

2016

**State of Utah, Plaintiff/Appellee, vs. Romeo Lucero Olivarez,
Defendant/Appellant**

Utah Court of Appeals

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39142

Case No. 20150284-CA

IN THE
UTAH COURT OF APPEALS

STATE OF UTAH,
Plaintiff/Appellee,

v.

ROMEO LUCERO OLIVAREZ,
Defendant/Appellant.

Brief of Appellee

Appeal from convictions for two counts of unlawful possession of a controlled substance, both third degree felonies, in the Third Judicial District, Salt Lake County, the Honorable Randall Skanchy presiding

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Oral Argument Requested

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Brief of Appellee

STATEMENT OF JURISDICTION

Defendant appeals from convictions for two counts of unlawful possession of a controlled substance, both third degree felonies. This Court has jurisdiction under Utah Code Ann. § 78A-4-103(2)(e) (West Supp. 2012).

INTRODUCTION

The stop. While exiting the freeway on a four-lane ramp into Salt Lake City, Defendant properly signaled before moving from the second lane to the third lane. But immediately after entering the third lane, Defendant moved into the fourth lane. A Salt Lake City police officer who was following Defendant stopped him for violating Utah Code section 41-6a-804, which requires motorists to signal "continuously for at least the last two seconds preceding the beginning of the movement," i.e., the lane change.

Impounding the car. After making the stop, the officer learned that the car was not registered to Defendant and that Defendant's driver's license had been denied. Because Defendant did not have a valid driver's license, the officer decided to impound the car. After Defendant exited the car, the officer permitted him to make a telephone call for somebody to pick up the car. The officer also asked whether Defendant had any drugs or weapons. Defendant admitted to having a pair of brass knuckles. The officer seized the brass knuckles and arrested Defendant for possession of a dangerous weapon. Pursuant to department policy, the officer inventoried the car in preparation for its impound. That inventory uncovered a variety of illegal drugs and paraphernalia. After the officer had inventoried the car and just as it was being hooked up to the tow truck, the registered owner arrived to pick up his car. But because the car was well into the impound process, the officer refused to let the owner take possession at that point.

STATEMENT OF THE ISSUES

1. Did the officer have reasonable suspicion that Defendant violated Utah Code section 41-6a-804, requiring motorists to signal "continuously for at least the last two seconds preceding the beginning" of a change in lanes?
2. Did the officer violate Defendant's Fourth Amendment rights when he impounded the automobile Defendant was driving when stopped?

Standard of Review. A trial court's decision on a motion to suppress alleging a Fourth Amendment violation is a mixed question of law and fact. The court's factual findings are reviewed for clear error; its legal conclusions are reviewed for correctness, including its application of the legal standard to the facts. *State v. Fuller*, 2014 UT 29, ¶17, 332 P.3d 937.

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

The following constitutional provisions, statutes, and rules are reproduced in Addendum A: U.S. Const. amend. IV; Utah Code Ann. § 41-6a-804 (West Supp. 2015).¹

STATEMENT OF THE CASE

A. Summary of facts.

While exiting Interstate 15 on the four-lane ramp to the 1300 South Street or 900 South Street exits in Salt Lake City, Officer Jeremy Crowther saw a vehicle in front of him – driven by Defendant – move from the second lane to the fourth, or far right, lane. R141-42 (R65-66:¶2). Defendant properly signaled before moving from the second lane to the third lane, but then “in one continuous movement” Defendant “just went across all the traffic”

¹ Although the traffic stop at issue was in April 2013, the State cites section 41-6a-804 as amended in 2015. That amendment did not change the elements of the offense, but reduced the degree of the offense to an infraction. See Utah Code Ann. § 41-6a-804(5) (West Supp. 2015).

into the fourth lane—"without leaving [his vehicle in the third lane for] the appropriate two second signal." R142,153 (R65-66:¶2). Officer Crowther activated the emergency lights in his unmarked patrol car and Defendant pulled off to the side of the road after turning right (east) onto 900 South Street. R142-44,148 (R66:¶2).

Officer Crowther approached Defendant, explained why he stopped him, and requested his driver's license and registration. R145,156. Defendant produced the car's registration, which was in someone else's name, and Defendant advised Officer Crowther that it was not his car. R146,154. Defendant did not have a driver's license in his possession. R145-46. Officer Crowther asked if he had a valid license and Defendant told him that he did. R146. But when the officer requested Defendant's name and date of birth, and said that he was going to do a license check, Defendant admitted to Officer Crowther that his license might be suspended. R146.

Officer Crowther returned to his patrol car and ran a computer check on Defendant's driver's license, the vehicle registration, and Defendant's criminal background. R146-47. The driver's license check revealed that Defendant's license had in fact been denied. R146 (R66:¶3). The registration check showed that the vehicle he was driving was registered to someone other than Defendant. R146. And the criminal background check revealed

that Defendant was "a documented gang member" and drug user. R147,156. In fact, Officer Crowther had himself arrested Defendant several months before the stop on an unrelated drug charge. R147 (R66:¶3). After gathering this information, Officer Crowther decided to impound the vehicle because Defendant did not have a valid driver's license. R147,158 (R66:¶4).

Officer Crowther, together with a second officer who had arrived as backup, notified Defendant that his license had been denied and that they were going to impound the vehicle. R148-49. Upon being so advised, Defendant told Officer Crowther that the car belonged to his brother and asked if he could call him to come pick it up. R149,153-55 (R66:¶7). Officer Crowther permitted him to do so, but only after he exited the car. R149,151. Concerned for his safety based on Defendant's gang affiliation, Officer Crowther asked Defendant if he "had anything illegal, weapons or anything on his person." R149,156 (R66:¶5). Defendant admitted that he had a pair of brass knuckles in his pocket and consented to a search of his person. R149,157 (R66:¶5). Officer Crowther retrieved the brass knuckles and arrested Defendant for carrying a concealed weapon. R149-50 (R66:¶5).

After placing Defendant in his patrol car, Officer Crowther inventoried the vehicle Defendant had been driving in preparation for impound. R150 (R66:¶6). Consistent with the department's impound policy, SE2 (Ad-

dendum C), Officer Crowther documented the property found in the car using the department's impound forms. R150-51. The inventory uncovered methamphetamine, heroin, marijuana, and a glass pipe used to smoke narcotics. R152 (R66:¶6). The registered owner of the car—presumably Defendant's brother—arrived to pick up the car after the inventory was completed, just as the vehicle was being hooked up to the tow truck. R151-52 (R66:¶7). Because the car was already in the process of being towed, Officer Crowther proceeded with the impound. R152 (R66:¶7).

