STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case No. 2024AP000617-CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

CARTER A. NELSON,

Defendant-Respondent.

On Appeal from an Order Suppressing Evidence Entered in the Waukesha County Circuit Court, the Honorable Dennis Moroney, Presiding.

BRIEF OF DEFENDANT-RESPONDENT

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ISSUE PRESENTED

A New Berlin police officer came upon Carter Nelson's unoccupied vehicle parked at an angle in the right lane of the road. Eleven minutes later, police officers entered the vehicle and searched it, finding a small vial containing cocaine under Mr. Nelson's identification card in a cupholder.

> Did the warrantless search of the vehicle violate Mr. Nelson's Fourth Amendment right against unreasonable searches?

The circuit court answered yes, finding that the search was neither justified by plain view nor was it a proper inventory search.

POSITION ON ORAL ARGUMENT AND PUBLICATION

The defense requests neither oral argument or publication. This case may be resolved by applying well-established legal principles to the facts of this case.

STATEMENT OF FACTS

On June 20, 2023, at approximately 11:35 p.m. New Berlin Police Officer Jack Goritz was traveling northbound on South Moorland Road in Waukesha County when he learned that West Allis Police were

engaged in a vehicle pursuit. (Ex. 2 at 1:33; 18:3-5).[1] While making his way towards 124th Street and National Avenue, he observed a Ford Explorer parked at an angle in the righthand lane on West National Avenue near 128th Street. (18:5-6; Ex. 1 at 0:24; Ex. 2 at 9:30-37).[2]

Officer Goritz pulled up behind the parked car, activated his emergency lights, walked up to the vehicle and peered inside the front passenger window, where he observed rifle rounds on the center console. (18:10). The car doors were closed upon his arrival. (Ex. 1 at 0:10-0:24; Ex. 2 at 2:00-2:22). He testified that he also observed an identification card in a cup holder that was later determined to be Mr. Nelson's, and that he also saw a vial of cocaine underneath the card, which was later retrieved during the search of the car. (18:10, 16). After looking through the windows, Officer Goritz called for back-up because he was in a low-lit area and was worried about a potential ambush. (18:10-12).

[1] In their brief, the State repeatedly cites "R16," indicating Document 16; there is no Document 16 in the record. It appears the references are likely to the motion hearing transcript, which is Document 18. The State also does not consistently cite to specific page numbers within the transcript to support their assertions. *See* Wis. Stat. § 809.19(1)(d).

[2] The exhibit list (Doc. 15) does not clearly differentiate between the Officer Goritz's dash cam (Ex. 1) and his body cam (Ex. 2). However, these exhibit numbers are reflected in the motion hearing transcript. (*See* 18:7-9).

While he waited for back-up, Officer Goritz determined through the Department of Transportation ("DOT") that the car was registered to Carter Nelson. (18:12; Ex. 2 at 5:23-8:50).[3] Officer Goritz testified that he was able to find multiple phone numbers for Mr. Nelson and attempted contact, but was unsuccessful. (18:13). He indicated that he had left a voicemail to the most "viable" phone number. (*Id.*).[4]

Officer Goritz testified that he contacted the West Allis and Milwaukee police departments because Mr. Nelson had addresses listed in those cities. (18:14). He also testified that while he was on the phone with those jurisdictions, officers went to the residences, but did not locate Mr. Nelson. (*Id.*).[5]

Although Officer Goritz did not know how long the car had been sitting in the road, he thought the car was abandoned because it was illegally parked, Mr. Nelson was not present and unreachable, and the car

[3] Officer Goritz utilized the vehicle's license plate to determine the registered owner. (Ex. 2 at 4:50).

[4] It should be noted that there is a timeframe in Exhibit 2 (Officer Goritz's body cam) in which it appears that Officer Goritz disabled the microphone on his body cam. *See* Ex. 2 at 16:35-20:44. Additionally, the voicemail that he testified he left is not reflected in his body cam footage prior to the initial search. (Ex. 2 at 5:23-8:50).

[5] It is not clear from Officer Goritz's body cam footage that this occurred while he was on scene. *See* Ex. 2 at 5:23-8:50; *also see* 16:35-20:44 (This footage reflects an exchange between Officer Goritz and other officers after the initial search, but there is no audio).

was "cold" to the touch, which meant to him that it had been sitting for a while. (18:15, 22).

