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 ENTERED IN THE MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE JEFFREY A. WAGNER, PRESIDING

BRIEF OF THE PLAINTIFF-RESPONDENT

JOSHUA L. KAUL
Attorney General of Wisconsin

LISA E.F. KUMFER
Assistant Attorney General
State Bar #1099788

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 267-2796
(608) 266-9594 (Fax)
kumferle@doj.state.wi.us

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Page

Page

Constitutional Provisions

ISSUES PRESENTED

1. Did the circuit court properly deny Defendant-Appellant Alfonso Lorenzo Brooks' motion to suppress a gun found in his car during an inventory search performed before the car was towed?

The circuit court found that the tow and associated search were reasonable exercises of the officers' community caretaking function and denied the motion.

This Court should affirm the circuit court.

2. Did the circuit court properly deny Brooks' postconviction motion—alleging that trial counsel was ineffective for failing to present evidence of the sheriff department's written tow policy—without a *Machner* hearing?

The circuit court found that the search and tow of the car were proper exercises of the officers' community caretaker function and that they were reasonable both for safety reasons and to protect the sheriff's department from claims of wrongdoing, therefore counsel could not be ineffective for failing to pursue a non-meritorious issue.

This Court should affirm the circuit court.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State disagrees with Brooks that this case is appropriate for oral argument or publication.

INTRODUCTION

Brooks was driving his girlfriend's Lexus sport-utility vehicle when police pulled him over for speeding and learned that his driver license was suspended. They wrote him some tickets and told Brooks he was free to leave, but that they would have to tow the car because there was no licensed

driver on scene who could take possession of it. They called for a tow and, before towing the car, performed an inventory search and found a gun. They arrested Brooks for being a felon in possession of a firearm.

Brooks now claims that the tow and associated search violated the Fourth Amendment. But the police reasonably exercised their community caretaker function in towing the car and inventorying it, because they did so according to reasonable standard criteria articulated by the Milwaukee County Sheriff's Department, and there was no licensed driver on scene who could take possession of it.

Further, Brooks' counsel cannot have been ineffective for failing to introduce the written policy about arrest tows. Brooks was not arrested but, even so, he was unable to drive the vehicle due to his license being suspended, and the officers testified that the Sheriff's Department policy requires them to tow a vehicle in that situation. No Wisconsin case holds that a police department policy must be written to be "standardized." The fact that the policy may be unwritten does not make it any less reasonable. And, apart from Brooks being given a citation rather than being arrested, the tow and search the officers conducted complied with the written policy in every other respect.

In short, the tow and inventory search were reasonable, Brooks' counsel was not ineffective, and Brooks is due no relief.

STATEMENT OF THE FACTS

While on patrol, Milwaukee County Sheriff's Office Deputy Dean Zirzow saw a black Lexus sport-utility vehicle travelling approximately 65 to 70 miles per hour in a 50 mile per hour zone. (R. 1:1.) He pulled over the Lexus and learned that the driver, Alfonso L. Brooks, had a suspended driver license. (R. 1:1.) The car was registered to Meaghan Hill,

Brooks' girlfriend. (R. 110:42–43.) During their warrant check they also learned that Brooks was a convicted felon. (R. 1:1.) The officer asked Brooks if there were any weapons in the car, and Brooks said no. (R. 1:1.)

Zirzow then explained to Brooks that the Lexus would have to be towed pursuant to sheriff's department policy, because there was no licensed person on scene to drive it away. (R. 1:1.) He further explained that an inventory search would be conducted. (R. 1:1.) Assisting Deputy Travis Thompson began the inventory process and found a handgun in the trunk. (R. 1:1–2.) The deputies arrested Brooks, and the State charged him with possession of a firearm by a felon. (R. 1:2.)

After a series of events not relevant here, Brooks' case was scheduled for trial pending a motion to suppress the gun that Brooks filed himself, though he was represented at the time. (R. 107:15–19; 38.)

The circuit court held a suppression hearing[1] on Brooks' pro se motion, and Deputies Zirzow and Thompson testified.[2] (R. 110:1.)

Zirzow testified that after he pulled Brooks over and ran his driver license, he learned that Brooks' license was

---

[1] The court also addressed a *Miranda-Goodchild* issue at this time and determined that Brooks' statements to police about possessing the gun were obtained in compliance with *Miranda*. (R. 110:31–45.) Brooks does not raise any issues regarding the *Miranda-Goodchild* hearing on appeal, therefore the State will not discuss it further.

[2] Deputy Thompson testified during the *Miranda-Goodchild* portion of the hearing. (R. 110:31–32.) Some of his testimony is relevant to the suppression issue, though, and the court denied both motions after hearing all of the relevant testimony at one hearing. The State will therefore briefly discuss Thompson's relevant testimony.

suspended. (R. 110:11.) He testified that because there was no other valid driver in the car, according to Milwaukee County Sheriff's Department policy and procedures, he had to call for a tow. (R. 110:12.)

Zirzow said that, also according to the policy, before the tow the deputies "have to do an inventory of the vehicle." (R. 110:12.) The prosecutor asked him why, and Zirzow replied, "[t]o make sure there's no valuables in there." (R. 110:12.) Zirzow explained that the inventory search was necessary to protect the department from claims that there was "a bag of money that's no longer in there." (R. 110:12.) Essentially, the inventory was necessary to "protect us from any source of complaint" that someone's belongings disappeared from their car after the tow. (R. 110:12.)

