RECEIVED
04-12-2017
CLERK OF SUPREME COURT
OF WISCONSIN

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

---

REPLY BRIEF

ANDREW R. HINKEL
Assistant State Public Defender
State Bar No. 1058128

Office of the State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 267-1179
hinkela@opd.wi.gov

Attorney for Defendant-Appellant-Petitioner

TABLE OF CONTENTS

CASES CITED

CONSTITUTIONAL PROVISIONS AND STATUTES CITED

ARGUMENT

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.

The state's brief illustrates clearly the need for limits on officer discretion to impound vehicles. It invokes purely imaginary threats—including a hypothesized fire—to justify seizure of Mr. Asboth's car. In the state's view, a vehicle's "threaten[ing] to obstruct" theorized traffic through a rural storage facility (though there was room to drive around the car) is grounds to seize it and subject it to thorough search. Were the state's view to prevail, nearly any vehicle parked nearly anywhere would be open to seizure and search. It's to protect against just this possibility that courts have (contrary to the state's claims) required impoundments to be conducted in accord with established criteria.

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

The state makes several incorrect or misleading claims in arguing that departmental policies are not required for a valid impoundment. While ***Bertine*** did address, in part, the inventory search of the defendant's vehicle, the passage on the need for standardized criteria is expressly about the decision to *impound*. 479 U.S. 367, 375-76 (1987); State's Brief at 23. The state is thus wrong when it claims that the Supreme Court has distinguished inventory searches from the

impoundments that precede them, requiring standard criteria only as to the former. State's Brief at 24.

It is also not true that courts "overwhelmingly… agree that … the absence of standardized procedures does not automatically render an impoundment unconstitutional." State's Brief at 26. In fact, the case the state cites for that proposition holds (in the very next sentence) that for a vehicle on private property, not obstructing traffic or "creating an imminent threat to public safety," the absence of standardized procedures renders an impoundment unconstitutional. ***United States v. Sanders***, 796 F.3d 1241, 1248 (10th Cir. 2015). The state treats a single federal case, ***United States v. Coccia***, 446 F.3d 233 (1st Cir. 2006), as if it were the beginning and end of the law in this area, but as Mr. Asboth noted in his opening brief, the federal courts are divided on this issue. State's Brief at 24-25; Opening Brief at 9. Many courts regard standard criteria as a requirement of ***Bertine***.[1]

The state's contrary argument obscures the holdings of the cases it cites. State's Brief at 28-29. Thus, it claims that no case requires standardized impoundment procedures, and cites ***United States v. Duguay***, which in fact held that "[a]mong those criteria which must be standardized are the

[1] The state also relies on ***United States v. Clyburn***, 24 F.3d 613, 616 (4th Cir. 1994), but this case is not about impoundments. The state's quotation from the case: "[T]he Fourth Amendment, not federal rules or state law, governs the admissibility of evidence," omits the rest of the sentence: "obtained by state officers but ultimately used in a federal prosecution." State's Brief at 26. The state also omits the italicized language, of obvious significance to this case, from its quotations of ***South Dakota v. Opperman***, 428 U.S. 364, 369 (1976): "The authority of police to seize and remove *from the streets* vehicles impeding traffic or threatening public safety and convenience is beyond question." State's Brief at 1, 8.

circumstances in which a car may be impounded." 93 F.3d 346, 351 (7th Cir. 1996). It cites ***United States v. Petty*** without acknowledging that the case holds that "[s]ome degree of standardized criteria or established routine must regulate these police actions … to ensure that impoundments and inventory searches are not merely a ruse for general rummaging in order to discover incriminating evidence." 367 F.3d 1009, 1012 (8th Cir. 2004). It cites ***Miranda v. City of Cornelius***, again without admitting that it states ***Bertine*** "limited the discretion of the impounding officer" and allows 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"; it adds that "impoundment is not a matter which can simply be left to the discretion of the individual officer." 429 F.3d 858, 863 (9th Cir. 2005).

The state gives similar treatment to the cases Mr. Asboth cites from other states. State's Brief at 29. It simply disregards most of them, and distorts or ignores inconvenient holdings of the ones it does mention. Thus it claims that ***Commonwealth v. Oliveira*** is "irrelevant" and has "no mention of standardized criteria" even though it declares that impoundment searches must be "conducted in accord with standard police written procedure," 47 N.E.3d 395, 398 (Mass. 2016). It cites ***People v. Ferris***, but doesn't address that case's statement that "there must be a standard police procedure authorizing the towing of the car in the first place." 9 N.E.3d 1126, 1137 (Ill. 2014). It claims that ***Fair v. State*** says the opposite of what it says: that a community caretaking impoundment must be "in keeping with established departmental routine or regulation." 627 N.E.2d 427, 433 (Ind. 1993). It asserts that the Ohio case cited by Mr. Asboth misstates Ohio law, when in fact that state's high court held, in ***State v. Leak***, that in the absence of a department policy,

there was no basis to impound a vehicle. 47 N.E.3d 821, 829 (Ohio 2016).

