STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

APPEAL NO. 2014AP002226

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

One 2013, Toyota Corolla/s/le four-door, License #437MXR, VIN #2T1BU4EEDC038839, Its Tools and Appurtenances,

Defendant,

Steven T. Baumgard and Gladys A. Vogel,

Defendants-Appellants.

BRIEF OF PLAINTIFF-RESPONDENT

ON APPEAL FROM A VEHICLE FORFEITURE ORDER ENTERED BY THE HONORABLE KRISTINE E. DRETTWAN, CIRCUIT COURT JUDGE CIRCUIT COURT FOR WALWORTH COUNTY, BRANCH III

Daniel A. Necci
District Attorney for
Walworth County, Wisconsin

By: Haley J. Rea
Assistant District Attorney
Attorney for Plaintiff-
Respondent
State Bar No. 1067866

ADDRESS:

P.O. Box 1001
Elkhorn, WI 53121
(262) 741-7198

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

OTHER AUTHORITY:

STATEMENT OF THE ISSUE

DID THE TRIAL COURT PROPERLY FIND STEVEN BAUMGARD TO BE THE OWNER OF THE 2013 TOYOTA COROLLA AND ORDER THAT VEHICLE FORFEITED?

Trial Court answer: Yes.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Neither publication of this court's opinion nor oral argument is necessary in this case. The issues presented are adequately addressed in the brief and under the rules of appellant procedure, publication of this decision is not appropriate because it is a one-judge appeal. *See* Sec. 809.23(1)(b)(4), Wis. Court Rules and Procedures.

STATEMENT OF THE CASE

The facts in addition to those cited by the Defendant-Appellant, hereinafter Gladys Vogel and Steven Baumgard, will be included within the argument section of this brief as needed.

ARGUMENT

I. THE TRIAL COURT PROPERLY ENTERED AN ORDER FORFEITING THE 2013 TOYOTA COROLLA.

A. Standard of review and applicable legal principles.

Wisconsin Stat. § 961.55 provides in relevant part:

961.55 Forfeitures. (1) The following are subject to forfeiture:

(a) All controlled substances or controlled substance analogs which have been manufactured,

delivered, distributed, dispensed or acquired in violation of this chapter.

(b) All raw materials, products and equipment of any kind which are used, or intended for use, in manufacturing, compounding, processing, delivering, distributing, importing or exporting any controlled substance or controlled substance analog in violation of this chapter.

....

(d) All vehicles which are used, or intended for use, to transport, or in any manner to facilitate the transportation, for the purpose of sale or receipt of property described in pars. (a) and (b) …., but:

….

2. No vehicle is subject to forfeiture under this section by reason of any act or omission established by the owner thereof to have been committed or omitted without the owner's knowledge or consent.

….

4. If forfeiture of a vehicle encumbered by a bona fide perfected security interest occurs, the holder of the security interest shall be paid from the proceeds of the forfeiture if the security interest was perfected prior to the date of the commission of the felony which forms the basis for the forfeiture and he or she neither had knowledge of nor consented to the act or omission.

....

(3) In the event of seizure under sub. (2), proceedings under sub. (4) shall be instituted promptly. All dispositions and forfeitures under this section and ss. 961.555 and 961.56 shall be made with due provision for the rights of innocent persons under sub. (1)(d)1., 2. and 4.

> Any property seized but not forfeited shall be returned to its rightful owner.....

In a vehicle forfeiture proceeding under Wis. Stat. § 961.55, the state must prove to a "reasonable certainty by the greater weight of the credible evidence that the property is subject to a forfeiture." Wis. Stat. § 961.555(3). Additionally, Wis. Stat. § 961.56(1) specifies: "It is not necessary for the state to negate any exemption or exception in this chapter.... The burden of proof of any exemption or exception is upon the person claiming it."

Whether a party has met its burden is a question of law which this court examines without deference to the circuit court's conclusion. However, in doing so, this court must accept the circuit court's assessment of the credibility of the witnesses and the weight to be given their testimony. *Jones v. State*, 226 Wis.2d 565, ¶61, 594 N.W.2d 738 (1999).