B. Summary of proceedings.

Defendant was charged with (1) unlawful possession of methamphetamine, a second degree felony; (2) unlawful possession of heroin, a second degree felony; (3) unlawful possession of a dangerous weapon by a restricted person, a class A misdemeanor; (4) unlawful possession of marijuana, a class A misdemeanor; and (5) unlawful possession of drug paraphernalia, a class B misdemeanor. R1-3. Following a preliminary hearing and bindover order, R24-25, R106-37 (transcript), Defendant moved to suppress the evidence seized from his person and from the car he was driving. R35-46. The State filed an opposing memorandum. R47-54. After holding an evidentiary hearing, the trial court denied the motion, R59-60,138-72, and entered corresponding findings of fact and conclusions of law, R65-68.

Defendant thereafter entered a conditional guilty plea to possession of methamphetamine and heroin, both third degree felonies, reserving his right to appeal the court's ruling denying his motion to suppress. R85,87-93. Defendant was sentenced to suspended prison terms of zero to five years, placed on supervised probation for 24 months, and ordered to serve 180 days in jail. R85-86. Defendant timely appealed. R75,84.

SUMMARY OF ARGUMENT

I. The justification for the stop. Defendant argues that the traffic stop was not justified at its inception because Utah Code section 41-6a-804 does not require that a driver signal for two seconds between each lane change. He is wrong. Section 41-6a-804, when properly read, requires a two-second signal before the beginning of a vehicle's movement, i.e., before a vehicle turns left or right or "change[s] lanes." Accordingly, when the officer saw Defendant immediately change to the fourth lane after entering the third lane, he had reasonable suspicion of a traffic violation that justified the stop. Even if this Court were to interpret section 41-6a-804 differently, reasonable suspicion still existed because the officer's interpretation would be a reasonable mistake of law—no appellate court has addressed the issue and the Department of Public Safety has interpreted section 41-6a-804 in similar fashion.

II. The vehicle impound. Defendant argues that the vehicle impound was not justified under the Fourth Amendment, primarily because the officer did not permit him to make arrangements for the registered owner to retrieve the vehicle. Although the vehicle impound cannot be justified under state law, it was reasonable under the circumstances. Defendant's driver's license had been denied. He was the only occupant of the car. And he was not the registered owner. Under these circumstances, impounding the car served the legitimate caretaking function of protecting the owner's property. Although Defendant was allowed to call the registered owner, the officer never knew whether or not arrangements had in fact been made. And he could not be certain that the person contacted was in fact the owner. Where Defendant was already under arrest, the officer was not required to wait in the hopes that the owner had been called and was on his way.

ARGUMENT

I.

The officer had reasonable suspicion that Defendant's continuous movement across two lanes was a violation of Utah Code section 41-6a-804.

In his motion to suppress, Defendant argued that Utah Code section 41-6a-804 requires only that a driver signal for two seconds before initiating a lane change, but may thereafter move into additional lanes without pausing two seconds in each lane changed. *See* R37. The trial court rejected that argument and thus concluded that "Officer Crowther directly observed a traffic offense and consequently the stop was justified at its inception." R67:¶1. This Court should affirm.

* * *

When a police officer makes a traffic stop, the vehicle occupants—both driver and passengers alike—are seized within the meaning of the Fourth Amendment. *Brendlin v. California*, 551 U.S. 249, 251 (2007). A routine traffic stop "is a relatively brief encounter" and is thus akin to the investigatory detention described in *Terry v. Ohio*, 392 U.S. 1 (1968). *Knowles v. Iowa*, 525 U.S. 113, 117 (1998). Accordingly, police officers are justified in making a traffic stop only if they have "'reasonable suspicion'—that is, 'a particularized and objective basis for suspecting the particular person stopped' of

breaking the law.” *Heien v. North Carolina*, ___ U.S. ___, 135 S.Ct. 530, 536 (2014).

The question in this case is whether Officer Crowther had reasonable, articulable suspicion that Defendant violated Utah Code section 41-6a-804 when he signaled for two seconds before changing from the second lane to the third, but then immediately moved into the fourth lane after entering the third lane. The answer is yes.

When properly read, section 41-6a-804 requires that a motorist signal for two seconds before changing into a different lane. Thus, a motorist wishing to move across multiple lanes must signal for two seconds before moving into each lane. Because Defendant moved into the fourth lane immediately after entering the third lane, the facts supported a reasonable suspicion that Defendant violated section 41-6a-804. But even if this Court were to interpret section 41-6a-804 as only requiring a two-second signal for the first lane change, reasonable suspicion still supported the stop. This is so because the officer’s reading of section 41-6a-804 as requiring a two-second signal before each lane change would be, in that case, a reasonable mistake of law.

- A. **Section 41-6a-804 requires that a driver signal for two seconds before moving into a different lane; Defendant's failure to do so thus provided the officer with at least reasonable suspicion to justify a traffic stop.**

Utah Code section 41-6a-804(1) imposes two requirements on drivers before turning or changing lanes:

(a) A person may not turn a vehicle or move right or left on a roadway or change lanes until:

(i) the movement can be made with reasonable safety; and

(ii) an appropriate signal has been given as provided under this section.

(b) A signal of intention to turn right or left or to change lanes shall be given continuously for at least the last two seconds preceding the beginning of the movement.

Utah Code Ann. § 41-6a-804(1) (West Supp. 2015). The issue on appeal addresses the second requirement governing the use of signals. The question is whether section 41-6a-804(1) requires a two-second signal before each lane change, or before only the first lane change when crossing over multiple lanes. As correctly understood by both the trial court and Officer Crowther, the statute requires a two-second signal before each lane change.

“ ‘When interpreting a statute, it is axiomatic that this court’s primary goal is to give effect to the legislature’s intent in light of the purpose that the statute was meant to achieve.’ ” *Monarrez v. Utah Dep’t of Transportation*, ___ P.3d ___, 2016 UT 10, ¶11 (quoting *Biddle v. Washington Terrace City*, 1999 UT 110, ¶14, 993 P.2d 875). That is generally done by looking to “ ‘the plain lan-

guage of the statute itself ” —not in isolation, but in “the relevant context” of the entire statutory scheme. *Id.* (quoting *State v. Miller*, 2008 UT 61, ¶18, 193 P.3d 92). When so read, section 41-6a-804 requires a two-second signal before each lane change.

