05AP1516

STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2005AP1516-CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

DAVID ALLEN BRUSKI,

Defendant-Respondent-Petitioner.

ON REVIEW OF A DECISION OF THE COURT OF APPEALS, DISTRICT III, REVERSING THE ORDERS SUPPRESSING EVIDENCE AND DENYING RECONSIDERATION ENTERED IN THE CIRCUIT COURT FOR DOUGLAS COUNTY, THE HONORABLE MICHAEL T. LUCCI, PRESIDING

BRIEF AND APPENDIX OF DEFENDANT-RESPONDENT-PETITIONER

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ISSUE PRESENTED

DID THE POLICE VIOLATE BRUSKI'S STATE AND FEDERAL RIGHT TO BE FREE FROM UNREASONABLE SEARCHES WHEN THE POLICE SEARCHED BRUSKI'S TRAVEL BAG FOUND IN A THIRD PARTY'S AUTOMOBILE WHERE HE HAD BEEN SLEEPING?

The circuit court ruled that Bruski had a reasonable expectation of privacy in the travel bag and accordingly,

granted Bruski's motion to suppress evidence obtained during the illegal search. (7:1-4; App. 108-111).

The court of appeals reversed. The court of appeals ruled that the circuit court erred as a matter of law because Bruski had no reasonable expectation of privacy in his travel case because he had no reasonable expectation of privacy in the third party's vehicle. ***State v. Bruski***, 2006 WI App. 53, ¶ 19. (App.107).

POSITION ON ORAL ARGUMENT AND PUBLICATION

Bruski requests both oral argument and publication of this court's decision.

STATEMENT OF THE CASE

When Officer James Olson first observed Bruski on March 3, 2005, at 8:00 a.m., Bruski was sleeping in an automobile parked in back of the house at 1326 John Avenue in the City of Superior (28:4, 27). Bruski appeared to be passed out. He had a sandwich in his lap and a bit of food in his mouth; he was nodding off and had difficulty answering Olson's questions. Olson had difficulty understanding Bruski's speech. (28:21, 25). Bruski said he did not know how he got there (28:22). Olson spoke with Bruski who identified himself and said that he was waiting for a friend (28:20).

Olson determined that the automobile was registered to Margaret Smith. An employee at the police communications center spoke with Smith and "she told the communications center that her daughter was supposed to be in possession of the vehicle, and that she may be allowing a friend to operate the vehicle." (28:5-6). Two hours later, Smith came to the police department and asked for "an officer to escort her over to her vehicle location to recover it." (27:6).

When Smith, Officer Olson and Officer Jerry Beauchamp arrived at the automobile, Bruski again appeared "passed out" (28:25). Olson asked Bruski to step out of the vehicle (27:7). Bruski did so. Olson and Smith stood with Bruski on the driver's side of the car while Beauchamp was next to the passenger's side of the car. Smith stood to Olson's left and Bruski stood in front of Olson (28:10-11). The three (Olson, Smith and Bruski) engaged in conversation. Smith questioned Bruski about her daughter's whereabouts. Bruski said that he was waiting for a friend. He knew Smith's daughter by first name, but did not know where she was. (28:7).

Smith did not have a key to operate the vehicle. When asked whether he had a car key, Bruski said he did not. (28:8).

On the opposite side of the automobile, Officer Beauchamp began searching the interior of the automobile from the front passenger side (28:9-10). Beauchamp testified that he said "I'm going to look for the keys, or words to that effect." (28:33). Olson testified "I can't state whether or not [Bruski] had knowledge that we were searching the vehicle at that time. We were all in a conversation, Ms. Smith, myself, Mr. Bruski and Officer Beauchamp." (28:11). The police officers did not ask Smith for consent to search the interior of the automobile (28:9).

Beauchamp found a silver colored, hard shelled travel bag, opened it and found marijuana, methamphetamine and drug paraphernalia inside. Bruski was arrested and handcuffed. Beauchamp continued his search. He testified that before looking in the trunk, he said to Smith "it's okay to look in your vehicle, right? And she says, yeah by all means." (28:31).

Officer Olson said that he assumed they "had permission to search because of the circumstances where [Smith] wanted to take possession of her vehicle and she

did not have keys." (28:16). Beauchamp testified that he felt that he had permission to look for the keys because "the owner was standing right there wanting her keys. I'm, well, I'll see if I can find 'em." (28:33).

Bruski moved to suppress the evidence seized as the result of warrantless search of his travel bag (6). An evidentiary hearing occurred April 14, 2005, where Officers Olson and Beauchamp testified. Neither Smith nor Bruski testified at the suppression hearing. The circuit court received oral and written arguments from the parties. On April 18, 2005, the circuit court issued a Memorandum Decision. The court ruled that there was no consent to search Bruski's travel bag. The court ruled "that under these circumstances defendant had a reasonable right of privacy with respect to his personal belongings inside the vehicle, including his travel bag located on the floor of the front seat." (7:3; App. 110).

The state filed a motion for reconsideration arguing that the court should find there was implied consent for the search because Smith asked for assistance in recovering her automobile. (16). The court denied the motion for reconsideration, ruling that "the owner of the vehicle not only did not give implied consent for the police to search the car but she also could not give such consent to search defendant's travel bag." (19; App. 114).

On appeal, the court of appeals "agree[d] with the State that Bruski lacked standing to assert a Fourth Amendment claim" and reversed. ¶ 19. (App. 107).

RELEVANT CONSTITUTIONAL PROVISIONS

Art. I, § 11 of the Wisconsin Constitution:

> The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated; and no warrant shall issue but upon probable cause, supported by oath or affirmation,

> and particularly describing the place to be searched and the persons or things to be seized.

Fourth Amendment to the United States Constitution:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

ARGUMENT

THE CIRCUIT COURT PROPERLY SUPPRESSED THE EVIDENCE FOUND DURING A WARRANTLESS AND UNREASONABLE SEARCH OF BRUSKI'S TRAVEL BAG.

A. This court applies a two step process of review in constitutional claims.

This court applies a two-step standard of review in search and seizure cases. ***State v. Martwick***, 2005 WI 5, ¶ 43, 231 Wis. 2d 801, 822, 604 N.W. 2d 552. This court reviews deferentially the circuit court's findings of historical or evidentiary facts. The appellate court independently reviews the application of constitutional principles to the historical facts. ***Id.*** ¶ 20, 231 Wis. 2d at 812. The circuit court's findings of fact "shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." Wis. Stat. § 805.17(2) (2003-2004).[1] When a circuit court does not expressly make a finding necessary to support its legal conclusion,

1 All references to the Wisconsin Statutes are to the 2003-2004 version.

the appellate court can assume that the trial court made the finding in the way that supports its decision. ***State v. Echols,*** 175 Wis. 2d 653, 672-73, 499 N.W.2d 631 (1993). If it is possible to draw more than one inference from the evidence, the circuit court's choice of inference is accorded deference on appeal. ***State v. Friday***, 147 Wis. 2d 359, 370-71, 434 N.W.2d 85 (1989). "It is not within the province of [. . .] any appellate court to choose not to accept an inference drawn by a factfinder when the inference drawn is a reasonable one." ***Id.*** at 370-71. "While an appellate challenge to factual findings and credibility determinations may occasionally be appropriate, in the vast majority of cases such determinations are unassailable." ***State v. Trecroci***, 2001 WI App 126, ¶ 2, n. 1, 246 Wis. 2d 261, 268, n. 1, 630 N.W.2d 555.

The second step, the application of constitutional principles, this court reviews independently. ***Martwick, Id.*** at ¶ 20, 231 Wis. 2d at 812. ***State v. Richardson***, 156 Wis. 2d 128, 137-38, 456 N.W.2d 830 (1990); ***State v. Pallone***, 2000 WI 77, ¶ 27, 236 Wis. 2d 162, 177, 613 N.W. 2d 568.

B. The warrantless search of Bruski's travel bag violated his state and federal right to security in his personal effects.

1. Bruski had standing to challenge the search of his travel bag, in which he reasonably expected privacy.

a. The circuit court correctly concluded that Bruski had a reasonable expectation of privacy in his travel case.

Bruski was sleeping in an automobile parked in the rear of a residence. He was not on the street or in the

public's view. Bruski had a property interest in his travel bag. The state conceded at the suppression hearing that the travel bag belonged to Bruski. (28:37-38). Bruski had complete dominion and control over the travel bag and had the right to exclude others from using or looking into his travel bag. Bruski did not leave his travel bag on the seat, which would have made it more visible to a person outside the car. The travel bag was on the floor on the front passenger's side. The travel bag was silver colored and hard shelled. These features ensured that the contents would not be visible or discernable by touch. The officers referred to the bag as a "travel bag," which shows that the container was a personal item not a generic container like a cardboard box. Subjectively, Bruski had a reasonable expectation of privacy.

The circuit court found that Bruski had a reasonable expectation of privacy "with respect to his personal belongings inside the vehicle, including his travel bag located on the floor of the front seat." (App. 103). A person has a reasonable expectation of privacy (1) when the person has exhibited an actual, subjective expectation of privacy and (2) society is willing to recognize that such an expectation of privacy is reasonable. ***State v. Thompson***, 222 Wis. 2d 179, 186, 585 N.W.2d 905 (Ct. App. 1998). The defendant has the burden of proving by a preponderance of the evidence that he had a reasonable expectation of privacy in the item searched. ***State v. Whitrock***, 161 Wis. 2d 960, 972, 468 N.W.2d 696 (1991).

Whether society is willing to recognize the defendant's subjective expectation of privacy as reasonable is an objective test. The following factors are relevant:

> 1. Whether the person had a property interest in the premises;

> 2. Whether the person was legitimately on the premises;
>
> 3. Whether the person had complete dominion and control and the right to exclude others;
>
> 4. Whether the person took precautions customarily taken by those seeking privacy;
>
> 5. Whether the person put the property to some private use; and
>
> 6. Whether the claim of privacy is consistent with historical notions of privacy.

State v. Trecroci, 2001 WI App 126, ¶ 36, 246 Wis. 2d 261, 282, 630 N.W. 2d 555.

The court of appeals held that Bruski failed "to show any reasonable expectation of privacy in his travel case." ¶ 17. The record refutes this.

