STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2018AP1774-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ALFONSO LORENZO BROOKS,

Defendant-Appellant.

On Appeal from a Judgment of Conviction and an Order Denying Postconviction Relief, Both Entered in the Milwaukee County Circuit Court, the Honorable Jeffrey A. Wagner Presiding

---

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

LEON W. TODD
Assistant State Public Defender
State Bar No. 1050407

Office of the State Public Defender
735 North Water Street, Suite 912
Milwaukee, WI 53202
(414) 227-4805
toddl@opd.wi.gov

Attorney for Defendant-Appellant

TABLE OF CONTENTS

CASES CITED

CONSTITUTIONAL PROVISIONS AND STATUTES CITED

ISSUE PRESENTED

Whether the community caretaker exception permits police officers to inventory and tow a vehicle after discovering that the driver does not have a valid license, when the vehicle is lawfully parked and not obstructing traffic.

The circuit court answered yes and denied Alfonso Brooks' motion to suppress the evidence discovered during the inventory search of his vehicle.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The briefs will fully address the issue presented, so Mr. Brooks does not request oral argument. *See* Wis. Stat. § 809.22(2)(b). Publication is appropriate because the case involves a factual situation significantly different from that in other published Wisconsin opinions involving the community care doctrine. *See id.* § 809.23(1)(a)2. It also involves a constitutional issue of substantial and continuing public interest, which is likely to recur in other cases. *See id.* § 809.23(1)(a)5.

STATEMENT OF CASE AND FACTS

A. The allegations of the criminal complaint and the plea and sentencing hearings.

On August 28, 2015, the State filed a criminal complaint charging Alfonso Brooks with possession of a firearm by a felon. The complaint alleged that on

August 24, 2015, two Milwaukee County Sheriff's deputies conducted a routine traffic stop of a vehicle for a speeding violation. Mr. Brooks was the driver and sole occupant of the vehicle. After running a criminal history and Department of Transportation (DOT) records check, the deputies learned that Mr. Brooks had a suspended driver's license, as well as a prior felony conviction. The deputies informed Mr. Brooks that because his license was suspended, they would need to tow his vehicle. They also explained that they would need to perform an inventory search before towing the vehicle. During the search, one of the deputies discovered a handgun in the car's trunk. (1:1-2).

On November 29, 2016, Mr. Brooks pled guilty to possession of a firearm by a felon. (110:51-52). The next day, the circuit court, the Honorable Jeffrey A. Wagner, sentenced Mr. Brooks to thirty-seven months of initial confinement and thirty months of extended supervision. (111:27-28).

B. Mr. Brooks' motion to suppress.

Before pleading guilty, Mr. Brooks filed and litigated a motion to suppress the evidence obtained during the inventory search of his vehicle. His motion alleged that the search and towing of his vehicle were an improper exercise of law enforcement's community caretaker function and thus unreasonable under the Fourth Amendment. (38). On November 29, 2016, the circuit court conducted a suppression hearing. (110; App. 101-45). Two witnesses testified at the hearing: (1) Deputy

Dean Zirzow of the Milwaukee County Sheriff's Department and Mr. Brooks.[1]

Deputy Zirzow testified that on August 24, 2015, he conducted a traffic stop of a car driven by Mr. Brooks, which was traveling at a high rate of speed on Highway 794, just north of Oklahoma Avenue in the City of St. Francis. (110:9-10, 20; App. 109-10, 120). Mr. Brooks exited the freeway and, after Deputy Zirzow initiated the traffic stop, pulled his vehicle over in the 3900 block of South Pennsylvania Avenue. (110:10; App. 110). Deputy Zirzow stated that Mr. Brooks had been driving approximately sixty-five to seventy miles per hour in a fifty mile-per-hour zone. (110:11; App. 111).

Deputy Zirzow further testified that after pulling the vehicle over, he obtained Mr. Brooks' driver's license and conducted a check on his license status. The check revealed that Mr. Brooks' license was suspended. (110:11; App. 111). Deputy Zirzow stated that pursuant to his department's policies and procedures, he was required to have the vehicle towed because Mr. Brooks had a suspended license and there were no other licensed drivers in the vehicle. (110:12; App. 112). No written policies or procedures from the sheriff's department were

[1] Deputy Travis Thompson testified later at the same hearing regarding a *Miranda-Goodchild* claim raised by Mr. Brooks. (110:32-40; App. 132-40). *See Miranda v. Arizona*, 384 U.S. 436 (1966); *State ex rel. Goodchild v. Burke*, 27 Wis. 2d 244, 133 N.W.2d 753 (1965). The circuit court denied that claim, and Mr. Brooks does not challenge that ruling on appeal.

actually offered or received into evidence at the suppression hearing.

Before having the car towed, Deputy Zirzow's partner, Deputy Travis Thompson, conducted an inventory search to determine if any valuables were in the car. (110:12-13; App. 112-23). During the search, Deputy Thompson discovered a gun in the vehicle's trunk. (110:13-14; App. 113-14). Deputy Zirzow had previously run a criminal history check on Mr. Brooks and learned that he was a convicted felon. (110:14; App. 114). He therefore arrested Mr. Brooks for possession of a firearm by a felon. (110:14; App. 114).

On cross-examination, Deputy Zirzow stated that Mr. Brooks "begged" him not to tow his vehicle, and instead to permit his girlfriend, Meaghan Hill, to pick up the car. (110:16; App. 116). According to Deputy Zirzow, however, his department's policies and procedures did not allow for that:

> [W]e don't allow any other vehicles to come to our scene because we don't know what—that's like our work zone at that time, and we don't allow anybody else to show up because we don't know what else they're going to bring to the scene.
>
> So if there's a valid driver—if she was in the vehicle at the time, we would allow—if she was valid, we would have allowed her to drive the vehicle. But because there's nobody else in the vehicle, we have to tow it per our policy.

