

**VIRGINIA : IN THE CIRCUIT COURT OF THE CITY OF VIRGINIA BEACH**

**COMMONWEALTH OF VIRGINIA,**

**Plaintiff**

**v.**

**DOCKET NO:**

**,  
Defendant**

**BRIEF IN SUPPORT OF MOTION TO SUPPRESS**

COMES NOW Defendant, , by counsel, and respectfully moves this court to suppress evidence seized incident to a warrantless search in violation of the Fourth Amendment to the United States Constitution. Facts and legal arguments in support of this motion follow:

**Statement Of Facts**

On , Detectives and , narcotics detectives in the VBPD's special investigations unit, were conducting surveillance on a residence at . Road. The residence had been under surveillance for at least six months and was known to be involved in drug dealing activity. (Tr. 36-42). After a white Dodge Nitro departed from the residence, the detectives followed the vehicle in their unmarked unit towards the

area of Virginia Beach. The detectives radioed Officer , who was driving a marked police car, and requested that he find a reason to stop the Dodge Nitro for a traffic violation. Bott subsequently stopped the vehicle for running a stop sign.<sup>1</sup> (Tr. 12-13, 39). The detectives waited in a Harris Teeter parking lot located about 500 feet from the traffic stop. (Tr. 17, 42-43). The detectives acknowledged that they "didn't see anything indicative of a narcotics transaction" prior to requesting that stop the vehicle. (Tr. 41).

The defendant, who was the driver of the vehicle, provided his driver's license which determined was suspended. acknowledged that he didn't know why the defendant's license was suspended and that the police computer reflected that the defendant had not received notice of the suspension. Based on the lack of notice to the defendant, chose not to charge him with driving on a suspended operator's license. (Tr. 14-15). After determined that a passenger in the vehicle also had a suspended operator's license, he decided to impound and tow the vehicle on the basis that it

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<sup>1</sup> , this Court found that the traffic stop was supported by objective reasonable suspicion.

constituted a traffic hazard. (Tr. 10-11, 15-16). The vehicle was parked in a single lane of a two lane road where traffic was moderate to heavy. (Tr. 11, 16). acknowledged that he elected not to allow the defendant to make any of the following alternative arrangements to move the vehicle: (1) to hire his own tow truck, (2) to call a licensed a driver to move the vehicle, or (3) to allow the defendant to park the vehicle in a large shopping center located approximately 500 feet from the traffic stop. further admitted that there was no police policy against allowing any of the above options. (Tr. 16-18).

Officers and arrived on scene and began an inventory search of the vehicle. Both officers conceded that completing a written tow form recording items recovered during the search is part of department inventory search procedures. Both officers admitted that they did not complete the form. (Tr. 24-25, 31-32). During their search of the vehicle, the officers recovered a glass smoking device containing suspected marijuana “shake” from the driver’s side door and a plastic bag containing white residue from the passenger side. (Tr. 20-21, 28). Based on the discovery of the suspected narcotics, Officer searched the defendant’s person during which the defendant dropped several bags of narcotics onto the ground. (Tr. 28-29, 33). Upon discovery of the narcotics, Detectives and arrived on scene and took over the investigation. (Tr. 43).

### **Question Presented**

#### **I. DOES THE INVENTORY SEARCH IN THIS CASE SURVIVE FOURTH AMENDMENT SCRUTINY?**

#### **Burden of Proof**

The Fourth Amendment guarantees the right of the people to be secure . . . against unreasonable searches and seizures. Const. amend. IV. It is well-settled that “warrantless searches and seizures are per se unreasonable and, therefore, unlawful under the Fourth Amendment. Commonwealth v. Ealy, 12 Va. App. 744, 751-52 (1991). However, warrantless searches and seizures are permissible where an established and well-delineated warrant exception is applicable under the circumstances. Thompson v. Louisiana, 469 U.S. 17, 19–20 (1984). *The Commonwealth bears the burden of establishing a warrantless search or seizure was “reasonable” under the given circumstances, and thus constitutionally permissible. Welsh v. Wisconsin, 466 U.S. 740, 749–50 (1984) (emphasis added).*

