STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

Case No. 2017AP1345

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

MICHAEL J. SCOTT, LORI M. SCOTT,
ALLY FINANCIAL, INC.
a/k/a C T CORPORATION SYSTEM,
A BLACK 1966 OLDSMOBILE AUTOMOBILE
VIN #338676M362750,
A BROWN 2015 CHEVROLET SILVERADO
VIN #1GC1KWE81FF631314,
A 2008 POLARIS RANGER SERIAL
#4XARB50A482701431,
A 2008 SEA DOO "JET SKI" HULL
#YDV13580E808,
A 2008 SEA DOO "JET SKI" HULL
#YDV24947C808,
APPROXIMATELY 55 LBS. OF
TETRAHYDROCANNABINOLS (THC) AND
$22,955.00 IN UNITED STATES CURRENCY,

Defendants-Respondents.

ON APPEAL FROM ORDER GRANTING MOTION FOR SUMMARY JUDGMENT TO DEFENDANTS, ENTERED IN THE CIRCUIT COURT FOR GREEN COUNTY, THE HONORABLE THOMAS J. VALE, PRESIDING

REPLACEMENT REPLY BRIEF OF PLAINTIFF-APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

ARGUMENT

The failure of defendants to refute certain arguments in the State's replacement brief-in-chief constitutes a concession that those arguments are correct; therefore, this Court should deem admitted the State's arguments not addressed by the defendants.

If a respondent does not respond to or refute an argument presented in the appellant's brief-in-chief, the argument is "deemed admitted." *State v. Chu*, 2002 WI App 98, ¶ 41, 253 Wis. 2d 666, 643 N.W.2d 878. "Respondents on appeal cannot complain if propositions of appellants are taken as confessed which they do not undertake to refute." *Charolais Breeding Ranches v. FPC Secs. Corp.*, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (citation omitted).

As of November 21, 2017, the parties had fully briefed this case in the Court of Appeals. At that time, the State was represented on appeal by the Green County District Attorney, because it was a one-judge appeal. On December 19, 2017, after the State moved for a three-judge panel, this Court offered the Attorney General an opportunity to file a replacement brief on behalf of the State.

The Attorney General filed a replacement brief-in-chief on April 2, 2018. By letter of May 18, 2018, defendants informed the Court that they would stand on their original brief and not file a replacement response brief. The Court subsequently issued an order stating that the State must file a replacement reply brief.

Because defendants have not filed a replacement response brief, they have conceded all arguments presented in the State's replacement brief-in-chief not addressed in their original response brief. Accordingly, this Court should deem those arguments confessed. *See Charolais*, 90 Wis. 2d at 109.

Part I of the State's Argument relied heavily on *State v. One 2004 Lincoln Navigator*, 494 S.W.3d 690 (Tex. 2016). (State's Repl. Br. 6–8, 11–12.) Defendants address that case in their original response brief superficially.

Defendants discount *Lincoln Navigator* by distinguishing it on four grounds, none of which justify ignoring its analysis. First, they note that Texas has separate supreme courts for civil and criminal appeals, but fail to explain why the reasoning of this particular decision should therefore be rejected. (Scott's Br. 19.) Second, they assert that "Texas statutes permit the seizure of property without a warrant." (Scott's Br. 19.) The contention is both undeveloped and misleading. As the Texas Supreme Court explained, Texas Code of Criminal Procedure Article 59.03(b)(4) allows warrantless seizures "incident to a lawful arrest, lawful search, or lawful search incident to arrest," all circumstances under which a warrantless seizure is permitted under constitutional case law. *See* 494 S.W.3d at 699. In *Lincoln Navigator*, the exclusionary rule was nevertheless at issue because the officer's seizure of the property at issue was not permitted under Article 59.03(b)(4). *See* 494 S.W.3d at 700. Third, defendants correctly state that Texas has codified the exclusionary rule, but misleadingly assert that the statute allows it to be used in criminal cases only. (Scott's Br. 20.) As the Texas court explained, the exclusionary-rule statute does not preclude the use of the constitutionally based exclusionary rule in civil cases. *See* 494 S.W.3d at 694–95. Fourth, defendants

observe that the Texas civil-forfeiture statute, is "expressly civil and non-punitive," whereas the Wisconsin statute "is quasi-criminal and is punitive." (Scott's Br. at 20.) That is not correct. As the State explained in its brief-in-chief, Wis. Stat. §§ 961.55 and 961.555 are, like the Texas statute, civil and non-punitive. (State's Repl. Br. 12–13.)

Defendants' one-paragraph treatment of the *Lincoln Navigator* decision concedes (by failing to refute) two aspects of the State's argument. First, they concede that the Texas case presents a well-reasoned argument for not applying the holding in *Plymouth Sedan* to Wis. Stat. §§ 961.55 and 961.555, as argued on pages 6–13 of the State's Replacement Brief. Second, they concede that Wis. Stat. §§ 961.55 and 961.555 are civil and non-punitive forfeiture statutes as argued on pages 12 and 13 of the State's Replacement Brief.

Even more significantly, the defendants have not responded to Part II of the State's Argument, that "[i]f the exclusionary rule applies in this case, the good-faith exception to the rule applies as well, and the circuit court erred by not granting the State's request for an evidentiary hearing on the good-faith issue." (State's Repl. Br. 14.) The entire argument is unrefuted, and must therefore be deemed admitted in its entirety. *See Charolais*, 90 Wis. 2d at 109.

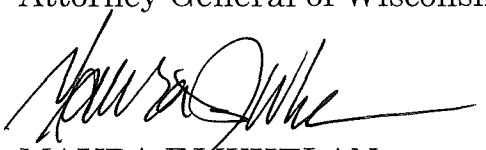
CONCLUSION

For the reasons stated here and in its opening replacement brief-in-chief, the State of Wisconsin respectfully requests that this Court reverse the circuit court's order and reinstate the complaint for further proceedings. In the alternative, the State requests that this Court remand the case to the circuit court to conduct an evidentiary hearing pursuant to *State v. Eason*, 2001 WI 98, 245 Wis. 2d 206, 629 N.W.2d 625.

Dated this 18th day of June, 2018.

Respectfully submitted,

BRAD D. SCHIMEL
Attorney General of Wisconsin



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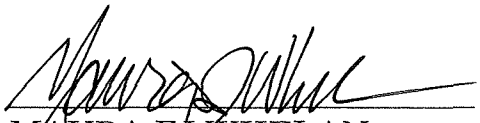
CERTIFICATION

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 805 words.

Dated this 18th day of June, 2018.



MAURA FJ WHELAN
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 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. § 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 18th day of June, 2018.

MAURA FJ WHELAN
Assistant Attorney General