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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

In re KASHAAD BROWN on Habeas Corpus.	B239066 (Los Angeles County Super. Ct. No. SA073687)

ORIGINAL PROCEEDING on petition for writ of habeas corpus. Katherine Mader, Judge. Petition denied.

Adrian K. Panton, under appointment by the Court of Appeal, for Petitioner.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Blythe J. Leszkey and Louis W. Karlin, Deputy Attorneys General, for Respondent.

A jury convicted Kashaad Brown of possession for sale of cocaine base (Health & Saf. Code, § 11351.5) and ectasy (Health & Saf. Code, § 11378), possession of a firearm by a felon (Pen. Code, § 12021, subd. (a)(1)), unlawful possession of ammunition (Pen. Code, § 12316, subd. (b)(1)) and possession of a short barreled shotgun or rifle (Pen. Code, § 12020, subd. (a)(1)); and the trial court imposed an aggregate state prison sentence of six years four months. This court affirmed the judgment on appeal after Brown's appointed counsel filed an opening brief in which no issues were raised and our own examination of the record confirmed no arguable issue existed. (*People v. Brown* (Jan. 25, 2012, B230954) [nonpub. opn]; see *Smith v. Robbins* (2000) 528 U.S. 259, 277-284 [120 S.Ct. 746, 145 L.Ed.2d 756]; *People v. Kelly* (2006) 40 Cal.4th 106; *People v. Wende* (1979) 25 Cal.3d 436, 441.)

Shortly after we filed our opinion Brown petitioned this court for a writ of habeas corpus, arguing his trial counsel had provided constitutionally deficient representation by failing to move to suppress the evidence recovered after Brown's arrest during an inventory search of his impounded vehicle. Brown contended the impoundment of his car was not justified by any community caretaking function of the Santa Monica Police Department, the agency responsible for the arrest, and his trial counsel had erred in assuming the inventory search was lawful. After receiving an informal response from the Attorney General, on April 19, 2012 we issued an order to show cause why the relief requested by Brown's petition should not be granted and specifically direct the written return to address the following question: "Was the search of petitioner's vehicle conducted pursuant to a standardized inventory procedure? (See *South Dakota v. Opperman* (1976) 428 U.S. 364, 372[, (96 S.Ct. 3092, 49 L.Ed.2d 1000)].)"

Based on the petition, the Attorney General's return and Brown's traverse, we conclude Brown is not entitled to habeas corpus relief.

FACTUAL BACKGROUND

1. *Brown's Arrest and the Search of His Car*

On the night of May 13, 2010 Santa Monica Police Officer Christopher Kahmann and his partner, Enrique Rodriguez, were informed a narcotics transaction had occurred at a house on Michigan Avenue in Santa Monica. The officers drove by the house and saw a woman talking to the driver of a parked car outside the house. A computer check of the car's license plate showed that Brown, the registered owner, had a suspended license. The officers parked in an adjacent alley to watch the car.

When the car drove away, the officers followed for two blocks, noticed the car had an inoperable tail light and initiated a traffic stop. Brown, the driver, produced his license and acknowledged it was suspended. The officers noted the address on Brown's license was the same as the house where the narcotics transaction had reportedly occurred. Brown was arrested for driving on a suspended license. Claiming he lived around the corner from the point of arrest, Brown asked if he or someone else could drive his car home. (In fact, Brown's then-current residence was in Inglewood; the Santa Monica house was owned by his family.) That request was not answered.

During a search of Brown, Officer Kahmann found a four and one-half inch, fixed-blade kitchen-type knife in Brown's pocket. Brown was placed in the back of the patrol vehicle, and Kahmann searched Brown's car. Kahmann recovered a total of 192 methylenedioxymethamphetamine (ecstasy) tablets divided into 17 separate plastic bags; $192 in cash; lists of names and telephone numbers on sheets of paper; and 15 grams of rock cocaine, most of which was inside a large bag and some of which was divided among three separate plastic bags contained inside the large bag. The ecstasy was found inside the center console of Brown's car; the cash and lists in the glove compartment; the rock cocaine underneath the carpet in the vehicle's trunk. The officers also found a loaded, sawed-off shotgun protruding from a backpack inside the trunk. Additional ammunition was inside the backpack.

