STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

Case No. 2015AP2052-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

KENNETH M. ASBOTH, JR.,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION ENTERED IN THE DODGE COUNTY CIRCUIT COURT, THE HONORABLE JOHN R. STORCK, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

BRAD D. SCHIMEL
Wisconsin Attorney General

JEFFREY J. KASSEL
Assistant Attorney General
State Bar No. 1009170

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-2340
(608) 266-9594 (Fax)
kasseljj@doj.state.wi.us

TABLE OF CONTENTS

Page

CASES CITED

Page

Page

STATUTE CITED

OTHER AUTHORITY

STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

Case No. 2015AP2052-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

KENNETH M. ASBOTH, JR.,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION ENTERED IN THE DODGE COUNTY CIRCUIT COURT, THE HONORABLE JOHN R. STORCK, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not request oral argument or publication. This case may be resolved by applying well-established legal principles to the facts of this case.

STATEMENT OF THE CASE

Given the nature of the arguments raised in the brief of defendant-appellant Kenneth M. Asboth, Jr., the State exercises its option not to present a statement of the case. *See* Wis. Stat. § (Rule) 809.19(3)(a). The relevant facts and procedural history will be discussed in the argument section of this brief.

ARGUMENT

Asboth was convicted following his no contest plea to armed robbery with the threat of force after he robbed a bank while displaying a gun to the teller (1:1-8; 206:1). He argues on appeal that the trial court erred when it denied his motion to suppress items found during an inventory search of his car, including a pellet gun that appeared similar to the gun used in the robbery.

"Although an inventory search is a 'search' within the meaning of the fourth amendment, it is also a well-defined exception to the warrant requirement." *State v. Weber,* 163 Wis. 2d 116, 132, 471 N.W.2d 187 (1991) (citation omitted). "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.; *see also Weber*, 163 Wis. 2d at 133.

In this case, Asboth does not challenge the reasonableness of the inventory search; he challenges only the reasonableness of the seizure of the vehicle. *See* Asboth's brief at 7-15. Because the record establishes that the police acted reasonably when they impounded the car, the court should affirm the circuit court's order denying his suppression motion.

I. STANDARD OF REVIEW.

The court of appeals reviews an order granting or denying a motion to suppress under a two step analysis. *State v. Padley*, 2014 WI App 65, ¶ 15, 354 Wis. 2d 545, 849 N.W.2d 867. The court will uphold the circuit court's findings of historical fact unless those findings are clearly erroneous. *Id*. The application of constitutional principles to the facts found presents a question of law that the court reviews de novo. *Id*.

II. THE IMPOUNDMENT OF THE CAR WAS REASONABLE UNDER THE FOURTH AMENDMENT.

Asboth argues that the impoundment of his car was not valid because the seizure "was not sanctioned by a departmental policy setting forth standard criteria cabining officer discretion" and because "[t]he 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." Asboth's brief at 7. Before addressing those

arguments, the State begins by reviewing the trial court's factual findings and conclusions of law.

In its June 26, 2013, decision and order denying Asboth's suppression motion, the court made the following findings:

> (1) The vehicle could not be left where it was and needed to be impounded.
>
> (2) The arresting deputy was alone and made a reasonable mutual aid request.
>
> (3) The officers involved believed that the vehicle belonged to someone other than the Defendant.
>
> (4) It is undisputed that Beaver Dam police conducted the inventory search according to established procedures.
>
> (5) The firearm was found in plain view during the inventory search.
>
> (6) The inventory search continued after the firearm was found.
>
> (7) Several items of property unrelated to the robbery were taken from the vehicle and held for safekeeping.

(44:2, A-Ap. 102.) Based on those findings, the court held that the inventory search "was not conducted 'for the sole purpose of investigation.'" (44:1, A-Ap. 101.)

In its March 24, 2014, decision and order denying Asboth's motion for reconsideration, which "argu[ed] that the initial ***seizure*** of his vehicle was

improper" (87:1, A-Ap. 103), the court made the following additional factual findings:

> (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.

(87:2, A-Ap. 104.)

Based on those findings, the court "agree[d] 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.'" (*Id*.) The court concluded that "removal under these circumstances is a valid community caretaker function." (*Id*.)

