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STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2018AP1774-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ALFONSO LORENZO BROOKS,

Defendant-Appellant-Petitioner.

On Review of a Decision of the Court of Appeals, Affirming 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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BRIEF AND APPENDIX OF DEFENDANT-APPELLANT-PETITIONER

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TABLE OF CONTENTS

CASES CITED

CONSTITUTIONAL PROVISIONS AND STATUTES CITED

OTHER AUTHORITIES CITED

ISSUE PRESENTED

1. Whether the community caretaker exception permits law enforcement to inventory and tow a vehicle after learning that the driver does not have a valid license, when the driver is not arrested and the vehicle is lawfully parked and not obstructing traffic.

The circuit court and the court of appeals answered yes.

POSITION ON ORAL ARGUMENT AND PUBLICATION

By granting review, this Court has deemed both oral argument and publication to be appropriate.

INTRODUCTION

Two sheriff's deputies conducted a routine traffic stop of a vehicle driven by Alfonso Brooks. After the deputies activated their emergency lights, Mr. Brooks pulled the car over and parked by the side of the road. The place he stopped was less than two miles from his house. It was also a legal parking spot.

During the stop, the deputies learned that Mr. Brooks had a suspended driver's license, so they decided to tow his car. Before doing so, the deputies

conducted an inventory search and discovered a handgun in the trunk. The deputies then arrested Mr. Brooks for possession of a firearm by a felon.

The court of appeals held that the deputies' actions constituted a reasonable exercise of their community caretaker function. That conclusion was incorrect. At the point when the deputies decided to inventory and tow Mr. Brooks' vehicle, the car was lawfully parked and not obstructing traffic. As a result, none of the concerns that are typically present in community caretaker traffic cases existed. There were no traffic ordinance violations, no public safety concerns, and no need to tow Mr. Brooks' car to permit the uninterrupted flow of traffic. Also, the deputies did not arrest Mr. Brooks as a result of the traffic stop, so he could have arranged for another driver or private tow truck to remove his car from the scene.

This Court should reverse the court of appeals and hold that the deputies' actions were improper and unreasonable under the community caretaker doctrine.

STATEMENT OF THE CASE AND FACTS

1. *The criminal complaint*. According to the criminal complaint, two Milwaukee County Sheriff's deputies stopped a vehicle driven by Mr. Brooks for a speeding violation. After running a criminal history and license 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 of his suspended license, they would need to tow the car. Before doing so, the deputies performed an inventory search and discovered a handgun in the car's trunk. (1:1-2).

2. *Trial-level proceedings*. Mr. Brooks ultimately pled guilty to possession of a firearm by a felon. (110:51-52). The circuit court, the Honorable Jeffrey A. Wagner, sentenced him to thirty-seven months of initial confinement and thirty months of extended supervision. (111:27-28).

Before pleading guilty, Mr. Brooks filed and litigated a motion to suppress the evidence discovered during the inventory search of the car. His motion alleged that the towing and associated inventory search were an improper exercise of law enforcement's community caretaker function. (38). Three witnesses testified at the suppression hearing: Deputy Dean Zirzow, Deputy Travis Thompson, and Mr. Brooks. (110; App. 116-58)

Deputy Zirzow testified that he stopped Mr. Brooks for driving approximately sixty-five to seventy miles per hour in a fifty miles-per-hour zone. (110:9-11, 20; App. 124-26, 135). Mr. Brooks was the sole occupant of the car. After Mr. Brooks pulled over, Deputy Zirzow obtained his driver's license and checked his license status and criminal history. The check revealed that Mr. Brooks had a suspended license and a prior felony conviction. (110:11, 14; App. 126, 129). Deputy Zirzow asserted that, under

these circumstances, his department's policies and procedures required him to have the vehicle towed because Mr. Brooks did not have a valid license and there were no other licensed drivers in the vehicle who could drive the car from the scene. (110:12; App. 127). No written policies or procedures were ever presented at the hearing.

Deputy Zirzow further testified that before towing the car, his partner, Deputy Thompson, conducted an inventory search to determine if any valuables were in the car. (110:12-13; App. 127-28). While Deputy Thompson searched the car, Deputy Zirzow issued two citations to Mr. Brooks: one for speeding and another for driving with a suspended license. (110:10, 12-13; App. 125, 127-28).

During the search, Deputy Thompson discovered a gun in the car's trunk. (110:13-14; App. 128-29). Deputy Zirzow then arrested Mr. Brooks for possession of a firearm by a felon. (110:14; App. 129).

