STATE OF WISCONSIN

C O U R T O F A P P E A L S

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

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REPLY BRIEF OF DEFENDANT-APPELLANT

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ARGUMENT

I. The towing and associated inventory search of Mr. Brooks' vehicle constituted an improper exercise of law enforcement's community caretaker function.

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

The State claims that it "did not concede that Brooks' car was lawfully parked" and not obstructing traffic. (State's Br. at 13). The record shows otherwise.

The chief argument Mr. Brooks raised in support of his postconviction motion was that his vehicle was lawfully parked and not obstructing traffic. (76:1, 7-11). The State never responded to that argument in any way, shape, or form before the circuit court. (78). Its vague assertion now that the car was parked "far" from the curb is thus too little, too late.[1] (State's Br. at 13).

Because of the State's failure to respond to this argument at the postconviction stage, the circuit court was almost certainly operating under the presumption that the State had conceded the point. There was thus no need for the court to hold an evidentiary hearing on the issue.

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[1] The State also claims that the squad cam video shows that several cars had to enter the other lane to avoid Mr. Brooks' vehicle. (State's Br. at 13). The State is wrong. Those cars entered the other lane simply to steer well clear of an ongoing traffic stop. (*See* Ex. 3 at 9:34:07 to 9:37:30).

This court should therefore hold that the State has conceded that Mr. Brooks' vehicle was lawfully parked and not obstructing. *See Brown County DHS v. Terrance M.*, 2005 WI App 57, ¶13, 280 Wis. 2d, 694 N.W.2d 458. It should further hold that the circuit court implicitly found that Mr. Brooks' vehicle was lawfully parked and not obstructing traffic. While the circuit court did not make specific factual findings on this issue, it adopted the arguments contained in a response brief that conceded Mr. Brook's car was legally parked.

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

1. The deputies were not exercising a bona fide community caretaker function.

The deputies in this case were not exercising a bona fide community caretaker function when they decided to inventory and tow Mr. Brooks' car. Because the vehicle was lawfully parked, none of the usual public safety or traffic ordinance-related concerns that are typically associated with towing a vehicle were present here. In *South Dakota v. Opperman*, 428 U.S. 364, 368-69 (1976), the United States Supreme Court identified two principal examples of when law enforcement may tow a vehicle under the community caretaker exception: (1) "[v]ehicle accidents," after which officers take custody of vehicles "[t]o permit the uninterrupted flow of traffic"; and (2) vehicles that "violate parking ordinances," and "thereby jeopardize both the public

safety and the efficient movement of vehicular traffic."

The State points out that the examples cited in *Opperman* are "non-exclusive." (State's Br. at 10, 17 (citing *State v. Asboth*, 2017 WI 76, ¶16, 376 Wis. 2d 644, 898 N.W.2d 541)). Perhaps so, but if there was no need to tow Mr. Brooks' vehicle to prevent a public safety concern, address a traffic or parking violation, or permit the uninterrupted flow of traffic, what was the legitimate, alternative community caretaker need in this case?

The State's reliance on *Asboth* to fill this gap is misplaced for several reasons. First and foremost, unlike the vehicle in *Asboth*, Mr. Brooks' car was lawfully parked on a public street. It therefore did not create a hassle for a private property owner by impeding access to multiple storage sheds. *See Asboth*, 376 Wis. 2d 644, ¶¶4, 18. Consequently, the car did not need to be moved to a different location, much less moved quickly.

Also, unlike the defendant in *Asboth*, Mr. Brooks was not arrested at the outset of the stop. *Id.*, ¶¶3, 19. He therefore did not "face[] a lengthy detention, and the possibility of a concomitant lengthy abandonment of the car." *See id.*, ¶19. To the contrary, Mr. Brooks was free to leave the scene after the stop, so he would have been able to make arrangements to have a family member or friend pick up the car. There was thus no need for the deputies "to make arrangements to reunite the car with its registered owner." *See id.*, ¶20. Mr. Brooks was perfectly capable of doing so himself.

By contrast, the defendant in *Asboth* was arrested, so it was unlikely he would have been able to make arrangements to move the car, at least not within a reasonable timeframe. The Wisconsin Supreme Court therefore concluded that the police were not required to offer him the opportunity to make arrangements for moving his car, given "the lack of realistic alternatives to impoundment." *Id.*, ¶35. In fact, the Wisconsin Supreme Court specifically recognized that the lack of feasible alternatives in *Asboth* distinguished that case from *State v. Clark*, 2003 WI App 121, 265 Wis. 2d 557, 666 N.W.2d 112, a case in which a vehicle was towed despite the fact that it lawfully parked and not obstructing traffic. *Asboth*, 376 Wis. 2d 644, ¶35 n.8.[2]

The State argues that it would have been unreasonable to make the deputies stand around and wait for someone to come pick up Mr. Brooks' vehicle. (State's Br. at 16). That argument is a red herring. After the deputies issued the citations to Mr. Brooks, there was no reason or need for them remain on the scene. The traffic stop was complete. *See Rodriguez v. United States*, ___ U.S. ___, 135 S. Ct. 1609, 1614 (2015). At that point, the deputies could have simply