Where, as here, the facts regarding ownership are disputed in a forfeiture proceeding, the ownership question is a factual one, and the court will defer to the circuit court's finding unless the court concludes that the court clearly erred. *See Tri-Tech Corp. of Am. v. Americomp Servs, Inc.*, 2001 WI App 191, ¶13, 247 Wis.2d 317, 633 N.W.2d 683 (where facts are disputed, question of ownership

is a factual issue), rev'd on other grounds, 2002 WI 88, 254 Wis.2d 418, 646 N.W.2d 822.

Whether the civil forfeiture of Baumgard's vehicle violated the Excessive Fines Clause of the Eighth Amendment to the United States Constitution, presents an issue that this Court reviews de novo. *See State v. Hammad*, 212 Wis.2d 343, 348, 569 N.W.2d 68, 70 (Ct. App. 1997).

B. The trial court correctly concluded that Steven Baumgard was the owner of the forfeited vehicle as that term is used in Wis. Stat. § 961.55.

In July of 2013, the state started a forfeiture action against Gladys Vogel, the Toyota Corolla, and Vogel's grandson Steven Baumgard. R1; R2. The forfeiture petition alleged that both Gladys Vogel and Steven Baumgard were the Toyota Corolla's "registered owners," and that the Toyota Corolla was used by Baumgard to facilitate the delivery of marijuana on three occasions in violation of Wis. Stat. § 961.55, and was, therefore, subject to forfeiture under § 961.55(1). R1; R2. The state agrees that Vogel's grandson's drug offenses were committed without Vogel's knowledge or consent.

One of the issues at the forfeiture hearing held on July 10, 2014, and of this appeal, is whether Steven Baumgard or Gladys Vogel is the "actual" owner of the

Toyota Corolla for purposes of the vehicle forfeiture statute.

Following testimony at the July 10, 2014 hearing, citing *State v. Kirch*, 222 Wis.2d 598, 587 N.W.2d 919 (Ct. App. 1998) the trial court agreed with the state and concluded that Gladys Vogel was a "nominal" owner and that the "actual" owner of the vehicle for forfeiture purposes was Steven Baumgard. The Court stated:

> [T]he Court looks for guidance from State v. Kirch, which…really is the benchmark here for the Court and for the parties to use in trying to determine whether or not a person is an owner of a vehicle for the purposes of a vehicle forfeiture "innocent owner" exception.
>
> The Court directed this Court to look at relevant factors such as possession, title, control and financial stake. So when I look at those items and I look at the facts that have been presented to me here today, first of all, we have a defendant, Mr. Baumgard, who committed and that has been stipulated to by the admission of the criminal complaint, the fact that it was later dismissed because of an agreement, he worked as a CI, doesn't negate the fact that he committed these offenses. And each of these offenses carries a maximum penalty of $10,000 and three and a half years in the prison system or both. So we're talking thirty in potential fines and over ten years of imprisonment here.
>
> The testimony that I received from Deputy Winger was that when he spoke to defendant Baumgard on July 14th of 2013, Defendant Baumgard said that he owned the Toyota. He said that grandma had bought it for him. I'm just saying gramma here – it's Ms. Vogel. That Ms. Vogel had bought it for him and that he's paying her back. He said he pays the insurance. He pays for the gas. He pays to maintain the vehicle. He said she does not drive it. He did not live with Ms.

Vogel. When the vehicle was taken he took items out of the vehicle. When the deputy ran under the TIME system who owned or who was registered and had the vehicle titled in their name that's exhibit..1..it came back to both Ms. Vogel and Mr. Baumgard. And then low and behold three days later Mr. Baumgard signs over his interest in the vehicle to Ms. Vogel and a new title is signed. When the deputy spoke to Ms. Vogel over the phone on the following day after the title transfer, June 18th, she told the deputy her car was in her name as of a couple of days ago and she did not ask to have any items taken out of the vehicle…Ms. Vogel testified that they live at separate addresses, although it sounds like he comes and goes from her house a lot. She said she wrote a $20,000 check to Smart Motors for the car. He was to pay her a certain amount each month, although she told him to pay what he could. He did make a payment on May 5th of 2013, and he made a payment on October 18th of 2013. So one was made before the seizure and one was made after the seizure. She also testified she did not know about his criminal activity and did not consent to that. And I have no reason not to believe that. I don't think she knew anything about what he was doing with the car that she bought for him. She testified she has her own vehicle which is not the Toyota and she has not had to buy another car after the Toyota was seized. She also testified that Steven traded in his car on the purchase price of this Toyota and she told him he could have it for school and work and yet he had testified it's his car. He pays for the gas. He pays for the insurance. He pays to maintain it. She doesn't drive it. For all practical purposes this is his car.