Zirzow said that Deputy Thompson inventoried the car while Zirzow explained the citations to Brooks. (R. 110:12–13.) He said during the inventory Thompson motioned with his hand telling Zirzow he found a gun. (R. 110:13.) Zirzow knew Brooks was a convicted felon from the criminal history he ran as part of the traffic stop when checking Brooks' license status, so once Thompson found the gun Zirzow placed Brooks under arrest. (R. 110:14.)

The defense asked if Brooks told the officers that he would be able to have someone else come and get the car, and Zirzow said "[h]e begged me not to tow it. He wanted his girlfriend to pick it up because he had financial difficulties." (R. 110:16.) Zirzow explained, however,

> It's not allowed in our sheriff's office policy. Because we 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 [had a

> valid license], 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.

(R. 110:16.)

The defense asked if it was "within your policy to allow the car to remain locked in a valid state as long as it's not on the active road?" (R. 110:16.) Zirzow said no, though other agencies such as the city police may have a different policy. (R. 110:17.) Zirzow said he told Brooks he was free to leave, though "we encourage people to stay with the tow to make sure that their vehicle goes on there and there's no complaints." (R. 110:18.) When the gun was found, though, "that changed the circumstance of the events." (R. 110:18.)

Brooks testified and admitted he was driving over the speed limit, and he said he called his girlfriend to inform her he was getting pulled over. (R. 110:24, 30.) She told him she was coming to that location and was not far off. (R. 110:24.) After Zirzow told Brooks they would have to tow the car, Brooks said he did not understand why, because it was not a road hazard and was not violating any parking ordinance. (R. 110:25.) Brooks testified that Zirzow told him it was policy. (R. 110:25.)

Thompson testified that it is standard to search every part of the car and every compartment during an inventory search, "[b]ecause we don't want somebody coming back later and saying I had $5,000 hidden behind my driver's manual in the glove box. So I try and get every possible spot." (R. 110:38.) He said he usually asks the person if there is anything else in the car they need, such as baby seats or medication, "to give them that chance to get those things as well." (R. 110:38.) The defense asked if police were instructed that any part of the car is off limits, and Thompson answered, "[u]nder an inventory, no." (R. 110:38.)

Based on the testimony, the court found that the police properly stopped the vehicle for speeding. (R. 110:30.) The court further found that "based upon the protocol, after finding out that the defendant was driving after suspension or revocation and speeding tickets, there was an inventory search that was conducted that was conducted appropriately based upon what the testimony was, and the gun was found." (R. 110:31.) It denied the suppression motion.[3] (R. 110:31.)

After the court denied the suppression motion, Brooks pled guilty to the charge. (R. 110:48.) The court sentenced Brooks to 37 months of initial confinement and 30 months of extended supervision. (R. 111:27–28.)

Brooks filed a postconviction motion to vacate his conviction, withdraw his plea, and to suppress "all evidence obtained" as a result of the inventory search. (R. 76:1.) He claimed the tow was an improper exercise of law enforcement's community caretaker function because the car was lawfully parked and not obstructing traffic. (R. 76:1.) The inventory search, he argued, was therefore unreasonable. (R. 76:1.)

He also alleged that "to the extent this court denies this motion based on the existing record, then . . . his trial attorney was ineffective for failing to present additional evidence showing that his vehicle was lawfully parked and that the written policies of the Milwaukee County Sheriff's Department did not authorize the towing of his vehicle." (R. 76:1–2.) He attached a portion of the written tow policy to his motion. (R. 76:23.) He requested a *Machner* hearing on this issue. (R. 76:2.)

---

[3] The court denied the *Miranda-Goodchild* motion as well. (R. 110:45.)

The circuit court denied the motion without a hearing. (R. 85:1.) It agreed with the State that the search and tow of the car "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." (R. 85:1.) Consequently, the court could not "find that trial counsel was ineffective for failing to raise a non-meritorious claim." (R. 85:1.)

Brooks appeals.

ARGUMENT

I. The circuit court properly denied Brooks' suppression motion because the tow and associated inventory search of the car were reasonable exercises of the police's community caretaking function.

A. Standard of review

"Whether evidence should be suppressed is a question of constitutional fact." *State v. Floyd*, 2017 WI 78, ¶ 11, 377 Wis. 2d 394, 898 N.W.2d 560 (citation omitted). Under this standard, this Court will uphold the circuit court's findings of historical fact unless they are clearly erroneous. *Id*. This Court reviews independently the court's application of constitutional principles to those facts. *Id*.

B. Relevant law

The federal and state constitutions do not protect against all warrantless searches and seizures, but only unreasonable ones. *State v. Pinkard*, 2010 WI 81, ¶ 13, 327 Wis. 2d 346, 785 N.W.2d 592 (the ultimate standard set forth in the Fourth Amendment is reasonableness).

The Supreme Court of the United States and the Wisconsin Supreme Court have recognized an exception to

the warrant requirement "where a law enforcement officer is 'serving as a community caretaker to protect persons and property.'" *State v. Asboth*, 2017 WI 76, ¶ 12, 376 Wis. 2d 644, 898 N.W.2d 541 (citation omitted). Similarly, the courts have recognized that "[a]lthough an inventory search is a 'search' within the meaning of the [F]ourth [A]mendment, it is also a well-defined exception to the warrant requirement." *State v. Weber,* 163 Wis. 2d 116, 132, 471 N.W.2d 187 (1991) (citation omitted).

