No.

IN THE
SUPREME COURT OF THE UNITED STATES

RICHARD SYLVESTER,

PETITIONER

v.

UNITED STATES,

RESPONDENT

On Petition for a Writ of Certiorari to the
United States Court of Appeals,
First Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. In order for a vehicle impound to be consonant with the Fourth Amendment, must a police officer comply with established impound policies and procedures, if they exist?

2. In order for a vehicle impound to be consonant with the Fourth Amendment, may an officer have an investigatory motive when impounding the vehicle?

3. Which party has the burden of establishing a police officer's subjective intent, and may the officer's subjective intent be inferred from the totality of the circumstances?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Richard Sylvester respectfully petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the First Circuit.

OPINION BELOW

The opinion of the First Circuit under review is reported at *United States v. Sylvester*, 993 F.3d 16 (2021).

STATEMENT OF JURISDICTION

The First Circuit issued its decision on April 2, 2021. The time within which to file the petition for a writ of certiorari extends until August 30, 2021. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS

The Fourth Amendment to the U.S. Constitution provides that:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

A. Introduction

Petitioner Sylvester conditionally pleaded guilty to possession with intent to distribute controlled substances (cocaine, methamphetamine and heroin) and possession of a firearm in furtherance of a drug-trafficking crime in violation of federal laws, reserving his right to appeal the district court's denial of his motion to suppress. The district court principally sentenced Sylvester to 72 months' imprisonment, followed by three years of supervised release.

At around 7:300 p.m. on May 19, 2017, Sylvester was driving his truck along a busy highway when he was stopped and arrested on an outstanding warrant. Sylvester's truck was impounded, inventoried, and then searched pursuant to a warrant. In both the district court and the appellate court, Sylvester argued that the search warrant for the truck was invalid because it was based on evidence discovered during an inventory search which was itself unlawful because the initial impoundment of the car was unreasonable.

The government conceded before the district court and on appeal that the inventory search and the search warrant were valid only if the initial impound decision was also lawful. The district court determined that there was not probable cause to search the car under the automobile exception to the warrant requirement at the time the car was stopped and Sylvester was arrested. The government likewise did not challenge that determination.

Nevertheless, the district court upheld the search of the truck. The district court concluded that the officers acted reasonably because there was no other "obvious option in getting this car off the highway." The First Circuit affirmed. Reiterating its own case-law that adherence to standard procedures is not the "sine qua non of a reasonable impound decision," and that the presence of an investigatory motive is not necessarily defeating, the court held that because there were no other passengers nor anyone else immediately available to remove the car, leaving the car on the shoulder of a heavily trafficked highway would have been hazardous. Thus, it reasoned, the officers did not act unreasonably.

Both the district court and the First Circuit recognized, however, that the police violated established impound and inventory procedures. According to those procedures, impoundment of the car was permissible only after (a) offering the driver the opportunity to call a third-party to come and get the car, and then, (b) only after the police determined that a third party would not be able to arrive before the police were ready to leave. The notion that there was no obvious alternative means for removing the car other than impoundment is betrayed by the record because the police never asked Sylvester whether anyone was available to take custody of the car; as it turns out, someone was nearby, and the police stayed on the scene long after Sylvester's arrest.

Had Sylvester litigated his appeal in the Seventh, Eighth, Tenth, or D.C. Circuits, he likely would have won. Those courts hold that the decision to impound must be made pursuant to a standardized procedure. The First, Second, Third and

Fifth Circuits, however, hold that impoundment is reasonable as long as it serves the government's community caretaking interests, and strict adherence to policy is not required.

Both the district court and the First Circuit also recognized that when the officer's impounded the car, they had an investigatory motive. This Court has instructed that the presence of an investigatory motivate strongly militates against a reasonableness determination. The federal courts have failed to head that warning. Compounding the problem, the First Circuit faulted Sylvester for failing to ask the district court to make a specific finding about why the officers did not comply with the inventory and impound policies, and thus, it concluded, any argument about the officers' true motives was unavailing. The court noted that because defendant failed to request such a finding, it had no need to address which party had the burden of proving that removal of the vehicle was a pretext for a search. The court observed that the Ninth and Tenth Circuits have addressed the issue and determined that the burden is on the defendant.

Respectfully, this Court should grant review to clarify the way in which the reasonableness calculus accounts for adherence to standardized police policies and an officer's pretextual subjective intent. Also, to clarify that the government has the burdens of proof and production when its agents search without a warrant.

B. Historical facts

In lieu of an evidentiary hearing, the parties stipulated to the facts contained in Government's Exhibits 1 through 6, and Defendant's Exhibit 1. These exhibits are

all included in the Joint Appendix on file in the First Circuit.[1] They establish the following facts.

C. The arrest warrant

On May 19, 2017, Maine DEA Special Agent Jacob Day was off duty and driving his personal vehicle when by happenstance, he passed a vehicle driven by Sylvester, a person with whom Day was familiar. (A-14, ¶1-2). A "few weeks" prior, Day learned from United States DEA Agent Kate Barnard that Sylvester "had a federal arrest warrant" for "dangerous drugs." (*Id.*; A-31).

Day didn't know it at the time – in fact, it appears it didn't come to light until Sylvester initiated suppression proceedings – but, the federal arrest warrant issued in response to conduct that allegedly occurred about a year prior, in August 2016. (Add-21).

Day ran a registration check on the license plate and learned that Hailee Goodwin of Hancock, Maine, was the registered owner of the Cadillac Escalade that Sylvester was driving. (A-14, ¶3). Day also called Barnard, who confirmed that the federal warrant was active and that the U.S. Marshall Service was currently searching for Sylvester. (*Id.*). Day then called Lieutenant Tim Cote of the Hancock County Sheriff's Department and told him about the outstanding warrant and Sylvester's whereabouts. (*Id.* at ¶4). Cote reported that he would head towards Sylvester's direction "with other Deputies." (*Id.*).

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[1] Record citations throughout this pleading refer to the Appendix (A-) and Addendum (Add-) on file in the First Circuit.

D. The traffic stop

Lt. Cote, along with Sheriff's Deputies Corey Bagley, Jeff McFarland, and Andrew Weatherbee, spotted Sylvester on Route 1A in Dedham, Maine, and initiated a traffic stop. (A-34). Deputy Bagley told Sylvester to "step out of the vehicle." (A-31). As Sylvester got out of the car, Bagley noticed a knife attached to the belt of Sylvester's pants. (A-31). Bagley removed the knife and asked Sylvester if he had any other weapons; Sylvester replied that he had another knife in his pocket and a pair of brass knuckles. (*Id.*). Bagley handcuffed Sylvester, patted him down, and seized the second knife and the brass knuckles. (*Id.*). Bagley also removed Sylvester's wallet and "a wad of cash that was in his front pocket." (*Id.*). The cash totaled $2,799.00. (*Id.*). Sylvester said at first that he sold vehicles for a living, which explained the cash. (A-36). Sylvester later said that he sold his ATV to his brother and that the cash was the proceeds from that sale. (*Id.*). Sylvester (who was at all times cooperative with the police) was placed in the back of Bagley's vehicle, and transported to the Hancock County Jail where he was booked on the federal arrest warrant. (A-31, 36).

