

FILED: March 14, 2012

IN THE COURT OF APPEALS OF THE STATE OF OREGON

STATE OF OREGON,
Plaintiff-Respondent,

v.

JAY LEE HANNA,
Defendant-Appellant.

Lane County Circuit Court
201001029

A145291

Charles D. Carlson, Judge.

Argued and submitted on January 31, 2012.

Jedediah Peterson, Deputy Public Defender, argued the cause for appellant. With him on the brief was Peter Gartlan, Chief Defender, Office of Public Defense Services.

Janet A. Klapstein, Senior Assistant Attorney General, argued the cause for respondent. With her on the brief were John R. Kroger, Attorney General, and Mary H. Williams, Solicitor General.

Before Haselton, Presiding Judge, and Armstrong, Judge, and Duncan, Judge.

HASELTON, P. J.

Conviction on Count 2 reversed and remanded; remanded for resentencing; otherwise affirmed.

HASELTON, P. J.

2 Defendant appeals from his convictions, following a stipulated facts trial,
3 for a variety of crimes, including one count each of unlawful possession of
4 methamphetamine, ORS 475.894, and felon in possession of a firearm, ORS 166.270.
5 Defendant contends that the trial court erred in denying his motion to suppress evidence
6 discovered during an inventory of his pickup truck. As explained below, we conclude
7 that officers' examination of the area under a tonneau cover¹ covering the bed of
8 defendant's pickup exceeded the scope of the authorizing policy in that that area was
9 neither a "trunk" nor an "external vehicle container[] attached to the vehicle." Thus,
10 evidence obtained as a result of that unlawful search--specifically the shotgun on which
11 the felon in possession charge was predicated--must be suppressed. Accordingly, we
12 reverse defendant's conviction on that charge and remand, affirm defendant's other
13 convictions, and remand the case for resentencing.

14 The facts material to the suppression ruling are as follows. A Eugene
15 police officer, who was part of a team investigating property crimes, saw defendant put
16 items that may have been stolen into the back of his Dodge pickup truck. The bed of the
17 pickup truck was covered with a locked tonneau cover. Defendant drove off with two

¹ "Tonneau" is defined as "the rear seating compartment of an automobile <~ of a limousine> <sports car ~ with removable canvas cover>." *Webster's Third New Int'l Dictionary* 2408 (unabridged ed 2002). The parties here appear to agree that a "tonneau cover," as used in this context, means a covering, made of hard plastic, fiberglass, or metal and with a locking mechanism, that is placed over the bed of a pickup and securely attached to the walls of the pickup. *See, e.g.*, http://en.wikipedia.org/wiki/Tonneau_cover (accessed Feb 29, 2012).

1 passengers, and police officers followed, stopping the pickup after defendant committed a
2 traffic violation. The officers determined that defendant was driving without a valid
3 license and that defendant had failed to comply with sex-offender reporting requirements.
4 They then asked for defendant's consent to search the pickup. Defendant refused and was
5 handcuffed and transported to the Lane County Jail. Meanwhile, both of defendant's
6 passengers, neither of whom had a valid driver's license, left the scene.

7 The police, after determining that the other registered owner of the pickup
8 was not available to drive it away, decided to tow and impound the vehicle.² Officers
9 then began to conduct an inventory of the pickup's contents pursuant to the Eugene Police
10 Department's policy prescribing procedures for vehicle tows and impounds and related
11 inventories. That policy, set out in Eugene Police Department General Order 602,
12 provides, as pertinent:

13 **"F. Inventory of impounded vehicles**

14 "1. Inventory the contents of all vehicles you impound. Do this to protect
15 the property of the vehicle owner, to protect the City against claims
16 regarding property loss or damage, and to protect the public and police
17 personnel from potential danger. The inventory is not a search for evidence
18 of a crime; however, seize any evidence or contraband located during the
19 inventory.