Also before responding to Asboth's specific arguments, the State notes that he refers to the impounded vehicle as his car. *See, e.g.,* Asboth's brief

at 1, 7, 11. For convenience, the State will at times do the same. But, as discussed below, at the time of the impoundment, the car was not registered to Asboth. *See infra* at 22-23.

A. The impoundment of the car was proper under the Sheriff's Department's written policies.

Asboth first argues that "[t]he written policies of the law enforcement agencies did not justify the impoundment of Mr. Asboth's car." Asboth's brief at 7. Citing *Colorado v. Bertine*, 479 U.S. 367 (1987), and *United States v. Duguay*, 93 F.3d 346 (7th Cir. 1996), Asboth argues that "[t]o be valid, a community caretaker impoundment must be conducted in accord with 'standard criteria,'" including "'the circumstances in which a car may be impounded." Asboth's brief at 8.

The federal courts of appeals are divided on whether *Bertine* requires that an impoundment be conducted pursuant to a standardized policy to be constitutional. *See United States v. Sanders*, 796 F.3d 1241, 1247-48 (10th Cir. 2015) (collecting cases and noting that "no circuit has held either that the existence of standardized procedures automatically renders an impoundment constitutional, or that the absence of standardized procedures automatically renders an impoundment unconstitutional"). But regardless of the federal courts' views on this issue, Asboth's contention that the impoundment of his vehicle was unconstitutional unless it was conducted

pursuant to a standardized police policy cannot be squared with this court's decision in *Clark*.

The issue in *Clark* was whether the decision to impound and tow the vehicle was reasonable. *See Clark*, 265 Wis. 2d 557, ¶ 12. The court first examined whether the seizure and towing of the vehicle was conducted pursuant to the Milwaukee Police Department's policies. *See id.* ¶¶ 14-17. It concluded that the department's written "safekeeping tow" policy was inapplicable to the tow in question, that the department's unwritten "unsecured vehicle" policy was overbroad, and that even assuming the reasonableness of both polices, the detective who decided to have the vehicle towed failed to comply with those policies. *See id*. ¶¶ 15-17.

If compliance with a valid impoundment policy were an absolute Fourth Amendment requirement, as Asboth contends, the *Clark* decision would have ended at that point. But it did not. Rather, the court said that it "must . . . determine, absent any police department policies, whether the seizure satisfied the reasonableness standard of the Fourth Amendment to the United States Constitution and article 1, section 11, of the Wisconsin Constitution." *Id*. ¶ 18. It then examined at length whether the seizure was reasonable under the community caretaker exception to the Fourth Amendment's warrant requirement. *See id*. ¶¶ 19-20.

But even if Asboth were correct about the need for compliance with a departmental policy, the seizure in this case was authorized by the Dodge County Sheriff's Department "Wrecker

Requests/Towing of Vehicles" policy. (71:1-3, A-Ap. 112-14.) The "Policy" section of that document provides in relevant part that "Deputies of the Dodge County Sheriff's are authorized to arrange for towing of motor vehicles under the following circumstances: . . . When the driver of a vehicle has been taken into custody by a deputy, and the vehicle would thereby be left unattended." (71:1, A-Ap. 112.)

That policy is similar to the policy under which the defendant's vehicle was seized in *Bertine*. The policy in *Bertine* provided that "[a] peace officer is authorized to remove or cause to be removed a vehicle from any street, parking lot, or driveway when . . . (4) The driver of a vehicle is taken into custody by the police department." *Bertine*, 479 U.S. at 368 n.1. Indeed, the Dodge County policy is more narrowly drawn than the policy in *Bertine* because the Dodge County policy applies only when the vehicle is left unattended as a result of the driver being taken into custody. That policy is sufficiently standardized to satisfy constitutional concerns. *See United States v. Cartwright*, 630 F.3d 610, 615 (7th Cir. 2010) (holding that a policy permitting the impoundment of vehicles "operated by a non-licensed or suspended driver" or "by [a] person under custodial arrest for any charge" is "sufficiently standardized").