On cross-examination, Deputy Zirzow said Mr. Brooks "begged" him not to tow the car, and instead to allow his girlfriend, Meaghan Hill, to pick the car up. (110:16; App. 131). Ms. Hill was the car's registered owner. (110:43; App. 158). Deputy Zirzow asserted that his department's policies and procedures did not allow that. He explained:

> [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. 131).

When asked if his policies allowed a car to remain parked and locked at the scene if it was lawfully parked, Deputy Zirzow claimed 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. 132).

Deputy Zirzow stated that he told Mr. Brooks he was free to leave while the inventory search was being conducted. (110:18; App. 133). He also said that Mr. Brooks remained free to leave until the gun was found. (110:18; App. 133).

Deputy Thompson testified about the nature of inventory searches.[1] He explained that they involve

[1] Deputy Thompson testified during a later portion of the hearing that dealt with a separate *Miranda-Goodchild* claim raised by Mr. Brooks. (110:32-40; App. 147-55). *See Miranda v. Arizona*, 384 U.S. 436 (1966); *State ex rel.* (Continued)

searching each part of the vehicle to give drivers the opportunity to remove anything they might need and to protect the sheriff's department from liability claims. (110:36-38; App. 151-53).

Mr. Brooks testified that after he pulled over and gave the deputies his license, he called Ms. Hill and told her he had been pulled over. Mr. Brooks explained that Ms. Hill was driving a different car on the same route, and that she was only a few minutes behind him. (110:21-24; App. 136-39). Ms. Hill informed Mr. Brooks she would be at his location shortly. (110:24; App. 139).

Mr. Brooks further testified that after the deputies returned to his car, they told him to exit the vehicle. When he got out, the deputies told him he was not under arrest. They explained the tickets and told him they were going to tow his vehicle. (110:24-25; App. 139-40). Mr. Brooks stated he did not understand why that was necessary, as his vehicle was lawfully parked and not creating a roadside hazard. (110:25; App. 140). Deputy Zirzow told him the car had to be towed pursuant to his policies. (110:25; App. 140).

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.

The squad cam video of the traffic stop was also admitted at the hearing.[2] The video shows that when Mr. Brooks pulled over, he parked the car in what appears to be a lawful parking spot. (110:40; App. 155; Ex. 3 at 9:34:00 *et seq.*) It also shows that Ms. Hill arrived at the scene shortly after Mr. Brooks was stopped—before the arrival of the tow truck, but after Mr. Brooks' arrest. (Ex. 3 at 9:56:00 to 10:08:00; *see also* 110:23-24; App. 138-39).

Based on this record, the circuit court denied Mr. Brooks' suppression motion. First, the court concluded that the deputies had probable cause to stop Mr. Brooks for speeding. (110:30; App. 145). It also concluded that the impoundment and inventory search were proper based on the deputies' "protocol," as Mr. Brooks was driving with a suspended license. (110:31; App. 146).

3. *Postconviction proceedings*. After sentencing, Mr. Brooks filed a Rule 809.30 postconviction motion arguing that the circuit court erred in denying his suppression motion. Specifically, he asserted that the towing and associated inventory search were an improper and unreasonable exercise of the deputies' community caretaker function because his vehicle was lawfully parked and not obstructing traffic after he pulled over. (76:5-11).

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[2] The video was admitted during the *Miranda-Goodchild* potion of the hearing. (110:40; App. 155). It is nonetheless part of the record in this case.

He further argued that, to the extent the circuit court concluded that the record did not establish that his vehicle was lawfully parked, 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 attorney's investigator alleging that the investigator had gone to the exact spot where Mr. Brooks parked his vehicle on the night of the stop. The investigator concluded that this location "was indeed a legal parking spot." (76:19-20).

In addition, Mr. Brooks asserted that, to the extent the circuit court concluded that the impoundment and search were proper based on Deputy Zirzow's claim that he was following his department's policies and procedures, his trial attorney was also ineffective for failing to introduce the department's written policies. (76:15-17). Those policies do not authorize the towing of a vehicle just because a driver does not have a valid license. They authorize towing 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. Rather, they require that the licensed driver be present "at the scene prior to the tow arriving."

As relevant here, the written policies provide:

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.

(76:23-23; App. 159-60 (emphasis added)).

In its response brief, the State argued that the impoundment and inventory search were a reasonable exercise of the deputies' community caretaker function for three reasons—first, the deputies could not permit Mr. Brooks to drive the car

because he did not have a license; second, the deputies could not allow a third party to come to the scene for safety reasons; and third, even if the deputies were going to leave the car where it was, an inventory search was necessary to protect the sheriff's department from claims of wrongdoing. (78:1-3; App. 111-13). The State, however, never disputed Mr. Brooks' claim that the vehicle was lawfully parked and not obstructing traffic. (*See* 78:1-5; App. 111-15).