"When evaluating a claimed community caretaker justification for a warrantless search or seizure, Wisconsin courts apply a three-step test . . . ." *Asboth*, 376 Wis. 2d 644, ¶ 13. The court first evaluates "whether a search or seizure within the meaning of the Fourth Amendment occurred." *Id.* (citation omitted). If so, the court then determines "whether the police were exercising a bona fide community caretaker function." *Id*. (citation omitted). If they were, the court evaluates "whether the public interest outweighs the intrusion upon the privacy of the individual such that the community caretaker function was reasonably exercised." *Id.* (citation omitted).

The mere possibility that police could have allowed a defendant to make alternative arrangements does not render a tow or related inventory search unconstitutional. As the Supreme Court has explained, "reasonable police regulations relating to inventory procedures administered in good faith satisfy the Fourth Amendment, even though courts might as a matter of hindsight be able to devise equally reasonable rules requiring a different procedure." *Colorado v. Bertine*, 479 U.S. 367, 375–76 (1987).

However, "compliance with an internal police department policy does not, in and of itself, guarantee the reasonableness of a search or seizure." *State v. Clark*, 2003 WI App 121, ¶ 14, 265 Wis. 2d 557, 666 N.W.2d 112.

"Rather, the constitutionality of each search or seizure will, generally, depend upon its own individual facts." *Id.*

"The essential question is whether the action of the law enforcement officer was reasonable under all the facts and circumstances present." *State v. Williams*, 2001 WI 21, ¶ 23, 241 Wis. 2d 631, 623 N.W.2d 106 (citation omitted).

C. The tow and related search of Brooks' car were reasonable pursuant to *Asboth*; therefore, there was no Fourth Amendment violation.

The State does not dispute that the tow was a seizure of Brooks' vehicle within the meaning of the Fourth Amendment. (Brooks' Br. 16.) That, however, is where Brooks' meritorious contentions end. This case is squarely controlled by *Asboth*, which, as Respondent will show in sections C.1.–4., disposes of Brooks' claim.

1. The Wisconsin Supreme Court's opinion in *State v. Asboth*

In *Asboth*, police arrested the defendant, Kenneth Asboth, at a storage facility, where the car he was driving was parked in an alley between two storage sheds. *Asboth*, 376 Wis. 2d 644, ¶ 3. None of the officers asked if Asboth could arrange to have the car moved, and space remained available for cars to maneuver around it through the alley. *Id.* ¶ 4. An officer ran a check of the car's registration and learned that Asboth did not own the car. *Id.* Police impounded the car and conducted an inventory search, during which they found evidence implicating Asboth in an armed robbery. *Id.* ¶ 6.

Like Brooks, Asboth claimed that the seizure of the car was unconstitutional because "it was not conducted pursuant to sufficiently detailed standardized criteria or

justified by a bona fide community caretaker purpose."[4] *Asboth*, 376 Wis. 2d 644, ¶ 9.

Asboth first argued that in *South Dakota v. Opperman*, 428 U.S. 364 (1976), the Supreme Court limited the objectively reasonable bases to tow a car under the community caretaking function to those situations where the vehicle has been involved in an accident or impedes the efficient movement of traffic. *Asboth*, 376 Wis. 2d 664, ¶ 17. Second, relying on *Bertine*, Asboth claimed that "an impoundment will be constitutionally valid only if governed by 'standard criteria' set forth in law enforcement procedures." *Id.* ¶ 22.

The Wisconsin Supreme Court disagreed with both contentions.

Regarding the community caretaker function, it first noted that the situations described in *Opperman* were "non-exclusive examples" of situations where police lawfully take custody of vehicles under their community caretaker function; it then assessed the particular facts of the case. *Asboth*, 376 Wis. 2d 644, ¶ 16. It found the tow a reasonable exercise of that function for three reasons:

First, Asboth's car was impeding beneficial use of the storage facility by blocking a storage unit and making it difficult for vehicles to drive through the alley. *Asboth*, 376 Wis. 2d 644, ¶ 18.

Second, police had no way of knowing when Asboth would be released from custody or able to provide

---

[4] In *Asboth*, the police departments involved in the incident had written procedures for towing vehicles; Asboth claimed that the written policies were not specific enough to validate the search. *State v. Asboth*, 2017 WI 76, ¶¶ 5, 22, 376 Wis. 2d 644, 898 N.W.2d 541.

arrangements for the car, therefore "[i]mpounding rather than abandoning Asboth's car protected the vehicle and its contents from potential theft or vandalism in his absence." *Asboth*, 376 Wis. 2d 644, ¶ 19. The court specifically noted that "the impoundment's protective function undermines Asboth's argument that the officers could have towed the car somewhere other than the police station; his car likely would have faced greater risk of vandalism or theft if abandoned in a public place." *Id.* ¶ 19. "Asboth no doubt would have been upset to learn that his personal property was stolen from the car—regardless of whether officers decided to abandon it at the storage facility or in some other public place." *Id.*

Finally, the court noted that Asboth was not the registered owner of the car. *Asboth*, 376 Wis. 2d 644, ¶ 20. "With no one else immediately present claiming ownership or otherwise available to take possession of the vehicle, the possibility existed that officers would need to make arrangements to reunite the car with its registered owner." *Asboth*, 376 Wis. 2d 644, ¶ 20.

Having found that the police had a bona fide community caretaker function, the court moved to whether the seizure was reasonable. *Asboth*, 376 Wis. 2d 644, ¶¶ 22–30.

