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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 PETITION TO REVIEW A DECISION OF THE WISCONSIN COURT OF APPEALS, DISTRICT I, AFFIRMING 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

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases

Page

Page

Page

Constitutional Provisions

ISSUES PRESENTED

1. Did the circuit court properly deny Defendant-Appellant-Petitioner Alfonso Lorenzo Brooks' motion to suppress a gun found in the car he was driving 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. The court of appeals agreed and affirmed.

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. The court of appeals again agreed and affirmed.

This Court should affirm the circuit court.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

As with any case warranting this Court's review, publication and oral argument are appropriate.

INTRODUCTION

Brooks was driving his girlfriend's Lexus sport-utility vehicle when police pulled him over for speeding and learned

that his driver's license was suspended. They wrote him some tickets. They also told Brooks that 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 the associated inventory search violated the Fourth Amendment because the police could have let him lock the car and leave it on the side of the road. But the Fourth Amendment prohibits only *unreasonable* searches and seizures, and the mere fact that the police could have chosen a different course of action does not make their actions unreasonable. The police reasonably exercised their community caretaker function in towing the car and performed a lawful standard inventory search on it beforehand.

The car was pulled to the side of the road, and contrary to Brooks' contention, there is nothing in the record establishing that it was legally parked. But even if it were, the officers' decision to tow the car was still a reasonable exercise of the community caretaker function. Their decision was made according to standardized criteria articulated by the Milwaukee County Sheriff's Department. There was no licensed driver on scene who could take possession of the car. The car did not belong to Brooks. It was parked more than two miles away from Brooks' house in a mixed residential and commercial area, and just off the highway. The police could be liable to the owner if they simply left the car there, where it could be subject to vandalism or theft. And, while the officers informed Brooks that they would have allowed another licensed driver to drive the car from the scene if the driver had been present in the car, department policy prohibited them from allowing Brooks to call someone else to

the scene. This policy is reasonable for both officer safety and use-of-officer-resources reasons.

In short, the tow was a reasonable exercise of the officers' community caretaker function, and the search was a reasonable standard inventory search. The circuit court properly denied Brooks' suppression motion.

Brooks' ineffective assistance claim likewise fails. The written arrest tow policy he submitted postconviction proves nothing—this Court made clear in *Asboth*[1] that the validity of a community caretaker tow does not depend upon an officers' adherence to, or even the existence of, standardized criteria. Officer Zirzow testified that the department had a policy that a car must be towed if there was no licensed driver to take possession of the car. And Brooks has submitted nothing showing that Zirzow was incorrect about the tow policy when a driver is unlicensed and unaccompanied, but not arrested. Since the arrest tow policy Brooks submitted is irrelevant, his ineffective assistance claim was correctly denied without a hearing. Counsel is not deficient for failing to submit irrelevant evidence. And since the relevant question is simply whether an officer's actions were reasonable—regardless of the existence of governing criteria or an officer's adherence to them—Brooks could not have been prejudiced by this alleged deficiency.

This Court should affirm the decision of the circuit court and the court of appeals.

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[1] *State v. Asboth*, 2017 WI 76, ¶ 12, 376 Wis. 2d 644, 898 N.W.2d 541.

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[2] on Brooks' pro se motion, and Deputies Zirzow and Thompson testified.[3] (R. 110:1.)

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[2] 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); *see Miranda v. Arizona*, 384 U.S. 436 (1966). Brooks does not raise any issues regarding the *Miranda-*

Zirzow testified that after he pulled Brooks over and ran his driver's license, he learned that Brooks' license was suspended. (R. 110:11.) He testified that because "there was no other valid driver in the car, [he] ha[d] to call for a tow" according to Milwaukee County Sheriff's Department policy and procedures. (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, "To 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.)

Goodchild issue on appeal, therefore the State will not discuss it further.

[3] 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.

The defense asked if Brooks told the officers that he would be able to have someone else come and get the car. Zirzow said, "He 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, but "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, however, "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, "Under 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.[4] (R. 110:30.)

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

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

was lawfully parked and not obstructing traffic. (R. 76:1.) The inventory search, he argued, was therefore also unreasonable. (R. 76:1.)

