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STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2015AP2052-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

KENNETH M. ASBOTH, JR.,

Defendant-Appellant-Petitioner.

On Review of a Decision of the Court of Appeals, District IV, Affirming a Judgment Entered in the Dodge County Circuit Court, the Honorable John R. Storck, Presiding

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BRIEF AND APPENDIX OF DEFENDANT-APPELLANT-PETITIONER

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ISSUES 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. The officers seized the car, towed it to a police station, and searched it.

I. Must a community-caretaker impoundment of a vehicle be governed by "standard criteria" limiting the discretion of law enforcement officers and, if so, was the impoundment here made in accord with such criteria?

The circuit court and court of appeals both held the law enforcement agents acted in accord with standard criteria.

II. Does the Constitution require the state to show that a community caretaker impoundment and search is not a pretext concealing criminal investigatory motives? Was the impoundment here a valid, non-pretextual community caretaker action where the vehicle was parked at a private storage facility and thus posed neither a threat to public safety nor a traffic hazard?

The court of appeals held that "even a strong investigatory motive" does not invalidate an otherwise valid community caretaker seizure. Both the circuit court and court of appeals found the impoundment and search to be valid community caretaker actions.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Both oral argument and publication are customary for cases decided by this court.

STATEMENT OF THE CASE AND FACTS

Based primarily on 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, a sheriff's deputy, saw a man, who turned out to be Mr. Asboth, standing outside 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 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. 126).

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. 143-48).

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. 123).

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. 125).

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).

Mr. Asboth appealed the denial of his suppression motion, arguing that the seizure was not made in accord with standard criteria and was not a valid community caretaker activity. (234). The court of appeals affirmed in an unpublished opinion. ***State v. Asboth***, No. 2015AP2052-CR, 2016 WL 5416012 (Wis. Ct. App. Sept. 29, 2016); (App. 101-21).

ARGUMENT

Introduction and standard of review

There has never been any dispute that the impoundment of Mr. Asboth's vehicle was a seizure governed by the Fourth Amendment. *See* ***United States v. Duguay***, 93 F.3d 346, 351 (7th Cir. 1996) ("Both the decision to take the car into custody and the concomitant inventory search must meet the strictures of the Fourth Amendment"). As he did in the court of appeals, Mr. Asboth submits that this seizure was unlawful for two independent reasons. First, it 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.

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***, 2016 WI 3, ¶13, 366 Wis. 2d 64, 873 N.W.2d 502.

I. Law enforcement officers do not have unlimited power to seize vehicles—their discretion must be cabined by established criteria, and the departmental policies here are insufficient.

A. To guard against unreasonable warrantless seizures, the Supreme Court has established that standardized criteria must govern vehicle impoundments

In ***Colorado v. Bertine***, 479 U.S. 367 (1987), the Supreme Court upheld the search of a van pursuant to a police impoundment. In so doing, the majority opinion rejected the defendant's claim that the search was unconstitutional because departmental regulations permitted police either to impound his van or to park and lock it. The Court responded: "nothing in [***South Dakota v. Opperman***, 428 U.S. 364 (1976)] or [***Illinois v. Lafayette***, 462 U.S. 640 (1983)] prohibits the exercise of police discretion so long as that discretion is exercised according to standard criteria and on the basis of something other than suspicion of evidence of criminal activity."

With some exceptions, state and federal appellate courts have read ***Bertine*** to establish that impoundments and inventories must be governed by "standard criteria" in order to be constitutionally valid. *See, e.g.* ***United States v. Duguay***, 93 F.3d 346, 351 (7th Cir. 1996) ("Standardized criteria or established routine must regulate inventory searches. Among those criteria which must be standardized are the circumstances in which a car may be impounded."(citation omitted)); ***United States v. Petty***,