When another squad arrived, Officer Goritz told the back-up officer about his observation of ammunition in the center console, but made no reference to any vial of cocaine. (18:23). Eleven minutes after Officer Goritz arrived on the scene, he opened the front right passenger door, which was unlocked, and began to search the car along with other officers. (18:25; Ex. 2 at 11:26).

During the car search, officers seized the ammunition, a "Kwik Trip" card belonging to Mr. Nelson, and Mr. Nelson's identification card. (18:26). From Officer Goritz's body cam footage, it was the back-up officer who first saw the vial of cocaine, which prompted Officer Goritz to respond, "plain view, too." (Ex. 2 at 12:49-55). No keys were located in the vehicle. (18:19).

Officer Goritz testified to his understanding of the New Berlin Police Department's policies and procedures regarding inventory searches. (18:17-18). He stated that if contraband is found inside a car, law enforcement may conduct an inventory search of the car. (18:17-18) ("So if there's a vehicle that is involved in a situation or if you find contraband on itself inside the vehicle, you're allowed to inventory search the vehicle"). He also testified that an inventory search may be conducted if a car is towed. (*Id*. at 18). New Berlin's standard operating procedure for inventory searches was not, however, admitted into evidence,

nor did the State introduce any documentation describing the items that were inventoried.

Officer Goritz testified that Mr. Nelson came to the New Berlin Police Department one to two days later to retrieve his rifle rounds. (18:20).

The State charged Mr. Nelson with misdemeanor possession of cocaine for the vial found in his car. (2). He entered a not guilty plea at his initial appearance on September 28, 2023. A motion to suppress was filed by defense counsel on October 20, 2023. (10).

An evidentiary hearing on the suppression motion was held on January 8, 2024 and the court, the Honorable Dennis Moroney, heard legal arguments at the close of testimony. (18). The State argued that Mr. Nelson did not have standing to challenge the search because he abandoned the car, and that therefore, the court need not address whether an exception to the warrant requirement existed. (18:29-31).

In response, defense counsel argued that Mr. Nelson has standing to challenge the police search of his vehicle and that the search was not justified under plain view, as a probable cause search, or an inventory search. (18:33-34).

In ruling on the motion, the circuit court noted the issue of whether Mr. Nelson had a reasonable expectation of privacy in his vehicle, and did not find that Mr. Nelson lacked standing. (18:37). With regard to whether the warrantless car search could be

justified as an inventory search, and whether Officer Goritz could have previously seen the cocaine vial in plain view by looking in the car, the court noted:

> 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…
>
> But certainly this, you know, in looking how you observed the vial underneath – underneath the license does not indicate to me that it was readily observable. It was underneath the license. And to be candid with you, it was up against the side wall of the cup holder underneath there, the way I saw you try to pick it up and bring it up the side of the cup holder. So I don't think 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.

(18:38-39).

The circuit court therefore granted the defendant's motion to suppress. (18:40).

The State subsequently filed a motion for reconsideration with the circuit court. (19).

The court held a hearing, where it affirmed its prior ruling and denied reconsideration, finding that plain view did not apply because Officer Goritz could not have seen the cocaine prior to the search and the inventory search was improperly conducted prior to the tow. (25:15).

> 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. But when you use the plain view exception, well you better have a plain view of it. And there was no way he would have had a plain view of it. The only way he had a plain view is when he went in and did the inventory search before he should have.

(25:13-14).

The State appeals.

ARGUMENT

I. The circuit court correctly concluded that police violated Mr. Nelson's Fourth Amendment rights in conducting a warrantless search of his car.

A. Fourth Amendment standing and standard of review.

The Fourth Amendment ensures "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. IV; *also see* Wis. Const. Art. 1, sec. 11. Warrantless searches are *per se* unreasonable, subject to a few carefully delineated exceptions. *State v. Boggess*, 115 Wis. 2d 443, 449, 340 N.W.2d 516 (1983). Although diminished, owners of motor vehicles have a reasonable expectation of privacy in the passenger compartment of their vehicle. *California v. Carney*, 471 U.S. 386, 390 (1985).