He also alleged that, if 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 Milwaukee Sheriff's Department written policy titled "Arrest Tow" to his motion. (R. 76:23.) It stated, in relevant part, "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 arrest, to take control of the vehicle." (R. 76:23.) He requested a *Machner* hearing[5] on this issue. (R. 76:2.)

The circuit court denied the motion without a hearing. (R. 85.) 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.)

Brooks appealed and the court of appeals affirmed in a per curiam opinion. *See State v. Brooks*, No. 2018AP1774-CR, 2019 WL 3917405 (Wis. Ct. App. Aug. 20, 2019) (unpublished). The court held that the officers were engaged in a bona fide community caretaker function when they towed and searched Brooks' car. *Id.* ¶ 16. They noted that Brooks was pulled over in a mixed commercial and

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

residential area, did not have a valid driver's license, was not the registered owner of the car, and there were no other drivers present to drive the car. *Id.* Further, Zirzow explained why they could not let someone else come to the scene to retrieve it: it compromised officer safety. *Id.*

The court of appeals then concluded that the deputies reasonably exercised their bona fide community caretaker function under the four-factor test stated in *Asboth*. *Id.* ¶¶ 17–21. The public had an interest in officer safety, and the policy of not letting others come to the scene furthered that interest. *Id.* ¶ 18. The deputies did not use force and told Brooks he was free to leave. *Id.* ¶ 19. Brooks' claim that the officers violated the sheriff's department policy was immaterial, given this Court's holding in *Asboth* that police were not required to abide by a specific policy to render a decision to tow reasonable. *Id.* Finally, reasonable alternatives were not available. *Id.* ¶ 20. The Fourth Amendment did not require the officers to allow Brooks to leave the car parked on the side of the road for an indeterminate amount of time, which could invite theft and vandalism. *Id.*

Brooks petitioned for review, which this Court granted.

ARGUMENT

I. The circuit court properly denied Brooks' suppression motion because the decision to tow the car was a reasonable exercise of the police's community caretaking function, and the inventory search was reasonably performed.

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 (quoting *State v. Knapp,* 2005 WI 127, ¶ 19, 285 Wis. 2d 86, 700 N.W.2d 899). 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. Reasonably executed community caretaker functions and inventory searches are two well-established exceptions to the Fourth Amendment's warrant requirement.

As a preliminary matter, it is important to delineate what Brooks is not challenging. Brooks is not challenging the legality of the traffic stop. Furthermore, Brooks does not claim that the inventory search itself was performed in an unreasonable manner or was impermissible in scope; rather, he argues that the decision to tow the car was an unreasonable exercise of the officers' community caretaker function, and therefore the inventory search was necessarily unlawful as well because it never should have occurred. (Brooks' Br. 12–36.) In other words, Brooks' constitutional challenge to both the seizure of the car and the inventory search rises and falls on whether the seizure of the car was reasonable. He has no independent argument that the inventory search was unreasonable if the tow was permissible. Apart from the general overview of the law regarding inventory searches as it relates to police seizures below, then, the State will limit its discussion to whether the tow in this case amounted to an unreasonable seizure.

The Fourth Amendment to the United States Constitution and Article I, sec. 11 of the Wisconsin constitution do not protect against all searches and seizures, only unreasonable ones. *State v. Pinkard*, 2010 WI 81, ¶ 13, 327 Wis. 2d 346, 785 N.W.2d 592 (explaining that the ultimate standard set forth in the Fourth Amendment is

reasonableness). Warrantless searches are considered *per se* unreasonable unless they fall within a clearly delineated exception. *State v. Artic*, 2010 WI 83, ¶ 29, 327 Wis. 2d 392, 786 N.W.2d 430. Two of those clearly delineated exceptions are (1) when a police officer is "serving as a community caretaker to protect persons and property," *Pinkard*, 327 Wis. 2d 346, ¶ 14, and (2) a police inventory search, *State v. Callaway*, 106 Wis. 2d 503, 510, 317 N.W.2d 428 (1982). Under either exception, the ultimate question is whether the search or the seizure at issue was reasonable given the totality of the circumstances. *See id.* at 511–12. The burden is on the State at the suppression hearing to prove that an exception to the warrant requirement applies. *See State v. Payano-Roman*, 2006 WI 47, ¶ 66, 290 Wis. 2d 380, 714 N.W.2d 548.