A proper interpretation of section 41-6a-804 first requires an understanding of the vehicle movements it governs. There are two: (1) “turn[ing]” or “mov[ing] right or left on a roadway,” and (2) “chang[ing] lanes.” Utah Code Ann. § 41-6a-804(1)(a). Thus, like the Texas traffic code at issue in *United States v. Alvarado-Zarza*, 782 F.3d 246 (5th Cir. 2015)—upon which Defendant relies, Aplt.Brf. 17-20—the Utah Traffic Code recognizes “a distinction between the two” movements. *Alvarado-Zarza*, 782 F.3d at 250. But unlike the Texas statute under review in *Alvarado-Zarza*, section 41-6a-804 governs both movements. Accordingly, reference in the statute to “movement” refers to the movements of both “turn[ing] right or left” and “chang[ing] lanes.” Utah Code Ann. § 41-6a-804(1)(b). The focus here is the movement of changing lanes.

Section 41-6a-804 provides that a driver “may not . . . change lanes until” two requirements are met: (1) “the movement,” *i.e.*, the lane change, can be made with reasonable safety,” Utah Code Ann. § 41-6a-804(1)(a)(i); and (2) “[a] signal of intention . . . to change lanes [has been] given continu-

ously for at least the last two seconds preceding the beginning of the movement," *i.e.*, the lane change, Utah Code Ann. §§ 41-6a-804(1)(a)(ii) & (b). By its plain language, therefore, the statute imposes a two-second signal requirement "preceding the beginning" of any lane change. The Utah Driver Handbook also interprets section 41-6a-804 as requiring a signal "[f]or two seconds before beginning *any* lane change." Utah Driver Handbook p.12 (rev. 06-14) (attached to Aplt.Brff., Add. E) (emphasis added).

Here, Defendant did not make a single lane change; he made two such movements. After signaling for two seconds, he first changed from the second lane to the third lane. R141-42 (R65-66:¶2). Defendant then changed lanes again. After entering the third lane, he immediately moved into the fourth lane. R142,153 (R65-66:¶2). Unlike the first lane change, Defendant did not signal "continuously for at least the last two seconds preceding the beginning of [that] movement." Utah Code Ann. § 41-6a-804(1)(b). When Officer Crowther observed Defendant's movement from the third to the fourth lane, he not only had reasonable suspicion, but probable cause that Defendant violated section 41-6a-804(1). *See State v. Gettling*, 2010 UT 17, ¶5, 229 P.3d 647 ("Observing a vehicle commit a traffic violation gives police probable cause to detain the driver and passengers of the vehicle.").

The error in Defendant's interpretation of section 41-6a-804 is his failure to read the statute as a whole. Instead, he attempts to interpret the plain meaning of "movement" in isolation, without reference to the context in which the term is used. *See Monarrez*, 2016 UT 10, ¶11 (holding that Court will "'not interpret the plain meaning of a statutory term in isolation'") (citation omitted). Defendant interprets "movement" as referring only to the movement away from the lane of travel. Thus, according to Defendant, a change of multiple lanes in one continuous movement—or in his words, a "lane change maneuver"—constitutes but a single movement. *See Aplt.Brff.* 18,21 (arguing that Defendant complied with Utah's lane change law because he initiated a signal prior to starting his lane changes that consisted of 'one continuous movement'). But as discussed, that is not the way the statute reads. As relevant here, the term "movement" in section 41-6a-804 refers to "chang[ing] lanes." Utah Code Ann. § 41-6a-804(1)(b). Therefore, once Defendant entered the third lane, he was required to signal "continuously for at least the last two seconds before the beginning of the [next] movement, *i.e.*, before "chang[ing] lanes" again. *Id.*

The foregoing plain language interpretation of section 41-6a-804 is also consistent with "the purpose that the statute was meant to achieve.'" *See Monarrez*, 2016 UT 10, ¶11. Like all provisions in the Traffic Code, the pur-

pose of section 41-6a-804 is to ensure highway safety. Indeed, the first requirement before turning or changing lanes is that "the movement can be made with reasonable safety." Utah Code Ann. § 41-6a-804(1)(a)(ii). The two-second signal requirement furthers that objective by alerting motorists in the vicinity that the vehicle will be moving into their lane. A two-second signal ensures that motorists in that lane, or that motorists who are also about to enter that lane, are aware of that pending movement and have time to act accordingly. Nearby motorists would have no such warning if drivers were permitted to cross multiple lanes immediately after the first lane change.

In sum, the trial court's interpretation of the statute is consistent with both the plain language and purpose of the statute. Because Defendant did not signal continuously for two seconds before changing from the third lane to the fourth lane, Officer Crowther had at least reasonable suspicion that Defendant violated section 41-6a-804 and he was thus justified in making the traffic stop.

B. Even if section 41-6a-804 does not require that a driver signal for two seconds before each lane change, the officer's belief otherwise is a reasonable mistake of law.

Even if this Court were to interpret section 41-6a-804 as not imposing a two-second signal requirement before any lane change, Officer Crowther's interpretation of the statute to read otherwise was a reasonable mistake of law. "And because the mistake of law was reasonable, there was reasonable suspicion justifying the stop." *Heien*, 135 S.Ct. at 540.

"[S]earches and seizures based on mistakes of fact [or law] can be reasonable. . . . The limit is that 'the mistakes must be those of reasonable men.'" *Id.* at 356 (quoting *Brinegar v. United States*, 338 U.S. 160, 176 (1949)). In other words, "[t]he Fourth Amendment tolerates only *reasonable* mistakes, and those mistakes—whether of fact or of law—must be *objectively* reasonable." *Id.* at 539. Should this Court interpret section 41-6a-804's two-second signal requirement as applying only to the beginning of the first lane change in a multiple "lane change maneuver," Officer Crowther's contrary interpretation was, in fact, an "objectively reasonable" mistake of law.

As discussed, section 41-6a-804 is reasonably read as requiring a two-second signal before making any turn or lane change. This was the interpretation of the trial court. See R67:¶1. And this is the interpretation of the official Utah Driver Handbook published by the Department of Public Safety.