A defendant invoking Fourth Amendment protection, has the burden of establishing a privacy interest in the place or object searched. *Rawlings v. Kentucky*, 448 U.S. 98, 104 (1980). Whether an individual had a reasonable expectation of privacy in an area subjected to a search depends on: (1) whether the individual's conduct exhibited an actual (i.e. subjective) expectation of privacy in the area searched and the item seized; and (2) if the requisite expectation of privacy is met, whether such an expectation of privacy was legitimate or justifiable (i.e., one that society is willing to recognize as reasonable). *State v. Bruski*, 2007 WI 25, ¶23, 299 Wis. 2d 177, 727 N.W.2d 503 (citing *Smith v. Maryland*, 442 U.S. 735 (1979)); *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J. concurring).

The Wisconsin Supreme Court has identified several factors applicable to the determination of whether society recognizes a person's expectation of privacy as reasonable:

> (1) whether one has a property interest in the premises;
>
> (2) whether one is legitimately on the premises;
>
> (3) whether one has complete dominion and control and the right to exclude others;
>
> (4) whether one 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.

See State v. Dixon, 177 Wis. 2d 461, 469, 501 N.W.2d 442 (1993); *State v. Trecroci*, 2001 WI App 126, ¶36, 246 Wis. 2d 261, 630 N.W.2d 555.

This list of factors is not controlling or exclusive; instead, the totality of the circumstances is the controlling standard. *Id*.

Appellate review of a circuit court's determination of a motion to suppress under the Fourth Amendment to the United States Constitution and Article I, section 11 of the Wisconsin Constitution presents a question of constitutional facts. *State v. Moeser*, 2022 WI 76, ¶13, 405 Wis. 2d 1, 982 N.W.2d 45. Under this two-step standard of review, a reviewing court will uphold a circuit court's findings of historic facts unless they are clearly erroneous. *Id*. This Court independently applies constitutional principles to those facts. *Id*.

B. Mr. Nelson had a legitimate expectation of privacy in his vehicle because he did not abandon it.

A defendant who challenges a search or seizure under the Fourth Amendment has the burden of establishing a reasonable expectation of privacy by a preponderance of the evidence. *State v. Whitrock*, 161 Wis. 2d 960, 972, 468 N.W.2d 696 (1991) (citing *Rawlings*, 448 U.S. at 104). Fourth Amendment protection does not extend to abandoned property,

however; when a property owner abandons his property, he forfeits his possessory interest and right to object to its search or seizure. *Abel v. United States*, 362 U.S. 217, 241 (1960).

1. Mr. Nelson had an expectation of privacy that was legitimate and justifiable.

The totality of the evidence demonstrates that Mr. Nelson did not intend to abandon his car, and therefore had a legitimate and justifiable reasonable expectation of privacy.

Consistent with the factors in *Dixon*, Mr. Nelson's expectation of privacy of his car was legitimate. Whether property is abandoned is a question of intent, which can be inferred from actions. *See State v. Bauer*, 127 Wis. 2d 401, 406-7, 379 N.W.2d 895 (1985) (no Fourth Amendment violation occurred after police viewed a deceased horse lying in a driveway where the defendant intended to have it removed); *compare with*, *State v. Roberts*, 196 Wis. 2d 445, 456, 538 N.W.2d 825 (1995) (defendant did not have a legitimate expectation of privacy in his car after he fled on foot from police after vehicle pursuit).

Here, police learned through a DOT check that Mr. Nelson was the registered owner of the car. (18:12). And, although the car was unlocked, the car doors were closed, which supports a notion of privacy in shielding contents from onlookers and passerby. (Ex. 1 at 0:10-0:24; Ex. 2 at 2:00-2:22). Further, no

keys were found inside, which prevented others from taking control and dominion of the car. (18:19).

In addition, there was no evidence presented that Mr. Nelson denied ownership of the vehicle. Although not explicitly a *Dixon* factor, the denial of ownership is important under the totality of the circumstances. For example, in *United States v. Tolbert*, the court found that the defendant did not have a reasonable expectation of privacy in her luggage after she denied its ownership. 692 F.2d 1041, 1044 (6th Cir. 1982), *cert. denied*, 464 U.S. 933 (1983).

Further, there was no testimony that the car was on the side of the road for a significant period of time, and Officer Goritz testified that he did not know how long the car had been there. (18:22).

The State asserts that Mr. Nelson did not establish a reasonable expectation of privacy because (1) his car was illegally parked on the street;[6] (2) it was unlocked; and (3) he did not have complete dominion and control of the car because he was not near the car. (State's Br. at 6). But these claims are unconvincing.