When I look at the purchase agreement, the Infiniti, the '98 Infiniti that was actually the car that was used on that first buy, so he must have used the Infiniti to make the first buy, and then went with his grandmother and I'm sure she had no idea what he had just done with the Infiniti, and then goes and buys the Toyota. He trades in the Infiniti, 2,500 bucks is what they got for the trade-in value and she wrote a check for the rest. The first certificate of title

> issued May 1st of 2013 is in both of their names but it's his physical address. It's where the car is being kept. There is no testimony that she ever drove it. He's the one that drove it and whether or not she said just for school and work, he clearly was the one in actual possession of it. Used it for the next two times that he sold drugs. He is clearly the one when I look at the factors under State v. Kirch that has possession of the vehicle. The fact that he ran and gave up his interest per title three days after it was seized is very telling to the Court of evidence, acknowledgement, that, oh boy, guilt on his part. He clearly was in possession of it. It was titled in both of their names until a couple of days after the seizure. He clearly was in control of it and he did have a financial stake in that vehicle. He put 2,500 of the Infiniti in there and he made at least one payment to his grandmother. Now that's not to say that I don't recognize that the primary financial stake issue here falls on Ms. Vogel. She's the one that wrote the $20,000 check for it, but I think it's pretty clear to the Court despite what she may say now that she bought it for him and he was just supposed to pay her what he could. But in all other aspects of it, it was his car. And therefore when I look at the factors of Kirch, I do find that she was only a nominal owner basically just in name and that he was the actual owner here and that the vehicle is subject to forfeiture under 961.55.

R19:52-57.

A review of the record supports the trial court's decision. The factors to be considered when determining ownership of motor vehicles for purposes of the forfeiture of any vehicle used in the commission of a criminal offense are possession, title, control and financial stake. *State v. Kirch*, 222 Wis.2d at 606-607. Holding title to the

automobile does not, in and of itself, prove actual legal ownership of an automobile for purposes of a forfeiture. *Id*.

It is undisputed that the state established that Baumgard was driving the 2013 Toyota Corolla while dealing drugs in the City of Whitewater on April 24, 2013, May 1, 2013 and May 8, 2013, and that the vehicle was registered to both Baumgard, and Baumgard's grandmother, Gladys Vogel at the time of those drug sales. R19:4, 11-13, 22, 25-26.

Following the seizure of the 2013 Toyota Corolla, Deputy Daniel Winger spoke with Baumgard on June 14, 2013. R19:8. At that time, Deputy Winger ran the vehicle's registration through the Wisconsin Department of Justice Crime Bureau Information, TIME system, and learned that the vehicle was registered to Baumgard and Vogel. R19:11-12. Baumgard, however, claimed that he owned the Toyota Corolla. R19:8. Baumgard explained that his grandmother, Vogel, had bought the vehicle for him and that he was paying her back. R19:8-9, 15. Baumgard claimed that he paid for the vehicle's insurance, gas and maintenance. R19:9. Baumgard stated that his grandmother did not drive the vehicle, and that he did not live with his grandmother, but lived with his mother at an address different from his grandmother's. R19:9. Baumgard also took personal items out

of the vehicle when it was seized by officers on June 14, 2013. R19:10, 11.