The circuit court issued a decision and order denying Mr. Brooks' postconviction motion without a hearing. The court did not make any factual findings regarding whether Mr. Brooks' 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 [were] 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." (85: App. 110). The circuit court adopted these arguments without providing any additional reasoning. (85; App. 110).

4. *The court of appeals*. On appeal, the court of appeals affirmed the judgment and postconviction decision of the circuit court. First, the court held that the deputies were exercising a bona fide community caretaker role when they impounded and searched Mr. Brooks' vehicle. (COA Op. ¶16; App. 106-07). In support of that conclusion, the court noted that

Mr. Brooks did not have a valid driver's license, he was not the car's registered owner, and there were no other drivers immediately present to take possession of the car. (*Id.*; App. 106-07). It also noted that Deputy Zirzow had testified he could not permit Mr. Brooks to call his girlfriend to retrieve the car because, according to his department's policies, other vehicles were not allowed at the scene for safety reasons. (*Id.*; App. 107). Thus, according to the court of appeals, "'[t]here 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.'" (*Id.*; App. 107 (quoting State's COA Resp. Br. at 15)).

The court of appeals further held that the deputies reasonably exercised their community caretaker function. (*Id.*, ¶17; App. 107). First, the court stated the public had an interest in officer safety, and Deputy Zirzow had testified that his policies did not allow him to permit Mr. Brooks to have someone else pick the car up because of officer safety reasons. (*Id.*, ¶18; App. 107-08).

Second, the court concluded that the seizure was reasonable because of the following circumstances: the deputies did not use force; they told Mr. Brooks he was free to leave during the search; and, to the extent the deputies violated their internal policies, this Court had concluded that law enforcement officers are "not required to abide by a specific policy in rendering their decision to tow the vehicle." (*Id.*, ¶19; App. 108 (citing *State v. Asboth*,

2017 WI 76, ¶¶27-28, 376 Wis. 2d 644, 898 N.W.2d 541)).

Finally, the court of appeals concluded that there were no reasonable alternatives to impounding the car. In this respect, the court noted that Mr. Brooks was alone in the vehicle, he was not the car's registered owner, and neither the owner nor any other licensed drivers were immediately present to take possession of the vehicle. The court of appeals acknowledged that the deputies could have allowed Mr. Brooks' girlfriend to pick up the car at a later time, but it concluded that the Fourth Amendment did not require them to do so. (*Id.*, ¶20; App. 108). The court also concluded that leaving the vehicle on the side of the road for an indeterminate amount of time could have invited theft and vandalism. (*Id.*; App. 108).

ARGUMENT

I. Because Mr. Brooks had not been arrested and his vehicle was lawfully parked and not obstructing traffic, the towing and associated inventory search of the vehicle constituted an improper and unreasonable exercise of the deputies' community caretaker function.

The deputies' decision to tow and inventory Mr. Brooks' car was both unreasonable and unnecessary. Although Mr. Brooks did not have a valid license, his vehicle was lawfully parked and not

obstructing traffic. He also had not been arrested, so he could have arranged for another licensed driver to drive the car from the scene. There was thus no legitimate community caretaker justification for towing his car.

A. Standard of review and general legal principles.

In reviewing a motion to suppress, this 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.*

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. Betterly*, 191 Wis. 2d 406, 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); *Asboth*, 376 Wis. 2d 644, ¶14. Where an unlawful search 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; *Wong Sun v. United States*, 371 U.S. 471, 487-88 (1963).

"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)). However, "[b]ecause the ultimate touchstone of the Fourth Amendment is 'reasonableness,' 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.

The only warrant exception that the State asserts in this case with respect to the seizure and impoundment of Mr. Brooks' vehicle is the community caretaker exception.[3] (*See* State's COA Resp. Br. at 7-24). This exception recognizes that law enforcement officers may conduct warrantless searches and seizures when "serving as a community

[3] The State also asserts that the inventory exception applies with respect to the search of Mr. Brooks' vehicle. (State's COA Resp. Br. at 8). Of course, if the seizure/impoundment was unconstitutional, the associated inventory search would be unconstitutional, as well. *See State v. Clark,* 2003 WI App 121, ¶11, 265 Wis. 2d 557, 666 N.W.2d 112.

caretaker to protect persons and property." *State v. Pinkard*, 2010 WI 81, ¶14, 327 Wis. 2d 346, 785 N.W.2d 592. Community caretaker functions involve 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.

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." *State v. Anderson,* 142 Wis. 2d 162, 169 n.4, 417 N.W.2d 411 (1987).