367 F.3d 1009, 1012 (8th Cir. 2004) (standard criteria or established routine is required); ***Miranda v. City of Cornelius***, 429 F.3d 858, 863 (9th Cir. 2005) (same); ***United States v. Sanders***, 796 F.3d 1241, 1249 (10th Cir. 2015) (impoundment on private property of vehicle not posing safety hazard or obstructing traffic must be justified by standard policy and community caretaker rationale) ***United States v. Proctor***, 489 F.3d 1348, 1354 (D.C. Cir. 2007) (where a standard procedure exists, it must be followed); ***State v. Weaver***, 900 P.2d 196, 199 (Idaho 1995); ***People v. Ferris***, 9 N.E.3d 1126, 1137 (Ill. Ct. App. 2014) ("There must be a standard police procedure authorizing the towing of the car in the first place."); ***State v. Huisman***, 544 N.W.2d 433, 437 (Iowa 1996); ***Patty v. State***, 768 So. 2d 1126, 1127 (Fla. Dist. Ct. App. 2000); ***Fair v. State***, 627 N.E.2d 427, 433 (Ind. 1993); ***Com. v. Oliveira***, 47 N.E.3d 395, 398 (Mass. 2016); ***State v. Robb***, 605 N.W.2d 96, 104 (Minn. 2000); ***State v. Milliorn***, 794 S.W.2d 181, 186 (Mo. 1990); ***State v. Filkin***, 494 N.W.2d 544, 549 (Neb. 1993); ***People v. O'Connell***, 188 A.D.2d 902 (N.Y. App. Div. 1992); ***State v. O'Neill***, 29 N.E.3d 365, 374 (Ohio Ct. App. 2015); ***McGaughey v. State***, 37 P.3d 130, 142–43 (Okla. Crim. App. 2001).

A few courts have rejected a "standard criteria" requirement for impoundments, notably the First, Third and Fifth federal circuits. These courts rely solely upon a general "reasonableness" test for impoundments. ***United States v. Coccia***, 446 F.3d 233, 239 (1st Cir. 2006); ***United States v. Smith***, 522 F.3d 305, 312–15 (3d Cir. 2008); ***United States v. McKinnon***, 681 F.3d 203, 208 (5th Cir. 2012).

As the opinion below recognized, Wisconsin appellate courts have not expressly decided whether standard criteria must govern impoundments. ***Asboth***, No. 2015AP2052-CR,

¶¶16-17; (App. 109-10). This court should conclude that they must, for several reasons.

First, as the Tenth Circuit noted, the notion that such criteria are *not* required "ignore[s] 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.'" ***Sanders***, 796 F.3d at 1248 (emphasis in original).

Second, requiring standard criteria for non-emergency impounds where traffic is not obstructed harmonizes ***Opperman*** and ***Bertine***:

> ***Bertine*** makes the existence of standardized criteria the touchstone of the inquiry into whether an impoundment is lawful. However, ***Bertine*** did not purport to overrule ***Opperman***, and ***Opperman*** envisioned a situation in which an impoundment is immediately necessary, regardless of any other circumstances, in order to facilitate the flow of traffic or protect the public from an immediate harm.

Sanders, 736 F.3d at 1248-49.

Third, the standard criteria requirement "ensures that police discretion to impound vehicles is cabined rather than uncontrolled." ***Id.*** at 1249. As will be argued more fully below, police may not use impoundment and inventory as a pretext to search a vehicle for evidence of a crime. In the absence of clear rules for when a vehicle must or should be impounded, an arresting officer may be tempted to seize an arrested suspect's vehicle in order to justify its search, even where probable cause for a search is absent. As the Supreme Court stated regarding inventory searches in ***Florida v. Wells***, 495 U.S. 1, 4 (1990), the standardized criteria requirement "is based on the principle that an inventory search must not be a

ruse for a general rummaging in order to discovery incriminating evidence." Particularly where, as here, the vehicle is on private property and is no threat to public safety, standardized criteria serve to safeguard the core Fourth Amendment protection against unreasonable, arbitrary, warrantless searches.

B. The officers' seizure of Mr. Asboth's vehicle was not governed by standard criteria within the meaning of ***Bertine***.

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. (52:18; 70; app. 126). 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 about Mr. Asboth's possession of the car or whether he had 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. 129).