As to factor 6, Bruski's claim of privacy in his travel bag is consistent with "historical notions of privacy." ***State v. Thompson,*** *supra.* A travel bag is the type of personal property that society recognizes as private. "Indeed, to the sojourner in our midst all of us at one time or another the suitcase or trunk may well constitute practically the sole repository of such expectation of privacy as are had." ***United States v. Block***, 590 F.2d 535, 541 (4th Cir. 1978).

As to factor 1, the state conceded that Bruski had a property interest in his travel bag. (28:37-28). Factors 3-5 indicate that Bruski had an objectively reasonable expectation of privacy. He was using his travel bag for personal property. He had dominion and control over the bag which was within his sight and reach on the floor of the front seat of the automobile. He had the right to

exclude others from opening his personal luggage. Bruski took precautions customarily taken by those seeking privacy, namely, he used an opaque, hard shell case to protect the secrecy of his belongings. The travel bag was on the floor of the car, not in the more visible location on the car seat. As in ***State v. Lange***, 158 Wis. 2d 609, 620, 463 N.W. 2d 390 (Ct. App. 1990), "he took steps to protect the area from observation by people passing by."

The remaining factor 2 does not appear applicable where the object of the search is a thing, not a premise.

Bruski's expectation of privacy in his travel bag was objectively reasonable, and rooted in "understandings that are recognized and permitted by society," ***Rakas v. Illinois***, 439 U. S. 128, 144, n. 12, (1978). This court should conclude that Bruski carried his burden of showing that his expectation of privacy was objectively reasonable.

b. Bruski did not need a reasonable expectation of privacy in the automobile to enjoy a reasonable expectation of privacy in his personal travel bag while in a third party's automobile.

The state argues that Bruski lost any reasonable expectation of privacy in his travel case because he was in a third party's automobile, citing ***State v. Matejka***, 2001 WI 5, 241 Wis. 2d 52, 621 N.W.2d 52, 621 N.W.2d 891. In ***Matejka***, a law enforcement officer stopped a van for a traffic code violation. The driver consented to the officer searching the van. This court held that this consent justified the police search of the defendant's jacket, which she left in the van. When Matejka exited the van, she left her jacket behind, knowing the van was going to be searched. This court stated that passengers in cars have a reduced expectation of privacy with regard to the property

that they transport in cars, ***Id.*** at ¶ 26. The ***Matejka*** court acknowledged that its holding did not apply to "private, personal property," such as a purse. ***Id.*** at ¶ 36, n. 6.

The court of appeals accepted the state's argument and ruled that Bruski could not have a reasonable expectation of privacy in the travel bag because he did not have a reasonable expectation of privacy in the automobile. The court of appeals relied on a Fourth Circuit decision, ***United States v. Hargrove***, 647 F.2d 411, 412 (4th Cir. 1981), to find Bruski's expectation of privacy in his travel bag to be objectively unreasonable. In that case the defendant was stopped by the police while driving and arrested on a warrant. A search of the car revealed cocaine in a paper bag behind the front seat.

The court of appeals reliance on ***Hargrove*** was misplaced. The Fourth Amendment permits a full search of the passenger compartment, including any containers therein, pursuant to a custodial arrest. ***New York v. Belton***, 453 U.S. 454, 460 (1981). In ***Hargrove,*** the search of the car was incident to an arrest pursuant to a warrant. In addition, the paper bag in ***Hargrove*** is not the type of personal property that society recognizes as private. Further, the location of the bag – beyond Hargrove's sight or reach – indicated Hargrove did not have an objectively reasonable expectation of privacy in the paper bag.

Unlike ***Hargrove***, there was no warrant for Bruski's arrest and there was no probable cause to believe Bruski had committed or was committing a crime. The container at issue – a travel bag – is the type of container that society recognizes as the depository for personal effects.

The court of appeals stated that Bruski's claim that he reasonably expected privacy was "undermined by Bruski's failure to object or attempt to prevent Beauchamp from searching the vehicle after the officer

stated he was going to look for keys." ¶ 16. This assertion reveals the court of appeals failed to review the circuit court's findings and reasonable inferences with proper deference. The circuit court did not find that Bruski knew the police were going to search his travel bag. Bruski was on the far side of the automobile engaged in conversation with Olson and Smith when Beauchamp began searching. Under the deferential review of historical findings, this court assumes that the circuit court made a finding, if not express, in the way that supports its decision. ***State v. Echols***, 175 Wis. 2d at 672-73. Under this deferential review, this court should assume that the circuit court found that Bruski did not hear the police officer say or know he was going to search the automobile.

Though Bruski was unable "to explain how he got there in the first place" (App. 110), the circuit court correctly concluded that Bruski had a reasonable expectation of privacy in his personal private travel bag. The circuit court held "that under these circumstances defendant had a reasonable right of privacy with respect to his personal belongings inside the vehicle, including his travel bag located on the floor of the front seat." (App. 110). These circumstances included Bruski sleeping in the early morning in an automobile parked behind a residence with his personal travel bag close at hand.

The Fourth Amendment "protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected." ***Katz v. United States***, 389 U.S. 347, 351-352 (1967) (citation omitted).

Even where a defendant does not have a reasonable expectation of privacy in an automobile, he may have a reasonable expectation of privacy in a container within the automobile that contains the

defendant's personal belongings. The Tenth Circuit Court of Appeals found that the defendant "clearly manifested a subjective expectation of privacy in the bags and that his expectation was one that society has recognized as reasonable" where the defendant's personal belongings were in his luggage in the trunk of a vehicle that he did not have a reasonable expectation of privacy. ***United States v. Edwards,*** 242 F. 3d 928, 937 (10th Cir. 2001). *See also* ***People v. Young***, 363 Ill. App. 3d, 268, 843 N.E.2d 489 (Ill. App. Ct. 3d Dist. 2006) (passenger did not have reasonable expectation of privacy in vehicle, but did in his luggage).

Searching Bruski's travel bag was unreasonable. The police officers could have told Smith to find out from her daughter why Bruski had possession of the automobile. The officers could have asked Bruski to leave. The search was without a warrant and none of the exceptions to the warrant requirement apply. The court of appeals did not rely on any valid exception to the warrant requirement.

Since Bruski had a reasonable expectation of privacy in his travel bag, he is entitled to the protection of the Fourth Amendment, ***Minnesota v. Olson***, 495 U.S. 91, 100 (1990), and Article I, Section 11 of the Wisconsin Constitution (*see infra*).

2. In the event this court concludes Bruski had no reasonable expectation of privacy because of his unexplained presence in a third party's automobile, this court should rule Bruski had automatic standing under Article I, Section 11, of the Wisconsin Constitution.

The United States Supreme Court in ***United States v. Salvucci***, 448 U. S. 83 (1980), abandoned rule where a defendant had automatic standing to challenge a search if the government charged criminal possession of the seized evidence at the time of the challenged search. (The automatic standing rule was enunciated in the Supreme Court's decisions in ***Jones v. United States,*** 362 U. S. 257 (1960), and ***Brown v. United States***, 411 U. S. 223 (1973).).

This court in ***State v. Callaway***, 106 Wis. 2d 503, 520, 317 N. W. 2d 428 (1982), adopted the reasoning in ***United States v. Salvucci,*** and held that "criminal defendants charged with crimes of possession must first prove that their own constitutional rights have been infringed upon a search or seizure before they can challenge the constitutionality of that search and/or seizure." The court did not engage in any analysis of Article I, Section 11, of the Wisconsin Constitution.

This court should consider whether the Wisconsin Constitution confers automatic standing to defendants charged with possession of illegal material to challenge the search of the automobile which uncovered the illegal material. If this court construes Article 1, Section 11, of the Wisconsin Constitution to confer automatic standing, the court will join the franks of at least 13 states that have

construed the state constitution to allow for automatic standing.[2] Kent M. Williams, *Note, Property Rights*

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[2] *See* ***State v. Maia***, 243 Conn. 242, 247, 704 A. 2d 797 (1997) the Connecticut Supreme Court noted that:

> The automatic standing doctrine has been adopted by several states under their state constitutions. *See* ***Commonwealth v. Amendola***, 406 Mass. 592, 600, 550 N.E.2d 121 (1990) (automatic standing rule survives in Massachusetts as matter of state constitutional law in automobile and house search cases); ***State v. Bullock***, 272 Mont. 361, 901 P.2d 61, 69 (1995) ("when the charge against the defendant includes an allegation of a possessory interest in the property which is seized, the defendant has standing to object to the prosecutorial use of that evidence"); ***State v. Alston***, 88 N.J. 211, 228, 440 A.2d 1311 (1981) (defendant has automatic standing "if he has a proprietary, possessory or participatory [*246] interest in either the place searched or the property seized"); ***Commonwealth v. Sell***, 504 Pa. 46, 67-68, 470 A.2d 457 (1983) ("a person charged with a possessory offense must be accorded 'automatic standing'"); ***State v. Wood***, 148 Vt. 479, 489, 536 A.2d 902 (1987) ("defendant need only assert a [***7] possessory, proprietary or participatory interest in . . . the area searched to establish standing" under the state constitution); ***State v. Simpson***, 95 Wash. 2d 170, 180, 622 P.2d 1199 (1980) (state constitution's privacy clause encompasses right to assert violation of privacy in cases where defendant is charged with possession of very item which was seized); see also ***State v. Owen***, 453 So. 2d 1202, 1204-1205 (La. 1984) (specific language in state constitution conferring standing on any person adversely affected by search confers standing on defendant, for whom no arrest warrant was issued, to contest admissibility of evidence seized in search of his trailer); ***State v. Settle***, 122 N.H. 214, 218, 447 A.2d 1284 (1982) (language of state constitution "requires that 'automatic standing' be

Protection Under Article I, Section 10 of the Minnesota Constitution: A Rationale for Providing Possessory Crimes Defendants with Automatic Standing to Challenge Unreasonable Searches and Seizures, 75 Minn. L. Rev. 1255, 1273-1300 (1991). ("Because of dissatisfaction with the "legitimate expectation of privacy" standard, several state courts have interpreted the search and seizure provisions of their state constitutions to protect both property and privacy interests, and grant automatic standing to persons charged with possessory crimes.") *See also*, Robert F. Williams, *Symposium: The Future of State Supreme Courts as Institutions in the Law: in the Glare of the Supreme Court: Continuing Methodology and Legitimacy Problems in Independent State Constitutional Rights Adjudication*, 72 Notre Dame L.

