STATE OF WISCONSIN

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

DISTRICT IV

Case No. 2015AP2052-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

REPLY BRIEF OF DEFENDANT-APPELLANT

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

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

In his opening brief, Mr. Asboth argued that the impoundment of his car was unlawful for two independent reasons: first, that it was not done in accord with a standardized departmental policy that adequately guided officer discretion, and second, that it was not a bona fide community caretaker activity. Appellant's Brief at 8-11.

The state first responds by noting that the federal circuits are divided on whether standardized criteria are necessary for a valid impoundment, and suggesting that under ***State v. Clark***, 2003 WI App 121, 265 Wis. 2d 557, 666 N.W.2d 112, it is the law of this state that they are not. Respondent's Brief at 8-9. The argument is that once the ***Clark*** court determined that the vehicle seizure was not in accord with departmental policy, it nevertheless went on to analyze its reasonableness under the community caretaker rubric.

The state reads too much into the structure of the ***Clark*** opinion. The opinion does not even acknowledge the question of whether a standard policy is necessary, much less decide it. As for the dispute among the federal circuits, the state is correct that some have held that a standard policy is not required. Ultimately, however, the decisions of the federal circuits do not bind this court; those of the Supreme Court do.

And as the Tenth Circuit has noted, ***Colorado v. Bertine***, 479 U.S. 367 (1987), makes clear that such policies are required:

> [T]o hold, as have the First, Third, and Fifth Circuits, that standardized criteria are never relevant is to ignore the plain language of ***Bertine***, which holds that police discretion to impound a vehicle is constitutional only "so long as that discretion is exercised according to standard criteria."

United States v. Sanders, 796 F.3d 1241, 1249 (10th Cir. 2015).

The state also submits that the Dodge County Sheriff's impound policy, rather than that of the Beaver Dam police, is the relevant document. It cites testimony that the Sheriff's Department did not have room for the vehicle in its impound, resulting in it being taken to Beaver Dam. Respondent's Brief at 2. But the state admits that the record is unclear as to which agency made the determination to impound the car, and ignores the testimony by Beaver Dam Detective Johnson that he "made the decision" to tow the vehicle. Appellant's Brief at 2-3. In any case, why the vehicle *ended up* in Beaver Dam is not determinative; the question is which agency elected to impound the car, and thus whose policy was being invoked. The state argues that because the storage facility was not in Beaver Dam, the Sheriff's department must have been the impounding agency. But as the state notes, the Beaver Dam police were on scene pursuant to a mutual aid request. Respondent's Brief at 10-11. They took custody of both Mr. Asboth and his vehicle. The state makes no attempt to explain why, if the Beaver Dam police could validly exercise their other police powers on scene, they could not seize the car.

Mr. Asboth thus maintains that the Beaver Dam policy is the relevant one. And though the state notes that this policy permits "any officer having a vehicle in lawful custody" to impound said vehicle, it provides no response to Mr. Asboth's observation that the policy does not provide any criteria for when a vehicle may be *taken* into custody, and thus runs afoul of ***Bertine*** and ***Clark***. Appellant's Brief at 9-10; Respondent's Brief at 12.

As to the Dodge Sheriff's policy, the state argues that it is "sufficiently standardized" and compares it favorably to that at issue in ***Bertine***. But the quoted portion of the ***Bertine*** policy is only an excerpt of the relevant language, as the opinion later makes clear:

> In arguing that the Boulder Police Department procedures set forth no standardized criteria guiding an officer's decision to impound a vehicle, the dissent selectively quotes from the police directive concerning the care and security of vehicles taken into police custody. The dissent fails to mention that the directive establishes several conditions that must be met before an officer may pursue the park-and-lock alternative. For example, police may not park and lock the vehicle where there is reasonable risk of damage or vandalism to the vehicle or where the approval of the arrestee cannot be obtained…. Not only do such conditions circumscribe the discretion of individual officers, but they also protect the vehicle and its contents and minimize claims of property loss.

Bertine, 479 U.S. at 376 n.7. The Dodge Sheriff's policy here simply states that officers *may* tow a vehicle where a driver is taken into custody and the vehicle is unattended, but also provides that 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 (emphasis

added)). In contrast to that in ***Bertine***, the Dodge policy provides absolutely no "conditions circumscrib[ing] the discretion of individual officers." It, like the Beaver Dam policy, is effectively no policy at all, and cannot justify the impoundment here.

B. The seizure of Mr. Asboth's car was not a valid community caretaker seizure.

1. The police conduct was not a bona fide community caretaker activity.

The state disputes Mr. Asboth's recitation of the law regarding the role of "investigatory police motive" in the analysis of whether an impoundment and inventory search is a bona fide community caretaker activity. Respondent's Brief at 14-16. The state's position is apparently that police are, in fact, permitted to use such a procedure as a pretext to conduct criminal investigations. For this proposition, it cites ***State v. Kramer***, 2009 WI 14, 315 Wis. 2d 414, 759 N.W.2d 598, which, curiously, has nothing to do with impoundments or inventory searches. ***Kramer***'s general statement about community caretaker functions did not purport to address the question of pretextual impoundments or inventories, and it does not bind this court on the issue.