Asboth argues that the Dodge County Sheriff's Department policy does not provide "standard criteria" for towing a vehicle when the driver has been taken into custody because a different provision of the policy, titled "vehicles on private property," provides that "[i]f a vehicle is on private

property (i.e. abandoned, trespassing or suspicious), deputies will investigate the situation." (71:3, A-Ap. 114.) Under that provision, "[i]f a property owner requests removal of such vehicle, deputy will advise the property owner that it is his/her responsibility to have the vehicle removed and to pay for towing expenses." (*Id*.)

As Asboth acknowledges, however, *see* Asboth's brief at 11, Dodge County Sheriff's Deputy Kevin Harvancik testified that the "vehicles on private property" provision does not apply when the Sheriff's Department has taken the driver into custody. (78:22.) He testified that "we had taken Mr. Asboth into custody and it would of [sic] been unreasonable to tell the owner of the storage facility that it was gonna be their responsibility to remove the vehicle. We had caused it to be there without a driver and so standard operating procedure would be that we would remove the vehicle." (*Id*.) The trial court agreed 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." (87:2, A-Ap. 104.)

Asboth contends that "it is not clear from the policy itself" that the "vehicles on private property" provision does not apply when the police cause the abandonment by arresting the driver. *See* Asboth's brief at 11. But the examples given in that provision for when it does apply – "abandoned, trespassing or suspicious" vehicles – are dissimilar from situations in which the driver has been taken into police custody, as there would be no reason in that

circumstance for the deputies to "investigate the situation." And, as the deputy testified and the trial court found, it would be an unreasonable application of the "vehicles on private property" provision to make the property owner responsible for removing a vehicle when the police have created the situation by taking the driver into custody. The lack of clarity asserted by Asboth arises only if the Sheriff Department's policy is interpreted unreasonably.

Asboth directs much of his argument to the Beaver Dam Police Department's vehicle impoundment policy. *See* Asboth's brief at 8-10. He acknowledges that the "testimony was unclear as to which agency made the decision to impound Mr. Asboth's car." Asboth's brief at 8. The State agrees that the record is unclear on this point, and the trial court made no factual finding regarding which department made the decision to impound the vehicle. But there is no dispute in the record that the storage facility was outside Beaver Dam's city limits and that it therefore was within the Sheriff's Department jurisdiction and outside of the Beaver Dam Police Department's jurisdiction. (38:38, 62; 78:27.) Sheriff's Deputy Harvancik had the initial contact with Asboth and took him into custody on a probation warrant. (78:13, 20.) Beaver Dam police officers were present at the scene to assist Deputy Harvancik at the request of the Sheriff's Department under a mutual aid agreement. (38:69; 78:41, 44-46, 50-51, 61.) Consistent with that evidence, the trial court found that "[t]he arresting deputy was alone and made a reasonable mutual aid request." (44:2, A-Ap. 102.)

Asboth argues that the relevant impound policy is not that of Sheriff's Department but that of the Beaver Dam Police Department because "it was the Beaver Dam police who ultimately took custody of the vehicle." Asboth's brief at 8. But that argument ignores the testimony of a Beaver Dam detective that the car was towed to the Police Department's lot after a lieutenant in the Sheriff's Department told him that it was going to Beaver Dam because the Sheriff's Department did not have space for it. (78:65.)

The car was seized in a location over which the Dodge County Sheriff's Department had jurisdiction and the Beaver Dam Police Department did not. Asboth was arrested by a Dodge County Sheriff's Deputy. Beaver Dam police officers were present to assist the Sheriff's Deputy Harvancik under a mutual aid agreement. The car was towed to the Beaver Dam facility rather than to the Sheriff's Department because the Sheriff's Department did not have space for it. Under these circumstances, the Sheriff's Department impoundment policy is the applicable policy.[1]

[1] The inventory search conducted later by Beaver Dam police officers while the car was at a Beaver Dam Police Department facility would have been subject to that department's inventory search policy. (35:4-5; 38:40-44; A-Ap. 109-10.) But because the initial seizure of the car and the subsequent inventory search present distinct issues, *see Clark*, 265 Wis. 2d 557, ¶ 1, and because Asboth challenges only the seizure of his car, *see* Asboth's brief at 7-15, the Beaver Dam inventory search policy is not relevant to this appeal.