E. The vehicle impoundment and inventory

Cote spoke with Day, who requested that a K-9 conduct a "sniff test" of the vehicle; so Cote passed that request on to the Maine State Police. (A-36). Cote was advised that the K-9 was in the Washington County area. (*Id.*) "Due to the travel time," Cote instructed an auto wrecker to remove the vehicle from the roadside and transport it to the wrecker's impound yard. (*Id.*). Eventually, a K-9 sniffed the

vehicle, but "did not hit" on it. (A-34). Officers then conducted an inventory of the vehicle. (*Id.*).

Bagley, Cote and McFarland conducted the inventory search. (*Id.*). Inside the passenger compartment of the car, they found a cell phone and a woman's wallet with a Maine Driver's License belonging to Hailee Goodwin. (*Id.*). Inside a backpack on front passenger's side floor, McFarland found a loaded 9 mm handgun with a round in the chamber. (*Id.*). McFarland also found a plastic baggie that contained eight bundles of what appeared to be heroin and "four pretty good size chunks of a white hard substance" that McFarland believed was cocaine. (A-32). At that point, the officers agreed to stop the inventory search and notify the Maine Drug Enforcement Agency so that they could obtain a search warrant for the vehicle. (A-34-35).

F. Sylvester's phone call from jail

The reader will recall that Sylvester was arrested, and the Escalade was inventoried, on the evening of Friday, May 19, 2017. Two days later, on Sunday, May 21, 2017, Special Agent Christopher Smith listened to jail recordings, and he heard Sylvester say to a woman caller that he had "10 grand in the vehicle and it would be good if Hailee could get the vehicle out of impound." (A-15, ¶12-13). On Monday, May 22, 2017, Day listened to the same recording and he heard the same message. (*Id.* at ¶13).

G. The search warrant

On Monday, May 22, 2017, Day applied for, and obtained, a search warrant for the Escalade. (*Id.* at ¶14; A-45-55). The affidavit in support of the search warrant

detailed all of the foregoing information. (A-45-51). A search of the vehicle uncovered a loaded 9 mm handgun with a round in the chamber and a second 9 mm magazine; a clear plastic bag with two chunks of methamphetamine weighing a total of 22.0 grams; eight bundles of ten individually wrapped waxed paper folds containing heroin with a gross weight of 23.8 grams; and three solid chunks of cocaine with a gross weight of 88.1 grams.[2] (A-16-17, ¶¶ 16-20). The police also found a cell phone, a glass crack pipe, a spoon with residue on it, empty clear plastic baggies, a scale with white residue, and two notebooks that appeared to be drug ledgers. (*Id.* at ¶¶ 18, 19). They did not locate the "ten grand."

H. The pertinent impound and inventory policies

There are two Hancock County Sheriff's Department policies that are relevant to this case: the "towing/wreckers" policy (the impound policy) and the "vehicle inventory" policy (the inventory policy). The impound policy authorizes law enforcement to tow and store a vehicle under certain circumstances, including when the vehicle impedes or endangers traffic. The impound policy specifies that "[n]o vehicle shall be stopped or left unattended in such a manner as to impede or render dangerous the highway by others, except in cases of a mechanical breakdown, law enforcement emergency or traffic crash." The policy further provides:

> Whenever possible, owners or operators of vehicles for which towing is required will be encouraged to specify a towing service of their own choice. When required, the law enforcement officer will summon a

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[2] Day tested the substances using the TruNarc system and he weighed the substances himself. (A-17, ¶20).

> tow truck, unless a specific request for a particular tow service has been made by the owner or operator of the vehicle to be towed, and if such tow service is reasonabl[y] available.

The policy makes plain that "[w]hen a wrecker service is needed, the law enforcement officer shall as the vehicle owner/operator if they have a preference of wrecker service" and if they do, the law enforcement officer will arrange for that tow/wrecker service to be contacted. However, "[w]hen a wrecker service is not at the owners' request, [it] would be considered a law enforcement tow." An inventory search is required of all vehicles taken into police custody because of a law enforcement tow "if the wrecker operator has to open the vehicle prior to towing it."

The inventory policy provides that before taking a vehicle into custody "[w]here the owner or operator in possession of the vehicle is arrested…and the vehicle is not required as evidence and need not be impounded for any other reason, the law enforcement officer" shall:

> **Advise the owner or operator that they may release the vehicle to a licensed driver who is willing to assume full responsibility for the vehicle and all property contained therein**. This person must be at the scene or be able to arrive prior to the law enforcement officer leaving. … If the owner or operator chooses not to release the vehicle to a third party, the vehicle shall be removed by an agency-dispatched wrecker. A[n] inventory will not be required if not impounded.

(Emphasis added).

I. The district court's ruling

1. The district court's factual findings

The district court's factual findings are all supported by evidence in the record. Sylvester respectfully disagrees with the district court's application of the law to the facts, but he does not challenge the court's findings. The district court found:

> The basic timeline, as I understand it, is that Mr. Sylvester was arrested pursuant to a federal drug trafficking warrant on the evening of May 19, that the Hancock County deputies searched his person and that yielded two knives, brass knuckles, and $2,799 in cash, but they did not search the driver's compartment incident to the arrest.
>
> Thereafter the car was towed and impounded at an auto wrecker that evening. A drug dog did an exterior sniff test at the auto [wrecker's] premises that was negative that evening. And there was then an inventory search that resulted in discovery of a weapon and drugs in the backpack on the front seat that evening, and then the search was terminated and the vehicle was sealed.
>
> On Sunday there was a phone call from Mr. Sylvester at the jail to Gina Tinker stating that there was 10 grand in the car and that Hailee should try to get it out of impound, Hailee being his girlfriend. And law enforcement listened to the call on that day and again on Monday morning, May 22nd, and then proceeded to apply for and obtain a search warrant from a state district judge on May 22nd. That is what I understand to be the sequence.

(Add-9-10).

2. The district court's legal conclusions

First, the court agreed with Sylvester that "[c]learly law enforcement had probable cause" to arrest Sylvester "on account of the active drug trafficking warrant, and they did arrest him," but "once he had been taken from the scene, there was no probable cause for an independent search of the automobile." (Add-10-11).

Second, the district court observed that the Escalade was stopped "on a busy highway in the breakdown lane" and there was "no other driver on the scene" after Sylvester was arrested. (Add-11). According to the district court, "the car needed to be moved; that's what raises the issue of whether the community caretaking exception applies." (Add-11). After discussing the Hancock County inventory and impound (*e.g.* towing) policies at some length, the district court again agreed with Sylvester and concluded "that the Hancock County deputies violated the Hancock policies by not trying to reach out to Goodwin, give her the choice of taking the vehicle if she could before they left the scene, or telling Sylvester that he had the first choice of what towing service to use." (Add-14).

The district court further concluded, however, that the officers "did not violate the policy in actually removing the vehicle." (Add-14). After surveying the First Circuit's case-law, the district court reasoned: "Here the Escalade had to be moved because of its circumstances on the highway. There were solid noninvestigatory reasons for moving the car." (Add-15). And, because under the First Circuit's case-law, the inquiry is "reasonableness," "the impoundment decision was reasonable, with solid noninvestigatory reasons." (Add-16-17). In particular, the Escalade "was

in the breakdown lane of a busy highway and Hancock County had announced in writing its community caretaking policy and functions. There was no need for law enforcement on the scene to repeat them." (Add-17). Noting case-law from other circuits – "the Tenth Circuit has said the First Circuit, the Third Circuit, and Fifth Circuit line up together, Tenth doesn't follow them" – the district court remarked: "So perhaps the First Circuit will narrow the scope of its rulings when given the opportunity to do so." (Add-18-19). It added: " But here, with no obvious option in getting this car off the highway, I conclude the impound decision was objectively reasonable under the scope and reasoning of the *Coccia* decision and that as a district judge in the First Circuit I must follow it." (Add-19; referring to *United States v. Coccia*, 446 F.3d 233 (1st Cir. 2006)).

