STATE OF MICHIGAN
IN THE 56A DISTRICT COURT
FOR THE COUNTY OF EATON

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff, File No. 20-1111-FY

Hon. Julie A. O'Neill

MICHAEL ANTHONY GONZALEZ,

Defendant.

Robin Narlock (P77879)
Attorney for Plaintiff
1045 Independence Blvd
Charlotte, MI 48813

Michael A. Komorn (P47970)
Attorney for Defendant
30903 Northwestern Hwy, Suite 240
Farmington Hills, Michigan 48334

OPINION & ORDER
AFTER PRELIMINARY EXAMINATION

At a session of said Court, held in the Courthouse
in the City of Charlotte, County of Eaton, on
this 30th day of May, 2021.

PRESENT: THE HONORABLE JULIE A. O'NEILL
DISTRICT COURT JUDGE

The Court held a Preliminary Examination in this matter over the course of two (2) days, on March 10, 2021 and May 4, 2021 respectively. At the examination, the Court heard testimony from a single witness presented by the Prosecution and admitted five (5) exhibits, two (2) from the Prosecution and three (3) from Defendant. At the outset of the Preliminary Examination, the Court resolved to delay consideration of three (3) pending motions filed by Defendant, in part due to the lack of filed responses from the Prosecution and in part to allow for relevant testimony to support the parties' positions. Those motions are as follows: Motion to Suppress Evidence and Dismiss

I. Findings of Fact

The Preliminary Examination consisted of testimony from a single witness called by the Prosecution, Richard Barry ("Chief Barry"), the Chief of Police at the Potterville Police Department (PPD). Five (5) exhibits were also admitted. They are as follows:

- photograph of two black garbage bags closed with zip-ties (People's Exhibit 2) [People's proposed Exhibit 1 was not admitted];
- photograph of clear vacuum-sealed bags of marijuana (People's Exhibit 3);
- PPD Directive 200, titled "Arrests," (Defendant's Exhibit A);
- PPD Directive 438, titled "Abandoned and Impounded Vehicles," (Defendant's Exhibit B); and,
- PPD Directive 210, titled "Search & Seizure," (Defendant's Exhibit C).

On September 3, 2020, at approximately 10:00 p.m., Defendant Michael Anthony Gonzalez ("Defendant") was pulled over by Chief Barry near the intersection of Lansing Road and Hartel Road in Eaton County, Michigan, for speeding and for an improper use of a turn signal. Chief Barry made contact with Defendant by approaching the passenger side window of Defendant's vehicle, a Ford F150 truck. Chief Barry requested that Defendant present his identification, vehicle registration, and proof of insurance. Defendant responded that he did not have his driver's license or other requested information, but that his wife could text him a picture of the materials. Defendant proceeded to call his wife.

Officer Barry testified he had smelled an odor of marijuana emanating from the vehicle and noticed a black garbage bag on the passenger seat. While Defendant was still on the phone, Officer Barry asked Defendant what was in the garbage bag three (3) times, to which Defendant responded trash. Officer Barry further inquired about the smell of marijuana, asking Defendant if he had any marijuana in the vehicle. Defendant responded that he had wax in his possession, which

Chief Barry, when under direct and cross examination, admitted would exude an odor and not in and of itself supply probable cause for a search of Defendant's vehicle.

Chief Barry then ordered Defendant to exit his vehicle. Defendant complied. On cross examination, Chief Barry testified that he was not free to leave the scene at that point. Defendant rolled up the windows to the vehicle, turned the vehicle off, and locked it, before meeting Chief Barry at the front of his patrol car. Chief Barry next asked Defendant if he could search Defendant's person. Defendant consented. Chief Barry found Defendant's cell phone and $200.00. Chief Barry again asked Defendant about the garbage bag, indicating to Defendant that he was behaving weirdly by locking his vehicle while admitting during his testimony, that it was not illegal for Defendant to do so. Chief Barry then asked for Defendant's consent to search the vehicle. Defendant declined to give consent. Chief Barry testified that he asked Defendant why he could not search the vehicle, indicating that he was investigating the garbage bag at that point. Chief Barry also stated that he had asked Defendant six (6) times about the garbage bag within the first two (2) minutes and forty-five (45) seconds of the stop.