Although the State does not believe that the Beaver Dam Police Department's impoundment policy is relevant here, it notes that the policy provides that "[a]ny 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 an alternative does not preclude the officer's authority to impound." (35:3, A-Ap. 108.) In this case, the vehicle was in the lawful custody of the Sheriff's Department. And, as discussed below, *see infra* at 21-24, there were no reasonable alternatives to impoundment. Under these circumstances, if the Beaver Dam impoundment policy were relevant here, it provided sufficiently clear guidance.

B. The impoundment of the car was a valid exercise of police community caretaker authority.

As Asboth correctly states, *see* Asboth's brief at 11, this court held in *Clark* that "compliance with an internal police department policy does not, in and of itself, guarantee the reasonableness of a search or seizure." *Clark*, 265 Wis. 2d 557, ¶ 14. "Rather, the constitutionality of each search or seizure will, generally, depend upon its own individual facts." *Id*.

"A three-step test is used to evaluate the reasonableness of such a seizure: '(1) that a seizure within the meaning of the [F]ourth [A]mendment 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 (quoting *State v. Anderson*, 142 Wis. 2d 162, 169, 417 N.W.2d 411 (Ct. App. 1987)). The State agrees with Asboth, *see* Asboth's brief at 12, that there is no dispute with regard to the first step, that the towing of the car was a seizure under the Fourth Amendment.[2]

Asboth argues that the seizure was unreasonable under the second and third steps of the analysis. *See* Asboth's brief at 12-15. For the following reasons, the court should conclude that the seizure was reasonable under both steps.

1. The seizure was a bona fide community caretaker activity.

Asboth argues that the police were not engaged in a bona fide community caretaker activity because they had a subjective law enforcement reason for wanting to search the car. For that reason, he contends, the seizure was not "'divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute.'" Asboth's brief at 12 (quoting *Clark*, 265 Wis. 2d 557, ¶ 21).

[2] The "community caretaker analysis is the same under both the United States and Wisconsin Constitutions." *State v. Matalonis*, 2016 WI 7, ¶ 31, 366 Wis. 2d 443, 875 N.W.2d 443.

Asboth acknowledges that, in a case decided after *Clark*, our supreme court held that "when under the totality of the circumstances an objectively reasonable basis for the community caretaker function is shown, that determination is not negated by the officer's subjective law enforcement concerns." *State v. Kramer*, 2009 WI 14, ¶ 30, 315 Wis. 2d 414, 759 N.W.2d 598. But, he argues, *Kramer*'s holding does not apply to impoundments under community caretaker function. *See* Asboth's brief at 12.

Asboth's argument on this point consists of a single sentence:

> 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,' . . . *Kramer*, 2009 WI 14, ¶ 30, . . . 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)."

Asboth's brief at 12. The court should reject that argument for the following reasons.

First, Asboth's one-sentence argument is undeveloped. This court "will not decide issues that are not, or inadequately, briefed." *State v. Flynn*, 190 Wis. 2d 31, 39 n.2, 527 N.W.2d 343, 346 (Ct. App. 1994).

Second, Asboth is wrong on the merits. The United States Supreme Court stated in *Opperman*, an inventory search case, that "[a]s in *Cady* [*v. Dombrowski*, 413 U.S. 433 (1973)], there is no suggestion whatever that this standard procedure, essentially like that followed throughout the country, was a pretext concealing an investigatory police motive." *South Dakota v. Opperman*, 428 U.S. 364, 376 (1976). Even if that statement could be read as a requirement that police have no investigative motive when conducting an otherwise proper inventory search, the Court subsequently held in *Bertine* that the inventory search in that case was valid because "as in *Opperman* and [*Illinois v.*] *Lafayette,* [462 U.S. 640 (1983),] there was no showing that the police, who were following standardized procedures, acted in bad faith or *for the sole purpose of investigation*." *Bertine*, 479 U.S. at 372 (emphasis added).

Bertine thus holds that an inventory search is invalid if it is conducted in bad faith or for the sole purpose of investigation; it does not hold that an otherwise valid inventory search is rendered invalid if the police also had an investigatory motive. *See Whren v. United States,* 517 U.S. 806, 811 (1996) ("in *Colorado v. Bertine,* . . . in approving an inventory

search, we apparently thought it significant that there had been 'no showing that the police, who were following standardized procedures, acted in bad faith or for the sole purpose of investigation'"); *see also United States v. McKinnon*, 681 F.3d 203, 210 (5th Cir. 2012) (rejecting the argument that the officer's "subjective motivation in conducting the search renders the inventory search invalid under the Fourth Amendment").

