STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT IV

Case No. 2015AP002052-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

KENNETH M. ASBOTH, JR.

Defendant-Appellant.

On Notice of Appeal from a Judgment
Entered in the Dodge County Circuit Court,
the Honorable John R. Storck, Presiding

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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ISSUE PRESENTED

> Law enforcement officers arrested Kenneth Asboth at a private storage facility. The car he had been driving was parked in the lane between rows of storage units, in front Mr. Asboth's leased unit. Were the law enforcement officers constitutionally justified in impounding Mr. Asboth's car?

The circuit court upheld the seizure and the resulting inventory search.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The issues for decision can be presented in briefing, so Mr. Asboth does not request oral argument. Publication is not warranted, as this case can be resolved by the application of established law to a particular fact pattern.

STATEMENT OF THE CASE AND FACTS

Based on primarily eyewitness and photographic evidence, police suspected Mr. Asboth of robbing a bank in Beaver Dam. (1). The robbery had been accomplished with the aid of what appeared to be a handgun. (1:2).

About a month after the robbery, the Fox Lake police received a tip that Mr. Asboth was at a storage facility. (38:60). Though the facility was outside the jurisdiction of Beaver Dam, both sheriff's deputies and Beaver Dam police responded. (38:38, 62). The first officer to arrive saw a man, who turned out to be Mr. Asboth, standing outside of a car parked in the lane between rows of storage units and reaching

into the back seat. (38:61). The officer took Mr. Asboth into custody at gunpoint but without incident. (38:61-62). Mr. Asboth was handcuffed and placed in the back of a squad car. (38:62). The bases for Mr. Asboth's arrest were a probation warrant, as well as suspicion that he had committed the robbery. (38:37-38; 38:61, 65, 91).

The car he had been reaching into was not registered to Mr. Asboth. (38:38, 63). Its registered owner had apparently sold it to Mr. Asboth but the DOT had not been appropriately notified. (38:17). The officers on the scene discussed what to do with Mr. Asboth's car. A sheriff's deputy testified that it was decided that the vehicle should be removed because:

> [i]t wouldn't have been able to remain there regardless. It was in—in an area that would have been blocking at least—right in the middle of the lane between the two buildings. It would have been blocking three or four different—or access to three to four different units…. Or at least it would have blocked free access.

(38:63). At a subsequent hearing, the same deputy agreed that the alley in which the car was parked was "maybe about three car lengths or widths, maybe more" across. (78:17). He also testified that there were not any "No Parking" signs. (78:24). The car was not blocking traffic; the deputy testified that "[y]ou could drive around it" though "[i]t would cause a restriction to the storage units." (78:24). Two pictures of the car as it was positioned are in the record. (52:18; 70; App. 105).

None of the officers on the scene recall speaking with Mr. Asboth about whether he could arrange to have someone pick up the car. (38:65-66; 78:14, 23, 49). Nor did they contact the owner of the property to see whether the owner wanted the car removed. (78:23). It was ultimately

determined that the car would be towed to the Beaver Dam police station.

At the first hearing on suppression, Beaver Dam Police Detective Corey Johnson testified that he had made the towing decision:

> Q: Did you call in for it to be towed somewhere else or--?
>
> A: Yes. Well, they called me in. I made the decision; yes.

(38:52). However, at a hearing nine months later, Johnson altered his story:

> Q: And did you—Detective, did you have a—some decision making authority as it related to where Mr. Asboth's vehicle would go that day?
>
> A: Are you asking if I wanted it impounded, or not?
>
> Q: Yeah.
>
> A. No.
>
> Q. Okay. Did you receive any direction from any other Beaver Dam Officer as to who should impound the vehicle or what department should impound the vehicle?
>
> A. I, I was notified that Mr. Asboth was arrested. That his vehicle was going to be impounded and towed.
>
> I ultimately did have a telephone conversation with Lieutenant Loos from the Sheriff's Department. He, he had voiced his concern that they did not have room for the vehicle. So since it was a Beaver Dam case that

> we were investigating for the armed robbery, the vehicle was brought to Beaver Dam.
>
> Q. Do you—I mean, was there someone specifically who made that decision in your Department as to that it be brought to Beaver Dam?
>
> A. I had a conversation with him that I was basically told it was coming to Beaver Dam because they did not have the space.
>
> Q. Okay. Did you specifically order Mr. Asboth's vehicle be towed to the Beaver Dam Police Department rather than the Dodge County Sheriff's Department?
>
> A. No, that is absolutely not true. Actually during my conversation with Lieutenant Loos, I did discuss with him the potential of the vehicle being towed to their facility.