See Handbook, p.12 ("Signals are required . . . [f]or two seconds before beginning *any lane change*.") (emphasis added). Under these circumstances, a contrary holding by this Court could only be the result of an ambiguous statute. The officer's interpretation of the statute, therefore, was reasonable. Had this Court or the Utah Supreme Court interpreted the statute otherwise before now, the officer's alleged misunderstanding of the law would not have been reasonable. But Utah's appellate courts have not addressed this question. Accordingly, the officer's interpretation of section 41-6a-804, if mistaken, was reasonable. See *Alvarado-Zarza*, 782 F.3d at 250 (observing that mistake of law in *Heien* was reasonable where "statute contained at least some ambiguity" and "the state's appellate courts had not previously addressed the issue"). Because Officer Crowther's mistake of law—if there were one—"was reasonable, there was reasonable suspicion justifying the stop" in any event. *Heien*, 135 S.Ct. at 540.

II.

The officer's decision to impound the vehicle Defendant was driving did not violate the Fourth Amendment.

Defendant also argued below that Officer Crowther's inventory of the car violated the Fourth Amendment because (1) impounding the car was unnecessary where the registered owner was present at the scene, (2) impounding the car was not authorized by statute, and (3) impounding the car

was a pretext to search for drugs. R43-45. The trial court rejected these arguments. It ruled that impound was reasonable where Defendant "did not have a valid driver's license," Defendant "was not the owner," and Defendant "was the only occupant" of the vehicle. R67:¶2. The court also rejected Defendant's pretext claim because "Officer Crowther conducted the impound [inventory] pursuant to his department impound policy." R67:¶4. This Court should affirm.

* * *

As a general rule, a search requires a warrant based upon a finding of probable cause. *See United States v. Karo*, 468 U.S. 705, 717 (1984) (holding that "[w]arrantless searches are presumptively unreasonable"). The warrant rule, however, is subject to "a few limited exceptions." *Id.* One such exception is the inventory of lawfully impounded property, such as an automobile. *See South Dakota v. Opperman*, 428 U.S. 364 (1976). The inventory of an automobile serves three purposes: (1) "protecting the owner's property," (2) protecting the police against "liability for lost or stolen property," and (3) "protecting the police and public from danger." *State v. Hygh*, 711 P.2d 264, 267 (Utah 1985); *accord Opperman*, 428 U.S. at 369.

The inventory exception, therefore, is not grounded in the State's law enforcement interests. It is grounded in the State's "'community caretaking

functions.’ ” *Opperman*, 428 U.S. at 368 (quoting *Cady v. Dombrowski*, 413 U.S. 433, 441 (1973)). As such, “[t]he policies behind the warrant requirement are not implicated in an inventory search, nor is the related concept of probable cause” *Colorado v. Bertine*, 479 U.S. 367, 371 (1987). An inventory is permissible under the Fourth Amendment if two requirements are met. First, police must have “reasonable and proper justification for [impounding] the vehicle.” *Hygh*, 711 P.2d at 268. And second, police must conduct the inventory in substantial compliance with “ ‘an established reasonable procedure for safeguarding impounded vehicles and their contents.’ ” *Id.* at 269 (quoting 2 LaFare, Search & Seizure § 7.4, at 576-77 (1978)). The only issue on appeal is the first requirement—whether Officer Crowther was justified in impounding the car.²

As explained in *Hygh*, impounding a car may be justified “either through explicit statutory authorization or by the circumstances surrounding the initial stop.” *Id.* In this case, no specific statutory authority exists authorizing the impound of a vehicle whose driver does not have a valid operator’s license. *See, e.g.*, Utah Code Ann. § 41-1a-1101 (West Supp. 2015).

² Defendant has never claimed that Officer Crowther did not conduct the inventory in conformance with the Salt Lake City Police Department’s established impound policy. *See* R35-46; R160-67; Aplt.Brff. 22-37.

That said, the circumstances surrounding the stop justified the impound and resulting inventory. *Hygh*, 711 P.2d at 268.

As noted by the trial court, Defendant did not have a valid driver's license; he was the only occupant of the vehicle; and he was not the vehicle's owner. R67:¶2. Thus, whether or not he was under arrest when Officer Crowther decided to impound the car, Defendant could not lawfully drive it away from the scene, nor would he be permitted to do so. Defendant was also physically incapable of driving the car away once he was arrested — which preceded both the inventory and impound. *See* R150 (R66:¶5). And finally, no one was with Defendant who could have driven the car away. *See* R145. Officer Crowther thus had two choices: he could leave the car there — parked along the curb of 900 South Street, which sustains traffic from cars exiting the freeway — or he could impound the vehicle for the absent owner's safekeeping. Under these circumstances, the officer's choice to impound the car was justified under the Fourth Amendment. *See State v. Johnson*, 745 P.2d 452 (Utah 1987) (upholding impound where "neither [defendant] nor his friends could properly have moved the vehicle" from the motel parking lot). This is especially true where the registered owner was not present. *See Hygh*, 711 P.2d at 267 (recognizing that impound serves the legitimate purpose of "protecting the owner's property").

Citing *State v. Gauster*, 752 N.W.2d 496, 508 (Minn. 2008), Defendant argues that impound was not justified because "Officer Crowther failed to allow for an alternative to impound when [he] made it clear that a viable and immediate one was available." Apl't.Brf. 30. But the Fourth Amendment does not require an officer to pursue alternatives to impoundment. As noted by the Utah Supreme Court in *Johnson*, the United States Supreme Court in *Colorado v. Bertine* "held that although the police could have offered the defendant the opportunity to make other arrangements for the safekeeping of his property, their failure to do so did not eliminate the justification for taking an inventory of the defendant's property." *Johnson*, 745 P.2d at 454. As *Bertine* explained, "the police may still wish to protect themselves . . . against false claims of theft or dangerous instrumentalities." 479 U.S. at 373. " 'The reasonableness of any particular governmental activity does not necessarily or invariably turn on the existence of alternative less intrusive means.' " *Id.* at 374 (quoting *Illinois v. Lafayette*, 462 U.S. 640, 647 (1983)). It turns instead on " 'whether the Fourth Amendment *requires* such steps.' " *Id.* (quoting *Lafayette*, 462 U.S. at 647 (emphasis in original)). Here it did not.

