STATE OF WISCONSIN
C O U R T O F A P P E A L S
DISTRICT II
Case No. 2024AP000617

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

CARTER A. NELSON,

Defendant-Respondent.

BRIEF OF PLAINTIFF-APPELLANT

On Appeal from a Final Order of the Waukesha County
Circuit Court, Case No. 2023CM1452,
The Honorable Dennis Moroney, Presiding

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

Constitutional Provisions

ISSUES PRESENTED

1. Did Nelson have standing to make a Fourth Amendment claim?

Circuit Court Answer: Yes

2. If one Fourth Amendment warrant requirement exception does not apply, does that invalidate a search of a vehicle?

Circuit Court Answer: Yes.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests neither oral argument nor publication. The briefs in this matter can fully present and meet the issues on appeal and fully develop the theories and legal authorities on the issues. *See* Wis. Stat. (Rule) 809.22(1)(b). Further, as a matter to be decided by one judge, this decision will not be eligible for publication. *See* Wis. Stat. (Rule) 809.23(1)(b)4.

STANDARD OF REVIEW

A trial court's decision on a motion to suppress evidence presents a mixed question of fact and law. *State v. Casarez*, 2008 WI App 166, ¶ 9, 314 Wis. 2d 661, 762 N.W.2d 385. The reviewing court will uphold the trial court's findings of fact unless they are clearly erroneous. *Id.*; Wis. Stat. § 805.17(2) (made applicable to criminal proceedings by Wis. Stat. § 972.11(1)). We review an order granting or denying a motion to suppress evidence as a question of constitutional fact, which requires a two-step analysis. *State v. Asboth*, 2017 WI 76, ¶ 10, 376 Wis. 2d 644, 654, 898 N.W.2d 541, 545 (citing *State v. Matalonis*, 2016 WI 7, ¶ 28, 366 Wis.2d 443, 875 N.W.2d 567). "First, we review the circuit court's findings of historical fact under a deferential standard, upholding them unless they

are clearly erroneous. Second, we independently apply constitutional principles to those facts." *Id*. (quoting State v. Robinson, 2010 WI 80, ¶ 22, 327 Wis.2d 302, 786 N.W.2d 463). Where the trial court does not make specific findings, it is necessary for this court to independently review the record. *Turner v. State,* 76 Wis. 2d 1, 18-19, 250 N.W.2d 706 (1977). The trial court's application of constitutional principles is reviewed de novo. *Casarez,* 314 Wis. 2d 661, ¶ 9.

STATEMENT OF THE CASE

On June 20th, 2023, at approximately 11:35 PM, Officer Goritz was on routine patrol in the City of New Berlin. (R2). The New Berlin Police Department had been notified by the West Allis Police Department that they were in a high-speed pursuit of a stolen vehicle that was possibly heading towards New Berlin. (R16). Officer Goritz was heading towards the West Allis city border to prepare to assist when he observed a car traveling in the opposite direction swerve to avoid a 2003 silver Ford Explorer, which was stopped in the middle of the road. (R16). Officer Goritz immediately identified the SUV as a traffic safety hazard as the SUV was parked in lane two on an angle, abandoned. (R16).

Given the information Officer Goritz had received from the West Allis Police Department regarding the high-speed pursuit, he was wary of the reason for the vehicle being parked there and was unsure whether it had anything to do with the high-speed pursuit. (R16). Officer Goritz approached the vehicle and observed there were no occupants inside of the vehicle and no lights, including hazard lights, were activated. (R16). From his outside vantage point, Officer Goritz was able to observe loose .223 Winchester rifle rounds scattered throughout the vehicle and it appeared cold to the touch. (R16). Officer Goritz later testified that through the window, he was also able to observe a glass vial in the cupholder of the center console containing a substance he believed, based on his training and experience, to be cocaine. (R16).

Given his concerns regarding the high-speed pursuit in West Allis, Officer Goritz requested additional officers to respond to the location. (R16). The officers found the vehicle to be unlocked and looked inside the vehicle for the keys or information about the identity or location of the driver of the vehicle. (R16). A Department of Transportation search of the vehicle found it to be registered to the defendant/appellee, Carter Nelson. (R16). Officers attempted multiple different ways to call or locate Nelson but were unable to get in contact with him that night. (R16). Officer Goritz testified that he was on the scene for almost 2 hours and Nelson never returned to retrieve his vehicle. (R16). As a result of nobody returning to the scene to remove the vehicle, it had to be towed from the scene to ensure the safe flow of traffic. (R16).

