APPENDIX

APPENDIX CONTENTS

Page

APPENDIX A

RECOMMENDED FOR PUBLICATION
Pursuant to Sixth Circuit I.O.P. 32.1(b)
File Name: 24a0080p.06

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 22-1432/1433

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

GREGORY ROGERS,

Defendant - Appellant.

Appeal from the United States District Court for the Western District of Michigan at Grand Rapids

No. 1:20-cr-00053-1—Hala Y. Jarbou, District Judge

Argued: December 5, 2023
Decided and Filed: April 10, 2024

Before MCKEAGUE, STRANCH, and NALBANDIAN, Circuit Judges.

NALBANDIAN, J., delivered the opinion of the court in which McKEAGUE, J., joined. Stranch, J., delivered a separate dissenting opinion.

OPINION

NALBANDIAN, Circuit Judge:

A jury convicted Gregory Rogers of various drug and firearm related crimes—six counts in total. He challenges all six convictions, claiming that key evidence collected from his girlfriend's car violated his Fourth Amendment rights. Because we agree with the trial court that Rogers had no legitimate expectation of privacy in the vehicle, we AFFIRM.

I.

On January 27, 2020, officers from the Grand Rapids Police Department responded to a reported domestic assault in Grand Rapids. Upon arrival, Officer Peter Thompson was told that the suspected assailant had fled south. To the south, he saw a running Chevy Cruze parked by the road. Officer Kenneth Nawrocki checked to see if the assailant was inside. Instead of the assailant, Officer Nawrocki found Rogers alone in the passenger seat without a driver's license. When asked, Rogers explained that the car belonged to his girlfriend who was nearby and emphasized that he "wasn't even driving."

Officer Nawrocki checked Rogers's identity in a database, discovering that he had an outstanding felony warrant for carrying a concealed weapon. He then arrested Rogers, finding car keys and $785 in

cash on him. After confirming that Rogers's girlfriend was the car's sole registered owner and seeing she was nowhere to be found,[1] Officer Nawrocki decided to impound the Chevy Cruze and conduct an inventory search. He found two digital scales, plastic baggies, a large bag of marijuana, and a loaded pistol. Two days later, Rogers's girlfriend called the police to report that "she [had] let [Rogers] use her car on the day of the incident while she was at work and school." R. 22-1, Mot. to Suppress, Attach. A, p. 10, PageID 79.

In April 2020, the United States charged Rogers with possession of marijuana with intent to distribute, possession of a firearm in furtherance of a drug trafficking crime, and being a felon in possession of a firearm, and issued an arrest warrant. A few days later, investigators found Rogers in the same Chevy Cruze. Arresting him again, the investigators found a loaded pistol with an obliterated serial number, as well as 2.5 ounces of marijuana, more plastic baggies, a digital scale, and a cutting tray.

Ultimately, Rogers was indicted on two counts each of possession of marijuana with intent to distribute, possession of a firearm in furtherance of a drug trafficking offense, and being a felon in possession of a firearm—one count for each arrest in January and April. Rogers pleaded not guilty and moved to suppress the fruits of his January arrest. The trial court held an evidentiary hearing on the motion where both Officers Thompson and Nawrocki testified. Rogers submitted a police report showing

---

[1] Evidence at trial revealed that Rogers's girlfriend was at work during the January 2020 arrest, not nearby, as Rogers had told officers on the scene.

that he had permission to use the Chevy Cruze on January 27, 2020, but he otherwise presented no evidence at the hearing.

After the hearing, the district court denied the motion to suppress. The court held that Rogers lacked Fourth Amendment "standing" to object to the search because he lacked a legitimate expectation of privacy in the interior of the vehicle. Rogers was neither the owner nor the driver of the car and failed to show that he had permission to occupy it. The court also determined, in the alternative, that the search was a valid inventory search.

After trial, a jury convicted Rogers on all six counts. Rogers timely appealed, arguing (1) that he had a reasonable expectation of privacy in the Chevy Cruze, which the police violated in the January arrest, and (2) that the April arrest was a fruit of that poisonous tree.

II.

With suppression motions, we review factual findings for clear error and legal conclusions de novo. *United States v. Lattner*, 385 F.3d 947, 952 (6th Cir. 2004). Factual findings are clearly erroneous when the record leaves the reviewing court "with the definite and firm conviction that a mistake has been committed." *United States v. Shank*, 543 F.3d 309, 312 (6th Cir. 2008) (citation omitted). A "denial of a motion to suppress will be affirmed on appeal if the district court's conclusion can be justified for any reason." *United States v. Moorehead*, 912 F.3d 963, 966 (6th Cir. 2019) (citation omitted). And we review the evidence "in the light most likely to support the district court's [denial]." *Id.* (citation omitted).

To establish that police violated his Fourth Amendment rights, Rogers must show that he had "a 'legitimate expectation of privacy'" in his girlfriend's car. *Hicks v. Scott*, 958 F.3d 421, 431 (6th Cir. 2020) (quoting *Rakas v. Illinois*, 439 U.S. 128, 144 (1978)). A legitimate expectation of privacy comes in two parts. First, Rogers "must have exhibited an actual (subjective) expectation of privacy." *Id.* (internal quotation marks omitted). Second, "that expectation must also be one that society is prepared to recognize as reasonable." *Id.* (internal quotation marks omitted).

We recognize expectations of privacy "on a case-by-case basis," considering among other factors the defendant's "proprietary or possessory interest in the place to be searched," his "right to exclude others," and "whether he was legitimately on the premises." *United States v. King*, 227 F.3d 732, 744 (6th Cir. 2000). But Rogers must assert that *his own* Fourth Amendment rights were infringed. *Rakas*, 439 U.S. at 133–34. Fourth Amendment rights "may not be vicariously asserted." *Id.* (quoting *Alderman v. United States*, 394 U.S. 165, 174 (1969)).

Rogers failed to meet his "burden of establishing his standing" to challenge the search, *United States v. Smith*, 263 F.3d 571, 582 (6th Cir. 2001), because he never exhibited a subjective expectation of privacy. He was neither owner nor driver of the vehicle. Police found Rogers—without a driver's license—in the passenger seat of his girlfriend's car. And he never showed he had "complete dominion and control" over the car. *Rakas*, 439 U.S. at 149 (distinguishing *Jones v. United States*, 362 U.S. 257, 259 (1960)).

Now, this Court has recognized a passenger's legitimate expectation of privacy when both he and the driver "had participated in borrowing the car from its owner" and when both people "hav[e] joint access or control for most purposes." *United States v. Dunson*, 940 F.2d 989, 994–95 (6th Cir. 1991) (quoting *United States v. Matlock*, 415 U.S. 164, 171 n.7 (1974)). But to establish Fourth Amendment "standing" to challenge a vehicle search, one must "exhibit a legitimate expectation of privacy in the car *at the time of the search*." *United States v. Rucker*, No. 91–5863, 1992 WL 24904, at *1 (6th Cir. Feb. 12, 1992) (emphasis added) (citing *United States v. Knox*, F.2d 285, 293–94 (6th Cir. 1988)). And a subjective expectation of privacy is established by one's conduct. *Smith v. Maryland*, 442 U.S. 735, 740 (1979). Accordingly, by your "actions and vigorous oral disclaimers" you may fail to exhibit any subjective expectation. *United States v. Tolbert*, 692 F.2d 1041, 1045 (6th Cir. 1982).