Third, the district court concluded that "once the impoundment occurs the inventory search is according to established policy." (Add-20). *Fourth*, alluding to the search warrant issued on May 22, 2017, the district court decided, "there was probable cause even without the inventory search" because of the active federal arrest warrant for drug activity; the fact that the U.S. Marshal service was searching for Sylvester; $2,799 in cash and brass knuckles and two knives were found on Mr. Sylvester's person; and because of Sylvester's phone call from jail that Hailee should get the vehicle out of impound because he had 10 grand in it. (Add-21-22). Furthermore, this probable cause generated reason to conclude that the "vehicle contained contraband, *i.e.* drug sale proceeds, and therefore probable cause." (Add-22).

J. The First Circuit's decision

Citing to its own case-law, the First Circuit observed that pursuant to the "community caretaking" exception to the warrant requirement, an impound decision is constitutionally valid as long as it is "reasonable under the totality of the circumstances." *Sylvester*, 993 F.3d at 23. In other words, the "inventory decision must be justified by a legitimate, non-investigatory purpose and cannot be "a mere subterfuge for investigation, [but] the coexistence of investigatory and caretaking motives will not invalidate the seizure." *Id.* at 23 (citing *Coccia*, 446 F.3d at 237 and *Rodriguez-Morales*, 929 F.2d at 787).

The First Circuit further emphasized that adherence to standardized procedures is not the sole measure of reasonableness. Again, citing to its own case-law, the court explained:

> [I]t is inappropriate for the existence of (and adherence to) standard procedures to be the sine qua non of a reasonable impound decision[.]…
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> * * * * *
>
> [S]tandard protocols have limited utility in circumscribing police discretion in the impoundment context because of the numerous and varied circumstances in which impoundment decisions must be made. Moreover, a police officer's discretion to impound a car is sufficiently cabined by the requirement that the decision to impound be based, at least in part, on a reasonable community caretaking concern and not exclusively on "the suspicion of criminal activity." Accordingly, the impoundment of [the defendant's] car did not violate the Fourth Amendment merely because there was no evidence that the impoundment was done pursuant to pre-existing police protocols.

Sylvester, 993 F.3d at 23 (citing *Coccia*, 446 F.3d at 239).

The court acknowledged that the district court "explicitly found that the officers were motivated in part by an investigatory purpose," but, the court said, the district court "went on to cabin that holding and also held that the officers clearly had a legitimate and objectively reasonable noninvestigatory purpose." *Id.* at 23. Building on that, the court instructed that "[t]he presence of both investigatory and community caretaking motives does not render unlawful an objectively reasonable decision to impound" and it endorsed the view that impoundment was reasonable because:

> There were no other passengers nor anyone else immediately available to remove the car. Sylvester indeed never asserted that the owner of the car was nearby or that anyone else could immediately retrieve the car. Leaving the car on the shoulder of a heavily trafficked highway was an obvious hazard to other drivers, especially on a Friday night with darkness approaching.

Id. at 23-24.

Lastly, the court addressed Sylvester's argument that "the sole purpose of the impound was investigatory," based on the fact that the officers violated aspects of the Hancock County Impound and Inventory Policies by not notifying him that he could request a third party to immediately remove the car and thus created the need for impoundment. *Id.* at 24. The court said that "Sylvester did not ask the district court to make a specific finding about why the police officers did not comply with those aspects of the policies and none was made, thus precluding any such argument from

having merit…." *Id.* The court added that because of defendant's failure to request such a finding, it had "no need to address who has the burden of proving pretext" although "two other circuits have addressed the question in the same context or in similar contexts and held the burden is on the defendant." *Id.* 24, n. 6 (citing to *United States v. Orozco*, 858 F.3d 1204, 1213 (9th Cir. 2017) and *United States v. Maestas*, 2 F.3d 1485, 1489 (10th Cir. 1993)).

Concluding that the subsequent inventory search was, therefore, lawful, the First Circuit decided that "the district court committed no error in denying Sylvester's motion to suppress." *Id.* at 25.

REASONS FOR GRANTING THE WRIT

I. The circuits are divided over whether, to be valid, the impoundment of a vehicle must be executed pursuant to standardized criteria.

A. Vehicle impoundment as a community caretaking function.

It is reasonable for the police to search the personal effects of a person under lawful arrest. *Illinois v. Lafayette*, 462 U.S. 640, 646 (1983). This includes a person's automobile. *South Dakota v. Opperman*, 428 U.S. 364, 367-73 (1976). The justification for such a search – *i.e.* to safeguard the effects and protect against specious claims of theft – does not rest on probable cause, and thus, the absence of a warrant is immaterial to the reasonableness of the search. *Lafayette*, 462 U.S. at 643; *Opperman*, 428 U.S. at 369. Instead, reasonableness depends on the subjective intent of the officer who makes the decision to impound the vehicle and on the officer's compliance with standardized or routine inventory procedures when searching vehicle's contents. *Colorado v. Bertine*, 479 U.S. 367, 372 (1987); *City of Indianapolis*

v. Edmond, 531 U.S. 32, 45 (2000); *Florida v. Wells*, 495 U.S. 1, 4 (1990). When properly executed, vehicle impoundment and its concomitant inventory search are "beyond challenge." *Opperman*, 428 U.S. at 369.

After Sylvester was arrested on a federal warrant, law enforcement officers had to figure out what to do with the car. When police officers perform a community caretaking function, the permissible range of options is tightly circumscribed by established police department rules or policy. This limitation is the defining reason why a community caretaking search is an exception to the warrant requirement: because the officer's discretion is carefully restrained, all of the justifications for prior judicial authorization are minimized. As this Court explained in *Opperman*:

> In the criminal context the requirement of a warrant protects the individual's legitimate expectation of privacy against the overzealous police officer. Its protection consists in requiring that those inferences concerning probable cause be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. Inventory searches, however, are not conducted in order to discover crime. The officer does not make a discretionary determination to search based on a judgment that certain conditions are present. Inventory searches are conducted in accordance with established police department rules or policy and occur whenever an automobile is seized. There are thus no special facts for a neutral magistrate to evaluate.
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> * * * * *
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> [N]o significant discretion is placed in the hands of the individual officer: he usually has no choice as to the subject of the search or its scope.

Opperman, 428 U.S. at 383-84; *see also Wells*, 495 U.S. at 4-5 (an officer's exercise of discretion is permissible if it furthers the purpose of the inventory search); *Bertine*, 479 U.S. at 375 ("Nothing…prohibits the exercise of police discretion as long as that discretion is exercised according to standard criteria and on the basis of something other than suspicion of evidence of criminal activity."); *Lafayette*, 462 U.S. at 648 ("[I]t is not 'unreasonable' for police, as part of the routine procedure incident to incarcerating an arrested person, to search any…article in his possession, in accordance with established inventory procedures.").