Officers seized the vial found in the cupholder and the substance within the vial later tested positive for cocaine. (R16). The State of Wisconsin then charged Nelson with Possession of Cocaine contrary to Wis. Stat. § 961.41(3g)(c). (R2). Nelson then filed a Motion to Suppress for Lack of Probable cause, arguing the cocaine evidence seized from the subject vehicle was found during an illegal search of his vehicle in violation of his Fourth Amendment right against warrantless searches and seizures because Officer Goritz did not have a warrant at the time he searched Nelson's vehicle. (R10) The State of Wisconsin filed a letter brief in response. (R14)

A hearing was held on Nelson's Motion to Suppress For Lack of Probable Cause on January 8, 2024. At that hearing, Officer Goritz testified that, although he was able to see the vial of cocaine from outside of the vehicle, the vial was not the basis for the search. (R16:28, 21). He testified that the main concerns of the officers was to ensure other motorists did not strike the abandoned car, to get the vehicle moved out of the way of traffic, and to ensure the safety of any nearby civilians and the officers. (R16). Officer Goritz further testified that he

ultimately towed the car because he believed it was a safety issue and impeded the flow of traffic. (R16:28, 21).

After hearing the testimony of Officer Goritz and the legal arguments made by the parties, the circuit court granted Nelson's Motion to Suppress for Lack of Probable Cause. (R18:40). The State subsequently filed a Motion for Reconsideration of the circuit court's January 8th ruling. (R19). A hearing was held on the State's Motion for Reconsideration on February 5th, 2024. After hearing further legal arguments by the parties, the circuit court upheld its prior ruling granting Nelson's Motion to Suppress the Evidence for Lack of Probable Cause. (R19).

This appeal follows.

Additional relevant facts will be set forth, below.

ARGUMENT

I. THE CIRCUIT COURT ERRED IN SUPPRESSING THE EVIDENCE AS THE DEFENDANT DOES NOT HAVE STANDING AND MULTIPLE FOURTH AMENDMENT WARRANT REQUIREMENT EXCEPTIONS APPLY

a. The defendant does not have standing to claim a violation of the Fourth Amendment warrant requirement

Both the United States and Wisconsin Constitutions provide express protections against unreasonable searches and seizures conducted by the government. U.S. Const. amend IV.; Wis. Const. art. 1, §11. However, these protections are not absolute. As a threshold question, courts must first determine whether a "search" or "seizure" has occurred such that the actions of law enforcement implicate the Fourth Amendment.

See Katz v. United States, 389 U.S. 347, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967).

To have a Fourth Amendment claim, the proponent must initially satisfy two requirements. *Boyd v. United States*, 116 U.S. 616, 630, 6 S.Ct. 524, 29 L.Ed. 746 (1886). The Fourth Amendment protects citizens from government intrusion. *Id*. First, the search must have been done by a government agent. *Id*. Given that Officer Goritz, a government agent as a law enforcement officer, conducted the search, Nelson has satisfied this requirement.

Second, an individual must have standing. *Rakas v. Illinois*, 439 U.S. 128, 130 n. 1, 99 S.Ct. 421, 58 L.Ed.2d 387 (1978). Standing exists when an individual has a reasonable expectation of privacy. *Id*. at 144, 99 S.Ct. 421. The proponent of a Fourth Amendment claim bears the burden of proving that he or she had a reasonable expectation of privacy. *State v. Whitrock*, 161 Wis.2d 960, 972, 468 N.W.2d 696 (1991) (citing *Rawlings*, 448 U.S. at 104, 100 S.Ct. 2556). To determine whether a reasonable privacy interest exists, the Supreme Court adopted the two-prong test laid out in Justice Harlan's concurrence in *Katz v. United States*: (1) the person must exhibit an actual (i.e. subjective) expectation of privacy in the area searched and the item seized, and (2) the expectation must be justifiable in that society is prepared to recognize it as reasonable. *Katz*, 389 U.S. 357, 361; *State v. Bruski*, 2007 WI 25, ¶ 21, 299 Wis. 2d 177, 186, 727 N.W.2d 503, 508.

In considering whether an individual's expectation of privacy constitutes a legitimate or justifiable one, the Wisconsin Supreme Court has stated that the following factors may be relevant:

> (1) whether the accused had a property interest in the premises; (2) whether the accused is legitimately (lawfully) on the premises; (3) whether the accused had complete dominion and control and the

> right to exclude others; (4) whether the accused took precautions customarily taken by those seeking privacy; (5) whether the property was put to some private use; and (6) whether the claim of privacy is consistent with historical notions of privacy.