Community caretaker functions are those that police undertake for the benefit of the community, which are "totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute." *Cady v. Dombrowski*, 413 U.S. 433, 441 (1973). "When evaluating a claimed community caretaker justification for a warrantless search or seizure, Wisconsin courts apply a three-step test . . . ." *State v. Asboth*, 2017 WI 76, ¶ 13, 376 Wis. 2d 644, 898 N.W.2d 541.

The court first evaluates "whether a search or seizure within the meaning of the Fourth Amendment occurred." *Id.* (quoting *State v. Matalonis,* 2016 WI 7, ¶ 31, 366 Wis. 2d 443, 875 N.W.2d 567). If so, the court then determines "whether the police were exercising a bona fide community caretaker function." *Id.* (quoting *Matalonis,* 366 Wis. 2d 443, ¶ 31). 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.* (quoting *Matalonis,* 366 Wis. 2d

443, ¶ 31). This final step is evaluated under a four-factor test, considering: "(1) the degree of public interest and the exigency of the situation; (2) the attendant circumstances surrounding the seizure, including 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 (quoting *State v. Kramer*, 2009 WI 14, ¶ 40, 315 Wis. 2d 414, 759 N.W.2d 598).

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, 374–76 (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 (quoting *State v. Richardson,* 156 Wis. 2d 128, 139–40, 456 N.W.2d 830 (1990)).

C. This Court's decision in *Asboth*.

In *Asboth*, police arrested armed-robbery suspect 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. When Asboth was arrested, 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 the 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."[6] *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, Asboth relied on *Bertine*, 479 U.S. 367, 374–76, where the Court found no constitutional violation because officers followed "standardized procedures" and acted in good faith. Citing *Bertine*, Asboth claimed that "an impoundment will be constitutionally valid only if governed by 'standard criteria' set forth in law enforcement procedures." *Absoth,* 376 Wis. 2d 664, ¶ 22.

This Court disagreed with both contentions.

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[6] 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. *Asboth*, ¶¶ 5, 22, 376 Wis. 2d 644.

Regarding the community caretaker function, this Court 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. *Asboth*, 376 Wis. 2d 644, ¶¶ 16–18. 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 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. This 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 were engaged in a bona fide community caretaker function, this court moved to whether the seizure was reasonable under the four-factor *Kramer* test. *Asboth*, 376 Wis. 2d 644, ¶¶ 22–30.

This 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. "[T]he 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.

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.

This Court then held that, under the four-factor test, the tow and related inventory search were reasonable. *Asboth*, 376 Wis. 2d 644, ¶ 36. First, Asboth had a lesser expectation of privacy in a car than he would in a home. *Id.* ¶ 31. Next, 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, 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 as to when to tow a car. *Id.* ¶ 34. Finally, there was a lack of reasonable alternatives because Asboth "did not have a

companion who could immediately take possession of the car." *Id.* ¶ 35. In making that final determination, this Court rejected the notion that the officers had to offer Asboth the opportunity to make other arrangements in order to comply with the Fourth Amendment. *Id*. ¶ 35.

D. For substantially the same reasons as in *Asboth*, the officers' decision to tow the car in this case was a reasonable exercise of their community caretaker function.

1. The record does not support Brooks' contention that his car was lawfully parked and not obstructing traffic, but whether it was is irrelevant.

As Brooks explicitly admits in his very first sentence regarding this issue, "[T]he circuit court did not make explicit factual findings concerning whether Mr. Brooks' vehicle was lawfully parked and not obstructing traffic." (Brooks' Br. 16.)

Brooks tries to make up for this gap in the factual findings by arguing that the State conceded postconviction that Brooks' car was lawfully parked. (Brooks' Br. 16.) The State made no such concession at the postconviction stage and does not do so now. And indeed, Brooks bases this concession theory on nothing of substance. He notes that he argued in his postconviction brief that his car *appeared* to be lawfully parked, but he did not produce any evidence postconviction to prove that the car actually was lawfully parked. (Brooks' Br. 16.) The State in its briefing said it generally had no dispute with the facts and procedure as set forth by Brooks, which on this subject was only that the car "appeared" to be lawfully parked. The State concedes nothing.