(78:65-66).

Once the vehicle arrived at the Beaver Dam police station, officers searched it. (38:45). A pellet gun appearing similar to that used in the robbery was found in the spare tire compartment in the trunk. (38:45-46). The search also revealed a video game system in the trunk and a cell phone in the center console next to the driver's seat. (38:48). The officers conducting the search testified that they considered it to be an inventory search, and conducted it according to their inventory search procedures (38:71-77; App. 115-121), though one officer conducting the search filled out a form indicating it was done for "evidence" rather than the other possible purposes including "abandoned," "parked in traffic," or "safekeeping." (37; 38:79). The same officer later claimed that his checking of the box was done after the search and did

not reflect his actual motivation for performing the search. (78:55-60; App. 122-27).

Mr. Asboth moved to suppress the gun on the ground that the search of the vehicle was not a valid inventory and violated the Fourth Amendment. (28). After a hearing and briefing, the court issued a memorandum decision denying suppression. (38; 39; 40; 44). The court concluded that the search was reasonable, stating that "the vehicle could not be left where it was and needed to be impounded… the officers believed that the vehicle belonged to someone other than the Defendant [and] [i]t is undisputed that Beaver Dam police conducted the inventory search according to established procedures." (44:2; App. 102).

Mr. Asboth filed a motion for reconsideration, arguing that the court had erred in its decision as to the inventory search and also alleging that the car had not lawfully been impounded. (52). The court heard additional evidence and ultimately issued an order confirming its previous denial of suppression. (87). It stated the following conclusions:

> (1) Both the Dodge County Sheriff's Department and the Beaver Dam Police Department's written policies favor impoundment in this scenario. (The Court agrees with the State's analysis of those policies).
>
> (2) The vehicle was parked on another individual's property, not legally parked on a public street.
>
> (3) The vehicle was blocking access to more than one of the business's storage lockers and impeding travel by other customers through the complex.
>
> (4) There were valuable items in the vehicle including electronics.

> (5) Defendant was arrested while in possession of the vehicle and was actually observed reaching into the vehicle.
>
> In light of these facts, the Court agrees with the State that, "when the police arrest a person who has driven a vehicle onto private property other than their own, leaving that vehicle behind and making its removal the property owner's problem is unreasonable." The Court finds that removal under these circumstances is a valid community caretaker function.

(87:2; App. 104).

Mr. Asboth ultimately pled no contest to armed robbery. (121:10). He attempted, unsuccessfully, to withdraw this plea, and to pursue an interlocutory appeal of the denial of withdrawal. (122; 157; 167). The court sentenced him to 20 years of imprisonment, with ten years of initial confinement and ten of extended supervision. (175). He appeals. (234).

ARGUMENT

The Police Seizure of Mr. Asboth's Vehicle Was Not a Constitutionally Valid Impoundment.

A. Standard of review and summary of argument.

This court reviews denial of suppression using a mixed standard, upholding the circuit court's findings of fact unless clearly erroneous but applying constitutional principles to those facts *de novo*. ***State v. Dumstrey***, 2015 WI App 5, ¶7, 359 Wis. 2d 624, 859 N.W.2d 138, *aff'd*, 2016 WI 3, __Wis. 2d__, __N.W.2d__141.

The issue on appeal is whether the officers' seizure of Mr. Asboth's vehicle was a valid community caretaker impoundment (the state has never claimed that the seizure was supported by probable cause). It was not valid, for two reasons.

First, the seizure was not sanctioned by a departmental policy setting forth standard criteria cabining officer discretion. Second, under the circumstances as they existed at the time of Mr. Asboth's arrest—a car parked on private property, not blocking traffic and capable of being moved to a legal spot—there was not a valid community caretaker basis to tow the car to the police station. The officers' decision to do so was not a bona fide community caretaker activity, and the public interest in moving (and searching) the vehicle did not outweigh Mr. Asboth's privacy interest in it. Because the impoundment was unconstitutional, the fruits of the resulting inventory search must be suppressed.