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 ***State v. Clark***, 2003 WI App 121, 265 Wis. 2d 557, 666 N.W.2d 112, 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. The court of appeals 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").

The court of appeals determined, however, that the Sheriff's Department policy, rather than the Beaver Dam Police Department policy, was the relevant document. Its grounds for this conclusion were as follows:

> Asboth does not challenge factual findings of the circuit court, summarized above, regarding the seizure, which we conclude are more pertinent. To repeat, the court found that a sheriff's deputy arrested Asboth, that the storage facility where Asboth was arrested was outside of the jurisdiction of the city police department, and that, after making the mutual aid request, the sheriff's department asked the police department to temporarily house the car only because the sheriff's department lacked storage space for the car. Under these circumstances, we conclude that this was a seizure generated, and primarily directed, by the sheriff's department and therefore the county's policy is the applicable policy.

Asboth, No. 2015AP2052-CR, ¶14; (App. 108).

Contrary to the court of appeals, the circuit court made no finding that "the sheriff's department asked the police

department to temporarily house the car only because the sheriff's department lacked storage space for the car." (44; 87). There was inconsistent testimony on this point: 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, who at one hearing said that he made "the decision," and at a subsequent hearing he denied it. (38:52; 78:65-66). The circuit court did not resolve this ambiguity, instead simply holding that "[b]oth … polices favor impoundment in this scenario." (87:2; App. 125).

In any case, how the vehicle *ended up* in Beaver Dam is not determinative. The fact remains that it was the Beaver Dam police who actually *took custody of* (i.e., seized) Mr. Asboth's vehicle by having it towed to their station (where they then searched it). In view of these facts, it is difficult to make sense of the claim that some other agency impounded the car.

But even if the sheriff's department policy were relevant, while it is more prolix than that of Beaver Dam it provides no greater clarity. It states 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. 133). 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. 135).

That is, under the policy, a deputy *may* tow a vehicle where a driver is taken into custody and the vehicle is unattended, but also "*always* has the discretion" not to. (71:1; App. 133 (emphasis added)). This is, again, a policy of unfettered discretion. *See* ***United States v. Osborne***, 489 F. Supp. 2d 860, 863-64 (C.D. Ill. 2007) (policy permitting impoundment where driver arrested, with no further guidelines for decision, "for all practical purposes … is no policy at all"; inventory search invalid).

In contrast to that in ***Bertine***, which "establish[ed] several conditions" governing the impoundment decision, the Dodge policy provides absolutely no "conditions circumscrib[ing] the discretion of individual officers." ***Bertine***, 479 U.S. at 376 n.7. It, like the Beaver Dam policy, is effectively no policy at all, and cannot justify the impoundment here.

II. The seizure of Mr. Asboth's car was not a valid community caretaker impoundment; the state did not show the seizure was not a pretext for criminal investigation where Mr. Asboth's vehicle was parked at a private storage facility and did not impede traffic and posed no threat to public safety.

Besides failing to show adequate standardized criteria governing the impoundment of Mr. Asboth's car, the state also did not prove the impoundment to be 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 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 impoundment of Mr. Asboth's car was a Fourth Amendment seizure. As to the second, given the officers' clear law-enforcement motivations to seize and search Mr. Asboth's car and the lack of other justification for doing so, the impoundment was not a bona fide community caretaker activity. Moreover, for similar reasons, the state fails the third step of the test, as the public need to remove his car from the storage lot did not outweigh his privacy interest in keeping his car free from warrantless search.

A. The state failed to show that the impoundment of Mr. Asboth's car was not a pretext to search for evidence; as such it did not demonstrate the seizure was a bona fide community caretaker function

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 unconstitutional where they serve as a pretext for criminal investigation.

In ***Opperman***, 428 U.S. at 376, the Supreme Court upheld an inventory search in part on the basis that "there [was] no suggestion whatsoever that this standard procedure, essentially like that followed throughout the country, was a pretext concealing an investigatory police motive." In ***Whren v. United States***, 517 U.S. 806, 811-12 (1996), the Court explained further; it distinguished searches based on probable cause (which are valid even if pretextual) from other types of searches, including inventories: "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*." (Emphasis added.) 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.