After speaking with Baumgard, Deputy Winger spoke with Baumgard's grandmother, Gladys Vogel, on June 18, 2013. R19:10-11. Ms. Vogel told Deputy Winger that the Toyota was registered in her name only, and that was done a couple of days ago. R19:12-13. Ms. Vogel did not ask Deputy Winger to have any personal items retrieved from the car. R19:13

At the hearing, Ms. Vogel further testified that she is Baumgard's grandmother and that she is the owner of the Toyota Corolla. R19:17-18. Ms. Vogel testified that she purchased the Toyota Corolla on April 24, 2013. R19:18. Ms. Vogel testified that she paid $20,000 for the vehicle and Baumgard traded in his vehicle towards the purchase price of the Toyota. R19:19-19, 26. Ms. Vogel explained that the title was initially put in her and Baumgard's name because "[Baumgard] didn't have no money to pay down or anything on it. And, I said, well, I'll put my name along on the title and we'll do it that way and you pay me a certain amount every month." R19:20. Ms. Vogel further testified that she and Baumgard did not have a written agreement and that no fixed payments were established, but that Baumgard was to pay her what he could. R19:20. Two car payments were made by Baumgard to Ms. Vogel. R19:20-21. The first payment in

the amount of $350.00 was made on May 5, 2013 shortly after the vehicle was purchased, and the second payment in the amount of $200.00 was made on October 18, 2013 after the vehicle had already been seized. R19:21-22.

Ms. Vogel testified that Baumgard signed the vehicle over to her on June 17, 2013, after the Toyota had been seized by officers. R19:22. When the title was changed to her name only, Vogel stated her address also went on the title, which is different from Baumgard's address. R19:25-26. Although Baumgard is over to her residence a lot, Vogel stated that Baumgard did not live with her when the Toyota was purchase, nor did he live with her after he signed the car over to her. R19:24-25.

Finally, Vogel testified that the seizure of the Toyota Corolla did not cause her to have to purchase another vehicle to drive. R19:24-25. Ms. Vogel stated that she had her own vehicle at the time the Toyota Corolla was purchased and that she still had that vehicle. R19:24.

Vogel stated that she told Baumgard that he could use the Toyota to go to work and school. R19:26.

From this evidence, the trial court concluded that Vogel was a "nominal" owner of the 2013 Toyota Corolla and that Baumgard, who exercised dominion and control over the vehicle, was the "owner" for purposes of vehicle

forfeiture. Although Vogel in large part purchased the vehicle, the evidence supports the conclusion that the vehicle was a gift to Baumgard, and that Baumgard possessed and exercised dominion and control over the actual vehicle. Consequently, the State met its burden of proof. Accordingly, the trial court's decision should be affirmed.

Citing *United States v. One 1981 Datsun*, 644 F. Supp. 1280 (1986), Vogel argues that the trial court improperly concluded that Baumgard was the owner of the 2013 Toyota Corolla for purposes of vehicle forfeiture. Vogel's reliance on *One 1981 Datsun* to support her position, however, is misplaced. The facts of the present case are distinguishable from *One 1981 Datson*.

In *One 1981 Datson*, on August 22, 1984 Mr. Robert Bogol purchased a Datson and registered the vehicle in his name. *Id*. at 1282. The Bogol family anticipated that Robert's daughter Roxanne, who resided in Robert's home, would have primary use of the Datsun until around Christmas 1984 when she was expected to have enough money to buy her own car. *Id*. The vehicle Roxanne was currently driving was experiencing mechanical difficulties. *Id*. at 1281. When Roxanne purchased her own car, the Datsun was to be used primarily by Robert's wife, Janet. *Id* at 1282. In the months following the purchase of the Datsun, the car was

primarily driven by Roxanne, but it was also driven by Robert. Roxanne also used the car to give driving lessons to Janet. In November of 1984 Roxanne moved in with her boyfriend but still visited her parents' home. *Id*.

Shortly after moving out of her parents' home, Roxanne was arrested on November 27, 1984 for transporting methamphetamine in the Datson. *Id*. at 1283-84. Upon her arrest, Roxanne told at least one FBI agent that the Datsun belonged to her, even though she did not believe it to be true but said this to prevent her parents' learning about the events of November 27, 1984. Roxanne hoped to recover the car from the FBI before her parents learned of its seizure. *Id*. at 1283.

Around Christmas 1984, Robert and his wife lost contact with Roxanne and went to her last known residence to take possession of the Datsun, but neither the car nor Roxanne were there. For several weeks Robert staked out the apartment, but saw no sign of either Roxanne or the Datsun. *Id*. at 1283-1284.

Robert first learned that the Datsun had been seized on April 4, 1985 when he received a letter from the FBI. *Id*. at 1284.

