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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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REPLY BRIEF OF DEFENDANT-APPELLANT-PETITIONER

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ARGUMENT

I. Because Mr. Brooks was not arrested and his vehicle was lawfully parked, the towing of his vehicle constituted an improper exercise of the deputies' community caretaker function.

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

The State claims it never conceded that Mr. Brooks' vehicle was lawfully parked. (Resp. Br. at 16). The record shows otherwise.

The chief argument Mr. Brooks raised in support of his postconviction motion was that his car was lawfully parked and not obstructing traffic. (76:1, 7-11). The State never responded to that argument in any way. It even admitted in its postconviction response that the squad cam video shows that Mr. Brooks parked his "car in what appears [to be] a lawful parking spot." (76:5; 78:1; App. 111). The State should be precluded from taking a contrary position now.

In any case, whether the State conceded this argument is beside the point. The State had the burden of proof at the suppression hearing, so it needed to present affirmative evidence establishing a community caretaker need. *State v. Jiles*, 2003 WI 66, ¶48, 262 Wis. 2d 457, 663 N.W.2d 798. The State

presented no evidence showing that Mr. Brooks' car was illegally parked or obstructing traffic. Its vague assertion now that the car appears to be parked "far" from the curb (Resp. Br. at 17) does not constitute actual evidence that the car was illegally parked or obstructing traffic. The State therefore cannot rely on this belated claim as a justification for impoundment.

B. The deputies did not have a bona fide community caretaker justification for impounding and searching Mr. Brooks' vehicle.

The State, citing *Colorado v. Bertine*, 479 U.S. 367 (1987), and *State v. Asboth*, 2017 WI 76, 376 Wis. 2d 644, 898 N.W.2d 541, claims that the U.S. Supreme Court 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." (Resp. Br. at 17). That is a misreading of *Bertine* and *Asboth*. There is no indication in *Bertine* that the car was lawfully parked after Bertine was arrested. *Bertine*, 479 U.S. at 368-69. In *Asboth*, the car was abandoned on private property. *Asboth*, 376 Wis. 2d 644, ¶4.

While the Supreme Court and this Court have not addressed a community caretaker case involving a lawfully parked car, the court of appeals has held that towing a lawfully parked but unlocked car is an

improper exercise of law enforcement's community caretaker function. *State v. Clark*, 2003 WI App 121, 265 Wis. 2d 557, 666 N.W.2d 112. Numerous courts from other jurisdictions have also held that towing a vehicle that is lawfully parked and/or not obstructing traffic is improper when the driver is not arrested, even if he or she does not have a valid license. *United States v. Cervantes*, 703 F.3d 1135 (9th Cir. 2012); *United States v. Ibarra*, 955 F.2d 1405 (10th Cir. 1992); *People v. Brown*, 415 P.3d 815 (Colo. 2018); *State v. Rohde*, 852 N.W.2d 260 (Minn. 2014).

The State does not cite any cases with a contrary holding to show there is any disagreement among courts on this issue. Instead, it simply attempts to distinguish the cases cited by Mr. Brooks. The State's efforts in this respect fail.

The State claims *Clark* is distinguishable because the car in that case, although lawfully parked, was unattended when the officer arrived. The State points out that Mr. Brooks' car was parked due to a traffic stop. Also, he could not drive the car because he did not have a license. (Resp. Br. at 22-23). This is a meaningless distinction. In both this case and *Clark*, no one was immediately available to drive the cars, so they would have had to be left in a public parking place for at least some amount of time. Both cars were also registered to someone other than the defendants. *Clark*, 265 Wis. 2d 557, ¶¶3-4. And the risk of theft or vandalism, if any, was greater in *Clark* than here. The vehicle in *Clark* was unlocked and it was unknown when Clark—who had fled the

scene on foot after someone attempted to rob him at gunpoint—might return to retrieve it. *Id.* In this case, Mr. Brooks was present at the scene, so he could have removed any valuables from the car and locked it himself. He also could have arranged to have another driver or a tow truck remove the car, and he could have remained at the scene until they arrived.

The State claims *Cervantes* is inapplicable because the officers in that case were following Cervantes as part of their surveillance of a suspected drug house. The State asserts there was thus "reason to question whether the community caretaking function was genuine." (Resp. Br. at 23). Pretext, however, was not one of the reasons the court in *Cervantes* rejected the claimed community caretaker justification. The court did so because the government presented no evidence that the "vehicle was parked illegally." *Cervantes*, 703 F.3d at 1141. Also, although the car was not in close proximity to Cervantes' home, "the government presented no evidence that the vehicle would be vulnerable to vandalism or theft if left in its residential location." *Id.* at 1141-42. And since Cervantes was arrested only after the inventory search resulted in the discovery of cocaine, *id.* at 1142-43, he could have arranged to have the car removed from the scene. It is also important to note that Cervantes was unable to produce any registration, so there was nothing showing he owned the car. *Id.* at 1138.