20 "** * * * *

² Defendant had parked the vehicle, in response to the stop, on private property (the parking lot of a service station) posted with "No Trespassing" signs. Under the Eugene Police Department's policy governing tows and impounds (General Order 602), promulgated pursuant to Eugene City Code section 5.695, a tow and impound is properly initiated where, as pertinent here, the driver has been arrested and the vehicle "is not parked lawfully."

1 "3. Thoroughly search the interior of the vehicle, including glove
2 compartment(s) and under the seats. Search the trunk and any external
3 vehicle container(s) attached to the vehicle (e.g., car-top carrier) if you can
4 open them without damaging the vehicle or the container.

5 "4. Do not open closed containers located either within the vehicle or any
6 of the vehicle's compartments for inventory purposes except for the
7 following, which shall be opened for inventory purposes: wallets, purses,
8 coin purses, fanny packs, personal organizers, briefcases, or other closed
9 containers designed for carrying money or small valuables, or closed
10 containers which are designed for hazardous materials."

11 (Boldface and underscoring in original.)

12 Officers began by inventorying the contents of the pickup's cab and, in that
13 area, they found a closed bag akin to a "large wallet or small camera case." The bag
14 contained a small glass pipe with a white residue that subsequent testing confirmed was
15 methamphetamine, as well as a set of keys. An officer then used one of those keys to
16 unlock the tonneau cover. In doing so, the officer believed that he was acting in
17 accordance with paragraph 3 of the inventory procedures set out above. Under the
18 tonneau cover, in the bed of the pickup, police discovered several items, including a
19 shotgun.

20 Defendant was charged with, *inter alia*, unlawful possession of
21 methamphetamine, ORS 475.894, based on the methamphetamine residue on the pipe
22 found during the inventory of the pickup's cab, and felon in possession of a firearm, ORS
23 166.270, based on the shotgun found in the pickup's bed, under the tonneau cover.³

³ Defendant was also charged with, and convicted of, felony failure to register as a sex offender and misdemeanor failure to register as a sex offender. ORS 181.599. He does not challenge either of those convictions.

1 Defendant moved to suppress all evidence obtained from his pickup truck, contending
2 that the inventory policy did not authorize any examination of the space under the
3 tonneau cover and, thus, the discovery of the items, including the shotgun, in that space
4 was the product of an unlawful warrantless search. It does not appear that defendant
5 advanced any independent or alternative argument pertaining particularly to the items,
6 including the glass pipe with the methamphetamine residue, found in the closed bag in
7 the pickup's cab area.

8 The trial court denied the motion to suppress, reasoning that "the inventory
9 search was in compliance with the written policy, and was * * * nondiscretionary in
10 nature." Defendant was then convicted, on stipulated facts, of each of the crimes
11 charged.

12 On appeal, defendant reiterates his contentions that the inspection of the
13 space under the tonneau cover exceeded the scope of the inventory policy. Specifically,
14 defendant contends that

15 "[t]he policy allows the police to search a trunk or an external vehicle
16 container. However, the back of a pick-up truck is not a trunk, regardless
17 of whether a tonneau cover is over it. Even when covered, the back of a
18 truck is not an external vehicle container because it is not external to the
19 vehicle, nor is it a container."

20 Defendant further and alternatively contends that, "[i]f the terms in the policy can be
21 stretched to include a tonneau-covered area," the policy affords officers impermissible
22 discretion in its execution, violating the requisites of *State v. Atkinson*, 298 Or 1, 10, 688
23 P2d 832 (1984) (inventory, to be valid, must, *inter alia*, "be conducted pursuant to a

1 properly authorized administrative program, designed and systematically administered so
2 that the inventory involves no exercise of discretion by the law enforcement person
3 directing or taking the inventory").⁴

4 We conclude that the inventory policy did not authorize examination of the
5 area under the tonneau cover. That area--the pickup's bed, as enclosed by the pickup's
6 walls and the locked tonneau cover--was neither a "trunk" nor an "external vehicle
7 container[] attached to the vehicle." Accordingly, the trial court erred in denying
8 defendant's motion to suppress to the extent that it pertained to items, including the
9 shotgun, found in that area. Because that error concerns only defendant's conviction for
10 felon in possession of a firearm (Count 2), we reverse and remand with respect to that
11 charge and affirm defendant's other convictions.