(110:16; App. 116).

When asked if his department's policies allowed a car to remain in a locked state if it was lawfully parked, Deputy Zirzow asserted that they did not:

> We get that conflicting with other agencies. If somebody will get stopped by the city and, like, if they let them park on the side road, we don't do that. We either allow somebody who's valid in the car to remove it, or we have to tow it.

(110:17; App. 117).

Deputy Zirzow further testified that he informed Mr. Brooks that he was free to leave while the inventory search was being conducted. (110:18; App. 118). In this respect, Deputy Zirzow stated that Mr. Brooks remained free to leave until the gun was found. (110:18; App. 118).

Mr. Brooks also testified at the hearing. He stated that after he pulled over and gave the deputies his driver's license, he called Ms. Hill and told her that he had been pulled over. He also explained that she was driving a different car on the same route, a few minutes behind him. (110:21-24; App. 121-24). During their call, Ms. Hill stated that she would be at his location shortly. (110:24; App. 124).

Mr. Brooks further testified that after the deputies asked him to exit the vehicle, they told him he was not under arrest and explained the tickets he was being issued. (110:24; App. 124). They also informed him they needed to tow his vehicle. (110:25; App. 125). Mr. Brooks stated that he did not understand why this was necessary, as his vehicle was lawfully parked and was not creating a roadside hazard. (110:25; App. 125). Deputy Zirzow, however,

told him that the vehicle needed to be towed pursuant to his department's policies. (110:25; App. 125).

The squad cam video[2] of the traffic stop was also admitted into evidence at the hearing.[3] The video shows that when Mr. Brooks pulled his vehicle over, he parked the car in what appears to be a lawful parking spot. (110:40; App. 140 Ex. 3 at 9:34:00 *et seq.*) It also reflects that Ms. Hill arrived on scene shortly after Mr. Brooks was pulled over, before the arrival of the tow truck. (Ex. 3 at 9:56:00 to 10:08:00; *see also* 110:23-24; App. 123-24).

Based on this record, the circuit court denied Mr. Brooks' motion. First, it determined that the deputies had probable cause to initiate the traffic stop for a speeding violation. (110:30; App. 130). It also determined that the inventory search was proper based on the deputies' "protocol," as Mr. Brooks was driving with a suspended license. (110:31; App. 131).

C. The postconviction proceedings before the circuit court.

Mr. Brooks subsequently filed a Rule 809.30 postconviction motion, arguing that the circuit court erred in denying his suppression motion. Specifically, he argued that the inventory search and

---

[2] The clerk of circuit court did not include the squad cam video in the record on appeal. Mr. Brooks has filed a motion to supplement the record to include the video.

[3] The video was admitted during the *Miranda-Goodchild* portion of the hearing. (110:40; App. 140). It is nevertheless part of the record in this case.

towing of his vehicle constituted an improper exercise of the deputies' community caretaker function, because his vehicle was lawfully parked and not obstructing traffic after he pulled over. (76:5-11).

He further argued that, to the extent the circuit court concluded that the record did not sufficiently establish that his vehicle was lawfully parked, then his trial attorney was ineffective for failing to present additional evidence establishing this fact at the suppression hearing. (76:12-15). In support of this claim, Mr. Brooks submitted a memorandum prepared by his investigator alleging that the investigator had gone to the exact spot where Mr. Brooks parked his vehicle on the night of the traffic stop. The investigator concluded that the location "was indeed a legal parking spot." (76:19-20).

In addition, Mr. Brooks asserted that, to the extent the court concluded that the search and towing of his vehicle were proper based on Deputy Zirzow's claim that he was following his department's internal policies and procedures, then his trial attorney was ineffective for failing to introduce the department's actual written policies. (76:15-17). Those policies do not, in fact, authorize the towing of a vehicle simply because a driver does not have a valid license. Rather, they only authorize the towing of a vehicle when a driver is arrested. They also do not require that another licensed driver be present in the vehicle at the time of the stop to take possession of the vehicle. They simply require that he or she be present "at the scene prior to the tow arriving":

501.31.19 Arrest Tow

It shall be the policy of this agency to tow any vehicle *when the driver and/or owner is arrested* and no responsible person is present, at the time of the arrest, to take control of the vehicle.

Procedure:

- The vehicle will be towed by a contracted towing agency.
- The owner of the vehicle, if arrested, may give a licensed driver permission to drive his/her vehicle from the scene of the arrest. In that case, the vehicle need not be towed. The arrest report will list who removed the vehicle. *The person taking control of the vehicle must be at the scene prior to the tow arriving*.
- Before removing an arrestee from the scene, ask them if the vehicle contains any items of value. Include this information in a separate paragraph of your arrest report. Inventory items consistent with division and agency policy.
- Officers will search all vehicles prior to being towed.
- If a vehicle is towed, the ignition key will go with the vehicle.[4]

(76:23) (emphasis added).

In its response brief, the State argued that the towing and inventory search of Mr. Brooks' vehicle were a reasonable exercise of the deputies'

[4] The written policies contain additional details regarding the proper procedure for searching vehicles being towed. (76:23-24).

community caretaker function. (78:1-3; App. 146-48). It also for the first time raised the issue of standing, arguing that Mr. Brooks lacked standing to challenge the search and seizure of the vehicle because no evidence showing who owned the vehicle was presented at the suppression hearing. (78:2-3; App. 147-48). The State was incorrect in this respect, however. During the hearing, Mr. Brooks testified that Ms. Hill was the registered owner of the vehicle. (110:43; App. 143).