## **Standard For Evaluating Inventory Searches**

Under the “Community Caretaker Doctrine,” a warrantless inventory search of a vehicle may be reasonable under the Fourth Amendment despite the absence of probable cause and a warrant. Colorado v. Bertine, 479 U.S. 367, 371 (1987). “This exception to the Fourth Amendment’s warrant requirement is based upon the need to protect the owner’s property, to protect the police against claims of lost or stolen property, to protect the police from physical danger, and to protect the public from dangerous instrumentalities or substances that may be pilfered from an impounded vehicle.” Reese v. Commonwealth, 220 Va. 1035, 1039 (1980). Because the police are engaging in their community caretaker function, not their criminal investigatory function, in meeting these needs they do not need a warrant or probable cause. United States v. Marshall, 986 F.2d 1171, 1174 (8th Cir. 1993). Fundamentally, warrantless inventory searches are assumed to be completely divorced from any investigatory motive. Thus, in order for an inventory search to survive Fourth Amendment scrutiny, the Commonwealth bears the burden of establishing all of the following: (1) the vehicle was lawfully impounded; (2) the impoundment and subsequent search were conducted pursuant standard police procedures; and (3) the impoundment and subsequent search “must not be a pretextual surrogate for an improper investigatory motive.” Williams v. Commonwealth, 42 Va. App. 723, 730 (2003). All three prongs must be independently satisfied by the Commonwealth in order for an inventory search to survive constitutional scrutiny.

### **Was The Vehicle Lawfully Impounded?**

“The validity of the impoundment is a question separate from the validity of the subsequent inventory search and must be determined first.” King v. Commonwealth, 39 Va. App. 306, 311 (2002). Under Va. Code §46.2-301.1(A), a motor vehicle being driven by any person suspended for the following reasons “shall be impounded or immobilized by the arresting law-enforcement officer at the time the person is arrested for driving after his driver’s license, learner’s permit or privilege to drive has been so revoked or suspended”:

- DUI (Va. Code §18.2-266)
- DUI Maiming (Va. Code §18.2-51.4)
- Driving After Being Suspended For DUI Offense (Va. Code §18.2-272)
- Driving During Administrative Suspension For DUI (Va. Code §46.2-391.2)
- Commercial Driver DUI (Va. Code §46.2-341.24)

- Driving after being declared an habitual offender (based on an alcohol-related offense)
- Breathalyzer Refusal (Va. Code §18.2-268.3) or Commercial Driver Breathalyzer Refusal (Va. Code §46.2-341.26:3)
- Driving Without An Operator's License In Violation of Va. Code §46.2-300 after having been previously convicted of the same offense

In this situation, the evidence has failed to establish that the defendant's operator's license was suspended for any of the above reasons. Moreover, Va. Code §46.2-301.1 only authorizes impoundment "at the time the person is arrested." In this case, Officer testified that he was not arresting the defendant due to lack of evidence that the defendant had notice of his suspension.

As there was no statutory basis for impounding the defendant's vehicle, the question then turns to whether there was any other lawful basis for impoundment. Officer testified that he impounded the vehicle because he found that it constituted a traffic hazard. The facts in this case are similar to those found in King v. Commonwealth, 39 Va. App. 306 (2002). In King, an officer determined that the defendant's license was suspended during a traffic stop. The defendant's vehicle was stopped on a two-lane "very heavily congested" street. An elementary school and other public buildings, including a library, were located nearby. The officer testified that he "wouldn't put a vehicle there and just leave it there" because the street was congested, and it was "not a rural street [where one would] leave a vehicle." However, the vehicle was not impeding traffic and there was no evidence it was in a no-parking or otherwise restricted zone. Id. at 307-308. The Court of Appeals found that the impoundment of the defendant's vehicle was not legally justified stating:

"Although the area where the stop occurred was described as a 'very heavily congested' two-lane street near an elementary school, a library, and other public buildings, the car neither obstructed the free flow of traffic, posed a trespassory presence on private property, nor violated any parking ordinances. In addition, King, the owner of the vehicle, was not taken into custody or removed from the scene and, although he could not personally drive the vehicle, the evidence failed to show he was unable to arrange for its removal to another location, or to safeguard his property. Indeed, the record shows that the police made no inquiry regarding King's ability to make arrangements to have the car driven from Virginia to his home in Maryland or otherwise moved. Moreover, there is no evidence that,

prior to impoundment, King had property in the car, subject to theft or vandalism.” Id. at 312.