Brown's trial counsel did not move to suppress the evidence seized in the search of the car. According to a declaration from Brown's appellate counsel included with the petition for writ of habeas corpus (the only evidence submitted that was not contained in the trial record), trial counsel "stated that it was his belief the search was proper as an inventory search of an impounded vehicle."

2. *Officer Kahmann's Declaration and the Santa Monica Police Department Policy 510*

In a declaration submitted with the Attorney General's return, Officer Kahmann explained his decision to impound Brown's car following his arrest for driving with a suspended license: "Because Mr. Brown was the sole occupant of the vehicle and could not legally drive it, I decided to have it towed to an impound lot, as authorized by Vehicle Code, section 14602.6, subdivision (a)(1),[1] section 14607.6, subdivision (a),[2] and section 22651, subdivision (p).[3]" Kahmann's declaration continues, "Another factor bearing on my decision to impound the Camry was that the vehicle [was] parked in a preferential parking zone . . . without the required permit. Not only would it be subject to ticketing and towing the following morning if left there, but there would be a likelihood that criminals would perceive it as being abandoned and break into it. The area was

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1 Vehicle Code section 14602.6, subdivision (a)(1), provides, "Whenever a peace officer determines that a person was driving a vehicle while his or her driving privilege was suspended or revoked . . . the peace officer may either immediately arrest that person and cause the removal and seizure of that vehicle or, if the vehicle is involved in a traffic collision, cause the removal and seizure of the vehicle without the necessity of arresting the person . . . ."

2 Vehicle Code section 14607.6, subdivision (a), provides, "Notwithstanding any other provision of law, . . . a motor vehicle is subject to forfeiture as a nuisance if it is driven on a highway in this state by a driver with a suspended or revoked license . . . ." Subdivision (c)(1) of this Vehicle Code section provides, "If a driver is unable to produce a valid driver's license on the demand of a peace officer enforcing the provisions of this code, . . . the vehicle shall be impounded regardless of ownership . . . ."

3 Vehicle Code section 22651, subdivision (p), authorizes the removal of a vehicle by a peace officer when the driver has been issued a notice to appear for driving with a suspended license (Veh. Code, § 14601), among other traffic offenses.

known as a high-crime area for automobile burglaries." With respect to Brown's request to allow someone else drive the car home, Kahmann stated he had learned the vehicle registration process was not completed for the car, raising some doubt whether Brown was authorized to release it to another person, and there were officer safety concerns in waiting for an unknown person to arrive at the scene.

In his declaration in support of the habeas petition, Brown's appellate counsel stated he was told by Investigator Olson of the Santa Monica Police Department in January 2012, "[T]he department does not have an independent written policy but relies on the authority of the Vehicle Code to impound a vehicle when the driver is arrested for driving with a suspended license." Responding to that comment, Officer Kahmann attached to his declaration a copy of Policy 510 of the Santa Monica Police Department's Policy Manual, "Vehicle Towing Policy." Kahmann declared, "I was aware of Policy 510 at the time I conducted the inventory of Mr. Brown's vehicle. I conducted the search in accordance with Policy 510 and especially, Policies 510.2.1, 510.[2].3, and 510.4."

Section 510.2 of the policy provides, in part, "If a vehicle presents a hazard, such as being abandoned on the roadway, it may be towed immediately." Section 510.2.3 provides, "Whenever a person in charge or in control of a vehicle is arrested, it is the policy of this Department to provide reasonable safekeeping by storing the arrestee's vehicle subject to the exceptions described below. . . . The vehicle, however, shall be stored whenever it is needed for the furtherance of the investigation or prosecution of the case, or when the community caretaker doctrine would reasonably suggest that the vehicle should be stored (e.g., traffic hazard, high crime area)." Section 510.2.3 gives examples of situations where consideration should be given to leaving a vehicle at the scene in lieu of storing "provided the vehicle can be lawfully parked and left in a reasonably secured and safe condition," including "[w]henever the vehicle otherwise does not need to be stored and the owner requests that it be left at the scene."