Significantly, neither Brooks' testimony nor the squad car video show that the vehicle is lawfully parked, (Brooks' Br. 17), or that it was not obstructing traffic. In fact, 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.*, R. 114:Ex. 3, 9:34:07–16.)

Ultimately, though, the State did not need to 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 this 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 leave the car 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.");[7] *accord 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, 1289–90 (5th Cir. 1980) (holding that the fact that the

[7] There is nothing in the record 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.

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).

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.

2. The officers were engaged in the bona fide community caretaker function.

a. The caretaker function here was to protect the property of an owner who was not present to take control of it at the scene and ensure that a licensed driver took possession of it later.

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

"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*, No. 12-P-338, at *2, 2013 WL 6847704 (Mass. App. Ct. Dec. 31, 2013) (unpublished); *see also United States v. Duguay*, 93 F.3d 346, 355 (7th Cir. 1996). 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.

First, there was no one at the scene that could legally take possession of the car. (R. 1:1.) Brooks did not have a

valid driver's license and there were no passengers in the car. 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. *See Asboth*, 376 Wis. 2d 644, ¶ 19.

Second, Brooks was not the registered owner of the car, so the officers had a duty to the registered owner to protect the vehicle. Despite Brooks' repeated descriptions of the Lexus as "his car" (Brooks' Br. 1, 2, 6, 13, 21, 23, 29), it belonged to Ms. Hill, who was not present at the scene when the police seized the vehicle. Such was the case in *Asboth*. *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 this 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.*

Third, the location and circumstances of the stop support the officers' community caretaker justification for moving the car. Brooks was pulled over on a side street, just off the highway, roughly two miles from his home, in a mixed residential and commercial area. (R. 1:1.) The car was parked far from the curb, potentially impeding traffic along the side of the street. 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. (R. 1:1; 114, Ex. 3.)

The officers made a reasonable decision to tow the car based on the facts they had at the time of the citation. Subsequent events—such as Ms. Hill's later arrival at the scene—do not make that decision less reasonable.

Even assuming that Brooks 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, when she would arrive, if she had a valid license, or if she might be dangerous to police.[8] And, contrary to his testimony at the suppression 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. He tells Zirzow that "y'all ain't have to do me like this," and asks if "[Ms. Hill] could call her sister or something," to which Zirzow answers that per policy he cannot let someone else come to the scene. (R. 114: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. Ms. Hill drove to the scene in a separate vehicle, so there were two vehicles on scene and only one licensed driver. The choice would have to be made

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[8] The State fails to understand Brooks' claim that Ms. Hill's spontaneous arrival on the scene after the seizure 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. 32.) 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. (R. 114:Ex. 3, 9:56:31–35.) 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 was already underway, and the gun had already been found by that time.

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.

Next, none of Brooks' arguments challenging the officers' community caretaker functions have merit. 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."[9] (Brooks' Br. 19.) But as both Brooks and this Court have recognized, the examples listed in *Opperman* are "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. And, as just discussed, this Court acknowledged in *Asboth* that protecting the vehicle on behalf of the registered owner is a legitimate community caretaker function. *Id*. at ¶ 20.

Brooks also repeatedly cites the Wisconsin Appeals Court case of *Clark*, 265 Wis. 2d 557, ¶ 22, as support for his

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[9] 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.

position. (Brooks' Br. 19–20, 23.) Brooks claims his case is closer to *Clark* than *Asboth*. He is mistaken.

The court in *Clark* found a Fourth Amendment violation, but the facts of that case are entirely distinguishable. In *Clark*, officers were responding to a report of shots fired and an attempted robbery in a neighborhood when they randomly discovered an unlocked, parked car in the vicinity of a shell casing. *Clark,* 265 Wis. 2d 557, ¶ 4. Although the car was legally parked, since it was unlocked, the officers decided to impound it for safekeeping. *Id.* at ¶ 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 or consent of the owner" to do so; otherwise, they had to tow the car. *Id.* ¶ 16 (alteration in original).