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afforded to all persons . . . charged with crimes in which possession of any article or thing is an element").

The reasoning of these courts is persuasive. For example, the New Jersey Supreme Court pointed out that "adherence to the vague 'legitimate expectation of privacy' standard, subject as it is to the potential for inconsistent and capricious application, will in many instances [***8] produce results contrary to commonly held and accepted expectations of privacy." ***State v. Alston***, *supra*, 88 N.J. 226. Further, the Pennsylvania Supreme Court opined that the "United States Supreme Court's current use of the 'legitimate expectation of privacy' concept needlessly detracts from the critical element of unreasonable governmental intrusion." ***Commonwealth v. Sell***, *supra*, 504 Pa. 66-67. Finally, the Vermont Supreme Court has concluded that the reasonable expectation of privacy test curtails the "function of [*247] the judiciary by focusing on the defendant's ability to present a challenge rather than on the challenge itself, and by unduly limiting the class of defendants who may invoke the right to be free from unlawful searches and seizures." ***State v. Wood***, *supra*, 148 Vt. 489.

Rev. 1015, 1048 n. 163 (state courts construe the state constitution in an institutional environment different than that of the Supreme Court).

State courts are free to interpret their own constitutions as granting more protections to individuals than the United States Constitution. ***California v. Greenwood***, 486 U.S. 35, 43 (1988); ***City of Mesquite v. Aladdin's Castle, Inc.,*** 455 U.S. 283, 293 (1982).

The Wisconsin Supreme Court is committed to examining the Wisconsin Constitution independent of United States Supreme Court jurisprudence. ***State v. Ward***, 2000 WI 3, ¶ 59, 231 Wis. 2d 723, 752, 604 N.W.2d 517. This court will not be "bound by the minimums which are imposed by the Supreme Court of the United States if it is the judgment of this court that the Constitution of Wisconsin and the laws of this state require that greater protection of citizens' liberties ought to be afforded." ***State v. Doe***, 78 Wis. 2d 161, 172, 254 N.W.2d 210 (1977).

In interpreting the Wisconsin Constitution, this court examines:

> (1) The plain meaning of the words in the context used; (2) The historical analysis of the constitutional debates and of what practices were in existence in 1848, which the court may reasonably presume were also known to the framers of the 1848 constitution; and (3) The earliest interpretation of this section by the legislature as manifested in the first law passed following the adoption of the constitution.

State v. Beno, 116 Wis. 2d 122, 136-37, 341 N.W.2d 668 (1984) (Citations omitted.).

The wording of Article I, Section 11, of the Wisconsin Constitution and the Fourth Amendment is the same. However, the preamble to the Wisconsin

Constitution[3] differs from that of the United States Constitution.[4] "Unlike the preamble to the Federal Constitution, by this preamble, preservation of liberty is given precedence over the establishment of government." John Sundquist, *Construction of the Wisconsin Constitution-Recurrence to Fundamental Principles*, 62 Marq. L. Rev. 531, 559 (1979). Chief Justice Winslow described the Wisconsin Constitution as "a very human document." He anticipated that the document would be interpreted in light of the "changed social, economic, and governmental conditions and ideals of the time." *Id.* at 561-62, quoting ***Borgnis v. Falk Co.,*** 147 Wis. 327, 348, 133 N.W. 209 (1911).

This court recognized that the Wisconsin Constitution protected the rights of criminal defendants long before the United States Supreme Court began incorporating the federal Bill of Rights into the Fourteenth Amendment. The earliest example was the right to counsel in felony cases. ***Carpenter v. Dane County***, 9 Wis. 274, 276 (1859). Especially relevant to this appeal is the court's decisions in ***Hoyer v. State***, 180 Wis. 407, 193 N.W. 89 (1923). In ***Hoyer,*** this court interpreted Article I, §§ 8 and 11, of the Wisconsin Constitution. The ***Hoyer*** court adopted "an exclusionary

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[3] The Preamble to the Wisconsin Constitution states:

> We, the people of Wisconsin, grateful to Almighty God for our freedom, in order to secure its blessings, form a more perfect government, insure domestic tranquility and promote the general welfare, do establish this constitution.

[4] The Preamble to the United States Constitution provides:

> We, the people of the United States, in order to form a more perfect union, establish justice, insure domestic tranquility, provide for the common defence, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America.

rule based upon the Wisconsin Constitution." ***State v. Brady***, 130 Wis. 2d 443, 453, 388 N.W.2d 151 (1986). The court has long held that "the only method" of protecting the constitutional guarantee against unreasonable searches and seizures is by ordering the illegally seized evidence suppressed. ***Glodowski v. State***, 196 Wis. 265, 268, 220 N.W. 227 (1928). Accordingly, "courts should at all times jealously guard and protect a citizen in the full enjoyment of his constitutional rights, by suppressing evidence seized in violation of his rights ...." ***State ex rel. Meyer v. Keeler***, 205 Wis. 175, 236 N.W. 561 (1931).

This court has said categorically that it consistently follows the United States Supreme Court's interpretation of the Fourth Amendment when construing Article I, Section 11 of the Wisconsin Constitution. ***State v. Griffith,*** 2000 WI 72, 236 Wis. 2d 48, ¶ 24 n.10, 613 N.W.2d 72; ***State v. Kiper***, 193 Wis. 2d 69, 80, 532 N.W.2d 698 (1995); ***State v. Fry***, 131 Wis. 2d 153, 171-72, 388 N.W.2d 565 (1986). In ***State v. Malone***, 2004 WI 108, ¶ 15, 274 Wis. 2d 540, 550-51, 683 N.W.2d 1, this court described its interpretation of Article I, Section 11, of the Wisconsin Constitution as evolving "in virtual lockstep with the United States Supreme Court's jurisprudence construing the Fourth Amendment."

However, both recent and old caselaw disprove that this court interprets our state constitution in lockstep with the United States Supreme Court rulings on the Fourth Amendment. In ***State v. Eason,*** 2001 WI 989, ¶ 47, 245 Wis. 2d 206, 629 N.W. 2d 625, this court departed from the United States Supreme Court's interpretation of the Fourth Amendment. This court interpreted Article I, Section 11, of the Wisconsin Constitution as affording additional protection than the Fourth Amendment. ***Id.***, ¶ 73. This court held that for the

good faith exception[5] to apply, the Wisconsin Constitution required the state to show a significant investigation and a review by an officer trained in probable cause and reasonable suspicion or a government attorney.

Even if it were true that this court never interpreted Article I, Section 11 of the Wisconsin Constitution any differently than the Fourth Amendment, this would not forestall a different interpretation now. In ***State v. Knapp***, 2005 WI 127, 285 Wis. 2d 86, 700 N.W.2d 899, this court stated that even though it had never interpreted the Due Process Clause of the Wisconsin Constitution any differently than the Due Process Clause of the Fourteenth Amendment:

> we retain the right to interpret our constitution to provide greater protections than its federal counterpart." Id., P41. We explained:
>
> While this results in a divergence of meaning between words which are the same in both federal and state constitutions, the system of federalism envisaged by the United States Constitution tolerates such divergence where the result is greater protection of individual rights under state law than under federal law. . . .
>
> Id. (quoting William J. Brennan, Jr., S*tate Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489, 500 (1977)).

Knapp, ¶ 61, 285 Wis 2d at 62.

With respect to interpretation of our constitution, this court has said:

> the conditions and problems surrounding the people, as well as their ideals, are constantly changing. The political or philosophical aphorism

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[5] In ***United States v. Leon***, 468 U. S. 897, 919-20 (1984), the Supreme Court recognized an exception to the exclusionary rule where a police officer relied in good faith upon a search warrant issued by an independent and neutral magistrate.

> of one generation is doubted by the next, and entirely discarded by the third; the race moves forward constantly, . . .

Borgnis v. Falk Co., 147 Wis. at 349.

Most importantly, the rationale for the exclusionary rule in Wisconsin differs from that of the United States Supreme Court. The Supreme Court's limited view of the exclusionary rule led to its decision in ***Stone v. Powell***, 428 U. S. 465 (1976), where it held that federal courts would no longer review habeas corpus petitions raising Fourth Amendment claims if the state provided opportunity for full and fair litigation. The Supreme Court reasoned that the deterrent effect of the exclusionary rule is outweighed by the societal costs from the loss of evidence.

In Wisconsin, the exclusionary rule emphasizes judicial integrity as well as deterrence of misconduct by law enforcement officers. The framers of the Wisconsin Constitution were concerned with judicial integrity, and this court's construction of Article I, Section 11, of the Wisconsin Constitution has reflected that concern. In ***Hoyer v. State***, this court held that the "Bill of Rights as embodied in constitutions to be of substance rather than mere tinsel." 180 Wis. 2d at 415. This court's use of the plural (constitutions) shows that it was not merely relying on the Fourth Amendment, but on the Wisconsin Constitution. The ***Hoyer*** Court saw "no reason in logic, justice, or in that innate sense of fair play" why a court should approve the use of illegally seized evidence. To allow the use of that evidence "is to gibe and to jeer." 180 Wis. at 418. The ***Hoyer*** decision shows a primary concern with judicial integrity when it refused to allow the admission of illegally seized evidence into judicial proceedings.

Concern for judicial integrity rather than deterrence motivated the Massachusetts Supreme Court to

interpret its Declaration of Rights to allow "automatic standing." ***Commonwealth v. Amendola***, *supra,* 406 Mass. 592. The court believed that allowing the government to have contradictory position as a basis for conviction as unjust. That the Massaschusetts Constitution allows automatic standing is significant because one of the drafters of the Wisconsin Constitution, Chief Justice Edward V. Whiton, who is described as having a leading part at the convention and instrumental in drafting the criminal code, came from Massachusetts. ***State ex rel Long v. Keyes***, 75 Wis. 288, 291, 44 N.W. 13 (1889). *See also* ***State v. Chicago & N.W. R. Co.,*** 128 Wis. 449, 486, 108 N.W. 594 (1906) (Chief Justice Whiton was among the members of the convention that framed the state constitution); ***Nunnemacher v. State***, 129 Wis. 190, 203, 108 N.W. 627 (1906) (Whiton took leading part at convention). His understanding of the value of freedom from unreasonable searches was shaped in Massachusetts.

