STATE OF WISCONSIN

COURT OF APPEALS – DISTRICT III

Case No. 2019AP000175-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

SYNIKA ANTONIO KIRK,

Defendant-Appellant.

Appeal Of An Order Denying A Motion To Suppress Evidence And Of A Judgment Of Conviction, Entered In Brown County Circuit Court, The Hon. Thomas J. Walsh, Presiding.

REPLY BRIEF

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I. Trooper Nicholas's Use of a Knife to Pry an Opening In The Locked Trunk of Kirk's Car, and His Use of a Scope To View The Inside of the Trunk, were Fourth Amendment Searches.

The State argues for the first time in its response brief that Kirk lacked a reasonable expectation of privacy in the locked trunk of his Jaguar, and thus does not have "standing" to challenge the search. State Br. at 5-7. However, the State has waived this issue, as in the circuit court it expressly limited its position on standing to ensuring that there was a record of Kirk's possessory interest in the Jaguar. (92:3). Because Kirk relied on the State's position below, the State cannot switch gears on appellate review. *State v. Van Camp*, 213 Wis. 2d 131, 144, 569 N.W.2d 577, 584 (1997).

Regardless, the facts adduced at the hearing establish Kirk's standing to pursue his Fourth Amendment claim. A Fourth Amendment search occurs, and a defendant has standing to challenge the search, when the government has either violated the defendant's reasonable expectation of privacy under *Katz v. United States*, 389 U.S. 347 (1967) or committed a common law trespass of defendant's property under *United States v. Jones*, 565 U.S. 400 (2012). *State v. Popp*, 2014 WI App 100, ¶¶ 18-19, 357 Wis. 2d 696, 708, 855 N.W.2d 471, 477. Here, Trooper Nicholas's use of a knife and fiber optic scope to view

the contents of the locked trunk of a car satisfies either test.

A. The State Has Waived Any Argument Based on A Lack of a Reasonable Expectation of Privacy.

Kirk bore the initial burden to show that a Fourth Amendment search occurred. *State v. Bruski*, 2007 WI 25, ¶ 22, 299 Wis. 2d 177, 187, 727 N.W.2d 503, 508. Kirk's suppression motion discussed the "reasonable expectation of privacy" test and argued that the facts applied to the law as follows:

> Kirk has standing to challenge the search of the Jaguar. As an offer of proof, discovery provided by the State contains abundant evidence that Kirk purchased and owned the Jaguar, made arrangements to ship it to Green Bay, paid for the initial "pick up" fee, provided his phone number to permit both pick-up and delivery, and was ready, willing, and able to receive delivery of the Jaguar. Discovery also contains abundant evidence that Kirk took reasonable and effective steps to protect the contraband from being discovered, even by someone with the valet key that was provided to the truck driver.

(33:6). Note, a "valet key … starts the ignition and opens the driver's side door, but prevents the valet from gaining access to valuables that are located in the trunk or the glove box."[1]

The State filed a written response to Kirk's motion that did not dispute Kirk's contention that he

[1] https://en.wikipedia.org/wiki/Car_key (accessed 12/05/2019).

had a reasonable expectation of privacy in the locked trunk of his Jaguar. (36:1-2). Instead, the State argued that Kirk lacked "standing" to challenge the search of the *first car*, the Impala, and that the marijuana found in the Impala gave rise to probable cause to search the Jaguar. (*Id.*)

At the suppression hearing itself, the State's only reference to Kirk's standing to challenge the search of the Jaguar was when the prosecutor asserted at the outset that "on the issue of standing to search the Jaguar, I think that a little bit of a record needs to be made by the defense to establish that [Kirk] has a possessory interest in the vehicle." (92:3). Kirk's attorney then referred to the facts raised in its motion, and pointed out that "in its response the State did not either mention it or object or contradict it." (*Id.*)

Kirk's attorney offered to provide testimony, but then the prosecutor stated "I'm not going to push it significantly," as the prosecutor's concern was that Kirk would claim that the vehicle was his during the suppression hearing but then deny any possessory interest at trial. (92:4). Defense counsel responded by pointing out that Kirk could be impeached at trial with any testimony from the suppression hearing. (*Id.*) The court then concluded "I'm going to find that there's standing here. I'm going to base that on the pleadings that have been submitted thus far." (*Id.*)