What does bind this court is ***South Dakota v. Opperman***, 428 U.S. 364, 376 (1976), which upheld an inventory search in part because it found the procedure was not "a pretext concealing an investigatory police motive." Also binding on this court is ***Whren v. United States***, 517 U.S. 806, 811-12 (1996), in which the Court, while holding that searches supported by probable cause are valid regardless subjective motivation, noted that the same is *not* true of searches conducted in the absence of probable cause: "the exemption from the need for probable cause (and

warrant), which is accorded to searches made for the purpose of inventory or administrative regulation, is not accorded to searches that are not made for those purposes." In other words, if a search's true "purpose" is to discover evidence of criminal wrongdoing, it is not a legal inventory and requires probable cause. *See also* ***Florida v. Wells***, 495 U.S. 1, 4 (1990) (standardized criteria must govern inventory searches "based on the principle that an inventory search must not be a ruse for a general rummaging in order to discover incriminating evidence").

Turning to the facts, while the state notes that the circuit court found the *search* of the vehicle was not conducted for the "sole purpose of investigation," Respondent's Brief at 16, it made no similar finding with respect to the initial *impoundment* of the vehicle. And that impoundment, as Mr. Asboth has argued and will argue below, was not supported by a real public need sufficient to outweigh Mr. Asboth's privacy interest.

2. The public need did not outweigh the intrusion on Mr. Asboth's privacy.

Mr. Asboth argued in his opening brief that his vehicle, parked in a wide private lane between two rows of storage sheds, did not present the sort of exigency that justified seizing the vehicle and searching its contents without a warrant. Appellant's Brief at 13-15. The state responds, in part, by wrongly labeling the trial court's statement that the vehicle "could not be left where it was and needed to be impounded" as factual finding, which it asserts that Mr. Asboth has not challenged. Respondent's Brief at 18-19. Whether the car "needed to be impounded" is simply a restatement of the question of whether the impoundment was

constitutionally valid, a question of law that Mr. Asboth obviously disputes.

The state goes on to posit that because Mr. Asboth's vehicle would prevent another car from parking *directly* in front of two adjacent storage units, and because other vehicles would have to drive around Asboth's vehicle to proceed down the lane, there was a "need" to move the car. Respondent's Brief at 18. This bare assertion does not amount to an argument that "the public need and interest outweigh[ed]" the intrusion into Mr. Asboth's privacy. ***Clark***, 265 Wis. 2d 557, ¶21. Potential minor inconvenience to two storage-shed tenants simply does not implicate the public interest in a way that justifies the warrantless seizure, and search, of a person's automobile.

The recent case of ***State v. Matalonis***, 2016 WI 7, 366 Wis. 2d 443, 875 N.W.2d 567, provides a useful comparison. There, officers responding to a medical call from an apartment discovered blood "all over the door," and followed a trail of blood to a second door from which emanated "two loud bangs." ***Id.***, ¶¶4-7. On receiving permission to enter the residence, they followed another trail of blood to a locked door, which they eventually entered. ***Id.***, ¶¶8-18. Even given these facts, only four of the seven justices of our supreme court agreed that the need to check for injured parties behind the door outweighed the residents' privacy interest. ***Id.***, ¶¶64-66. How, then, could the positioning of Mr. Asboth's car, which posed no danger to anyone, amount to an "exigency" justifying a warrantless seizure and search?

While acknowledging that this court is bound by ***Clark***, the state next argues that the ***Clark*** court erred when it held that one factor in determining whether an impoundment is a valid community caretaker function is "the availability,

feasibility and effectiveness of alternatives" to impoundment. Respondent's Brief at 20-22. Because the state is correct that this court cannot overrule ***Clark***, Mr. Asboth will limit his response to observing that ***Bertine*** did not hold that alternatives to impoundment are *never* relevant, but only stated that reasonableness "does not *necessarily* or *invariably* turn on the existence of alternative 'less intrusive' means." 479 U.S. at 367 (emphasis added). Nor do the federal cases cited by the state hold otherwise; they simply state that the failure of the police to offer alternative arrangements does not necessarily render an impoundment unlawful. Respondent's Brief at 21 n.3. Indeed, it would be impossible for a court to sensibly evaluate whether a particular situation justifies warrantless search or seizure without considering what other courses of action might be available.

Turning to the merits, the state makes much of the fact that Mr. Asboth's car was registered in another person's name. From this fact, the state leaps to the conclusion that the police could not take any action other than impoundment because, in the state's view, the vehicle belonged to "someone from Madison." Respondent's Brief at 23-24. But, as the state acknowledges, Mr. Asboth *did* own the car, Respondent's Brief at 23, a fact that the officers on the scene could have learned had they bothered to inquire. The failure to ascertain readily available facts about the vehicle is yet another indication that the law enforcement agents here were not interested in considering "effective alternatives" to impoundment. ***Clark***, 265 Wis. 2d 557, ¶23.

The state finally posits, relying on ***State v. Callaway***, 106 Wis. 2d 503, 317 N.W.2d 428 (1982), that the possibility that Mr. Asboth's car could have been vandalized justified its seizure. The state points to no facts suggesting any actual risk of vandalism; were the state's reasoning adopted, the police

would be justified in impounding every vehicle they come upon for the same reason. Clearly, this cannot be the law. *See* ***Clark***, 265 Wis. 2d 557, ¶16 (rejecting "unsecured vehicle" policy that "might lead to the police towing every unlocked vehicle on the street").

Because the seizure of Mr. Asboth's vehicle was not a lawful community caretaker activity, the fruits of the resulting search should have been 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 25th day of April, 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 2,096 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 25th day of April, 2016.

Signed:

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