Bruski respectfully asks this court to interpret Article I, Section 11, of the Wisconsin Constitution to allow him automatic standing to challenge the search of the automobile, and if this court fails to recognize a reasonable expectation of privacy in his travel bag, to challenge the search of the travel bag as well. To deny Bruski standing to challenge the search that uncovered the illegal substances and paraphernalia that gave rise to the criminal charge is inconsistent with our constitutional value of judicial integrity.

C. No exception to the warrant requirement existed.

A warrantless search is per se unreasonable under the Article I, Section 11, of the Wisconsin Constitution and the Fourth Amendment unless it falls within an exception to the warrant requirement. The state has the burden of proof that an exception to the exception to the warrant requirement exists. ***State v. Boggess***, 115 Wis. 2d

443, 449, 340 N.W.2d 516 (1983) (citing ***Cady v. Dombrowski***, 413 U.S. 433, 439 (1973)).

The state did not attempt to argue that an exigency existed. The state's sole effort was to convince the court that the search was pursuant to Smith's consent.

D. The circuit court's conclusion that there was no implied consent is supported by the evidence and reasonable inferences and a correct application of constitutional principles.

The facts and reasonable inferences support the circuit court's finding that there was no implied consent. When the police telephoned Smith sometime after 8:00 a.m., Smith was undisturbed by the police information that Bruski was sleeping in her car (27:6). She offered a possible explanation, namely, that her daughter gave a friend permission to use the car (28:5-6). An inference from the response is that her daughter, not Smith, had control of that vehicle. Two hours later Smith asked the police for assistance in recovering her automobile. There is no evidence that Smith had spoken with her daughter in the meantime. There is no evidence that Bruski's presence in the automobile was unlawful.

The circuit court judges the credibility of the witnesses. Office Beauchamp testified that he said he was going to look for the keys and he "assumed" Smith consented to the search of her car (28:33). The circuit court reasonably could have discounted this testimony, finding it incredible. Since Beauchamp expressly requested Smith's permission to search the trunk, the circuit court could reasonably infer that at the time Beauchamp searched Bruski's travel bag, Beauchamp had not considered the necessity of Smith's consent to search the interior of the automobile.

The state argued that one of the circumstances evincing implied consent is that Smith stood by watching while Beauchamp searched the car. (State's Court of Appeals brief, p. 2). However, the evidence shows that Smith, Bruski and Officer Olson were standing on the driver's side of the car, having a conversation (27:10-11; see also 28:7). Beauchamp was on the opposite side of the car. A reasonable inference is that Smith did not hear Beauchamp say that he was going to look for the keys. A reasonable inference is that Smith did not observe Beauchamp's search leading to the travel bag.

The state argued consent was implied as in ***State v. Kelly***, 75 Wis. 2d 303, 249 N.W.2d 800 (1977), because Smith telephoned the police and asked for assistance in recovering her automobile. Kelly called the police and reported that the victim was "running around outside, shot", 75 Wis. 2d at 310. Kelly reported the crime to the police in a manner indicating that the crime was committed by someone other than herself. The supreme court found Kelly had consented to the search of her home because she initiated the investigation leading to the search. 75 Wis. 2d at 311. As the circuit court found, the facts in ***Kelly*** "are not analogous to the facts in this case." (19-1; R.-App. 101). First, no probable cause existed that a crime had been committed. Second, the defendant here, Bruski, did not ask the police for help.

Other cases where courts have found implied consent are distinguishable. *See* ***State v. Flippo***, 575 S.E.2d 170 (W. Va. 2002) (when person summons the police to premises and states crime was committed against her, she implicitly consents to a search of the premises). In ***United States v. Wesela***, 223 F.3d 656 (7th Cir. 2000), the defendant's wife asked the police to come due to her husband's threatening behavior with a gun. Although the police did not ask for permission to search, the wife told the police where the gun was. The court found that consent was implied under these facts.

The circuit court found that Smith did not consent to the search of her car prior to the search of Bruski's bag. The court's findings are supported by the evidence and reasonable inferences. The court correctly applied the law concerning implied consent and determined there was none. This court should reverse the court of appeals and affirm the circuit court's order suppressing the evidence in this case.[6]

CONCLUSION

Bruski respectfully requests this court to reverse the court of appeals decision and affirm the circuit court's orders in this appeal.

Date this 9th day of June, 2006.

Respectfully submitted,

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6 The circuit court suppressed the evidence seized during the automobile search, and the evidence obtained as a result of Bruski's arrest (9, 11, 23).

CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 6,362 words.

Dated this 9th day of June, 2006.

Signed:

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APPENDIX

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COURT OF APPEALS
DECISION
DATED AND FILED

February 7, 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. 2005AP1516-CR **Cir. Ct. No. 2005CF60**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

V.

DAVID ALLEN BRUSKI,

DEFENDANT-RESPONDENT.

APPEAL from orders of the circuit court for Douglas County: MICHAEL T. LUCCI, Judge. *Reversed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 HOOVER, P.J. The State appeals an order granting David Allen Bruski's motion to suppress physical evidence and an order denying its motion for reconsideration. We agree with the State that Bruski lacked standing to assert a Fourth Amendment claim and we reverse.

Background

¶2 The City of Superior Police Department responded to a suspicious person and vehicle complaint during the morning of March 3, 2005. At about 8 a.m., officer James Olson made contact with a passed-out Bruski, the vehicle's occupant. The car was parked behind a building on John Street. Olson had to repeatedly shake Bruski to wake him. Olson reported Bruski then continued to "nod off" and had difficulty answering his questions. Bruski said he was waiting for a friend, and that he had no idea how he had gotten to that location.

¶3 Olson identified the vehicle and discovered it was registered to Margaret Smith. The police department's communications center contacted Smith and advised her of her vehicle's status. Smith informed the center that her daughter Jessica was supposed to have the car and might have let a friend drive it.

¶4 Smith contacted the police at about 10:20 a.m. and indicated she was concerned about her daughter and her car. She asked if an officer would escort her to recover the vehicle. Olson met her at the station, then took her to the John Street location where Bruski and the vehicle were still parked. Olson had Bruski step out of the car. Smith said she had never met nor seen Bruski before and that her daughter had never mentioned his name.

¶5 Olson informed Bruski that Olson and officer Gerald Beauchamp were there to help Smith recover her car. Olson asked Bruski if he had the keys, but Bruski claimed he did not. Bruski later indicated he knew Smith's daughter but could only give her first name.

¶6 When Bruski stated he had no keys, Beauchamp told Smith he would look for them in the car. At no point did Smith or Bruski object to

Beauchamp's search of the vehicle. Beauchamp encountered a hard "makeup travel case" on the floor of the front passenger seat. Smith later stated that it was not hers. Opening it, Beauchamp discovered drug paraphernalia and what appeared to be marijuana. Olson arrested Bruski, then searched him, discovering methamphetamine and the car keys.

¶7 Bruski was charged with possession of methamphetamine, drug paraphernalia, and THC. He filed a motion to suppress the evidence, arguing police had searched his closed container without probable cause or a warrant. He argued he had a reasonable expectation of privacy in his personal effects and in the vehicle because he had possession of it at the time.

¶8 The State responded that Bruski had no reasonable expectation of privacy because he was in someone else's vehicle and, accordingly, he had no standing to raise a Fourth Amendment challenge. The State also argued that Smith had at least given implied consent to search the car's interior.

¶9 The court determined Smith did not give consent to search the interior, nor had anyone given consent to search the travel case. Regarding standing, the court held Bruski

> had a reasonable right of privacy with respect to his personal belongings inside the vehicle, including his travel bag [or case] located on the floor of the front seat. The evidence shows that defendant did not give consent for the bag to be searched nor did the officers request such consent or even inquire as to whether the bag belonged to him or the vehicle owner before searching it. Under these circumstances, the defendant retained his Fourth amendment rights regarding his personal possessions, including his travel bag, and he was still entitled to a reasonable expectation of privacy with respect to the same.

¶10 For the reasons that follow, we conclude the court made a legal error. Bruski has no standing to raise a Fourth Amendment challenge.[1]

Discussion

¶11 We use a two-step standard of review for constitutional search and seizure inquiries. ***State v. Matejka***, 2001 WI 5, ¶16, 241 Wis. 2d 52, 621 N.W.2d 891. In reviewing a motion to suppress, we will uphold the circuit court's findings of evidentiary or historical facts unless clearly erroneous, but we evaluate those facts against the constitutional standard de novo. ***Id.***

¶12 When we assess a defendant's standing to challenge a search under the Fourth Amendment, "the critical inquiry is 'whether the person ... has a legitimate expectation of privacy in the invaded place.'" ***State v. Trecroci***, 2001 WI App 126, ¶26, 246 Wis. 2d 261, 630 N.W.2d 555 (quoting ***Rakas v. Illinois***, 439 U.S. 128, 143 (1978)).

¶13 The defendant has the burden of establishing a reasonable expectation of privacy by a preponderance of evidence. ***Trecroci***, 246 Wis. 2d 261, ¶35. Whether a person has a reasonable expectation of privacy depends on two things: whether the individual has exhibited an actual, subjective expectation of privacy in the area inspected and in the item seized, and whether society will recognize such an expectation of privacy as reasonable. ***Id.***

[1] Accordingly, we do not reach the question whether Smith implicitly consented to the search of her vehicle's interior. *See* ***Gross v. Hoffman***, 224 Wis. 296, 300, 277 N.W. 663 (1938) (only dispositive issues need be addressed).

¶14 The second prong is, however, an objective test, that relies on six factors:

> 1. Whether the person had a property interest in the premises;
>
> 2. Whether the person was legitimately on the premises;
>
> 3. Whether the person had complete dominion and control and the right to exclude others;
>
> 4. Whether the person took precautions customarily taken by those seeking privacy;
>
> 5. Whether the person put the property to some private use; and
>
> 6. Whether the claim of privacy is consistent with historical notions of privacy.

Id., ¶36 (citation omitted).

¶15 Bruski has failed to show that he had an objectively reasonable expectation of privacy in the car. The evidence only shows that he was found in a vehicle he did not own. He offered no evidence as to why he was in the vehicle, or that he had authorization to be in the vehicle. Bruski could not even fully identify the person from whom he had allegedly obtained the vehicle, and he certainly did not have the registered owner's permission to use the car. *See* ***United States v. Sanchez***, 943 F.2d 110, 113-14 (1st Cir. 1991).