The holding in King controls the outcome here. The testimony at the motion to suppress established that the vehicle was parked on a two lane street and was not obstructing the free flow of traffic. Moreover, the defendant was not being taken into custody, and thus had the ability to make his own arrangements for the vehicle to be moved to another location. Officer \_\_\_\_\_’s testimony that it was easier and more convenient to arrange for the vehicle to be towed himself is not a substitute for the requirement under the Fourth Amendment that “the public’s safety was at risk or that a need to safeguard the vehicle existed” before impoundment is legally justified. Id. at 312. As the Court of Appeals noted in King, “[I]ndividual citizens’ right to be free from unwarranted searches of one’s person or property is to be balanced against the public interest in the safety and welfare of all those involved. Thus, a law enforcement department’s general grant of authority to its officers to exercise discretion in impounding vehicles, of necessity, incorporates Fourth Amendment principles and the limitations they impose on the exercise of discretion in conducting such searches.” Id. at 312-313. Under the specific circumstances in this case where the defendant was not being taken into custody and his vehicle was not obstructing the flow of traffic, it violated his Fourth Amendment rights to seize and search his property without giving him an opportunity to make arrangements for his vehicle to be moved.

### **Was The Inventory Search Conducted Pursuant To Standard Police Procedures?**

The second prong of the Williams v. Commonwealth test requires proof from the Commonwealth that the warrantless inventory search was conducted by the officer according to standardized department procedures. The underlying justification for the warrantless search pursuant to the community caretaker inventory exception is that standardized procedures sufficiently limit the searching officer’s discretion, thereby, preventing his search from developing into “a ruse for a general rummaging in order to discover incriminating evidence.” Florida v. Wells, 495 U.S. 1, 4 (1990).

The Court of Appeals of Virginia in Cantrell v. Commonwealth, 65 Va. App. 53, (2015), conducted an analysis of cases examining the adequacy of police department standard procedures governing inventory searches. In each case, as in Cantrell, the trial court record provided details of the applicable department procedures either through the introduction of the written procedures or testimony of the officer describing the standard procedures. In this case, the Commonwealth did not introduce written department

inventory search procedures. The only testimony regarding standard inventory search procedures was Officers \_\_\_\_\_'s and \_\_\_\_\_'s admissions on cross-examination that they failed to fill out an inventory tow form as required by department policy. Since the Commonwealth bears the burden of proof to overcome the presumption against a warrantless search and seizure, the failure to introduce any evidence relating to department inventory procedures is fatal. Particularly when the only evidence of department procedures was that Officers \_\_\_\_\_ and \_\_\_\_\_ violated procedures by failing to complete a tow form.

While reviewing courts have not insisted that an officer conduct inventory searches in a totally mechanical fashion, the Commonwealth must provide some reference point for a comparison of police actions to department procedures. Florida v. Wells, 495 U.S. 1 (1990). In this case, this Court is unable to conduct the required review of compliance with department inventory procedures due to the Commonwealth's failure to introduce any evidence of standardized procedures. As it is the Commonwealth's burden to prove that the warrantless inventory search was reasonable, their failure of proof ends this Court's analysis and demands suppression of all evidence recovered during the search and flowing from the search.

### **Did The Challenged Inventory Search Have An Improper Investigatory Motive?**

In addition to the first two prongs, an inventory search will also fail Fourth Amendment scrutiny where “the inventory is merely ‘a pretext concealing an investigatory police motive.’” Reese v. Commonwealth, 220 Va. 1035, 1039 (1980) (concluding the inventory exception did not apply where the motive prompting the search was “manifestly” shown to be investigatory); Florida v. Wells, 495 U.S. 1, 4 (1990) (“An inventory search must not be a ruse for a general rummaging in order to discover incriminating evidence.”).

In Virginia, appellate courts have consistently held that even if investigatory motives are merely one factor among others, it renders an inventory search improper under the Fourth Amendment. In Cantrell v. Commonwealth, 65 Va. App. 53, 60 (2015), a police officer conducted a traffic stop after the defendant failed to stop at a stop sign. Id. at 51. The officer eventually impounded the vehicle and conducted an inventory search pursuant to the impoundment. Id. at 58. The officer testified that while taking inventory of the vehicle’s contents, he was looking for narcotics as well as inventorying the contents of the vehicle. Id. The Court of Appeals ruled the search was unreasonable, stating the officer’s “glaring admission prove[d] that [the officer’s] search of Cantrell’s vehicle was not for the benign purposes underlying the community caretaker exception;

instead, one of his reasons for performing the inventory search was to improperly search for contraband and other evidence of crime. Id. at 65. In sum, even if one reason for an otherwise legal inventory search is to search for narcotics, it undermines the total legality of the search. Id.