In his reply brief, Mr. Brooks asserted that the State had forfeited its right to challenge standing, because it failed to raise the issue in a timely manner while the suppression motion was being litigated. (82:5-6). However, in the event the court found that the State had not forfeited this issue, Mr. Brooks requested that the court reopen the testimony so that he could present additional evidence showing that he was an authorized driver of the vehicle and thus had standing. (82:6; 83:3). *See State v. Dixon*, 177 Wis. 2d 461, 470, 501 N.W.2d 442 (1993) ("a person who borrows a car and drives it with the owner's permission has an expectation of privacy which society is willing to recognize as reasonable"). As an offer of proof, he submitted a police report showing that Ms. Hill was the registered owner of the vehicle and that he was, in fact, an authorized driver of the vehicle. (83:1-7). Mr. Brooks further asserted that if the court was unwilling to reopen the testimony, then his trial attorney was ineffective for failing to present evidence at the suppression hearing establishing that he was an authorized driver. (82:6).

The circuit court issued a decision and order denying Mr. Brooks' postconviction motion. The court did not address the State's standing argument. Nor did it make any factual findings regarding whether Mr. Brook's vehicle was lawfully parked and not obstructing traffic. Instead, it noted that the State had argued "that the search and towing of the defendant's vehicle was a proper exercise of the community caretaker function and that it was a reasonable decision both for safety reasons and to protect the department from any claims of wrongdoing concerning the contents of the vehicle." The court adopted those arguments without providing any additional reasoning for its decision.[5] (85; App. 151).

This appeal follows.[6] (86).

---

[5] This court has repeatedly admonished circuit courts in criminal cases for the practice of adopting wholesale a parties' submission as the court's decision with no explanation of the judge's own analysis or rationale. *See, e.g.*, *State v. Kelly*, No. 2017AP1584-CR, unpublished slip op., ¶¶14-16 (Wis. Ct. App. July 31, 2018) (App. 153-54), *petition for review pending*; *State v. Gonzalez*, No. 2012AP1818-CR, unpublished slip op., ¶¶12-16 (Wis. Ct. App. July 23, 2013) (App. 158); *State v. McDermott*, 2012 WI App 14, ¶9 n.2, 339 Wis. 2d 316, 810 N.W.2d 237. It should do so again in this case.

[6] A defendant may appeal an order denying a suppression motion despite a guilty plea. Wis. Stat. § 971.31(10). Also, when a defendant challenges a trial court's failure to suppress evidence pursuant to Wis. Stat. § 971.31(10), "the burden of establishing that there is no reasonable possibility that the error contributed to the conviction is on the State." *State v. Semrau*, 2000 WI App 54, (continued)

ARGUMENT

I. The towing and associated inventory search of Mr. Brooks' vehicle constituted an improper exercise of law enforcement's community caretaker function, because the vehicle was lawfully parked and not obstructing traffic.

In this case, the sheriff's deputies decided to tow Mr. Brooks' vehicle because he did not have a valid license. That decision was both unreasonable and unnecessary. It overlooked the obvious fact that the vehicle was lawfully parked and not obstructing traffic. Mr. Brooks also had not been placed under arrest, so he could have easily arranged to have another licensed driver drive the car from the scene. This court should therefore hold that the towing and associated inventory search of Mr. Brooks' vehicle were an improper and unreasonable exercise of law enforcement's community caretaker function.

A. General legal principles and standard of review.

The right to be free from unreasonable searches and seizures is guaranteed by the Fourth Amendment to the United States Constitution, and Article I, § 11 of the Wisconsin Constitution. Wisconsin courts generally follow the United States Supreme Court's interpretation of the Fourth Amendment in construing Article I, § 11. *State v.*

¶21, 233 Wis. 2d 508, 608 N.W.2d 376 (citing *State v. Armstrong*, 225 Wis. 2d 121, 122, 591 N.W.2d 604 (1999)).

Betterly, 191 Wis. 2d 407, 417, 529 N.W.2d 216 (1995). The Fourth Amendment governs all police intrusions, including automobile searches and seizures. *See South Dakota v. Opperman*, 428 U.S. 364, 367 (1976); *State v. Asboth*, 2017 WI 76, ¶14, 376 Wis. 2d 644, 898 N.W.2d 541. Where an unlawful stop or seizure occurs, the remedy is usually to suppress the evidence it produced. *State v. Washington*, 2005 WI App 123, ¶10, 284 Wis. 2d 456, 700 N.W.2d 305 (2005); *Wong Sun v. United States*, 371 U.S. 471, 487-88 (1963).

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 associated inventory search thereafter. *State v. Clark*, 2003 WI App 121, ¶11, 265 Wis. 2d 557, 666 N.W.2d 112. Here, Mr. Brooks challenges the first step and argues that the police had no right to seize and tow the vehicle. The associated inventory search was thus unlawful, as well.

"A seizure conducted without a valid warrant is presumptively unreasonable." *State v. Brereton*, 2013 WI 17, ¶24, 345 Wis. 2d 563, 826 N.W.2d 369 (citing *United States v. Ross*, 456 U.S. 798, 824-25 (1982)). "[B]ecause the ultimate touchstone of the Fourth Amendment is 'reasonableness,'" however, "the warrant requirement is subject to certain exceptions." *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006). "These exceptions have been 'jealously and carefully drawn,' and the burden rests with those seeking exemption from the warrant requirement to prove that the exigencies made that course imperative."

State v. Lee, 2009 WI App 96, ¶6, 320 Wis. 2d 536, 771 N.W.2d 373.