In *Tolbert*, we found that the defendant could not assert a subjective expectation of privacy in her luggage because "she specifically disclaimed ownership thereof." *Id.* Here, not only did Rogers twice accurately inform the police that the Chevy Cruze was not his when asked, but he also had no ID and loudly disclaimed his authority over the vehicle, repeating to the officers that he "wasn't even driving," when no officer had inquired either time. His failure to exhibit an expectation of privacy at the time of the search prevents him from asserting one now to challenge that search in court.

Although the Supreme Court in *Byrd v. United States* recognized a driver's Fourth Amendment

privacy interest when borrowing someone else's rental car, 584 U.S. 395, 398–99 (2018), that is not this case. Both Byrd and Rogers had permission to occupy the relevant vehicles, but unlike Byrd, Rogers never exhibited "complete dominion and control over" his girlfriend's Chevy Cruze. *See Rakas*, 439 U.S. at 149. Both were alone in the vehicle when confronted by police, but Byrd was driving, *Byrd*, 584 U.S. at 400, and Rogers was sitting in the passenger seat, ostensibly waiting for his girlfriend to return from a quick trip into a neighbor's house up the street. And there is no suggestion that Byrd ever affirmatively disclaimed dominion and control over the car like Rogers did. *See id.* Rogers made it clear to the officers on the scene multiple times that he was not the driver, Byrd did not.

Thus, Rogers cannot establish that police violated his Fourth Amendment rights. He had no legitimate expectation of privacy because he exhibited no subjective expectation of privacy in his girlfriend's car.

Rogers further contends that his argument is supported by what the government argued at trial. He claims the "prosecution's entire theory of guilt at trial turned on the assertion that [he] had possession and control of the vehicle," which he claims "is facially incompatible with its earlier assertion . . . that [he] lacked control over, or any other possessory interest in, the car." Appellant Br. at 16, 18. But Rogers never renewed his motion to suppress, so the trial record is unavailable in our review. *United States v. Thomas*, 875 F.2d 559, 562 n.2 (6th Cir. 1989) ("Unless the district court is given an opportunity to correct the error, an appellate court cannot review evidence

presented at trial which casts doubt upon a pre-trial suppression motion.").

In any event, when Rogers contends that "[t]he sheer volume of Government evidence at trial to support a theory of constructive possession eviscerates the district court's suppression ruling, under any standard of review," Reply Br. at 6, he conflates two distinct concepts. Constructive possession of evidence found inside the car relies on immediate control over the premises. *United States v. Bailey*, 553 F.3d 940, 944 (6th Cir. 2009). This differs from a legitimate expectation of privacy, which relies on *rightful* dominion. *Rakas*, 439 U.S. at 149.

For example, in *United States v. Salvucci*, the Supreme Court rejected the argument that defendants are "entitled to claim 'automatic standing' to challenge the legality of a search" when "charged with crimes of possession." 448 U.S. 83, 84–85 (1980). Instead, the Court clarified "that a prosecutor may, with legal consistency and legitimacy, assert that a defendant charged with possession of a seized item did not have a privacy interest violated in the course of the search and seizure." *Id.* at 88–89; *see also United States v. Patton*, 292 F. App'x 159, 166 (3d Cir. 2008) ("The legal test for standing to challenge a search and seizure differs from the test for showing constructive possession."). This is essentially the trial-based argument that Rogers makes now.

Rogers also cites the fact he was alone "in the same car when he was arrested in April 2020" to prove he had a privacy interest. Appellant Br. at 19. But sitting in the driver's seat in April does not mean Rogers had a legitimate expectation of privacy while he occupied

the passenger seat without a driver's license back in January.

Although Rogers showed that, as it turned out, he had permission to use his girlfriend's car, he did not establish at the time of the search that he had a legitimate expectation of privacy. Therefore, the district court correctly denied his motion to suppress.

III.

For the reasons set forth above, we AFFIRM Rogers's conviction.[2]

[2] Rogers initially filed Notices of Appeals in two separate cases, which we consolidated here. But Rogers's opening brief raised no issues related to the second case, No. 22-1433, where he had pleaded guilty to aiding and abetting in an assault on a federal law enforcement officer using a deadly or dangerous weapon, in violation of 18 U.S.C. §§ 2, 111(a), (b). Therefore, we AFFIRM this conviction as well.

DISSENT

JANE B. STRANCH, Circuit Judge, dissenting.

On January 27, 2020, Gregory Rogers borrowed his girlfriend's car as he "often" did. While parked and sitting in the passenger seat of that car, he was approached by officers responding to an incident elsewhere on the block. The officers ran a database search of Rogers's name, learned that he had an outstanding warrant, and arrested him. They then decided to impound the vehicle and conduct an inventory search, which turned up contraband for which Rogers was later charged. The impoundment decision and corresponding search were conducted not based on probable cause or pursuant to a warrant, but under the community caretaking exception to the Fourth Amendment's warrant requirement. Yet the Government on appeal offers no legitimate community caretaking rationale to justify impounding the vehicle, which was legally and safely parked on a residential road in line with other identically parked cars. And our precedent makes clear that a person who borrows a vehicle and stores "personal belongings" in it, as Rogers did here, has "a legitimate expectation of privacy in the car and its contents" whether they are driver or passenger. *United States v. Dunson*, 940 F.2d 989, 994-95 (6th Cir. 1991), *abrogated on other grounds by United States v. Ferguson*, 8 F.3d 385 (6th Cir. 1993). I would therefore conclude that impounding and searching the vehicle violated Rogers's Fourth Amendment rights and would reverse the district court's denial of his motion to suppress. I respectfully **DISSENT**.

I. Analysis

The Fourth Amendment prohibits "unreasonable searches and seizures." *Caniglia v. Strom*, 593 U.S. 194, 198 (2021) (quoting U.S. Const. amend. IV). A defendant moving to suppress evidence under the Fourth Amendment must show that he experienced an unreasonable search or seizure that violated his "legitimate expectation of privacy." *See United States v. King*, 227 F.3d 732, 743 (6th Cir. 2000). My colleagues conclude that Rogers could not legitimately expect privacy in the vehicle he borrowed from his girlfriend and affirm the district court on that basis alone. I explain my disagreement below, beginning with Rogers's legitimate expectation of privacy and then addressing the unreasonableness of impounding and searching the vehicle.

A. Legitimate Expectation of Privacy

A defendant moving to suppress the products of a search carries a threshold burden of showing "a legitimate expectation of privacy in the place searched or the thing seized." *King*, 227 F.3d at 743. A legitimate expectation of privacy exists if (1) the defendant exhibited a subjective expectation of privacy in the place searched that (2) "society is prepared to recognize as" objectively reasonable. *Id.* (quoting *Bond v. United States*, 529 U.S. 334, 338 (2000)).

At the first step of the analysis, we ask whether the defendant has demonstrated an effort "to preserve something as private." *United States v. Mathis*, 738 F.3d 719, 729 (6th Cir. 2013) (quoting *Smith v. Maryland*, 442 U.S. 735, 740 (1979)). This inquiry turns on whether the defendant's actions manifest an

actual expectation of privacy in the place searched. *Id.* at 729-30. At the second step of the analysis, we ask whether the defendant's subjective expectation of privacy was objectively reasonable. *See id.* at 729. This question is resolved "either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society." *Byrd v. United States*, 584 U.S. 395, 405 (2018) (quoting *Rakas v. Illinois*, 439 U.S. 128, 144 n.12 (1978)).