As an initial matter, the State cites no case to support its claim that parking a car illegally results in an automatic forfeiture of one's reasonable expectation of privacy in the vehicle. Moreover, merely because an

[6] The State cites New Berlin City Ordinance § 261-4 in their brief, however, this ordinance was not admitted into evidence at the motion hearing and the circuit court made no finding as to this.

unlocked car is potentially accessible by passersby does not result in abandonment such that the car's owner has no reasonable expectation of privacy in it. *See O'Connor v. Ortega*, 480 U.S. 709, 719 (1987) (access by others to an employee's work area did not negate a reasonable expectation of privacy in that area).

Here, Mr. Nelson was the registered owner of the vehicle, and had not left his keys in the car. (18:19). Simply because others could potentially access the interior of an unlocked car does not diminish the owner's expectation of privacy in it such that it can be considered "abandoned" for Fourth Amendment purposes. If that were the case, leaving one's car unlocked on the street in front of one's house could result in "abandonment" such that police could – legally – remove things from the car or perhaps even seize it if the keys were left inside. And, like *O'Connor*, this Court in *Trecroci* found that, where third parties were allowed to enter a home and utilize a stairway with consent of the renters, "that alone does not negate a reasonable expectation of privacy." *Trecroci*, 2001 WI App 126, ¶39 (citing *O'Connor*, 480 U.S. at 721-24).

The State cites several cases in support of its claim that Mr. Nelson lacks standing. (State's Br. at 6-7). However, those cases are distinguishable, as they contain facts that demonstrate clear abandonment that are absent here.

In *State v. Bruski*, the Wisconsin Supreme Court held that the defendant had no privacy interest in a

travel case inside of a car that did not belong to him. *Bruski*, 2007 WI 25, 25, 299 Wis. 2d 177, 727 N.W.2d 503. Here, to the contrary, it is undisputed that Mr. Nelson owned the car.

Similarly, in *State v. Roberts*, this Court held that the defendant did not have a legitimate expectation of privacy in his car after he fled from police on foot after a vehicle pursuit. 196 Wis. 2d 445, 456, 538 N.W.2d 825 (1995). Here, in contrast, there was no evidence that Mr. Nelson fled from his car to avoid arrest.

In *United States v. Thomas*, the D.C. Circuit ruled that the defendant lost any privacy interest in a bag that he left in front of a door inside an apartment complex while fleeing police. 864 F.2d 843, 846 (D.C. Cir. 1989). And, in *United States v. Rem*, the Seventh Circuit ruled that the defendant lost any privacy interest in a locked bag that contained drugs which he left behind on a train luggage rack when he fled a train after learning that other individuals had been arrested for drugs on the train. *Rem*, 984 F.2d 806, 808-812 (7th Cir. 1993). In contrast to *Thomas* and *Rem*, however, this case does not involve abandonment of contraband during a police chase or upon arrest of others.

Mr. Nelson was the car's registered owner, there was no evidence that he did not intend to return to the car, the car doors were closed, and no keys were left in it. Under the totality of the circumstances, Mr. Nelson had a reasonable expectation of privacy that was legitimate and justifiable in the contents of his car. As

such, he has Fourth Amendment standing to challenge the search.

C. No exceptions to the Fourth Amendment's warrant requirement justified the search.

The State asserts that plain view does not need to be established because there are "multiple other warrant requirement exceptions." [7] (State's Br. at 9). Instead, they argue (1) the search was justified due to community caretaker activity requiring an inventory search (State's Br. at 12); and (2) inevitable discovery (State's Br. at 18-19). However, none of these exceptions to either the Fourth Amendment or the exclusionary rule are applicable.

1. The circuit court correctly found that Officer Goritz did not see contraband in plain view.

Officer Goritz testified that he saw in plain view the vial of suspected cocaine when he approached the right passenger side of the car. (18:22).

Police may search a car if they observe contraband in plain view and the following requirements are met: (1) the officer must have prior justification for being in the position from which the "plain view" discovery was made; (2) the evidence must be in plain view of the discovering officer; (3) the

[7] While the State has forfeited the argument that the search was justified under plain view, (State's Br. at 9), the defense nonetheless addresses it.

discovery of the evidence must be inadvertent; and (4) the item seized, in itself with facts known to the officer at the time of the seizure, provides probable cause to believe there is a connection between the evidence and criminal activity. *Bies v. State*, 76 Wis. 2d 457, 464, 251 N.W.2d 461 (1977) (citing *Coolidge v. New Hampshire*, 403 U.S. 433, 464-473 (1971)).