The court of appeals 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.

The record in this case does not reveal whether Brooks' car was legally parked. But even if the car was parked legally, Brooks' reliance on *Clark* is misplaced. *Clark*

involved an unattended vehicle. *Clark*, 265 Wis. 2d 557, ¶ 4. In *Clark* the officers had no way of knowing whether the owner of the car had intentionally parked it at that location. *Id.* In Brooks' case, the car was pulled over pursuant to a traffic stop. And it was the actions of law enforcement (conducting a valid traffic stop) that resulted in the car being parked at that location. Further, since Brooks did not have a valid driver's license, he could not take responsibility for the vehicle. (R. 1:1.) And the car did not belong to Brooks. (R. 110:42–43.) Under these circumstances, the officers had a duty to the owner of the car not to abandon it on the side of the road. *Asboth*, 376 Wis. 2d 644, ¶ 20. *Clark* is inapposite.

b. The cases Brooks cites from other jurisdictions are distinguishable.

Brooks also cites as persuasive authority several cases from other jurisdictions. (Brooks' Br. 23–26.) But not only are these cases nonbinding, they are all distinguishable.

First, Brooks cites *United States v. Cervantes*, 703 F.3d 1135, 1141 (9th Cir. 2012). In *Cervantes*, law enforcement officers were following Cervantes' car while surveilling a suspected narcotics stash house. *Id.* at 1137–38. So, there was reason to question whether the community caretaking function was genuine in that case because the officers suspected to find evidence of criminal activity when they searched the car. *Id.* And in *Cervantes*, the officers did not testify to a valid community caretaker justification for impounding the car. *Id.* at 1141–1142. Such is not the case here. The record does not reveal any ulterior investigative motive in this case. Officer Zirzow testified that because there was no 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.)

Next, Brooks cites *United States v. Ibarra*, 955 F.2d 1405 (10th Cir. 1992) for the proposition that, under the Fourth Amendment, a driver must be given the opportunity to provide for the custody or removal of a vehicle that does not pose a public safety hazard or obstruct traffic flow. (Brooks' Br. 24.) But *Ibarra* hinged on a specific Wyoming statute that does not exist in Wisconsin. Moreover, the officers had confirmed that the driver owned the car prior to the search, the trial court found incredible the officer's testimony on the caretaker function, and the search that revealed the contraband occurred *after* the car had been towed. *Ibarra,* 955 F.2d 1405. These critical differences make *Ibarra* inapposite.

Brooks also cites to the recent Colorado case of *People v. Brown*, 415 P.3d 815 (Colo. 2018). But *Brown* is likewise distinguishable. In *Brown*, the driver was the owner of the vehicle, and nothing in the record indicated that the defendant was unable to lawfully provide for the vehicle. *Id.* at 817. In contrast, Brooks was not the registered owner of the vehicle he was driving. (R. 110:42–43.) And at Brooks' hearing the officers testified that they were statutorily required to tow the car if there was no one on the scene to take possession of the car. (R. 110:12.) The officers also explained that, for officer safety reasons, they could not let anyone outside the scene into the scene of the traffic stop. (R. 110:16.)

Finally, Brooks cites *State v. Rohde*, 852 N.W.2d 260, 266 (Minn. 2014), for the proposition that, when a driver is not arrested, they must be given the opportunity to make arrangements for the vehicle. (Brooks' Br. 26.) But while the Minnesota Supreme Court in *Rohde* recognized a dichotomy between arrest and non-arrest cases, that rule is not binding on this Court. And the facts of *Rohde* are distinguishable. The driver in *Rhode* was the registered owner of the vehicle.

Id. at 262. And, like in *Cervantes,* the officers initially followed Rhode's car because they believed it was connected to a drug trafficking operation. *Id.* So, their interaction with Rhodes began with a suspicion of criminal activity unrelated to the basis of the traffic stop. While pretext does not preclude officers from using the community caretaker exception, it undermines the basis for the community caretaker function. *See State v. Gracia*, 2013 WI 15, ¶¶ 19, 84, 345 Wis. 2d 488, 826 N.W.2d 87. In other words, while a community caretaker function can emerge within an investigation, the investigation is still relevant to the overall reasonableness of the caretaker function.