Our precedent recognizes that one who borrows a vehicle and stores "personal belongings" in it has "a legitimate expectation of privacy in the car and its contents"—whether that person is driver or passenger. *Dunson*, 940 F.2d at 994-95. In *Dunson*, officers patrolling for drug runners on Interstate 75 stopped a car, asked for permission to search it, and obtained a signed consent form from the driver. *Id.* at 991-93. The search revealed seven kilograms of cocaine stored in a duffel bag in the vehicle's trunk alongside the occupants' luggage and resulted in drug trafficking charges for both men. *Id.* at 990, 993. When they moved to suppress the fruits of the search, we concluded they both "had a legitimate expectation of privacy" to support the challenge. *Id.* at 995. *Dunson* maps on to Rogers's case.

As for the subjective prong, Rogers, too, borrowed a car and was storing personal belongings in it, conduct *Dunson* explained bespeaks a subjective expectation of privacy. *Id.* at 994-95; *see King*, 227 F.3d at 744 (collecting cases holding that defendants exhibit a subjective expectation of privacy in the places they hide contraband). Rogers also chose a vehicle with tinted windows, rolled his window down only a crack

when officers engaged him, sought permission to exit the car when officers asked to "check" him, and rolled his window back up before stepping out of the car. These measures to preserve privacy in the vehicle's interior exceed any efforts taken by the defendants in *Dunson*, who left belongings in areas that were visible from outside the car, took no apparent steps to shield the car's interior during the stop, and ultimately consented to a search of the vehicle. *See Dunson*, 940 F.2d at 991-93.

As for the objective prong, Rogers was arrested in a car that he had permission to borrow, an arrangement we held in *Dunson* was sufficient to confer a reasonable expectation of privacy on the borrower. *Id.* at 994-95. And Rogers used the car, which belonged to his girlfriend, "often." The regularity with which Rogers used the vehicle, and the close personal relationship between Rogers and its owner, further bolster the reasonableness of Rogers's expectation of privacy in it. *See United States v. Montalvo-Flores*, 81 F.4th 339, 343-44 (3d Cir. 2023) (stressing that defendant's possession of his "girlfriend's" car, "not a stranger's," "matters"). Again, this makes the strength of Rogers's interest even stronger than that of the defendants in *Dunson*, who borrowed the car from an unspecified "friend" without any indication they did so regularly. *Dunson*, 940 F.2d at 992.

On both the subjective and objective prongs, Rogers had a stronger privacy interest than the defendants in *Dunson*. He therefore had a legitimate expectation of privacy in the vehicle—a conclusion the majority opinion does not seriously dispute. Instead, the majority concludes that whatever expectation of privacy Rogers may have had in his girlfriend's car

generally, he disclaimed in this instance specifically, a result it grounds in our decision in *United States v. Tolbert*, 692 F.2d 1041 (6th Cir. 1982).

The defendant in *Tolbert*, Delphine Tolbert, transported cocaine in her checked luggage on a commercial airline flight. *See Tolbert*, 692 F.2d at 1043-44. Upon reaching her destination, Tolbert realized she was under law enforcement surveillance, skipped baggage claim, and rushed outside to hail a cab where she was intercepted by federal agents. *See id.* at 1043. The agents asked Tolbert about her bag and she repeatedly "denied having any luggage." *See id.* at 1043-44. The agents recovered a key from Tolbert's purse, however, and used it to successfully open the suitcase Tolbert had left at baggage claim, discovering distribution levels of cocaine inside. *See id.* at 1044. She was arrested and charged with drug trafficking. *See id.* at 1042.

When Tolbert's motion to suppress reached us, we explained that a person who abandons their luggage surrenders whatever expectation of privacy they may previously have had in it. *See id.* at 1044-45. Tolbert's "actions" (attempting to leave the airport without her luggage) coupled with her "vigorous oral disclaimers" (repeatedly denying she had luggage) "affirmatively indicated that she had no interest in preserving the secrecy of the contents of the suitcase." *Id.* at 1045. We held that Tolbert had abandoned her legitimate expectation of privacy in the suitcase. *Id.*

The majority opinion relies on three facts to equate Rogers's situation with Tolbert's: "Rogers twice accurately inform[ed] the police that the Chevy Cruze was not his when asked"; "repeat[ed] to the officers

that he 'wasn't even driving'"; and "had no ID." Maj. Op. at 5.

The opinion first latches on to Rogers's statements that the vehicle "was not his." These statements cannot have disclaimed Rogers's privacy interest in the car, however, because *Dunson* makes clear that a legitimate expectation of privacy attaches to borrowed vehicles. *Dunson*, 940 F.2d at 994-95. Rogers could not have forfeited his legitimate expectation of privacy in the car he "often" borrowed from his girlfriend by honestly communicating the arrangement to law enforcement.

The majority next emphasizes Rogers's statements that he "wasn't even driving." This, too, is legally irrelevant under *Dunson* because passengers retain a legitimate expectation of privacy in borrowed vehicles. *See Dunson*, 940 F.2d at 994-95. Rogers's statements that he had not been driving, and his presence in the passenger seat, are perfectly consistent with the privacy interest that accrues to automobile passengers. He cannot have abandoned that interest by conveying his status as a passenger when "a passenger lawfully in an automobile" retains "an expectation of privacy in" that vehicle. *Byrd*, 584 U.S. at 406 (quoting *Rakas*, 439 U.S. at 149 n.17).

Rogers's statements about driving are also taken out of context in the majority opinion. Rogers protested that he "wasn't even driving" only after he had been handcuffed and was being led away to a police cruiser. He appears to have made the statement in response to an onlooker asking why he was being arrested, to which he answered, "I don't know, I wasn't even driving." The officers responded by clarifying that he was not "getting jammed up for

driving." So even if we assume that disclaiming driving could in some circumstances contribute to the conclusion that a passenger was abandoning his privacy interest in a vehicle, that could not be the case here where the statements were post-arrest exclamations evincing nothing more than the uncharged arrestee's confusion about his detention.

The majority opinion's final point is that Rogers failed to produce a driver's license. But it is unclear what legal significance the majority draws from this fact either. If it takes it as reinforcing Rogers's status as a passenger, *Dunson* again refutes the point; if it takes it as evidence that Rogers committed a traffic violation, it does not say what violation he committed by occupying the passenger seat of a parked car without a license, and in any event, it does not explain why such a violation would vitiate Rogers's otherwise legitimate expectation of privacy. *See Montalvo-Flores*, 81 F.4th at 345 n.10. It cannot be that Rogers had a legitimate expectation of privacy in the vehicle until he failed to produce a license when no Michigan law has been identified requiring him to possess one in the first place.

The majority opinion's fixation on three isolated details empty of the legal significance it ascribes to them also overlooks the bigger picture. Rogers occupied a vehicle with tinted windows, minimally cracked his window when officers approached, and requested permission to exit the vehicle before submitting to a consent search, rolling his window back up before stepping out of the car. The officers then immediately handcuffed Rogers and secured him in the back of a police vehicle, developments that prompted Rogers to speak out in protest. It is unclear

from this chain of events how Rogers could have done more to exhibit an expectation of privacy in the vehicle short of resisting arrest.