In sum, the state's claim of "widespread agreement that…the absence of standardized procedures does not automatically render an impoundment unconstitutional" is refuted both by the cases it cites and the ones it ignores. State's Brief at 10.

Nor is there merit to the state's argument that requiring police to follow policies will hobble law enforcement. State's Brief at 27. Police officers are, of course, required to adhere to all manner of rules. Some (the warrant requirement, probable cause to arrest, restrictions on ***Terry*** stops) inhere in the Fourth Amendment; some (restrictions on interrogation) the Fifth or Sixth. These doctrines can be quite complex, and are supplemented by state statutes (*see, e.g.* Wis. Stat. §§ 968.27-37 (governing wiretapping and other intercepts)), local ordinances, and departmental policies. Rules are not the enemy of "sound police procedure," but its foundation.

This does not mean, as state suggests, that departments must develop minutely detailed protocols "running the entire gamut of possible eventualities." State's brief at 27. Rather, "[t]he requirement that discretion be fettered … has never meant that a decision to impound or inventory must be made in a 'totally mechanical' fashion. As with an inventory search, an impoundment policy may allow some 'latitude' and 'exercise of judgment' by a police officer when those decisions are based on concerns related to the purposes of an impoundment." ***Petty***, 367 F.3d at 1012.

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

The state asserts that it is "only the County's policy" that matters here. State's Brief at 32. It repeats the court of appeals's statement that the trial court made a factual finding that the Sheriff's deputies decided to seize the car, and that the Beaver Dam police only took custody of it because the County lot was full. State's Brief at 4. As Mr. Asboth has repeatedly pointed out, this statement is in error; the trial court made no such finding. Opening Brief at 13-14. Moreover, the testimony the state relies on was given by a Beaver Dam officer who had earlier testified that *he* made the decision to impound. Opening Brief at 14. In fact, the same detective testified at the preliminary hearing that the vehicle was impounded for safekeeping "[b]ased on our policy and procedure." (38:38). Meanwhile, the deputies on the scene each denied having ordered the impound, and one testified that "ultimately Beaver Dam Police Department made the determination that they would take the vehicle." Opening Brief at 14; (78:26-27). And the fact remains that it was the Beaver Dam police who in fact took, i.e. *impounded*, Mr. Asboth's vehicle.

The state's effort to avoid acknowledging this reality makes sense, because the Beaver Dam policy—which is, again, that the police can impound a vehicle when they have "lawful custody" of it—is utterly without meaning. The state attempts to salvage it by claiming that the word "lawful" encapsulates "the standardized criteria of the community-caretaker doctrine." State's Brief at 11, 33-34. So, the policy becomes, in essence, that the police may lawfully do what they may lawfully do. This obviously provides no guidance

and is not a "policy" in any meaningful sense; to accept it would be to nullify the ***Bertine*** "standard criteria" requirement altogether.

Turning to the state's preferred policy, the county sheriff's, the state claims it was followed because the provision requiring deputies to "advise the property owner that it is his/her responsibility to have the vehicle removed" "does not apply when the Dodge County police have taken the driver of the vehicle into custody." State's Brief at 31. The transcript page it cites for this claim, however, is simply a deputy's testimony that, in his opinion, following this provision "would [have] been unreasonable" and not "standard operating procedure" in Mr. Asboth's case. (78:22). Moreover, as Mr. Asboth noted in his opening brief, that policy grants total discretion to law enforcement officers to either impound or not to impound; it cannot be said to "circumscribe the discretion of individual officers." Opening Brief at 15.

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, did not impede traffic and posed no threat to public safety.

Mr. Asboth argued in his opening brief that a vehicle seizure, purportedly undertaken for community caretaking reasons, is invalid if the true, ulterior motivation of the police is law enforcement. Opening Brief at 17-18. He further argued that the absence of any real need to remove his vehicle from the storage facility, and the officers' failure to consider any action short of impoundment, showed this to be the case here. ***Id.*** at 18-21. He finally submitted that these same

factors showed that the "public interest" in impounding the vehicle did not "outweigh[] the intrusion upon" his privacy. ***Id.*** at 21-22; *see, e.g.*, ***State v. Matalonis***, 2016 WI 7, ¶31, 366 Wis. 2d 443, 875 N.W.2d 567.