B. The written policies of the law enforcement agencies did not justify the impoundment of Mr. Asboth's car.

"Both the decision to take the car into custody and the concomitant inventory search must meet the strictures of the Fourth Amendment." ***United States v. Duguay***, 93 F.3d 346, 351 (7th Cir. 1996). "An analysis of an inventory search involves a two-step process: (1) analysis of the reasonableness of the seizure of the car in the first instance; and (2) analysis of the reasonableness of the inventory search. ***State v. Clark***, 2003 WI App 121, ¶11, 265 Wis. 2d 557, 666 N.W.2d 112.

"An impoundment must either be supported by probable cause, or be consistent with the police role as 'caretaker' of the streets and completely unrelated to an

ongoing criminal investigation." ***Duguay***, 93 F.3d at 352 (*citing* ***South Dakota v. Opperman***, 428 U.S. 364, 370 n.5 (1976)). To be valid, a community caretaker impoundment must be conducted in accord with "standard criteria," ***Colorado v. Bertine***, 479 U.S. 367, 375 (1987); "[a]mong those criteria which must be standardized are the circumstances in which a car may be impounded." ***Duguay***, 93 F.3d at 351.

When Mr. Asboth was arrested, his car was parked on the private property of the storage facility, in the lane between two rows of storage sheds in front of his own unit. There were no "No Parking" signs. (78:24). The lane was "maybe about three car lengths or widths, maybe more" wide, (78:17), thus "[y]ou could drive around" the car although "[i]t would cause a restriction to the storage units." (78:24). Two pictures of the car as it was positioned are in the record. (52:12; 70). Though officers testified they knew Mr. Asboth's car was registered in someone else's name (38:38, 63), they did not give any reason to believe it was stolen, nor did they make any inquiries to find out more about its status or inquire as to whether he had the vehicle title.

The testimony was unclear as to which agency made the decision to impound Mr. Asboth's car. At one hearing, Detective Johnson of the Beaver Dam police said that he made "the decision," while at a subsequent hearing he denied it. (38:52; 78:65-66). Regardless, it is clear that it was the Beaver Dam police who ultimately took custody of the vehicle. Their written policy on impoundment is as follows:

> **Impoundment Generally**. Any officer having a vehicle in lawful custody may impound said vehicle. The officer will have the option not to impound said vehicle when there is a reasonable alternative; however, the existence

> of an alternative does not preclude the officer's authority to impound.

(35:3; App. 108).

This is, to be sure, a concise policy. In fact it is so abbreviated that it amounts to no policy at all. The policy states that an officer may (though need not) impound a car when it is in "lawful custody"—but the entire point of "standardized criteria" is to establish *when* a vehicle may be taken into "custody." There, the policy has nothing to say: it completely begs the question. In contrast to ***Bertine***, where police discretion was "exercised in light of standardized criteria, related to the feasibility and appropriateness of parking and locking a vehicle rather than impounding it," 479 U.S. at 375-76, the Beaver Dam policy gives police no guidance as to when to impound a vehicle.

In ***Clark***, the state sought to justify an impoundment on the basis of the Milwaukee police's "safekeeping tow" policy, which provided in part that such a tow could be used when "a vehicle is to be towed and the owner/driver is unable to authorize a tow." 265 Wis. 2d 557, ¶6. This court responded that the policy:

> provides no guidance as to *why* or *when* an automobile may be towed for safekeeping. The policy states: "This tow category is to be used only when ... [a] vehicle *is to be towed* and the owner/driver is unable to authorize a tow." Basically, this states that "a vehicle is to be towed for safekeeping when a vehicle is to be towed." Because this subsection offers no insight into *why* or *when* a vehicle may be seized-only that if it has already been determined that a vehicle is to be towed, the officer may do so for safekeeping even if the owner is unable to consent-[it] is wholly unhelpful here.

Id., ¶15 (emphasis in original).

As in ***Clark***, the Beaver Dam "policy" here is simply that an officer may take custody when he may take custody. The policy provides absolutely no "standard criteria" governing the decision to impound, effectively leaving the decision to the unfettered discretion of the officer. This is impermissible. ***Bertine***, 479 U.S. at 375 (officer discretion permissible "so long as that discretion is exercised according to standard criteria").