Section 510.4 of the policy governs the procedure for an inventory search of an impounded vehicle: "All property in a stored or impounded vehicle shall be inventoried

and listed on the vehicle storage form. This includes the trunk and any compartments or containers, even if closed and/or locked. Members conducting inventory searches should be as thorough and accurate as practical in preparing an itemized inventory. These inventory procedures are for the purpose of protecting an owner's property while in police custody, to provide for the safety of officers, and to protect the Department against fraudulent claims of lost, stolen, or damaged property."

Although Brown's traverse disputed whether Kahmann had, in fact, conducted the inventory search of his car in accordance with the Santa Monica Police Department's written policy guidelines, he does not deny that the department adopted Policy 510 or that Kahmann was familiar with it.

DISCUSSION

1. *Governing Legal Principles*

a. *Habeas corpus*

"'"For purposes of collateral attack, all presumptions favor the truth, accuracy, and fairness of the conviction and sentence; *defendant* thus must undertake the burden of overturning them. Society's interest in the finality of criminal proceedings so demands, and due process is not thereby offended."'" (*In re Avena* (1996) 12 Cal.4th 694, 710.) "'Because a petition for writ of habeas corpus seeks to collaterally attack a presumptively final criminal judgment, petitioner bears a heavy burden initially to *plead* sufficient grounds for relief, and then later to *prove* them.' [Citation.] The petitioner 'must prove, by a preponderance of the evidence, facts that establish a basis for relief on habeas corpus.'" (*In re Price* (2011) 51 Cal.4th 547, 559.)

b. *Ineffective assistance of counsel*

"'To establish ineffective assistance of counsel under either the federal or state guarantee, a defendant must show that counsel's representation fell below an objective standard of reasonableness under prevailing professional norms, and that counsel's deficient performance was prejudicial, i.e., that a reasonable probability exists that, but for counsel's failings, the result would have been more favorable to the defendant.'"

(*In re Roberts* (2003) 29 Cal.4th 726, 744-745; see *Strickland v. Washington* (1984) 466 U.S. 668, 694 [104 S.Ct. 2052, 80 L.Ed.2d 674]; *People v. Ledesma* (1987) 43 Cal.3d 171, 217.) With respect to the requisite showing of prejudice in a habeas corpus proceeding alleging trial counsel was incompetent, "'the petitioner must show us what the trial would have been like, had he been competently represented, so we can compare that with the trial that actually occurred and determine whether it is reasonably probable that the result would have been different.' [Citation.] After weighing the available evidence, its strength and the strength of the evidence the prosecution presented at trial [citation], can we conclude petitioner has shown prejudice? That is, has he shown a probability of prejudice 'sufficient to undermine confidence in the outcome'?" (*In re Hardy* (2007) 41 Cal.4th 977, 1025.)

The failure to move to suppress or otherwise object to evidence does not constitute ineffective assistance of counsel if the evidence was admissible and any objection would have been unsuccessful: "The Sixth Amendment does not require counsel to raise futile motions." (*People v. Solomon* (2010) 49 Cal.4th 792, 843, fn. 24; accord, *People v. Memro* (1995) 11 Cal.4th 786, 834 ["[t]he Sixth Amendment does not require counsel '"to waste the court's time with futile or frivolous motions'"'"]; see *People v. Szadziewicz* (2008) 161 Cal.App.4th 823, 836 [failure to make a futile or unmeritorious motion or request is not ineffective assistance].)