Officer Crowther did in fact allow Defendant to make a telephone call for his brother to pick up the car. R151. But after Defendant made the call, Officer Crowther was never made aware of whether Defendant successfully

made arrangements for the car's retrieval. See R154 (when asked whether he knew there was an owner willing to take possession of the car, the officer testified, "I didn't talk to him, sir, so I don't know"). He thus had no idea if or when the registered owner would come. He only learned that when the owner arrived following the inventory. See R151 (testifying that Defendant "did make a phone call because someone actually showed up").

Additionally, as in *Bertine*, Defendant here had been arrested and placed in the patrol car before the vehicle was impounded. R150 (R66:¶¶5-6). Thus, as even *Gauster* recognized, it may be "necessary to do something with the vehicle" under such circumstances. 752 N.W.2d at 507 (emphasis in original). And *Gauster* agreed that it was not unreasonable for the Supreme Court in *Bertine* "to have concluded that in such a case, the police should not have to take time to determine how the arrestee wants to dispose of his vehicle." *Id.* This is especially true here. Although Defendant claimed that his brother owned the car, Officer Crowther had no way of knowing that was true at the time. And he had reason to doubt Defendant's representation—Defendant had initially lied that he had a valid driver's license, coming clean only after learning that Officer Crowther intended to verify his license status. R146. Under these circumstances, it was reasonable to proceed with the impound.

Defendant also argues that the impound was not justified because it violated the Salt Lake City Police Department's Impound Policy. Appt.Brf. 32-35. Relying on Tenth Circuit precedent, Defendant contends that to justify a vehicle impound, the police department's impound policy must "delineate the amount of discretion an officer has when deciding whether to impound a vehicle" and the officer must comply with those procedures. Appt.Brf. 32-33 (citing *United States v. Sanders*, 796 F.3d 1241, 1245 (10th Cir. 2015)). Defendant's argument fails for two reasons. First, whether a vehicle impound is justified under the Fourth Amendment does not turn on local police policies. And even if it did, Officer Crowther did not violate Salt Lake City's impound policy.

The federal circuits are in fact split as to whether the validity of a vehicle impound depends on the creation of, and compliance with, a police department's impound policy. See *Sanders*, 796 F.3d at 1247-48 (recognizing "a clear divide between the First, Third, and Fifth Circuits, which never consider whether an impoundment follows standardized procedures, and the Seventh, Eighth, Ninth, and D.C. Circuits," which do). This Court should follow the rationale of the First, Third, and Fifth Circuits.

As noted by the First Circuit, the Supreme Court in *Bertine* held that the vehicle impound in that case "was reasonable under the Fourth

Amendment because it was conducted pursuant to standard criteria and was based on something other than the suspicion of criminal activity.” *United States v. Coccia*, 446 F.3d 233, 238 (1st Cir. 2006). But the First Circuit understood *Bertine* to merely hold that an impound decision “made pursuant to standardized procedures will most likely, although not necessarily always, satisfy the Fourth Amendment.” *Id.* at 238-39. This Court should read *Bertine* likewise. As the United States Supreme Court has more recently emphasized, “ ‘whether or not a search is reasonable within the meaning of the Fourth Amendment’ . . . has never ‘depend[ed] on the law of the particular State in which the search occurs.’ ” *Virginia v. Moore*, 553 U.S. 164, 172 (2008) (quoting *California v. Greenwood*, 486 U.S. 35, 43 (1988)). In light of this holding, it would be strange indeed to hold that the reasonableness of an impound depended on local policy policies.

The “ ‘ultimate touchstone of the Fourth Amendment is reasonableness.’ ” *Riley v. California*, 134 S.Ct. 2473, 2482 (2014) (quoting *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006)). And reasonableness in the inventory setting is grounded not in a police department’s policy manuals, but in the legitimate caretaking interests of “protecting the police and public from danger, avoiding police liability for lost or stolen property, and protecting the owner’s property.” *Hygh*, 711 P.2d at 267. The Utah Supreme Court has thus

held that in determining whether a vehicle impound was justified under the Fourth Amendment, courts "must look to the circumstances surrounding the stop to determine whether the impound was reasonable." *Id.* at 268. This Court is bound to follow suit.

In any event, Officer Crowther followed department policy in exercising his discretion to impound the car. That policy permits officers to "impound vehicles as a means of enforcing local and State Laws, removing a public hazard or nuisance, securing evidence, *or protecting the vehicle and its contents until the owner can take possession of it.*" Impound Policy, p. 1 (Addendum C) (emphasis added). As explained above, the vehicle impound in this case was reasonable to "protect[] the vehicle and its contents until the owner [could] take possession of it." *Id.*

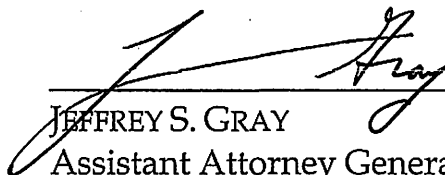
Defendant points to the policy's ensuing line: "To avoid needless expense and inconvenience to the vehicle owner, officers shall use discretion in determining whether or not a vehicle should be impounded." *Id.* But this does not mean that an officer must always eschew impound if doing so will avoid expense and inconvenience. As explained, the car's owner was not present and Officer Crowther had no assurance he would arrive. It was thus reasonable for him to impound the car. And by the time the owner did arrive, Officer Crowther had already conducted the inventory.

CONCLUSION

For the foregoing reasons, the Court should affirm.

Respectfully submitted on April 20, 2016.

SEAN D. REYES
Utah Attorney General



JEFFREY S. GRAY
Assistant Attorney General
Counsel for Appellee

CERTIFICATE OF SERVICE

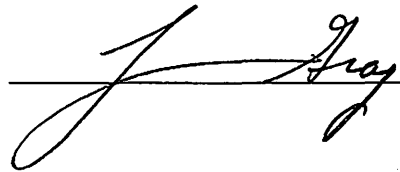
I certify that on April 20, 2016, two copies of the Brief of Appellee were ☒ mailed ☐ hand-delivered to:

Teresa L. Welch
Ralph Dellapiana
Salt Lake Legal Defender Ass'n
424 East 500 South, Ste. 300
Salt Lake City, UT 84111

Also, in accordance with Utah Supreme Court Standing Order No. 8, a courtesy brief on CD in searchable portable document format (pdf):

☐ was filed with the Court and served on appellant.

☒ will be filed and served within 14 days.



A handwritten signature in cursive script, appearing to read "J. Gray", is written over a horizontal line.