Third, this court is bound by the supreme court's holding in *Kramer*, 315 Wis. 2d 414, ¶ 30, that "when under the totality of the circumstances an objectively reasonable basis for the community caretaker function is shown, that determination is not negated by the officer's subjective law enforcement concerns." *See Cook v. Cook*, 208 Wis. 2d 166, 189, 560 N.W.2d 246 (1997). Nothing in *Kramer* suggests that a different rule applies depending on the circumstances prompting the police to engage in community caretaking.

Fourth, the circuit court found that the inventory search in this case "was not conducted 'for the sole purpose of investigation.'" (44:1, A-Ap. 101.) Asboth does not argue that this finding is clearly erroneous, though he nibbles at the edge of disputing that finding. He notes that the inventory form prepared by the officers who searched the car indicates that it was impounded as "evidence." *See* Asboth's brief at 15. But the officer who prepared the form testified that he filled it out after conducting the inventory search and that he marked the form as

"evidence" because an officer who assisted with the inventory search told him that the gun they found in the car was probably the gun used in the armed robbery. (78:55-56.)

The officers' recognition that an item they found during the inventory search had evidentiary value does not mean that they were conducting the inventory search in bad faith or for the sole purpose of investigation. And, in fact, the officer testified that the fact that he checked the "evidence" box on the form afterwards said nothing about his motivation for conducting the inventory search in the first place. (78:56.)

Asboth's sole argument with regard to whether the police were engaged in a bona fide community caretaker activity is based on his assertion that they seized his car because they wanted to search it. The court should reject that argument because it is wrong on both the law and the facts.

2. The public need and interest outweighed the intrusion on privacy.

This third step of the community caretaker analysis "requires [the court] to consider 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.'" *Clark*, 265 Wis. 2d 557, ¶ 21 (quoting *Anderson,* 142 Wis. 2d at 169-70). "'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.* (quoting *Anderson,* 142 Wis. 2d at 169).

Asboth grudgingly concedes that there "may be *some* 'public need and interest' in preserving wide-open access to private storage shed," but argues that the location of the car "was not a matter of 'exigency.'" Asboth's brief at 13. But he does not argue that there was no need to move the car. The car was blocking access not just to the storage unit he was using; it completely prevented the user of an adjacent unit from parking in front of that unit and partially blocked the unit behind his car (78:19), as the photo appended to his brief illustrates (52:18, A-Ap. 105).

The trial court found that "[t]he vehicle was blocking access to more than one of the business's storage lockers and impeding travel by other customers through the complex." (87:2, A-Ap. 104.) It also found that "[t]he vehicle could not be left

where it was and needed to be impounded." (44:2, A-Ap. 102.) Asboth does not argue that any of those findings is clearly erroneous.

Asboth also argues that "it is hard to credit the notion that the public interest in removing the vehicle outweighed Mr. Asboth's privacy interest in it" because the officers did not contact the owner of the storage facility to determine whether the owner wanted it removed. Asboth's brief at 13. But in all but one of the cases he cites in support of that argument, the vehicle was legally parked in a parking lot; in the other case, the car was parked at a friend's house. *See Sanders*, 796 F.3d at 1250 ("The vehicle was legally parked in a private lot, and there is no evidence that it was either impeding traffic or posing a risk to public safety."); *United States v. Pappas*, 735 F.2d 1232, 1234 (10th Cir. 1984) ("In this case the car was legally parked in a private lot."); *State v. Lowe*, 480 S.E.2d 611, 613 (Ga. Ct. App. 1997) ("the vehicle was legally parked in a safe and secure place on private property"); *McGaughey v. State*, 37 P.3d 130, 134 & n.12 (Okla. Crim. App. 2001) (car parked at friend's house); *State v. Thirdgill*, 613 P.2d 44, 46 (1980) (car legally parked in restaurant parking lot).

Asboth cites the Seventh Circuit's decision in *Duguay* for the proposition that "[t]he 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." Asboth's brief at 14. But one such situation identified by the court in *Duguay* is "where the driver is the sole occupant and is legitimately arrested." *Duguay*, 93 F. 3d at 353 n.2. That was the situation here.