Id. (citing *Smith v. Maryland*, 442 U.S. 735, 740, 99 S.Ct. 2577, 61 L.Ed.2d 220 (1979); *Dixon*, 177 Wis.2d at 468, 501 N.W.2d 442. Fat 469, 501 N.W.2d 44)).

Nelson clearly did not establish a reasonable expectation of privacy in this instance. While he did have a property interest in the vehicle as its owner, the vehicle was illegally parked on the street in violation of the City of New Berlin ordinance. Nelson failed to have complete dominion and control over the vehicle since he was nowhere near the vehicle at the time that the Officer Goritz first observed the vehicle. He also did not take the customary precaution of those seeking privacy by locking the vehicle. All the behavior by Nelson surrounding the handling of his vehicle on June 20, 2023, was not consistent with historical notions of privacy. Those seeking privacy regarding their belongings typically take steps towards establishing privacy from others. It would be illogical to say that someone who leaves their unlocked vehicle in the middle of a public street is seeking privacy from the intrusion of others and is inconsistent with historical notions of privacy.

Further, a person cannot have a reasonable expectation of privacy in an item after they have abandoned it. *See State v. Roberts*, 196 Wis. 2d 445, 453, 538 N.W.2d 825, 828 (Ct. App. 1995) (citing *Abel v. United States*, 362 U.S. 217, 241, 80 S.Ct. 683, 698, 4 L.Ed.2d 668 (1960) "In the fourth amendment context, the test for abandonment of property is distinct from the property law notion of abandonment; it is possible for a person to retain a property interest in an item but nonetheless to relinquish his or her reasonable expectation of privacy in the object. *United States v. Thomas*, 864 F.2d 843, 845

(D.C.Cir.1989). Abandonment is an ultimate fact or conclusion based generally on a combination of act and intent. *Friedman v. United States,* 347 F2d 697 (8th Cir. 1965).

In *State v. Rem,* the court determined that a suitcase left on an Amtrak public luggage rack had been abandoned. Rem was traveling on an Amtrak train with a suitcase. *United States v. Rem*, 984 F.2d 806, 811 (7th Cir. 1993). Instead, of checking the suitcase he chose to place it on a public luggage rack without any identification markings. Rem then abruptly left the train without it. Rem's failure to pick up the luggage along with several other factors indicated to the court that he had abandoned the luggage and, therefore, he retained no legitimate expectation of a privacy interest in it. *Id.*

Here, like in *State v. Rem*, Nelson did not have an expectation of privacy in the vehicle when he left it parked in the middle of a public road, unlocked, and did not return to retrieve it for over two hours. The court in Rem determined that Rem could not have a legitimate expectation of privacy in the suitcase and so, the Fourth Amendment protection against warrantless search and seizure could not apply because it would be unreasonable for someone to expect a right to privacy in property that has been abandoned in a public place. It is unlikely that society would be willing to recognize such an expectation of privacy as reasonable or justifiable as it would preclude law enforcement officers' ability to intervene in a suspicious or dangerous situation. Such a situation is exemplified in this case before the court. A reasonable person who had abandoned their vehicle in the manner that Nelson did would reasonably expect the vehicle to be checked by law enforcement and moved out of the way of other cars.

It was readily apparent that Nelson's vehicle was abandoned. Officer Goritz testified that based on his observations of the vehicle, he immediately thought the vehicle was abandoned.

Q: I heard you say "abandoned property." Why do you think the car was abandoned?

A: So it's on -- In the City of New Berlin, you can't park on any street unless you have law enforcement permission. And the way that it was parked, it was parked in lane two, so there's no shoulder on National until you get west of Calhoun Road.

Q: And did this vehicle have permission to park there?

A: It did not.

Q: I heard you also state the car was cold. What did that mean to you?

A: That it's been sitting there a while, and he made no attempt to contact us, dispatch, or anyone. And really, particularly if someone was in an emergency and needed to leave their vehicle there, they normally leave their hazard lights on.

Q: How long in total were you at this location?

A: We were on the call for over an hour and 15 minutes. And I was there for probably two and a half hours because I sat there to make sure he didn't show up on foot again.

Q: Did he ever show up again?

A: He did not.

(R18:15-16).

Further, the circuit court even said directly in their ruling that the subject vehicle was obviously abandoned and that there was a question regarding Nelson's expectation of privacy.

> Court: First of all, I do believe that there is a question of reasonable expectation of privacy. I mean, obviously the car was abandoned or so it appeared at least. It's parked in some cockamamy angle on the side of a roadway where there's no parking allowed.

(R18:37,10-13).

This reasoning by the circuit court indicates that the Nelson not have a reasonable privacy interest in the abandoned vehicle.