Thus, the State had an opportunity to challenge Kirk's assertion of a reasonable expectation

of privacy in the Jaguar, but declined to do so. The court found that Kirk had standing "base[d] … on the pleadings … thus far," implicitly finding that the State had waived any challenge to Kirk's standing. (92:4). Accordingly, the balance of the hearing focused on the question of whether the State met its burden of showing that an exception to the warrant requirement applied. (92).

When a party decides not to contest a factual issue in circuit court, it cannot raise the issue on appeal, even if the party is the respondent to the appeal. For example, in *Van Camp*, 213 Wis. 2d at 144, the supreme court ruled that although it was respondent on appeal, the State waived an argument it had conceded in circuit court.

> This contention, advanced for the first time in briefs before this court, was waived by the State, and we decline to consider it. As a general rule, this court will not address issues for the first time on appeal. The reason for this general rule is to give trial courts the opportunity to correct errors, thus avoiding appeals. Had the State raised this issue below, the defendant would have had an opportunity to cure, and the trial court would have had the opportunity to consider, this claimed defect. We are unpersuaded that justice would be served here by entertaining the State's arguments where the trial court was not afforded an opportunity to do so.

Van Camp, 213 Wis. 2d at 144 (citations and quotation marks omitted).

As in *Van Camp*, if the State had challenged Kirk's assertion of a reasonable expectation of privacy in the locked trunk of his own car, Kirk "would have had an opportunity to cure, and the trial court would have had the opportunity to consider, this claimed defect." 213 Wis. 2d at 144. Kirk could have made an additional record for why he had a reasonable expectation of privacy, such as by explaining the significance of the valet key or by introducing the terms of the transportation contract.

Inducing Kirk to forgo making a record supporting his claim of a reasonable expectation of privacy in the locked trunk of his Jaguar by not contesting the issue, but then arguing on appeal that the record does not support a reasonable expectation of privacy, is the kind of "sandbagging" that the waiver rule is designed to prevent. *State v. Huebner*, 2000 WI 59, ¶ 12, 235 Wis. 2d 486, 493, 611 N.W.2d 727, 730. The State has waived this issue, and it should not be considered by this court.

B. A Fourth Amendment Search Occurred Under Either the Trespass or the Privacy Test.

Even if the court were to consider the standing issue on the merits, there was sufficient evidence adduced at the suppression hearing for Kirk to advance his claim. The Supreme Court has clarified that a Fourth Amendment claim exists *either* when there is an invasion of a "reasonable expectation of privacy," or there is a common law "trespass." *Popp*,

2014 WI App 100, ¶¶ 18-19. The search of the trunk of Kirk's Jaguar satisfies either test.

In *Jones*, the Supreme Court held that placing a GPS tracker on the undercarriage of the defendant's vehicle implicated his Fourth Amendment rights because it was a "physical intrusion" into the defendant's "private property for the purpose of obtaining information." 565 U.S. at 404-405. Even if the defendant did not have a reasonable expectation of privacy in the underbody of his vehicle – which, after all, would be exposed to the public roads – the act of intruding into the defendant's private property was the kind of governmental trespass that the Fourth Amendment was intended to prohibit. *Id.*

Here, the government's intrusion into Kirk's vehicle was even greater than the intrusion in *Jones*. Trooper Nicholas pushed in a rubber plug behind the bumper, and shoved his knife and a "fiber optic scope" through the opening. (92:27). The scope allowed Trooper Nicholas to see that inside the trunk were several duffle bags. (*Id.*) In addition, the knife pierced one of the duffle bags, as Nicholas could smell marijuana on the knife. (*Id.*) Nicholas then seized the Jaguar and opened the trunk with force. (*Id.*)

Certainly, if a private citizen uses a scope to peer inside the locked trunk of a car, sticks a knife in the trunk and pierces the luggage inside, and then forces open the trunk, that person has committed a

common law trespass.[2] "Where, as here, the Government obtains information by physically intruding on a constitutionally protected area, such a search has undoubtedly occurred." *Jones*, 565 U.S. at 407 n. 3. Kirk is thus entitled to claim that Trooper Nicholas's actions were an unreasonable search under the Fourth Amendment.