All this takes Rogers's conduct worlds away from *Tolbert*. The legally significant conduct in *Tolbert* was the defendant's attempt to leave the airport without her luggage and her statements denying possession or control of the luggage. *Tolbert*, 692 F.2d at 1043-45 (Tolbert was "apparently intent on departing the airport without her luggage" and "denied having any luggage"); *see Byrd*, 584 U.S. at 407 ("expectation of privacy . . . comes from lawful possession and control" of property). Rogers, by contrast, never willingly left the vehicle, separating from it only when he was arrested and taking steps to preserve his privacy throughout the encounter. He never denied possessing or controlling the car, simply explaining to officers when asked that it belonged to his girlfriend. The outcome in *Tolbert* followed from the unique combination of the defendant's "actions" (leaving her property) and "disclaimers" (denying possession of the property)—not the result of either "fact alone"—and each factor contributed to the court's conclusion that the property had been abandoned. *Tolbert*, 692 F.2d at 1044-45. Neither element is present in Rogers's case—much less both.

The Supreme Court has repeatedly stressed that "passengers" may have the "possession and control" of an automobile necessary to confer a legitimate expectation of privacy, a principle we have until now honored in cases such as *Dunson*. *Byrd*, 584 U.S. at 406-07. The majority opinion's analysis nevertheless turns largely on Rogers's role as a passenger—Rogers told officers "that he 'wasn't even driving,'" "Rogers

was sitting in the passenger seat," Rogers made clear "that he was not the driver"—reasoning that is incompatible with controlling precedent. Maj. Op. at 5. I would conclude instead that Rogers had a reasonable expectation of privacy in the vehicle sufficient to maintain his Fourth Amendment claim.

B. Reasonableness of the Search and Seizure

Because I would hold that Rogers had a legitimate expectation of privacy in the car, I would also assess whether impounding the vehicle without a warrant was consistent with the Fourth Amendment. The Government contends that it was under the community caretaking exception to the Fourth Amendment's warrant requirement.

The community caretaking exception enables law enforcement engaged in the course of duty to respond to the "special needs" of the community that are beyond the scope of "normal law enforcement." *United States v. Morgan*, 71 F.4th 540, 544 (6th Cir. 2023) (quoting *Griffin v. Wisconsin*, 483 U.S. 868, 873-74 (1987)). It applies "in narrow instances when public safety is at risk" and "delay is reasonably likely to result in injury or ongoing harm to the community at large." *Taylor v. City of Saginaw*, 922 F.3d 328, 335 (6th Cir. 2019) (quoting *United States v. Washington*, 573 F.3d 279, 289 (6th Cir. 2009)). An officer's actions are covered only when they are "totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute." *Cady v. Dombrowski*, 413 U.S. 433, 441 (1973).

A vehicle may be impounded under the community caretaking exception if it is "impeding traffic or threatening public safety and convenience." *South*

Dakota v. Opperman, 428 U.S. 364, 369 (1976). This includes removing incapacitated vehicles from the side of the highway, *Dombrowski*, 413 U.S. at 443; towing illegally parked vehicles interfering with "the efficient movement of vehicular traffic," *Opperman*, 428 U.S. at 369; and retrieving vehicles that would otherwise be abandoned in the private driveway of a third-party, *United States v. Jackson*, 682 F.3d 448, 455 (6th Cir. 2012).

The officers here arrested Rogers after removing him from a vehicle that was legally parked in line with other cars on a residential street. *See Opperman*, 428 U.S. at 375; *Jackson*, 682 F.3d at 455; *United States v. Kimes*, 246 F.3d 800, 804 (6th Cir. 2001). Bodycam footage shows the vehicle aligned with the roadside a few inches from the curb. *See Dombrowski*, 413 U.S. at 443; *United States v. Snoddy*, 976 F.3d 630, 636 (6th Cir. 2020); *United States v. Lilly*, 438 F. App'x 439, 443-44 (6th Cir. 2011). The sedan is positioned directly behind another identically parked vehicle on a street dotted with other cars parked in front of residential homes. And it is across the street from the home of a woman Rogers identified as his "cousin." In short, the video evidence shows a residential street appearing just as one would expect to find it on any other winter afternoon. An uninitiated bystander would be unable to reasonably identify any car "impeding traffic or threatening public safety and convenience"—much less to select as the culprit the vehicle at issue here. *See Opperman*, 428 U.S. at 369.

The Government nevertheless justifies impounding the car for two reasons: a risk prevention theory and a liability-limitation theory. It contends that leaving

the car on the street would have "posed risks to the car itself" and created "liability for the city" because the vehicle was parked in a "more violent" neighborhood. Accepting this risk-prevention theory would license impoundment "any time" someone is arrested and taken into custody in a high crime neighborhood—even in the absence of any specific threat to the vehicle—a result that is flatly "inconsistent" with law enforcement's role in "'caretaking' of the streets." *United States v. Duguay*, 93 F.3d 346, 353 (7th Cir. 1996). The car here was in "no different" a parking place "than any other vehicle" on the block, so "officers could no more impound" it "than they could impound any other vehicle" on the same street. *United States v. Venezia*, 995 F.3d 1170, 1182 (10th Cir. 2021). The liability-limitation theory, meanwhile, would create "new police obligations . . . where none existed before." *Duguay*, 93 F.3d at 352. "The police do not owe a duty to the general public to remove vulnerable automobiles from high-crime neighborhoods," and the Government fails to explain how a police department could be liable for leaving on the street a vehicle it lacked constitutional authority to remove. *Id.* at 352-53. "While protection of the arrestee's property and municipal liability are both valid reasons to conduct an inventory *after* a legal impoundment, they do not establish the *a priori* legitimacy of the seizure." *Id.* at 352 (first emphasis added). The risk-prevention theory proves too much; the liability-limitation theory proves too little.

But even accepting the premise that risks to a car and liability to a city can alone justify impoundment in some circumstances, the Government would still bear the burden of proving that such risk existed here.

See Taylor, 922 F.3d at 334. That burden is particularly stringent when the Government relies only on the justification that the search or seizure was carried out in a high-crime area, because that explanation triggers "special concerns of racial, ethnic, and socioeconomic profiling." *United States v. Caruthers*, 458 F.3d 459, 467 (6th Cir. 2006), *abrogated on other grounds by Mathis v. United States*, 579 U.S. 500 (2016). A citation to "an area as 'high-crime'" must therefore be "factually based" and specific to "circumscribed locations where particular crimes occur with unusual regularity." *Id.* at 467-68 (quoting *United States v. Montero-Camargo*, 208 F.3d 1122, 1138 (9th Cir. 2000) (en banc)). Yet the Government here offers only the vague, unsubstantiated testimony of a single police officer characterizing the neighborhood in which Rogers was arrested as "more violent." The statement provides no factual basis for deeming the area "more violent," does not address the "particular crime" of vandalism itself, and is not limited to a "specific" location, apparently applying instead to "an entire neighborhood" if not more. *See id.* Such general and conclusory testimony cannot withstand the scrutiny with which the Government's "high-crime area" justifications must be met.

