No. 18-9801

IN THE SUPREME COURT OF THE UNITED STATES

RASHAWN LONG, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether an inventory search of a rental car that petitioner had parked in a stranger's yard and that police, responding to the homeowner's complaint, had ordered towed away was lawful under the Fourth Amendment.

RELATED PROCEEDINGS

United States District Court (Western District of Missouri):

United States v. Long, No. 13-cr-405 (Feb. 16, 2016)

United States Court of Appeals (8th Cir.):

United States v. Long, No. 16-1419 (Oct. 12, 2018)

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. E 1-12) is reported at 906 F.3d 720. A prior opinion of the court of appeals is reported at 870 F.3d 792. The order of the district court is not published in the Federal Supplement but is available at 2014 WL 2505222.

JURISDICTION

The judgment of the court of appeals was entered on October 12, 2018. A petition for rehearing was denied on March 18, 2019 (Pet. App. 1). The petition for a writ of certiorari was filed on

June 13, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Western District of Missouri, petitioner was convicted of possession with intent to distribute 2-(Methylamino)-1-phenyl-1-butanone (commonly known as buphedrone), a controlled substance, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(C), and possession of a firearm by a felon, in violation of 18 U.S.C. 922(g)(1) and 924(a)(2). Am. Judgment 1. He was sentenced to 360 months of imprisonment, to be followed by six years of supervised release. Id. at 2-3. The court of appeals affirmed. Pet. App. E 1-12.

1. Police officers in Kansas City, Missouri, responded to a homeowner's call that a stranger had parked his car in her backyard without permission, knocked on her door, and left when she did not answer. Pet. App. E 2. The officers determined from the license plate that it was a rental car; after an unsuccessful attempt to contact the rental car company, the officers called a tow truck. Ibid. Before the tow truck arrived, petitioner approached from another house and said that he had parked the car to hide while visiting a friend nearby. Id. at 2-3. The officers handcuffed and frisked petitioner. Id. at 3. They asked petitioner if they could search the car; petitioner consented, but said that the keys were in a neighbor's house. Ibid. After a computer search revealed two outstanding arrest warrants, the

officers placed petitioner in a patrol car; even after they determined that the warrants were from another jurisdiction and therefore unenforceable, the officers continued to hold petitioner because one of the officers said that he wanted to "determine if there was anything illegal in the car." Ibid. Around that time, the officers were joined by a colleague who had been investigating petitioner in connection with several homicides and had been called to the scene. Ibid.

After the tow truck driver arrived, he jimmied the car door, enabling the officers to perform an inventory search before the car was towed away. Pet. App. E 3. That search uncovered a bag of white powder -- later determined to be buphedrone -- hidden in a soda can in a backpack. Id. at 3-4. The officers terminated the inventory search at that point to obtain a search warrant. A subsequent search pursuant to a warrant revealed a videorecorder containing videos of petitioner holding a pistol. Ibid. Petitioner was indicted on one count of possessing with intent to distribute buphedrone, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(C), and one count of possession of a firearm by a felon, in violation of 18 U.S.C. 922(g)(1) and 924(a)(2). Indictment 1-2.

2. The district court denied petitioner's motion to suppress the evidence from the car. D. Ct. Doc. 34, at 1-2 (June 3, 2014), available at 2014 WL 2505222. The court adopted the magistrate judge's report and recommendation, see id. at 1, which explained that "the inventory search of [petitioner's car] was

proper" because "inasmuch as the officers acted properly in towing the vehicle, they were justified in performing an inventory search of the [car] prior to the tow," Pet. App. B 7-8. The court declined to reach the government's alternative argument that petitioner lacked standing to challenge the search because he was not an authorized driver of the rental car. See id. at 6 n.3.

Following a trial, the jury found petitioner guilty on both counts in the indictment. Verdict 1-2. After denying petitioner's subsequent motions for acquittal or a new trial, D. Ct. Doc. 77, at 1-4 (Feb. 11, 2015), and to dismiss the indictment for lack of subject-matter jurisdiction, D. Ct. 108, at 1 (Jan. 20, 2016), the district court sentenced petitioner to 360 months of imprisonment, to be followed by six years of supervised release, Am. Judgment 2-3.