Given that a reasonable expectation of privacy is a necessary element to bring a Fourth Amendment claim, the circuit court erred in finding that Nelson had standing to assert a Fourth Amendment violation after finding that the vehicle was abandoned.

II. IT IS NOT NECESSARY TO PROVE THAT THE "PLAIN VIEW" DOCTRINE APPLIES TO ESTABLISH A LAWFUL SEARCH OF THE DEFENDANT'S VEHICLE BECAUSE MULTIPLE OTHER WARRANT REQUIREMENT EXCEPTIONS EXIST

"A seizure conducted without a valid warrant is presumptively unreasonable." *State v. Asboth*, 2017 WI 76, 376 Wis. 2d 644, 655, 898 N.W.2d 541, 545–46 (citing *State v. Brereton*, 2013 WI 17, ¶ 24, 345 Wis.2d 563, 826 N.W.2d 369). The proponent of a warrantless seizure must therefore

overcome this presumption. A seizure deprives an individual of "dominion over his or her person or property," *Horton v. California*, 496 U.S. 128, 133, 110 S.Ct. 2301, 110 L.Ed.2d 112 (1990), whereas a search occurs "when an expectation of privacy that society is prepared to consider reasonable is infringed." *United States v. Jacobsen*, 466 U.S. 109, 113, 104 S.Ct. 1652, 80 L.Ed.2d 85 (1984).

The question is, not whether the search was authorized by state law, but because the ultimate touchstone of the Fourth Amendment is "reasonableness," the question is rather whether the search was reasonable under the Fourth Amendment. *Dakota v. Opperman*, 428 U.S. 364, 372, 96 S. Ct. 3092, 3099, 49 L. Ed. 2d 1000 (1976); *Asboth*, 2017 WI 76. The Fourth Amendment warrant requirement is thus subject to certain exceptions for reasonable searches. *See Asboth*, 2017 WI 76.

In the context of warrantless seizures involving automobiles, there exists a strong governmental interest, recognized under the Fourth Amendment, to ferret out crime and conduct necessary investigations before the vehicle and its occupants may be "spirited away." *Brereton*, 2013 WI 17, ¶ 28 (citing *Florida v. White*, 526 U.S. 559, 565, 119 S.Ct. 1555, 143 L.Ed.2d 748 (1999)). Law enforcement also has a "substantial" interest in "minimizing the risk of harm" to officers or occupants of a vehicle. Brereton, 2013 WI 17, ¶ 28. In addition, other "substantial" governmental interests may justify warrantless seizures. *See Brereton*, 2013 WI 17, ¶ 28 (citing *United States v. Place*, 462 U.S. 696, 103 S. Ct. 2637, 77 L. Ed. 2d 110 (1983). These interests are further significant when the object to be seized is a vehicle located in a public place. *Brereton*, 2013 WI 17, ¶ 28 (citing *White*, 526 U.S. at 565–66, 119 S.Ct. 1555).

An automobile may be searched without warrant if there is probable cause to search the vehicle, and the vehicle is readily mobile. *State v. Sherry*, 2004 WI App 207, 277 Wis. 2d 194; *State v. Marquardt*, 2001 WI App 219, 247 Wis. 2d 765. A probable cause finding requires an assessment of "whether,

under the totality of the circumstances, given all the facts and circumstances ... there is a fair probability that contraband or evidence of a crime will be found in a particular place." *State v. Sutton*, 338 Wis. 2d 338, 346 (Ct. App. 2011).

Here, there is no dispute that the defendant's vehicle was readily mobile, Officer Goritz was lawfully on the public street, and that he could see through the windows of the vehicle.

A. The circuit court erred in requiring the elements of the plain view warrant exception to be met

Officer Goritz used the term "plain view" in his incident report causing Nelson's defense attorney to cite to the "plain view" doctrine as a reason to suppress the evidence. The circuit court then granted the motion to suppress the evidence because the search of Nelson's vehicle did not meet the necessary elements of the "plain view" exception to the Fourth Amendment warrant requirement. However, it is not necessary to establish that the vial was in "plain view" to determine that the search of Nelson's vehicle was lawful given the multiple other warrant requirement exceptions apply.