B. The circuits are split over how to measure the reasonableness of police conduct in this context.

1. Courts are divided over the significance of adherence to established police policy and procedure.

Notwithstanding this Court's insistence on adherence to established police procedures and the exercise of discretion only in furtherance of the justifications that undergird the impound-inventory exception, the federal courts are deeply divided on the question of whether the impoundment of a car must be executed pursuant to standardized criteria. *See United States v. Lyle*, 919 F.3d 716, 728 (2d Cir. 2019) (recognizing the split); *United States v. Sanders*, 796 F.3d 1241, 1248 (10th Cir. 2015) (same). After the Second and Tenth Circuits recognized this "clear divide," they then exacerbated it, each reaching different conclusions. *Sanders*, 796 F.3d at 1248.

In one camp are the First, Second, Third, and Fifth Circuits, which hold that impoundment is reasonable as long as it serves the government's community caretaking interests. *See Coccia*, 446 F.3d at 239 ("[I]impoundments of vehicles for

community caretaking purposes are consonant with the Fourth Amendment so long as the impoundment decision was reasonable under the circumstances. …. [I]t is inappropriate for the existence of (and adherence to) standard procedures to be the sine qua non of a reasonable impound decision."); *Lyle*, 919 F.3d at 731 ("While the existence of and an officer's adherence to a standardized criteria may be helpful in evaluating the reasonableness of an impoundment, we decline to adopt a standardized impoundment procedure requirement."); *United States v. Smith*, 522 F.3d 305, 314 (3d Cir. 2008) (Declining to adopt "the more structured approach…requiring that there be standardized police procedures governing impoundments that the police follow."); *United States v. McKinnon*, 681 F.3d 203, 208 (5th Cir. 2012) ("[W]e have focused our inquiry on the reasonableness of the vehicle impoundment for a community caretaking purpose without reference to any standardized criteria.").

In the other camp are the Seventh, Eighth, Tenth, and D.C. Circuits, which hold, generally, that the decision to impound must be made pursuant to a standard procedure. *See United States v. Duguay*, 93 F.3d 346, 351-52 (7th Cir. 1996) ("[S]tandardized criteria or established routine must regulate inventory searches. Among those criteria which must be standardized are the circumstances in which a car may be impounded.") (internal citation omitted); *United States v. Petty*, 367 F.3d 1009, 1012 (8th Cir. 2004) (impoundments must be regulated by "[s]ome degree of 'standardized criteria' or 'established routine.'"); *Sanders*, 796 F.3d at 1248-49 (standardized criteria are "the touchstone of the inquiry into whether an

impoundment is lawful"); *United States v. Proctor*, 489 F.3d 1348, 1354 (D.C. Cir. 2007) ("[I]f a standard impoundment procedure exists, a police officer's failure to adhere thereto is unreasonable and violates the Fourth Amendment.").

This division has importance to our case because the police did not fully comply with the Hancock County vehicle impound policy and procedures. On one hand, the towing/wreckers policy provides that any vehicle "which creates a traffic hazard" "may be ordered towed," and the district court found that the car was located "on a busy highway in the breakdown lane" and it "needed to be moved." (A-24, Part III.B, C; Add-11). On the other hand, the vehicle inventory policy mandates that when the vehicle is not required as evidence, police must advise the driver that it may be released to a third party, provided the third party is either on the scene or capable of arriving prior to the police officer leaving. (A-20-21, Part III.B.1.a-b).[3] Sylvester was never told as much in our case, and Hailee Goodwin's mother was just up the road and waiting for Sylvester to come meet her.[4] (Add-14).

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[3] The towing/wreckers policy provides in pertinent part: "No vehicle shall be stopped or left unattended in such a manner as to impede or render dangerous the use of the highway by others…." (A-25; Part III.C.). Also: "When a wrecker service is needed, the law enforcement officer shall ask the vehicle owner/operator if they have a preference of wrecker service. If the vehicle owner/operator does, then the law enforcement officer shall [make arrangements to] call the preferred wrecker service." (A-26; Part IV.A.). The inventory policy provides in pertinent part: "Where the owner or operator in possession of the vehicle is arrested…, and the vehicle is not required as evidence and need not be impounded for any other reason, the law enforcement officer will adhere to the following procedures: a. Advise the owner or operator that they may release the vehicle to a licensed driver who is willing to assume full responsibility for the vehicle and all property contained therein. This person must be on the scene or be able to arrive prior to the law enforcement officer leaving." (A-20-21; Part III.B.1.a.)

[4] The district court concluded that "the Hancock County deputies violated the Hancock County policies by not trying to reach out to Goodwin, give her the choice of

2. Case-law about the role that an officer's subjective intent plays in the analysis points in opposite directions.

There is another aspect of community caretaking searches and seizures that has importance to our case. Impoundment and an inventory search must not be "a subterfuge for criminal investigations" and they cannot be a "pretext concealing an investigative motive." *Opperman*, 428 U.S. at 370, n. 5, 376. Impoundment and inventory "must not be a ruse for a general rummaging in order to discover incriminating evidence." *Wells*, 495 U.S. at 4. Repeatedly, this Court has emphasized that inventory searches are not subject to the warrant requirement because they are "totally divorced" from the "detection, investigation, or acquisition of evidence relating to the violation of a criminal statute." *Bertine*, 479 U.S. at 381 (Marshall, J., dissenting) (citing *Cady v. Dombrowski*, 413 U.S. 433, 441 (1973)).

In other words, an officer's subjective intent *is* relevant to the Fourth Amendment validity of this species of search and seizure, which distinguishes it from searches conducted pursuant to probable cause. *Edmond*, 531 U.S. at 45 (distinguishing between searches based on probable cause, where an officer's subjective intent is irrelevant, and searches conducted in the absence of probable cause, citing *Wells* and *Bertine* as examples); *but see United States v. Hawkins*, 279 F.3d 83, 86 (1st Cir. 2002) ("The subjective intent of the officers is not relevant so long as they conduct a search according to a standardized inventory policy.").

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taking the vehicle if she could before they left the scene, or telling Sylvester that he had first choice of what towing service to use, but that they did not violate the policy in actually removing the vehicle." (Add-14).

Notwithstanding this, the vast majority of federal courts hold that an officer's investigative motive will not necessarily render the community caretaking function unreasonable. *See* 3 W. LaFave, Search and Seizure § 7.5(d), n. 72 (5th ed. 2012) (collecting cases). Federal courts have found this to be particularly true when the government can show that the improper motive did not affect the manner or scope of the search or seizure in question. *See e.g. United States v. Grey*, 959 F.3d 1166, 1183 (9th Cir. 2020); 1 W. LaFave, Search and Seizure § 1.4(e) (5th ed. 2012) (When the action would have been taken even absent the investigatory intent or motivation, there is no conduct that ought to have been deterred and thus no reason to bring the Fourth Amendment exclusionary into play for purposes of deterrence).

For example, in *Rodriguez-Morales*, 929 F.2d at 787, the First Circuit explained:

> That the impoundment of defendant's vehicle stemmed in part from an investigatory motive does not change either the analysis or the result. As long as impoundment pursuant to the community caretaking function is not a mere subterfuge for investigation, the coexistence of investigatory and caretaking motives will not invalidate the seizure. …. [T]he impoundment of the [vehicle] in the exercise of the troopers' community caretaking responsibilities was amply justified on objective grounds. Hence, any speculation into the troopers' subjective intent would be supererogatory.

See also Coccia, 446 F.3d at 240-41 ("A search or seizure undertaken pursuant to the community caretaking exception is not infirm merely because it may also have been

motivated by a desire to investigate crime" as long as there is "no evidence that these justifications were merely pretext for an investigatory search.").