In the trial court, the state submitted that it was the county sheriff's policy, rather than that of the Beaver Dam police, that governed the impoundment. (85:3). The state's theory was that the sheriff's department "seized" the vehicle after determining that it could not remain at the storage facility and "turned [it] over to the Beaver Dam Police Department." (85:3). But this somewhat metaphysical view of events finds no support in the evidence. Though sheriff's deputy Harvancik testified that "I believe we originally had called for the tow truck" because the vehicle "couldn't remain" where it was (38:63-64), he later denied having "any decision making process as it related to the impounding of that vehicle on that day." (78:14). The other sheriff's deputy on the scene likewise denied having decided to impound the car. (78:26). The only person who ever (inconsistently) testified to having made the decision was Detective Johnson of the Beaver Dam police. Moreover, of course, it was the Beaver Dam police that took the car; it thus makes no sense to claim that some other agency was the one to impound it.

Even if the sheriff's policy were relevant, while it is more prolix than that of Beaver Dam it provides no greater clarity. It provides that deputies are "authorized" to arrange a tow where "the driver … has been taken into custody by a

deputy, and the vehicle would thereby be left unattended," though it adds that unless otherwise indicated, "the deputy always has the discretion to leave the vehicle at the scene and advise the owner to make proper arrangements for removal." (71:1; App. 112). Later, however, the policy states that in the case of a vehicle abandoned on private property, "deputy will advise the property owner that it is his/her responsibility to have the vehicle removed and to pay for towing expenses." (71:3; App. 114). Though there was testimony that at least one officer believed this provision should not apply where the police caused the abandonment by arresting the driver, this is certainly not clear from the policy itself, which, again, must provide "standard criteria" if it is to justify impoundment. ***Bertine***, 479 U.S. at 375.

C. The seizure of Mr. Asboth's car was not a bona fide community caretaker activity.

Besides failing to demonstrate standardized criteria governing the impoundment of Mr. Asboth's car, the state also failed to show that the impoundment was a valid community caretaker seizure. "Compliance with an internal police department policy does not, in and of itself, guarantee the reasonableness of a search of seizure." ***Clark***, 265 Wis. 2d 557, ¶14. Rather, the state must additionally show that the impoundment "on its own facts" is a valid exercise of the community caretaking authority of the police. ***Id.*** This inquiry is a three-step test: (1) whether a seizure within the meaning of the Fourth Amendment has occurred; (2) if so, whether the police conduct was bona fide community caretaker activity; and (3) if so, whether the public need and interest outweigh the intrusion upon the privacy of the individual. ***Id.***, ¶21.

As to the second step, a "bona fide community caretaker activity" is one that is "divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute." ***Id.*** Although, in general, an officer's subjective law enforcement concerns do not invalidate a search or seizure where "an objectively reasonable basis for the community caretaker function is shown," ***State v. Kramer***, 2009 WI 14, ¶30, 315 Wis. 2d 414, 759 N.W.2d 598, the analysis is different in the case of impoundment: inventory searches (unlike other searches and seizures, which can be constitutional even though pretextual) are impermissible where they serve as a "pretext concealing an investigatory police motive." ***Opperman***, 428 U.S. at 376; ***Whren v. United States***, 517 U.S. 806, 811-12 (1996) (distinguishing administrative searches from those supported by probable cause).

As to the third step, in weighing the public interest against the intrusion on the individual's privacy, the court weighs four additional factors: "(1) the degree of the public interest and the exigency of the situation; (2) the attendant circumstances surrounding the seizure, including time, location, the degree of overt authority and force displayed; (3) whether an automobile is involved; and (4) the availability, feasibility and effectiveness of alternatives to the type of intrusion actually accomplished." ***Id.*** "Overriding this entire process is the fundamental consideration that any warrantless intrusion must be as limited as is reasonably possible, consistent with the purpose justifying it in the first instance." ***Id.***

Regarding the first step, there has never been any dispute that the seizure of Mr. Asboth's car was a Fourth Amendment seizure. As to the second and third, given

the lack of any real community caretaker reason to impound the car, and the officers' clear law-enforcement motivations to do so, the state did not meet either one.

The officers' stated reason for impounding Mr. Asboth's car was that it could not remain where it was: parked in the lane between storage sheds at a private storage facility. (38:63-64). While there may be *some* "public need and interest" in preserving wide-open access to private storage sheds, clearly the positioning of Mr. Asboth's car was not a matter of "exigency"; Mr. Asboth's car was not "jeopardiz[ing] … public safety and the efficient movement of vehicular traffic." ***South Dakota v. Opperman***, 428 U.S. 364, 369 (1976).