Officer Goritz claimed at the motion hearing that he saw a vial of suspected cocaine underneath Mr. Nelson's identification card in the cup holder. (18:16; 18:22). However, as the circuit court correctly found (and the State does not challenge here), the vial was not in Officer Goritz's view when he was outside of the car. (Exhibit 2 at 9:45-10; 11:38-45). From observing the body cam footage, the circuit court explicitly found this testimony to be incredible:

> But certainly this, you know, in looking how you observed the vial underneath – underneath the license does not indicate to me that it was readily observable. It was underneath the license. And to be candid with you, it was up against the side wall of the cup holder underneath there, the way I saw you try to pick it up and bring it up the side of the cup holder.

(18:38).

The circuit court affirmed its credibility finding when it denied the state's motion to reconsider.

> But when you use the plain view exception, well you better have a plain view of it. And there was no way he would have had a plain view of it.

(25:13).

On this record, the circuit court's factual finding was not clearly erroneous and is entitled to deference. This Court should affirm and find that the State has not satisfied the "plain view" exception to the warrant requirement.

2. Police were not acting as community caretakers when they searched Mr. Nelson's car, nor was this a valid inventory search.

The State asserts that police searched the car as part of their community caretaking function because the vehicle was impeding traffic, and because Officer Goritz observed rifle rounds in the car and was concerned that an "active shooter" was in the area. (State's Br. at 12-18) The State claims this justified police impoundment of the car and an inventory search of its contents. (*Id*. at 17-18).

The community caretaker exception to the Fourth Amendment's warrant requirement allows police to make reasonable intrusions so long as they are separate from "the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute." *Cady v. Dombrowski*, 413 U.S. 433, 441 (1973); *State v. Kramer*, 2009 WI 14, ¶¶19-20, 315 Wis. 2d 414, 759 N.W.2d 598. When the community caretaker function is asserted, "the trial court must determine: (1) that a seizure within the meaning of the fourth amendment has occurred; (2) if so, whether the police conduct was bona fide community caretaker

activity; and (3) if so, whether the public need and interest outweigh the intrusion upon the privacy of the individual." *State v. Anderson*, 142 Wis. 2d 162, 169, 417 N.W.2d 411 (Ct. App. 1987).

As to the third factor, "relevant considerations include: (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*. at 169-70.

The United States Supreme Court recently clarified law enforcement's community caretaking functions in the context of a warrantless search of a home. *Caniglia v. Strom*, 593 U.S. 194 (2021). There, the Court found that police entry into a home to seize firearms was not justified as "community caretaking" simply because the homeowner was undergoing a psychiatric evaluation, where no other exigent circumstances existed (e.g. rendering emergency assistance or protecting an occupant from imminent injury). *Id*. at 198.

In a concurring opinion, Justice Alito expressed concern about the seemingly unlimited potential that police may have to conduct searches and seizures pursuant to a "community caretaking" doctrine. *Id*. at 200 (Alito, J., concurring). He noted that the Court's majority holding found "there is no special Fourth

Amendment rule for a broad category of cases involving 'community caretaking.'" *Id.*

Following the *Caniglia* decision, the Wisconsin Supreme Court very recently considered community caretaking functions of law enforcement in *State v. Wiskowski*, 2024 WI 23, 412 Wis. 2d 185, 7 N.W.3d 474. There, it ruled that law enforcement had no reasonable suspicion to conduct a *Terry*[8] stop of a vehicle in a parking lot after observing the driver asleep, without other indicators of impairment. *Id.*, ¶¶12-14. Furthermore, the Court noted that even if officers were acting as bona fide community caretakers, the stop was unlawfully continued after the community caretaking concern dissipated. *Id.*, ¶¶27-28.

In his concurrence, Justice Hagedorn thoroughly outlined the Court's community caretaking jurisprudence and made several observations in light of *Caniglia*. *Id.*, ¶30. He stated that the United States Supreme Court "cast at least some doubt about whether the community caretaker doctrine is a standalone category through which police conduct should be analyzed." *Id.*, ¶40 (Hagedorn, J., concurring). He also observed that the United States Supreme Court seemed uncomfortable with the idea that community caretaking is a broad category authorizing warrantless searches and seizures, essentially echoing the sentiments of Justice Alito. *Id.* ¶73. Ultimately, Justice Hagedorn warned that

[8] *Terry v. Ohio*, 392 U.S. 1 (1968).

