

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 11, 2006

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2005AP2228-CR

Cir. Ct. No. 2004CF130

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

VINCENT J. SPENCER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Waukesha County:
RALPH M. RAMIREZ, Judge. *Affirmed.*

Before Snyder, P.J., Brown and Nettesheim, JJ.

¶1 SNYDER, P.J. Vincent J. Spencer appeals from an order denying his motion to suppress evidence obtained during a search incident to arrest for operating a motor vehicle while intoxicated (OWI), which led to a judgment of conviction for two counts of burglary. Spencer does not contest the OWI arrest,

nor does he challenge the search. He contends the circuit court erred when it held that the police officers legally seized a bicycle and six power tools from the vehicle during the search. We disagree and affirm the judgment of the circuit court.

BACKGROUND

¶2 The facts are brief and undisputed.¹ Village of Pewaukee Police Officer Craig Drummy was on duty at approximately 2:30 a.m. on January 2, 2004, when he spotted a red vehicle moving at a high rate of speed. He noticed a bicycle hanging out of the trunk of the vehicle with one tire in the trunk and one tire out, and the trunk lid going up and down on the bike. Drummy followed the vehicle and observed that it veered from one side of the lane to the other and that both the front and rear tire were on the center line. He asked dispatch to run the plates on the car and determined the name of the registered owner. Drummy stopped the vehicle and identified the driver as Spencer, though the car was not registered to him.

¶3 During their conversation, Drummy asked Spencer about the bike in the trunk of the car. Spencer said it was his. Drummy also noticed some power tools in the back seat of the car and asked Spencer whose tools they were. Spencer said they were his. While talking to Spencer, Drummy noticed an odor of

¹ Spencer has not provided citations to the record to corroborate the facts set out in his briefs. An appellate court is improperly burdened where briefs fail to properly cite to the record. See *Meyer v. Fronimades*, 2 Wis. 2d 89, 93-94, 86 N.W.2d 25 (1957). Furthermore, such failure is a direct violation of the Rules of Appellate Procedure, which requires parties to set out facts “relevant to the issues presented for review, with appropriate references to the record.” WIS. STAT. RULE 809.19(1)(d) (2003-04). All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise stated.

intoxicants coming from the vehicle. An investigation for operating while intoxicated (OWI) ensued and Spencer was ultimately cited for OWI.

¶4 Upon his arrest, Spencer was handcuffed and placed in the back of Drummy's squad car. Drummy and his colleague, Sergeant John Maloney, who was also on the scene, proceeded to search the vehicle incident to arrest. They noted that Spencer had stopped the vehicle in a no parking zone and that there was no place to legally park the car. Drummy did not call the registered owner of the vehicle to pick it up because the owner, Spencer's girlfriend, had been evicted from her apartment and Drummy did not know how to contact her. The officers called a towing company to move the car.

¶5 The tow truck driver refused to tow the car with the bike in it. Maloney removed the bike from the car, shut the trunk lid, and put the bike in the trunk of his squad car. Maloney asked Spencer about six expensive power tools that were in the car. Spencer could not produce any proof of ownership of the tools and the officers knew the car was not registered to Spencer; therefore, Maloney determined that the tools should be taken into custody for safekeeping until ownership could be verified. Maloney believed that the towing company's storage facility would not be sufficiently secure.

¶6 Maloney took the items to the police department, inventoried them, and secured them in the department's property facility. While doing this, Maloney checked the serial numbers on the items and ran "wanted checks" on those serial numbers. He did not pursue anything further regarding the bicycle and the power tools. Ultimately, the police determined that the bike and the power tools were stolen property.

¶7 Spencer was charged with two counts of burglary, contrary to WIS. STAT. § 943.10 and two counts of bail jumping, contrary to WIS. STAT. § 946.49. He moved to suppress the evidence regarding the bike and the power tools, and the circuit court denied his motion. Spencer subsequently pled guilty to two counts of burglary.

DISCUSSION

¶8 Spencer does not challenge the search of the vehicle but instead contends that the inventory exception to the warrant requirement did not justify seizure of the bicycle and power tools from the vehicle. He contends that the circuit court should have suppressed the illegally seized evidence. When reviewing a circuit court's decision on a motion to suppress, we employ a two-part standard of review. First, we uphold the circuit court's findings of fact unless they are clearly erroneous. *State v. Knight*, 2000 WI App 16, ¶10, 232 Wis. 2d 305, 606 N.W.2d 291. Second, we decide as a matter of law whether the facts satisfy a particular statutory or constitutional standard. See *State v. Hughes*, 2000 WI 24, ¶15, 233 Wis. 2d 280, 607 N.W.2d 621. Here, the facts are undisputed. Our task is to determine whether the facts demonstrate that the Fourth Amendment protection against illegal seizure was violated.