In our case, the district court reasoned that "the Escalade had to be moved because of its circumstances on the highway. There were solid noninvestigatory reasons for moving the car." (Add-15). The court further explained:

> Let me address the subterfuge issue. There was no subterfuge in the arrest. There was clearly a valid outstanding warrant. And there's no subterfuge in the need to move the car off the highway. Yes, there was an investigatory motive for the impoundment; that's clear from listening to the dash cam audio. But that motive does not irreparably taint the impound.

(Add-19).

The record strongly suggests, however, that the officers' investigatory intent affected both their decision to impound the car and the manner in which the impound-inventory was carried out. Lieutenant Cote's report makes clear that he impounded the Escalade because he wanted to conduct a dog sniff, but the dog was located in Washington County and the wait-time on the side of the road would be too long:

> I had been in contact with S/A Day who had requested that we have a K-9 conduct a "sniff test" of the vehicle, I made that request with the Maine State Police. I was later advised that the K-9 was enroute [sic] from the Washington County area. Due to the travel time I allowed the wrecker to remove the vehicle from the roadside to their facility in Hancock where the K-9 would check the vehicle.

(A-36). So, instead of offering Sylvester the opportunity to have a third-party remove the car – as the impound policy required – Cote simply ordered that the vehicle be impounded. This Court may safely presume that the police ordered the drug dog to sniff the Escalade in the hope that a positive alert would give rise to probable cause to search the vehicle. The Government, which bore the burden to prove admissibility, offered nothing to suggest that a dog sniff is a routine part of the impound-inventory protocol. The written policies the Government submitted make no mention of a drug dog, which suggests that it is not. When discussing among themselves the idea of calling a drug dog to sniff the Escalade, one unnamed Sheriff's Deputy says to Day: "The only problem with that, Jake, is that my ability to search it pursuant to the impound is out the window at that point." (A-72). At the suppression hearing, the Government acknowledged: "It's clear that there was an interest in finding out whether there was contraband in that car. There's no other reason they called for a K-9 if there had not been some investigatory purpose, but to say it's a subterfuge or that that's the only basis ignores the fact that the car was on a busy thoroughfare." (A-92).

C. Courts are also confused about which party has the burden of proving a police officer's subjective intent.

Relying on what it believed to be support from the Ninth and Tenth Circuits, the First Circuit suggested that defendant bore the burden of presenting direct evidence that a law enforcement officer's "sole purpose of the impound was investigatory." *Sylvester*, 993 F.3d at 24, n. 6. Respectfully, this cannot be the law for two reasons.

One, direct proof of a person's intent is hen's tooth rare. Rather, intent is nearly always established by inferences drawn from the facts or circumstantial evidence. *See generally McFadden v. United States*, 576 U.S. 186, 192 n. 1 (2015) (*mens rea* can be established through either direct evidence or circumstantial evidence). And, appellate courts do not hesitate to decide whether evidence supports an inference or not, as a matter of law. This is especially true in search and seizure cases, where, for example, appellate courts are tasked with deciding whether the inference of criminal activity is supported by the totality of the circumstances. *See e.g. Johnson v. United States*, 333 U.S. 10, 13-14 (1948) (the point of the Fourth Amendment is to require that inferences be drawn by a neutral and detached magistrate instead of an officer engaged in the competitive enterprise of ferreting out crime.)

Accordingly, there is no reason why Sylvester was required to ask the district court to make a specific finding about whether, considering the totality of the circumstances, the officers were principally interested in searching the truck and acting in furtherance of that interest. The record supported that inference, and the appellate court should have incorporated it into its analysis.

Two, the government bears the burden of establishing that the seizure and search of the truck – which was conducted without a warrant – was constitutionally permissible. The government bears the "heavy burden" to justify dispensing with a warrant, including in the emergency-aid and exigent circumstances contexts. *Welsh v. Wisconsin,* 466 U.S. 740, 749-50 (1984); *Michigan v. Fisher*, 558 U.S. 45 (2009)

(emergency-aid); *Kentucky v. King*, 563 U.S. 452 (2011). So, too, here. *See generally Caniglia v. Strom*, 141 S.Ct. 1596 (2021) (Kavanaugh, J., concurring) (Insofar as emergencies are concerned, "community caretaking" and "exigent circumstances" are "more labeling than substance".).

II. This case is a good vehicle for resolving these issues.

The aforementioned confusion impacted the outcome of this case. If reasonableness were measured exclusively, or even, primarily, by strict compliance with established policies and procedures, as it is in some jurisdictions, then Sylvester would have prevailed. By that measure, the police acted unreasonably because, as the district court found and the First Circuit acknowledged, the police violated the impound and inventory policies and procedures.

If the First Circuit properly accounted for the fact that the officers had an investigatory motive, which the record demonstrates principally dictated their decision to impound the vehicle, then Sylvester also would have prevailed. The police did not need to impound the car to remove it from the side of the road. In fact, the inventory policy mandated that the police try to remove the vehicle a different way: by offering the driver the opportunity to call a third-part to come and get the car. The officers ignored the policy and impounded the car – not to remove it from the highway, which could have been accomplished by different means, and in compliance with the policy – but rather, to conduct a dog sniff of the vehicle, which is something that both contravenes the policy and renders the impound and resulting inventory unlawful, even if compliance with the policy is not the exclusive measure of reasonableness.

Even the officers recognized that once they called for a drug dog, "the impound is out the window." (A-72).

The First Circuit's decision has the effect of creating a categorical rule that impoundment is always reasonable whenever a driver is arrested, there is no one immediately available to take possession of the car, and the police have a non-investigatory reason for impounding the car, which will arise anytime the vehicle needs to be removed from a public space in order to prevent vandalism. But, this Court, and other federal courts, have eschewed such a rule, requiring instead that reasonableness is grounded by established policies and procedures, if they exist. Respectfully, without additional guidance from this Court, the divisions discussed *supra* will only deepen.

CONCLUSION

This Court should grant the petition for a writ of certiorari.

June 9, 2021

Respectfully submitted,
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APPENDIX

993 F.3d 16
United States Court of Appeals, First Circuit.

UNITED STATES of America, Appellee,
v.
Richard SYLVESTER, Defendant, Appellant.

No. 19-2127
|
April 2, 2021

Synopsis

Background: After denial of defendant's motion to suppress, defendant entered a conditional guilty plea in the United States District Court for the District of Maine, D. Brock Hornby, Senior District Judge, to possession with intent to distribute various controlled substances and possession of firearm in furtherance of a drug-trafficking crime. Defendant appealed.

The Court of Appeals, Lynch, Circuit Judge, held that officers had legitimate community-caretaking function for moving defendant's car after his arrest, so that their impound decision was objectively reasonable.

Affirmed.

Procedural Posture(s): Appellate Review; Pre-Trial Hearing Motion.

***17** APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MAINE, [Hon. D. Brock Hornby, U.S. District Judge]

Attorneys and Law Firms

Jamesa J. Drake, with whom Drake Law LLC and Richard S. Berne, Portland, ME, were on brief, for appellant.

Julia M. Lipez, Assistant United States Attorney, with whom Halsey B. Frank, United States Attorney, was on brief, for appellee.

Before Lynch, Thompson, and Barron, Circuit Judges.

Opinion

LYNCH, Circuit Judge.

