident, pending, also, but that Robinson was allowed intervention in lieu of conviction in that case.

{¶ 9} Robinson moved to suppress the evidence seized when he was arrested, contending that it was obtained as the result of an unlawful search and seizure. Following a hearing, Robinson's motion to suppress was overruled. Robinson then pled no contest to the charge, was found guilty, and was sentenced accordingly. From his conviction and sentence, Robinson appeals.

II

{¶ 10} Robinson's First Assignment of Error is as follows:

{¶ 11} "THE TRIAL COURT ERRED TO THE DEFENDANT-APPELLANT'S PREJUDICE WHEN IT OVERRULED DEFENDANT-APPELLANT'S MOTION TO SUPPRESS BECAUSE THE DAYTON POLICE DEPARTMENT TOW POLICY VIOLATES THE FOURTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND GIVES INDIVIDUAL POLICE OFFICERS UNFETTERED DISCRETION ON DETERMINING WHEN TO TOW A VEHICLE."

{¶ 12} The Dayton Police Department tow policy authorizes, but does not require, the towing of a vehicle when its driver is arrested. Barnes testified that he has discretion, under the policy, whether to order a vehicle towed in that circumstance. The policy provides no standards or guidance for the police officer's

exercise of individual discretion.

{¶ 13} Robinson argues, in support of this assignment of error, that the tow policy violates the Fourth Amendment by allowing a police officer, in his or her absolute discretion, to determine whether to tow a vehicle when the driver of the vehicle is arrested, citing *State v. Bozeman*, Montgomery App. No. 19155, 2002-Ohio-2588. Robinson also made this argument in his memorandum in support of his motion to suppress.

{¶ 14} We conclude, however, that Robinson abandoned this argument when he submitted the suppression issue to the trial court for decision following the hearing. The trial court afforded the parties the opportunity to argue the motion before rendering a decision orally from the bench. Robinson's trial counsel focused exclusively upon the opening of the bag found in the trunk, as being an unlawful search, arguing that the opening of the bag violated the tow policy. At no point did she argue that the tow policy gives police officers too much discretion whether to tow a vehicle and, as a consequence of that decision, to conduct an inventory search. In fact, she appeared to concede that the search of the trunk of the vehicle was lawful:

{¶ 15} "THE COURT: SO YOU'RE SAYING HE SHOULD NOT HAVE OPENED THE TRUNK?

{¶ 16} "THE DEFENSE: OH NO, HE . . . OPEN THE TRUNK. THAT'S FINE. INVENTORY WHAT'S IN THE TRUNK. BUT WHEN HE'S DOING HIS INVENTORY SHEET HE SHOULD HAVE MARKED, YOU KNOW, BACK PACK –

{¶ 17} "THE COURT: THIS BAG AND CONTINUE.

{¶ 18} "THE DEFENSE: LOCKED BACK PACK. YES, BECAUSE CLEARLY THEIR POLICY SAYS, 'DO NOT OPEN LOCKED CONTAINERS –

{¶ 19} "THE COURT: ARE YOU SAYING –

{¶ 20} "THE DEFENSE: – BUT LIST THEM ON THE INVENTORY –

{¶ 21} "THE COURT: ARE YOU SAYING –

{¶ 22} "THE DEFENSE: – SHEET.'

{¶ 23} "THE COURT: – HE SHOULD NOT HAVE EVEN TOUCHED IT AND PICKED IT UP JUST TO –

{¶ 24} "THE DEFENSE: NO.

{¶ 25} "THE COURT: – DESCRIBE IT?

{¶ 26} "THE DEFENSE: DESCRIBE IT. IF THEY WANTED (INAUDIBLE) –

{¶ 27} "THE COURT: SAID BAG –

{¶ 28} "THE DEFENSE: – TO FIGURE IT OUR –

{¶ 29} "THE COURT: – BELONGING IN THE TRUNK.

{¶ 30} "THE DEFENSE: – THAT'S OKAY.

{¶ 31} "THE COURT: THEY WOULDN'T PICK IT UP AND LOOK AT IT AND PUT A DESCRIPTION DOW [sic]?

{¶ 32} "THE DEFENSE: SURE. THE OFFICER'S ALLOWED TO DO THAT. MY SOLE PROBLEM WITH THIS IS THAT THE OFFICER PULLED THE ZIPPER APART WHEN THERE WAS OBVIOUSLY A LOCK, LOOKED INSIDE, AND USED THAT AS A BASIS TO DECIDE TO TAKE IT TO THE PROPERTY ROOM, TO THEN SEARCH IT, AND THEN TRY TO CLAIM THAT SOMEHOW THE FOURTH AMENDMENT'S NOT USURPED BY THAT.