The court first rejected the notion that *Bertine* stood for the proposition that an impoundment is "constitutionally valid only if governed by 'standard criteria' set forth in law enforcement procedures." *Asboth*, 376 Wis. 2d 644, ¶ 22. The court noted the federal circuit split on the issue, and adopted the position of the First, Third, and Fifth Circuits, holding: "the absence of standard criteria does not by default render a warrantless community caretaker impoundment unconstitutional under the Fourth Amendment reasonableness standard. Nor does law enforcement officers' lack of adherence to standard criteria, if they exist, automatically render such impoundments unconstitutional."

Asboth, 376 Wis. 2d 644, ¶¶ 27–28. Rather, the standard remains simply reasonableness, though "a Wisconsin court may consider the existence of, and officers' adherence to, standard criteria as a relevant factor when assessing the reasonableness of a community caretaker seizure." *Id.* ¶ 29.

The court then engaged in the third step of Wisconsin's community caretaker test, "balancing the public interest or need that is furthered by the officer's conduct against the degree of and nature of the restriction upon the liberty interest of the citizen." *Asboth*, 376 Wis. 2d 644, ¶ 30.

The court applied the four-factor test articulated in *State v. Kramer*, 2009 WI 14, ¶ 40, 315 Wis. 2d 414, 759 N.W.2d 598, considering: 1) the degree of public interest and exigency of the situation; 2) the attendant circumstances surrounding the seizure, such as time, location, and the degree of authority displayed; 3) whether a vehicle is involved; and 4) the availability, feasibility, and effectiveness of alternatives to the intrusion. *Asboth*, 376 Wis. 2d 644, ¶ 30.

The court found that under that test, the tow and inventory search were reasonable. *Asboth*, 376 Wis. 2d 644, ¶ 36. It first acknowledged that Asboth had a lesser expectation of privacy in a car than he would in a home. *Id.* ¶ 31. Next, it determined the officers served a legitimate public interest in seizing a vehicle that, left unattended, would inconvenience the property's owner and create a potential hazard by obstructing traffic through the facility. *Id.* ¶ 32. Third, it determined that the circumstances surrounding the seizure reflected its reasonableness: the officers complied with the terms of the department procedures governing impoundments, which actually cabined the officer's exercise of discretion of when to tow a car. *Id.* ¶ 34. Finally, it determined there was a lack of reasonable alternatives because Asboth "did not have a companion who could immediately take possession of the

car." *Id.* ¶ 35. And in doing so, it rejected the notion that the officers had to offer Asboth the opportunity to make other arrangements to comply with the Fourth Amendment. *Id.* ¶ 35.

2. The State did not, and does not, concede that Brooks' car was lawfully parked, but whether it was is irrelevant.

As a preliminary matter, the State did not concede that Brooks' car was lawfully parked and does not do so now. (Brooks' Br. 14.) And the record is far from "uncontradicted in this respect." (Brooks' Br. 14.)

Brooks' self-serving testimony that he told the officers that it was unnecessary to tow his vehicle because it was allegedly lawfully parked is insufficient to establish it was. (Brooks' Br. 14–15.) Nor does the squad-car video establish that the car was not "interrupting the flow of traffic." (Brooks' Br. 15.) Indeed, the video shows that Brooks' car is parked far from the curb, and several vehicles that drive by have to enter the other lane to avoid the officers' and Brooks' car. (*See, e.g.*, Ex. 3, 9:34:07–16.)

Ultimately, though, the State did not address that contention, and the circuit court did not need to make findings of fact on it, because such a finding was not necessary to decide the issue.

The Supreme Court of the United States and the Wisconsin Supreme Court have expressly rejected the argument that a tow and inventory search of a car is rendered unconstitutional simply because the police could have allowed the defendant to lock the car and leave it in a public parking place. *Bertine*, 479 U.S. at 375–76 ("Nothing in [the Supreme Court's inventory search cases] prohibits the exercise of police discretion [in how to deal with a vehicle to be left unattended] 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");[5] *cf. Asboth*, 376 Wis. 2d 644, ¶ 26 (Police "must be free to follow 'sound police procedure,' that is to choose freely among the available options, so long as the option chosen is within the universe of reasonable choices" (quoting *United States v. Coccia*, 446 F.3d 233, 239 (1st Cir. 2006))); *see also United States v. Staller*, 616 F.2d 1284, 1290–91 (5th Cir. 1980) (the fact that the defendant's car was legally parked in a mall parking lot did not render impounding the car an unreasonable exercise of the community caretaker function).

As the Fourth Circuit explained, "[t]he question . . . is not whether there was a need for the police to impound [Brooks'] vehicle but, rather, whether the police officer[s'] decision to impound was reasonable under the circumstances." *United States v. Brown*, 787 F.2d 929, 932 (4th Cir. 1986). In other words, it does not matter if the car was lawfully parked. What matters is whether the police reasonably towed and searched it, even assuming it *was* lawfully parked. As Respondent will show below, they did.

3. The deputies possessed a bona fide community caretaker justification for impounding the car.

Like in *Asboth*, here the officers possessed a bona fide community caretaker justification for impounding the car Brooks was driving.

First, Brooks was pulled over on a side street roughly two miles from his home, in a mixed residential and

---

[5] There is nothing in the record even suggesting that the police towed and searched the car because they suspected evidence of criminal activity, and Brooks makes no argument that police towed the car for some ulterior investigative motive.

commercial area. (R. 1:1.) The car was parked far from the curb, potentially impeding traffic along the side street, and it was far enough away from Brooks' residence that it could be difficult for a member of his household to retrieve it expeditiously if any issues with the car arose.