The rationale behind the plain view doctrine is that if an article is already in plain view, neither its observation nor its seizure would involve any invasion of privacy. *Horton v. California*, 496 U.S. 128, 133–34, 110 S. Ct. 2301, 2306, 110 L. Ed. 2d 112 (1990) (citing *Arizona v. Hicks*, 480 U.S. 321, 325, 107 S.Ct. 1149, 1152, 94 L.Ed.2d 347 (1987). Under *Horton*, for the plain view doctrine to apply "the evidence must be in plain view, the officer must have a lawful right of access to the object itself, and the object's incriminating character must be immediately apparent." *Horton*, 496 U.S. at 136–37. To show that the incriminating character of the item was "immediately apparent," police are required to prove they had probable cause to believe the item in plain view was evidence or contraband and the probable cause determination is a subjective standard made by the officer. *Id.*

Officer Goritz wrote in his report that he was able to see the vial of cocaine from outside of the vehicle "in plain view" and, based on his training and experience, it was immediately apparent to him that the vial was cocaine. However, Officer Goritz also testified on the stand multiple times that his observation of the vial of cocaine was not the reason for his search of the vehicle.

> Q: Again, your main concern was originally for searching the vehicle was not the cocaine, correct?
> A: Yes.
> Q: What was?
> A: It was someone trying to ambush myself or my partners.

(R18:26-27).

As such, it is not the plain view exception, but the community caretaker function exception to the Fourth Amendment warrant requirement that applies.

B. A warrant was not required because Officer Goritz was acting within in his community caretaker function when he searched and moved the vehicle

Law enforcement officers may conduct a warrantless seizure without violating the Fourth Amendment when performing community caretaker functions. *See State v. Kramer*, 2009 WI 14, ¶¶ 19-20, 315 Wis.2d 414, 759 N.W.2d 598. This exception is broadly recognized by the Wisconsin Supreme Court when considering law enforcement officers' interests while "serving as a community caretaker to protect persons and property." *Asboth*, 2017 WI 76 (citing *State v. Pinkard*, 2010 WI 81, ¶ 14, 327 Wis.2d 346, 785 N.W.2d 592). The community caretaker exception to the warrant requirement

accounts for the multifaceted nature of police work. *Asboth*, 2017 WI 76 (citing *State v. Kramer*, 2009 WI 14, ¶¶ 19-20, 315 Wis.2d 414, 759 N.W.2d 598). As the Wisconsin Supreme Court has observed, "Police officers wear many hats: criminal investigator, first aid provider, social worker, crisis intervener, family counselor, youth mentor and peacemaker, to name a few.... They are society's problem solvers when no other solution is apparent or available." *Asboth*, 2017 WI 76 (quoting *State v. Matalonis*, 2016 WI 7, 366 Wis. 2d 443, 875 N.W.2d 567).

When evaluating a claimed community caretaker justification for a warrantless search or seizure, Wisconsin courts apply a three-step test, which asks:

> (1) whether a search or seizure within the meaning of the Fourth Amendment has occurred; (2) if so, whether the police were exercising a bona fide community caretaker function; and (3) if so, whether the public interest outweighs the intrusion upon the privacy of the individual such that the community caretaker function was reasonably exercised.

Asboth, 2017 WI 76.

Given that Nelson's car was searched and towed, there is no dispute that a seizure of Nelson's car occurred within the meaning of the Fourth Amendment. The community caretaker justification evaluation should then be focused on the second and third prongs of the test.

A court assessing whether an officer acted for a bona fide community caretaker purpose may consider the officer's subjective intent. *Id*. However, this step of the test ultimately turns on whether the officer can "articulate an objectively reasonable basis" for exercising a community caretaker

function. *Asboth*, 2017 WI 76 (citing *Pinkard*, 327 Wis.2d 346, ¶ 31).

Here, impoundment and seizure of Nelson's vehicle was clearly reasonable due to all the functions that the officers were forced to perform while handling the situation caused by the vehicle. Officer Goritz articulated an objectively reasonable basis for exercising a community caretaker function when he testified multiple times at the January 8th motion hearing that he felt the need to search the vehicle due to his many safety concerns.

> Q: And you approached the vehicle, and what did you observe inside of the vehicle when you looked through the window?
> A: When I walked up to the passenger side of the vehicle, I was able to observe the rifle rounds on the center console. So just on the center console and so just in the center of the vehicle, which is very unusual. I've never probably in 1,000 traffic stops I've made never once have seen rifle rounds just dumped everywhere. The defendant's ID and at the time what seemed to be a vial of cocaine.
> Q: What were you -- what made you -- Was there anything that made you the most suspicious?
> A: The rifle rounds.
> Q: And what did you do after you saw the vehicle or after you looked through the windows? Excuse me.
> A: That's when I dispatched other units to come my way. When I was saying I go 533, that's one of my sergeants because I knew they were relatively close to the area I was in. Just due to that original pursuit occurring with West Allis, most of