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

As noted above, the circuit court did not make explicit factual findings concerning whether Mr. Brooks' vehicle was lawfully parked and not obstructing traffic. Instead, the court adopted the arguments contained in the State's postconviction response brief. Nowhere in that brief did the State dispute Mr. Brooks' chief argument that his vehicle was lawfully parked and not obstructing traffic. (78; App. 111-15). In fact, the State specifically stated that it "did not dispute the facts or procedural history as outlined in" Mr. Brooks' postconviction motion. (78:1; App. 111). This included the assertion that the "video shows that when Mr. Brooks pulled his vehicle over, he parked the car in what appears [to be] a lawful parking spot." (76:5).

The State should therefore be deemed to have admitted this argument. *See Brown County DHS v. Terrance M.*, 2005 WI App 57, ¶13, 280 Wis. 2d 396, 694 N.W.2d 458 ("Arguments not refuted are deemed admitted."). 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 circuit court to hold an evidentiary hearing on the issue.

Accordingly, this Court should hold that the State has conceded that Mr. Brooks' vehicle was lawfully parked and not obstructing traffic. It should

further hold that the circuit court implicitly found that Mr. Brooks' vehicle was lawfully parked and not obstructing traffic. This is the only logical conclusion based on this record. Again, the circuit court adopted the arguments of a brief which conceded that Mr. Brooks' vehicle was lawfully parked and not obstructing traffic. The evidentiary record is also uncontradicted on this point. At the suppression hearing, Mr. Brooks testified that the car was lawfully parked and not creating a roadside hazard after he pulled over. (110:25; App. 140). The squad cam video shows that the 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.

Furthermore, even if this Court concludes that the record does not affirmatively establish that Mr. Brooks' vehicle was lawfully parked and not obstructing traffic, that would not change the outcome of the case. The State had the burden of proof at the suppression hearing. *See State v. Jiles*, 2003 WI 66, ¶48, 262 Wis. 2d 457, 663 N.W.2d 798. It was therefore the State's burden to affirmatively prove that a community caretaker justification actually existed in this case. The State presented no evidence indicating that Mr. Brooks' vehicle was illegally parked, obstructing traffic, vulnerable to theft or vandalism, or jeopardizing public safety in

any way. The State therefore failed to carry its burden.[4]

C. The deputies did not have a bona fide community caretaker justification for impounding and searching Mr. Brooks' vehicle, because the vehicle was lawfully parked and not obstructing traffic.

The first two parts of the community caretaker test alone demonstrate that the search and seizure were improper. First, there is no dispute that the deputies seized Mr. Brooks' vehicle within the meaning of the Fourth Amendment. (*See* State's COA Resp. Br. at 9 (conceding this point)). Regarding the second step, when a vehicle is lawfully parked and not obstructing traffic, there is no bona fide community caretaker need to tow the car, even if the driver does not have a valid license. Decisions of

[4] If this Court concludes that the circuit court's failure to give its own findings and reasoning (rather than adopting the State's brief) prevents it from adequately addressing the community caretaker question in this case, then the only alternative would be to remand the case to the circuit court for additional fact finding. *Cf. State v. McDermott*, 2012 WI App 14, ¶9 n.2, 339 Wis. 2d 316, 810 N.W.2d 237) ("Since our review of the circuit court's denial of McDermott's motion to modify his sentence is based on our *de novo* analysis of whether he has presented new factors, the circuit court's failure to give *its* reasons (rather than adopt the State's brief *in haec verba*) is of no consequence in this case.") (emphasis in original). Mr. Brooks believes that such a remand is unnecessary, however.

the United States Supreme Court, this Court, and courts from other jurisdictions bear this out.

1. *The United States Supreme Court*. In *Opperman*, the United States Supreme Court described the community caretaker function in the context of traffic cases 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 threatening public safety and convenience is beyond challenge.

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

None of the concerns described in *Opperman* were present in this case. 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 State v. Clark,* 2003 WI App

121, ¶22, 265 Wis. 2d 557, 666 N.W.2d 112. *Opperman* therefore supports that the deputies here were not engaged in a bona fide community caretaker function when they impounded Mr. Brooks' vehicle.

Before the court of appeals, the State pointed out that the examples listed in *Opperman* are "non-exclusive." (State's COA Resp. Br. at 10, 17 (citing *Asboth*, 376 Wis. 2d 644, ¶16)). 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, then what exactly was the alternative community caretaker need in this case?