Brooks' case is very different. The record does not indicate that the officers had any suspicion of criminal activity beyond the traffic violation. Also, there was no one at the scene that could drive the car, and Brooks was not the registered owner of the car. (R. 1:1; 110:42–43.) And, as this Court explained in *Asboth*, the registered owner's absence from the scene is relevant to whether a community caretaker function exists because officers might need to make arrangement to reunite the car with the owner. *Asboth*, 376 Wis. 2d 644, ¶ 20.

The officers in this case were executing a valid community caretaking function when they towed Brooks' car.

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

Brooks' Fourth Amendment claim fails because the public interest in officer and citizen safety, and the protection of property, outweighed the minimal privacy

interest Brooks had in his girlfriend's car after being stopped for speeding without a valid license. Further, the officers' 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.

The officers testified at the hearing that their decision was made according to a standardized policy observed by the sheriff's department in this situation. The trial court found this testimony credible, and Brooks has not shown that that finding was clearly erroneous. And while the officers in this case were following department policy, even in the absence of "standard criteria," the search would have been constitutional 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 the exigency of the situation; (2) the attendant circumstances surrounding the seizure, including 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 (quoting *Kramer,* 315 Wis. 2d 414, ¶ 40). Here, those factors weigh in favor of the officers' decision to tow the car.

First, 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.) But he said that, 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.)

Officer safety 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 (alteration in original) (quoting *Rodriguez v. United States,* 575 U.S. 348, 357 (2015)). 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 the third party arriving at the scene has a nefarious purpose. Officers have no way of knowing whether that person would come alone, whether the person is armed, or even whether the person is coming to help the stopped driver 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.

Second, 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.* And the officers had a legitimate safety interest in not allowing an unknown person to be called to the scene. But the record also shows that the officers did not make any coercive "show of authority to [a]ffect the seizure." *Asboth*, 376 Wis. 2d 644, ¶ 33. In fact, the squad video shows that the officers calmly approached the car and spoke to Brooks about the reason for the stop. (R. 114: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. (R. 114:Ex. 3, 9:45:05–9:45:09.) Neither officer had his weapon drawn at any point. (R. 114:Ex. 3.) Brooks was not handcuffed. (R. 114: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." (R. 114:Ex. 3, 9:46:14–9:46:18.) There was nothing forceful or coercive about the seizure.

Additionally, like in *Asboth*, the officers were following 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. (R. 114: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. (R. 114:Ex. 3, 9:46:14–9:49:00.) 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. 32 n.9, 39.) But the written policy Brooks submits is the arrest tow policy, which is irrelevant here. The policy at issue is the department policy to which the officers testified at the hearing. But even if the written arrest tow policy applied, it is consistent with the officers' actions in this case. (R. 76:23.) Like someone who had been arrested, Brooks could not lawfully drive the car from the scene because he had no valid driver license, so the rationale for the tow policy in this case is the same as the rationale for the arrest tow policy. In this regard, the arrest tow policy Brooks identifies actually shows that the police acted reasonably here. And finally, it is important to remember that the officers did not even 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.

Third, since the officer action at issue is the decision to tow Brooks' girlfriend's car, it is undisputed that 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 (alteration in original) (quoting *State v. Anderson,* 142 Wis. 2d 162, 169 n.4, 417 N.W.2d 411 (Ct. App. 1987)). 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.

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.

As to this factor, Brooks claims that the deputies could have simply left Brooks at the scene and allowed him to call Ms. Hill, the registered owner, to take possession of the car and drive it away. (Brooks' Br. 30.) But, as discussed above, the officers had a duty to the registered owner of the car not to abandon it on the side of the road. And even if that was a viable option, 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.