In concluding that Mr. Bogol was an innocent owner the court observed that it was clear that Robert was not

involved in the drug transaction. In finding that Robert was the actual owner of the vehicle, the court further observed that Robert often drove the car and in the period before the drug transaction the Datsun was usually parked at Robert's home. *Id*. at p. 1286. The court stated:

> The Government has not suggested what steps should have been taken by a father who permitted his daughter to use his car to drive to work because the automobile she had been using was not running properly where that father had no reason to believe his daughter had ever or would ever engage in illegal drug use or an illegal drug transaction. Where, as here, the father often drove the car and saw it on most days of the week, the court finds that the father did all that reasonably could be expected of him to prevent illegal use of the automobile.

Id. at 1287-1288.

Here, unlike the facts in *One 1981 Datson*, Vogel did not loan the vehicle to her grandson for a short specified period of time, nor did Vogel frequently drive the vehicle or see it on most days of the week. Moreover, unlike *One 1981 Datson*, there is no indication that Vogel ever attempted to retrieve the vehicle from her grandson. Rather, the facts of the instant case show that Vogel's grandson was in sole possession of the 2013 Toyota Corolla, used the vehicle whenever he chose, and was the primary driver of the vehicle.

Instead, the facts of this case are substantially similar to those in *United States v. One 1971 Porsche Coupe*, 364 F. Supp 745 (E.D.Pa 1973), a case relied upon in *Kirch* to determine ownership of a vehicle for forfeiture purposes. *Kirch*, 222 Wis.2d at 606. In *One 1971 Porsche Coupe Auto., supra,* the United States District Court for the Eastern District of Pennsylvania considered who would suffer from a vehicle's loss to determine who had a sufficient ownership interest in the automobile to contest its forfeiture. The court found that the father paid for the vehicle and held title to it. *Id.* at 746. However, the court further found that the automobile was purchased for the benefit of the father's son, who "had sole possession and exercised dominion and control over it." *Id.* at 748. Based on these facts, the court determined that it was the son, not the father, "who [would] suffer the loss occasioned by forfeiture" and, therefore, that "the [father] lack[ed] the requisite real interest in the car [to contest its forfeiture]." *Id.*

Similar to *One 1971 Porsche Coupe Auto, Vogel* purchased the 2013 Toyota Corolla for the benefit of her grandson, Baumgard. The circuit court's well-supported findings establish that Baumgard exercised dominion and

control over the automobile and that he would suffer the loss occasioned by the vehicle's forfeiture.

Under these facts, the circuit court properly concluded that Vogel's grandson was the owner of the vehicle for purposes of vehicle forfeiture. The intent of the forfeiture provisions is to deprive drug traffickers of the means necessary to commit the proscribed drug offenses. *State v. Fouse*, 120 Wis.2d 471, 478-479, 355 N.W.2d 366, 370 (Ct. App. 1984). Forfeiture of the 2013 Toyota Corolla is consistent with the legislative purpose and public policy behind the forfeiture provisions.

Therefore, this court should affirm the decision of the circuit court forfeiting the 2013 Toyota Corolla.

C. **The Forfeiture Of Baumgard's Car Does Not Violate The Eighth Amendment**.

Baumgard also claims that the forfeiture of his vehicle, which he values at $22,500.00, is disproportionate to the gravity of his offense and would violate the Eighth Amendment. Although the state agrees with Baumgard that civil forfeitures are subject to the limitations imposed by the Eighth Amendment, under the facts of Baumgard's case forfeiture of Baumgard's car does not violate the Excessive Fines Clause. *See State v. Hammad*, 212 Wis.2d 343, 352, 569 N.W.2d 68 (Ct. App. 1997)

In *State v. Boyd,* 2000 WI App 208, ¶ 14, 238 Wis.2d 693, 618 N.W.2d 251 the court explained that courts determine whether a forfeiture violates the Excessive Fines Clause by considering the following factors: (1) the nature of the offense; (2) the purpose for enacting the statute; (3) the fine commonly imposed upon similarly situated offenders; and (4) the harm resulting from the defendant's conduct. Applying these standards, the court determined that forfeiture of Baumgard's vehicle does not constitute an unconstitutionally excessive fine. The Court stated:

> First of all, I look to the fact that the purpose of the statutes that have been on the books for awhile set out by our legislature and enforced by the state and looked at with a careful eye because of the nature of what's involved here is to deter people from using items like vehicles for criminal activity here is drug dealing. I note as I already said that the possible penalties here for the three times that they actually caught him selling drugs with a CI is $30,000 and over ten years of imprisonment. So – and I recognize that he worked them, got the benefit of the agreement and the case was dismissed. That was a huge benefit to him already to have that case dismissed, but that doesn't change the fact that he committed those crimes and that those were the maximum penalties that he was subjected to, and I've heard nothing to the fact that the agreement contained any sort of agreement about what was going to happen to the vehicle. It had already been seized by that point so that was not on the table in terms of the dismissal here. There is also – I think it's State v. Hopper, which is 122 Wis.2d 748; which clearly states that whether or not someone is convicted of the crime or is even charged with a crime that's not a prerequisite to the Court

> moving forward on a seizure here. So clearly here I don't think it's disproportionate when we look at the magnitude of the sentence that this was not a huge amount of marijuana and he didn't make a lot of money off of it, but I don't find that the penalty of seizing the car that he was using – he had been using his – I think it was an Infiniti, and now he's using the car that grandma bought for him that he takes care of, pays for, pays for the gas, insurance, everything else. It's kept at his house. The whole idea is to deter. If the only time a seizure and a forfeiture can be done is if they're driving junkers or something that's proportionate so to speak to what they're doing or the amount that they're doing at that particular time, I think that would have been put into the statute but it is not. Clearly here the issue is deterrence. And this was not a one-time thing that Mr. Baumgard was engaged in. They caught him three different times selling drugs. And the public ramifications and the dangers of drug dealing are well-known, and I don't think I need to go through what they are. And while I recognize the cases that have been pointed out to the Court, some of which I had already been aware of by the defendant, there are different circumstances and I really think that every case has to be looked at on a case-by-case basis to see whether or not it is excessive and disproportionate and given the factors here and in looking at other cases where clearly very similar factors have been found to be appropriate forfeitures, given these factors here I cannot find that it is excessive or disproportionate as I've already found he is the owner of this vehicle. So I am granting the state's complaint and petition to forfeit this vehicle.

R19:57-60.

Again, a review of the record supports the trial court's decision. First, Baumgard stipulated that on three separate occasions he delivered marijuana, contrary to Wis. Stat. §961.41(1)(h)1; which is a Class I felony. R19:4.

While this is not the worst offense imaginable, neither is it insubstantial. In fact delivery of marijuana, as committed and stipulated to in this case, is punishable by imprisonment up to three years and six months and/or a fine of not more than $10,000, on each charge. Given that Baumgard could have been ordered to pay a monetary fine of $30,000 in addition to being imprisoned, forfeiture of his vehicle, which by Vogel's own testimony is worth $22,500, is not a disproportionate penalty. As the *Boyd* court acknowledged, the potential fines can be considered in this type of analysis, and even if a proposed forfeiture is greater than the maximum fine, the forfeiture is not automatically deemed excessive. *See Boyd,* 2000 WI App 208, ¶16.

Second, the individual circumstances surrounding Baumgard's delivery of marijuana warrants vehicle forfeiture. As stated, Baumgard stipulated to delivering marijuana to a confidential informant on three separate occasions - April 24, 2013, May 1, 2013 and May 8, 2013. R19:4; R1, R2. Each of those three deliveries occurred in a public location, either the Wal-Mart parking lot or the Sentry parking lot, at a time of day when the public would be active in the area. R2. For instance on April 24, 2013 the deal occurred at 12:15 p.m., on May 1, 2013 the deal

occurred at 11:30 a.m., and on May 8, 2013 the deal occurred at 1:36 p.m. R2. It is common knowledge the danger such activity poses to the public's safety.

Moreover, although Baumgard was never convicted of any of the three deliveries, that was not due to a lack of evidence or seriousness of the offenses. Instead, Baumgard was offered and took advantage of the opportunity to work off his crimes by cooperating with the local drug unit. R19:29-30, 32. *See also State v. Hooper*, 122 Wis.2d 748, 364 N.W.2d 175 (Ct. App. 1984)(criminal charges against owner of property seized was not precondition to forfeiture action).