2. *The Wisconsin Supreme Court*. To fill this gap, the court of appeals relied on this Court's decision in *Asboth*. (*See* COA Op. ¶¶12-16; App. 105-06). The reasoning from *Asboth*, however, actually indicates the court of appeals erred in holding that the deputies were exercising a bona fide community caretaker function in this case.

In *Asboth*, there was an outstanding warrant for Asboth's arrest because of his alleged involvement in an armed robbery. *Asboth*, 376 Wis. 2d 644, ¶2. The police responded to a tip that Asboth was at a storage facility and apprehended him. 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 the 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.*

This Court concluded that the officers had a bona fide community caretaker justification for impounding Asboth's car based on a number of factors. First, if left unattended, the vehicle would have inconvenienced a private property owner and customers at the storage facility. *Id.*, ¶18. In addition, 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. The registered owner of the car was also 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. First and foremost, unlike the vehicle in *Asboth*, Mr. Brooks' car was lawfully parked on a public street, so it was not an inconvenience to any private

property owner or other drivers. The vehicle did not need to be moved to a different location, much less moved quickly.

Second, unlike Asboth, Mr. Brooks was 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 he was not under arrest and was free to leave while the search was being conducted. (110:18, 24; App. 133, 139). Deputy Zirzow testified that Mr. Brooks remained free to leave until the gun was found. (110:18; App. 133).

As a result, Mr. Brooks did not "face[] a lengthy detention, and the possibility of a concomitant lengthy abandonment of the car." *See Asboth*, 376 Wis. 2d 644, ¶19. He could have easily made arrangements to have Ms. Hill, the registered owner, or another family member or friend drive the car from the scene. Indeed, Ms. Hill was at the scene shortly after Mr. Brooks was pulled over. (*See* 110:21-24; App. 136-39; *see also* Ex. 3 at 9:56:00 to 10:08:00). There was consequently no need for the deputies "to make arrangements to reunite the car with its registered owner." *See Asboth*, 376 Wis. 2d 644, ¶20. Mr. Brooks was perfectly capable of doing so himself.

Asboth, by contrast, was arrested after the police arrived on scene, so it was unlikely he would have been able to make arrangements to move the car, at least not within a reasonable timeframe. This

Court therefore concluded in *Asboth* 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, this Court specifically recognized that the lack of feasible alternatives in *Asboth* distinguished that case from *Clark*, 265 Wis. 2d 557, a case in which the police impermissibly towed a vehicle that was lawfully parked and not obstructing traffic. *Asboth*, 376 Wis. 2d 644, ¶35 n.8.

Like *Opperman*, the reasoning from *Asboth* therefore establishes that the deputies in this case did not have a bona fide community caretaker justification for impounding and inventorying Mr. Brooks' car.

3. *Other jurisdictions*. This conclusion is supported by the decisions of numerous federal courts of appeals and state supreme courts from other jurisdictions. These courts hold that if a driver is ticketed because of an invalid license—but not arrested—impounding the car is an improper exercise of law enforcement's community caretaker function when the vehicle is lawfully parked and not obstructing traffic (or when the state fails to prove that the vehicle is illegally parked or obstructing traffic).

In *United States v. Cervantes*, 703 F.3d 1135 (9th Cir. 2012), the police impounded a vehicle they had stopped because Cervantes, the driver, was unable to provide a license, registration, or proof of

insurance. An inventory search revealed two kilograms of cocaine in the car. *Id.* at 1138. On appeal, the Ninth Circuit held that the impoundment and inventory search were not justified by the community caretaker exception. The court noted that the government presented no evidence that the "vehicle was parked illegally, posed a safety hazard, or was vulnerable to vandalism or theft." *Id.* at 1141. Cervantes, the court noted, was also arrested only after the inventory search resulted in the discovery of cocaine. *Id.* at 1142-43.

The Tenth Circuit reached a similar conclusion in *United States v. Ibarra*, 955 F.2d 1405 (10th Cir. 1992). In that case, the court held that impounding a stopped vehicle because the driver had a suspended license violated the Fourth Amendment, where the vehicle did not pose a public safety hazard or obstruct the normal flow of traffic, and the driver was never given the opportunity "to provide for its custody or removal" as required by state law. *Id.* at 1408-10.

The Colorado Supreme Court and the Minnesota Supreme Court have also held that towing a lawfully parked car just because the driver does not have a valid license is improper.