> us were located somewhere on the east side of the City of New Berlin; and so I wanted everyone there to illuminate the area. It really heightened my threat perception from this pursuit happening, also going through trainings within the Department within that same week for active shooters, all that. It's a very high residential area. The vehicle was located a block north of an elementary school. So I know it was nighttime, but that doesn't mean anything at that point. So –
> Q: Why did you feel back-up -- I mean -- I mean, can you explain a little bit more about why you felt that was necessary?
> A: Sure. So the area we're in, it's low light. There's a few streetlights down there, but it's very low light. There's open fields all throughout there. That business that was just north of where the vehicle was parked in front of, that's usually not open all the time. It's abandoned. There was an open door that we located on that business as well. So just due to the area, the areas of where someone could possibly be hiding attempting to ambush officers. There's an apartment complex that was directly east of where we were located, and there's a lot of criminal activity that occurs in there, including the shootings that happened there.

(R18:10-12).

In the interests of public safety and as part of what the Court has called "community caretaking functions, automobiles are frequently taken into police custody. *Asboth*, 2017 WI 76 (quoting *State v. Matalonis*, 2016 WI 7, 366 Wis.

2d 443, 875 N.W.2d 567). Police will also frequently remove and impound automobiles which violate parking ordinances, and which thereby jeopardize both the public safety and the efficient movement of vehicular traffic. *See South Dakota v. Opperman*, 428 U.S. 364, 96 S. Ct. 3092, 49 L. Ed. 2d 1000 (1976). The authority of police to seize and remove from the street, vehicles impeding traffic or threatening public safety and convenience is beyond challenge. *State v. Callaway*, 106 Wis. 2d 503, 509–10, 317 N.W.2d 428, 432 (1982) (citing *South Dakota v. Opperman*, supra at 367, 368, 369, 96 S.Ct. at 3096).

These caretaking procedures have almost uniformly been upheld by the state courts, which by virtue of the localized nature of traffic regulation have had considerable occasion to deal with the issue. *See South Dakota v. Opperman*, 428 U.S. 364, 369–71, 96 S. Ct. 3092, 3097–98, 49 L. Ed. 2d 1000 (1976). To permit the uninterrupted flow of traffic and, in some circumstances, to preserve evidence, disabled or damaged vehicles will often be removed from the highways or streets at the behest of police engaged solely in caretaking and traffic-control activities. *Asboth*, 2017 WI 76 (quoting *State v. Matalonis*, 2016 WI 7, 366 Wis. 2d 443, 875 N.W.2d 567).

Nelson's vehicle was parked unattended in lane two of traffic, causing an impediment to traffic and a potential safety hazard, clearly falling directly into both caretaking and traffic-control activities.

In applying the Fourth Amendment standard for "reasonableness" of the law enforcement officer's exercise of a bona fide community caretaker function, the state courts have overwhelmingly concluded that, even if an inventory is characterized as a "search," the intrusion is constitutionally permissible. The reasonableness evaluation is done by "balancing [the] public interest or need that is furthered by the officer's conduct against the degree of and nature of the restriction upon the liberty interest of the citizen." *Asboth*,

2017 WI 76 (quoting *Kramer*, 315 Wis.2d 414, ¶ 40.) Four factors are generally considered:

> (1) the degree of the public interest and the exigency of the situation; (2) the attendant circumstances surrounding the seizure, including time, location, the degree of overt authority and force displayed; (3) whether an automobile is involved; and (4) the availability, feasibility and effectiveness of alternatives to the type of intrusion actually accomplished.

Id., (quoting *State v. Kelsey* C.R., 2001 WI 54, ¶ 36, 243 Wis.2d 422, 626 N.W.2d 777). The degree of public interest and exigency of the situation surrounding Nelson's abandoned vehicle was broad and concerning. An automobile was involved and there was no force used by any of the officers. The officers also attempted to contact Nelson multiple times to move the vehicle in as an alternative, but to no avail. The intrusion put upon Nelson was not unreasonable under the circumstances.

Impoundments of vehicles for community caretaking purposes are consonant with the Fourth Amendment so long as the impoundment decision was reasonable under the circumstances. *Asboth*, 2017 WI 76. In *State v. Callaway*, the mere fact that the car was parked illegally made the impoundment of the vehicle reasonable. *Callaway*, 106 Wis. 2d 503.

When vehicles are impounded, local police departments generally follow a routine practice of securing and inventorying the automobiles' contents. These procedures developed in response to three distinct needs: (1) the protection of the owner's property while it remains in police custody, ...; (2) the protection of the police against claims or disputes over

lost or stolen property, ...; and (3) the protection of the police from potential danger. *Id*.