¶16 Indeed, Bruski offers no evidence under the ***Trecroci*** factors to show he had any objective expectation of privacy in the vehicle. The closest argument he makes is that he was taking "precautions customarily taken by those seeking privacy" because he was parked off the street and behind a building. This argument rings hollow, because if Bruski could not recall how he arrived on John Street, it is unlikely he would recall why he parked there. He also contends he

demonstrated a subjective expectation of privacy because the case was placed on the floor, not the seat, and the case was not transparent. This argument is undermined by Bruski's failure to object or attempt to prevent Beauchamp from searching the vehicle after the officer stated he was going to look for the keys. *Cf.* ***Matejka***, 241 Wis. 2d 52, ¶37 (defendant, aware police were about to search car's interior where she left her jacket, did not protest search). In any event, Bruski's subjective expectations are only part of the equation. Ultimately, he simply fails to carry his burden of proof.

¶17 Bruski also fails to show any reasonable expectation of privacy in his travel case. While both he and the trial court stressed his ownership of the case, this is insufficient given that the case was inside the car. The United States Supreme Court has "emphatically rejected the notion that 'arcane' concepts of property law" govern Fourth Amendment claims. ***Rawlings v. Kentucky***, 448 U.S. 98, 105 (1980). That is, possession alone will not confer standing. ***State v. Curbello-Rodriguez***, 119 Wis. 2d 414, 424-25, 351 N.W.2d 758 (Ct. App. 1984).

¶18 "Whether a person has an expectation of privacy in a container that is searched is not determined by his subjective beliefs." ***United States v. Hargrove***, 647 F.2d 411, 412 (4th Cir. 1981). The expectation must be objectively reasonable. ***Id.*** "A person who cannot assert a legitimate claim to a vehicle cannot reasonably expect that the vehicle is a private repository for his personal effects, whether or not they are enclosed in some sort of a container...." ***Id.*** (citing ***Rakas***, 439 U.S. at 151-52). "To hold otherwise would mean that the automobile ... was somehow transformed into a place of sanctuary ... free from the eyes of the law. We find it impossible to accept this proposition." ***People v. Henenberg***, 302 N.E.2d 27, 31 (Ill. 1973). Cases describing the kind of interest that will afford standing to challenge the legality of a search in terms of a

possessory interest in the seized goods do not involve property unlawfully or illegally placed upon premises belonging to another. ***Id.***

¶19 Bruski cannot show any reasonable expectation of privacy in the vehicle because he neither owned it nor has he shown he had permission to use it. Without a reasonable expectation of privacy in the vehicle, he has no expectation of privacy relative to his travel case as a matter of law, even though he owned the case. Accordingly, Bruski has no standing to raise a Fourth Amendment challenge to the search of the case and the seizure of evidence discovered therein.

By the Court.—Orders reversed.

Recommended for publication in the official reports.

STATE OF WISCONSIN CIRCUIT COURT DOUGLAS COUNTY

STATE OF WISCONSIN,

Plaintiff,

vs.

DAVID ALLEN BRUSKI,

Defendant.

MEMORANDUM DECISION
Case No.: 05-CF-60

Defendant moves to suppress evidence in the form of controlled substances and drug paraphernalia seized as the result of a search of defendant's travel bag while it was located on the floor of a vehicle in which the defendant was found seated on the morning of March 3, 2005. The court heard testimony of two officers who were dispatched to a location of a suspicious person seated in a vehicle at the rear of a residence. After considering their testimony, the arguments of counsel and the law, the court is satisfied that the motion should be granted.

First of all, it should be noted that this decision relates only to the search and seizure of evidence from defendant's travel bag. The facts surrounding the search are unusual and quite unique insofar as the defendant was not the owner of the vehicle and the search which yielded the alleged controlled substance in this case was not a search for any contraband or weapons, but instead was a search for car keys which the officer was attempting to retrieve for an anxious owner. The officer apparently looked into the travel bag that happened to belong to defendant and found evidence of a controlled substance and drug paraphernalia. It is undisputed that there was no consent given by defendant for the search of his bag while there is an issue over whether or not

the officer had the consent of the vehicle owner to search the interior of the vehicle. There is also no dispute over the fact that there was no probable cause to search the defendant or the vehicle when the officer first approached and that there was no reasonable suspicion to believe that the defendant had committed or was about to commit a crime when first approached.

The law is clear that warrantless searches are considered unreasonable per se and that one of the exceptions thereto are searches conducted with voluntary consent (See State v. Phillips, 218 Wis. 2d 180 (1998)) Furthermore, the "state bears the burden of establishing, clearly and convincingly, that a warrantless search was reasonable and in compliance with the Fourth Amendment." (State v. Matejka, 241 Wis.2d 52 (2001) at p. 59, citing State v. Keiffer, 217 Wis.2d 531 (1998)).

The primary issue in this case is whether the owner of the vehicle gave consent for the officer to search the interior of the vehicle. The state suggests that while the officer may not have asked the vehicle owner for consent to search the inside of the car prior to his searching it and while the owner did not expressly give her consent, the circumstances surrounding the scene and the statements of the owner amounted to implied or constructive consent for the officer to proceed to look for the keys for the owner's benefit and to accommodate her desire to retrieve them, especially after the defendant had indicated that he did not know where the keys were.

However, since the law provides that the state must demonstrate clearly and convincingly that consent was given and in the absence of any legal authority supporting a theory of implied or constructive consent, the court must find that consent was not given by the owner of the vehicle even though it's certainly reasonable to assume

under these circumstance that it would have been granted had the officers requested consent to search before the actual search and not later after the search and seizure occurred. Furthermore, the court can find no legal authority establishing any type of consent by acquiescence of the owner or by later ratification when the officer asked the owner after the fact whether it was alright for him to be searching inside the car after the evidence in this case was already found inside the defendant's travel bag and prior to the officer searching the trunk. While common sense suggests that the owner certainly would have consented if asked, the court must nevertheless find that consent was not given to search defendant's travel bag, which is the major distinction between the facts in this case and those in Matejka.

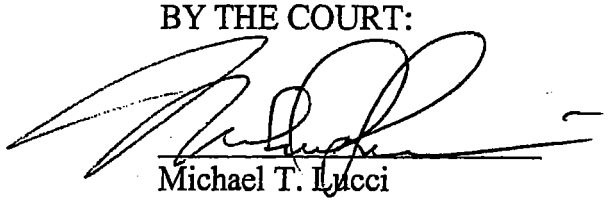
Finally, because the vehicle did not belong to defendant and because he was mysteriously found inside the vehicle without being able to explain how he got there in the first place as well as whether or not he had permission, the issue of his standing to challenge this search and seizure was raised. Based on the evidence and the law, however, the court must hold that under these circumstances defendant had a reasonable right of privacy with respect to his personal belongings inside the vehicle, including his travel bag located on the floor of the front seat. The evidence shows that defendant did not give consent for the bag to be searched nor did the officers request such consent or even inquire as to whether the bag belonged to him or the vehicle owner before searching it. Under these circumstances, the defendant retained his Fourth amendment rights regarding his personal possessions, including his travel bag, and he was still entitled to a reasonable expectation of privacy with respect to the same.

Based on the foregoing factors, the court must grant the motion to

suppress the evidence seized from defendant's travel bag on the grounds that it was the fruit of a warrantless search that was conducted without consent.

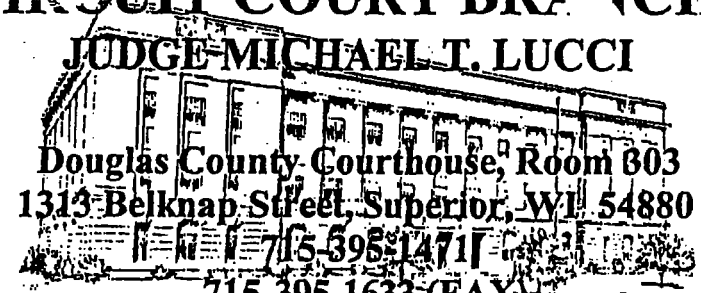
Dated this 18th day of April, 2005.

BY THE COURT:



Michael T. Lucci
Circuit Court Judge

CIRCUIT COURT BRANCH I
JUDGE MICHAEL T. LUCCI



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Re: State of Wisconsin vs. David Allen Bruski
Court Case No.: 05-CF-60

Dear Counsel:

Based on the evidence presented during the motion hearing, the oral arguments of counsel and the law, the court must conclude that any evidence found on defendant's person incident to his arrest must also be suppressed on the grounds that the arrest itself was based on evidence seized form the illegal search of his travel bag located inside the vehicle.

The court has considered this proposition from the standpoint of whether or not the search of the travel bag was sufficiently attenuated by circumstances which would provide an independent basis for the arrest and ensuing search. (See State v. Phillips, 218 Wis.2d 180 (1998)). Although one may argue that there were other factors sufficient enough to establish probable cause to arrest and search defendant, i.e. the suspicious circumstances surrounding his being found sitting in the driver's seat of a vehicle that he neither owned nor had the owner's permission to use, the court is satisfied that his arrest was predominantly the result of the police finding evidence of a controlled substance inside his travel bag. Since that search was unlawful for the reasons stated in the court's

original decision, the evidence seized incidental to his arrest should be suppressed as the fruit of the same illegal search and seizure.

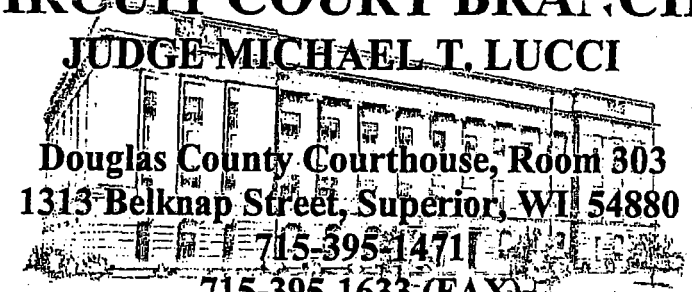
Respectfully yours,

Michael T. Lucci
Circuit Court Judge

MTL:jas

cc: Court File

CIRCUIT COURT BRANCH I
JUDGE MICHAEL T. LUCCI



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June 13, 2005

FILED

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Re: State of Wisconsin vs. David Allen Bruski
Court Case No.: 05-CF-60

Dear Counsel:

Please be advised that after reviewing the Motion to Reconsider the court's decision of April 18, 2005 and the defendant's response to said motion, the court is satisfied that the motion should be denied.