Next, Brooks repeatedly cites *Clark* to argue that towing the car was unreasonable because he had an expectation that he could leave his car legally parked without being towed. (Brooks' Br. 28–29.) He also attempts to rely on *Clark* for the proposition that the deputies "could have simply locked the vehicle and walked away" or "should have attempted to obtain Ms. Hill's consent before towing the vehicle." (Brooks' Br. 21.) But once again Brooks' reliance on *Clark* ignores the facts. *Clark* involved an unattended, legally parked car. *Clark*, 265 Wis. 2d 557, ¶ 4, 22. Here, Brooks' car was stopped by law enforcement because Brooks broke the law. (R. 1:1.) And then officers discovered that Brooks did not have a valid driver's license and the car did not belong to him. (R. 1:1; 110:42–43.) And finally, the record does not indicate that the car Brooks was driving was parked legally. So, under these circumstances,

Brooks has a very different expectation of privacy than the owner of the car in *Clark*.

Furthermore, in *Clark* this Court did not 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, Brooks challenges the court of appeals' finding that "[l]eaving the vehicle on the side of the road for an indeterminate amount of time could invite theft or vandalism." (Brooks' Br. 33 (alteration in original) (quoting Pet.-App. 108).) Brooks argues that there is no evidence that the officers actually believed that the car would be stolen or that the car was located in a high-crime area. (Brooks' Br. 33.) Brooks' argument misunderstands the law. The court of appeals' finding about theft and vandalism does not relate to the subjective reasonableness of the seizure, it relates to the objective reasonableness, and the presence of a bona fide community caretaker justification for impounding the car Brooks was driving. *Asboth*, 376 Wis. 2d 644, ¶ 28. The Fourth Amendment does not require officers on the scene to evaluate the dangerousness of the neighborhood or the specific likelihood of vandalism in each case. In fact, as this Court explained in *Asboth*, department policies are designed to reduce discretion on the part of law enforcement officers,

and the relevant inquiry is whether there was an "an objectively reasonable basis for performing a community caretaker function." *Asboth*, 376 Wis. 2d 644, ¶ 28 (quoting *Kramer,* 315 Wis. 2d 414, ¶ 32). [10] Here, there was.

Under the totality of the circumstances, the public interests in 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.

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

A. Standard of review

Whether Brooks was entitled to an evidentiary hearing on his ineffective assistance of counsel claim presents a mixed standard of review. *State v. Allen*, 2004 WI 106, ¶ 9, 274 Wis. 2d 568, 682 N.W.2d 433.

To receive a hearing, Brooks first had to allege sufficient material facts which, if true, would entitle him to

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[10] 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. 34–35.) The question here is whether the officers reasonably exercised a community caretaker function in towing the car. Although Mr. Brooks may be poverty-stricken, 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.

relief. *State v. Balliette,* 2011 WI 79, ¶ 18, 336 Wis. 2d 358, 805 N.W.2d 334. The sufficiency of the motion, however, is not the end of the inquiry. "[A] circuit court has the discretion to deny a defendant's motion—even a properly pled motion— . . . without holding an evidentiary hearing if the record conclusively demonstrates that the defendant is not entitled to relief." *State v. Sulla*, 2016 WI 46, ¶ 30, 369 Wis. 2d 225, 880 N.W.2d 659.

"'[W]hether a defendant's [postconviction motion] 'on its face alleges facts which would entitle the defendant to relief' and whether the record conclusively demonstrates that the defendant is entitled to no relief' are questions of law that [an appellate court] review[s] de novo." *Sulla*, 369 Wis. 2d 225, ¶ 23 (first alteration in original) (citation omitted).

"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. This decision "will only be reversed if the trial court erroneously exercised that discretion." *Id*. The circuit court's decision to deny an evidentiary hearing when the record conclusively demonstrates that the defendant is due no relief is likewise reviewed for an erroneous exercise of discretion. *State v. Romero-Georgana*, 2014 WI 83, ¶ 30, 360 Wis. 2d 522, 849 N.W.2d 668.

"A court properly exercises its discretion if it uses the correct legal standard and, using a demonstrated rational process, reaches a reasonable conclusion." *Pierce v. Am. Family Mut. Ins. Co.*, 2007 WI App 152, ¶ 5, 303 Wis. 2d 726, 736 N.W.2d 247.

B. Wisconsin law requires that counsel testify at an evidentiary hearing before a court can find that the attorney rendered ineffective assistance.

The right to counsel contained in the United States Constitution[11] and the Wisconsin Constitution[12] 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.

