STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2024AP000617-CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

CARTER A. NELSON,

Defendant-Respondent-Petitioner.

PETITION FOR REVIEW

BRETT L. MCKELLAR
Assistant State Public Defender
State Bar No. 1112894

Office of the State Public Defender
Appellate Division
735 N. Water Street - Suite 912
Milwaukee, WI 53202-4116
(414) 227-4616
McKellarb@opd.wi.gov

Attorney for Defendant-
Respondent-Petitioner

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ISSUE PRESENTED

1. When police fail to follow their department's own standard policies and procedures for vehicle inventory searches, should the inevitable discovery doctrine nonetheless be applied?

The circuit court did not address this question.

The Court of Appeals found that denying application of the inevitable discovery doctrine where police failed to comply with standard inventory search procedures would be "purely punitive" to the State.

CRITERIA FOR REVIEW

Police officers initially claimed that they viewed cocaine inside of Mr. Nelson's car in plain view through the car window as a basis for the car search. Police also claimed that they conducted a proper inventory search at the scene. The circuit court found the testimony of plain-view to be incredible and that police violated department policies relating to inventory searches. Thus, the circuit court suppressed the fruits of the search.

Relying on state and federal case law, the Court of Appeals reversed the circuit court and ruled that suppression would be purely punitive because officers would have conducted the inventory search at the police station, if not conducted at the scene. Thus, the inevitable discovery doctrine applied.

This case presents the question of whether the inevitable discovery doctrine should apply when police fail to follow their department's standard policies for inventory searches.

This question presents a real and significant federal constitution issue for review. Wis. Stat. 809.62(1r)(a).

STATEMENT OF FACTS

Mr. Nelson was charged with one count of possession of cocaine based on an incident which took place on June 20, 2023. (2). Subsequently, Mr. Nelson filed a motion to suppress all evidence derived from the unlawful police search of his vehicle. (10; App. at 70).

Suppression Hearing:

Evidence presented at the motion hearing established that, on June 20, 2023, New Berlin Police Officer Jack Goritz came upon a vehicle that was parked at an angle in the righthand lane of the road. (18:5-6; App. at 16-17).

Officer Goritz parked behind the vehicle, 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; App. at 21). No one was in the vehicle and the car doors were closed upon arrival. (Ex. 1 at 0:10-0:24; Ex. 2 at 2:00-2:22). He testified at the hearing that he

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. (18:10, 16; App. at 21, 27).

While Officer Goritz waited for back-up squads, he determined through the Department of Transportation ("DOT") that the car was registered to Carter Nelson. (18:12; App. at 23). Officer Goritz attempted to contact Mr. Nelson from the phone numbers he retrieved, but was unsuccessful. (18:13; App. at 24).

Officer Goritz did not know how long the car had been sitting in the road. (18:15, 22; App. at 26, 33). He believed the car to be abandoned because it was illegally parked, Mr. Nelson was not present and unreachable, and the car was "cold" to the touch, which meant to him that it had been sitting for a while. (*Id*.).

When a back-up squad arrived, Officer Goritz informed them about observing ammunition in the center console, but made no reference to any vial of cocaine. (18:23; App. at 34). 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; App. at 36). From observing Officer Goritz's body cam footage, it was the back-up officer who first saw the vial of cocaine. (Ex. 2 at 12:49:55). Officers retrieved the ammunition, a "Kwik Trip" card belonging to Mr. Nelson, and Mr. Nelson's identification card. (18:16;

App. at 27). No keys were located in the vehicle. (18:19; App. at 30).

Officer Goritz testified as to his understanding of police department policies relating to inventory searches, in which he stated that if contraband is found inside a car, law enforcement may conduct an inventory search of the car. (18:17-18; App. at 28-29). He also stated that if the car was not searched at the scene, he would have searched it after it was towed. (18:27; App. at 38).

In making its determination regarding the merits of the motion, the circuit court stated:

> 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; App. at 49-50).