In *People v. Brown*, 415 P.3d 815 (Colo. 2018), the police impounded Brown's car after officers issued him a citation for driving with a suspended license. During the subsequent inventory search, the police discovered crack cocaine. *Id.* at 817. However, "[t]here was no suggestion that the car was impeding

traffic or threatening public safety and convenience where it was stopped, much less that it was inoperable or otherwise unable to be safely and legally removed by a licensed party, even if that had been the case." *Id.* at 820. Under these circumstances, the Colorado Supreme Court held that impoundment was not justified as an exercise of law enforcement's community caretaker function. *Id.* at 821. The court further noted that "[a]lthough the officers may have reason to suspect that the driver will unlawfully drive the vehicle upon their departure, the community caretaking exception to the probable cause and warrant requirements of the Fourth Amendment definitionally cannot support seizures on the basis of suspicion that the driver has committed, is committing, or will commit a crime." *Id.* at 820.

In *State v. Rohde*, 852 N.W.2d 260 (Minn. 2014), the police stopped Rohde's vehicle after discovering that her license and registration had been revoked. After Rohde pulled over to the side of the road, her vehicle "was not interfering with traffic, blocking access to any property, or otherwise violating any parking rules." Nonetheless, the officer decided to tow and impound her car as required by a department policy requiring impoundment of uninsured vehicles. The resulting inventory search revealed two bags of methamphetamines. *Id.* at 262.

The Minnesota Supreme Court held that the impoundment was unreasonable, and therefore, the resulting inventory search was unconstitutional as

well. *Id.* at 263. The court noted that "there is nothing in this record to support an inference that immediately impounding the [car] was in any way necessary for public safety." *Id.* at 265. Nor was it necessary, the court stated, to impound the vehicle to protect Rohde's property from theft, as the officer did not plan to arrest her until he discovered the methamphetamines. *Id.* at 265-66. In so holding, the court in *Rohde* distinguished *Colorado v. Bertine,* 479 U.S. 367 (1987), a case in which the United States Supreme Court held that the police were not required to offer an arrested driver an opportunity to make alternative arrangements before taking his van into custody for safekeeping. The Minnesota Supreme Court reasoned that "cases in which the driver of a vehicle is arrested are fundamentally different from cases in which the driver remains free." *Id.* at 266. When a driver is arrested, the court stated, the police have a reason to take responsibility for the car, as the driver cannot do so himself. "On the other hand, when the driver is not arrested, it is not necessary for the police to take [the] vehicle into custody in the first place." *Id.* (internal quotation marks omitted; brackets in original).

Like these other jurisdictions, this Court should hold that the deputies in this case were not exercising a bona fide community caretaker function when they inventoried and towed Mr. Brooks' car.

D. The deputies did not reasonably exercise any community caretaker function that might have existed.

Even if the deputies were exercising a community caretaker function, it was not reasonably exercised in this case. Under the third step in the analysis—whether the public interest outweighs the intrusion upon the individual's privacy interests—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.[5] *Id.*, ¶29. However,

[5] The Court in *Asboth* concluded 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 (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.

These factors strongly indicate that the towing and associated inventory search of Mr. Brooks' vehicle were unreasonable and unconstitutional.

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. Mr. Brooks' reasonable expectation of privacy in this instance "included the expectation that he could leave his vehicle parked legally on the street . . . without being towed." *See Clark*, 265 Wis. 2d 557, ¶27. On the other hand, there were no exigencies in this case that required towing his vehicle. There were no traffic regulation or safety concerns, and there was no apparent threat of theft or vandalism.

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to standard policies and procedures, if they exist, automatically render impoundments unconstitutional. *State v. Asboth*, 2017 WI 76, ¶¶27-29, 376 Wis. 2d 644, 898 N.W.2d 76.

As noted in *Asboth*, there is a split of authority among federal courts of appeals regarding whether law enforcement may constitutionally perform a warrantless community caretaker impoundment and associated inventory search in the absence of standard criteria. *See id.*, ¶¶24-25. While this split remains a matter of contention under federal law, as it has not been resolved by the United States Supreme Court, Mr. Brooks acknowledges that *Asboth* definitely resolves the issue in Wisconsin courts.

Second, the circumstances surrounding the seizure also demonstrate the unreasonableness of deputies' actions. Mr. Brooks' vehicle was not involved in an accident. It "was legally parked and undamaged" on a public street, so "it posed no apparent public safety concern." *Id.*, ¶22. Wisconsin case law indicates 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. *Id.*, ¶¶22-27.

