

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

THE STATE OF NEVADA,
Appellant,
vs.
TERRI LYNN ZITTEL,
Respondent.

No. 65820

FILED

NOV 19 2015

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is a State's appeal from an order of the district court granting a motion to suppress evidence. First Judicial District Court, Carson City; James E. Wilson, Judge.

Terri Zittel filed a motion in the district court to suppress a post-arrest statement she made to Deputy Bindley and methamphetamine that was discovered in her clothing. The State opposed the motion.

The district court conducted an evidentiary hearing and made the following factual findings: Deputy Bindley conducted surveillance of a house in furtherance of a drug investigation. He viewed Zittel get into a vehicle that was parked in front of the house and drive away. Deputy Bindley had had contact with Zittel two weeks previously and knew her driver's license was suspended. He also saw Zittel make a turn without using her turn signal. Deputy Bindley then conducted a traffic stop and requested additional assistance and a drug dog. Deputy Bindley stopped Zittel because he was suspicious about her activities at a known drug house, she failed to use a signal when she made a left turn, and Bindley knew Zittel's license was suspended at the time of his prior contact with her. Deputy Boggan arrived at the scene at about the same time Deputy

Bindley confirmed that Zittel's license was still suspended and discovered that Zittel was not the owner of the vehicle. Deputy Bindley decided to issue a citation to Zittel and impound the vehicle because the registered owner was not present and there was no other licensed person present to take custody of the vehicle.

Because the vehicle was to be impounded, the deputies initiated an inventory search of it. During the inventory search, Deputy Boggan discovered drug paraphernalia near the driver's door and pointed this out to Deputy Bindley. Deputy Bindley then arrested Zittel and handcuffed her. After Zittel was in custody and handcuffed, Deputy Bindley asked Zittel, without first giving her the *Miranda*¹ warning, if she had any drugs on her. Zittel responded that she had "a 40" in her bra and a small amount of methamphetamine was recovered from her bra.

The inventory search was then completed. The deputies documented the vehicle's inventory on a form stating "tools - photos taken." Nine photographs accompanied the inventory form. The deputies did not look into buckets that were in the vehicle's truck bed or inventory the numerous items in the buckets and they failed to document on the inventory form numerous additional items that were discovered in the vehicle or to document those items through photographs.

Approximately nine minutes after the stop was initiated, Deputy Pullen arrived with a drug dog. After the inventory search was completed, Deputy Bindley learned the dog had alerted to drugs in the vehicle.

¹*Miranda v. Arizona*, 384 U.S. 436 (1966).

The district court concluded that Deputy Bindley had probable cause to make the traffic stop. The district court further concluded, however, that the deputies failed to carry out the inventory pursuant to standardized official department procedures, or to administer the inventory in good faith. The court determined, because of his experience, Deputy Bindley knew or should have known the Sheriff's policy requirements for a vehicle impound inventory and "his failure to carry out an inventory pursuant to standardized official department procedures, or to administer it in good faith, was deliberate, reckless, or grossly negligent." Because the sham inventory search led to Zittel's arrest, her subsequent admission about the methamphetamine in her bra, and the discovery of the methamphetamine in her bra, the court held that Zittel's statement and the methamphetamine must be suppressed as fruit of the poisonous tree. This appeal follows.

The State argues the district court erred by concluding the inventory search of the vehicle was unconstitutional because it was merely a ruse for discovering incriminating evidence. The Nevada Supreme Court has held "[an] inventory search must be carried out pursuant to standardized official department procedures and must be administered in good faith in order to pass constitutional muster." *Diomampo v. State*, 124 Nev. 414, 432, 185 P.3d 1031, 1042 (2008) (quoting *Weintraub v. State*, 110 Nev. 287, 288, 871 P.2d 339, 340 (1994)). "[T]he inventory search must not be a ruse for general rummaging in order to discover incriminating evidence." *Id.* (internal quotation marks omitted). We review a district court's findings of fact for clear error and the legal consequences of the findings de novo. *Somee v. State*, 124 Nev. 434, 441, 187 P.3d 152, 157-58 (2008).