When duty calls, the community caretaking exception answers by permitting police officers to step outside their ordinary law enforcement function to respond to pressing public safety matters—just as "any private citizen might." *Caniglia*, 593 U.S. at 198 (quoting *Florida v. Jardines*, 569 U.S. 1, 8 (2013)). "But the Supreme Court and our court have been careful not to allow this historically grounded, and

usually welcome, explanation for police work to overrun core Fourth Amendment protections." *Morgan*, 71 F.4th at 545. Community caretaking is "permitted when reasonable but only when reasonable." *Id.* at 546. Because the officers here impounded a car that was safely and legally parked on a residential street in line with other identically parked cars posing no threat to traffic or public safety, I would conclude that the impoundment—and subsequent search—were unreasonable and violated the Fourth Amendment.

II. CONCLUSION

For these reasons, I respectfully **DISSENT**.

APPENDIX B

FILED: Jun 14 2024
KELLY L. STEPHENS, Clerk

IN THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Nos. 22-1432/1433

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

GREGORY ROGERS,

Defendant-Appellant,

ORDER

BEFORE: McKEAGUE, STRANCH, and NALBANDIAN, Circuit Judges.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the cases. The petition then was circulated to the full court. No judge has requested a vote on the suggestion for rehearing en banc. Judge Stranch would grant rehearing for the reasons stated in her dissent.

Therefore, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Kelly L. Stephens
Kelly L. Stephens, Clerk

APPENDIX C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	
v.	)	CASE NO. 1:20-cr-53
GREGORY ROGERS,	)	Honorable Hala Y. Jarbou
Defendant.	)	

OPINION

The Government has charged Defendant Greg Rogers with the following offenses for an incident occurring on January 27, 2020: possession with intent to distribute marijuana (Count I); possession of a firearm in furtherance of drug trafficking (Count II); and being a felon in possession of a firearm (Count III). In addition, Defendant has been charged with the following offenses for an incident occurring on April 28, 2020: possession with intent to distribute marijuana (Count IV); possession of a firearm in furtherance of drug trafficking (Count V); and being a felon in possession of a firearm (Count VI). On both occasions, the police found him in a car, in possession of a gun and a substantial quantity of marijuana.

Before the court is Defendant's motion to suppress evidence discovered by the state police on two separate occasions: (1) when they arrested him on January 27, 2020, and searched the vehicle he was in at the time; and (2) when they executed a warrant to search his cell phone on October 9, 2019. The Court held a hearing on the motion on October 16, 2020, at which Officers Peter Thompson and Kenneth Nawrocki testified. The Court also reviewed video footage of arrest and of the vehicle search on January 27, 2020. After considering the evidence and the testimony at the hearing, and the parties' arguments and briefing, the Court will deny the motion.

I. Search of Vehicle (January 27, 2020)

On January 27, 2020, Grand Rapids police officers responded to a report of domestic assault at 941 Sherman Street. The victim claimed that her brother, Maxamillion Long, had strangled her.

The police department dispatched Officer Thompson to the scene. When he pulled up to the address, he saw the victim standing in front of her house, which is on the north side of the street. He noticed that there was a blue Chevy Cruze parked on the south side of the street, opposite the house. According to his testimony and his police report, he observed exhaust emanating from the rear of the Chevy Cruze. He also saw that someone was inside the vehicle.

Thompson approached the victim to interview her about the assault. She told him that Long had fled, pointing to the south. She thought that he might still be in the area. Thompson asked her if she knew whose

vehicle was parked across the street (i.e., the Chevy Cruze). She did not know.

Officer Kenneth Nawrocki was on patrol in the area, so he went to 941 Sherman to assist Officer Thompson. When Nawrocki pulled up, Thompson told him to investigate the Chevy Cruze. Thompson believed that Long might be hiding inside. According to Thompson, Nawrocki vehicle at that point, which meant that Nawrocki was responsible for investigating the vehicle and making further decisions about it.

Nawrocki pulled up behind the Chevy Cruze and then got out of his cruiser. He then walked over to the passenger side of the Chevy Cruze, shining a flashlight into the interior, through tinted windows. Defendant was inside the vehicle, sitting in the front passenger seat. Defendant rolled down the front passenger-side window a few inches. Nawrocki asked him if the car belonged to him. Defendant said that it belonged to his girlfriend, Cyesha. He said that his girlfriend had come to see his "cousin," pointing to the South. Meanwhile, Thompson crossed the road and stood next to Nawrocki. Nawrocki asked Defendant his name. Defendant initially responded that his name was "Greedy," but then he stated that his name was Greg Rogers. He said that he knew the victim, who was still standing on her porch at the time. He said that she was his "cousin," though not his biological cousin. And he knew her brother, "Max." Defendant said he did not have any identification on him.

Nawrocki went back to his cruiser to look up Defendant's information in the LEIN system. Meanwhile, Defendant called out to the victim from

the partially open car window, saying, "This is Greg!" She responded that she knew him. Thompson continued to question Defendant, asking him if he had seen anyone else around. Defendant claimed that he had just arrived and that he was waiting for his girlfriend.

Nawrocki discovered an outstanding arrest warrant for Defendant for "CCW" (carrying a concealed weapon). Nawrocki went back to the vehicle and relayed this information to Thompson. Nawrocki asked Defendant if the officers could "check" him. Defendant agreed and asked to get out of the car. After Defendant stepped out, Nawrocki searched Defendant's pockets and put Defendant in handcuffs. The officers discovered car keys and over $700 in cash on Defendant. Then Nawrocki escorted Defendant to a police vehicle with the help of another officer. Nawrocki told Defendant that the "gig" was that Defendant had a "prior case" that they needed to "take care of." Defendant became distraught and complained that he had not been driving the vehicle. He asked to have his mother come get his "stuff."

After officers secured Defendant inside a police cruiser, Nawrocki went back to his own cruiser to run the plate on the vehicle. He discovered that it belonged to Defendant's girlfriend, Cyesha Cross. Then he walked over to the car and began searching the inside of it.

After searching the passenger side, Nawrocki went over to the driver side. There, he discovered a bag of marijuana and then asked for the "IBO"[1] to come to

[1] IBO refers to the forensics unit at the police department.

the scene. He also found a gun tucked under the driver's seat and digital scales in the door pocket.

Nawrocki crossed the street and spoke to the victim and her mother, who repeatedly questioned why Defendant was being arrested and his car searched. After some back and forth, Nawrocki claimed that the police could search the car as part of a "cursory wingspan search." The victim asked for Defendant's belongings and for the keys to the car, but Nawrocki refused, telling her that the car had a "loaded gun" inside. Later, Nawrocki used the keys to lock the car. Eventually, a tow truck arrived and took the vehicle away. The owner of the vehicle never showed up during the hour or so that Thompson and Nawrocki were present on the scene.