Next, the State notes that in *Ibarra*, the police failed to comply with a Wyoming statute in impounding the car, and a similar statute does not exist in Wisconsin. (Resp. Br. at 24). This overlooks the fact that the court in *Ibarra* concluded—separately from its statutory analysis—that the officers' actions were not justified under the community caretaker exception described in *South Dakota v. Opperman*, 428 U.S. 364 (1976). *Ibarra*, 955 F.2d at 1409-10. The court based this holding on the fact that, as in this case, the vehicle did not pose a public safety hazard where it was parked. *Id.* at 1409. The court also reached this conclusion even though the vehicle's ownership was in question at the time the officer called for a tow. *Id.* at 1407.

The State claims *Brown* is distinguishable because "nothing in the record indicated that the defendant was unable to lawfully provide for the vehicle." (Resp. at 24). But nothing prevented Mr. Brooks from doing so either. Although Mr. Brooks was not the registered owner, he could have called the registered owner—Meaghan Hill[1]—to come pick up the car or asked her to send someone else to do so. If Ms. Hill was unavailable, then Mr. Brooks could have called another licensed driver

[1] The State falsely claims Mr. Brooks testified that he told the deputies Ms. Hill was on her way. (Resp. Br. at 20). Mr. Brooks never testified to that. (110:20-29, 41-43; App. 134-44, 156-58). It was Deputy Zirzow who testified that Mr. Brooks told him he wanted to have Ms. Hill pick up the car. (110:16; App. 131).

or a private tow truck. Nothing should have prevented him from making those types of arrangements, since there was no reason to believe he was "wrongfully in possession of [the car]." *See State v. Goodrich*, 256 N.W.2d 506, 511 (Minn. 1977).

The State also asserts that, unlike in *Brown*, the deputies in this case "were statutorily required to tow the car if there was no one on the scene to take possession of the car." (Resp. Br. at 24). The State points to no statute that mandated that result. Presumably, the State meant that the deputies' supposed unwritten policy required them to take these actions. But, even if this is true, mere compliance with a policy cannot constitutionalize an impoundment that lacks any legitimate or reasonable community caretaker justification. *See, e.g., Cervantes*, 678 F.3d at 806.

Finally, the State claims that *Rohde* is distinguishable because the officers initially followed Rohde because they believed she was connected to a drug operation. (Resp. Br. at 25). But as in *Cervantes*, pretext was not a basis for the court's decision. *Rohde*, 852 N.W.2d at 264-66. The *Rohde* court concluded that the impoundment was unconstitutional because Rohde's vehicle "was not violating any parking laws, impeding traffic, or posing a threat to public safety." *Id.* at 265. And importantly, as in this case, Rohde was not arrested as a result of the traffic stop, so it was not necessary for the police "to do *something* with the vehicle." *Id.* at 266 (emphasis in original).

Despite the clear weight of authority rejecting the community caretaker exception in cases where the driver is unlicensed but not arrested and the vehicle is lawfully parked and/or not obstructing traffic, the State asserts that several community caretaker justifications existed for towing Mr. Brooks' car. The State claims one justification was the danger of theft or vandalism. (Resp. Br. at 18). But this supposed justification is completely speculative. As in *Cervantes*, the State in this case "presented no evidence that the vehicle would be vulnerable to vandalism or theft if left in its [current] location." *See Cervantes*, 703 F.3d at 1141-42.

The State attempts to make up for this proof failure by arguing that "[t]he 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," because an officers' subjective beliefs are irrelevant. (Resp. Br. at 31). This argument is specious. While the Fourth Amendment analysis in this case does not depend the deputies' subjective beliefs, it does require the State to have presented *some* evidence showing that the seizure was objectively reasonable. Here, there was no evidence that the area in question was a high-crime neighborhood or that car break-ins or vandalism occurred frequently in the area. There was thus no objective basis for the deputies to "reasonably believe[] that the vehicle could be stolen or vandalized" if left temporarily unattended. *See Clark*, 265 Wis. 2d 557, ¶26.

Next, the State argues that because Mr. Brooks was not the car's owner, the deputies "had a duty to the registered owner to protect the vehicle." (Resp. Br. at 19). The State cites no authority showing that it owed Ms. Hill a duty of care, such that it would have been liable for damage to the vehicle or its contents. *See United States v. Duguay*, 93 F.3d 346, 353 (7th Cir. 1996) ("The states owes no legal duty to protect things outside its custody from private injury."). Moreover, any reasonable car owner would not have wanted the police to take on such a duty. What reasonable person would want to be called by the police to come pick up their car at an impound lot (where they would have to pay towing and storage fees) when their significant other could have simply called them to pick up the car at a location where it is safely and legally parked?