The circuit court granted the defendant's motion to suppress. (18:40; App. at 51). The State then filed a motion for reconsideration. (App. at 55). The circuit court subsequently affirmed its ruling, finding that plain view did not apply because Officer Goritz could not have seen the cocaine prior to the search; additionally, the court found that the inventory search was improperly conducted prior to the tow. (25:15; App. at 68).

Appellate Proceedings:

The State appealed the circuit court's ruling. After briefing and case submission, the Court of Appeals reversed and remanded, holding that the cocaine would have been inevitably discovered. *State v. Nelson*, No. 2024AP617-CR, unpublished slip op. at ¶ 1 (November 6, 2024). In its reasoning, the court stated that:

> …the inevitable discovery doctrine is a 'narrow exception to the exclusionary rule'—but in cases such as this, where the State has met its burden to prove by a preponderance of the evidence that the contraband at issue would have been discovered lawfully, exclusion would be purely punitive and inappropriate.

Id., ¶ 13 (citing *State v. Jackson*, 2016 WI 56, ¶¶ 70-72, 369 Wis. 2d 673, 882 N.W.2d 422).

Mr. Nelson petitions this Court for review.

ARGUMENT

I. Excluding evidence after an improper inventory search would not be purely punitive, but would have a deterrent effect in incentivizing law enforcement to follow their department's standard policies and procedures.

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 (Wis. 1983).

An inventory search is one of these delineated exceptions. 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, 26 N.W.2d 467 (Wis. 1978). 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.

Evidence that is seized pursuant to an illegal search must be suppressed pursuant to the

exclusionary rule. *Mapp v. Ohio*, 367 U.S. 643, 660 (1961). In addition, all derivative evidence as a result of the illegality is inadmissible. *State v. Schneidewind*, 47 Wis. 2d 110, 118, 176 N.W.2d 303 (Wis. 1970) (citing *Wong Sun v. United States*, 371 U.S. 471 (1963)). One of the exceptions is the inevitable discovery rule, which 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)).

The exclusionary 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." *Elkins v. United States*, 364 U.S. 206, 217 (1960). It is to encourage law enforcement to conduct themselves lawfully while conducting searches and seizures of individuals and their homes and property. *See Id*.

The Court of Appeals concluded that "in cases such as this, where the State has met its burden to prove by a preponderance of the evidence that the contraband at issue would have been discovered lawfully, exclusion would be purely punitive and inappropriate." Slip Op., ¶ 13; App. at 9.

But in its analysis, the Court of Appeals did not reconcile the officer's incredible testimony regarding

plain-view with his testimony that he would have *in fact* conducted the inventory search at the station. Law enforcement attempted to convince the circuit court that the contraband was in plain view, and that it was subject to an inventory search, which the circuit court found was improperly conducted contrary to police department protocol because officers conducted it at the scene, rather than after it was towed. Under this set of facts, to not exclude this evidence would send the message to law enforcement that proper training in inventory search protocols is insignificant, and can be used as a tool to seek evidence.

Ultimately, to not exclude the evidence here would override the exclusionary rule's goal of deterring police misconduct. And "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 different and obtain the evidence by legal means." *United States v. Cherry*, 759 F.2d 1196, 1205 (5th Cir. 1985) (Examined in *Jackson*, 2016 WI 56, ¶61).

CONCLUSION

Mr. Nelson asks that this Court grant review, reverse the decision of the Court of Appeals, and order the suppression of all evidence derived from the unlawful search.

Dated this 27th day of November, 2024.

Respectfully submitted,

Electronically signed by
Brett L. McKellar
BRETT L. MCKELLAR
Assistant State Public Defender
State Bar No. 1112894

Office of the State Public Defender
735 N. Water Street - Suite 912
Milwaukee, WI 53202-4116
(414) 227-4805
Mckellarb@opd.wi.gov

Attorney for Defendant-
Respondent-Petitioner

CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this petition conforms to the rules contained in s. 809.19(8)(b), (bm) and 809.62(4). The length of this petition is 1,748 words.

CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this petition 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 rules 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 or 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.

Dated this 27th day of November, 2024.

Signed:
Electronically signed by
Brett L. McKellar
BRETT L. MCKELLAR
Assistant State Public Defender