The Fourth Amendment generally requires warrants supported by probable cause in order to conduct a valid search. There is no dispute that the officers did not have a warrant to search the vehicle. Defendant claims that the search was invalid and was not justified by any exceptions to the warrant requirement.[2]

A. "Standing"

The Government contends that Defendant does not have "standing" to object to the search because he was not the owner of the vehicle. "[T]he Supreme Court rejected the concept of 'standing' in *Rakas v. Illinois*, 439 U.S. 128, 139-40 (1978)." *United States v. Smith*, 263 F.3d 571, 581 (6th Cir. 2001). Standing is now recognized as "the substantive question of whether or

[2] Defendant does not challenge the officers' decision to question him.

not the proponent of the motion to suppress has had his own Fourth Amendment rights infringed by the search and seizure which he seeks to challenge." *Rakas*, 439 U.S. at 133. In other words, the Government contends that Defendant cannot rely on the Fourth Amendment to challenge the search because he did not have a legitimate expectation of privacy in the area searched. "A person who is aggrieved by an illegal search and seizure only through the introduction of damaging evidence secured by a search of a *third person's* premises or property has not had any of his Fourth Amendment rights infringed. *Id.* (emphasis added).

To determine whether Defendant can challenge the search, the Court "must determine first, whether he had an actual, subjective expectation of privacy, and second, whether that expectation was a legitimate, objectively reasonable expectation." *Smith*, 263 F.3d at 582. "Legitimation of expectations of privacy by law must have a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society." *Rakas*, 439 U.S. at 143 n.12.

"Whether a legitimate expectation of privacy exists in a particular place or item is a determination to be made on a case-by-case basis." *United States v. King*, 227 F.3d 732, 744 (6th Cir. 2000).

> Aside from a defendant "proprietary or possessory interest in the place to be searched or item to be seized," some factors that courts have considered when "identifying those expectations which qualify for Fourth Amendment protection" include "whether the

> defendant has the right to exclude others from the place in question; whether he had taken normal precautions to maintain his privacy; [and] whether he has exhibited a subjective expectation that the area would remain free from governmental intrusion."

United States v. Ocampo, 402 F. App x 90, 95-96 (6th Cir. 2010) (quoting *United States v. Pollard*, 215 F.3d 643, 647 (6th Cir. 2000)) "A Defendant has the 'burden of establishing his standing to assert a Fourth Amendment violation.'" *United States v. Jenkins*, 743 F. App'x 636, 648 (6th Cir. 2018) (quoting *Smith*, 263 F.3d at 582).

Rakas is instructive for a vehicle search like the one at issue here. In that case, the defendants sought to suppress evidence recovered from the search of a vehicle in which they were merely passengers when the police stopped the vehicle. The Supreme Court held that they could not challenge the search because "[t]hey asserted neither a property nor a possessory interest in the automobile, nor an interest in the property seized." *Rakas*, 439 U.S. at 148. In other words, "they made no showing that they had any legitimate expectation of privacy in the glove compartment or area under the seat of the car in which they were merely passengers. *Id.*

Like the defendants in *Rakas*, Defendant Rogers was neither the owner of the vehicle nor the driver. The car belonged to Defendant's girlfriend who, according to Defendant, drove the vehicle to that location and was visiting someone nearby. In addition, Defendant does not claim an interest in the property seized.

Defendant contends that this case is different from *Rakas* because he possessed the keys to the vehicle, which gave him a possessory interest in it. In *Rakas*, the Supreme Court distinguished the case of *Jones v. United States*, 362 U.S. 257 (1960), in which the friend of an apartment owner had permission to use the searched apartment, stored his possessions there, had keys to the apartment, and thus "had complete dominion and control over the apartment and could exclude others from it." *Jones*, 362 U.S. at 149. Consequently, that friend had a privacy interest on which to base a Fourth Amendment challenge to the apartment search, even though he was not the owner of the apartment.

Jones is distinguishable because there is no evidence that Defendant had permission from the owner to use the vehicle or be present inside it. "*Rakas* makes clear that "wrongful" presence at the scene of a search would not enable a defendant to object to the legality of the search.' . . . Likewise, 'a person present in a stolen automobile at the time of the search may [not] object to the lawfulness of the search of the automobile.'" *Byrd v. United States*, 138 S. Ct. 1518, 1529 (2018) (quoting *Rakas*, 439 U.S. at 141 n.9). Neither Defendant nor his girlfriend testified at the suppression hearing. Moreover, there is no evidence that Defendant's girlfriend was ever present with Defendant. No one saw the vehicle arrive, and the officers testified that Defendant's girlfriend never appeared on the scene while they were present. Defendant cannot demonstrate an expectation of privacy in the vehicle without first demonstrating that he had permission to use it. *See Jenkins* 743 F. App'x at 648 (finding that the

defendant failed to present evidence of an expectation of privacy in a searched vehicle where he did not testify at the hearing or present any record evidence of his permission to use it).

Defendant's presence in, and possession of the keys to, the vehicle does not establish that he had that permission. *See Jenkins*, 743 F. App'x at 648 (holding that possession of keys to a car rented to someone else does not establish permission to use it); *United States v. Sanchez*, 635 F. 3d 47, 64 (2d Cir. 1980) (same); *see also United States v. Ponce*, 947 F.2d 646, 649 (2d Cir. 1991) ("The fact that defendants were observed using the car does not establish their right to use the car.")

Even if the Court were to infer from the circumstances that Defendant had permission to possess or occupy the vehicle, the evidence does not establish that he had the right to exercise significant control over it, let alone "complete dominion and control." He claimed at the time of his arrest that he did not drive the vehicle; his girlfriend did. He also claimed that his girlfriend was visiting someone nearby, and that he was waiting for her to return. Moreover, Defendant could not lawfully drive the vehicle because he could not produce any form of identification, such as a driver's license, when asked by the police to do so. In other words, for all intents and purposes, his girlfriend was still in control of the vehicle. Unlike the defendant in *Jones*, who could enter and leave the apartment at will and store possessions there for safekeeping, Defendant here was, at best, a temporary occupant of someone else's vehicle, waiting for the owner to return. His privacy interests were much closer to those of the passengers in *Rakas* than the defendant in *Jones*.

Jones is also distinguishable because that case involved an apartment, not an automobile. An individual's expectation of privacy in an automobile is lower than his expectation of privacy in a residence. "Automobiles operate on public streets; they are serviced in public places; they stop frequently; they are usually parked in public places; their interiors are highly visible; and they are subject to extensive regulation and inspection." *Rakas*, 439 U.S. at 154 n.2 (Powell, J, concurring.). In short, as a passenger in a vehicle waiting for the return of its driver and owner, Defendant did not have a legitimate expectation of privacy in the interior of the vehicle. Accordingly, he cannot claim that his Fourth Amendment rights were violated by a search of that vehicle.

B. Inventory Search Exception

Even assuming Defendant has standing, Defendant's challenge to the search fails under the inventory-search exception for impounded vehicles. Generally, the Government cannot automatically search a vehicle following the arrest of its occupant. A vehicle search is subject to "the basic rule that searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions." *Arizona v. Gant*, 556 U.S. 332, 338 (2009) (internal quotation marks omitted). A routine inventory search in connection with impoundment of a vehicle is one of those exceptions. *See Colorado v. Bertine*, 479 U.S. 367, 374 (1987) ("[R]easonable police regulations relating to inventory procedures administered in goodfaith satisfy the Fourth Amendment."). "An inventory search is the

search of property lawfully seized and detained, in order to ensure that it is harmless, to secure valuable items (such as might be kept in a towed car), and to protect against false claims of loss or damage." *Whren v. United States*, 517 U.S. 806, 811 n.1 (1996).