The State is also incorrect that this Court's decision in *Asboth* authorized the deputies to tow the vehicle to protect the registered owner. (*See* Resp. at 19). In *Asboth*, this Court stated that because Asboth was arrested and faced the possibility of a lengthy detention, "the possibility existed that officers would need to make arrangements to reunite the car with its registered owner," which Asboth had abandoned on private property. *Asboth*, 376 Wis. 2d 644, ¶¶18-20. That is not the situation here. Mr. Brooks was not arrested as a result of the traffic stop, so he could have called Ms. Hill or another licensed driver to pick up the car. He also did not abandon the car on private property. Other courts that have addressed similar factual situations have concluded that a

driver who is not the registered owner should be allowed to make those arrangements absent reason to believe they are wrongfully in possession of the vehicle. *Goodrich*, 256 N.W.2d at 511; *Cervantes*, 703 F.3d at 1138, 1141-43.

The State even acknowledges that Deputy Zirzow would have allowed Mr. Brooks to have another licensed driver remove the car if that driver had been a passenger in the car. (Resp. Br. at 26-27). The fact that Mr. Brooks was not the registered owner did not matter in this respect, according to Deputy Zirzow. (*See* 110:12, 16; App. 127, 131). If allowing Mr. Brooks to have the car removed under those circumstances was a reasonable alternative, then the fact that an unlicensed driver is not the registered owner is not, on its own, a valid basis for towing a car.

Essentially then, what the State is arguing is that an unlicensed driver—owner or not—must be able to make immediate arrangements to remove a car while the traffic stop is still ongoing or be subject to involuntary towing of their car and the resulting fees, even though the vehicle is legally parked.

There is simply no legitimate community caretaker justification for requiring that a vehicle be removed in such an immediate fashion when it is lawfully parked, not obstructing traffic, and not inconveniencing a private property owner. A law enforcement policy that requires that level of immediacy is patently unreasonable—especially

when that policy at the same time prevents the driver from making the necessary arrangements during the stop by prohibiting him from calling a third party to the scene.

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

Even assuming the deputies were exercising a community caretaker function here, they did not do so in a reasonable way. In arguing to the contrary, the State points out that officer safety is a serious concern during a traffic stop. The State therefore argues that it was reasonable for the deputies not to allow Mr. Brooks "to arrange for someone else to come to the scene to drive the car away." (Resp. Br. at 26-27).

Officer safety concerns, however, should not have prevented Mr. Brooks from having the car removed *after* the stop was over. Once the stop was over, the deputies were not required to remain on the scene any longer. Any contact they would have had with a third party from then on would have been completely voluntary.

The State claims that the "circumstances surrounding the tow reflect the seizure's reasonableness" because the officers spoke calmly to Mr. Brooks and did not use force. (Resp. Br. at 27-28). But the circumstances also show that the car was legally parked on a public street and not creating a roadside hazard. Under those circumstances, even

though the deputies did not yell at Mr. Brooks or immediately clap him in jail for driving without a license, the seizure was still unreasonable and unnecessary.

This is all the more true because there were a number of reasonable alternatives to impounding the car. The deputies could have allowed Mr. Brooks to have another person pick up the car. They could have confiscated the ignition key. At a minimum, they should have tried to get Ms. Hill's consent before towing the vehicle. *See Clark*, 265 Wis. 2d 557, ¶¶26-27.

The State asserts that in *Clark* the court of appeals did not conclude that attempting to contact the registered owner is a reasonable alternative to impoundment. Instead, according to the State, the court simply found that the officer failed to follow his department's policies, which "'require[d] an attempt to locate the vehicle's owner and seek consent to either tow or lock and leave the vehicle.'" (State's Br. at 31 (quoting *Clark*, 265 Wis. 2d 557, ¶17)). That is not accurate.

The court in *Clark* held that attempting to contact the owner *is* a reasonable alternative when a vehicle is lawfully parked. *Clark*, 265 Wis. 2d 557, ¶¶26-27. The court stated that this reasonable "alternative directly corresponds to the Milwaukee Police Department's own 'safekeeping tow' policy." *Id.*, ¶26 n.4. But the court's conclusion that the seizure was constitutionally unreasonable—which

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

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.

The State claims that the arrest tow policy attached to Mr. Brooks' postconviction motion is irrelevant because Mr. Brooks was not arrested. (Resp. Br. at 36). The State misses the point entirely.

The arrest tow policy is not simply a policy for towing vehicles in a different context, it is the sheriff's department's *only* written policy about towing vehicles in *any* context. (76:21-22). The fact that there is nothing in writing to corroborate Deputy Zirzow's claim that his department actually has a policy requiring that a vehicle be towed when the driver does not have a license—even if it is lawfully parked—raises serious concerns about the reliability and credibility of his claim.

Thus, had trial counsel introduced the written policy into evidence, it would have seriously undermined Deputy Zirzow's credibility. Trial counsel was ineffective for failing to do so.

CONCLUSION

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 suppress 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, Mr. Brooks requests that this Court reverse the court of appeals' decision and the circuit court's postconviction order, and remand the case to the circuit court for a *Machner* hearing.

Dated this 9th day of March 2020.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 3,000 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 9th day of March 2020.

Signed:

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Assistant State Public Defender