One such exception is where law enforcement is "serving as a community caretaker to protect persons and property." *State v. Pinkard*, 2010 WI 81, ¶14, 327 Wis. 2d 346, 785 N.W.2d 592. Specifically, law enforcement officers may conduct a warrantless search or seizure without violating the Fourth Amendment when performing community caretaker functions—those actions that are "totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute." *State v. Kramer*, 2009 WI 14, ¶¶19-20, 315 Wis. 2d 414, 759 N.W.2d 598. An inventory search of an impounded vehicle is conducted as part of law enforcement's community caretaker function. *See Colorado v. Bertine*, 479 U.S. 367, 371-72 (1987); *Asboth*, 376 Wis. 2d 644, ¶¶12-14; *Clark*, 265 Wis. 2d 557, ¶¶20-22.

When evaluating a claimed community caretaker justification for a warrantless search or seizure, Wisconsin courts apply a three-step test, which asks:

> (1) Whether a search or seizure within the meaning of the Fourth Amendment has occurred; (2) if so, whether the police were exercising a bona fide community caretaker function; and (3) if so, whether the public interest outweighs the intrusion upon the privacy of the individual such that the community caretaker function was reasonably exercised.

Asboth, 376 Wis. 2d 644, ¶13. "'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.'" *Clark*, 265 Wis. 2d 557, ¶21.

In reviewing a motion to suppress, an appellate court applies a two-step standard of review. *State v. Martin*, 2012 WI 96, ¶28, 343 Wis. 2d 278, 816 N.W.2d 270. First, it upholds the trial court's findings of fact unless clearly erroneous. Second, it independently reviews whether the facts meet the applicable constitutional standard. *Id.*

B. Mr. Brooks' vehicle was lawfully parked and not obstructing traffic.

As noted above, the circuit court did not make explicit factual findings regarding whether Mr. Brooks' vehicle was lawfully parked and not obstructing traffic. Instead, the court simply adopted the arguments contained in the State's response brief. Nowhere in that brief, however, did the State dispute Mr. Brooks' arguments that his vehicle was lawfully parked and not obstructing traffic. The State has therefore admitted those points. *See Brown County DHS v. Terrance M.*, 2005 WI App 57, 13, 280 Wis. 2d, 694 N.W.2d 458 ("Arguments not refuted are deemed admitted."). Thus, by adopting the State's brief, the court circuit appears to have implicitly found that Mr. Brooks' vehicle was lawfully parked and not obstructing traffic once he pulled over in response to the traffic stop.

This is especially true given that the record is uncontradicted in this respect. At the suppression hearing, Mr. Brooks testified that his car was

lawfully parked and not creating a roadside hazard after he pulled over. (110:25; App. 125). The squad cam video shows that Mr. Brooks' vehicle appears to be lawfully parked, as well. (Ex. 3 at 9:34:00 *et seq*.) There is also no indication in the video that the vehicle was interrupting the flow of traffic, damaged or disabled, or in any way jeopardizing public safety. Additionally, the State had the burden of proof at the suppression hearing, and it presented no evidence to suggest otherwise. *See State v. Jiles*, 2003 WI 66, ¶48, 262 Wis. 2d 457, 663 N.W.2d 798.

Based on this record, this court should conclude that the circuit court implicitly found that Mr. Brooks' vehicle was lawfully parked and not obstructing traffic immediately following the traffic stop.[7]

C. There was no reasonable basis to search and tow Mr. Brooks' vehicle because it was lawfully parked and not obstructing traffic.

1. Regarding the merits of this case, the three-part test for analyzing a community caretaker

[7] The only alternative would be to conclude that the circuit court's failure to give its own findings and reasons (rather than adopting the State's brief) requires a remand to for additional fact-finding. *Cf. Gonzalez*, No. 2012AP1818-CR, ¶14 (App. 158) ("even when the circuit court's adoption of a party's brief is without such adequate explanation, we typically do not remand when the issues raised are otherwise address by us *de novo*.") (citing *McDermott*, 339 Wis. 2d 316, ¶9 n.2). Mr. Brooks believes that such a remand is unnecessary, however.

justification demonstrates that the search and seizure of Mr. Brooks' vehicle were not justified. *See Asboth*, 376 Wis. 2d 644, ¶13. First, there is no real dispute that the deputies seized and searched Mr. Brooks' vehicle within the meaning of the Fourth Amendment. The deputies informed Mr. Brooks that they were required to tow his car, searched it, and then had the car towed to an impound lot. (110:12-14; App. 112-14; Ex. 3 at 10:07:00 *et seq*.)

2. Second, the deputies were not exercising a bona fide community caretaker function when they decided to inventory and tow Mr. Brooks' car. In *Opperman*, the United Supreme Court described the community caretaker function as follows:

> In the interests of public safety and as part of what the Court has called "community caretaking functions," automobiles are frequently taken into police custody. Vehicle accidents present one such occasion. To permit the uninterrupted flow of traffic and in some circumstances to preserve evidence, disabled or damaged vehicles will often be removed from the highways or streets at the behest of police engaged solely in caretaking and traffic-control activities. Police will also frequently remove and impound automobiles which violate parking ordinances and which thereby jeopardize both the public safety and the efficient movement of vehicular traffic. The authority of police to seize and remove from the streets vehicles impeding traffic or threating public safety and convenience is beyond challenge.

Opperman, 428 U.S. at 368-69.

In this case, none of the typical public safety concerns illustrated by *Opperman* are present. Mr. Brooks' vehicle was not: (1) involved in an accident; (2) interrupting the flow of traffic; (3) disabled or damaged; (4) violating any parking ordinances; or (5) in any way jeopardizing public safety or the efficient movement of vehicular traffic. *See Clark*, 265 Wis. 2d 557, ¶22. The reasoning from *Opperman* therefore indicates that the deputies in this case were not engaged in a bona fide community caretaker function.