3. The court of appeals affirmed. Pet. App. A 1-11; Pet. App. E 1-12. The court initially determined that petitioner lacked standing to challenge the inventory search because he had received permission to drive the rental car from the renter's friend, not from the renter herself. See Pet. App. A 6-7. But the court granted petitioner's motion for panel rehearing and vacated its opinion following this Court's decision in Byrd v. United States, 138 S. Ct. 1518 (2018), which held that a person may have a reasonable expectation of privacy in a rental car even if he is not listed as a driver on the rental agreement, id. at 1531. C.A. Doc. 4672462, at 1 (June 13, 2018); see Pet. App. C.

After supplemental briefing, the court of appeals affirmed the district court's decision on an alternative ground -- namely, that even if petitioner had standing to challenge the inventory search, the search was lawful. Pet. App. E 1-12. The court observed that petitioner used the car "to trespass on the private property of a stranger" and "concealed [the car] without permission in that person's backyard before seemingly abandoning" it. Id. at E 6. The court further observed that "[i]n response to the homeowner's understandable call for help in this suspicious situation, and before [petitioner] returned to the scene, the officers determined it was necessary and appropriate to tow the car." Ibid. In light of those facts, the court determined that "[a]s of that point in time, an inventory search was fully justified," and that "[n]othing that occurred after [petitioner's] return lessened the need or the propriety of towing the vehicle and performing an inventory search." Ibid.

The court of appeals acknowledged that one officer's statement that he wanted to "'determine if there was anything illegal in the car'" provided "evidence suggesting pretext," but explained that "'the presence of an investigative motive does not invalidate an otherwise valid inventory search.'" Pet. App. E 3, 6 (brackets and citation omitted). The court also rejected petitioner's assertion that the officers deviated from the police department's inventory-search policies in two respects, so as to render the search unlawful. Id. at 7-8. First, the court observed

that the officers' failure to affix a summons to the car before towing it did not violate the policy because the policy "recognizes discretion for officers in the field" to determine when to tow a car, and that "the decision to tow in this case was made in response to the trespass report, before [petitioner] arrived on the scene, and in reference to a rental vehicle when the rental company could not be reached and when the operator was unknown." Id. at 7. Second, the court rejected petitioner's argument that the inventory search was invalid because the officers "did not open the glove box or trunk and did not write down items observed in the backpack," explaining that the officers truncated the inventory search because they decided to apply for a search warrant after discovering the drugs, and that "[t]hese arguable deviations from the department's written policy are understandable in context and are not infirmities that make the inventory search unconstitutional." Id. at 7.

ARGUMENT

Petitioner renews his contention (Pet. 8-11) that the inventory search of his car was unconstitutional because one of the officers subjectively wanted to look for evidence of criminal conduct. That contention lacks merit, and the factbound decision below does not conflict with any decision of this Court or another court of appeals. Further review is unwarranted.

1. In South Dakota v. Opperman, 428 U.S. 364 (1976), this Court noted that, in performing their community caretaking

functions, police will "frequently remove and impound automobiles which violate parking ordinances and which thereby jeopardize both the public safety and the efficient movement of vehicular traffic" and that the authority of police to seize such vehicles without a warrant "is beyond challenge." Id. at 369. Once a vehicle has been impounded, this Court has held, officers may conduct an inventory of its contents without a warrant. Colorado v. Bertine, 479 U.S. 367, 371-373 (1987).

Recognizing that "an inventory search must not be a ruse for a general rummaging in order to discover incriminating evidence," the Court has stated that such searches must be conducted pursuant to "standardized criteria" or "established routine" and that "[t]he policy or practice governing inventory searches should be designed to produce an inventory." Florida v. Wells, 495 U.S. 1, 4 (1990). Standard inventory procedures "serve to protect an owner's property while it is in the custody of the police, to insure against claims of lost, stolen, or vandalized property, and to guard the police from danger." Bertine, 479 U.S. at 372; accord Whren v. United States, 517 U.S. 806, 811 n.1 (1996). Based on those interests, as well as the diminished expectation of privacy in automobiles, see Opperman, 428 U.S. at 367-368, this Court has "accorded deference to police caretaking procedures designed to secure and protect vehicles and their contents within police custody," Bertine, 479 U.S. at 372.