Trooper Nicholas's actions also violated Kirk's reasonable expectation of privacy. A "Fourth Amendment search occurs when the government violates a subjective expectation of privacy that society recognizes as reasonable." *Kyllo v. United States*, 533 U.S. 27, 33 (2001). Kirk certainly had a subjective expectation of privacy in the trunk of his vehicle. Kirk provided the transport company with a valet key that denied the company access to the trunk, suggesting that he expected the company to stay out of the trunk. The company's acceptance of the valet key demonstrates that it had no intent on accessing the trunk, further strengthening Kirk's subjective expectation that the contents of the trunk would remain private.

This expectation of privacy is one that society recognizes as reasonable. Society certainly recognizes that car trunks, as a general proposition, are private

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[2] "A trespass to a chattel may be committed by intentionally … using or intermeddling with a chattel in the possession of another" and "'[i]ntermeddling' means intentionally bringing about a physical contact with the chattel." Restatement (Second) of Torts § 217(b) & Comment E (1965).

areas not open to the public. For example, the Supreme Court recently held that if the defendant had been "in lawful possession and control of a rental car," he had a reasonable expectation of privacy in the trunk of that car, "even if the rental agreement [did] not list him … as an authorized driver." *Byrd v. United States*, 138 S. Ct. 1518, 1524 (2018). *See also United States v. Lupo*, 652 F.2d 723, 726 (7th Cir. 1981). Society also recognizes a right to maintain that privacy even when handing the car over to a third-party, as demonstrated by the widespread use of valet keys.

The facts of this case are thus easily distinguished from the two Seventh Circuit cases the State relies upon. In *United States v. Crowder*, 588 F.3d 929 (7th Cir. 2009), a car transporter gave police permission to search a car on his transport. Police found a significant amount of drugs in a "secret compartment" behind the backseat, after noticing that the backseat had been tampered with and was missing a screw. Although the defendant had a subjective expectation of privacy, the court concluded that it was not reasonable. 588 F.3d at 934 n. 6. The court reasoned that the defendant's car could not be considered the type of "closed container" where there is a reasonable expectation of privacy, because "[t]he doors to the Mustang were unlocked, the driver had the keys, and Crowder knew that the driver would be opening the doors and driving the car." *Id.* at 935 (*citing United States v. Villarreal*, 963 F.2d 770 (5th Cir.1992)).

The other case relied upon the State was almost identical to *Crowder*: a car transporter consented to a search of the main cabin of the defendant's (alleged) vehicle, and police found drugs in a secret compartment. *United States v. Covarrubias*, 847 F.3d 556, 557 (7th Cir. 2017) (per curiam). The court relied on *Crowder* to determine that the defendant did not have a reasonable expectation of privacy. Neither did he "have a legitimate expectation of privacy in the car because he did not own the car, had never been inside it, and did not control the car's contents." *Id*.

Thus, while the truck driver in *Crowder* and *Covarrubias* had access to the main compartment of the vehicle searched by the police, here Kirk had denied the driver access to the area searched by providing him with a key that would not unlock the trunk. Notably, in *Crowder* and *Covarrubias*, the government introduced the bills of lading that described the level of access authorized by the car owner. Here, the State only introduced dispatch sheets and driver logs, neither of which indicates that the driver was authorized to access the trunk. (37,39,99). In addition, neither *Crowder* nor *Covarrubias* discuss the "trespass" test for standing under *Jones*. 565 U.S. at 404-405. Thus, even if this court finds *Crowder* and *Covarrubias* persuasive and Kirk did not have a reasonable expectation of privacy, Trooper Nicholas's trespass constitutes a search that Kirk may challenge.

Accordingly, the circuit court properly determined that Kirk had standing to challenge Trooper Nicholas's search of his Jaguar.