Second, Brooks did not have a valid driver license, and there was no one else on scene who did who could drive the car away. There was no way for police to anticipate when Brooks' driving privileges would be restored and he, or someone else, would be able to collect the car. *Cf. Asboth*, 376 Wis. 2d 644, ¶ 19. The officers therefore made a reasonable decision to tow it based on the facts they had at that moment, and subsequent events—such as Ms. Hill's later arrival at the scene—do not make that decision less reasonable.

Even assuming that Brooks had told the deputies that his girlfriend was already on the way to the scene, the officers would have no way to know whether or not she was actually coming, or, if so, when she would arrive, or if she actually had a valid license, or if she may be dangerous to police.[6] And, contrary to his testimony at the suppression

---

[6] The State fails to understand Brooks' claim that Ms. Hill's spontaneous arrival on the scene makes the "underlying premise" of the officers' safety rationale for refusing to permit invitations for unknown parties to come to traffic stops "questionable." (Brooks' Br. 23.) Obviously, the officers could not *prevent* third parties from approaching the scene, and when Ms. Hill arrived, Zirzow immediately told her that she needed to leave. (Ex. 3, 9:56:31–35.) Further, the State does not comprehend how the fact that she appeared "prior to the tow truck arriving" could be relevant to the analysis here. (Brooks' Br. 23.) Both the tow truck and Ms. Hill arrived long after police had already found the gun and placed Brooks under arrest. The fact that police could conceivably have released the car to Hill once she arrived adds nothing to the Fourth Amendment question because the search

hearing, at no point on the squad car video does Brooks tell police that his girlfriend was on the way; rather, he begs the officers not to tow the car because he has no money, tells Zirzow that "y'all ain't have to do me like this," and asks if "she could call her sister or something," to which Zirzow answers that per policy he cannot let someone else come to the scene. (Ex. 3, 9:47:00–948:42). In any event, it would be unreasonable to force the police to stand around waiting on the side of the road for a person who may or may not be arriving, and who may or may not be dangerous if he or she did arrive.

Additionally, Ms. Hill's timely arrival would not have remedied the situation. She obviously would have to drive there, and then there would have been two vehicles on scene and only one licensed driver. The choice would have to be made between abandoning the car Brooks had been driving or abandoning the car his girlfriend drove to the scene. Leaving either car in a public place for an unanticipated amount of time would subject them to the possibility of theft or vandalism, and that concern supported the officers' decision to tow the vehicle. *See Staller*, 616 F.2d at 1290–91. Ergo, "[i]mpounding rather than abandoning [the Lexus Brooks was driving] protected the vehicle and its contents from potential theft or vandalism in his absence." *Asboth*, 376 Wis. 2d 644, ¶ 19.

Finally, like in *Asboth*, Brooks was not the registered owner of the car. *Asboth*, 376 Wis. 2d 644, ¶ 20. "With no one else immediately present claiming ownership or otherwise available to take possession of the vehicle, the possibility existed that officers would need to make arrangements to reunite the car with its registered owner." *Id.* And as the

---

was already underway, and the gun had already been found by that time.

Wisconsin Supreme Court observed, "the protective function of impoundment . . . carries no less force (and perhaps more) for an absent registered owner than it would if officers knew that [Brooks] owned the car." *Id.*

"The impoundment of a vehicle for noninvestigatory reasons is generally justified if supported by public safety concerns or by the danger of theft or vandalism to a vehicle left unattended." *Commonwealth v. Lugg*, 84 Mass. App. Ct. 1127, *2, 2013 WI 6847704 (Mass. App. Ct., Dec. 31, 2013) (unpublished). As explained above, there is no suggestion that the police had any investigatory purpose in impounding the car, and their decision was supported by the danger of theft or vandalism to a vehicle left unattended for an unanticipated amount of time. The deputies were engaged in a bona fide community caretaker function when they decided to tow the car.

Brooks contends that the deputies were not engaged in a bona fide community caretaker function because "none of the typical public safety concerns illustrated by *Opperman*" were present—the car 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 traffic.[7] (Brooks' Br. 16–18.) As the Wisconsin Supreme Court recognized, however, the examples listed in *Opperman* were "non-exclusive." *Asboth*, 376 Wis. 2d 644, ¶ 16. The car did not have to meet one of these criteria for the police to reasonably remove it under their community caretaker function.

---

[7] As explained, the State does not concede that the car was not violating any parking ordinances or jeopardizing public safety or the efficient movement of traffic.

4. The public interest outweighed the intrusion on Brooks' privacy, and the police reasonably exercised their community caretaker function in towing and searching the car.

The public interest in both officer and citizen safety and the protection of property outweighed the minimal privacy interest Brooks had in his girlfriend's car. The deputies' legitimate safety and protective reasons for towing the car instead of leaving it parked on-scene or allowing someone else to come to the scene to drive it away made their decision to tow it a reasonable exercise of the community caretaking function. They also testified that their decision was made according to a standardized policy observed by the sheriff's department in this situation, which the court found credible, and Brooks has not shown that that finding was clearly erroneous. The deputies did not need explicit written towing procedures addressing this precise situation in order to follow "standardized criteria," but even if they did, the absence of such criteria does not invalidate this seizure under the Fourth Amendment because the seizure was reasonable. *Asboth*, 376 Wis. 2d 644, ¶¶ 27–28.