The court of appeals correctly applied those principles to the facts here. The court observed that petitioner had used the rental car "to trespass on the private property of [a] stranger" and "concealed [it] without permission in that person's backyard before seemingly abandoning" it there. Pet. App. E 6. The court explained that under those circumstances, "it was necessary and appropriate to tow the car," and that petitioner's subsequent behavior and the officers' inability to confirm his right to drive the car with the rental car company "left officers with little assurance that it would have been appropriate to release the vehicle to [petitioner's] control." Id. at 6-7.

Petitioner's suggestion (Pet. 8) that the officers did not "adhere to [police] policies and procedures" governing the towing of abandoned cars is mistaken. The Kansas City police department's towing policy states:

> In the officer's discretion, vehicles may be towed when * * * [a]ny vehicle is parked on private property * * * without the consent of the owner, lessee, or person in charge of any such property or facility, and upon complaint to the police department by the owner, lessee, or person in charge of such property or facility and a summons has been presented to the owner or operator or affixed to the vehicle.

Pet. App. H 4. Petitioner indisputably parked the rental car on private property without consent, and the owner of the property indisputably complained to the police. And although the record does not reflect that officers presented or affixed a summons before the car was towed, it is undisputed that the officers

decided to tow the car and called for a tow truck only after having unsuccessfully attempted to contact the rental car company, and before petitioner arrived on the scene. Under those circumstances, the court of appeals correctly found the officers' decision to tow the apparently abandoned car to be reasonable. As the court of appeals observed (Pet. App. E 7), the towing policy "recognizes discretion for officers in the field" to react to unusual circumstances, such as the ones here.

Because the decision to tow the car was reasonable, the court of appeals also correctly determined that "[a]s of that point in time, an inventory search was fully justified" as well. Pet. App. E 6. That follows not only from this Court's case law on inventory searches, see, e.g., Bertine, 479 U.S. at 371-373, but also from the Kansas City, Missouri police department's towing policy, which states that an inventory search "is required for the towing and protective custody of all vehicles," Pet. App. H 1 (emphasis added), and that officers towing a car must conduct an inventory search -- including by opening "locked and/or closed compartments * * * and containers," ibid. -- "unless otherwise instructed by a supervisor," id. at 2. That is what the officers did here.

Petitioner errs in suggesting that the inventory search was unlawful both because officers had to "break[] into [the] rental vehicle" to perform the search, Pet. 9 (capitalization altered); see Pet. 5-6, and because they "fail[ed] to complete [the] inventory" once they started the search, Pet. 10 (capitalization

altered). Jimmying the car door was necessary only because petitioner -- who had consented to a search -- did not produce the keys or otherwise assist officers in performing the inventory search. And as the court of appeals recognized (Pet. App. E 7), the officers permissibly truncated the inventory search in favor of obtaining a search warrant as soon as they discovered the drugs, which provided probable cause to suspect criminal activity. Neither decision was unreasonable under the circumstances.

Finally, petitioner contends (Pet. 8-9) that the inventory search was unconstitutional because one of the officers subjectively wanted to search for evidence of criminal activity. That contention lacks merit. The officers' compliance with police procedures renders the search reasonable, regardless of the officers' intent. Although this Court has stated that an inventory search "must not be a ruse for a general rummaging in order to discover incriminating evidence," the Court has viewed the requirement that inventory searches be conducted according to standardized procedures as sufficient to guard against that possibility. Wells, 495 U.S. at 4; see Opperman, 428 U.S. at 374-375 (explaining that when "the protective search was carried out in accordance with standard procedures in the local police department," that "factor tend[s] to ensure that the intrusion would be limited in scope to the extent necessary to carry out the caretaking function") (emphasis omitted). Thus, when an officer impounds a vehicle and conducts an inventory search in accordance

with established police policy or practice, any subjective investigatory motive does not invalidate the impoundment and search. See, e.g., United States v. Williams, 930 F.3d 44, 57 (2d Cir. 2019); United States v. McKinnon, 681 F.3d 203, 209-210 (5th Cir. 2012) (per curiam), cert. denied, 568 U.S. 1145 (2013).*