Wisconsin courts may "soon need to address whether to formally abandon community caretaking as a separate, freestanding doctrine through which warrantless searches and seizures should be evaluated." *Id.*, ¶74.

Here, New Berlin police were not acting as bona fide community caretakers when they searched Mr. Nelson's car within eleven minutes of Officer Goritz's arrival. While the State asserts that Officer Goritz needed to access the car to obtain the driver's information, (State's Br. at 23), this is unsupported by the testimony, which reflects that police already knew that Mr. Nelson was the car's owner, and thus there was no need to search the car to locate information regarding the car's owner or driver. (18:12).

Further, Officer Goritz's testimony established that the primary law enforcement purpose involved police investigation, not community caretaking.[9] Officer Goritz testified that the ammunition he observed through the car's window made him "suspicious" and he was concerned about an ambush. (18:10-11). He also claimed that he saw a vial of cocaine in plain view from outside the car. (18:22).[10] Neither of these explanations, however, encompass a

[9] The State in its appendix includes incident reports along with Officer Goritz's police report. (State's App. at 76-83). Although referenced in Officer Goritz's testimony, none of the reports were admitted and thus are not part of the record and should all be stricken from the State's Appendix.

[10] Again, the circuit court discounted this claim, finding it not credible. (18:38; 25:13).

bona fide community caretaking function, but rather reflect concerns regarding potential criminal activity.

Moreover, even assuming New Berlin police were acting as community caretakers, the search cannot be upheld as a valid inventory search. Law enforcement may conduct inventory searches of impounded vehicles in order to secure or protect the car and its contents. *Thompson v. State*, 83 Wis. 2d 134, 140, 265 N.W.2d 467 (1978). Inventory searches are meant to protect police against claims made by the accused that personal property has disappeared from the car while it was in custody. *Warrix v. State*, 50 Wis. 2d 368, 376, 184 N.W.2d 189 (1971). Wisconsin courts have been guided by two principles in determining the reasonableness of an inventory search: (1) law enforcement must follow standardized procedures for inventorying property; and (2) the inventory search may not be conducted in bad faith, where it is used as a subterfuge for investigating a crime. *Colorado v. Bertine*, 47 U.S. 367, 372, 374 (1987); *Thompson*, 83 Wis. 2d at 140.

The State asserts that "after Officer Goritz's discovery of the vial of cocaine, Nelson's vehicle was towed from the scene, impounded, and inventory searched." (State's Br. at 23). But this suggests that the initial discovery of the cocaine occurred via some other basis, such as plain view, which the State has expressly abandoned. (*See* State's Br. at 11).

Finally, as the circuit court found, the vial of cocaine was discovered from the unlawful search at

the scene, not as part of a legitimate inventory search. (18:38; 25:13-14). The State concedes that police did not follow New Berlin Police Department inventory search procedures because they conducted the search before, rather than after, impounding and towing the vehicle. (State's Br. 18, 23). And there was no evidence introduced that any of the items police found in their search were even inventoried at the scene. Simply put, this was not a legitimate inventory search, as police did not follow standardized procedures, and the search occurred due to police concern regarding possible criminal activity. *See Bertine*, *Id.*; *Thompson*, *Id.*

3. The inevitable discovery doctrine does not apply because police did not have any alternative, lawful means of discovery.

Lastly, the State asserts that the evidence found in Mr. Nelson's car would have been inevitably discovered because police would have simply had the car towed to the New Berlin Police Department and discovered the contraband during an inventory search at the station. (State's Br. at 18-19).

Evidence that is obtained due to the illegality of law enforcement must be suppressed pursuant to the exclusionary rule. *Mapp v. Ohio*, 367 U.S. 643, 660 (1961). Furthermore, all derivative evidence as a result of the illegality is inadmissible. *State v. Schneidewind,* 47 Wis. 2d 110, 118, 176 N.W.2d 303 (1970) (citing *Wong Sun v. United States*, 371 U.S. 471 (1963)).

However, the inevitable discovery doctrine allows the fruits of an otherwise illegal search to be admitted if there is a preponderance of the evidence that the evidence would have been inevitably discovered by lawful means. *State v. Washington*, 120 Wis. 2d 654, 664, 358 N.W.2d 304 (Ct. App. 1984) (quoting *Nix v. Williams*, 467 U.S. 431, 444 (1984)).