In analyzing the question of what constitutes a lawful impoundment as a condition precedent to a warrantless inventory search, the court of appeals concluded that based upon the decisions of several other courts, a vehicle is lawfully impounded if… there is shown to be a reasonable police need to impound the vehicle. *Callaway*, 106 Wis. 2d 503; *South Dakota v. Opperman*, supra at 367, 368, 369, 96 S.Ct. at 3096.

As seen in Officer Goritz's body camera footage and testified by him at the motion hearing on January 8th, the vehicle was illegally parked in the middle of the street and was causing other vehicles to swerve to avoid colliding with it. Officer Goritz also testified that the city of New Berlin has a city ordinance prohibiting vehicles to park overnight on any public roadway without the permission of the city. New Berlin City Ordinance § 261-4. He further testified that as a part of their standard operating procedure, the New Berlin Police Department conducts inventory searches of vehicles that are towed.

Here, the officers' search would clearly be within the scope of the of a reasonable seizure and inventory search. By towing the vehicle from the middle of the road, they were adhering to the New Berlin City ordinance. But, if they had followed the procedures of the New Berlin Police Department by conducting an inventory search on after the impoundment of the vehicle, they would have neglected their community caretaker responsibilities. However, the officers would have inevitably discovered the vial of cocaine during the inventory search back at the police department because it was simply in the center console cup holder of the vehicle. Thus, the discovery of the vial is admissible under the inevitable discovery doctrine of the warrant requirement.

C. The evidence is admissible under the inevitable discovery doctrine as it would have been found

after the vehicle was towed to the New Berlin Police Department and subjected to an inventory search

Under the inevitable discovery doctrine, "evidence obtained during a search which is tainted by some illegal act may be admissible if the tainted evidence would have been inevitably discovered by lawful means." *State v. Lopez*, 207 Wis.2d 413, 427, 559 N.W.2d 264 (Ct.App.1996) (citing *State v. Schwegler*, 170 Wis.2d 487, 499, 490 N.W.2d 292 (Ct.App.1992)); *State v. Jackson*, 2016 WI 56, 369 Wis. 2d 673, 697–98, 882 N.W.2d 422, 434.

An impoundment decision made pursuant to standardized procedures will most likely, although not necessarily always, satisfy the Fourth Amendment." *United States v. Coccia*, 446 F.3d 233, 238 (1st Cir. 2006). Law enforcement officers' lack of adherence to standard criteria, if they exist, does not by default render a warrantless community caretaker impoundment unconstitutional under the Fourth Amendment reasonableness standard. *Id*. Under the reasonableness standard, "a police officer's discretion to impound a car is sufficiently cabined by the requirement that the decision to impound be based, at least in part, on a reasonable community caretaking concern and not exclusively on 'the suspicion of criminal activity.'" *Coccia*, 446 F.3d at 239 (quoting *Bertine*, 479 U.S. at 375, 107 S.Ct. 738).

To prove inevitable discovery, the prosecution must demonstrate: (1) a reasonable probability that the evidence in question would have been discovered by lawful means but for the police misconduct; (2) that the leads making discovery inevitable were possessed by the government at the time of the misconduct; and (3) that prior to the unlawful search the government also was actively pursuing some alternate line of investigation. *State v. Jackson*, 2016 WI 56, 369 Wis. 2d 673, 704, 882 N.W.2d 422, 437.

Because courts identify these objective justifications for the impoundment, the Wisconsin Supreme Court cases make clear that, even if the officers had an additional investigatory interest in conducting a subsequent inventory search, the officers' subjective interests do not render the warrantless seizure of the car unconstitutional. *See Kramer*, 315 Wis.2d 414, ¶ 32. *State v. Asboth*, 2017 WI 76, 376 Wis. 2d 644, 660, 898 N.W.2d 541, 548. "Even if the police were not actively pursuing an alternative line of investigation at the time of police error or misconduct, for example, the government may well be able to establish that the execution of routine police procedure or practice inevitably would have resulted in discovery of disputed evidence." *Id*. § 11.4(a) n. 164, at 368 (quoting *Thomas*, 524 F.3d at 862 (*Colloton*, J., concurring)). *State v. Jackson*, 2016 WI 56, 369 Wis. 2d 673, 706, 882 N.W.2d 422, 438.

Courts exclude evidence only when the benefits of deterring police misconduct "outweigh the substantial costs to the truth-seeking and law enforcement objectives of the criminal justice system." *Id*. As a result, if the court were to insist upon suppression even when the State presents evidence proving that it inevitably would have discovered thae evidence, we would improperly apply exclusion in a purely punitive manner. *Id*.