That rule makes sense. When "officers, following standardized inventory procedures, seize, impound, and search a car in circumstances that suggest a probability of discovering criminal evidence," they may well expect to find, and be motivated in part by the possibility of finding, evidence of criminal activity. United States v. Mundy, 621 F.3d 283, 294 (3d Cir. 2010), cert. denied, 131 S. Ct. 1531 (2011). But that expectation does not alter the fact that when an inventory search is undertaken pursuant to, and in compliance with, standardized inventory procedures, it is a necessary and routine part of police officers' caretaking function, independently justified by strong governmental interests unrelated to criminal investigation.

2. Petitioner errs in suggesting (Pet. 6, 8-9) that this Court's review is warranted because the decision below conflicts

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* See also, e.g., United States v. Mundy, 621 F.3d 283, 294 (3d Cir. 2010), cert. denied, 562 U.S. 1242 (2011); United States v. Coccia, 446 F.3d 233, 241 (1st Cir. 2006), cert. denied, 549 U.S. 1149 (2007); United States v. Garner, 181 F.3d 988, 991 (8th Cir. 1999), cert. denied, 528 U.S. 1119 (2000); United States v. Lumpkin, 159 F.3d 983, 987 (6th Cir. 1998); United States v. Lomeli, 76 F.3d 146, 148 (7th Cir. 1996); United States v. Bowhay, 992 F.2d 229, 231 (9th Cir. 1993); United States v. Bosby, 675 F.2d 1174, 1179 (11th Cir. 1982).

with the Ninth Circuit's decision in United States v. Johnson, 889 F.3d 1120 (2018) (per curiam).

Johnson concluded that "an administrative search may be invalid where the officer's 'subjective purpose was to find evidence of crime,'" if the officers would not have conducted the search but for that investigatory purpose. 889 F.3d at 1126 (citation omitted). The Ninth Circuit made clear, however, that "the mere 'presence of a criminal investigatory motive' or a 'dual motive -- one valid and one impermissible --' does not render an administrative stop or search invalid," and that a court must "ask whether the challenged search or seizure 'would . . . have occurred in the absence of an impermissible reason.'" Ibid. (citation omitted). Johnson found the officers' effectuation of the inventory search there to be unreasonable because "the officers themselves explicitly admitted that they seized items from the car in an effort to search for evidence of criminal activity," id. at 1127, and that "[i]n the face of such evidence, it is clear to us that the officers' decision to seize the [items] from [the car] would not have occurred without an improper motivation to gather evidence of crime," id. at 1128.

The Ninth Circuit's decision in Johnson does not conflict with the factbound decision here. Unlike in Johnson, the undisputed evidence here demonstrates that the officers would have towed -- and thus inventoried the contents of -- the abandoned rental car even absent any criminal investigatory motive. Indeed,

the officers already had "determined it was necessary and appropriate to tow the car" and "had already called the tow vehicle before [petitioner] came running back to the scene." Pet. App. E 6. As the court of appeals observed, at "that point in time, an inventory search was fully justified." Ibid. That one of the officers subsequently developed an investigatory motive does not show that the search "would not have occurred without [that] improper motivation." Johnson, 889 F.3d at 1128. At most it shows a "dual motive," which even the Ninth Circuit acknowledged is insufficient to invalidate an otherwise lawful administrative search. Id. at 1126 (citation omitted); see Bertine, 479 U.S. at 372 (explaining that an inventory search conducted under "standardized procedures" is not unreasonable unless police "acted in bad faith or for the sole purpose of investigation").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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