The motion does not point out any new factors or legal authority which would persuade the court to reconsider the decision that there was no consent to search the defendant's travel bag, implied or otherwise. Moreover, the circumstances in the Kelly case cited in the motion in support of the proposition that there was implied consent are not analogous to the facts in this case. Under the circumstances herein, the owner of the vehicle not only did not give implied consent for the police to search the car but she also could not give such consent to search defendant's travel bag. Since he himself did not provide consent, the search was illegal.

Respectfully yours,

Michael T. Lucci
Circuit Court Judge

MTL:jas

STATE OF WISCONSIN | CIRCUIT COURT | DOUGLAS COUNTY

STATE OF WISCONSIN,

Plaintiff,

vs

David Allen Bruski,

Defendant.

FILED

JUL 19 2005

Joan Osty
Clerk of Circuit Court

ORDER

Case #2005CF000060

Based upon the decisions of this court on April 18, 2005, May 10, 2005 and on June 13, 2005 (see attached)

IT IS ORDERED that the defendant's motion to suppress evidence is hereby granted and the State's motion to reconsider is hereby denied.

Dated this 19th day of July, 2005.

BY THE COURT:

Michael T. Lucci
Circuit Court Judge
Douglas County, Wisconsin

CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 809.19(2)(a) and that contains: (1) a table of contents; (2) relevant trial court record entries; (3) the findings or opinion of the trial court; and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial court's reasoning regarding those issues.

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 first names and last initials 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 9th day of June, 2006.

Signed:

Margaret A. Maroney

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STATE OF WISCONSIN

IN SUPREME COURT

No. 2005AP1516-CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

DAVID ALLEN BRUSKI,

Defendant-Respondent-Petitioner.

REVIEW OF DECISION OF COURT OF APPEALS, DISTRICT III, THAT REVERSED ORDER GRANTING MOTION TO SUPPRESS EVIDENCE AND ORDER DENYING MOTION TO RECONSIDER ENTERED IN CIRCUIT COURT FOR DOUGLAS COUNTY, THE HONORABLE MICHAEL T. LUCCI, PRESIDING

BRIEF AND APPENDIX OF PLAINTIFF-APPELLANT

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STATE OF WISCONSIN

IN SUPREME COURT

No. 2005AP1516-CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

DAVID ALLEN BRUSKI,

Defendant-Respondent-Petitioner.

REVIEW OF DECISION OF COURT OF APPEALS, DISTRICT III, THAT REVERSED ORDER GRANTING MOTION TO SUPPRESS EVIDENCE AND ORDER DENYING MOTION TO RECONSIDER ENTERED IN CIRCUIT COURT FOR DOUGLAS COUNTY, THE HONORABLE MICHAEL T. LUCCI, PRESIDING

BRIEF AND APPENDIX OF PLAINTIFF-APPELLANT

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The fact that this court granted the petition for review demonstrates that the case merits oral argument and publication of the court's decision.

FACTS

The Statement of the Case at pages 2-4 of the Brief of Defendant-Respondent-Petitioner provides background

for the issues discussed in the briefs. Additional facts will be set forth in this brief when they are relevant to the issues being discussed.

ARGUMENT

I. SUMMARY OF ARGUMENT.

The state appealed from the trial court's orders granting David Allen Bruski's motion to suppress the evidence seized from the travel case in the car and from his person (14:1-8; 24:1-10).

In the court of appeals, the state first argued that the suppression motion should have been denied because Bruski never proved that he had a reasonable expectation of privacy in the car or the travel case that were searched and, therefore, he could not assert a claim under the Fourth Amendment.

The state also contended that the suppression motion should have been denied because, even if Bruski had a reasonable expectation of privacy in the car or the travel case, the searches of the car and the travel case were valid because they were conducted under the authority of the implied consent from the car's owner, Margaret Smith. By asking for police assistance in retrieving her car, Smith gave her implied consent for the police to take whatever action was necessary to return the car to her. Smith's implied consent extended to a police search of the car to find the keys Smith needed to regain possession of her car. Because Smith's implied consent to search the car extended to containers found in the car, the implied consent authorized the police to search the travel case while looking for the keys.

The court of appeals concluded that Bruski failed to show that he had a reasonable expectation of privacy in the car or the travel case. *State v. Bruski*, No.

2005AP1516-CR, slip op. at ¶¶15-19 (Wis. Ct. App. Dist. III Feb. 7, 2006); Pet-Ap. 105-07.

In this brief, the state will argue that the court of appeals correctly concluded that Bruski failed to carry his burden of proving that he had a reasonable expectation of privacy in the car or the case. The state will also argue that, if Bruski had a reasonable expectation of privacy in the car or the case, the searches of the car and the travel case were valid because they were conducted under the authority of the implied consent from Smith.

II. BRUSKI FAILED TO PROVE THAT HE HAD A REASONABLE EXPECTATION OF PRIVACY IN THE CAR OR THE TRAVEL CASE.

A. To assert a claim under the Fourth Amendment or under art. I, § 11 of the Wisconsin Constitution, Bruski had to prove that he had a reasonable expectation of privacy in the area searched.

Bruski filed a motion to suppress evidence seized in the search of the travel case and to suppress other fruits of the search, which would have included Bruski's arrest and evidence seized in searching Bruski incident to the arrest (6:1; 8; 10; 11:1-2; Pet-Ap. 112-13). Bruski alleged that the search was in violation of the Fourth Amendment to the United States Constitution and art. I, § 11 of the Wisconsin Constitution (6:1).

Whether Bruski may assert a claim under the Fourth Amendment depends upon whether he had a reasonable expectation of privacy in the area searched. *State v. Andrews*, 201 Wis. 2d 383, 391, 549 N.W.2d 210 (1996); *State v. Dixon*, 177 Wis. 2d 461, 467, 501 N.W.2d 442 (1993); *State v. Trecroci*, 2001 WI App 126, ¶26, 246 Wis. 2d 261, 630 N.W.2d 555; and *United States v.*

Wellons, 32 F.3d 117, 119 (4th Cir. 1994) ("Only where a search intrudes upon a space as to which an individual has 'a legitimate expectation of privacy' will the search violate that individual's Fourth Amendment rights."). The Wisconsin Constitution has been construed to impose the same requirements as the Fourth Amendment. *State v. McCray*, 220 Wis. 2d 705, 709, 583 N.W.2d 668 (Ct. App. 1998).

In the trial court, Bruski had the burden of establishing his reasonable expectation of privacy in the car and the travel case by a preponderance of the evidence. *Rawlings v. Kentucky*, 448 U.S. 98, 104 (1980); *Trecroci*, 246 Wis. 2d 261, ¶35; and *United States v. Allen*, 235 F.3d 482, 489 (10th Cir. 2000). To establish that he has a reasonable expectation of privacy, Bruski had to prove, first, that he had "by his . . . conduct exhibited an actual (subjective) expectation of privacy in the area searched and in the seized item," and, second, that "such an expectation is legitimate or justifiable in that it is one that society is willing to recognize as reasonable." *Dixon*, 177 Wis. 2d at 468. *See also Trecroci*, 246 Wis. 2d 261, ¶35. The second part is an objective test. *Dixon*, 177 Wis. 2d at 468; and *Trecroci*, 246 Wis. 2d 261, ¶36.

The following factors are relevant in determining whether Bruski had an expectation of privacy in the car and the travel case that society is willing to recognize as reasonable:

> (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; (6) whether the claim of privacy is consistent with historical notions of privacy. This list of factors is not controlling or exclusive. The totality of the circumstances is the controlling standard.

Dixon, 177 Wis. 2d at 469.

B. Bruski failed to prove that he had a reasonable expectation of privacy in the area searched.

1. Bruski failed to prove that he had a reasonable expectation of privacy in the car.

In this court, Bruski does not claim that he had a reasonable expectation of privacy in the car that was searched. Nevertheless, to provide context for the later discussion about reasonable expectation of privacy in the travel case, the state will briefly explain why Bruski failed to prove that he had a reasonable expectation of privacy in the car.

In the circuit court, Bruski's attorney argued that Bruski had a reasonable expectation of privacy in the car because he was possessing it (28:36-37).[1] When granting the suppression motion, the court did not determine whether Bruski had a reasonable expectation of privacy in the car; but the court concluded that Bruski had a reasonable expectation of privacy in the travel case (7:3; Pet-Ap. 110).

The court of appeals concluded that Bruski failed to show that he had a reasonable expectation of privacy in the car. *Bruski*, slip op. at ¶¶15-16; Pet-Ap. 105-06. The court explained that, even if Bruski showed a subjective expectation of privacy, he failed to carry his burden of proving an objective expectation of privacy in the car. *Id.*

In this court, Bruski does not challenge the court of appeals' conclusion that he failed to prove that he had a reasonable expectation of privacy in the car. In addition, Bruski's argument in the circuit court that he had a

[1]Because the entire transcript of the suppression hearing is reproduced in the appendix to this brief, citations to the transcript will only be to the transcript's page number and will not include the corresponding appendix page.

reasonable expectation of privacy in the car simply because he possessed it is contrary to the established law.

Mere possession of the car was not sufficient to give Bruski a reasonable expectation of privacy in the car. *United States v. Salvucci*, 448 U.S. 83, 92 (1980) ("We simply decline to use possession of a seized good as a substitute for a factual finding that the owner of the good had a legitimate expectation of privacy in the area searched."); *State v. Curbello-Rodriguez*, 119 Wis. 2d 414, 424, 351 N.W.2d 758 (Ct. App. 1984) (while possession is a relevant consideration it alone will not show a reasonable expectation of privacy); *Allen*, 235 F.3d at 489 ("Furthermore, this court has found the mere fact of presence in the car, or even possession of the car keys, insufficient to meet the defendant's burden of proving standing."); *United States v. Erickson*, 732 F.2d 788, 790 (10th Cir. 1984) (defendant's unexplained possession of the airplane failed to show that he had a reasonable expectation of privacy).