Moreover, none of the officers contacted the owner of the storage facility to determine whether the owner wanted it removed. Absent such a request, it is hard to credit the notion that the public interest in removing the vehicle outweighed Mr. Asboth's privacy interest in it. *See, e.g.*, ***United States v. Sanders***, 796 F.3d 1241, 1251 (10th Cir. 2015). (impoundment unlawful where car parked in Goodwill parking lot and "no evidence in the record that the police consulted the owners of the parking lot about the vehicle remaining where it was"); ***United States v. Pappas***, 735 F.3d 1232, 1234 (10th Cir. 1984) (impoundment improper where car parked in lot of bar and owner not asked whether it could remain); ***State v. Lowe***, 480 S.E.2d 611, 613 (Ga. 1997) (impoundment illegal where owner of private property did not request removal); ***McGaughey v. State***, 37 P.3d 130, 143 (Okla. 2001) ("The decision to impound on private property does not properly rest with the police officer. It is incumbent upon the owner of the private property to request removal of a car if he deems it a nuisance or a trespass."); ***State v. Thirdgill***, 613 P.2d 44, 46 (1980) (arrestee's car parked in

restaurant parking lot, "[n]o one asked that the car be removed," impoundment illegal).

Even accepting, for the sake of argument, that the car needed to be moved, it does not follow that it needed to be *towed to the police station*. As this court held in ***Clark***, where an impoundment is claimed to be a community caretaker activity, "we must compare the availability and effectiveness of alternatives to the type of intrusion actually accomplished." 265 Wis. 2d 557, ¶25. "The decision to impound an automobile, unless it is supported by probable cause of criminal activity, is only valid if the arrestee is otherwise unable to provide for the speedy and efficient removal of the car from public thoroughfares or parking lots." ***Duguay***, 93 F.3d at 353.

It is clear from the testimony of the officers that no options other than impoundment were even considered, though many were available. If the concern was truly about the specific location of the vehicle marginally impeding access to a few storage lockers, it could simply have been moved to another location on the property or even to a legal street parking spot. Or, the officers could have asked Mr. Asboth if he knew anyone who could pick up the car. ***Duguay***, 93 F.3d at 353 ("The policy of impounding the car without regard to whether the defendant can provide for its removal is patently unreasonable if the ostensible purpose for impoundment is for the 'caretaking' of the streets."); ***Sanders***, 796 F.3d at 1251 (impoundment invalid; police failed to permit arrestee to have someone pick up car on her behalf).

The only other proffered justification for seizing the car was that, as the circuit court found, "[t]here were valuable items in the vehicle including electronics." (87:2; App. 104).

But, as the record shows, these items were not in plain view but were discovered after the car had been impounded, during the inventory search. (38:48-57). Obviously, then, they cannot serve as justification for permitting the impoundment in the first place. In the absence of a real non-law-enforcement need for impoundment, the public interest in seizing Mr. Asboth's car did not outweigh his right to privacy. The third step of the community caretaker test is thus unsatisfied.

The lack of a community caretaker basis for the tow implicates the second step as well. Mr. Asboth was arrested on suspicion of the armed robbery (38:91), and though the officers who searched his car testified that they did so for purposes of administrative inventory, the inventory form indicates that the car was impounded as "evidence." (37). While Mr. Asboth's car was not threatening public safety or blocking traffic where it was parked, it *did* present a tempting target for an investigatory search, despite the absence of probable cause or a warrant. In contrast with ***Opperman***, then, in which there was "no suggestion whatever that this standard procedure … was a pretext concealing an investigatory police motive," 428 U.S. at 376, here the state did not show that the seizure was "divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute." ***Clark***, 265 Wis. 2d 557, ¶27.

Because the police seizure of Mr. Asboth's vehicle was not a valid community caretaker impoundment, the fruits of the resulting search must be suppressed.

CONCLUSION

For the foregoing reasons, Mr. Asboth respectfully requests that this court vacate his conviction, reverse the circuit court's order denying suppression of the items found in his vehicle, and remand for further proceedings.

Dated this 5th day of February, 2016.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 3,962 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after 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 this 5th day of February, 2016.

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CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under s. 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using one or more initials or other appropriate pseudonym or designation instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

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