Addenda

ADDENDUM A

Relevant Constitutional Provisions and Statutes

U.S. Const. amend. IV

Utah Code Ann. § 41-6a-804 (West Supp. 2015)

U.S. Const. amend. IV

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

Utah Code Ann. § 41-6a-804 (West Supp. 2015)

(1)(a) A person may not turn a vehicle or move right or left on a roadway or change lanes until:

(i) the movement can be made with reasonable safety; and

(ii) an appropriate signal has been given as provided under this section.

(b) A signal of intention to turn right or left or to change lanes shall be given continuously for at least the last two seconds preceding the beginning of the movement.

(2) A person may not stop or suddenly decrease the speed of a vehicle without first giving an appropriate signal to the operator of any vehicle immediately to the rear when there is opportunity to give a signal.

(3)(a) A stop or turn signal when required shall be given either by the hand and arm or by signal lamps.

(b) If hand and arm signals are used, a person operating a vehicle shall give the required hand and arm signals from the left side of the vehicle as follows:

(i) left turn: hand and arm extended horizontally;

(ii) right turn: hand and arm extended upward; and

(iii) stop or decrease speed: hand and arm extended downward.

(c)(i) A person operating a bicycle or device propelled by human power may give the required hand and arm signals for a right turn by extending the right hand and arm horizontally to the right.

(ii) This Subsection (3)(c) is an exception to the provision of Subsection (3)(b)(ii).

(4) A person required to make a signal under this section may not flash a signal:

(a) on one side only on a disabled vehicle;

(b) as a courtesy or "do pass" to operators of other vehicles approaching from the rear; or

(c) on one side only of a parked vehicle.

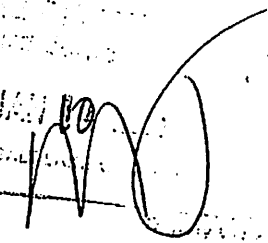
(5) A violation of this section is an infraction.

ADDENDUM B

Findings of Fact and Conclusions of Law

(R65-68)

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FILED
JAN 10
By 

IN THE THIRD DISTRICT COURT, SALT LAKE DEPARTMENT
IN AND FOR THE COUNTY OF SALT LAKE, STATE OF UTAH

THE STATE OF UTAH,

Plaintiff,

-vs-

ROMEO LUCERO OLIVAREZ,

Defendant.

FINDING OF FACTS AND
CONCLUSIONS OF LAW

Case No. 131904665 FS

Hon. Randall N. Skanchy

Defendant's Motion To Suppress having been raised in Court in the above entitled matter on December 9, 2013. The Court considered memoranda submitted by the Defense and the State as well as testimony and evidence adduced at the motion hearing. The Defendant was represented by counsel, Ralph Dellapiana, and the State was represented by Deputy District Attorney, Byron F. Burmester. The Court now enters its Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. Defendant, Romeo Lucero Olivarez was charged with three counts of possession of controlled substances, possession of a dangerous weapon by a restricted person and possession of drug paraphernalia arising out of a traffic stop on April 30, 2013.
2. On April 30, 2013 Officer Crowther observed a vehicle coming off the 900 South exit onto West Temple turn on its right turn signal but change multiple lanes

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Case No. 131904665

Page 2

without pausing 2 seconds for each lane change. When the vehicle turned east on 900 South the officer made a traffic stop.

3. After contacting the Defendant who was the lone occupant of the vehicle, Officer Crowther discovered the Defendant's drivers license was denied. Officer Crowther further realized that the Defendant was a known gang member and that he had arrested him recently on unrelated drug charges.
4. Officer Crowther decided at that point he would impound the vehicle. He informed the Defendant and asked the Defendant to get out of the vehicle that was registered to someone else.
5. Officer Crowther asked the Defendant if he had any weapons or contraband on him, to which the Defendant replied that he had brass knuckles. Officer Crowther seized the brass knuckles and then arrested the defendant.
6. Pursuant to Salt Lake City Police Department policy Officer Crowther began an impound inventory of the vehicle. During the inventory officer Crowther found methamphetamine, heroin, and a pipe for ingesting controlled substances.
7. At some point after the officer had informed the Defendant that he was going to impound the vehicle, the Defendant requested that he be permitted to call the owner to retrieve the vehicle. Someone arrived purporting to be the owner after the inventory was complete and the vehicle was being hooked up to the tow truck. The officer declined to turn the vehicle over and completed the impound process.
8. The defendant filed a motion to suppress.

CONCLUSIONS OF LAW

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Case No. 131904665

Page 3

1. Officer Crowther directly observed a traffic offense and consequently the stop was justified at its inception. Further, the officer's questioning of the defendant did not exceed the scope of the purpose of the stop.
2. Once the vehicle stopped the officer determined that the driver did not have a valid license; that he was the only occupant; and that the driver was not the owner. Thus the officer's decision to impound the vehicle did not exceed the scope of the purpose of the stop.
3. Based on the totality of the circumstances, including the defendant's criminal history, gang affiliation, and admission of possessing a dangerous weapon, the officer had a reasonable belief in his concern for his safety.
4. Officer Crowther conducted the impound pursuant to his department impound policy.
5. Therefore the State has satisfied its burden that the seizure and subsequent impound were reasonable and the evidence obtained is not the fruit of the poisonous tree.
6. Accordingly, the Defendant's motion is denied.

DATED this 10th day of January, 2014.

BY THE COURT:


Honorable Randall N. Skanchy

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Case No. 131904665

Page 4

READ AND APPROVED AS TO FORM:

A handwritten signature in black ink, appearing to read 'R. Dellapiana', is written over a horizontal line.

Ralph Dellapiana

Counsel for Romeo Lucero Olivarez

ADDENDUM C

Salt Lake City Police Department Impound Policy
(State's Exhibit 2)



III-400 IMPOUNDS, VEHICLE HOLDS AND RELOCATIONS

Officers of this Department may impound vehicles as a means of enforcing local and State Laws, removing a public hazard or nuisance, securing evidence, or protecting the vehicle and its contents until the owner can take possession of it. To avoid needless expense and inconvenience to the vehicle owner, officers shall use discretion in determining whether or not a vehicle should be impounded.

All impounds will be documented in the RMS and on a Salt Lake City Police Department Impound Report. The impounding officer will provide the tow driver the white and pink copies and submit the yellow copy to Records.