As Professor LaFave puts it: "What is especially important about that distinction is that the pretextual nature of

an otherwise lawful stop or arrest, which under ***Whren*** cannot be used to challenge that seizure, can turn out to be powerful evidence of the pretextual/unconstitutional nature of a vehicle inventory conducted thereafter." 3 Wayne R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* § 7.5(e) at 906 (5th ed. 2012). *See also* ***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"), ***Sanders***, 796 F.3d at 1245 (***Bertine*** establishes that impoundment unconstitutional where police discretion is "exercised as a pretext for criminal investigation"); ***Wilford v. State***, 50 N.E.3d 371, 376 (Ind. 2016) (citing prior cases invalidating impoundments and inventories unconstitutional because pretextual); ***State v. Leak***, 47 N.E.3d 821, 828 (Ohio 2016) (impoundment may not be pretext for evidentiary search); ***Oliveira***, 47 N.E.3d at 398 (where officers' true purpose is investigative, seizure may not be justified as precursor to inventory search; inventory search "may not be allowed to become a cover or pretext for an investigative search").

The evidence adduced at the hearing shows that the police had a substantial investigatory interest in Mr. Asboth's car, as he was suspected of a bank robbery. So, despite the inability to identify any serious problem with the car's location, and the availability of other reasonable means for dealing with the car, the police elected to impound and search it.

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).[1] 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.***

[1] 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. 125). 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.

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 ***Clark*** held, 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 officers' testimony 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 lack of a compelling public safety need to move Mr. Asboth's car points to a different police motive: the investigation of the armed robbery in which he was a suspect.

While the 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. Though the circuit court concluded (in Mr. Asboth's view erroneously) that "the vehicle could not be left where it was and needed to be impounded," it made no finding with regard to the police's subjective law-enforcement concerns. (44:2; App. 123). In fact, in its first written decision, the circuit court concluded that, while the search was not conducted for the "sole purpose of investigation," "investigation of Defendant's role in the armed robbery was clearly one component of this inventory search." (44:1; App. 122).

Given the clear law enforcement interest in searching the car of Mr. Asboth, a bank robbery suspect, and the absence of any need to move his car for public safety or traffic-control reasons, this court should conclude that the seizure of the car was pretextual and hence not a bona fide community caretaker activity.

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

Many of the facts discussed in the prior section also go to show that the third step of the community caretaker test was not met—any public need to remove Mr. Asboth's car did not outweigh his right to privacy so as to justify a warrantless search of its contents.

Again, Mr. Asboth's car was parked in the lane between rows of storage sheds, in such a way that vehicles could drive around it, though it may have provided some impediment to full access to one or two sheds that were not his own. The police did not seek to determine whether the owner of the storage facility wanted Mr. Asboth's car

removed; they did not check with Mr. Asboth to see whether he could make arrangements for someone else to pick it up; they did not consider whether it could be moved to a nearby, legal parking spot. Had they taken any of these actions, perhaps there would be a stronger case to be made that their impoundment decision was governed by public need to move the vehicle. But what they actually did was simply seize the vehicle without making any attempt to find out whether it actually needed to be removed. There is, accordingly, little if any evidence in the record showing a public interest in impounding and searching the vehicle.

State v. Matalonis, 2016 WI 7, 366 Wis. 2d 443, 875 N.W.2d 567, provides a useful illustration as to the sort of public interest that can justify a warrantless search. 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 this 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, create a public need great enough to justify a warrantless seizure and search?

Simply put, potential minor inconvenience to two storage-shed tenants does not implicate the public interest in a way that justifies the warrantless seizure, and search, of a private automobile. Mr. Asboth's privacy interest in his car

outweighed any public need to move it; thus its seizure was not a valid community caretaker impoundment.

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 8th day of February, 2017.

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 5,813 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 8th day of February, 2017.

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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; and (3) 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 first names and last initials 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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