II. The Record Does Not Establish That The Transport Driver Consented to The Search of the Locked Trunk of Kirk's Jaguar.

A. The Transport Driver Did Not In Fact Consent To The Search Of Kirk's Jaguar.

The State asserts that the trial court found that the truck driver consented to the search of Kirk's vehicle, and that this finding was not clearly erroneous. (State Br. at 7-10). The State misreads the record.

Once Kirk met his burden of showing that a Fourth Amendment search of his car occurred, the burden shifted to the State to prove that some exception to the warrant requirement applied. *State v. Kieffer*, 217 Wis. 2d 531, 542, 577 N.W.2d 352, 357, (1998). The State consistently argued that once the marijuana was found in the Impala, the automobile exception justified the search of Kirk's Jaguar. The State raised the concept of "consent" to justify the initial search of the *Impala*, not Kirk's Jaguar.

In the State's response to Kirk's suppression motion, the State argued that Kirk "lack[ed] standing to object to the search of the first vehicle, a Chevrolet Impala … [because] [t]here is no evidence that [Kirk] has any possessory interest in the Impala[.]" (36:1).

The State then argued that under the automobile exception to the warrant requirement, "when marijuana is located in one automobile on the transport truck, there is probable cause to search all containers, which are automobiles in this case, on the transport truck." (36:2).

During the suppression hearing, the State sought to establish that the truck driver consented to the search of the Impala:

> **State**: What happens after [returning the paperwork to the truck driver]?
>
> **Nicholas:** I asked him if I could look at the Impala.
>
> **State**: What did he say about that?
>
> **Nicholas**: Yes. That was fine.
>
> **State**: So did he consent to searching the cargo in his vehicle?
>
> **Nicholas**: Yes.
>
> **State**: What did you do after he gave you consent?
>
> **Nicholas**: I asked him if it was locked, if the car was locked. Some car haulers will lock all the cars, and some of them don't. So I asked him if it was locked. He said he didn't know. So he handed me the key for it, which was a single key with no key fob.

(92:23). Although Trooper Nicholas agrees with the State's broad recharacterization of his testimony –

that the driver "did consent to searching the cargo in his vehicle" – it is clear in context that Trooper Nicholas understood the prosecutor's reference to "the cargo" as being to the Impala, not to all of the cars on the trailer. His testimony was that he asked the driver for permission to search the Impala, not all the vehicles; and that he was then given a key to just the Impala, not all of the vehicles. (92:23). In any event, his subsequent testimony makes clear that he only asked for permission to search the Impala.

Specifically, Trooper Nicholas went on to describe the search of the Impala, but then states he could not remember whether he tried the doors of the Impala first before asking for a key, or asked for the key first. (92:23-24). Trooper Nicholas then consulted his report, and testified that his report stated the following:

> I asked if I could look at the Impala that was on the top row, and he said yes. I asked if it was unlocked. He said he didn't know. He handed me the keys. Once I crawled up the side, I tried to open the front passenger's door and found it locked. I tried the back door, and it opened, and I could immediately smell the marijuana.

(92:24). Later on cross-examination, after Trooper Nicholas's bodycam video[3] is played in court, Trooper

[3] The parties neglected to move the video into evidence at the hearing, so afterwards defense counsel filed a letter enclosing the video and requesting it be made a part of the record. (41). However, the court never acted on the request, and the circuit court did not include the DVD in the record on appeal. Although neither Kirk nor the state rely on the video

Nicholas confirmed that he specifically asked if he "could please look at the Impala[.]" (92:43).

After finding the marijuana in the Impala, Trooper Nicholas told the truck driver to shut off the truck as it would be brought to a Kansas Department of Transportation facility. (92:25-26). Trooper Nicholas then said "I just want to check the other cars in the truck. And I don't think there's anything else in there, but I just want to check." (92:46). Although Trooper Nicholas initially testified that he had specifically mentioned the Jaguar's paperwork (92:26), after listening to his bodycam video he admitted that he did not mention the Jaguar. (92:46-47).