State Impounds will be documented on the TC-540/Utah State Tax Commission Vehicle Impound Report. The impounding officer will provide the tow driver the yellow copy and submit the white and goldenrod copies to Records, who will forward the form to the Impound Coordinator in Auto Theft. The Impound Coordinator will send the Impound forms by mail to the Motor Vehicle Division. The pink copy has vehicle release information on the reverse side and will be left with the driver. The Division of Motor Vehicles must be notified within 48 hours of impound.

An impound report form will be completed for every vehicle impounded for any reason.

Notice of Impoundment

SLCPD will provide the vehicle owner a Notice of Impoundment and Right to Impound Hearing form within 48 hours of a city impoundment. This form should not be used with State tax impounds.

The officer will fill in the name of the vehicle owner or driver from the information obtained by valid identification, if available. The most current address should be obtained.

The officer will date and sign the form and deliver the original to the vehicle owner or driver at the time of impound. The copy of the Notice of Impoundment and Right to Impound Hearing form should be turned into Records who will forward it to the Impound Coordinator in Auto Theft. The Impound Coordinator will send notification by certified mail to

the registered owner and lien holder within 5 working days of impoundment whether or not the vehicle is being held for evidence.

The initial officer should deliver the original copy of the Notice of Impoundment form to the vehicle's registered owner or driver during the course of the investigation. If the vehicle's owner or driver has left the scene prior to impound, the original should be left in a visible and safe place in the vehicle's driver compartment. The officer should write "Unavailable to Sign" in the "Deliver To" area. The copy should then be forwarded as above.

State Impounds for Expired Registration

The following procedure will govern the impounding of vehicles for expired registration only situations.

Occupied Vehicles: In cases where a vehicle displaying expired registration is accompanied by the owner or a responsible party or if the owner can be contacted, and that person verifies the registration is in fact expired, the following applies:

- If the expiration date is less than 90 days, do not impound.
- If the expiration date is 90 days or more and verification can be obtained as stated above, a State Impound may be in order. Officers may exercise discretion on the side of not impounding as the facts of the situation dictate.

Revoked Registration: For various reasons the DMV can revoke the registration of a vehicle. When the registration has been revoked, the vehicle can be impounded, holding for the vehicle for State Tax.

Unoccupied Vehicles: Unoccupied vehicles will not be impounded for expired registration relying solely upon the information provided from the State Computer System. This policy does not preclude the enforcement of any City Ordinances applicable, including abandoned vehicles or streets for storage.

"No Insurance": vehicles will not be impounded for the reason of "No Insurance." "No Insurance" can be added to the citation as a secondary to the primary reason for impound.

Authority of Parking Enforcement Personnel

Parking enforcement personnel are authorized to impound vehicles that are parked in violation of City

Ordinances and State Laws. Upon request, an officer of this Department will respond and provide assistance as needed. Appropriate reports and documentation will be entered into the RMS by Parking Enforcement and maintained by this Department.

Impound Fee Waiver

If fees are to be waived, the follow-up Detective will go to the Service Desk, obtain the waiver form and fill it out completely. The follow-up detective will have the Division/Unit Commander, Assistant Division/Unit Commander or Watch Commander approve and initial the form. The follow-up detective will call the Hearing Office at 801-535-6321 and notify them that a fax is enroute. The follow-up detective will then fax the form to the Hearing Office at 801-535-6082.

The Hearing Officer will review the form and will either give approval or denial then fax the form back to the Police Department at the number provided by the follow-up detective. The follow-up detective will then return the form to the Service Desk. The citizen will be given a copy to take to the impound lot for release of the vehicle. If the recommendation is to deny the fee waiver, the person requesting the waiver should be referred to the Hearing Officer.

Wrecker Use

The officer must determine the appropriate type of impound, City or State and fill out the appropriate impound form. Only those towing companies specified by contractual agreement with the City will be used to tow impounded vehicles on non-state impounds. There is only one City Impound lot.

There are several State-impound lots used to store impounded vehicles. The reporting officer must list the Towing Company, phone number and destination in the Vehicle Field on the Impound Report form and is to be included in the Seized/Towed details page of the RMS.

Holds on Impounded Vehicles

At the time of impound, the officer must notify Dispatch of any holds on the impounded vehicle. Holds will be documented in the Seized/Towed details page. Police personnel will refer to this information when a vehicle owner or the owner's representative inquires about release of the vehicle.

- **Hold for Owner:** The vehicle may be released to the owner or the owner's representative.
- **Hold for State:** Release of the vehicle must be obtained through the State Division of Motor Vehicles.
- **Hold: Recovered Stolen:** Is either a hold for Detectives or hold for Owner.
- **Hold for Evidence:** The vehicle can only be released upon authorization of the investigating division or the District Attorney's Office.

If a car is impounded as a recovered stolen vehicle, the car shall be removed to the City Impound Lot and "Hold for Owner". Should the vehicle be improperly registered, evidence in another case, ownership in dispute, etc., a hold should be placed for the follow-up squad. (Any vehicle which would have been released to the owner at the scene can be "Hold for Owner", when impounded. When a vehicle is impounded with a hold for evidence, the hold will expire seven days from the date of impoundment. The Impound Coordinator will send the follow-up Detective an Impound request for approval to release. If circumstances require the hold to be extended past the seven-day period, follow-up investigators must submit the written request through their Division/Unit Commander advising the Impound Coordinator of the extension. The Impound Coordinator will update the computer entry on the Seized/Towed details pages indicating the extension of the hold. After the extended day has expired, the Impound Coordinator will send a second request for approval to release. The follow-up Detective will remove the extended hold as soon as possible.

Vehicle Inventory

A thorough inventory search will be made of all vehicles being impounded. A thorough inventory search will include:

- The interior of the vehicle, including under the seats, the glove box, etc.
- Under the hood.
- The trunk, when possible.
- All closed containers, i.e., sacks, bags, boxes, etc.

The officer will remove all valuables from the vehicle and place them in evidence for safekeeping. Closed or locked briefcases, luggage, etc., will be opened before being placed in evidence. Such items will be opened in the presence of a supervisor if the locks must be forced or other damage done in order

to open them. It is recommended the vehicle's owner or the driver be present.

All items not considered valuables, such as spare tires, old clothing, etc., will be locked in the vehicle's trunk, if possible.

The officer will include the following in the property report:

- Valuables placed into evidence.
- Valuable items left in the vehicle because of the difficulty of transporting them to evidence (large machinery, etc.) will be listed in the report's details.
- If no valuables are found in the vehicle, the officer will note that information in the report's narrative.