As explained above, the court uses a four-factor test when evaluating whether the public interest outweighed the intrusion on privacy resulting from law enforcement's exercise of a bona fide community caretaker function. *Asboth*, 376 Wis. 2d 644, ¶ 30. Those factors are: 1) the degree of public interest and exigency of the situation; 2) the attendant circumstances surrounding the seizure, such as time, location, and the degree of authority displayed; 3) whether an automobile is involved; and 4) the availability, feasibility, and effectiveness of alternatives to the intrusion. *Asboth*, 376 Wis. 2d 644, ¶ 30. Here, those factors weigh in favor of the officers' action in towing the car.

First, the decision to tow a car obviously means an automobile was involved. This is significant because "[i]n some situations a citizen has a lesser expectation of privacy in an automobile." *Asboth*, 376 Wis. 2d 644, ¶ 31 (citation omitted.) In *Asboth*, the Wisconsin Supreme Court held that a community caretaker tow is one such situation. *Id.* "Therefore, law enforcement officers impounding a vehicle as community caretakers need not demonstrate the same extraordinary public interest necessary to justify a warrantless community caretaker entry into the home." *Asboth*, 376 Wis. 2d 644, ¶ 31.

Second, there was a legitimate and serious public interest in officer safety at play. Officer Zirzow testified that, according to sheriff's office policy, he would have allowed another licensed driver to drive the car away instead of towing it if that other licensed driver was already present. (R. 110:16.) He said that, though, according to the policy, he was not allowed to permit Brooks to arrange for someone else to come to the scene to drive the car away. (R. 110:16.) He testified that this was due to officer safety concerns: "Because we 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." (R. 110:16.)

This is an exceptionally weighty interest that is legitimately advanced by refusing to allow another driver who is not already there to come to the scene to retrieve the vehicle. "Traffic stops are 'especially fraught with danger to police officers. . . .'" *Floyd*, 377 Wis. 2d 394, ¶ 26 (citation omitted). And consequently, "[p]ublic interest in officer safety during traffic stops is great." *State v. Salonen*, 2011 WI App 157, ¶ 12, 338 Wis. 2d 104, 808 N.W.2d 162; *see also Pennsylvania v. Mimms*, 434 U.S. 106, 110 (1977) ("We think it too plain for argument that the State's proffered

justification—the safety of the officer—is both legitimate and weighty."). Police have no way of knowing whether an off-scene person being called to the side of the road ostensibly to retrieve a car would have some other nefarious purpose. They have no way of knowing whether that person would come alone, whether the person would be coming armed, or even whether the person was being called to actually retrieve the vehicle instead of to help the person stopped escape or attack the police. Given the inherent danger in a traffic stop and law enforcement's need to control the scene to protect themselves, there can be no question that there was a legitimate and substantial public interest served by towing the vehicle instead of allowing Brooks to contact an unknown driver to come to the scene.

Third, the attendant circumstances surrounding the tow reflect the seizure's reasonableness. *Asboth*, 376 Wis. 2d 644, ¶ 33. As explained, if abandoned by the officers, the car could have been subject to theft or vandalism. *Id.* They had a legitimate safety interest in not allowing an unknown person to be called to the scene. The officers did not make any coercive "show of authority to [a]ffect the seizure." *Asboth*, 376 Wis. 2d 644, ¶ 33. The squad video shows that the officers calmly approached the car and spoke to Brooks about the reason for the stop. (Ex. 3, 9:33:45–9:37:25; 9:44:29–9:45:05.) They explicitly told Brooks he was not under arrest and that they "just want[ed] to explain some tickets to [him]" when they asked him to step out of the car. (Ex. 3, 9:45:05–9:45:09.) Neither officer had his weapon drawn at any point. (Ex. 3.) Brooks was not handcuffed. (Ex. 3, 9:45:00–9:46:20.) Zirzow simply told Brooks that because there was "no licensed operator in the vehicle right now, I have to tow it." (Ex. 3, 9:46:14–9:46:18.) There was nothing forceful or coercive about the seizure.

Additionally, like in *Asboth*, nothing suggests that the seizure did not comply with the terms of the Milwaukee

County Sheriff's Department procedures regarding towing a vehicle when there is no licensed driver to take possession of it. *Asboth*, 376 Wis. 2d 644, ¶¶ 33–34. Zirzow explicitly set forth the policy on the squad cam video, stating that he would have to tow the vehicle because there was no one on-scene who could drive it away. (Ex. 3, 9:46:14–9:49:00.) He explained that had another licensed driver been present, he could have allowed that person to take it, but he could not allow Brooks to call someone to come to the scene. (*Id.*) Zirzow testified under oath that that was the sheriff's department policy and he was required to follow it, and Zirzow could not simply lock the car and leave it there. (R. 110:16–17.) The circuit court accepted Zirzow's testimony that the sheriff's office "protocol" required a tow and an inventory search, and that it was performed appropriately. (R. 110:31.)

Brooks claims that the deputies' "written policies appear to contradict this claim, as they only authorize the towing of a vehicle when a driver is arrested." (Brooks' Br. 22 n.9.) But the policy shows that the deputies complied with every written directive in the policy except that Brooks had not at the time been arrested for driving with a suspended license. (R. 76:23.) Like someone who had been arrested, though, Brooks could not lawfully drive the car from the scene because he had no valid driver license. Brooks fails to explain why it is material that Brooks was not arrested: he could not drive the car from the scene, the officers could not let someone else come take it for officer safety reasons, and an inventory search was necessary to ensure that Brooks had all his personal property out of the car and to protect the department from claims of wrongdoing. The policy actually shows that the police acted reasonably here. But at any rate, the sheriff's department did not need to have or abide by any written criteria to reasonably perform a tow: "Nor does law enforcement officers' lack of adherence to standard criteria,

if they exist, automatically render such impoundments unconstitutional." *Asboth*, 376 Wis. 2d 644, ¶¶ 27–28.