In Knight v. Commonwealth, 71 Va. App. 771 (2020), two officers stopped a vehicle for not having any license plates. While waiting for dispatch to run info on the vehicle's registration, bodycam captured officers discussing whether, and how, they could search the car for weapons and drugs. When dispatch advised the officers that the driver had a warrant for failure to pay court costs, one of the officers pumped his fist in a "yes!" gesture. The officers arrested the defendant, impounded the vehicle, and conducted an inventory search yielding contraband. Id. at 778-779. The Court of Appeals reversed the defendant's conviction and held that the inventory search clearly had an investigatory motive demonstrated by the officers' joyful reaction to the discovery of the defendant's warrant and their discussion of ways to justify a search. Id. at 784-785.

Cantrell and Knight demonstrate that the bar for an improper investigatory motive is extremely low in Virginia. If an officer's mere enthusiasm regarding the ability to search a vehicle, or an officer's admission that looking for contraband was one aspect of his motivation is sufficient to prove an improper investigatory motive, then the police conduct in the instant case far exceeds this standard. Detective \_\_\_\_\_ admitted that Mr. \_\_\_\_\_

was a person of interest in an ongoing narcotics investigation connected to \_\_\_\_\_

Road and that he directed Officer \_\_\_\_\_ to find a reason to pull him over. Officer \_\_\_\_\_ acknowledged that \_\_\_\_\_'s directive to pull over the vehicle was the entire impetus behind the traffic stop. It strains credulity to conclude anything other than that Detective \_\_\_\_\_

's purpose was to try to find a way to get into the vehicle and that Officer \_\_\_\_\_ knew there were likely narcotics in the vehicle based on being directed by narcotics detectives to pull it over. Moreover, the officers' investigatory motive is clearly manifested by the fact that Officers \_\_\_\_\_ and \_\_\_\_\_ immediately abandoned their search of the vehicle upon discovering suspected drugs and failed to record any of the contents of the vehicle. It is difficult to believe that the officers were acting in a community caretaking role to protect Mr. \_\_\_\_\_'s property when they failed to record a single item of his property.

As Cantrell and Knight demonstrate, any hint of an officer's ulterior motive in conducting an inventory search context renders the search unreasonable. In this case, the combined roles of the officers make plain that the search of the vehicle was investigatory. Narcotics detectives \_\_\_\_\_ and \_\_\_\_\_ requested that Officer \_\_\_\_\_ effect a pretextual traffic stop on a vehicle leaving a drug house under surveillance. \_\_\_\_\_, without probable cause, utilized an improper warrant exception to justify a search. Officers \_\_\_\_\_ and \_\_\_\_\_ immediately abandoned their search of the vehicle upon the discovery of narcotics and

summoned and back to the scene. No items recovered from the vehicle other than the narcotics were ever recorded. The totality of the circumstances overwhelmingly demonstrates that the officers' combined actions had nothing to do with safekeeping the defendant's property and were instead prompted by an improper investigatory motive which violated the Fourth Amendment.

### **Request For Relief**

The defendant respectfully moves this Honorable Court to suppress all evidence found pursuant to the inventory search of the defendant's vehicle because the Commonwealth has failed to satisfy their burden of establishing that the warrantless search was "reasonable" under the Fourth Amendment. The defendant further moves the Court to suppress all evidence recovered from a search of his person because that search only resulted from the improper inventory search and is thus "fruit of the poisonous tree." Wong Sun v. United States, 371 U.S. 471, 484-85 (1963).

Respectfully submitted,

By: \_\_\_\_\_

Taite A. Westendorf  
Westendorf & Khalaf, PLLC  
1 Columbus Center, Suite 600  
Virginia Beach, Virginia 23462  
757-961-3311, 757-707-9422 (fax)

### **CERTIFICATE OF SERVICE**

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Taite A. Westendorf