Richard Sylvester was convicted, pursuant to a conditional plea agreement, on one count of possession with intent to distribute various controlled substances and one count of possession of a firearm in furtherance of a drug-trafficking crime in violation of federal law. Sylvester appeals the denial of his motion to suppress a firearm and drug evidence seized pursuant to a search warrant for the car he was driving when he was arrested on a different and outstanding federal warrant. He argues that the search warrant for the car was invalid because it was issued based on evidence discovered during an inventory search, which was, he alleges, itself unlawful because he argues the initial impoundment of the car was unlawful after he was arrested along a busy highway at night. ***18** The district court rejected these arguments and we find no error.

I.

A. Facts

The parties stipulated to the facts contained in the various exhibits submitted to the district court, which establish the following.

1. The Arrest and Impound

In or around May 2017, a federal warrant was issued for Sylvester's arrest for suspected drug activity said to have occurred in August 2016. Around 7:30 P.M. on Friday, May 19, 2017, Maine Drug Enforcement Agency ("MDEA") Special Agent Jacob Day ("Agent Day") was driving off duty along Route 1A in Dedham, Maine. Route 1A is a major highway that runs along the coast of Maine to the Canadian border. Agent Day passed a black Cadillac Escalade driven by Sylvester. Sylvester was alone in the car. Agent Day recognized Sylvester and was aware of the outstanding federal warrant for his arrest from speaking with a United States Drug Enforcement Agency ("DEA") agent a few weeks before.

Agent Day ran a registration check on the Escalade's plate number which revealed that the owner of the car was Hailee Goodwin, who lived in Hancock, Maine. She was later

determined to be Sylvester's girlfriend. Agent Day called the DEA agent with whom he had previously spoken and she confirmed that the federal arrest warrant was still active and that Sylvester should be arrested.

Agent Day contacted Lieutenant Tim Cote ("Lt. Cote") of the Hancock County Sheriff's Department to request the arrest of Sylvester pursuant to that warrant. At some point, Agent Day also requested that a K-9 unit be brought in to conduct a sniff test of the exterior of the Escalade.

Acting on the federal warrant and at Agent Day's request, Lt. Cote went with Sheriff's Deputies Corey Bagley ("Dep. Bagley") and Jeffrey McFarland ("Dep. McFarland") and another officer to Route 1A to locate the Escalade. They stopped the Escalade sometime after 7:30 at night along Route 1A in or near Ellsworth, Maine. Sylvester, the sole occupant, was told to get out of the car and was arrested.

Videos of the traffic stop recorded on the officers' dashboard cameras show that Route 1A is and was on that Friday night a well-trafficked, two-lane highway, and that the parked Escalade was sticking out into the traffic lane so that the cars passing by had to swerve into the oncoming traffic lane to avoid it. During Sylvester's arrest, Dep. Bagley found two knives, a pair of brass knuckles, and a wad of $2,799 in cash on Sylvester. Sylvester told the officers there were no other weapons in the car (that proved not to be true). He also told them he was headed "up the road" to meet Goodwin's mother, but not Goodwin, at a McDonald's. There is no evidence as to how far away the McDonald's was or whether Goodwin's mother was authorized by Goodwin to drive the car or whether Goodwin's mother was available to come retrieve the Escalade promptly or how she would do so. Nor is there evidence that Sylvester specifically requested that Goodwin's mother or anyone else come remove the stopped car.

The officers transported Sylvester to the Hancock County Jail where he was booked on the federal arrest warrant. The Hancock County officers did not inform Sylvester that he could contact someone, nor did he make any such request. They also did not ask him whether he had a preferred towing service.

***19** During the stop, Lt. Cote requested the Maine State Police to do the K-9 sniff as MDEA Agent Day had requested. He was told that it would take some time because the K-9 unit was traveling from a different county. Lt. Cote authorized a towing service to remove the car from the side of the highway and take it to an impound facility in Hancock.

2. The Impound and Inventory Policies

The stop of the Escalade was at the request of a MDEA agent and a federal DEA agent who are not subject to the Hancock County Sheriff's Department's policies, but Hancock County Sheriff's Department officers made the stop and are subject to those policies.[1] There are two Hancock County policies that are relevant to this appeal: the "TOWING/WRECKERS" policy ("the Impound Policy") and the "VEHICLE INVENTORY" policy ("the Inventory Policy"). The Impound Policy authorizes law enforcement to tow and to store a vehicle under certain circumstances, including where the vehicle "[i]mped[es] or [e]ndanger[s] [t]raffic." The Impound Policy specifies that "[n]o vehicle shall be stopped or left unattended in such a manner as to impede or render dangerous the use of the highway by others, except in cases of mechanical breakdown, law enforcement emergency or traffic crash," and "[i]f such disabled vehicle is not promptly removed the law enforcement officer may order the vehicle towed at the expense of the owner." The policy further states that

> [w]henever possible, owners or operators of vehicles for which towing is required will be encouraged to specify a towing service of their own choice. When required, the law enforcement officer will summon a tow truck, unless a specific request for a particular tow service has been made by the owner or operator of the vehicle to be towed, and if such tow service is reasonabl[y] available.

The policy reiterates that "[w]hen a wrecker service is needed, the law enforcement officer shall ask the vehicle owner/operator if they have a preference of wrecker service," and if they do, the law enforcement officer will arrange for that tow/wrecker service to be contacted. But "[w]hen a

wrecker service is NOT at the owners' request, [it] would be considered a law enforcement tow." An inventory search is required of all vehicles taken into police custody because of a law enforcement tow "if the vehicle is unlocked prior to the wrecker towing the vehicle" or "if the wrecker operator has to open the vehicle prior to towing it."

The Inventory Policy, in turn, provides that before taking a vehicle into custody "[w]here the owner or operator in possession of a vehicle is arrested ..., and the vehicle is not required as evidence and need not be impounded for any other reason, the law enforcement officer" shall

> [a]dvise the owner or operator that they may release the vehicle to a licensed driver who is willing to assume full responsibility for the vehicle and all property contained therein. This person must be at the scene or be able to arrive prior to the law enforcement officer leaving. ... If the owner or operator chooses not to release the vehicle to a third party, the vehicle shall be removed by an agency-dispatched wrecker. A[n] inventory will not be required if not impounded.

Where the police have taken a vehicle into police custody as a law enforcement ***20** tow, and so requiring an inventory of the vehicle pursuant to the two policies, the Inventory Policy explains that

> [t]he inventory will be completed by the law enforcement officer ordering the tow and will include the opening of closed containers and the listing of their contents. The purpose of the inventory is not to locate evidence of criminal activity, but to protect the owner[']s property, protect the agency from subsequent claims of loss or stolen property, and to protect law enforcement officers from dangerous instrumentalit[ies].

Among its standard procedures for conducting an inventory, the Inventory Policy prescribes that "[t]he scope of such an examination for personal property must be restricted solely to those areas where the person would ordinarily be expected to store or inadvertently leave his belongings, such as the floor, glove compartment, door pockets, trunk, dashboard, and on, under, and behind the seats."

3. The Inventory Search and Search Warrant

At the impound facility, the Maine State Police K-9 unit conducted a sniff of the exterior of the Escalade. The police dog did not alert to any contraband. Lt. Cote, Dep. Bagley, and Dep. McFarland then conducted an inventory search of the car. During the inventory search, the officers found a wallet containing Goodwin's driver's license in the backseat area, a cell phone in the middle console, and a backpack in the front passenger area. Inside the backpack, the officers found a loaded 9 mm handgun, a plastic bag containing eight bundles of what the officers suspected was heroin, and another plastic bag containing four chunks of a white hard substance which the officers suspected was cocaine. At that point, the officers agreed to stop the inventory search and contact Agent Day so that the MDEA could obtain a search warrant for the car. They left the evidence in the car, secured the car with evidence tape, and locked it in a garage at the impound facility.