In *State v. Machner*, the court of appeals established that "it is a prerequisite to a claim of ineffective representation on appeal to preserve the testimony of trial counsel." *State v. Machner*, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979). This is so because without trial counsel's testimony, the court "cannot otherwise determine whether trial counsel's actions were the result of incompetence or deliberate trial strategies." *Id.*

A defendant is not entitled to a *Machner* hearing simply because he alleges that counsel was ineffective. *Allen*, 274 Wis. 2d 568, ¶ 10. "The circuit court may deny a postconviction motion for a hearing if all the facts alleged in the motion, assuming them to be true, do not entitle the movant to relief; if one or more key factual allegations in the motion are conclusory; or if the record conclusively demonstrates that the movant is not entitled to relief." *Id.* ¶ 12 (footnote omitted).

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

[12] Wis. Const. art. I, § 7.

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. And finally, regardless of the sufficiency of the allegations made in Brooks' motion, the record must not conclusively demonstrate that Brooks' claim would fail on either prong. *Sulla*, 369 Wis. 2d 225, ¶ 30.

When a circuit court denies an ineffective assistance claim without holding a *Machner* hearing, the only question before an appellate court on review is whether the defendant is entitled to one, not whether counsel was ineffective. *See State v. Curtis*, 218 Wis. 2d 550, 554–55, 582 N.W.2d 409 (Ct. App. 1998) ("[T]he lack of a *Machner* hearing prevents our review of trial counsel's performance."); *accord State v. Sholar*, 2018 WI 53, ¶ 54, 381 Wis. 2d 560, 912 N.W.2d 89.

C. Brooks failed to allege facts showing that trial counsel's failure to present the Milwaukee County Sheriff's Department's written "Arrest Tow" policy at the suppression hearing was either deficient or prejudicial.

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. 36.) 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. 39.) He alleges this deficient performance prejudiced the defense because the circuit court found that the tow and search were done in conformity with the deputies' "protocol." (Brooks' Br. 42.)

This hollow argument establishes neither deficient performance nor prejudice. First, the policy he identifies is irrelevant to his case because Brooks was not arrested at the time the officers decided to tow the car. Accordingly, the circuit court properly denied Brooks' ineffective assistance claim without a *Machner* hearing because, even if true, nothing Brooks alleges amounts to ineffective assistance. *See State v. Bentley*, 201 Wis. 2d 303, 309–10, 548 N.W.2d 50 (1996); *cf. State v. Sanders*, 2018 WI 51, ¶ 29, 381 Wis. 2d 522, 912 N.W.2d 16 (explaining that counsel does not perform deficiently by pursuing a meritless strategy). His trial counsel could not be deficient for failing to find an irrelevant written policy or make a meritless argument. And since the arrest tow policy is not applicable, there is no probability that had counsel procured and introduced it at the suppression hearing, the result of the hearing would have been different. So, 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 687.

Next, Deputy Zirzow's testimony about the department's policy in non-arrest cases is sufficient to show a standardized procedure. 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 officers' 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. (R. 114: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.

Finally, Brooks argues that the arrest tow policy undermines the officers' testimony on third parties entering the scene. Specifically, Brooks argues that the arrest tow policy conflicts with Zirzow's testimony that, for officer safety reasons, they do not let other vehicles to come to the scene. (Brooks' Br. 39–40.) But, again, the policy Brooks cites applies to arrests, so it is not the policy Zirzow was referring to at the hearing. Additionally, the very first sentence of the arrest tow 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).) And although the policy later mentions that anyone taking custody of the vehicle must be there prior to the tow arriving, that does not directly conflict with Zirzow's testimony. The written arrest tow policy does not expressly state that the driver is entitled to call a third party to come to the scene. (R. 76:23.)

Brooks' ineffective assistance claim was properly denied without a hearing because nothing he alleges amounts to ineffective assistance or identifies prejudice. *See Bentley*, 201 Wis. 2d at 309–10.

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 24th day of February 2020.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 10,914 words.

Dated this 24th day of February 2020.

ABIGAIL C.S. POTTS
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.

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Dated this 24th day of February 2020.

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