Finally, there was a lack of realistic alternatives to towing the car. *Asboth*, 376 Wis. 2d 644, ¶ 35. Like *Asboth*, Brooks was alone at the scene and he did not have a companion who could immediately take possession of the car; that fact alone was sufficient to meet this criterion in *Asboth*, and it is sufficient here. *Asboth*, 376 Wis. 2d 644, ¶ 35.

Brooks claims that the deputies "could have allowed Ms. Hill, the registered owner, to take possession of the car and drive it away." (Brooks' Br. 21.) That is true. But as the squad cam shows, Ms. Hill did not arrive (and the officers had no reason to know that she may arrive) until after the tow truck had already been called and the gun had already been found; therefore, releasing the car to Hill would not have any bearing on the events at issue here.

Alternatively, Brooks claims that "the deputies could have allowed [Hill] to retrieve the car at a later time, or they could have allowed her or Mr. Brooks to make arrangements" to have someone with a valid license retrieve it later. (Brooks' Br. 21.) But as *Asboth* explained, the mere possibility that the deputies could have done this does not mean the Fourth Amendment required them to do so. *Asboth*, 376 Wis. 2d 644, ¶ 35.

Finally, Brooks attempts to rely on *Clark* for the proposition that the deputies "could have simply locked the vehicle and walked away" or "should have at least attempted to obtain Ms. Hill's consent before towing the vehicle." (Brooks' Br. 21.) But *Clark* rested on a materially different set of facts than those here and is therefore easily distinguishable.

In *Clark*, police were investigating a shooting and found two spent shell casings near an unlocked, undamaged,

gray Taurus legally parked on the street. *Clark*, 265 Wis. 2d 557, ¶¶ 2–5. Police decided to have the car towed to the police impound lot and found cocaine during an inventory search. *Id.* ¶ 4. At the subsequent suppression hearing, the detective testified that he was following the Milwaukee Police Department's "safekeeping tow" policy, which permitted officers to tow a vehicle if "[the] vehicle is to be towed and the owner/driver is unable to authorize a tow." *Id.* ¶ 6. The department's "unsecured vehicle" policy further authorized police to lock an unsecured vehicle found on the street and leave it legally parked only "when they had the permission of consent or the owner" to do so; otherwise, they had to tow the car. *Id.* ¶ 16.

This Court found the seizure of the car unreasonable, and the stated policies did not save it. *Clark*, 265 Wis. 2d 557, ¶¶ 14–18. Because the safekeeping tow policy gave no guidance on *why* or *when* a vehicle may be seized, it did nothing to inform whether a tow was reasonable. *Id.* ¶ 15. The unsecured vehicle policy was so broad that it could "lead to the police towing every unlocked vehicle on the street for 'safekeeping,'" *id.* ¶ 16; therefore, it was "wholly unhelpful" when assessing the Fourth Amendment question. *Id.* ¶ 15. That is not the situation here. Zirzow explained that he must tow a vehicle only if he performs a stop and there is no licensed driver at the scene who can take possession of the car. (R. 110:12.)

Furthermore, this Court did not in *Clark* make law enforcement's attempt to contact the owner of the car a prerequisite to a constitutional decision to tow the car. Rather, it noted that even if it assumed both policies described above were reasonable, both policies "require[d] an attempt to locate the vehicle's owner and seek consent to either tow or lock and leave the vehicle." *Clark*, 265 Wis. 2d 557, ¶ 17. The detective in Clark failed to attempt to contact the owner of the Taurus and obtain consent, "[t]herefore he

failed to comply with the Milwaukee Police Department's policies, written and unwritten." *Id.* No part of *Clark* suggests that police can never constitutionally tow a car without attempting to obtain consent from the owner, and the deputies' failure to do so here was reasonable.

Finally, confiscating the ignition key is not a reasonable alternative. (Brooks' Br. 24.) It would serve only the purpose of avoiding an inventory search; the car would still be abandoned on the street for an indeterminate amount of time, it would still be subject to vandalism or theft, and there would be no safe way for police to allow a person to retrieve his or her possessions from the car beforehand.[8]

Under the totality of the circumstances here, the deputies' towing Brooks' car outweighed Brooks' lesser privacy interest in the car. "Because the officers advanced that public interest in pursuit of a bona fide community caretaker function," the warrantless seizure of the car was reasonable under the Fourth Amendment. *Asboth*, 376 Wis. 2d 644, ¶ 36.

---

[8] The State asserts that Brooks' complaints about the "effect that towing a vehicle can have on people living in poverty, like Mr. Brooks" is an inappropriate consideration for the question at hand. (Brooks' Br. 25–26.) The question is whether the officers reasonably exercised a community caretaker function in towing the car. It is unfortunate that Mr. Brooks is poverty-stricken, but that does not make the public interest in officer safety and the need to protect both the car itself and the property in it any less weighty, nor does his poverty have any bearing on the reasonableness of the officers' decisions in light of those interests.

II. The circuit court properly denied Brooks' postconviction motion alleging ineffective assistance of counsel without a *Machner* hearing.