The Carson City Sheriff's Office policy requires deputies to search a vehicle and create a thorough inventory of the items in the vehicle when a vehicle is to be impounded. The policy specifically states deputies are to search containers and create a specific inventory of any contents of the containers. Here, the Vehicle Impound and Inventory Record listed the personal property in the vehicle as "tools – photos taken." Nine photographs accompanied the inventory form. No other itemized inventory of the items located in the vehicle was prepared. The district court specifically found and concluded:

Deputies failed to carry out an inventory pursuant to standardized official department procedures, or to administer the inventory in good faith. Specifically, deputies failed to prepare a specific, thorough, and accurate inventory list; deputies failed to look at all of the contents of the containers; deputies failed to prepare a specific, thorough, and accurate inventory by photographs; and deputies failed to include a specific, thorough, and accurate inventory list on the vehicle storage form. As a result none of the purposes of the Policy were met. This was a sham inventory; a plain old warrantless search for drugs.²

We conclude the district court's factual findings are supported by the record and the district court did not err by concluding that the inventory was a sham and, therefore, the inventory search was illegal. *See*

²The State argues the district court's written order differs from the factual findings it orally pronounced at the suppression hearing. However, a review of the record reveals the written order substantially complies with the court's oral ruling. Further, a district court's written order controls over the oral ruling. *See generally Bradley v. State*, 109 Nev. 1090, 1094-95, 864 P.2d 1272, 1274-75 (1993).

U.S. Const. amend. IV; Nev. Const. art. 1, § 18; *Diomampo*, 124 Nev. at 432, 185 P.3d at 1042; *Weintraub*, 110 Nev. at 288, 871 P.2d at 340.

The State also argues the independent source doctrine is applicable in this case and the district court erred in finding that the inevitable discovery doctrine did not apply.³

The independent source doctrine and the inevitable discovery doctrine are exceptions to the exclusionary rule. The independent source doctrine applies when a “lawful seizure is genuinely independent of an earlier, tainted one.” *Murray v. United States*, 487 U.S. 533, 542 (1988). The inevitable discovery doctrine applies when evidence has been obtained through unlawful means, but “the prosecution can establish by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful means.” *Nix v. Williams*, 467 U.S. 431, 444 (1984). Under the inevitable discovery doctrine, the prosecution is not required to prove the absence of bad faith. *Id.* at 445.

The district court found that Deputy Bindley had probable cause to make the traffic stop, he requested a drug dog immediately after making the stop and before impounding the vehicle, and the request for the drug dog did not unreasonably extend the traffic stop. The court further found that although “[t]he State failed to produce specific evidence of when the dog sniff occurred or the time the dog alerted,” “both events probably occurred within a short amount of time,” approximately 18

³Because we concluded that these claims were adequately preserved for appeal, but the district court order did not contain sufficient factual determinations to address them, we remanded this appeal for the limited purpose of having the district court enter additional factual findings. *State v. Zittel*, Docket No. 65820 (Order of Limited Remand, August 10, 2015).

minutes after the stop was initiated.⁴ Finally, the court found that the sham inventory unconstitutionally extended the stop and, because the dog sniff and illegal questioning of Zittel overlaid the illegal inventory search, the court could not determine whether the dog sniff and/or the illegal questioning extended the stop. These findings are supported by the record.


Given these findings, we conclude that the independent source and inevitable discovery exceptions to the exclusionary rule did not apply. Deputy Bindley decided to issue a citation to Zittel and she would have been free to leave upon issuance of the citation. However, as a result of the sham inventory, the stop was unconstitutionally extended, the citation was never completed, and Zittel was not permitted to leave. Had Deputy Bindley continued working on the citation, rather than inspecting the drug paraphernalia Deputy Boggan discovered during the sham inventory and taking Zittel into custody, it is likely that he would have completed the citation prior to the drug dog alerting on the vehicle and Zittel would have been free to leave. Further, if permitted to leave, it is possible that Zittel could have discarded the methamphetamine once out of the presence of the deputies. Therefore, we cannot say that, even if the dog sniff would have resulted in the discovery of the drugs in the vehicle and provided probable cause to arrest Zittel, Deputy Bindley would have obtained the same admission from Zittel about having methamphetamine in her bra or


⁴Although the district court also found that Deputy Bindley was informed that the dog alerted to the presence of drugs in the vehicle after the inventory search was completed, the timing of when Deputy Bindley was notified of the alert is not relevant to whether the dog sniff was wholly independent of the sham inventory or whether the drug evidence ultimately or inevitably would have been discovered by lawful means.

that any subsequent search of Zittel would have yielded the methamphetamine that was recovered from her bra. Accordingly, we conclude the district court did not err by excluding Zittel's post-arrest statement and the methamphetamine discovered in her clothing as fruit of the poisonous tree, and we

ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Silver

cc: Hon. James E. Wilson, District Judge
Attorney General/Carson City
Carson City District Attorney
State Public Defender/Carson City
Carson City Clerk