The vehicle here was also not inconveniencing a property owner or interrupting the flow of traffic. Also, because Mr. Brooks had not yet been arrested, the deputies' actions of seizing, searching, and towing the car constituted an overt and forceful show of authority. *Cf. Asboth*, 376 Wis. 2d 644, ¶33 ("because Asboth was already under arrest at the time of impoundment, officers did not make an improperly coercive show of authority to effect the seizure")

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 Anderson*, 142 Wis. 2d at 169 n.4, Mr. Brooks still had a reasonable expectation of privacy in his car. Again, this included the expectation that he could leave the car parked legally on a public 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. First, the deputies could have simply instructed Mr. Brooks he could no longer drive the vehicle and allowed him to have another person pick the car up.[6] Mr. Brooks would then have had a number of reasonable options. He could have remained on the scene and called Ms. Hill or another family member or friend to come and pick up the car, perhaps by taxi or rideshare service. Or he could have called a private 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 where it was 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, either then or at a later time. 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. As the car was lawfully parked, there was no traffic safety reason for preventing Mr. Brooks from taking one of these steps.[7]

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[6] The deputies could then have left the scene at that point, as the traffic stop was complete.

[7] The fact that Mr. Brooks was not the car's registered owner should not have prevented him from taking one of these steps. *See State v. Goodrich*, 256 N.W.2d 506, 511 (Minn. 1977) ("The mere fact that the automobile was not registered to defendant, in the absence of reason to believe that defendant was wrongfully in possession of it, does not render

(Continued)

On the other hand, 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 for Mr. Brooks.

At a minimum, the deputies should have attempted to obtain Ms. Hill's consent before towing the vehicle. In *Clark*, the court of appeals 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 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. *Clark*, 265 Wis. 2d 557, ¶¶26-27. In this case, there is no indication in the record that the deputies had a reasonable belief that the vehicle would be stolen or vandalized if left unattended, or that they ever

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impoundment reasonable upon defendant's unrelated arrest for 'driving under the influence,' and despite defendant's alternative arrangements for disposition of the automobile.").

attempted to obtain Ms. Hill's consent before towing the vehicle.

The court of appeals, however, wrongly concluded that the deputies had no reasonable alternative but to tow the car because they could "not permit Brooks to call his girlfriend to retrieve the vehicle because other vehicles were not allowed on the scene for officer safety purposes." (COA Op., ¶16; App. 106-07). As an initial matter, the deputies did permit Ms. Hill to come to the scene,[8] so the premise underlying this claim is questionable.[9]

Moreover, 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 once the stop is complete. Here, after the deputies issued the citations to Mr. Brooks, the traffic stop was over. 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

[8] It is true that the deputies initially told Ms. Hill that she needed to leave the scene when she arrived. Once they realized she was the registered owner, however, they 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 the scene, even while the stop was in progress, did not create a real safety concern.

[9] The deputies' actual written policies also appear to contradict this claim in that they permit this type of activity when a driver of a vehicle is arrested. *See infra* § II.

car. 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*, 575 U.S. 348, 354 (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 therefore could not have reasonably prevented Mr. Brooks from having a family member or friend come to the scene to take possession of the car once the stop was complete.

The court of appeals also asserted that "[l]eaving the vehicle on the side of the road for an indeterminate amount of time could invite theft and vandalism." (COA Op., ¶20; App. 108). But again, there is no indication 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. Also, because Mr. Brooks was not arrested, he could have removed any valuables from the car and locked it himself, if necessary. There was no more risk of theft or vandalism in this case than there is for any car parked on a public street.

Additionally, although Deputy Zirzow claimed he was following his department's mandatory policies and procedures in impounding the car,[10] "compliance with an internal police department policy does not, in and of itself, guarantee the reasonableness of a search or seizure." *See id.*, ¶14; *see also Cervantes*, 678 F.3d at 806 ("The fact that an impoundment complies with a state statute or police policy, by itself, is insufficient to justify an impoundment under the community caretaker exception."); *Rohde*, 852 N.W.2d at 264 ("But this focus on whether impoundment was authorized by Minnesota law is misplaced, because the real question in this case is whether the impoundment was reasonable *under the Fourth Amendment*.") (emphasis in original). Under the circumstances of this case, even if Deputy Zirzow was following his department's policies, the impoundment was still unreasonable due to the lack of any rational community caretaker justification. "Unconstitutional searches cannot be constitutionalized by standardizing them as part of normal police practices." *State v. Jewell*, 338 So. 2d 633, 640 (La. 1976).

As a final matter, Mr. Brooks asserts that in judging the reasonableness of the deputies' actions, this Court should consider the particularly burdensome and intrusive effect that towing a vehicle can have on people who are living in poverty, like

[10] Again, the deputies' own written policies appear to contradict this claim. *See infra* § II.

Mr. Brooks.[11] 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.[12] *See* City of Milwaukee's Online Information Regarding Towed Vehicles, *available at* https://city.milwaukee.gov/ParkingServices/ParkingTowing.htm#.W_BnSyMrK2w (last visited on Jan. 17, 2020). 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, it 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 fifteen days (or within thirty days if the vehicle is of "substantial value"). *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

[11] 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.