The state responds, first, by arguing that there is no absolute requirement that police contact the owner of property where a vehicle is parked, or offer the driver an opportunity to make arrangements to move it. State's Brief at 18-20. Mr. Asboth has never argued to the contrary; again, his position is that the availability of simple steps, short of impoundment, to resolve any possible problem with the car's location undermines the state's contention that the public interest outweighed his own privacy interest; and further reveals that the purported community caretaking concerns were not "bona fide"—they were a pretext for investigation.

Turning to the facts, regarding the third, "balance of interests" step of the community caretaker test, the state can point only to increasingly farfetched hypothetical threats posed by Mr. Asboth's car. Without evidence, it posits that the car, parked in a rural storage facility, either "was … a target" or "would be a potential target" for vandalism. State's Brief at 9, 15. It asserts that the vehicle—which there was room to drive around—nevertheless "threatened to obstruct" traffic through the facility. ***Id.*** Delving further into "what ifs," it conjures the possibility that there could be fire at the facility, or that "emergency vehicles" might need to access the storage sheds for some other unspecified reason. ***Id.*** at 1, 9, 15. All these imagined threats, the state contends, add up to an "exigency" justifying seizing and searching Mr. Asboth's vehicle. While the state notes that an "exigency" need not be an "emergency," ***id.*** at 16, its definition of "exigency" robs the term of any meaning at all.

Besides being products of the state's imagination, what these "exigencies" have in common is that they are all completely generic—they could be applied to virtually any vehicle, parked on any street or lot, at any time. Vandals can, of course, strike anywhere, as can fires. The state's argument would thus justify the seizure, and the search, of a large proportion of all the unattended vehicles in this state. *See* ***State v. Clark***, 2003 WI App 121, ¶16, 265 Wis. 2d 557, 666 N.W.2d 112 (rejecting a policy that "might lead to the police towing every unlocked vehicle on the street").

This cannot be what it means for a seizure to be "reasonable" under the Fourth Amendment. The state's view would condition the "right of the people to be secure in their … effects" on the whims of the police. Its argument on this point only demonstrates the need, discussed earlier, for standard criteria limiting police discretion to impound.

As to the other facets of the community caretaking balancing test, the state strangely claims that the general public had a greater "liberty interest" in Mr. Asboth's car than he did. State's Brief at 16-17. There is no authority for the state's notion that car's operator lacks a privacy interest in its contents simply because he is not the registered owner. The state goes on to assert that the "availability, feasibility and effectiveness of [any] alternatives" need not be considered—despite this court's statements to the contrary. State's Brief at 17; *see, e.g.*, ***Matalonis***, 366 Wis. 2d 443, ¶58. Given the low public need to tow Mr. Asboth's car, his privacy interest in the vehicle should prevail.

Turning to the question of pretext, the state finally responds, somewhat confusingly, that where "an objectively reasonable basis … for the community caretaker function" exists, an impoundment is valid. However, it also concedes

that "pretextual impoundments" are invalid—a difficult concession to square with its earlier statement. State's brief at 21-22. In any case, the law is as Mr. Asboth explained in his opening brief (and as the ***State v. Kramer*** court noted): while the subjective motivations of the police are irrelevant to the legality of an action supported by probable cause, a seizure *without* probable cause, like a community caretaker seizure, is unlawful if pretextual. 2009 WI 14, ¶¶27-28, 315 Wis. 2d 414, 759 N.W.2d 598; Opening brief at 17-18.

As with the need for standard criteria, this case exemplifies why courts must ensure that "community caretaker" impoundments are truly carried out for "community caretaker" purposes—rather than as pretexts for criminal investigation. The impoundment of a vehicle, which leads nearly automatically to its thorough search, is a great intrusion on individual privacy. These actions are routinely justified in terms of protecting the public, protecting the police, and even protecting the person whose car is impounded. But can anyone truly believe that the police—who believed Mr. Asboth had recently robbed a bank—towed and searched his car to protect themselves from liability claims, or to protect the storage facility from fire, or to protect Mr. Asboth's possessions? To do away with the probable cause requirement on the basis of such pretenses is to trivialize the Fourth Amendment's guarantees of personal security against government intrusion.

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 12th day of April, 2017.

Respectfully submitted,

ANDREW R. HINKEL
Assistant State Public Defender
State Bar No. 1058128

Office of the State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 267-1779
hinkela@opd.wi.gov

Attorney for Defendant-Appellant-Petitioner

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 2,581 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 12th day of April, 2017.

Signed:

ANDREW R. HINKEL
Assistant State Public Defender
State Bar No. 1058128

Office of State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 267-1779
hinkela@opd.wi.gov

Attorney for Defendant-Appellant-Petitioner