2. *The Inventory Search of Brown's Car Did Not Violate His Fourth Amendment Rights*

a. *The inventory-search exception to the Fourth Amendment's warrant requirement*

The Fourth Amendment's prohibition of "unreasonable searches and seizures" generally precludes warrantless searches of an individual and his or her possessions, including an automobile. (See *In re Arturo D.* (2002) 27 Cal.4th 60, 68.) However, the Supreme Court has recognized police officers have a legitimate interest in taking an inventory of the contents of vehicles they legally tow and impound "to protect an owner's property while it is in the custody of the police, to insure against claims of lost, stolen, or

vandalized property, and to guard the police from danger." (See *Colorado v. Bertine* (1987) 479 U.S. 367, 372 [107 S.Ct. 738, 93 L.Ed.2d 739].) Such "inventory searches" are now considered "a well-defined exception to the warrant requirement of the Fourth Amendment." (*Id.* at p. 371.) To ensure it is not merely used as a pretext or ruse to search vehicles for contraband or other incriminating evidence, a warrantless inventory search must be conducted "pursuant to standard police procedures" (*South Dakota v. Opperman*, *supra*, 428 U.S. at p. 372 and be "sufficiently regulated" to avoid wholly unfettered police discretion. (*Florida v. Wells* (1990) 495 U.S. 1, 4 [110 S.Ct. 1632, 109 L.Ed.2d 1]; see also *Opperman,* at p. 384.) Evidence discovered in an inventory search conducted pursuant to clear police department guidelines must nonetheless be excluded if the decision to impound the vehicle violated the Fourth Amendment. (See *People v. Aguilar* (1991) 228 Cal.App.3d 1049, 1053.)

b. *Brown's car was subject to impound*

This court in *People v. Green* (1996) 46 Cal.App.4th 367 suggested the authority to impound under the Vehicle Code is all that is required for a valid impoundment, explaining, because the "officers acted pursuant to standard impound procedures provided by Vehicle Code section 22651, subdivision (p), [they] acted well within their authority to impound defendant's car . . . ." (*Green*, at p. 373.) Our colleagues in Division Eight of this court in *People v. Williams* (2006) 145 Cal.App.4th 756, in contrast, held a decision to impound a vehicle must be based on a valid community caretaking or public safety function, not simply statutory authorization. "Whether 'impoundment is warranted under this community caretaking doctrine depends on the location of the vehicle and the police officers' duty to prevent it from creating a hazard to other drivers or being a target for vandalism or theft.'" (*Id*. at p. 761.)

We need not reconcile the holdings of these decisions, however; for Brown does not dispute objective grounds existed for impounding his car under either standard. The car was subject to impoundment under the relevant provisions of the Vehicle Code and the department's policy manual identified by Officer Kahmann and quoted above.

Moreover, because Brown was legally disabled from driving and his car parked without the required permit in a restricted parking zone known as a high-crime area, impoundment was plainly justified by the police department's community caretaking function. (Compare, e.g., *People v. Benites* (1992) 9 Cal.App.4th 309 [impoundment proper where neither driver nor passenger had valid driver's license; van was three miles from town on an isolated stretch of road late at night] and *People v. Burch* (1986) 188 Cal.App.3d 172 [impoundment proper where car's registration tag was expired and driver's license was suspended] with *People v. Williams, supra,* 145 Cal.App.4th at pp. 759, 762 [impoundment constitutionally unreasonable where appellant stopped for failing to wear seatbelt and subsequently arrested based on outstanding warrant; parties stipulated Santa Monica Police Department had no written policy addressing when a car should be impounded; and appellant's car was properly registered and legally parked in front of his residence].)