12 Our analysis begins--and, indeed, ends--with the text of the inventory
13 policy. That is, the lawfulness of the inspection depends on whether the area under the
14 tonneau cover either was a "trunk" or constituted an "external vehicle container[]
15 attached to the vehicle."

16 We begin with the ordinarily obligatory reference to the dictionary. A
17 "trunk" is "the luggage compartment of an automobile." *Webster's Third New Int'l*

⁴ As before the trial court, defendant identifies no reason on appeal why, even if the inspection of the area under the tonneau cover constituted an unlawful search, suppression of the items found during the inventory of the pickup cab--which occurred before officers examined the area under the tonneau cover--should be suppressed. There is no assertion, for example, that the examination of the contents of the closed bag found in the pickup's cab exceeded the scope of the inventory policy or was derivative of officer discretion.

1 Dictionary 2456 (unabridged ed 2002). An "automobile" is, in turn, defined as "a usu. 4-
2 wheeled automotive vehicle designed for passenger transportation on streets and
3 roadways * * * -- called also *car* or esp. Brit. *motorcar*." *Id.* at 148 (emphasis in
4 original).

5 In this case, as in many, resort to dictionary definitions is unsatisfying.

6 That is so because--putting aside such provocative abstractions as whether a pickup truck
7 can ever be characterized as an "automobile" (as opposed to some other species of motor
8 vehicle)--in automotive America, "trunk" has a single, indisputable meaning. The phrase
9 "pop the trunk" universally summons a definitive, word-associative image: A "trunk" is
10 the self-contained and separately accessible cargo compartment in the rear of a car.

11 Bluntly: Cars have trunks, and pickups don't; pickups have beds, and cars don't.

12 To be sure, the combination of the bed of a pickup and a tonneau cover can
13 create a space that performs the same *function* as a trunk, just as a backpack or fanny
14 pack can perform the same function as, for example, a briefcase or a purse. But just as a
15 fanny pack is not a purse, neither is a pickup bed covered with a tonneau cover a trunk.

16 In that regard, we emphasize that the operative provision of the inventory policy at issue
17 here is phrased precisely, in terms of a specific referent, "trunk," rather than more broadly
18 and functionally--*e.g.*, "a trunk or any other area of a motor vehicle designed or created to
19 contain items of personal property." Indeed, it is striking that other provisions of the
20 Eugene inventory policy are phrased in such functional terms--*e.g.*, "wallets, purses, * * *
21 or other closed containers designed for carrying money or small valuables"--but "trunk"

1 is simply "trunk."

2 We turn, then, to "any *external* vehicle container(s) *attached* to the vehicle
3 (e.g., car-top carrier)." (Emphasis added.) Reference to the dictionary would be
4 gratuitous because, even granting that the combination of the tonneau cover and the bed
5 and walls of the pickup created a "container," that "container" was not "external" or
6 "attached" to the vehicle. Rather, parts of the vehicle itself were integral components of
7 the "container"; that is, without the vehicle, there could be no "container." Nor is the
8 tonneau cover, which *is* "attached to the vehicle," itself a "container" any more than the
9 lid to a travel coffee mug is a container. Rather, the cover by itself is just that--a cover.

10 We thus conclude that, in examining the area under the tonneau cover,

11 officers exceeded the scope of their authority under the inventory policy and,
12 consequently, effected an unlawful search. Accordingly, the trial court erred in denying
13 defendant's motion to suppress to the extent that it pertained to items, including the
14 shotgun on which the felon in possession charge was predicated, found in that area.
15 Accordingly, defendant's conviction for felon in possession of a firearm must be reversed
16 and remanded.

17 Conviction on Count 2 reversed and remanded; remanded for resentencing;
18 otherwise affirmed.