A. Standard of review

Whether Brooks sufficiently pled his claim of ineffective assistance of counsel to trigger a hearing presents a mixed standard of review. *State v. Allen*, 2004 WI 106, ¶ 9, 274 Wis. 2d 568, 682 N.W.2d 433. This Court must first determine if Brooks alleged sufficient facts that, if true, would entitle him to relief. This is a question of law and is reviewed de novo. *Id.*

"If the motion fails to allege sufficient facts, the trial court has the discretion to deny the motion without an evidentiary hearing." *State v. Phillips*, 2009 WI App 179, ¶ 17, 322 Wis. 2d 576, 778 N.W.2d 157 (citation omitted). "This discretionary decision will only be reversed if the trial court erroneously exercised that discretion." *Id.*

B. Relevant law

It is well-settled that the right to counsel contained in the United States Constitution[9] and the Wisconsin Constitution[10] includes the right to the effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686 (1984). A defendant who asserts ineffective assistance must demonstrate: (1) counsel performed deficiently, and (2) the deficient performance prejudiced the defendant. *Id.* at 687.

Merely asserting ineffective assistance of counsel is not sufficient to warrant a hearing on the claim. *Phillips*,

---

[9] U.S. Const. amends. VI, XIV.

[10] Wis. Const. art. I, § 7.

322 Wis. 2d 576, ¶ 17. To receive a hearing, Brooks had to allege sufficient material facts which, if true, would entitle him to relief. *State v. Balliette,* 2011 WI 79, ¶ 18, 336 Wis. 2d 358, 805 N.W.2d 334. In other words, Brooks' motion had to contain facts that, if true, showed that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland*, 466 U.S. at 687. It also had to contain facts that, if true, showed that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694.

If Brooks did not allege sufficient material facts, or presented conclusory allegations, or if the record conclusively demonstrated he was not entitled to relief, the circuit court properly exercised its discretion by denying his motion without a hearing. *State v. Bentley*, 201 Wis. 2d 303, 309–10, 548 N.W.2d 50 (1996).

C. Brooks did not allege any facts that would have amounted to ineffective assistance even if true.

Brooks claims that his trial counsel was ineffective for failing to obtain the written "arrest tow" policy he appended to his postconviction motion. (Brooks' Br. 28.) He claims that this was deficient performance because the written policy only speaks to towing a car when the driver has been arrested; therefore, according to Brooks, "[t]he 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." (Brooks' Br. 28.)[11] He alleges this deficient performance

[11] The State fails to comprehend how Brooks arrived at the conclusion that the arrest tow policy allows third parties to come

prejudiced the defense because the circuit court found that the tow and search were done in conformity with the deputies' "protocol." (Brooks' Br. 29.)

This argument is specious and establishes neither deficient performance nor prejudice. First, no Wisconsin case holds that the "policies and procedures" must be written in order to be standardized and consistently adhered to by the police department. *Cf. Clark*, 265 Wis. 2d 557, ¶ 16.

More importantly, the Wisconsin Supreme Court in *Asboth* specifically held that "the absence of standard criteria does not by default render a warrantless community caretaker impoundment unconstitutional under the Fourth Amendment reasonableness standard. Nor does law enforcement officer's lack of adherence to standard criteria, if they exist, automatically render such impoundments unconstitutional." *Asboth,* 376 Wis. 2d 644, ¶ 27.

The fact that the Milwaukee Sheriff's Department may not have a written policy about towing vehicles when the driver is not arrested, but cannot drive the vehicle, does not mean that the policy does not exist. Zirzow testified that it does, and the squad-cam video shows that his testimony was consistent with what he told Brooks the policy was. (Ex. 3, 9:46:14–9:49:00.) Nevertheless, policy or no policy, as shown above, the police made a reasonable decision to tow the car under the circumstances.

The fact that the written "arrest tow" policy does not address this specific situation is therefore irrelevant. *Asboth*, 376 Wis. 2d 644, ¶ 28. Accordingly, the circuit court properly

---

to the scene to remove a vehicle. (Brooks' Br. 28–29.) The very first sentence of the policy states, "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." (R. 76:23 (emphasis added).)

denied Brooks' ineffective-assistance claim without a *Machner* hearing because nothing he alleges amounts to ineffective assistance even if true. *See Bentley*, 201 Wis. 2d at 309–10; *cf. State v. Sanders*, 2018 WI 51, ¶ 29, 381 Wis. 2d 522, 912 N.W.2d 16 (counsel does not perform deficiently by pursuing a meritless strategy). His trial counsel could not be deficient for failing to make a meritless argument, nor is there any probability that had counsel procured and introduced the arrest tow policy at the suppression hearing, the result of the hearing would have been different. Brooks can show neither deficient performance nor prejudice based upon trial counsel's failure to locate and introduce the policy he appended to his postconviction motion. *Strickland*, 466 U.S. at 686.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of conviction and decision of the circuit court denying Brooks' postconviction motion.

Dated this 21st day of February, 2019.

Respectfully submitted,

JOSHUA L. KAUL
Attorney General of Wisconsin

LISA E.F. KUMFER
Assistant Attorney General
State Bar #1099788

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 267-2796
(608) 266-9594 (Fax)
kumferle@doj.state.wi.us

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 8,045 words.

Dated this 21st day of February, 2019.

_____
LISA E.F. KUMFER
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 21st day of February, 2019.

_____
LISA E.F. KUMFER
Assistant Attorney General