Rather than questioning the objective factors supporting impoundment, citing *People v. Torres* (2010) 188 Cal.App.4th 775, Brown insists they were a ruse to discover evidence of criminal activity through an inventory search. (See *id*. at p. 791 ["[t]he relevant question is whether the impounding was subjectively motivated by an improper investigatory purpose"]; *South Dakota v. Opperman, supra,* 428 U.S. at p. 376 [inventory search may not be "a pretext concealing an investigatory police motive"]; *Colorado v. Bertine, supra,* 479 U.S. at p. 376 [inventory search improper when police officers impound vehicle "in order to investigate suspected criminal activity"].) In *Torres* the officer who had impounded defendant's truck, which was safely and legally parked in a public lot following a traffic stop, testified narcotics agents had asked him to manufacture a reason to detain and search the vehicle. (*Torres*, at pp. 786, 789-790.)[4] Based on that

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[4] Brown also cites *People v. Aguilar, supra,* 228 Cal.App.3d 1049, in which the officer who had impounded the vehicle testified he followed the vehicle because he suspected criminal activity and intended to make a stop as soon as a traffic violation was committed. He then impounded the vehicle so he could look in the trunk. (*Id.* at pp. 1051-1052.)

express admission and the absence of any evidence the truck was illegally parked, at an enhanced risk of vandalism, impeding traffic or could not be driven away by someone other than defendant, the appellate court held impounding the truck served no community caretaking function and the subsequent inventory search was unlawful. (*Id.* at pp. 789-790.)

Although lacking any similar concession of investigatory motive from Officer Khamann (and without demonstrating any reasonable probability Khamann would have made such an admission if examined by his counsel at a suppression hearing), Brown argues the circumstances surrounding his detention justify an inference the purpose of the stop was solely to create a basis for impounding the vehicle and then conducting an inventory search for evidence of criminal activity: Officer Khamann knew the Camry was registered to Brown, Brown's license was suspended and the Camry appeared to have an inoperable tail light; yet Khamann allowed him to drive two blocks away from the house before initiating the traffic stop.

As discussed, however, in *People v. Torres, supra,* 188 Cal.App.4th 775, there was both an admission by the officer impoundment of the vehicle was a ploy and a complete absence of any community caretaking considerations to justify the impoundment. As the court explained, "[T]he cases upholding inventory searches of impounded cars driven by unlicensed drivers stress one or both of two factors, neither of which is present here: (1) the need to impound the car to serve some community caretaking function, and (2) the absence of pretext." (*Id*. at p. 791.) Similarly, in *United States v. Cervantes* (9th Cir. 2012) 678 F.3d 798, modified by 703 F.3d 1135, discussed at length in Brown's traverse, the majority emphasized neither of the arresting officers testified the vehicle they impounded was parked illegally, posed a safety hazard or was vulnerable to vandalism or theft. (*Id.* at p. 805.) Here, in contrast, there was strong evidence—now reinforced by Officer Kahmann's declaration—the impound decision was based on legitimate community caretaking concerns.

Moreover, even if there was some circumstantial evidence that might arguably support an inference the decision to impound was also intended to help develop evidence of criminal activity,[5] dual motives do not make the impoundment pretextual. (See *United States v. Frank* (3d Cir. 1988) 864 F.2d 992, 1001 ["[t]he mere fact that an inventory search may also have had an investigatory purpose does not, however, invalidate it"]; cf. *United States v. Bowhay* (9th Cir. 1993) 992 F.2d 229, 231 [so long as officer "had dual bona fide motives," an investigatory motive does not invalidate an otherwise lawful inventory search]; see also *United States v. Ponce* (5th Cir. 1993) 8 F.3d 989, 995 ["[s]ince Ponce has failed to show that the police, who were following standardized procedures, acted in bad faith or for the sole purpose of investigation, the search was reasonable under the Fourth Amendment"]; *United States v. Staller* (5th Cir. 1980) 616 F.2d 1284, 1290 [approving inventory search where, even assuming officers suspected vehicle contained additional contraband, an officer's suspicion that evidence may be present does not invalidate an otherwise lawful inventory search" and noting, "'if an inventory search is otherwise reasonable, its validity is not vitiated by a police officer's suspicion that contraband or other evidence may be found'"].)

c. *The inventory search was conducted pursuant to the Santa Monica Police Department's written guidelines*