The purpose of the forfeiture statute is to deter offenders from using their vehicles to commit a felony. *See Boyd*, 2000 WI App 208, ¶17. Clearly, the state does not want people to use their vehicles to deliver marijuana, which the legislature has deemed significant enough to constitute a felony, particularly at a time and place when the public most likely will be subjected to the activity potentially putting anyone in the area at risk.

Citing *State v. Bergquist*, 2002 WI App 39, 250 Wis.2d 792, 641 N.W.2d 179, *State v. Boyd*, 2000 WI App 208, 238 Wis.2d 693, 618 N.W.2d 251 and *State v. Hammad*, 212 Wis.2d 343, 569 N.W.2d 68 (Ct. App. 1997) Baumgard argues that

the forfeiture of his vehicle violated the Eighth Amendment. Baumgard's reliance on *Bergquist*, *Boyd,* and *Hammad* to support his position, however, is misplaced.[1]

[1] For much of Baumgard's argument he also relies on *State v. Peloza*, 2013 WI App 73, 348 Wis.2d 264, 831 N.W.2d 825, an unpublished *per curiam* opinion, which may not be cited in any court of this state as precedent or authority. *See* Wis. Stat. §809.23(3)(b). Because Peloza is a *per curiam* opinion, the State would ask the Court not to consider the case. In addition, not only is Peloza improperly cited, it is also distinguishable from the facts of Baumgard's case.

In *Peloza*, the defendant was arrested and charged with felony possession with intent to deliver marijuana after he sold marijuana for $355 to an undercover investigator. *Id*. at ¶2. After the sale, the defendant agreed to sell the undercover investigator $1500 in marijuana. The sale was not completed, as Peloza was arrested and charged with possession with intent to deliver. *Id*. The defendant subsequently entered a deferred prosecution agreement in which he pled guilty to misdemeanor possession. After the defendant successfully completed the agreement, and upon paying a $250.00 fine, the defendant's conviction was expunged. *Id*. at ¶3. After the criminal case was resolved, the state proceeded with proceedings to forfeit Peloza's vehicle valued at $16,000.00. In finding that the forfeiture of Peloza's vehicle violated the excessive fine clause, the court stated:

> When we consider the factors in this case, it is patently obvious that forfeiture of Peloza's car is excessive. Certainly, drug sales are not to be encouraged, but Peloza was ultimately convicted of mere possession. Peloza's offense did not involve violence, did not result in injury to anyone, and was not gang related. There is no suggestion that Peloza is a large-scale drug dealer, and he had no prior criminal record. The total value of the drugs he sold was less than $2000. The State apparently does not view the offense as exceptionally serious, as it was willing to permit a disposition resulting in expunction of the conviction and payment of a

Baumgard's reliance on *Bergquist* to support his position fails. In *Bergquist*, at issue was the return of two guns that were seized from Bergquist after neighbors reported that he fired the guns toward their property. *Bergquist*, 2002 WI App 39, ¶2. Bergquist was originally charged with two counts of recklessly endangering safety, contrary to Wis. Stat. § 941.30(2), but later pled no contest to one count of disorderly conduct, a Class B misdemeanor. *Id*. at ¶2. In support of his argument that forfeiture if the guns would violate the Excessive Fines Clause of the Eighth Amendment, Bergquist presented evidence that the total value of the two guns was between $5,000 and $7,150. *Id*. at ¶4. He argued that because the maximum fine for disorderly conduct is $1,000, and the fine

---

> small $250 fine. The maximum fine for misdemeanor possession was $1000, and even for the originally charged felony, the maximum fine was only $10,000. Forfeiture of a $16,000 vehicle is unconstitutionally disproportionate to the offense at hand.

State v. Peloza, 2013 WI App 73, ¶8.