Asboth also argues that even if the vehicle needed to be moved, "it does not follow that it needed to be *towed to the police station*." Asboth's brief at 14. Citing *Clark*, he argues that the court must consider the available alternatives to towing the car to the station. *See id.*

This court held in *Clark* that "under the third step of the reasonableness test, we must compare the availability and effectiveness of alternatives with the type of intrusion actually accomplished." *Clark*, 265 Wis. 2d 557, ¶ 25. The State recognizes that this court is bound by *Clark*. *See Cook*, 208 Wis. 2d at 189-90. But to preserve the argument, the State respectfully notes that it believes that *Clark* does not correctly state the law because the United States Supreme Court held in *Bertine* that the police need not consider such alternatives. The Court stated in *Bertine*:

> The Supreme Court of Colorado also expressed the view that the search in this case was unreasonable because Bertine's van was towed to a secure, lighted facility and because Bertine himself could have been offered the opportunity to make other arrangements for the safekeeping of his property. But the security of the storage facility does not completely eliminate the need for inventorying; the police may still wish to protect themselves or the owners of the lot against false claims of theft or

> dangerous instrumentalities. And while giving Bertine an opportunity to make alternative arrangements would undoubtedly have been possible, we said in *Lafayette*:
>
> > "[T]he real question is not what 'could have been achieved,' but whether the Fourth Amendment *requires* such steps . . .
> >
> > "The reasonableness of any particular governmental activity does not necessarily or invariably turn on the existence of alternative 'less intrusive' means."

Bertine, 479 U.S. at 373-74 (quoting *Illinois v. Lafayette*, 462 U.S. 640, 647 (1983)).

Many federal courts of appeal have held that under *Bertine*, police are not required to explore alternatives to impoundment.[3] And in his *Search and*

---

[3] *See, e.g., Cartwright*, 630 F.3d at 615 (citing *Bertine* for the proposition that "[t]he Fourth Amendment does not require that the police offer these sorts of alternatives to impoundment"); *United States v. Cherry*, 436 F.3d 769, 778 (7th Cir. 2006) ("The Supreme Court's decision in *Bertine* suggests that a rule that all towed vehicles shall be impounded is reasonable within the meaning of the Fourth Amendment; the owner need not be given an opportunity to make alternative arrangements even if they would protect the valid interest of the police in shielding themselves from charges of theft or damage to the owner's property as well as from the danger that the vehicle may contain weapons that might be used against them."); *Miranda v. City of Cornelius*, 429 F.3d 858, 865 n.6 (9th Cir. 2005) ("[a]n officer, acting within the scope of his or her community care-taking function, is not required to consider 'the existence of alternative less intrusive means' when the vehicle must in fact be moved to avoid the creation of a hazard or the continued unlawful operation of the

Seizure treatise, Professor LaFave argues that for an impoundment to be reasonable under the Fourth Amendment, the arrestee should be given the opportunity to avoid impoundment by directing that his vehicle be disposed of in some other lawful manner. *See* 3 Wayne R. LaFave, *Search and Seizure*, § 7.3(c), at 820-21 (5th ed. 2012). But he acknowledges that "the Supreme Court declined to adopt such a view in *Colorado v. Bertine. . . ." Id.* at 821.

Because this court is bound by *Clark*, the State will discuss the alternatives to impoundment suggested by Asboth. The State begins by noting that while Asboth was with the car when a sheriff's deputy found him at the storage facility, the car was not registered in his name. (38:61, 63.) Rather, the car was registered to a person with a Madison address. (38:39.)