In sum, at no point does Trooper Nicholas ask the driver for permission to search Kirk's Jaguar, or for general permission to search all the cars. Instead, Trooper Nicholas asked for permission to search the Impala specifically. And once he found the marijuana in the Impala, he told the driver to turn off the truck as they were going to wait for the DOT to convey it to another location, and told the driver that he would be searching the other cars in the interim.

Thus, the State does not rely on any of the statements made by the driver or Trooper Nicholas to support its consent argument. Instead, the State asserts that the "record indicates that the truck driver gave a key for Kirk's car to the trooper" and

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on appeal, for the sake of completeness Kirk is filing with this brief a motion to supplement the record with the video.

that this "act provided non-verbal consent to search." State Br. at 9. According to the State "[n]o other reasonable inference can be drawn from the driver handing over the key to the trooper." (*Id*.)

This is the first time that the State has claimed that the driver consented to the search through the act of handing over the Jaguar valet key to Trooper Nicholas. As discussed above, the State cannot raise such a fact-specific argument for the first time on appeal. *Van Camp*, 213 Wis. 2d at 144.

Regardless, "[c]onsent to search must be unequivocal and specific, and it must be freely and voluntarily given. Consent is not freely and voluntarily given if it is the result of mere acquiescence to a claim of lawful authority." *State v. Reed*, 2018 WI 109, ¶ 8, 384 Wis. 2d 469, 476, 920 N.W.2d 56, 59 (footnotes and quotation marks omitted).

To show that the driver's consent to search the trunk of the Jaguar was "unequivocal and specific," and not "mere acquiescence," the State cites to a passage in the suppression hearing where Trooper Nicholas explains how the Jaguar key would not open the trunk. State Br. at 9 (*citing* 92:27). Trooper Nicholas does not explain how he came into possession of the key. Thus, there is no evidence that the driver gave "unequivocal and specific" consent.

Further, the record indicates that the driver was not giving consent but "mere[ly] acquiesce[ing]" to Trooper Nicholas's request for the key to the

Jaguar. Given the sequence of events, the driver had to have given Trooper Nicholas the Jaguar key *after* he ordered the driver to turn off the truck while they waited for the DOT to arrive, and told the driver that he wanted to check the other vehicles. The driver had given Trooper Nicholas a "single key" to the Impala after saying he did not know whether it was locked. (92:23-24). Trooper Nicholas found the marijuana in the Impala, and then ordered the driver to turn off his truck. There is no evidence that Trooper Nicholas gave the driver any choice in the matter.

Accordingly, if the circuit court had found that the truck driver had in fact consented to Trooper Nicholas searching the Jaguar (or all of the vehicles including the Jaguar), either verbally or through non-verbal conduct, the court's finding would have been clearly erroneous.

However, it appears that the court only found that the driver consented to the search of the Impala. Here is the entire passage where the court discusses consent.

> I look then at the third-party consent issues that were raised. The fact of the matter is that the truck driver in this case authorized a search of the Impala. The issue, however, regarding the search of the Impala is -- is not really relevant. The issue of that car isn't before this Court. The fact of the matter is, some information -- the drugs were found in the Impala. I'm satisfied, however, that the driver of this truck, Ocampo, although he consented to the search, I don't find that he had the authority to consent to the search of that vehicle. I've considered all of the

> facts that surround the consent that he gave, and I'm not satisfied that in his role as the truck driver of this vehicle that was -- of this truck that was hauling cars gave him authority to authorize the search of any and all vehicles that were on that truck.

(94:4; App. 104). In this passage, the court explicitly states that the truck driver "authorized a search of the Impala," and never states that the driver consented to the search of Kirk's Jaguar.

Indeed, the court never mentions the Jaguar, and only references the Impala. Thus, the court's subsequent references to "that car" and "that vehicle" are references to the Impala, not to Kirk's Jaguar. And when the court states "although [the driver] consented to the search, I don't find that he had the authority to consent to the search of that vehicle," the Court is referring to the Impala, not Kirk's Jaguar. And, notably the court makes no factual findings with respect to the State's claim on appeal that the driver gave nonverbal consent to search the car.