Important indicia of inevitability include (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. Schwegler*, 170 Wis. 2d 487, 500, 490 N.W.2d 292 (Ct. App. 1992) (citing *United States v. Cherry*, 759 F.2d 1196, 1204 (5th Cir. 1985), *cert. denied*, 479 U.S. 1056 (1987)); *also see State v. Jackson*, 2016 WI 56, 66, 369 Wis. 2d 673, 882 N.W.2d 422 (finding these factors important indicia of inevitability rather than indispensable elements of proof).

Wisconsin courts have applied the inevitable discovery doctrine as it relates to unlawful searches of cars. In *State v. Kennedy*, this Court upheld the seizure of evidence discovered by a defective search warrant of a car. *Kennedy*, 134 Wis. 2d 308, 318, 396 N.W.2d 765 (Ct. App. 1986). It reasoned the evidence would have been discovered through a valid inventory search and therefore the defective search warrant did not compel exclusion, particularly since police had

acted pursuant to their belief that the warrant was in fact valid. *Id*. However, this Court warned that the doctrine of inevitable discovery "is not an open door through which the fruits of all defective searches may be transformed into admissible evidence" and "must be used with restraint and circumspection lest it become a vehicle abrogating the right of all citizens to be free from unreasonable searches and seizures." *Id*.

The facts here are distinguishable from *Kennedy* because here the police misconduct was flagrant and brazen, rather than in good faith. As the circuit court found, Officer Goritz's claim that, while looking in the car window, he was able to see the vial of cocaine underneath Mr. Nelson's identification card in the center console was not credible. (18:38; 25:13-14). In fact, Officer Goritz's body cam footage reflects that his partner was the first to observe the vial while the car search was occurring. (Ex. 2 at 12:49-55). As the circuit court indicated in ruling on the State's motion to reconsider:

> But when you use the plain view exception, well you better have a plain view of it. *And there was no way he would have had a plain view of it*. The only way he had a plain view is when he went in and did the inventory search before he should have.

(25:13-14) (emphasis added).

In addition, as the State concedes, police officers failed to follow the department's standard procedure for inventory searches because they conducted the

search prior to impoundment and towing of the vehicle. (State's Br. at 18, 23).

The State nonetheless asserts that despite the officers' "departure" from police policy in conducting the search, the exclusionary rule should not apply because forcing officers to follow the policy would, in the State's view, "impede officers' ability to do their job as *investigators* and safety officers." (State's Br. at 21) (emphasis added). It is unclear from the State's claim how requiring officers to adhere to their own department procedures and wait to conduct any inventory search until after the vehicle is towed to the department would "impede" the officers' ability to do their jobs. And, importantly, the State's argument appears to acknowledge that the officers were in fact *investigating* rather than acting as community caretakers.

The State also claims that application of the exclusionary rule in this instance would be "purely for punitive reasons." (State's Br. at 23). But the policy behind the exclusionary rule is not punishment, but rather to encourage police officers to conduct themselves lawfully when conducting searches and seizures of individuals and their homes and property, and deterring future misconduct. *Elkins v. United States*, 364 U.S. 206, 217 (1960) ("The rule is calculated to prevent, not to repair. Its purpose is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it").

Officer Goritz claimed to see drugs in plain view, but the circuit court concluded that he did not. He also offered conflicting legal justifications for his search of the car (i.e., suggesting plain view, as well as an inventory search). (18:17-18, 25).

This type of police misconduct is what the exclusionary rule was intended to mitigate. *Mapp*, 367 U.S. at 659 (quoting *Olmstead v. United States*, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting)), *overruled by Katz v. United States*, 389 U.S. 347 (1967)) ("Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example… If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy").

Adopting the State's position would mean that the inevitable discovery exception would override the exclusionary rule's goal of deterring police misconduct. "While suppression in such a case may put the prosecution in a worse position because of the police misconduct, a contrary result would cause the inevitable discovery exception to swallow the rule by allowing evidence otherwise tainted to be admitted merely because the police could have chosen to act differently and obtain the evidence by legal means." *Cherry*, 759 F.2d at 1205.

This Court should reject the State's claim that inevitable discovery applies in this circumstance.

CONCLUSION

For the reasons stated, Mr. Nelson requests that this Court affirm the circuit court.

Dated this 26th day of August, 2024.

Respectfully submitted,

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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 5,728 words.

Dated this 26th day of August, 2024.

Signed:

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