The Wisconsin Supreme Court's recent decision in *Asboth* also illustrates this fact. In that case, Asboth was a wanted man in connection with an armed robbery, and there was an outstanding probation warrant for his arrest. *Asboth*, 376 Wis. 2d 644, ¶2. The police responded to a tip that Asboth was at a storage facility and apprehended him there. After his arrest, Asboth's car remained parked at the storage facility. Although the car was left in the middle of an alley between two storage sheds, and space remained for a vehicle to maneuver around it through the alley, the car entirely blocked access to one storage unit and impeded access to several others. Also, when officers ran a check on the car's registration, they discovered that the car was registered to a person other than Asboth. Thus, rather than abandoning the car on private property, the officers chose to impound the car. *Id.*, ¶¶2-4. In accordance with their written policies, the officers also conducted an inventory search of the vehicle at the police station. *Id.*, ¶6. The search revealed a handgun that resembled the one used in the armed robbery that Asboth was wanted for. *Id.*

The Wisconsin Supreme Court concluded that the officers had a bona fide community caretaker justification for impounding Asboth's car based on three different factors. First, if left unattended, the vehicle would have inconvenienced a private property owner and customers at the storage facility. *Id*., ¶18. Second, because Asboth was a suspect in a crime who had also allegedly violated his probation, he likely faced a lengthy detention, as well as the possibility of a lengthy abandonment of his car. *Id*., ¶19. Third, the registered owner of the car was someone other than Asboth. Thus, with no one else immediately present to claim ownership or take possession of the car, the possibility existed that the officers would need to make arrangements to reunite the car with its registered owner. *Id*., ¶20.

None of these factors are present in this case. Mr. Brooks' car was lawfully parked, so it was not an inconvenience to any private property owner or other drivers. Mr. Brooks was also not a suspect in any crime or otherwise wanted by law enforcement. In fact, prior to conducting the inventory search, Deputy Zirzow informed Mr. Brooks that he was not under arrest and he was free to leave while the search was being conducted. (110:18, 24; App. 118, 124). Deputy Zirzow also testified that Mr. Brooks remained free to leave until the gun was found. (110:18; App. 118). Mr. Brooks therefore could have easily made arrangements to have Ms. Hill, the registered owner of the car (110:43; App. 143), or some other family member or friend drive the car from the scene. Indeed, Ms. Hill was at the scene shortly after Mr. Brooks was pulled over, before the arrival of the tow truck. (*See* 100:21-24; App. 121-24 *see also* Ex. 3

at 9:56:00 to 10:08:00). There was thus no risk of a lengthy abandonment of the car. Accordingly, the deputies here were not exercising a bona fide community caretaker function when they inventoried and towed Mr. Brooks' vehicle.

3. Even if the deputies were exercising a community caretaker function, however, it was not reasonably exercised in light of the public interest in towing Mr. Brooks' car when balanced against the intrusion that would have on his privacy interest. Under the third step in this analysis, Wisconsin courts consider four 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.

Asboth, 376 Wis. 2d 644, ¶30 (quoting *Kramer*, 315 Wis. 2d 414, ¶41). Wisconsin courts may also consider the existence of, and the officers' adherence to, any standard policies or procedures as a relevant factor when assessing the reasonableness of a community caretaker seizure.[8] *Id.*, ¶29. However,

[8] The court in *Asboth* concluded, however, that the absence of standard policies and procedures does not by default render a warrantless community caretaker impoundment unconstitutional. Nor does a police officer's lack of adherence to standard policies and procedures, if they exist, automatically (continued)

"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.

The first and second factors in this analysis—the public interest advanced by the impoundment and the surrounding circumstances—strongly indicate that the towing and associated inventory search were unreasonable and unconstitutional. Again, Mr. Brooks' vehicle was lawfully parked on a public street. It was not involved in an accident, damaged or disabled, inconveniencing a property owner, or interrupting the flow of traffic. It was thus not jeopardizing public safety in any way. This court has found that when a vehicle is left "legally parked and undamaged," even if unlocked, "it pose[s] no apparent public safety concern," which weighs against finding a reasonable community caretaker justification for towing a vehicle. *Clark*, 265 Wis. 2d 557, ¶¶22-27.

With respect to the third factor, the evaluation of an inventory search and towing of a car necessarily involves an automobile. However, although individuals generally have a lesser expectation of privacy in an automobile than a home, *see State v. Anderson*, 142 Wis. 2d 162, 169 n.4, 417 N.W.2d 411 (1987), Mr. Brooks still had a reasonable expectation of privacy in his vehicle. This "included the expectation that he could leave his vehicle parked

---

render such impoundments unconstitutional. *State v. Asboth*, 2017 WI 76, ¶¶27-29, 376 Wis. 2d 644, 898 N.W.2d 76.

legally on the street . . . without being towed." *See Clark*, 265 Wis. 2d 557, ¶27.

Regarding the fourth factor, there were a number of reasonable alternatives to impounding the car. Again, the deputies could have allowed Ms. Hill, the registered owner, to take possession of the car and drive it away. Alternatively, if Ms. Hill was unable or unwilling to take possession of the vehicle at that time, the deputies could have allowed her to retrieve the car at a later time, or they could have allowed her or Mr. Brooks to make arrangements to have a different family member or friend with a valid license come take possession of the car, either then or at a later time.

At a minimum, the deputies should have at least attempted to obtain Ms. Hill's consent before towing the vehicle. In *Clark*, this court held that the towing of a lawfully parked, but unlocked vehicle was an improper exercise of law enforcement's community caretaker function because at least two reasonable alternatives existed. First, the officer could have simply locked the vehicle and walked away. Second, if the officer was convinced that the vehicle could not be locked or if he reasonably believed it could be stolen or vandalized, he should have attempted to contact the owner and obtain consent. *Id.*, ¶¶26-27. Here, there is no indication in the record that the deputies had a reasonable belief that the vehicle could be stolen or vandalized if left unattended, or that they ever attempted to obtain Ms. Hill's consent before towing the vehicle.