In *Florida v. Wells, supra*, 495 U.S. 1 the Supreme Court held the trial court should have suppressed marijuana found when officers opened a locked suitcase while inventorying a vehicle. (*Id*. at p. 2.) Reiterating the limitation on inventory searches it had announced in *Colorado v. Bertine, supra,* 479 U.S. 367, the Court explained "standardized criteria [citation] or established routine [citation] must regulate the opening

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[5] The officers' motive for the initial traffic stop itself is irrelevant to the validity of Brown's detention. (*Whren v. United States* (1996) 517 U.S. 806, 813 [116 S.Ct. 1769, 135 L.Ed.2d 89] [traffic stop is lawful if the "circumstances, viewed objectively, justify [the officer's] action"]; accord, *People v. Rodriguez* (1997) 53 Cal.App.4th 1250, 1266.) Brown does not contend his stop or his arrest for driving on a suspended license was improper.

of containers found during inventory searches" to safeguard the "principle that an inventory search must not be a ruse for a general rummaging in order to discover incriminating evidence." (*Wells*, at p. 4.) "The policy or practice governing inventory searches should be designed to produce an inventory. The individual police officer must not be allowed so much latitude that inventory searches are turned into 'a purposeful and general means of discovering evidence of crime.'" (*Ibid*.) Because the record in *Wells* contained no evidence of *any* policy of the law enforcement agency whose officers had conducted the search regarding the opening of closed containers during inventory searches, the Supreme Court concluded the marijuana found in the suitcase should have been suppressed: "[A]bsent such a policy, the . . . search was not sufficiently regulated to satisfy the Fourth Amendment . . . ." (*Id.* at p. 5.)

In *People v. Williams* (1999) 20 Cal.4th 119 the California Supreme Court reinforced this constitutional standard, emphasizing the "prosecution must always prove the existence of a policy supporting an inventory search . . . ." (*Id.* at p. 138.) "Because of the risk that an inventory search will be 'a ruse for a general rummaging,' a risk that this case particularly exemplifies, a valid inventory search must adhere to a preexisting policy or practice. [Citation.] This rule may require the prosecution to prove more than the existence of some general policy authorizing inventory searches; when relevant, the prosecution must also prove a policy or practice governing the opening of closed containers encountered during an inventory search." (*Ibid*.; see *Florida v. Wells*, *supra*, 495 U.S. at pp. 4-5.) The officers in *Williams* found methamphetamine in closed leather bags inside the defendant's truck during the inventory search. Because the prosecution did not prove the leather bags had been opened "pursuant to a policy or practice," the Court held the warrantless search was unlawful. (*Williams*, at p. 138.)

Brown's petition alleged the Santa Monica Police Department did not have a written policy governing the impoundment and inventory search of a vehicle when the driver has been arrested for driving with a suspended license. The Attorney General's informal response to the petition, filed at the request of this court, did not address that

point, arguing instead Brown's petition should be summarily denied because it provided no evidentiary basis for challenging the inventory search on the ground it was a ruse to conceal an improper investigatory motive for searching the vehicle. Accordingly, we issued an order to show cause and, as discussed, specifically directed that the return address whether the search of the vehicle had been conducted pursuant to a standardized inventory procedure.

Officer Kahmann's declaration, which Brown does not contradict, establishes that section 510.4 of Policy 510 of the Santa Monica Police Department's Policy Manual, "Vehicle Towing Policy," provides the requisite standardized inventory procedure. Because Officers Kahmann and Rodriguez were justified in impounding Brown's vehicle, the inventory search pursuant to this standardized procedure was constitutionally reasonable. (See *South Dakota v. Opperman, supra,* 428 U.S. at p. 372; *People v. Williams, supra,* 145 Cal.App.4th at p. 761.) Accordingly, the decision by Brown's trial counel not to move to suppress the evidence recovered during that search did not constitute ineffective assistance. (*People v. Solomon, supra,* 49 Cal.4th at p. 843, fn. 24.) Brown is not entitled to habeas corpus relief.

DISPOSITION

The petition for writ of habeas corpus is denied.

PERLUSS, P. J.

We concur:

WOODS, J.

JACKSON, J.