Defendant then showed Chief Barry a photo of what appeared to be a Florida driver's license on his phone and also supplied his name and date of birth. Chief Barry took the information down with pen and paper, entering his patrol vehicle so that he could run the information through LEIN and NCIC, while Defendant remained near the hood of the patrol vehicle. Chief Barry indicated that the search pulled up a list of active warrants associated with names and dates of birth similar to Defendant's. He testified that based on the severity of some of the warrants, Chief Barry called for backup before returning to where Defendant stood at the front of his patrol car. Defendant again showed Chief Barry the picture of his driver's license on his cell phone, enlarging

the image for Chief Barry. When asked, Defendant also supplied his Social Security Number (SSN). Chief Barry testified that he delayed running the SSN until after backup arrived.

When Eaton County Sheriff's Deputy Crabtree arrived on scene, Chief Barry detained Defendant, placing him in handcuffs and seating him in the back of Chief Barry's patrol vehicle. Defendant remained handcuffed for the rest of the encounter, unable to access his cell phone that was taken from his pocket earlier. Later, Chief Barry ran Defendant's proffered SSN, verifying that no active warrants were associated with the name and date of birth provided by Defendant and that a valid Florida driver's license existed associated with the same SSN, name, and date of birth. Defendant nevertheless remained detained because Chief Barry stated he was not certain of his identity, stating he was not 100% certain of Defendant's identity until it was verified by the live-scanner at PPD. Chief Barry also admitted that part of the reason was that he wanted to search Defendant's vehicle, while recognizing that he did not yet have probable cause.

Throughout the verification process, Chief Barry and his partner continued to investigate the garbage bag, asking Defendant about the contents of his vehicle. Chief Barry looked through the windows of the vehicle, noticing a second black garbage bag in the backseat. At the behest of Deputy Crabtree, Chief Barry returned to the vehicle again, seeing a plastic grocery bag on the passenger rear side containing a green leafy substance. Chief Barry stated he then contacted a prosecutor to get clarification on the marijuana laws in place and advice on how to proceed under the circumstances. The prosecuting attorney advised him to arrest Defendant under MCL 257.311, no possession of operator's license on person. Chief Barry indicated that he was generally aware of the law change allowing for the recreational use of marijuana and allowing people to drive with marijuana in their vehicles. However, he further testified that he did not know the specifics of the

law including the allowable amounts, he was not aware of the existing federal laws on hemp farming, and he could not articulate a distinction between hemp and marijuana beyond THC levels.

Chief Barry placed Defendant under arrest for not having his driver's license on his person and read Defendant his *Miranda* rights. Chief Barry told Defendant that because Defendant was being arrested, his vehicle was going to be impounded and subjected to an inventory search. Chief Barry indicated that the purpose of the search was also related to his observation of what appeared to be a large quantity of marijuana. When pressed about the purpose of the search, Chief Barry testified that, while he did not receive direction from the prosecutor regarding probable cause to search the vehicle, he believed he had independent probable cause to search based on his viewing of the two garbage bags and the grocery bag, which appeared to contain several pounds of marijuana. Ultimately, Chief Barry's suspicions were confirmed when his inventory search of Defendant's vehicle produced forty-four (44) vacuum-sealed bags of marijuana. Chief Barry again called a prosecutor to confer, and subsequently placed Defendant under arrest for an additional charge of possession with intent to distribute marijuana.[1] When he weighed the confiscated bags back at the station, Chief Barry found that each individual bag weighed roughly half a pound for a grand total of 26.2 pounds of marijuana.[2] Chief Barry later tested the substance in one of the bags, verifying with a THC test-kit that the substance was marijuana. The test did not quantify the amount of THC present. Chief Barry did not send any sample out for laboratory certification.

When asked about PPD's policies regarding the impounding of vehicles, Chief Barry first indicated that the decision to allow another person to get the vehicle was wholly within the arresting officer's discretion. When asked what policies related to inventory searches and the

[1] It should be noted that Chief Barry did not issue tickets to Defendant for speeding or improper use for a turn signal and he further did not charge Defendant with operating a vehicle without a license on his person.
[2] In its closing, the Prosecution indicated that 26.3 pounds of marijuana were found.

impounding of vehicles, Chief Barry indicated that, at the time of Defendant's arrest, three (3) conflicting policies existed on the subject. Chief Barry further testified that he had since amended the policies to resolve the conflicting language. This amendment process was prompted by Chief Barry's receipt of FOIA requests for department policies from Defendant's attorney following his arrest, which brought to his attention the conflicting language. Ultimately, Chief Barry admitted that PPD did not have clearly established directives with respect to inventory searches and the impounding of vehicles when Directives 200, 210, and 438 were collectively considered.