Additionally, although Deputy Zirzow claimed that he was following his department's mandatory policies and procedures in impounding the vehicle,[9] "compliance with an internal police department policy does not, in and of itself, guarantee the reasonableness of a search or seizure." *See id*., ¶14.

Before the postconviction court, the State argued that the deputies had no reasonable choice but to tow the vehicle, because "they could not allow the defendant to drive it. He did not have a license." (78:2; App. 147). The State cited no authority, however, for the notion that the community caretaker doctrine permits law enforcement to tow a lawfully parked vehicle based simply on speculation that an unlicensed driver might attempt to drive the vehicle again. Such an expansive interpretation of the community caretaker exception is incompatible with the overriding consideration "that any warrantless intrusion must be as limited as is reasonably possible, consistent with the purpose justifying it in the first instance." *See Clark*, 265 Wis. 2d 557, ¶21.

Here, the deputies could have simply instructed Mr. Brooks that he could no longer drive the vehicle because he did not have a license, thereby requiring him to arrange for another licensed driver to take possession of the car after the stop was complete. As the vehicle was lawfully parked, there was no legitimate traffic safety reason why Mr. Brooks could not have been allowed to do so, even it if required

[9] The deputies' own written policies appear to contradict this claim, as they only authorize the towing of a vehicle when a driver is arrested. *See infra* § I.D.

temporarily leaving the vehicle at the scene for a period of time.[10]

The State further argued below that the deputies could not "allow a third party to come to the scene because of obvious safety reasons." (78:2; App. 147). As an initial matter, Ms. Hill was already at the scene prior to the tow truck arriving, so the underlying premise of this argument is questionable.[11] However, even if allowing another driver to come to the scene of an ongoing traffic stop is a valid safety concern, there is certainly no such concern after the stop is complete. Here, after the deputies issued the citations to Mr. Brooks, the traffic stop was complete. From that point on, there was no legitimate safety reason for preventing a third party from coming to the scene to take possession of the vehicle. The deputies were not required to remain on scene at that point, and they had no authority to detain Mr. Brooks any longer. *See Rodriguez v. United States*, ___ U.S. ___, 135 S. Ct. 1609, 1614 (2015) ("Because addressing the infraction is the purpose of the [traffic] stop, it may last no longer than is necessary to effectuate that purpose.") (internal quotations, brackets, and citations omitted). The deputies thus could not have reasonably prevented Mr. Brooks from having a family member

[10] According to the criminal complaint, Mr. Brooks address at the time was less than two miles from the location of the stop. (*See* 1:1).

[11] Again, the deputies' actual written policies appear to contradict this claim in that they permit this type of activity when a driver and/or owner of a vehicle is arrested. *See infra* § I.D.

or friend come to the scene to take possession of the car once the stop was complete.

Moreover, if the deputies were really concerned that Mr. Brooks might drive the car again after they left, or that it was unsafe to allow another driver to come to the scene, they could have confiscated the ignition key and instructed Mr. Brooks that he would have to pick up the key at the police station with another a licensed driver, or that Ms. Hill would have to do so as the registered owner. This reasonable alternative would have been less burdensome on the sheriff's department, as well as less intrusive on Mr. Brooks.

The State also argued before the circuit court that "[e]ven if the police were going to leave the car where it was they would have had to search the car to protect themselves and the defendant from any future claims of wrongdoing." (78:2; App. 147). This argument is specious. First, there is no evidence in the record that Deputy Zirzow "reasonably believe[d] that the vehicle could be stolen or vandalized" if left temporarily unattended. *See Clark*, 265 Wis. 2d 557, ¶26.

Furthermore, the sheriff's department would not have been liable for any potential losses or damages to the vehicle if Mr. Brooks and/or Ms. Hill had decided to temporarily leave it at the scene. The State cited no authority for the dubious proposition that it would have been legally responsible for losses caused by a third party at a time when the vehicle was not in the department's custody or control.

Lastly, in judging the reasonableness of the deputies' actions in this case, this court should be mindful of the particularly burdensome and intrusive effect that towing a vehicle can have on people who are living in poverty, like Mr. Brooks.[12] When the police tow and impound a vehicle, the owner is required to pay additional fees to get the vehicle back. For example, the City of Milwaukee charges a towing fee of $105, plus a $20 per day storage fee.[13] *See* City of Milwaukee's Online Information Regarding Towed Vehicles, *available at* https://city.milwaukee.gov/ParkingServices/ParkingTowing.htm#.W_BnSyMrK2w (last visited on November 19, 2018). For a person with means, those fees are a relatively minor penalty. But for low-income members of our community, they can represent a grievous loss. For those who are already struggling to get by, those fees can mean the difference between being able to buy groceries and going hungry, or between making rent and getting evicted. And, if a person is unable to pay the fees, they can mean the loss of their vehicle altogether. Vehicles impounded at the City of Milwaukee's tow lot may be sold or recycled if the owner does not retrieve the vehicle within thirty days if the vehicle is of "substantial value," or within fifteen days if it is

[12] Mr. Brooks has been continuously represented in this case by attorneys appointed by the Office of the State Public Defender, meaning his indigency has been conclusively established by the State of Wisconsin.