Bruski's unexplained possession of the car was insufficient to give him a reasonable expectation of privacy in the car. *See Allen*, 235 F.3d at 489 (even though it was later shown that Allen had a legal possessory interest in the vehicle, the court found that Allen failed at the suppression hearing to prove that he lawfully possessed the vehicle in order to show that he had a reasonable expectation of privacy in the vehicle); *Wellons*, 32 F.3d at 119 (Wellons did not have a reasonable expectation of privacy in a rental vehicle because he was not an authorized driver of the rented car); *Erickson*, 732 F.2d at 790[2] (the defendant's unexplained possession of the airplane was insufficient to show that he had a reasonable expectation of privacy in the airplane); *People v. Henenberg*, 302 N.E.2d 27, 31 (Ill. 1973) (the

[2]In *State v. Dixon*, 177 Wis. 2d 461, 472, 501 N.W.2d 442 (1993), this court cited *Erickson* as a case where a non-owner operator did not have a reasonable expectation of privacy in the interior of a vehicle.

court held that the defendant did not have standing to object to the search of a car he had stolen; and *Bell v. Commonwealth*, 563 S.E.2d 695, 708 (Va. 2002) (court held that Bell failed to carry his burden of proving he had a reasonable expectation of privacy in the car he was driving).

In this case, the evidence only shows that Bruski was found sitting in the car owned by Margaret Smith. Bruski provided no evidence to show why he was in the car or that he was authorized to be in the car. Bruski offered no evidence on the six factors that are used to determine whether he had an objective expectation of privacy in the car. The court of appeals, therefore, correctly concluded that Bruski failed to carry his burden of proving that he had a reasonable expectation of privacy in the car.

2. Bruski failed to prove that he had a reasonable expectation of privacy in the travel case.

   a. Ownership alone is insufficient to prove reasonable expectation of privacy.

In the circuit court, Bruski's attorney relied on Bruski's ownership of the travel case to show that Bruski had a reasonable expectation of privacy in the case (28:37-38).

In finding that Bruski failed to prove that he had a reasonable expectation of privacy in the case, the court of appeals pointed out neither ownership nor possession alone is sufficient to prove reasonable expectation of privacy. *Bruski*, slip op. at ¶17; Pet-Ap. 106. Citing *United States v. Hargrove*, 647 F.2d 411 (4th Cir. 1981), and *Henenberg*, the court of appeals concluded that Bruski did not have a reasonable expectation of privacy in the case since the case was in the car in which he had no

reasonable expectation of privacy. *Bruski*, slip op. at ¶¶18-19; Pet-Ap. 106-07.

The court's conclusion that neither ownership nor possession is sufficient to establish a reasonable expectation of privacy is supported by *Rawlings*, 448 U.S. at 105 (Supreme Court disagrees with petitioner's claim that ownership of the drugs entitled him to challenge the search regardless of his expectation of privacy); *Salvucci*, 448 U.S. at 92 ("We simply decline to use possession of a seized good as a substitute for a factual finding that the owner of the good had a legitimate expectation of privacy in the area searched."); and *Curbello-Rodriguez*, 119 Wis. 2d at 424 (while possession is a relevant consideration it alone will not show a reasonable expectation of privacy).

b. There is no evidence of other circumstances to prove a reasonable expectation of privacy.

In this court, Bruski does not claim that ownership alone showed a reasonable expectation of privacy; but he argues that other circumstances show that he had a reasonable expectation of privacy in the case. Brief of Defendant-Respondent-Petitioner at 6-9.

Bruski seems to argue that this court should assume that the circuit court made factual findings consistent with the circumstances Bruski cites to support the circuit court's conclusion that Bruski had a reasonable expectation of privacy in the travel case. Brief of Defendant-Respondent-Petitioner at 5-9. Bruski also indicates that this court is bound by the factual findings assumed to have been made and the inferences assumed to have been drawn by the circuit court. Brief of Defendant-Respondent-Petitioner at 5-6.

The circuit court can make findings based on inferences; but the inferences must be founded in the

evidence. An inference "is a conclusion drawn by reason from facts established by proof" and "inferences must be logical, reasonable, and drawn from established fact." *State v. Davis*, 51 S.W.3d 869, 872 (Mo. Ct. App. 2001). "An inference is reasonable if it can fairly be drawn from the facts in evidence," and "inferences should be logical and natural results drawn from the evidence by proper deduction." *In re Paternity of A.M.C.*, 144 Wis. 2d 621, 636, 424 N.W.2d 707 (1988).

There must be positive evidence in the record from which inferences may be drawn. *Yelk v. Seefeldt*, 35 Wis. 2d 271, 278-79, 151 N.W.2d 4 (1967). Inferences "must be drawn from established facts which logically support them." *Creamery Package Mfg. Co. v. Industrial Comm.*, 211 Wis. 326, 331, 248 N.W. 140 (1933). "A fact finder may not indulge in inferences wholly unsupported by any evidence." *State v. King*, 120 Wis. 2d 285, 293, 354 N.W.2d 742 (Ct. App. 1984).

"[A]n inference cannot be based on speculation or conjecture." *In re Paternity of A.M.C.*, 144 Wis. 2d at 636. If there is no credible evidence upon which the trier of fact can make a reasoned choice between two possible inferences, a finding would be in the realm of speculation and conjecture. *Merco Distg. Corp. v. Com'l Police Alarm Co.*, 84 Wis. 2d 455, 460, 267 N.W.2d 652 (1978). A judgment cannot be based on conjecture, unproved assumptions or mere possibilities. *Merco*, 84 Wis. 2d at 461. *See also Creamery Package*, 211 Wis. at 331 (a finding of fact by a commission, court or jury cannot be based upon mere conjecture).

The difference between an inference and speculation depends upon whether the connection between the evidence and the inference is strong enough to support the proposed intellectual exercise. *Yelk*, 35 Wis. 2d at 280-81. It is a permissible inference if, in human experience, it is reasonable to say that the inference can be drawn from the evidence. *Yelk*, 35 Wis. 2d at 281.

Bruski fails to identify the evidence that would support the facts and inferences that he claims shows he had a reasonable expectation of privacy in the travel case. Without providing record citations to support his claim, Bruski states: "Bruski had complete dominion and control over the travel bag and had the right to exclude others from using or looking into his travel bag." Brief of Defendant-Respondent-Petitioner at 7.

There is no evidence in the record from which the court could find or infer that Bruski had dominion and control over the case (other than the dominion and control consistent with possession) or that he had the right to exclude others from using or looking into the case. The record shows nothing about Bruski's connection to the travel case other than that he owned it and that he was found in a car with it. There is no evidence why Bruski was in the car or that he had a right to be in the car. There is no evidence whether anyone else had access to the travel case or control over the case. There was evidence that Margaret Smith's daughter, Jessica, had been in possession of the car and that Jessica's clothes were in the back seat of the car (28:5-6, 13). The travel case was found on the floor in front of the front passenger seat (28:22). Jessica's connection to the car (her possession of it and her clothes in it) and the fact the case was found on the passenger side of the car indicate that she had control of the case just as much as Bruski did. The main point is that it is pure speculation as to whether Bruski had complete dominion and control over the case (other than the dominion and control consistent with possession) or whether he could exclude anyone from it.

Bruski claims at page 7 of his brief that he "did not leave his travel bag on the seat, which would have made it more visible to a person outside the car." Bruski implies that he placed the case on the floor where it was found; but there is no evidence that Bruski, rather than someone else, placed the case on the floor of the car. As indicated above, it is just as likely that Jessica placed the case where it was found as it is that Bruski placed it there. In light of

the lack of evidence, anyone could have placed it where it was found. While Bruski was sleeping (28:21, 24-25), anyone could have opened the unlocked[3] passenger door and opened or moved the case.

Because there is no evidence from which, in human experience, it is reasonable to say that Bruski had complete dominion and control over the case (other than dominion and control consistent with possession) or that he had the right to exclude others from the case, it would be mere conjecture, not permissible inference, to reach those conclusions.

Bruski cites the fact that the case was silver-colored and hard-shelled, which ensured that the contents would not be visible or discernable by touch. Brief of Defendant-Respondent-Petitioner at 7. Those facts, however, do not show whether Bruski had a reasonable expectation of privacy in the case.

Bruski argues that the fact the officers referred to the item as a travel bag shows that it was a personal item, not a generic container like a cardboard box. Brief of Defendant-Respondent-Petitioner at 7.

Bruski does not cite where in the record the officers referred to the item as a "'travel bag.'" Several times they referred to it as travel case (28:12-13, 16-17, 19, 22-23, 29, 30-31). Whatever the officers called the item, the term they used does not determine whether Bruski had a reasonable expectation of privacy in the case. If the officers could determine the outcome of the issue by the term they used, the police could always defeat a defendant's claim of reasonable expectation of privacy by calling the item in question whatever term would defeat

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[3]The state says that the passenger door was unlocked because Officer Beauchamp entered the car through the passenger door to look for the keys (28:32-33). Because Beauchamp did not have the keys, the door must have been unlocked if he entered the car through it.

the claim. Bruski seems to think it makes a difference whether the container was a personal item or a cardboard box. Brief of Defendant-Respondent-Petitioner at 10. However, the Supreme Court has said that "a traveler who carries a toothbrush and a few articles of clothing in a paper bag or knotted scarf" may claim a right to conceal his possessions from official inspection equal to that of a sophisticated executive with the locked attache case. *United States v. Ross*, 456 U.S. 798, 822 (1982). This means that the label the police attach to the item has no affect on whether Bruski had a reasonable expectation of privacy in the item.

Bruski claims he was using the case for personal property. Brief of Defendant-Respondent-Petitioner at 8. There is no evidence to support Bruski's statement. There was no evidence that the hard case contained anything other than drug paraphernalia and a cigarette box containing a green leafy substance that appeared to be marijuana (28:12-13). There was no evidence whether the drug paraphernalia and marijuana was for Bruski's personal use or whether he shared it with Jessica or other people.

Bruski again claims that he had "the right to exclude others from opening his personal luggage." Brief of Defendant-Respondent-Petitioner at 8-9. Again, there is no evidence to support that claim. Since Jessica's clothes were found in the car of which she apparently had possession (28:5-6, 13), it is just as likely that she had access to the case as that Bruski could exclude her or others from it.

Bruski contends that he took precautions taken by those seeking privacy because the case was on the floor of the car and not in the more visible location on the car seat. Bruski claims that he took steps to protect the area from observations by people passing by. Brief of Defendant-Respondent-Petitioner at 9. Despite Bruski's claim, there is no evidence that he placed the case on the floor of the car; and because there is no evidence that he placed the

case on the floor, it cannot be said that he took precautions to protect the case from passersby.