[2] The State also cites a number of non-Wisconsin cases for support, but those cases are distinguishable for similar reasons. The defendants in those cases were arrested or committed, so their vehicles would likely have been abandoned for a lengthy period of time. *See Colorado v. Bertine*, 479 U.S.367, 368-69 (1987); *United States v. Coccia*, 446 F.3d 233, 236 (1st Cir. 2006); *United States v. Staller*, 616 F.2d 1284, 1288 (5th Cir. 1980). It is also unknown whether the vehicle in *Bertine* was lawfully parked. Also, in *Coccia* and *Staller*, the defendants abandoned their vehicles on private property.

instructed Mr. Brooks that he could no longer drive the vehicle and left.[3]

Mr. Brooks would then have had a number of reasonable options, none of which would have required the deputies to be there. For example, Mr. Brooks could have remained on the scene and called Ms. Hill[4] or another family member or friend to come pick up the vehicle, perhaps by taxi or Uber. Or he could have called a tow truck to take the car to his house. Alternatively, if Mr. Brooks did not want to remain at the scene, he could have temporarily left the car there and walked to his house, which was less than two miles away. (1:1). Once he got home, he then could have made arrangements to have Ms. Hill or someone else pick up the car and drive it back to his house. Ms. Hill's house was less than a mile away (83:3), so she could have easily walked to the scene to get the car. Since the car was lawfully parked, there was no traffic safety reason for preventing Mr. Brooks from taking one of these steps.

There was also no officer safety reason for preventing Mr. Brooks from doing so. Again, once the traffic stop was complete, the deputies were not required to remain on the scene, so they had no

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[3] Of course, the deputies could have stayed at the scene if they wanted to, but they were not required to do so.

[4] The State falsely claims that Mr. Brooks testified that he told the deputies Ms. Hill was on her way. (State's Br. at 15-16). Mr. Brooks never made that claim at the suppression hearing. (110:20-29, 41-43). At any rate, Deputy Zirzow's testimony makes clear that he understood that Mr. Brooks wanted to have Ms. Hill pick up the car. (110:16; App. 116).

legitimate need to prevent a third party from coming there to pick up the car.[5]

The State further claims that towing Mr. Brooks' vehicle was necessary to prevent potential theft or vandalism. (State's Br. at 16). That is also incorrect. There is no indication in this case 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. There was no testimony or other evidence suggesting that this was a high-crime neighborhood or that car break-ins or vandalism occurred frequently in the area. Accordingly, there was no more risk of theft or vandalism in this case than there is for any car parked on a public street. Moreover, because Mr. Brooks was not arrested, he could have removed any valuables from the car and locked it himself, if necessary.

For all these reasons, the deputies here were not exercising a bona fide community caretaker function when they seized, inventoried, and towed Mr. Brooks' vehicle.

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[5] The State expresses confusion about how Ms. Hill's arrival at the scene made the deputies' purported safety rational questionable. (State's Br. at 15 n.6). It is true, as the State points out, that the deputies initially told Ms. Hill that she needed to leave. However, once they realized she was the registered owner, they changed their tune and allowed her to stay so they could speak with her. They even let her take an iPhone that was in the car, as well as the remaining keys. (Ex. 3, 9:56:31 to 10:7:30; 83:3). These facts demonstrate that allowing the registered owner to come to scene, even while the stop was in progress, did not create a real safety concern.

2. The deputies did not reasonably exercise their community caretaker function.

Even assuming the deputies were exercising a community caretaker function in this case, they did not exercise it in a reasonable way.

First, the public interest in towing Mr. Brooks' car was slight, if not nonexistent. It certainly did not outweigh the intrusion that towing the vehicle had on Mr. Brooks' privacy interests.[6] Mr. Brooks' reasonable expectation of privacy in his car "included the expectation that he could leave his vehicle parked legally on the street . . . without being towed." *See Clark*, 265 Wis. 2d 557, ¶27. There were also no exigencies to the situation that required towing his vehicle. There were no traffic regulation or safety concerns. There was no apparent threat of theft or vandalism. And there was no legitimate officer safety issue.

The circumstances surrounding the seizure also demonstrate the unreasonableness of deputies' actions. Again, Mr. Brooks' vehicle "was legally

[6] The State asserts that Mr. Brooks' discussion about the intrusive effect that towing a vehicle can have on people who are living in poverty is inappropriate. (State's Br. at 24 n. 8). The State misunderstands Mr. Brooks' point. Mr. Brooks does not claim that issues of poverty make the public interest in safety or traffic-control activities less weighty. Nor does he claim that he is entitled to extra Fourth Amendment protections because of his poverty. His point is that towing a vehicle is no small matter. In fact, for many people in our community, towing a car is a highly invasive, financially debilitating, and intrusive action. The degree of intrusion is a relevant consideration here.

parked and undamaged," so "it posed no apparent public safety concern." *Id.*, ¶22. Furthermore, because Mr. Brooks had not been arrested, the deputies' actions of seizing, searching, and towing his car constituted an overt and forceful show of authority. *Cf. Asboth*, 376 Wis. 2d 644, ¶33.