{¶ 33} "THE STATE: THE OFFICER DID NOT TESTIFY TO THAT FACT, THOUGH, JUDGE.

{¶ 34} "THE COURT: MM-HMM.

{¶ 35} "THE DEFENSE: ACTUALLY, HE DID.

{¶ 36} "THE STATE: NO, HE DIDN'T. I ASKED HIM IF HE WAS GOING TO TAKE THAT CONTAINER PRIOR TO EVEN PEEKING INSIDE TO THE PROPERTY ROOM BASED ON THE SMELL ALONE, AND HE SAID YES. THAT DETERMINATION WAS MADE PRIOR TO HIM EVEN FIGURING OUT WHAT WAS INSIDE THAT BAG.

{¶ 37} "THE COURT: OKAY –

{¶ 38} "THE DEFENSE: AND THE POLICY DOESN'T SAY ANYTHING ABOUT IF SOME ITEMS SMELLS LIKE CONTRABANDS THAT . . . THE POLICY DOESN'T ADDRESS IT, AND TO THE EXTENT THAT THE WRITTEN POLICY IS AMBIGUOUS, I WOULD ASK THAT THE COURT FIND THAT THE SEARCH WAS ILLEGAL.

{¶ 39} "THE COURT: OKAY. THANK YOU BOTH. THE COURT BELIEVES THAT IT IS WITHIN THE PURVIEW OF THIS POLICY. UH THE MOTION IS OVERRULED. WE'LL SET IT FOR TRIAL OR WHAT?"

{¶ 40} (Ellipses in original.)

{¶ 41} From this record it is clear that Robinson, for whatever reason, in submitting his motion to suppress to the trial court for decision, decided to abandon his argument that the tow policy, in giving police officers too much discretion to decide whether to tow a vehicle, violated the Fourth Amendment, and argue solely

that Barnes's search of the bag violated the tow policy.

{¶ 42} The trial court cannot be deemed to have erred in failing to base its decision upon an argument that Robinson had abandoned when submitting the issue to the trial court for decision. Robinson's First Assignment of Error is overruled.

III

{¶ 43} Robinson's Second Assignment of Error is as follows:

{¶ 44} "THE TRIAL COURT ERRED TO THE DEFENDANT-APPELLANT'S PREJUDICE WHEN IT OVERRULED THE DEFENDANT-APPELLANT'S MOTION TO SUPPRESS BECAUSE THE SEARCH OF THE CLOSED AND PADLOCKED BACKPACK IN THE TRUNK OF THE VEHICLE EXCEEDED THE PERMISSIBLE SCOPE OF A LAWFUL INVENTORY SEARCH AND WAS CONDUCTED, WITHOUT A WARRANT, CONTRARY TO THE DAYTON POLICE DEPARTMENT'S WRITTEN POLICY PROHIBITING THE SEARCHING OF LOCKED CLOSED CONTAINERS."

{¶ 45} We agree with Robinson that Barnes's search of the padlocked black cloth bag violated the Dayton Police Department tow policy. Robinson points out that the second sentence in paragraph IV(B)(5) of the policy states: "Do not open locked containers but list them on the vehicle inventory." Robinson relies upon that statement for the proposition that Barnes should not have opened the locked bag to see what was inside. The State responds by citing the very next sentence, which says: "Any container taken to the Property Room must be opened and inventoried for safety purposes." The State contends that this sentence overrides the prior

sentence, because Barnes had decided to send the bag to the property room, thereby invoking the sentence upon which the State relies.

{¶ 46} The State's reliance upon the sentence referring to containers taken to the property room begs the question of under what circumstances the tow policy authorizes the taking to the property room of items found in a car that is going to be towed. That subject is covered in paragraph IV(B)(1):

{¶ 47} "Inventory property inside the vehicle's passenger compartment, glove box, console, and trunk prior to towing. Secure all property inside the trunk, except **money** or **valuable items.** Place money and valuable items in the Property Room. * * * * ." (Bolding in original.)