The court went on to hold that the driver lacked the authority to consent to the "search of any and all vehicles that were on that truck," which would include both the Impala and the Jaguar. (94:4; App. 104). Indeed, the court may not have reached the question of whether the driver consented to the search of the Jaguar because the court had determined that the driver lacked the authority to do so regardless.

B. The Driver Lacked Authority To Consent to The Search Of the Trunk Of Kirk's Jaguar.

Even if the driver had in fact consented to the search of Kirk's Jaguar, he did not have the authority to do so. As discussed above, the court found that the driver was not authorized to give consent. On appeal, the State argues that the driver had apparent authority.

Once again, the State did not argue below that the driver had apparent authority to consent to the search of the vehicle. Indeed, the State said that the driver's authority was irrelevant because of a theory since abandoned by the State: that this was a proper regulatory search. Specifically, the State argued "[i]t's not that they [*i.e.*, car transport drivers] don't have the authority to grant consent. It's that the cases from Kansas are pretty clear that consent does not matter from the driver, because this is a tightly regulated interstate industry." (93:19). Because the State did not argue apparent authority below, it cannot do so here on appeal. *Van Camp*, 213 Wis. 2d at 144.

Still, the evidence that was adduced at the hearing does not support a finding of apparent authority to consent to the search of the locked trunk of the Jaguar, for the simple reason that by giving the driver only a valet key, Kirk had plainly limited the driver's access and control of the vehicle to the main cabin.

The United States Supreme Court sanctioned third-party consent doctrine in *United States v. Matlock*, 415 U.S. 164 (1974). The Court explained that the premise of third-party consent is that when people share "joint access or control" of property, they assume "the risk that one of their number might permit the common area to be searched." 415 U.S. at 172 n. 7 (citations omitted). Even when actual legal authority to consent is lacking, if the facts on the ground would lead an officer to reasonably believe that the person has authority – *i.e.*, "apparent" authority – to consent to the search, then the Fourth Amendment is not violated. *Illinois v. Rodriguez*, 497 U.S. 177, 183-189 (1990).

Because third-party consent is based on "joint access or control" over the property, it is not reasonable for law enforcement officials to believe that a third party has apparent authority to consent to the search of areas that the third party is not authorized to access. For example, the Wisconsin Supreme Court has held that officers did not have sufficient information to conclude that a homeowner had apparent authority to consent to the search of a separate loft area where his daughter and son-in-law were living, in part because the officers did not ask "whether the loft had a lock on the door, and if so, whether [the homeowner] had a key to it." *State v. Kieffer*, 217 Wis. 2d 531, 551, 577 N.W.2d 352, 361 (1998). Similarly, the Seventh Circuit has held that a friend possessing the defendant's briefcase did not have authority to consent to a search of the contents of the brief case, where the briefcase was locked and

the defendant had not told the friend the combination. *United States v. Basinski*, 226 F.3d 829, 835 (7th Cir. 2000).

Here, it was apparent to Trooper Nicholas that the truck driver was not authorized to consent to the search of the locked trunk of Kirk's Jaguar as soon as the key did not open the trunk. If the truck driver was not authorized to access the trunk – as manifest by Kirk providing a valet key that only allowed access to the main compartment – neither was the driver authorized to allow others to access the trunk.

III. The Government Lacked The Probable Cause Necessary To Satisfy The Automobile Exception To The Warrant Requirement.

The State lists five reasons for why Trooper Nicholas had probable cause to search the locked vehicle of Kirk's Jaguar. None are persuasive.

The State first points to "Trooper Nicholas's training and experience." State Br. at 11. Although a police officer's "training and experience" may be germane to a probable cause determination, ultimately it is up to the court to determine whether probable cause exists, not Trooper Nicholas. Indeed, as discussed below, many of Trooper Nicholas's explanations for why he searched the Jaguar appear to be post-hoc rationalizations for his search. For example, although Trooper Nicholas testified that he believed there were discrepancies in the Jaguar paperwork, he admitted after listening to his

recording that he did not actually ask about the Jaguar. (92:46-47).