The circuit court agreed that the evidence would have likely been found once it was subject to an inventory search back at the New Berlin Police Department. The court indicated that the reason the inevitable discovery doctrine did not apply was that when the search was conducted, it was not back at the police station like the policy usually instructs. However, this reasoning does not conform to the case law because there were lawful reasons for the search of the vehicle at the scene other than and the evidence would have been found even without the misconduct of the officers. Further, it would not make practical sense to prohibit officers from searching a vehicle at the scene

in this way and would impede officers' ability to do their job as investigators and safety officers.

> Circuit Court: Now, an inventory search under the protocol of the New Berlin Police Department is to take place back at the police department, not on the scene. So that part I don't know if it was really a legit inventory search, per se.

(R18:38).

> So I don't think that you have a right to take a look at that at that juncture. You had to bring the car in for an inventory search, regular protocol of the department. And if you would have done that, then I would have said, fine, I think that you have a legitimate stop -- stop in inventory here and a probable cause to search the car based upon its not being there and based upon the fact the guy did not come back for a total of over three hours, based on the time the officers were there and the time he was waiting in the car. So there's no question about that.

(R18:38-39).

> So I'm going to rule that you cannot use the item sought in the search under the circumstances. First of all, the rifle rounds are not contraband, and the vial was obtained in violation of this gentleman's Fourth Amendment rights under the circumstances of the way this search was conducted and when it was conducted.

(R18:40).

> What he did was do all these things that you said he could have done, he didn't do until after he discovered, after he went in and, and found the, the cocaine. If he would have done those things you suggested, A, take the car in, go and inventory it at the station, there would be no problem with this.

(R25:13).

> That is the problem, as I see it and, and in all due respect to the officer, I don't think he meant wrong by it but, you know, he took a shortcut and he should have done it the hard way, the long way. And that is to go in and exercise his duties as an officer and take the car in. If need be he could have moved it out of the way under his community caretaker situation. It was, it did go out into the roadway a bit, based on my observation, and certainly that would have been legit to push it, push it off the road or something to that extent or to have it towed off the road. But he didn't do any of that stuff at the time. He, he went in and under a pretense of, of plain view, and there was no way physically he could have done that. And unfortunately he, he kind of back-doored the discovery issue in this case when he could have done it properly and gone through the front door with the, with the inventory search. And, you know, even if he saw something in there and he smelled a rat, so be it. Then you got the inevitable discovery rule. But he didn't do any of those things. See? And that's where I ruled as I did. And I think

> that, you know, had he thought about it and, and gone through the steps, I don't think there would have been a problem with what he did. But when he did it he shortcut it and he tried to, he went and took the evidence before he had the right to take it and determine what it was and, or what he felt it was and, you know, that was improper. And that is why I ruled as I did to suppress the evidence under the circumstances of this search, which was before it was taken to the station, before inevitable discovery or before any kind of community caretaker situation was even considered.

(R25:14-15).

The circuit court erred in asserting that the violation of the New Berlin Police Department's inventory search procedures made the warrantless search a per se violation of Nelson's Fourth Amendment rights. As long as the break from procedure or misconduct was not the only reason the evidence was found and the discovery would have been made by lawful means, then the change from procedure does not make the search invalid. After Officer Goritz's discovery of the vial of cocaine, Nelson's vehicle was towed from the scene, impounded, and inventory searched. Nelson's vehicle would have been towed even if Officer Goritz had not searched the vehicle at the scene because the vehicle was blocking traffic and causing a safety concern. Additionally, the officers needed to search the vehicle during their effort to find out who the driver of the vehicle had been when it was abandoned on the road. As such, the departure from New Berlin Police Department policy had no impact on the vial's discovery and should not be suppressed purely for punitive reasons.

CONCLUSION

For the reasons stated above, Nelson was not subject to an illegal search of his vehicle in violation of his Fourth Amendment rights. All evidence was obtained during a lawful search. As such, the evidence should not be suppressed from use at trial or any other court proceeding relating to charges against him. Thus, the State respectfully requests the Court to reverse the circuit court's decision to grant Nelson's Motion to Suppress for Lack of Probable Cause.

Dated June 21, 2024

Respectfully submitted,

Electronically signed
/s/ Alexis Werthmann

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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b), (bm) and (c) for a brief. The length of this brief is 7,846 words.

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APPENDIX CERTIFICATION

I hereby certify that filed with this brief is an appendix that complies with s. 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under s. 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using one or more initials or other appropriate pseudonym or designation instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

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