When asked specifically about the section of Directive 438 that allows for another person to take the vehicle at the time of the incident and for another person to arrive on scene and prevent the towing away of a vehicle even after it has been hooked up to a tow truck, Chief Barry admitted that he never allowed Defendant the opportunity to call someone, despite Defendant's requests to call his wife, who was trying to communicate with him, and/or to speak to his attorney. The vehicle was towed and an inventory search was conducted.

II. Discussion

A. Motion to Suppress Evidence and Dismiss Based Upon Illegal Arrest

While Defendant filed his three (3) motions contemporaneously, the Court finds it chronologically logical to turn first to Defendant's Motion to Suppress Evidence and Dismiss Based Upon Illegal Arrest.

1. Parties' Arguments

Defendant seeks for the Court to suppress the evidence obtained in this case and to dismiss the charges. Defendant argues that he was unlawfully arrested under MCL 257.311, and that, as a result, all evidence obtained in connection with his arrest should be suppressed, warranting the dismissal of the felony charge against him. Defendant urges that Court to interpret the "immediate

possession" requirement of MCL 257.311 as allowing for constructive possession of a driver's license and not merely actual, physical possession. As support, Defendant cites *People v. Nicholson*, 297 Mich. App. 191, 199, 822 N.W.2d 284 (2012), and *People v. Davis*, 1010 Mich. App. 198, 300 N.W.2d 497 (1980). Defendant contends that he was in immediate possession of his driver's license, as he provided a digital copy of it to Chief Barry, from which Chief Barry was able to verify its validity at the time of the stop. As such, Defendant asserts that, under the precedents set forth in *Wong Sun v. United States*, 371 U.S. 471, 485 (1963), and *People v. Martin*, 94 Mich. App. 649, 653, 290 N.W.2d 48 (1980), the evidence obtained as a result of Defendant's illegal arrest must be suppressed.

In response, the Prosecution argues that Defendant's motion must be denied, as his initial seizure was valid, his arrest was supported by probable cause, and the marijuana located was done pursuant to a lawful search. The Prosecution asserts that a police officer may make a warrantless arrest where the officer has probable cause to believe that a crime has been committed, citing *Beck v. Ohio*, 379 U.S. 89 (1964), *People v. Harper*, 365 Mich. 494, 113 N.W.2d 808 (1962), and MCL 764.15a. Here, the Prosecution contends that Defendant's initial seizure was based on a reasonable suspicion of criminal activity, namely speeding and an improper use of a turn signal. After Chief Barry pulled Defendant over and requested his driver's license, Defendant was unable to produce it, in violation of MCL 257.311. While Defendant was able to provide an electronic copy of his license later in the stop, the Prosecution asserts that Defendant was not able to demonstrate that his license was in his immediate possession at all times when operating his vehicle, justifying Defendant's arrest.

2. Analysis

The Court is not persuaded by Defendant's argument. The relevant statute under which Defendant's arrest was made is MCL 257.311, which provides as follows:

> *The licensee shall have his or her operator's or chauffeur's license, or the receipt described in section 311a, in his or her immediate possession at all times when operating a motor vehicle, and shall display the same upon demand of any police officer, who shall identify himself or herself as such.*

It is undisputed that Defendant did not have his physical driver's license on his person at the time of the traffic stop on September 3, 2020. Additionally, even accepting *in arguendo* Defendant's constructive possession interpretation, Defendant did not have a digital copy of the license in his immediate possession, as his wife had to text him a copy of it. Further, while the Court acknowledges that the statute does not qualify whether possession must be actual, the Court views MCL 257.311 as requiring physical possession, an interpretation bolstered by Defendant's cited case law. *See Nicholson*, 297 Mich. at 200, 822 N.W.2d 284 (if proof of medical marijuana card is reasonably accessible and capable of being handed over, a person is in possession of it).

While the Court can appreciate that it may seem unusual to arrest an individual under MCL 257.311 when an officer can verify that the driver has a valid license, the Court must nevertheless recognize that, under MCL 257.901 and MCL 764.15(1)(a), an officer has the discretion to place someone under arrest for a misdemeanor offense instead of issuing a citation. As such, the seizure and arrest here were valid. Defendant's Motion to Suppress Evidence and Dismiss Based Upon Illegal Arrest is DENIED.