The State next asserts that the transport driver's behavior was "suspicious," because he did not drive straight through from his final pickup to his destination. State Br. at 11-12. Instead, the driver spent 17 hours in Sacramento, California, and two days in Reno, Nevada. According to Trooper Nicholas, this was "not normal." (92:14).

However, not all abnormal behavior is criminal. There are any number of reasons the driver would spend two days in Reno, the "Biggest Little City in the World." Perhaps the driver enjoyed one of Reno's casinos. Trooper Nicholas testified that he doubted the driver's claim that he had tire issues, because he did not think it would take two to find tires in a town the size of Reno. But, that would depend on the time of day that the tire issues arose and the availability of a shop to fix them. The driver did get delayed in Reno because he got into a fight, but Trooper Nicholas could not recall whether the driver told him that before or after the search of Kirk's vehicle.

But, most importantly, neither the State nor Trooper Nicholas explain why stopping for an unusually long period of time is indicative of *criminal* behavior, specifically of loading drugs into a car on the transporter. "Under an analysis of probable cause to search, the relevant inquiry is whether evidence of a crime will be found[.]"*State v. Secrist*, 224 Wis. 2d 201, 209, 589 N.W.2d 387, 391 (1999). Putting

marijuana into the trunk of a car would take minutes, not days. Thus, the fact that the driver stopped for two days, even if it is "unusual," does nothing to increase the likelihood that a search of the trunk of the Jaguar would find marijuana or other drugs.

Third, as discussed in Kirk's opening brief, Trooper Nicholas' assessment of the cost of the Jaguar, even if accurate, is irrelevant in light of the numerous reasons a person would want to transport a car regardless of its current street value. Kirk Br. at 12-13.

Fourth, the state points to the "suspicious" bill of lading. State Br. at 12. As discussed in Kirk's opening brief, neither the state nor Trooper Nicholas explain why the minor discrepancies suggest any criminal activity, especially in light of the fact that the paperwork was prepared by one of the intermediaries, not Kirk himself. Kirk Br. at 12. For example, why would providing only a first name suggest criminal activity, if it were acceptable to the transport company? And, if the implication is that the owner was trying to hide his identity, couldn't the owner provide a fictitious last name as well? The sloppy paperwork of a trucking company should not be the basis for searching a customer's property.

Plus, it does not appear that Trooper Nicholas viewed the Jaguar bill of lading prior to searching it. Trooper Nicholas admitted that he asked about the Impala's bill of lading after discovering the

marijuana in the Impala, and then asked the driver if any other cars came from the same place as the Impala. (92:44-45). If Trooper Nicholas had seen the Jaguar's bill of lading, he would have known the answer to that question. Trooper Nicholas then tells the driver that he wants to check all of the cars on the transport, without specifically mentioning the Jaguar or asking to see the Jaguar's bill of lading. (92:46-47). Thus, it appears that the supposed discrepancies were used after the fact to justify the search.

Finally, the State relies on the discovery of the drugs in the Impala to justify the search of the Jaguar. State Br. 12-13. Tacitly acknowledging that "mere propinquity" to other criminal conduct will not give rise to probable cause, Kirk Br. at 10 (*citing Ybarra v. Illinois*, 444 U.S. 85, 91 (1979)), the State attempts to tie the two cars together by both having the same discrepancies in their paperwork. However, as discussed above, neither the State nor Trooper Nicholas explains how discrepancies in paperwork prepared by the trucking company, not Kirk, are indicative of criminal activity. "Zero plus zero equals zero," and the government lacked probable cause to search the locked trunk of Kirk's Jaguar. *Mentek v. State*, 71 Wis. 2d 799, 809, 238 N.W.2d 752, 758 (1976).

CONCLUSION

For the reasons stated above and in the initial brief, the court should reverse the Judgment of

Conviction with respect to Count 3, and order that the court grant Kirk's motion to suppress evidence.

Dated this 5th day of December, 2019.

Respectfully submitted,

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CERTIFICATIONS

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, as well as the November 27, 2019 order expanding the word count for this brief to 5,500 words. The length of this brief is 5,436 words.

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 5th day of December, 2019.

Signed:

Thomas B. Aquino
Assistant State Public Defender