At the hearing on the suppression motion, the State questioned Asboth's standing to challenge the search. (38:17-18.) Defense counsel responded that Asboth was driving the car, which was sufficient to

---

vehicle," citing *Bertine*); *Vega-Encarnacion v. Babilonia*, 344 F.3d 37, 41 (1st Cir. 2003) ("[U]nder *Bertine,* law enforcement officials are not required to give arrestees the opportunity to make arrangements for their vehicles when deciding whether impoundment is appropriate."); *United States v. Andas-Gallardo*, 3 F. App'x 959, 963 (10th Cir. 2001) (citing *Bertine* for the principle that "the fact that alternatives to impoundment may have existed does not mean impoundment was per se unreasonable").

establish his expectation of privacy. (38:18.) Counsel also quoted from a police report that stated:

> On January 21st, 2013, Antonio Kennedy called and stated that he is no longer the owner of the 1999 Pontiac Grand Prix. Antonio Kennedy stated that he sold it to Ken Asboth and that Ken Asboth should have a signed title in the vehicle, as far as he knows. Kennedy said that he does not want the vehicle and gave it to Asboth. I explained to Antonio Kennedy that he needed to go to the Department of Transportation and fill out some paperwork, indicating that he no longer owns this vehicle because the VIN and the plate number come . . . back to him at his current address.

(*Id*.)

The prosecutor responded by noting that the conversation recounted in the report occurred two months after the search in question, which took place on November 10, 2012. (38:19-20, 37.) But, the prosecutor said, to avoid unnecessarily delaying the suppression hearing, he would stipulate to Asboth's standing. (38:28.)

The police report that defense counsel quoted does not appear to be in the record. But the record does establish that the car was registered to someone else. And, in a factual finding that Asboth does not challenge, the trial court found that "[t]he officers involved believed that the vehicle belonged to someone other than the Defendant." (44:2, A-Ap. 102.) So, when weighing the public need against Asboth's privacy interest and when considering the feasibility of alternatives to impounding the vehicle, the fact that the police knew that the car was not

registered to Asboth is relevant to the analysis. *See United States v. Haro-Salcedo*, 107 F.3d 769, 771 (10th Cir. 1997) (noting that in a prior case, the court "deemed impoundment necessary where defendant, traveling alone, was arrested on an outstanding warrant and provided an unnotarized, handwritten bill of sale to prove ownership of the vehicle"); *United States v. Long*, 705 F.2d 1259, 1262 (10th Cir. 1983) ("Because none of the four [occupants] could establish ownership of the Thunderbird, the police could properly impound the car until ownership could be ascertained.").

Asboth asserts that the car "could simply have been moved to another location on the property." Asboth's brief at 14. But Deputy Harvancik testified that because the Sheriff's Department had taken Asboth into custody, it would have been "unreasonable to tell the owner of the storage facility that it was gonna be their responsibility to remove the vehicle." (78:22.) The trial court agreed 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." (87:2, A-Ap. 104.) Asboth does not explain why it would have been reasonable to move the car to a different location at the storage facility and require the facility's owner to track down the vehicle's owner or arrange for the car to be towed, presumably at the facility's expense.

Asboth alternatively contends that the car "could simply have been moved . . . to a legal street parking spot." Asboth's brief at 14. But even if there

were a legal street parking spot in the vicinity – the record is silent on this point – the car was registered to a person with a Madison address and the car was near Beaver Dam. It would not have been reasonable to make someone from Madison travel to Beaver Dam to pick up the car.

Moreover, our supreme court, in upholding an impoundment as reasonable, has noted the risk that a car left on the street could be vandalized or harmed, and the risk of claims against the police that could then result:

> We also note that if the car had been left unattended on the street, there is more than a possibility that it could have been vandalized or struck by another vehicle in which case it is not unlikely that the owner would claim that the police department was negligent in some manner. It is not unreasonable for the police to avoid such claims by removing the vehicle and placing it in protective custody.

State v. Callaway, 106 Wis. 2d 503, 513, 317 N.W.2d 428 (1982).

The impoundment of the car Asboth was driving was a valid exercise of law enforcement's community caretaker function. Because the impoundment was reasonable under the Fourth Amendment, and because Asboth does not challenge the subsequent inventory search, this court should conclude that the trial court did not err when it denied Asboth's suppression motion.

CONCLUSION

For the reasons stated above, the court should affirm the judgment of conviction.

Dated this 6th day of April, 2016.

BRAD D. SCHIMEL
Wisconsin Attorney General

JEFFREY J. KASSEL
Assistant Attorney General
State Bar No. 1009170

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-2340
(608) 266-9594 (Fax)
kasseljj@doj.state.wi.us

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 5,713 words.

_____
Jeffrey J. Kassel
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (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 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 this 6th day of April, 2016.

_____
Jeffrey J. Kassel
Assistant Attorney General