¶9 The State does not dispute that a seizure occurred. Rather, it directs us to our supreme court's recognition of the well-defined inventory search exception to the warrant requirement:

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: the protection of the owner's property while it remains in police custody, ... the protection of the police against claims or disputes, over lost or stolen property, ... and the

protection of the police from potential danger The practice has been viewed as essential to respond to incidents of theft or vandalism[.]

State v. Weber, 163 Wis. 2d 116, 132, 471 N.W.2d 187 (1991) (citing *South Dakota v. Opperman*, 428 U.S. 364, 369 (1976)).

¶10 Challenging the seizure, Spencer first argues that the police had no probable cause to seize the bike and the power tools during the search of the car. We need not address this argument because the inventory search exception to the warrant requirement is not based on probable cause. *See Opperman*, 428 U.S. at 370 n.5 (an inventory search is administrative and not motivated by a search for evidence; therefore the justification for an inventory search does not rest on probable cause). Rather, to determine the reasonableness of an inventory search, we must balance its intrusion on the defendant's Fourth Amendment interests against its promotion of legitimate governmental interests. *Weber*, 163 Wis. 2d at 132-33. Reasonableness must be determined from the facts and circumstances of each case. *Id.* at 133. Our inquiry employs a two-step process, involving the reasonableness of the intrusion in the first instance, followed by the reasonableness of the scope of the intrusion. *Id.*

¶11 Spencer challenges the initial intrusion, arguing that Drummy or Maloney should have made an attempt to locate the owner of the vehicle instead of having it towed. This, he asserts, is a "common enough occurrence" in such a situation and "would have also circumvented the problem of what to do with the bicycle, car and tools." We disagree. The record facts demonstrate that Drummy and Maloney recognized the name of the registered owner of the vehicle and knew that she had recently been evicted from her apartment. Furthermore, this was the middle of the night, approximately 2:40 a.m. The decision to take custody of the

bicycle, which was hanging out of the trunk of the car and could not be secured, was reasonable.

¶12 The power tools were inside the vehicle and did not present the same concerns as the bicycle. However, Maloney testified that he took the power tools as part of his inventory search because department procedure dictated that items of value would be taken into custody for safekeeping and because the towing yard was protected by an approximately eight-foot fence that had been breached in the past. The decision to seize the power tools for safekeeping was reasonable under the circumstances.

¶13 Spencer also argues that the scope of the seizure was not reasonable because the officers took the bike and power tools but left different tools and other items in the car. This, Spencer argues, demonstrates that the scope of the search was aimed at items the officers suspected were stolen. The State counters that only the items that had significant value or could not be secured in the car were taken for inventory in secure storage. The items left behind included some clothing on the floor and some wrenches, vice grips and pliers. Maloney and Drummy determined that these items were not of significant value and would not need to be secured.

¶14 Spencer would have us believe that the selective nature of the seizure demonstrates the officers' intent to advance a covert theft investigation, not to secure and inventory the property. The officers did have some information regarding Spencer as a suspect in the theft of some fishing equipment; however, Maloney testified that at the time of the arrest for OWI, they had no idea that the bicycle and power tools were stolen. The circuit court found the officers' testimony credible and we have no reason to disturb that finding. *See Village of*

Big Bend v. Anderson, 103 Wis. 2d 403, 410, 308 N.W.2d 887 (Ct. App. 1981) (a circuit court judge, when acting as the trier of fact, is the ultimate arbiter of the credibility of witnesses).

CONCLUSION

¶15 A seizure pursuant to an inventory search is permissible if it is reasonable under the circumstances. Here, the officers searched the car incident to an OWI arrest. Because the car was parked in a no parking zone, and no legal parking was available nearby, the officers called a towing service. The tow truck driver would not tow the car with a bicycle hanging out of the trunk. The towing company storage lot was protected only by a moderately high fence and had been the subject of prior break-ins. The officers determined that expensive power tools that were in plain sight in the back of the car would not be sufficiently secure in the towing lot. Pursuant to their department procedure, the officers took the bicycle and power tools to the department to be inventoried and placed in secure storage. The seizure of the bicycle and the power tools was reasonable under the circumstances and the circuit court properly denied Spencer's motion to suppress the evidence.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.