[13] The towing and storage fees charged by the City of Milwaukee are provided for purposes of example only, as the fee amounts associated with towing by the Milwaukee County Sheriff's Department are not available online.

not. *See id.* If that vehicle is necessary for the owner or other members of the household to get to work or to get their children to school, the consequences become even more ruinous. They feed a cycle of poverty that becomes harder and harder to escape. This harsh reality highlights the unreasonableness of towing a vehicle when feasible, less intrusive alternatives are available.

Given all these factors, this court should hold that the towing and associated inventory search of Mr. Brooks' vehicle were an improper and unreasonable exercise of law enforcement's community caretaker function.

D. Trial counsel was ineffective for failing to introduce the sheriff's department's written policies, which did not authorize the towing and search of Mr. Brooks' vehicle.

Mr. Brooks further asserts that, to the extent this court concludes that towing and searching his vehicle were proper based, in whole or in part, on Deputy Zirzow's claim that he was following his internal policies and procedures, then Mr. Brooks' trial attorney provided ineffective assistance of counsel.

Wisconsin courts apply the two-part test outlined in *Strickland v. Washington*, 466 U.S. 668 (1984), to determine whether trial counsel was ineffective. A defendant raising ineffectiveness must show first "that counsel's performance was deficient" and second that "the deficient performance prejudiced the defense." *Strickland*, 466 U.S. at 687.

Deficient performance occurs when "'counsel's representation fell below an objective standard of reasonableness.'" *State v. Johnson*, 133 Wis. 2d 207, 217, 395 N.W.2d 176 (1986) (quoting *Strickland*, 466 U.S. at 688). Although the court must presume that counsel "rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment," *Strickland*, 466 U.S. at 690, the defendant overcomes that presumption "by proving that his attorney's representation was unreasonable under prevailing professional norms and that the challenged action was not sound strategy." *Kimmelman v. Morrison*, 477 U.S. 365, 384 (1986) (citing *Strickland*, 466 U.S. at 688-89).

Second, a defendant must show that counsel's deficient performance prejudiced his defense. The defendant need not show "that counsel's deficient conduct more likely than not altered the outcome of the case." *Strickland*, 466 U.S. at 693. Rather, to establish prejudice, the defendant must show "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *State v. Smith*, 207 Wis. 2d 258, 276, 558 N.W.2d 379 (1997) (citing *Strickland*, 466 U.S. at 694). "Reasonable probability" under this standard is defined as "'probability sufficient to undermine confidence in the outcome.'" *State v. Moffett*, 147 Wis. 2d 343, 357, 433 N.W.2d 572 (quoting *Strickland*, 466 U.S. at 694). In other words, the defendant need only demonstrate that the outcome is suspect, not that the final result would have been different. *Smith*, 207 Wis. 2d at 275.

Following Mr. Brooks' conviction and sentencing, his investigator submitted an open records request to the Milwaukee County Sheriff's Department, asking for all written policies and procedures concerning the towing and impounding of vehicles, as well as inventory searches of towed and impounded vehicles. (76:21-22). *See also* Wis. Stat. §§ 19.21-19.39 (open records law). The only policies or procedures produced in response to this request were those attached to Mr. Brooks' postconviction motion. (76:23-24). Again, those policies do not authorize the towing of a vehicle when a driver does not have a valid license. They only authorize the towing of a vehicle when a driver is arrested. (76:23-24).

Mr. Brooks was not under arrest at the time the inventory search took place. (110:18, 24-25; App. 118, 124-25). The sheriff's department's written policies therefore did not authorize the deputies to tow his car. And since towing the vehicle was unauthorized, the associated inventory search was unauthorized, as well.

The department's written policies thus appear to contradict Deputy Zirzow's testimony that he was required to tow Mr. Brooks' vehicle pursuant to his department's policies and procedures. (*See* 110:12; App. 112). They also appear to contradict his claim that his policies and procedure only permitted another licensed driver to take possession of the vehicle and drive it away if that driver was an occupant in the vehicle at the time of the stop. (*See* 110:16; App. 116). Contrary to this claim, the written policies permit another licensed driver to drive a

vehicle away from the scene so long as they are "at the scene prior to the tow arriving." (76:23).

Accordingly, if this court concludes that towing and searching Mr. Brooks' vehicle were reasonable because Deputy Zirzow's actions were consistent with his internal policies and procedures, as described in his testimony, then Mr. Brooks' trial attorney performed deficiently by failing to obtain and introduce into evidence the written policies attached to his postconviction motion. Trial counsel was also deficient for failing to confront and cross-examine Deputy Zirzow about the fact that his department's written policies did not actually authorize the towing of Mr. Brooks' vehicle and did not prevent another licensed driver from coming to the scene to take possession of the vehicle. It was simply unreasonable under prevailing professional norms for trial counsel to fail to challenge Deputy Zirzow's testimony in this manner. There was no conceivable strategic reason not to do so.

Trial counsel's failures in this respect were also prejudicial. The circuit court determined that the inventory search was proper because it was done in accordance with the deputies' "protocol." (110:31; App. 131). However, had counsel introduced the written polices into evidence, the circuit court would have known that the sheriff's department's policies did not, in fact, permit or authorize the search and towing of Mr. Brooks' vehicle. This would have seriously undermined Deputy Zirzow's credibility. In that event, the court would have granted Mr. Brooks' motion and suppressed all the evidence obtained as a result of the unlawful inventory search. As this

included the gun found the Mr. Brooks' trunk, the motion would have been dispositive and resulted in the dismissal of the entire case against him.[14]