Releasing Vehicles to Incompetent Drivers

If a vehicle owner requests release of an impounded vehicle and appears to be intoxicated or otherwise incapable of operating the vehicle safely, Service/Impound Desk personnel may request that an officer be dispatched to the desk. The assigned officer will evaluate the owner's condition and take appropriate action.

If the owner proves to be intoxicated or unable to operate a vehicle safely, the vehicle will not be released. If the owner is incapacitated, but requests that the vehicle be released to another person, and the officer is satisfied that the other person could legally operate the vehicle, the officer may authorize release of the vehicle.

Access to the City Impound Lot

No one will be allowed access to the impound lot without complying with procedures outlined in this policy. Impound lots under State control are not governed by this policy.

Authorized Access

Access to impounded vehicles stored in the City impound lot is limited to:

- Salt Lake City police officers, officers of the DEA Metro, and officers from outside agencies including Motor Vehicle Enforcement Investigator.
- The vehicle owner or the owner's representative.
- The vehicle owner is verified by the State Vehicle Registration which has been attached to the case by the first individual to run the registration.
- The owner's representative must have a notarized letter from the registered owner. Verification of release will be by verifying with State issued driver's license, State issued ID or passport against the registration or notarized letter.
- All fees need to be paid prior to releasing any vehicle.
- Insurance Adjusters: The Insurance Adjuster's identification will be verified by State issued driver's license, State issued ID or passport along with a business card from the insurance company with their name on the card. If the Insurance Adjuster is requesting release of the vehicle all fees need to be paid.
- Any other person authorized by court order: A court order will be verified by State issued driver's license, State issued ID or passport. If the court order states that fees are to be paid they need to be paid prior to releasing. If the court order indicates that the individual is not responsible for the fees, a waiver needs to be initiated by the follow-up Detective.
- Leasing Companies: The representative of the leasing company must submit a letter on Company letter head verifying that he/she is an employee of that leasing company and is authorized to obtain the release for that vehicle. All fees are required to be paid prior to releasing the vehicle.
- Dealers: The dealer must show evidence of ownership along with proof that they represent that dealership. The dealer must also present the dealer plate to the Impound Yard when transporting the vehicle from the Impound lot to the dealership unless towed or transported on a flatbed. All appropriate fees must be paid prior to giving a release.
- Registered Lien holders or their representatives: The lien holder must provide a copy of the title that shows the lien and proves that the lien

release section has not been signed. State issued driver's license, State ID or a passport is required to verify identification. If a release is to be given to the representative, they need to have a letter on company letterhead with the individual's name listed in the letter authorizing them to take possession of the vehicle.

- Towing Companies: If the insurance company is releasing to a tow company, a copy of the work order with the insurance company's information and name of the individual picking up the vehicle, along with the individual's driver's license, State ID or passport must be submitted at the time of request.
- If an individual is authorizing a tow company to take possession of their vehicle, a notarized letter stating the tow company's name needs to be submitted at the time of request to release the vehicle, along with the tow company's driver's license, State ID, or passport. All applicable fees need to be paid at the time of release.
- Company or Trust owned Vehicles: The individual requesting the release of the vehicle must submit a legal document with the company name or trust name and individual's name on the document showing that they are connected to the company or Trust and have the right to have the vehicle released to them. Driver's license, State ID or passport will also be required for identification. All fees have to be paid prior to releasing.

Note: Insurance agents may only inspect vehicles, not remove property from them.

An Impound Lot Inspection and Property Release form must be presented to the impound lot personnel to gain access to a vehicle stored in the lot.

Issuing Impound Lot Inspection and Property Release Forms

- A separate Impound Lot Inspection and Property Release form must be issued for each vehicle, each time it is inspected or searched. (Exception: The Auto Theft Sergeant may use one form to gain access to the lot for the purpose of verifying vehicle identification numbers on several cars.)
- Vehicles with Holds: Detectives from this Department or DEA Metro, may authorize the release of itemized property using the Impound Lot Inspection and Property Release Forms.

- Vehicles without Holds: SLCPD Officers, officers from outside agencies, vehicle owners and any other person authorized by this policy may obtain authorization forms via the Service Desk or the Impound Coordinator.
- Before issuing a form, any Hold on the vehicle must be cleared through the follow-up officer or the follow-up officer's supervisor. Officers from this Department or DEA Metro should give vehicle owners, officers, agents or other representatives specific instruction for clearing Holds.
- After hours, emergency property releases may be authorized by the on-duty Watch Commander.
- Property which may be authorized for release shall be limited to the personal property contained within the vehicle, but not attached to the vehicle or considered to be part of the vehicle's equipment (i.e. stereos, wheels, etc.).

Impound Lot Personnel

- Only persons with a valid Impound Lot Inspection and Property Release form will be given access to impounded vehicles.
- The impound lot attendant should, whenever possible, accompany the requesting party during inspection of the vehicle.
- Property removed from a vehicle must be verified against the Impound Lot Inspection and Property Release form. The vehicle owner or representative may only retrieve items itemized on the release form unless the release is for personal property and the Impound Lot personnel will list the items removed on the form. The Impound lot person will have the person receiving the property verify the accuracy of the property list.
- Officers removing additional property must itemize the property and its disposition on the form.
- The impound lot attendant will retain the original copy of the form and return the yellow copy to the Impound Coordinator. The Impound Coordinator will attach the yellow copy to the case to be filed for 3 years.

Officers Removing Property: Officers removing property for evidence must observe accepted search and seizure practices. Any evidence removed must be described in additional narrative and property/evidence entry.

Vehicle Relocations

Relocations are a courtesy to the vehicle owner. Illegally parked vehicles should be dealt with according to State law or City ordinance and Department policy regarding impounds. In some circumstances, it may be appropriate for an officer to have a legally parked, unattended vehicle relocated to another parking place.

Officers may arrange for the relocation of vehicles at the request of other City departments. Officers will explain to those representatives from other City departments that the relocation will be at the expense of that department. Vehicles will be relocated to the nearest legal parking place as the situation dictates. Only those towing companies specified by contractual agreement with the City will be used to relocate vehicles.

Officers will notify Dispatch of the description, license plate and the location of the relocated vehicle and the reason for relocating the vehicle. This information will be documented in the RMS.