B. Illegal Search in Connection with Inventory Search

1. Parties' Arguments

The Court next turns to Defendant's argument presented at the Preliminary Examination regarding an unconstitutional search due to Chief Barry's failure to comply with his department's

policies related to inventory searches and impounding vehicles. Defendant relies on *Rodriguez v. United States*, 575 U.S. 348 (2015) and *People v. Toohey*, 438 Mich. 265, 475 N.W.2d 16 (1991). Under *Rodriguez*, Defendant contends that Chief Barry was prohibited from extending an otherwise completed traffic stop to conduct an additional investigation. Here, because Chief Barry unreasonably delayed by taking thirty (30) minutes to verify Defendant's identity, he converted a lawful traffic stop into an unconstitutional seizure. Under *Toohey*, Defendant contends that Chief Barry was supposed to comply with his department's policies with respect to inventory searches and was further prohibited from using an inventory search as a pretext for an investigative search. Here, Defendant contends a violation of his Fourth Amendment rights occurred because Potterville Police Department (PPD) did not have a clearly established policy regarding inventory searches, Chief Barry did not follow the policies set forth by the PPD as he did not allow Defendant to call someone, and the inventory search was used as a pretext to allow Chief Barry access to Defendant's truck.

The Prosecution offered a brief response to Defendant's argument during the Preliminary Examination. It indicated that the traffic stop was not overly long, as the investigation into Defendant's identity took a reasonable amount of time under the circumstances, and that there was no pretext, as Chief Barry saw multiple pounds of marijuana in plain view. The Prosecution further expanded upon its response in its People's Answer Opposing Defendant's Motion to Suppress.[3] There, the Prosecution argued that Chief Barry appropriately complied with PPD's policy regarding the impoundment of vehicles and the inventorying of such vehicles. The Prosecution points to Directive 438(III)(A)(1)(k), which it interprets to require the impounding of all vehicles

[3] It should be noted that the Court is not in receipt of a motion by Defendant titled "Defendant's Motion to Suppress." However, the Court understands the answer to be responsive to Defendant's Motion to Suppress Statements and Request for *Miranda/Walker* Hearing. With that said, the Prosecution's answer does not address the issues raised by Defendant, instead discussing the inventory search conducted and the automobile exception.

for which the driver is being arrested unless the vehicle can be turned over to a responsible individual at the time of arrest. The Prosecution asserts that rationale underlying the policy is to minimize the liability PPD faces if the vehicle was to be left unattended. The Prosecution asserts that, because Defendant was the sole occupant of the vehicle and no other individual was present at the scene at the time of arrest, Chief Barry accordingly performed an inventory search before impounding Defendant's vehicle. The Prosecution further asserts that Chief Barry's actions squarely fit the rationale of Directive 438, as Defendant's vehicle would have been left at a public intersection for an undetermined length of time.

The Prosecution also advanced a secondary argument under *Pennsylvania v. Labron*, 518 U.S.938, 940 (2000), which sets forth the "automobile exception." The Prosecution contends that, due to vehicles' inherently mobile nature, officers can perform warrantless searches of vehicles when probable cause exists to believe that they contain contraband. As probable cause here, the Prosecution asserts that Chief Barry's observation of "material bags with marijuana in plain view" suffices.

2. Analysis

The Court finds Defendant's argument under *Toohey* to be persuasive. The *Toohey* Court definitively established the parameters for inventory searches of impounded vehicles, explaining as follows:

> *There has been clear acceptance and recognition of the inventory search of personal possessions as an exception to the Fourth Amendment warrant requirement as part of the caretaking function local police officers are required to perform. See Cady [v. Dombrowski, 413 U.S. 433 (1973)]. To be constitutional, an inventory search must be conducted in accordance with established departmental procedures, which all police officers are required to follow, and must not be used as a pretext for criminal investigation. See [South Dakota v.] Opperman[, 426 U.S. 364 (1976)] and Long II [*People v. Long *(*On Remand*), 419 Mich. 636, 359 N.W.2d 194 (1984)].*

> The United States Supreme Court has considered inventory searches to be an appropriate means to address three public policy concerns: (1) protection of the owner's property while in police custody, (2) protection of police against claims of lost or stolen property, and (3) protection of the police from potential physical danger. See *Opperman, supra.* Whether the police may achieve satisfaction of these concerns in a less intrusive or alternative manner does not render an inventory search unconstitutional. See *Cady, Opperman,* [*Colorado v.*] *Bertine*[, 479 U.S. 367 (1987)], [*Illinois v.*] *Lafayette*[, 462 U.S. 640 (1983)], and *Long II.*

438 Mich. at 283–84, 475 N.W.2d 16. The established departmental procedures at play in the present case are Directives 438 and 210. In relevant part, they state as follows:

> Directive 438
>
> *III. Vehicle Impounds*
>
> *A. Impounds under MCL 257.252d.*
>
> 1. Officers may remove vehicles from public or private property, whenever specifically required by statute, or immediately to a place of safekeeping at the expense of the registered owner of the vehicle in any of the following circumstances:
>
> e. If the vehicle must be seized to preserve evidence of a crime, or if there is reasonable cause to believe that the vehicle was used in the commission of a crime.
>
> k. Vehicles shall be towed if the driver is being arrested for any reason and the vehicle can not [sic] be turned over to a responsible individual at the time of the incident. This policy is being implemented in an effort to minimize the liability the department faces if the vehicle was to be left unattended after removing the driver from it.
>
> **3.** If the owner or other person who is legally entitled to possess the vehicle arrives at the location where a vehicle is located before the actual towing or removal of the vehicle, the vehicle shall be disconnected from the tow truck, and the owner or other person who is legally entitled to possess the vehicle may take possession of the vehicle and remove it without interference upon the payment of the reasonable service fee, for which a receipt shall be provided.

Directive 210

II. Procedural Guidelines

D. Specific Warrantless Searches

2. Search / Inventory of a Motor Vehicle

> When an officer stops and searches a vehicle, both the stop and the search must be reasonable. Unless the officer has a reasonable suspicion to stop a vehicle, he may not do so. A stop just to check a driver's license and vehicle is unreasonable and prohibited. A stop for a traffic violation does not justify a search of the vehicle unless the officer has probable cause to believe a warrantless search is authorized. The officer must be able to state probable cause of a criminal activity to justify a search of a vehicle stopped for a routine traffic violation. If the officer's visual inspection of the inside of a stopped vehicle reveals contraband or evidence of a possible crime, a search of the vehicle is justified.
>
> If the driver is arrested and the vehicle is being towed, the vehicle will be inventoried. This inventory, is [sic] conducted in connection to a lawful arrest, it is [sic] limited to the inside of the vehicle, including the glove compartment and including any containers within the vehicle . . .

Here, based on the facts from the Preliminary Examination, Chief Barry did not conduct the inventory search in accordance with established departmental procedures and that the inventory search was a pretext for a criminal investigation of Defendant's vehicle. Chief Barry testified that he believed he had the unfettered discretion to decide whether or not to release Defendant's vehicle to another person. Chief Barry did not permit Defendant to have access to his phone (which he still had taken from him) in order to call anyone, including his wife, to pick up his vehicle. In sum, a review of Directives 438 and 210 reveals that they do not provide for such discretion nor does *Toohey* contemplate such discretion as constitutionally permissible.

The Prosecution argues that Chief Barry had independent probable cause to search Defendant's vehicle. Chief Barry testified that the garbage bags factored into his search of

Defendant's vehicle, providing suspicion of evidence of criminal activity. However, given the legality of recreational use of marijuana in Michigan and Defendant's admission that he had wax in his vehicle, the Court is hard-pressed to find probable cause from the presence of two opaque, garbage bags and a grocery bag with a green, leafy substance visible.[4] It is unreasonable to determine that one could determine there was marijuana contained inside a solid black garbage bag that was zip tied at the top. As such, the automobile exception would not apply to save the search. For these reasons, the Court finds that the evidence obtained from the inventory search of Defendant's vehicle was unlawful and thus the motion to exclude any evidence gained is GRANTED.

C. Defendant's Remaining Motions

Given the Court's finding with respect to the inventory search, the Court declines to fully consider Defendant's Motion to Dismiss Pursuant to Prop 1 and Defendant's Motion to Suppress Statements and Request for *Miranda/Walker* Hearing.

III. Conclusion

For the aforementioned reasons, the Court having granted the Motion to exclude evidence obtained during the illegal search, there is no remaining evidence to establish probable cause to bind over on sole charge of Controlled Substance – Delivery/Manufacture 5-45 Kilograms of Marijuana/Synthetic Equivalent, MCL 333.7401(2)(d)(ii). Since no additional charges remain, the case is accordingly DISMISSED.

Julie A. O'Neill

Honorable Julie A. O'Neill
District Court Judge

This is to certify that I, Sara A. Lincoln, sent via US Mail, and/or email, a copy of the Opinion and Order after Preliminary Examination to the parties listed above.

Date: 5-20-21

Sara A. Lincoln

Sara A. Lincoln, Judicial Assistant to
Honorable Julie A. O'Neill

[4] While an exhibit was admitted of a picture of the two black garbage bags, the grocery bag was not featured.