1. Validity of Impoundment

In order for an inventory search of a vehicle to be lawful, the decision to impound the vehicle must be lawful. *See United States v. Snoddy*, --- F.3d ---, 2020 WL 5701910, at *2 (6th Cir. Sept. 24, 2020) ("A vehicle is lawfully seized and, thus, subject to an inventory search if it is lawfully impounded."). The state cannot impound a car or conduct an inventory search simply because it suspects that there might be evidence of criminal activity inside the vehicle. *See Bertine*, 479 U.S. at 372 (an impoundment or inventory search would be invalid if the officers "acted in bad faith or for the sole purpose of investigation"). As the Sixth Circuit summarized in *Snoddy*:

> Officers exercising their discretion to impound a vehicle must do so "according to standard criteria and on the basis of something other than suspicion of evidence of criminal activity." [*United States v. Jackson*, 682 F.3d 448, 454 (6th Cir. 2012)] (quoting *United States v. Kimes*, 246 F.3d 800, 805 (6th Cir. 2001)). Similarly, "[i]n order to be deemed valid, an inventory search may not be undertaken 'for purposes of investigation,' and it must be conducted 'according to standard police procedures.'" *Smith*, 510 F.3d at 651 (quoting *United States v. Lumpkin*, 159 F.3d 983, 987 (6th Cir. 1998)); see also *United States v. Alexander*, 954 F.3d 910, 916 (6th Cir. 2020)

> (stating that the inventory exception applies only when officers follow "'standardized criteria' or 'established routine' governing the scope of the inventory searches'" (quoting *Florida v. Wells*, 495 U.S. 1, 4 (1990))). The search is unconstitutional if "the evidence establishes that the 'police acted in bad faith or for the sole purpose of investigation' in conducting an inventory search." *Hockenberry*, 730 F.3d at 659 (quoting *United States v. Vite-Espinoza*, 342 F.3d 462, 470 (6th Cir. 2003)). In other words, officers cannot hide an investigative search under the pretext of an inventory search. *See id.*; *South Dakota v. Opperman*, 428 U.S. 364, 375 (1976). That said, "the mere fact that an officer suspects that contraband may be found in a vehicle does not invalidate an otherwise proper inventory search." [*United States v. Smith*, 510 F.3d 641, 651 (6th Cir. 2007)].

Snoddy, 2020 WL 5701910, at *2.

In other words, impoundment decisions and inventory searches will not pass muster under the Fourth Amendment if the evidence establishes that they were made in bad faith or for the sole purpose of conducting an investigation. *United States v. Hockenberry*, 730 F.3d 645, 659 (6th Cir. 2013). At the same time, "[t]he Fourth Amendment permits impoundment decisions and inventory searches that are *objectively justifiable* . . . , regardless of an officers subjective intent." *United States v. Kimes*, 246 F.3d 800, 805 (6th Cir. 2001) (emphasis added).

In *Snoddy*, the Sixth Circuit upheld an impoundment and inventory search because there

were objectively justifiable grounds for impounding the defendant's car. The applicable policy gave the officer discretion as to impoundment. Furthermore, the defendant was "the sole occupant of the car, and the car would have been left out on the side of the highway near an intersection in the middle of the night where it could be stolen, vandalized, or hit by another vehicle." *Snoddy*, 2020 WL 5701910, at *4. The impoundment and search were justified, even though the officer told dispatch that he was going to search the car, repeatedly asked the defendant for consent to search the car, and indicated his belief that he would find drugs in the car. *Id.* Also, the officer did not call a tow truck until after asking for consent to search the car. *Id.* Impounding the car (and then conducting an inventory search) in these circumstances was justifiable, according to the statements and beliefs.

Defendant argues that the inventory-search exception does not apply here because the officers did not follow their department's policy when deciding to impound Defendant's car. The Grand Rapids Police Department's written policy for impoundment states that police "shall" impound a car in the following circumstances:

> a. It is evidence in a crime or needs to be held for investigative purposes.
>
> b. It is parked illegally and could potentially present a traffic hazard.
>
> c. It is parked on private property and an emergency exists, i.e. blocking drive or loading dock with persons waiting to get in or out and the owner/lessee wishes the vehicle removed. . . .

> d. It has been marked abandoned and is parked or left standing in the same location in excess of 48 hours.
>
> e. The driver was arrested and is not the owner.
>
> f. It has been reported stolen and the owner cannot be notified or is unable to come to the scene and take possession of the recovered vehicle within a reasonable amount of time.
>
> g. The court has ordered a vehicle impounded due to overdue parking citations.
>
> h. The owner or driver has been involved in an accident or has been taken into custody and is not physically, mentally, or legally capable of driving the vehicle or giving consent to leave it.

(Impound Policy, ECF 22-2, PageID.82-83.)

None of the above circumstances have a perfect fit to this case. Section (e) is the closest: "The driver was arrested and is not the owner." The problem is that, according to Defendant, he did not drive the vehicle. And the police did not actually see Defendant driving the vehicle; Defendant was sitting in the passenger seat when police arrived, and he claimed that he came with his girlfriend.

On the other hand, Officer Nawrocki noted that the purpose of the policy is, among other things, to "[p]rotect the City of Grand Rapids and its employees from claims or disputes over lost, stolen, or damaged property." (Impounded Policy, PageID.82.) Nawrocki had this purpose in mind when deciding to impound the vehicle.

In particular, Nawrocki was concerned that Defendant might not have permission to use the

vehicle. Defendant's name was not on the title and the owner was not present. Nawrocki was worried that, if they left Defendant in possession of the keys, Defendant could obtain possession of the vehicle without permission from the owner if he was released on bond. Nawrocki's training and experience had taught him to be wary of claims from a driver whose name was not on the vehicle's registration that they had permission to use a vehicle. He was aware of a situation in which another officer trusted a driver who claimed that he had permission to use a vehicle, but the owner later told the police that the driver's statement was not true. Also, Nawrocki was worried that, by leaving the vehicle parked on a public street, the car could be damaged or looted and the owner would hold the City of Grand Rapids responsible. That neighborhood was one of the "more violent" areas of the city, according to Nawrocki. Also, it was winter, which meant that, in snowy conditions, plow trucks or other vehicles driving down the street could collide with the car.

In addition, Nawrocki noted that the policy provides that, "if none of the impoundment criteria are met," officers can "[l]eave the vehicle properly parked and secured at the scene, if . . . the owner requests it and will take full responsibility for it." (Impound Policy, PageID.83.) According to Nawrocki, this meant that they could leave the vehicle at the scene only with permission from the owner. In other words, if the owner did not give them permission to do so, they could not leave the vehicle. The Court finds that this is a reasonable interpretation of the policy. At the very least, Nawrocki's decision to impound the car was a reasonable exercise of discretion

considering the goals of the policy and a very similar circumstance in which officers are *required* to impound vehicles, i.e., when the driver is arrested and is not the owner.