---

[14] It is also Mr. Brooks' position that in *Colorado v. Bertine*, 479 U.S. 367, 375 (1987), the United States Supreme Court established that an impoundment will be constitutionally valid only if done pursuant to "standard criteria" set forth in law enforcement procedures. Accordingly, the impoundment and related inventory search in this case were per se unconstitutional because they were not done according to standard criteria set forth in the department's written policies and procedures. Numerous courts from other jurisdictions agree that law enforcement officers may constitutionally perform warrantless community caretaker impoundment only if done in accordance with standard criteria to minimize the exercise of their discretion. *See United States v. Sanders*, 796 F.3d 1241, 1248 (10th Cir. 2015) ("[I]mpoundment of a vehicle located on private property that is neither obstructing traffic nor creating an imminent threat to public safety is constitutional only if justified by both a standardized policy and a reasonable, non-pretextual community-caretaking rationale."); *United States v. Proctor*, 489 F.3d 1348, 1349 (D.C. Cir. 2007) ("if a standard impoundment procedure exists, a police officer's failure to adhere thereto is unreasonable and violates the Fourth Amendment"); *Miranda v. City of Cornelius*, 429 F.3d 858, 866 (9th Cir. 2005) ("The decision to impound must be guided by conditions which 'circumscribe the discretion of individual officers' in a way that furthers the caretaking purpose.") (quoting *Bertine*, 479 U.S. at 376 n.7); *United States v. Petty*, 367 F.3d 1009, 1012 (8th Cir. 2004) ("Some degree of 'standardized criteria' or 'established routine' must regulate these police actions."); *United States v. Duguay*, 93 F.3d 346, 351 (7th Cir. 1996) 662 ("Among those criteria which must be standardized are the circumstances in which a car may be impounded."). Mr. Brooks acknowledges that this argument is foreclosed by *Asboth*, 376 Wis. 2d 644, ¶¶27-29; however, he (continued)

E. The State forfeited its right to challenge Mr. Brooks' standing because it failed to raise the issue at the suppression hearing.

As a final matter, Mr. Brooks asserts, as he did before the postconviction court, that the State has forfeited its right to challenge his standing because it failed to raise this issue in a timely manner at or before the suppression hearing. *See City of Madison v. DHS*, 2017 WI App 25, ¶20, 375 Wis. 2d 203, 895 N.W.2d 844 (arguments not raised in the circuit court are forfeited); *State v. Callaway*, 103 Wis. 2d 389, 396-97, 308 N.W.2d 897 (Ct. App. 1987) (failure to raise the issue in the circuit court of whether the defendant had standing operated as a forfeiture of the State's right to argue on appeal that the defendant lacked standing), *reversed on other grounds in State v. Callaway*, 106 Wis. 2d 503, 317 N.W.2d 428 (1982).

Furthermore, one of the State's own police reports clearly demonstrates that Mr. Brooks had standing. The report reflects that Ms. Hill is the registered owner of the vehicle. (83:3). It also reflects that Ms. Hill arrived on scene shortly after the stop was initiated and told the deputies that she and Mr. Brooks had purchased "the vehicle not even 2 months ago." (83:3). She also told them that she and Mr. Brooks were the only people who drove the vehicle. (83:3). Additionally, at no time did Ms. Hill indicate that Mr. Brooks had taken her vehicle

---

wishes to preserve this argument in the event of further review before the Wisconsin Supreme Court or in federal court.

without permission. (83:3). The report therefore demonstrates that Mr. Brooks was an authorized driver of the vehicle. He therefore had standing to challenge the search and towing of the vehicle. *See Dixon*, 177 Wis. 2d at 470.

Forfeiture is thus particularly apt in this case because the State was fully aware (or at least should have been aware) that Mr. Brooks had standing. And, had the State timely raised this issue at the suppression hearing, Mr. Brooks could have presented additional testimony establishing that he was an authorized driver. This court should therefore hold that the State has forfeited any objection to Mr. Brooks' standing.

However, to the extent this court determines that the State has not forfeited this issue, then it should remand the case to the circuit court for an additional hearing on the issue of standing.[15] Failing that, it should remand the case to the circuit court for a *Machner*[16] hearing, as Mr. Brooks asserts that his trial attorney was deficient in failing to present additional evidence establishing that he was an authorized driver of the vehicle, either through the testimony of Ms. Hill or Mr. Brooks, and that this

---

[15] Remand for additional fact-finding in this event would be appropriate given that the squad cam video captures one of deputies saying that Ms. Hill told him that she and Mr. Brooks were the only people who drove the vehicle. (Ex. 3 at 10:15:35 to 10:15:55). There is thus evidence of Mr. Brooks' standing in the record.

[16] *See State v. Machner*, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

deficiency prejudiced him. *See Strickland*, 466 U.S. at 687.

CONCLUSION

For these reasons, Mr. Brooks respectfully requests that this court reverse the judgment and postconviction order of the circuit court, and remand the case to the circuit court with instructions to order the suppression of all evidence obtained as a result of the unlawful inventory search. Should this court conclude that the towing and inventory search were proper based on Deputy Zirzow's testimony that they were done in accordance with his policies and procedures, then Mr. Brooks requests that the court reverse the judgment and postconviction order of the circuit court and remand the case for a *Machner* hearing.

Dated this 19th day of November, 2018.

Respectfully submitted,

LEON W. TODD
Assistant State Public Defender
State Bar No. 1050407

Office of the State Public Defender
735 North Water Street, Suite 912
Milwaukee, WI 53202
(414) 227-4805
toddl@opd.wi.gov

Attorney for Defendant-Appellant

CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 8,038 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 19th day of November, 2018.

Signed:

LEON W. TODD
Assistant State Public Defender

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; (3) a copy of any unpublished opinion cited under § 809.23(3)(a) or (b); and (4) 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 one or more initials or other appropriate pseudonym or designation 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.

Dated this 19th day of November 2018.

Signed:

LEON W. TODD
Assistant State Public Defender

APPENDIX

INDE X
TO
APPENDIX