In addition, there were a number of reasonable alternatives to impounding Mr. Brooks' car. As discussed above, the deputies could have allowed Mr. Brooks to have another person pick up the car. Alternatively, they could have confiscated the ignition key and told him that he would need to pick up the key at the police station at a later time, along with licensed driver. Again, these alternatives were not precluded by safety concerns, the threat of theft or vandalism, or the risk of a lengthy abandonment of the car due to an arrest.

Yet another reasonable alternative would have been for the deputies to try to get Ms. Hill's consent before towing the vehicle. *See Clark*, 265 Wis. 2d 557, ¶¶26-27. The State asserts that in *Clark* the court simply found that the officers failed to follow their department's policies, which "require[d] an attempt to locate the vehicle's owner and seek consent to either tow or lock and leave the vehicle." (State's Br. at 22 (quoting *Clark*, 265 Wis. 2d 557, ¶17)). That assertion is not quite accurate, however. The court in *Clark* specifically held that attempting to contact the owner is a reasonable alternative when a vehicle is lawfully parked. *Clark*, 265 Wis. 2d 557, ¶¶26-27. The court did say this alternative corresponded with agency's policies in that case. *Id.*, ¶26 n.4. However, contrary to the State's suggestion, the court's conclusion that the seizure was

unreasonable—which was based in part on the officer's failure to attempt to contact the owner—was separate and distinct from its conclusion that the officer did not comply with his department's policies. *Id.*, ¶¶17-18.

But despite the existence of numerous reasonable alternatives in this case, the deputies never considered anything other than towing Mr. Brooks' car. The squad cam video shows that the deputies called for a tow truck almost immediately after running Mr. Brooks' license, before they even returned to his car to speak with him about the matter. (Ex. 3 at 9:37:15 to 9:39:05).

In light of these factors, towing and searching Mr. Brooks' vehicle constituted an improper and unreasonable exercise of the deputies' community caretaker function. This is true notwithstanding Deputy Zirzow's claim that he was simply following his department's policies. Even if Deputy Zirzow was following his department's policies, those policies were objectively unreasonable as applied to the facts of this case. *See Clark*, 265 Wis. 2d 557, ¶14 ("compliance with an internal police department policy does not, in and of itself, guarantee the reasonableness of a search of seizure").

C. 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.

The State claims that the sheriff's department's written policies do not actually contradict Deputy Zirzow's testimony, because "no Wisconsin case holds

that 'policies or procedures' must be written in order to be standardized and consistently adhered to." (State's Br. at 27).

The State's claim begs an obvious question, however: why would the sheriff's department have a specific written policy for towing cars in one situation (when the driver is arrested), and an unwritten policy for towing cars in another situation (when the driver does not have a valid license)? The State offers no plausible explanation for that discrepancy.

Having such an unwritten policy would raise numerous problems, as well. For example, how would other deputies know the details or specifics of the policy? And how would it be communicated in a consistent, standardized way?

These questions raise serious concerns about the credibility of Deputy Zirzow's claim that his department actually has an unwritten policy mandating the towing of all vehicles when the driver does not have a license, even if the vehicle is lawfully parked. This is especially true given Deputy Zirzow's assertion that the unwritten policy only permits another licensed driver to take possession of a vehicle when the other driver is a passenger in the car at the time of the stop. This is inconsistent with the department's written tow policy, which provides that the person arrested "may give a licensed driver permission to drive his/her vehicle from the scene," so long as "[t]he person taking control of the vehicle [is] at the scene prior to the tow arriving." (76:23). The written policy, unlike the purported unwritten policy, permits a third party to come to the scene to remove the vehicle. Why would such an inconsistency exist?

The State claims that the general statement of policy at the beginning of the written tow policies actually prevents a third party from coming to the scene to retrieve a car. (State's Br. at 26-27 n.11). Not so. The general policy language states the department's policy is "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." (76:23). That language only requires that the other driver be present while the arrest is taking place. It does not require that the other driver be present at the very beginning of the stop. However, to the extent there is a conflict between the general policy statement and the specific language describing the actual procedures to be followed, the specific language should control. *See Isermann v. MBL Life Assur. Corp.*, 231 Wis. 2d 136, 605 N.W.2d 210 (Ct. App. 1999).

Accordingly, had trial counsel introduced the written policies into evidence, the circuit court would have known that those policies did not authorize the towing and inventory search of Mr. Brooks vehicle, as Deputy Zirzow claimed. This would have seriously undermined Deputy Zirzow's credibility and caused the circuit court to grant Mr. Brooks' suppression motion. Trial counsel was therefore ineffective for failing to do so.

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 department's policies and procedures, then Mr. Brooks requests that the court reverse the circuit court's postconviction order and remand the case for a *Machner* hearing.

Dated this 11th day of April 2019.

Respectfully submitted,

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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 2,995 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 11th day of April 2019.

Signed:

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