Moreover, Nawrocki's impoundment decision was objectively justifiable. Here, the police had removed the sole occupant of a vehicle parked on a public street. This occupant possessed the keys to the vehicle, but the owner was not around. The police were justified in taking custody of the vehicle in these circumstances. The vehicle did not present a traffic hazard, like the one in *Snoddy*. But nonetheless, there were appreciable risks to leaving the vehicle parked on the street, in the winter, in a neighborhood that the officer described as "more violent." By taking possession of the vehicle, the police protected the city from possible claims from the owner that the city was responsible for any loss or damage to the vehicle that could occur if Nawrocki left the keys in Defendant's possession or left the car at the location where the officers found it.[3]

In addition, there is no significant evidence of bad faith or pretext behind Nawrocki's decision. Defendant notes that Nawrocki did not discuss the decision with anyone before searching the vehicle; however, both Nawrocki and Thompson testified that Nawrocki was responsible for that decision. Also,

---

[3] Defendant contends that leaving him with the keys would have preserved the "status quo," but that argument assumes that Defendant had permission to use the vehicle in the first place, which he has not established. It also assumes that the owner was willing to leave the vehicle unoccupied, parked on the street, without access to the keys. Surely the owner did not foresee or expect that possibility.

Nawrocki impounded cars on a regular basis. Thus, there was no need for him to discuss the decision with Thompson beforehand.

Defendant points to the fact that Nawrocki told the victim's mother that he could search the car as part of a wingspan search (which the Government acknowledges would not justify searching the car). However, Nawrocki testified that this statement was a mistake, made in the heat of an argument. The Court finds his testimony to be credible. Indeed, in his police report, Nawrocki wrote that he searched the car because "the owner was no where around and the vehicle was left unlocked and running"; they could not lock the car and let Defendant have the key. (Nawrocki Report, PageID.73.) The statement in the police report is consistent with the justifications Nawrocki provided at the suppression hearing for impounding the car.[4]

Defendant also points to an apparent discrepancy between the fact that Nawrocki stated in his police report that he saw marijuana shake on the vehicle floorboards and smelled unburnt marijuana in the vehicle, ostensibly before searching it, yet neither Nawrocki nor Thompson ever mentioned the smell or presence of marijuana until after the search.

---

[4] Defendant disputes Nawrocki's assertion that the car was "running," but that is what Thompson had told him before he arrived on the scene. And although there is no evidence of exhaust emanating from the car in the police videos, it was reasonable for Nawrocki to infer that Defendant had activated the car in some manner if Defendant was able to operate the automatic windows before speaking with Nawrocki. Thus, Nawrocki's prior statement in his police report does not undermine his testimony or his credibility.

However, Nawrocki explained in his testimony that the smell of marijuana was not a significant concern because it is not unusual for them to encounter marijuana in their work; it happens on a daily basis. Also, the possession of a small quantity of marijuana is legal in the State of Michigan, so Grand Rapids police officers generally do not rely on the smell of marijuana as probable cause to search a vehicle. This testimony is credible, and it supports the Government's assertion that Nawrocki impounded and then searched the vehicle as part of a routine inventory search, rather than for the purpose of conducting an investigation.

Defendant also claims that police should have considered a different alternative to impoundment. The impound policy provides the following:

As an alternative to vehicle impoundment, officers may:

a. With on-scene approval from the owner, allow a responsible person who possesses a valid operator's license to assume responsibility of the vehicle and its contents.

b. Summon a person of the owner's choice to come to the scene, in a timely manner, to take custody of the vehicle.

c. Leave the vehicle properly parked and secured at the scene, if none of the impoundment criteria are met and the owner requests it and will take full responsibility for it.

(Impound Policy, PageID.83.) None of these alternatives applied. As discussed above, the owner was not on scene and did not give approval for someone to take responsibility for the vehicle, or for

officers to leave the vehicle at its location. And note further that these alternatives are *permitted* by the policy; they are not required.

Defendant also claims that the officers should have made some effort to contact the owner; however, an impoundment decision is not impermissible simply because other alternatives to impoundment might exist. *See Kimes*, 246 F.3d at 805 (holding that officers were not required to "take[ ] it upon themselves to call [the defendant's] wife and ask her to get the vehicle").

Defendant also believes it is relevant that the officers did not call the tow truck before conducting the search; however, Nawrocki explained that it takes some time to process a vehicle,[5] and he did not want to waste the tow truck driver's time . In other words, the timing of the call for a tow truck does not suggest that impoundment was a pretext for an investigative search.

In summary, Nawrocki impounded the vehicle for legitimate reasons, consistent with the city's policy. He did not do so as a pretext for conducting an investigative search.

2. Validity of Search

Defendant argues that the search was not valid because the officers did not follow police policy for inventory searches. In his motion to suppress, Defendant asserted that the officers did not complete a full inventory of the contents of the vehicle, as required by policy, because he did not receive one from the Government. The policy requires the following:

---

[5] Among other things, the police department must photograph the vehicle to make a record of its condition.

1. All vehicles removed by the Grand Rapids Police Department for impound, evidence, or safekeeping shall be internally and externally inventoried. The vehicle inventory report form shall be accurately and thoroughly completed on all copies.

2. The reporting/arresting officer is responsible for completing the vehicle inventory. If another employee voluntarily or by assignment conducts the inventory, the responsibility shall be passed to that employee.

3. When it is not possible to conduct a full inventory without potentially destroying evidence, the reporting officer shall complete as much of the form as possible prior to the vehicle's removal. For example:

a. The type of removal

b. The incident and requisition numbers associated with the inventory

c. The location, time and date

d. Vehicle and owner information

e. Exterior condition of the vehicle

f. Any other information available from a visual survey of the interior.

g. All valuables over $100 as well as any electronic devices shall be entered into PMU for safekeeping.

4. In those cases when the reporting officer cannot complete the inventory, the employee assigned to process the vehicle shall complete a

> "followup" inventory report form and identify it as such in the "note" section.
>
> This inventory should be complete in and of itself, i.e. type of removal, the numbers associated with the inventory, the vehicle information, exterior condition and interior inventory.
>
> ...
>
> 6. Discovery of contraband during a vehicle inventory that may result in the filing of additional charges should be documented under a separate incident number.
>
> 7. The reporting officer shall document the removal of any property from the vehicle in accordance with Departmental procedures in the related incident report.
>
> 8. The wrecker driver shall signify receipt of the vehicle in its stated condition by signing the inventory form. The reporting officer shall retain the Police Department copy and give the wrecker driver the remaining two copies.
>
> (Impound Policy, PageID.84-85.)

At the hearing, however, the Government provided a copy of the inventory report completed by Nawrocki. Also, Nawrocki explained the contents of the report at the hearing. This report appears to comply with the policy. Thus, Defendant's argument is unsupported.

In short, the decision to impound the vehicle and to conduct the inventory search were reasonable, justified, and consistent with the parameters of the city's policy. Also, these decisions were made in good faith; the evidence does not suggest that they were a

pretext for an investigative search. Accordingly, the vehicle search is valid under the Fourth Amendment.

C. Probable Cause

The Government also argues that the vehicle search is justified based on probable cause and the automobile exception to the warrant requirement. The Court need not examine that issue, however, because the search is justified based on the inventory-search exception.

II. Search of Cell Phone (October, 2019)

In his motion, Defendant also objected to the execution of a warrant to search his cell phone. At the suppression hearing, however, Defendant agreed that this issue is moot because the Government does not intend to use evidence recovered from the cell phone in support of its case in chief.

III. Conclusion

For the foregoing reasons, the motion to suppress will be denied. An order will enter consistent with this Opinion.

Dated: October 30, 2020

/s/ Hala Y. Jarbou
HALA Y. JARBOU
UNITED STATES DISTRICT JUDGE