On Sunday, May 21, 2017, two days after Sylvester had been arrested, another MDEA special agent listened to a recorded phone conversation made that day from the Hancock County Jail, in which Sylvester was heard telling a woman "he had 10 grand in the vehicle and it would be good if Hailee could get the vehicle out of impound."

On Monday, May 22, 2017, Agent Day listened to the same recorded conversation. That day, Agent Day applied for and obtained a search warrant for the Escalade which authorized the search of the entire car for drugs, firearms, evidence of drug trafficking, and cell phones. In the affidavit submitted with the warrant application, Agent Day described the circumstances of Sylvester's arrest on the federal warrant, the seizure of the cash, the negative K-9 sniff, the handgun and suspected drugs discovered in the backpack in the front

of the car during the inventory search, and the recorded jail call in which Sylvester stated there was ten grand in the car. The officers executing the search warrant of the Escalade recovered a loaded 9 mm handgun, ammunition, methamphetamine, heroin, cocaine, drug paraphernalia, a cell phone, and suspected drug ledgers. They did not find the money Sylvester mentioned in the jail call.

B. Procedural History

In July 2017, Sylvester was indicted on one count of possession with intent to distribute cocaine, heroin, and five grams or more of methamphetamine, in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(B), and one count of possession of a firearm in furtherance of a drug-trafficking crime, in violation *21 of 18 U.S.C. § 924(c)(1)(A). In September 2017, Sylvester filed a motion to suppress the evidence seized from the car he was driving at the time he was arrested, challenging the lawfulness of the impound decision and the inventory search and the issuance of the search warrant. [2]

The district court held argument based on the stipulated facts on the motion to suppress on February 14, 2018. Defense counsel argued that the officers were "towing [the car] for an investigatory purpose" and were "not towing it under the community caretaking function." Defense counsel also argued that the officers' conversation captured by the dash-cam videos "is all driven by, we want to search this vehicle, can we figure out a way to lawfully do that," rather than "conceptualizing it as [ ] this [is] an impoundment and an inventory tow because we don't have somebody else to drive it away." The court responded that "your argument is subterfuge" and defense counsel stated "[i]t is a subterfuge, and I think there is an investigatory purpose to taking this vehicle from the side of the road to that tow yard." Defense counsel argued that this investigatory purpose was in part evidenced by the officers' failure to fully comply with the Impound and Inventory Policies. But defense counsel did not ask the district court to make a finding as to the reasons the officers deviated from the policies by not notifying Sylvester that he could contact a third party, including a preferred towing service, to remove the car from the highway.

On February 15, 2018, the district court orally denied Sylvester's motion to suppress. After concluding there was no probable cause to search the car at the time Sylvester was arrested, the district court held that the officers were justified in impounding the car and inventorying its contents pursuant to the community caretaking exception to the warrant requirement. It found that the officers' cruisers' "video cams show that" "[t]his was a stop and arrest on a busy highway in the breakdown lane." The court also found "[t]here was no other driver on the scene" and "the car needed to be moved" "because of its circumstances on the highway," which provided "solid noninvestigatory reasons for moving the car."

Turning to the alleged violations of the Impound and Inventory Policies, the court concluded that the "deputies violated the Hancock County policies by not trying to reach out to [the defendant's girlfriend], give her the choice of taking the vehicle if she could before they left the scene, or telling Sylvester that he had first choice of what towing service to use, but that they did not violate the policy in actually removing the vehicle."

Nonetheless, the court made findings that the policies authorized the impound in this situation where the driver had been arrested, the car was left dangerously along the side of the road, and there was no one immediately available to remove the car. And it found

> there's no evidence that [ ] Sylvester asked for an alternative to impoundment, [and] the record doesn't make clear how it even could have happened. The car belonged to the girlfriend ... who was not on the scene. And on this record there is no evidence of a viable alternative to getting someone to the scene to remove the car before law enforcement le[ft].

After reviewing First Circuit case law, the district court found that "there's no *22 subterfuge in the need to move the car off the highway." It found that "there was an investigatory motive for the impoundment[which was] clear from listening to the dash cam audio," but further concluded that the "co-

existence of investigatory and caretaking motives" "d[id] not irreparably taint the impound" under First Circuit law.

Having held the initial impound of the car was valid, the district court found that the subsequent inventory search was conducted "according to established policy" and so concluded it was also valid. The district court also held that regardless of whether there was a policy violation during the inventory search, there was probable cause to issue the search warrant for the car even without the information learned from the inventory search based on the federal arrest warrant, the circumstances of the arrest, and the jail call regarding the purported ten grand in the car.

Sylvester entered into a conditional plea agreement with the government in October 2018, subject to his ability to appeal the denial of his motion to suppress, and was sentenced in October 2019 to seventy-two months' imprisonment.[3] This timely appeal from his conviction followed.

II.

Sylvester argues the district court's denial of his motion to suppress was error. He argues that (1) the officers' decision to impound the car was unlawful because it was done solely for an investigatory purpose; (2) the subsequent inventory search was unlawful because it was tainted by the initial unlawful impound and the search warrant was not an independent source for the evidence discovered during that inventory search; and (3) the automobile exception to the warrant requirement did not justify the search of the car.[4] To be clear, Sylvester does not argue that the initial stop of the car or his arrest were unlawful.

In reviewing the denial of a motion to suppress, "[w]e review factual findings for clear error and legal conclusion[s] de novo." United States v. Coccia, 446 F.3d 233, 237 (1st Cir. 2006). "[W]e will uphold a denial of a motion to suppress if any reasonable view of the evidence supports it." Id. (quoting United States v. Garner, 338 F.3d 78, 80 (1st Cir. 2003)). Where the evidence of record is subject to different reasonable interpretations, "the district court's choice between competing inferences cannot be clearly erroneous." United States v. Hughes, 640 F.3d 428, 437 (1st Cir. 2011).

A. The Impound Decision

The district court found that the impoundment of the car and its removal from busy Route 1A was a proper exercise of the officers' community caretaking function. The community caretaking function "is one of the various exceptions to the Fourth Amendment's requirement that law enforcement officers have probable cause and obtain a warrant before effecting a search or seizing property." United States v. Rivera, 988 F.3d 579, 581 (1st Cir. 2021) ***23** (quoting Boudreau v. Lussier, 901 F.3d 65, 71 (1st Cir. 2018)). "Under that exception, law enforcement officers, in 'their role as "community caretakers," ' may 'remove vehicles that impede traffic or threaten public safety and convenience' without obtaining a warrant." Id. (quoting Boudreau, 901 F.3d at 72). Our law has been clear on this point for years.