[12] 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.

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.

II. 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 is entitled to an evidentiary hearing on his ineffective assistance of counsel claim.

In deciding whether a defendant's postconviction motion alleges sufficient facts to entitle the defendant to a hearing on an ineffectiveness claim, this Court applies a mixed standard of review. *State v. Allen*, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433. First, it determines whether the motion alleged sufficient material facts that, if true, would entitle the

defendant to relief. This is a question of law that this Court review *de novo*. If the motion raises such facts, the circuit court must hold an evidentiary hearing. *Id.*

If the motion fails to allege sufficient facts, or if the record conclusively demonstrates that the defendant is not entitled to relief, then the circuit court has the discretion to deny the motion without a hearing. This discretionary determination will only be reversed if the circuit court erroneously exercised its discretion. *Id.*

Both the United States and Wisconsin Constitutions guarantee a criminal defendant the right to counsel. U.S. Const. amends. VI, XIV; Wis. Const. art. 1, § 7. "This right includes the right to effective assistance of counsel." *State v. Roberson*, 2006 WI 80, ¶23, 292 Wis. 2d 280, 717 N.W.2d 111.

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). "The reasonableness of counsel's performance is to be evaluated from counsel's perspective at the time of the alleged error and in light of all the circumstances." *Id.* (citing *Strickland*, 466 U.S. at 689).

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 that "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 (1989) (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.

As alleged in Mr. Brooks' postconviction motion, after his conviction and sentencing, his attorney's 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. (76:15, 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:, 15, 23-24; App. 159-60). 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; App. 159-60). The sheriff's department's written policies therefore did not authorize the towing of Mr. Brooks' 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 internal policies and procedures. (*See* 110:12; App. 127). They also appear to contradict his claim that those policies and procedure only permit another licensed driver to take possession of a vehicle and drive it away if that driver was an occupant in the vehicle at the time of the stop. (*See* 110:16; App. 131). Contrary to this claim, the written policies permit another licensed driver to drive a vehicle

away from the scene if they are "at the scene prior to the tow arriving." (76:23; App. 159).

Before the court of appeals, the State argued that the 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 COA Resp. Br. at 27).

The State's argument begs an obvious question: 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 offered 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? [13]

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[13] Professor LaFave gives the following warning about alleged unwritten policies:

> A primary concern, of course, is the possibility of undetected arbitrariness, a risk which takes on much greater proportions when the supposed 'standardized procedures' are established only by the self-serving and perhaps inaccurate oral statements of a police officer, and are not memorialized in the department's previous

(Continued)

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. Again, 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; App. 159). 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?

Accordingly, as Mr. Brooks alleged in his postconviction motion, his trial attorney performed deficiently by failing to obtain and introduce into

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> written instructions to its officers. Another concern . . . is that what is represented as department policy may constitute nothing more than a custom, hardly deserving the deference which an actual policy receives.

Wayne R. LaFave, *Controlling Discretion by Administrative Regulations: The Use, Misuse, and Nonuse of Police Rules and Policies in Fourth Amendment Adjudication*, 89 Mich. L. Rev. 442, 456-57 (1990).

evidence the written policies attached to his postconviction motion. (76:16-17). 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. (76:17). It was simply unreasonable under prevailing professional norms for trial counsel to fail to challenge Deputy Zirzow's testimony in this manner. The existence of, and an officer's adherence to, standard policies or procedures is a relevant factor in assessing the reasonableness of a community caretaker seizure. *See Bertine*, 479 U.S. at 375; *see also Asboth*, 376 Wis. 2d 644, ¶29. There was also no conceivable strategic reason for counsel 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. 146). However, as asserted in Mr. Brooks' postconviction motion, had counsel introduced the written polices into evidence, the court would have known that the sheriff's department's written policies did not actually authorize the search and towing of Mr. Brooks' car. This would have seriously undermined Deputy Zirzow's credibility. In that event, the circuit court would have granted Mr. Brooks' motion and suppressed all the evidence obtained as a result of the unlawful inventory search. (76:17).

CONCLUSION

For these reasons, Mr. Brooks respectfully requests that this Court reverse the decision of the court of appeals and 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 this Court reverse the court of appeals' decision, as well as the circuit court's postconviction order, and remand the case to the circuit court for a *Machner*[14] hearing.

Dated this 17th day of January 2020.

Respectfully submitted,

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

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 9,789 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 17th day of January 2020.

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 17th day of January 2020.

Signed:

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Assistant State Public Defender

APPENDIX

INDEX TO APPENDIX