In this case, the facts of *Peloza* do little to support Baumgard's argument that forfeiture of his vehicle would violate the Eighth Amendment. As demonstrated above, the facts of Baumgard's case differ significantly from those of *Peloza*. Here, unlike *Peloza*, Baumgard stipulated to committing three Class I felonies under factual circumstances that put the public's safety in jeopardy. Moreover, unlike *Peloza*, as previously argued the value of Baumgard's $22,500.00 car is not disproportionate to the maximum fine of $30,000.00 for Baumgard's crimes.

imposed in Bergquist's case was $100, forfeiture of the guns would be excessive. *Id*. at ¶4. On appeal, the state failed to contest Bergquist's assertion that forfeiture of his guns would violate the Excessive Fines Clause. *Id*. at ¶4. Because arguments that are not refuted are deemed admitted, the *Bergquist* Court affirmed without further discussion that the forfeiture of the guns would violate the Excessive Fines Clause. *Id*. at ¶14.

Likewise, *Boyd* does not help Baumgard's case. In *Boyd*, the defendant stopped his truck in front of a police station and, using a .22 caliber handgun, fired at the front door. *Boyd*, 2000 WI App 208, ¶2. He was convicted of felony endangering of safety by the use of a dangerous weapon. The State also sought the forfeiture of his 1998 Chevy Pickup because it was used to commit the felony. *Id.* at ¶3. The truck had a value of $28,000, and the trial court ordered it sold, but would award only $10,000 of the proceeds to the police department. The State appealed. *Id.* at ¶6. The Wisconsin Court of Appeals affirmed, adopting the *Bajakajian* proportionality test regarding whether the forfeiture/fine was excessive. The court found the $28,000 forfeiture sought by the State to be excessive, primarily because of the great disparity between that amount, and the

$10,000 maximum possible fine for the conviction. *Id.* at ¶15-17, 25.

In contrast to *Boyd*, however, Baumgard admitted that on three separate occasions he delivered marijuana to a confidential informant. The maximum possible fines for Baumgard's offenses is $30,000. Unlike *Boyd*, there is not a great disparity between the amount of Baumgard's vehicle, $22,500, and the $30,000 maximum possible fines for Baumgard's crimes.

Instead, contrary to Baumgard's assertions, *State v. Hammad* supports the forfeiture of Baumgard's vehicle. In *Hammad*, the City of Milwaukee Police Department conducted a sting operation in which the defendant agreed to purchase stolen items from an undercover police officer for $175. *Hammad*, 212 WIs.2d at 346-47. The items had a wholesale value of approximately $2,005. *Id*. at 347. Hammad was subsequently convicted of a class E felony as result of his actions, and the State brought a civil forfeiture action claiming that Hammad's vehicle was used to transport property received in the commission of a felony. *Id*. at 346. In finding that the forfeiture of Hammad's vehicle would not violate the Excessive Fines Clause, the Court stated:

> [T]he vehicles value, as determined by the trial court, was approximately $4,300 – twice the value of the stolen property and significantly less than the maximum fine allowable for the crime of attempted receiving stolen property. Thus, the forfeiture is neither disproportionate to the crime nor unusual in nature. As such, the forfeiture does not shock public sentiment nor does it violate a reasonable person's sense of justice.

Id. at 357.

Similar to *Hammad*, the value of Baumgard's $22,500 car is less that the maximum $30,000 fine allowable for Baumgard's crimes. Moreover, unlike *Hammad*, Baumgard's felonies were committed under factual circumstances that put the public's safety in jeopardy. Thus, as previously argued the value of Baumgard's car is not disproportionate to the maximum fine for Baumgard's crimes. Consequently, this Court should conclude that the forfeiture at issue does not constitute an unconstitutionally excessive forfeiture under the Excessive Fines Clause of the Eighth Amendment to the United States Constitution.

CONCLUSION

For the reasons set forth above, the State respectfully requests that the trial court be affirmed.

Dated this _____ day of March, 2014.

Respectfully submitted,

_____
HALEY J. REA
Assistant District Attorney
Walworth County, Wisconsin
State Bar No. 1067866

Walworth County Judicial Center
PO Box 1001
Elkhorn, WI 53121
262-741-7198

CERTIFICATION

I certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c).

____ Monospaced font: 10 characters per inch; double spaces; double spaced; 1.5 inch margin on left side and 1 inch margins on the other 3 sides.

The length of the brief is ____ pages.

I also certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated: _____

Signed,

_____
Attorney