Pursuant to that exception, an impound decision is constitutionally valid so long as it is reasonable under the totality of the circumstances. See Coccia, 446 F.3d at 238-39; United States v. Rodriguez-Morales, 929 F.2d 780, 785-86 (1st Cir. 1991). The impound decision must be justified by a legitimate, non-investigatory purpose and cannot be "a mere subterfuge for investigation, [but] the coexistence of investigatory and caretaking motives will not invalidate the seizure." Coccia, 446 F.3d at 241 (quoting Rodriguez-Morales, 929 F.2d at 787); see also Colorado v. Bertine, 479 U.S. 367, 372, 107 S.Ct. 738, 93 L.Ed.2d 739 (1987); United States v. Del Rosario, 968 F.3d 123, 128-29 (1st Cir. 2020) ("To be clear, we are not saying that an improper subjective motive renders the community-caretaking exception inapplicable.");[5] Boudreau, 901 F.3d at 72-73; Rodriguez-Morales, 929 F.2d at 787 ("[T]he impoundment of the [car] in the exercise of the troopers' community caretaking responsibilities was amply justified on objective grounds. Hence, any speculation into the troopers' subjective intent would be supererogatory.").

As to standardized procedures when impounding a vehicle, this Court has already held that

> it is inappropriate for the existence of (and adherence to) standard procedures to be the sine qua non of a reasonable impound decision[.] ...
>
> ....
>
> ... [S]tandard protocols have limited utility in circumscribing police discretion in the impoundment context because of the numerous and varied circumstances in which impoundment decisions must be made. Moreover, a police officer's discretion to impound a car is sufficiently cabined by the requirement that the decision to impound be based, at least in part, on a reasonable community caretaking concern and not exclusively on "the suspicion of criminal activity." Accordingly, the impoundment of [the defendant]'s car did not violate the Fourth Amendment merely because there was no evidence that the impoundment was done pursuant to pre-existing police protocols.

Coccia, 446 F.3d at 239 (emphasis added) (citations omitted) (quoting Bertine, 479 U.S. at 375, 107 S.Ct. 738).

The district court, it is true, explicitly found that the officers were motivated in part by an investigatory purpose. But it went on to cabin that holding and also held that the officers clearly had a legitimate and objectively reasonable noninvestigatory purpose. As it found, the car Sylvester was driving when he was stopped and arrested was on the verge of a busy highway. There were no other passengers nor anyone else immediately available to remove the car. Sylvester indeed never asserted that the owner of the car was nearby or that anyone else could immediately retrieve the car. Leaving the car on the ***24** shoulder of a heavily trafficked highway was an obvious hazard to other drivers, especially on a Friday night with darkness approaching.

Under these circumstances, the court did not err in holding that the officers clearly had a legitimate community caretaking justification for moving the car. See id. at 240 ("Caselaw supports the view that where a driver is arrested and there is no one immediately on hand to take possession, the officials have a legitimate non-investigatory reason f[or] impounding the car." (quoting Vega-Encarnación v. Babilonia, 344 F.3d 37, 41 (1st Cir. 2003))); Rodriguez-Morales, 929 F.2d at 785 (holding that the impound decision was reasonable where "leav[ing] an automobile on the shoulder of a busy interstate highway" after arresting the occupants would pose a threat to public safety).

The presence of both investigatory and community caretaking motives does not render unlawful an objectively reasonable decision to impound. Coccia, 446 F.3d at 241. And the officers were not constitutionally required to "select the least intrusive way of fulfilling their community caretaking responsibilities." Rodriguez-Morales, 929 F.2d at 786; see also Bertine, 479 U.S. at 373-74, 107 S.Ct. 738; Coccia, 446 F.3d at 240 n.7 (explaining that there is no Fourth Amendment requirement that officers "provide [the defendant] with an opportunity to arrange for someone else to pick-up the car" before impounding and inventorying it (citing Vega-Encarnación, 344 F.3d at 41)). The officers' failure to fully comply with the Impound and Inventory Policies with respect to the impoundment does not change this result. See Coccia, 446 F.3d at 239.

The defendant does argue that the sole purpose of the impound was investigatory, based on the fact that the officers violated aspects of the Hancock County Impound and Inventory Policies by not notifying him that he could request a third party to immediately remove the car and thus created the need for impoundment. See Coccia, 446 F.3d at 241 ("[T]here were legitimate community caretaking justifications for impounding [the defendant]'s car and there was no evidence that these justifications were merely pretext for an investigatory search.").

But, Sylvester did not ask the district court to make a specific finding about why the officers did not comply with those aspects of the policies and none was made, thus precluding any such argument from having merit, even if we were to assume that it otherwise might.[6] And that failure invokes the plain error standard of review. It is self-evident there was no plain error. See United States v. Takesian, 945 F.3d 553, 563 (1st Cir. 2019) (explaining that "if an error pressed by the appellant turns on 'a factual finding [he] neglected to ask the district court to make, the error cannot be clear or obvious unless' he shows that 'the desired factual finding is the only one rationally supported by the record below' " (alteration in

original) (quoting *25 United States v. Olivier-Diaz, 13 F.3d 1, 5 (1st Cir. 1993))).

B. The Inventory Search

We also hold that the district court did not err in concluding that the subsequent inventory search of the car was lawful. "The Fourth Amendment permits a warrantless inventory search if the search is carried out pursuant to a standardized policy," United States v. Richardson, 515 F.3d 74, 85 (1st Cir. 2008) (citing Florida v. Wells, 495 U.S. 1, 3-4, 110 S.Ct. 1632, 109 L.Ed.2d 1 (1990)), and "on the basis of something other than suspicion of evidence of criminal activity," Bertine, 479 U.S. at 375, 107 S.Ct. 738. The district court did not clearly err in finding that, once the car was impounded, the inventory search of the car was conducted in accordance with the Hancock County Inventory Policy. That policy states legitimate, non-investigatory purposes. To the extent Sylvester argues that the inventory search itself was invalid because that search was also pretextual, that argument fails for the same reasons that his other pretext argument does.

III.

The district court committed no error in denying Sylvester's motion to suppress.

Affirmed.

All Citations

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Footnotes

1 The government has assumed and has not argued to the contrary that the Hancock County policies apply.

2 The government did not contest Sylvester's standing to challenge the impound and searches of the car based on an affidavit he submitted stating that Goodwin authorized him to drive the Escalade.

3 Sylvester also pleaded guilty to one count of conspiracy to distribute controlled substances in a separate case and was sentenced to thirty months' imprisonment to be served concurrently with the sentence imposed in this case. That separate conviction and sentence are not being challenged here.

4 The government conceded before the district court and on appeal that the inventory search and search warrant were valid only if the initial impound decision was also lawful. The government also does not challenge the district court's determination that there was not probable cause to search the car under the automobile exception to the warrant requirement at the time the car was stopped and Sylvester was arrested.

5 The Court in Del Rosario held that an impound decision was invalid where there was no real objective justification for it pursuant to the officers' community caretaking function, such that the only conclusion was "that the seizure served no purpose other than facilitating a warrantless investigatory search under the guise of an impoundment inventory." 968 F.3d at 127-29.

6 Because of the defendant's failure to request such a finding, we have no need to address who has the burden of proving pretext in this context. We note that two other circuits have addressed the question in the same context or in similar contexts and held the burden is on the defendant. See United States v. Orozco, 858 F.3d 1204, 1213 (9th Cir. 2017); United States v. Maestas, 2 F.3d 1485, 1489 (10th Cir. 1993); see also United States v. Magdirila, 962 F.3d 1152, 1157-58 (9th Cir. 2020) (applying Orozco's burden allocation rule to the inventory context); United States v. Johnson, 889 F.3d 1120, 1125-28 (9th Cir. 2018) (per curiam) (applying Orozco's burden allocation rule to the impound and inventory context).

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