{¶ 48} We have found no other provision in the tow policy that authorizes or directs the taking to the property room of items found within a vehicle that is going to be towed. When Barnes made the decision to send the black cloth bag and its contents to the property room, he had no basis to determine that there was money or valuable items within it, which was the only basis under the tow policy for making a decision to send the bag to the property room, instead of locking it in the trunk. All Barnes knew about the bag at that time was that an odor of marijuana was emanating from it.

{¶ 49} The State does not argue that the reasonably inferred fact that some quantity of marijuana was in the bag meant that it contained "valuable items." Obviously, almost anything contained within a bag would have some value, however slight. The reference to "valuable items" in the policy must mean items of unusual value, or it would encompass any property found, which would not be a reasonable

interpretation.

{¶ 50} In fact, there does seem to be a provision in the tow policy that covers the situation that Barnes was in when he detected the odor of marijuana emanating from the locked bag. Paragraph IV(B)(4) provides:

{¶ 51} "If there is reasonable cause to believe that contraband or criminal evidence is in the vehicle in areas not covered by the inventory, place a **'HOLD'** on the vehicle so a search warrant can be obtained." (Bolding in original.)

{¶ 52} Although the area inside the trunk was covered by the inventory, the area inside the bag was not, since it was a locked container that should not, under paragraph IV(B)(5) of the policy, be opened. Because Barnes had reasonable cause to believe that contraband; to wit: marijuana, was in the area inside the bag, paragraph IV(B)(4) applied, and he should not have opened the bag, but should have placed a hold on the vehicle and sought a search warrant. He did not do so. Therefore, we agree with Robinson that the opening and search of the bag violated the tow policy.

{¶ 53} But the State points to an independent basis for the search. Apart from the tow policy, which we conclude did not authorize the search, Barnes had probable cause to believe that the bag contained contraband when he detected the odor of marijuana emanating from it. He detected the odor before he searched within the bag. As the State points out, *Michigan v. Thomas*, supra, holds that where there is probable cause, a warrant is not required to search within a motor vehicle, even when the vehicle is in police custody preparatory to being towed. As the United States Supreme Court opined, " * * * the justification to conduct such a

warrantless search [under the motor vehicle exception to the warrant requirement] does not vanish once the car has been immobilized; nor does it depend upon a reviewing court's assessment of the likelihood in each particular case that the car would have been driven away, or that its contents would have been tampered with, during the period required for the police to obtain a warrant. [Footnote omitted.]" Id., at 261.

{¶ 54} "The police may search an automobile and the containers within it [without a warrant] where they have probable cause to believe contraband or evidence is contained." *California v. Acevedo* (1991), 500 U.S. 565, 580, 111 S.Ct. 1982, 114 L.Ed.2d 619, 634.

{¶ 55} Thus, Barnes's search of the bag did not violate the Fourth Amendment's proscription against unlawful searches and seizures. He had probable cause to believe that the bag contained marijuana, and the motor vehicle exception to the warrant requirement applied, even though the vehicle was in police custody and awaiting towing to a police lot.

{¶ 56} Although Barnes's search of the bag did violate the tow policy, a mere violation of state law (or, in this case, the violation of a police regulation) does not constitute a violation of the Fourth Amendment giving rise to application of the exclusionary rule. *Kettering v. Hollen* (1980), 64 Ohio St.2d 232, 235. In many cases involving inventory searches, the failure to comply with a tow policy is fatal. That is because, in many cases, the authority for the search derives exclusively from the existence of, and compliance with, a tow and inventory search policy. In this case, Barnes was in compliance with the tow and inventory search policy until, and

including, the moment that he smelled the odor of marijuana emanating from the bag. At that point, his authority to search the bag no longer depended upon his compliance with the tow and inventory search policy, which he thereafter violated. At that point, his authority derived from the probable cause represented by the odor of marijuana emanating from the bag, and the motor vehicle exception to the warrant requirement.

{¶ 57} Robinson's Second Assignment of Error is overruled.

IV

{¶ 58} Both of Robinson's assignments of error having been overruled, the judgment of the trial court is Affirmed.

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FROELICH, J., concurs.

GRADY, J., concurring:

{¶ 59} The issue of law the first assignment of error presents has been resolved by *City of Blue Ash v. Kavanagh*, 113 Ohio St.3d 67, 2007-Ohio-1103, which held that an officer acts within his discretion in impounding a vehicle when its driver has been arrested if authority to impound is conferred by statute or local ordinance. R.C.G.O. 76.08, which is cited in the City of Dayton's tow policy statement, confers such authority. Therefore, I would overrule the first assignment of error on the authority of *City of Blue Ash*.

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