The evidence showed that Bruski failed to protect the case from passersby. The passenger door of the car was unlocked as evidenced by Beauchamp's ability to enter the car to look for the keys (28:32-33). While the car was unlocked, Bruski was passed out or sleeping so soundly that Officer Olson had difficulty waking him up (28:21, 24-25). While Bruski was sleeping, any passerby could have opened the passenger door and taken the case. In *State v. Orta*, 2003 WI App 93, ¶13, 264 Wis. 2d 765, 663 N.W.2d 358, and in *State v. Eskridge*, 2002 WI App 158, ¶18, 256 Wis. 2d 314, 647 N.W.2d 434, the courts cited the defendants' failure to locks doors as evidence that the defendants had not taken precautions customarily taken by someone seeking privacy. The possibility of someone walking off with the case while Bruski soundly slept demonstrates that the case was not protected from a passerby.

Bruski argues that a circumstance showing that he had a reasonable expectation of privacy in the case was that he was sleeping with his "personal travel bag close at hand." Brief of Defendant-Respondent-Petitioner at 11. However, again there is no evidence that the case was for personal use. There is no evidence whether Jessica or someone else also used the case.

The foregoing discussion shows that there is no evidence or inferences to support a finding that Bruski had a reasonable expectation of privacy in the travel case. Bruski failed to carry his burden of proving that he had a reasonable expectation of privacy in the case.

Bruski contends that his claim of privacy in his travel case is consistent with notions of privacy. Brief of Defendant-Respondent-Petitioner at 8. Citing *United States v. Block*, 590 F.2d 535, 541 (4th Cir. 1978), Bruski argues that a travel case is the type of personal property that society recognizes as private.

For two reasons the *Block* case does not help Bruski. First, the issue in *Block* was not reasonable expectation of privacy but rather the scope of the defendant's mother's authority to give consent for the police to search the defendant's footlocker that was in his bedroom of the house where he resided. *Block*, 590 F.2d at 537-38, 540-42. Second, the footlocker was found in Block's room, not in a car in which he had no reasonable expectation of privacy.

c. Bruski contends he had a reasonable expectation of privacy in the travel case even if he did not have a reasonable expectation of privacy in the car.

Bruski contends that he did not need a reasonable expectation of privacy in the car to have a reasonable expectation of privacy in the travel case. Brief of Defendant-Respondent-Petitioner at 9-12.

Citing *Hargrove* and *Henenberg*, the court of appeals concluded that Bruski did not have a reasonable expectation of privacy in the case since the case was in the car in which he had no reasonable expectation of privacy. *Bruski*, slip op. at ¶¶18-19; Pet-Ap. 106-07.

Hargrove, *Henenberg* and *Wellons* support the conclusion that Bruski failed to prove that he had a reasonable expectation of privacy in the travel case because those cases hold that a person does not have a reasonable expectation of privacy in his personal belongings that are in a vehicle in which he has no reasonable expectation of privacy. Those cases help show that ownership of an item alone is not enough to establish reasonable expectation of privacy in the item.

In *Wellons*, 32 F.3d at 118, Wellons was stopped for speeding while driving a rental car he was not authorized

to operate. The car was searched and heroin was found in two bags of luggage that were in the car. *Wellons*, 32 F.3d at 119. The court concluded that, because Wellons was an unauthorized driver of the rented car, he had no reasonable expectation of privacy in the car. *Wellons*, 32 F.3d at 119. Wellons then argued that "even if he had no reasonable expectation of privacy in the rental car, he retained a reasonable expectation of privacy in his luggage which he placed in the car." *Wellons*, 32 F.3d at 119. Rejecting Wellons' argument and finding that he had no reasonable expectation of privacy in his luggage, the court said in *Wellons*, 32 F.3d at 119-20:

> However, as we have previously held,
>
> > [o]ne who can assert no legitimate claim to the car he was driving cannot reasonably assert an expectation of privacy in a bag found in that automobile.... A person who cannot assert a legitimate claim to a vehicle cannot reasonably expect that the vehicle is a private repository for his personal effects, whether or not they are enclosed in some sort of a container, such as a paper bag.
>
> *United States v. Hargrove, supra,* 647 F.2d at 413.

In *Hargrove*, 647 F.2d at 412, Hargrove was stopped by police after a brief chase and he was arrested on a warrant. After Hargrove was removed from the car and handcuffed, the police found behind the front seat a paper bag that contained three plastic sacks of cocaine. *Id.* The car Hargrove was driving had been reported stolen. *Id.* When Hargrove challenged the search of the car and the seizure of the bag, the court concluded that, because Hargrove did not have a reasonable expectation of privacy in the stolen car, he did not have a reasonable expectation of privacy in the bag that was found in the car. *Hargrove*, 647 F.2d at 412.

In *Henenberg*, 302 N.E.2d at 30-31, the police searched the car Henenberg had stolen. The court held that Henenberg had no standing to challenge the search of

the car or the seizure of his belongings that were in the car. *Henenberg*, 302 N.E.2d at 31.

Bruski finds himself in a situation similar to the defendants in *Wellons*, *Hargrove* and *Henenberg*. In this case, as in those cases, the defendant's belongings were in a car in which the defendant had no reasonable expectation of privacy. Just as the defendants in those three cases had no reasonable expectation of privacy (*Wellons* and *Hargrove*) or no standing (*Henenberg*) to assert a Fourth Amendment claim as to their personal belongings, Bruski also had no reasonable expectation of privacy in his travel case that was in the car.

Bruski tries to distinguish *Hargrove* on three grounds: first, the search was actually incident to Hargrove's arrest pursuant to *New York v. Belton*, 453 U.S. 454, 460 (1981); second, the paper bag in *Hargrove* is not the type of personal property that society recognizes as private; and third, Hargrove had no reasonable expectation of privacy in the bag because it was beyond his sight and reach. Brief of Defendant-Respondent-Petitioner at 10.

Bruski is wrong about the application of *Belton*. The court decided *Hargrove* on April 22, 1981. *Hargrove*, 647 F.2d at 411. The Supreme Court decided *Belton* on July 1, 1981. *Belton*, 453 U.S. at 454. Because *Hargrove* was decided before *Belton*, the search of Hargrove's car could not be justified as a search incident to arrest under the bright line rule in *Belton*. Bruski states that the bag was beyond Hargrove's sight and reach. Under those circumstances, the search could not be justified under the search incident to arrest criteria in *Chimel v. California*, 395 U.S. 752, 763 (1969), because the bag would have been beyond Hargrove's immediate control.

The fact that the container in *Hargrove* was a paper bag would not prevent Hargrove from having a reasonable expectation of privacy in it because people have an equal right to privacy in items carried in paper bags as they do in locked attaché cases. *Ross*, 456 U.S. at 822. In

addition, in *Wellons*, 32 F.3d at 119-20, the court applied the holding of *Hargrove* to luggage that was found in the car.

Bruski states that Hargrove had no reasonable expectation of privacy in the bag because it was beyond his sight and reach. Brief of Defendant-Respondent-Petitioner at 10. However, the fact that the bag in *Hargrove* was found behind the front seat indicates that the bag was concealed from view more than the travel case in this case; and the facts in *Hargrove* suggest an expectation of privacy more than the facts in this case.

Bruski's reasons for distinguishing *Hargrove* do not provide valid distinctions.

Bruski contends that the state cited *State v. Matejka*, 2001 WI 5, 241 Wis. 2d 52, 621 N.W.2d 891, to show that Bruski lost any reasonable expectation of privacy in the travel case because he was in a third party's automobile. Brief of Defendant-Respondent-Petitioner at 9-10. The prosecutor argued that Bruski did not have a reasonable expectation of privacy in the case because, as in *Matejka*, the owner of the car could consent to a search of the car that would include a search of the travel case (28:38-39). The state's argument is accurate because it is consistent with the holding in *Rawlings*, 448 U.S. at 104-06.

The Supreme Court held that Rawlings did not have a reasonable expectation of privacy in his drugs that were in containers that he placed in Vanessa Cox's purse. *Rawlings,* 448 U.S. at 100-01, 104-06. The Court pointed out that Rawlings had no right to exclude others from Cox's purse and he had no subjective expectation that Cox's purse would remain free from governmental intrusion. *Rawlings*, 448 U.S. at 105.

In this case, Bruski left his drugs in a case that was left in Margaret Smith's car just as Rawlings left his drugs in containers that were in Cox's purse. Just as Rawlings had no right to exclude others from Cox's purse and no

subjective expectation that Cox's purse would remain free from governmental intrusion, Bruski had no right to exclude others from Smith's car and no subjective expectation that the car would remain free from governmental intrusion. Therefore, just as Rawlings had no expectation of privacy in the container of drugs he left in Cox's purse, Bruski had no expectation of privacy in the case of drugs he left in Smith's car.

Bruski tries to distinguish *Matejka* from this case by claiming that the holding of *Matejka* would not apply to private personal property such as a purse. Brief of Defendant-Respondent-Petitioner at 10, citing *Matejka*, 241 Wis. 2d 52, ¶36 n.6. However, even if Bruski construes *Matejka* correctly (and the state does not concede that *Matejka* would not apply to private, personal property), Bruski failed to show that the plastic travel case qualified as private, personal property. There is no evidence in this case concerning Bruski's use of the case, except that it contained drug paraphernalia and marijuana; and there is no evidence concerning how many people had access to the case. Thus, there is no evidence the case was only for Bruski's personal use.

Citing the court of appeals decision at ¶16, Bruski points out that the court said his claim that he reasonably expected privacy was "'undermined by Bruski's failure to object or attempt to prevent Beauchamp from searching the vehicle after the officer stated he was going to look for keys.'" Brief of Defendant-Respondent-Petitioner at 10-11. According to Bruski, because the circuit court found that he had a reasonable expectation of privacy in the case, the circuit court must have found that Bruski did not hear Beauchamp say he was going to search for keys or that Bruski did not know that Beauchamp was going to search the automobile. Bruski contends that the appellate court must be bound by the factual findings of the circuit court. Brief of Defendant-Respondent-Petitioner at 11.

An appellate court is bound by factual findings of the circuit court unless the findings are clearly erroneous.

Matejka, 241 Wis. 2d 52, ¶16. In this case, there was no evidence to support a finding that Bruski did not hear Beauchamp say he was going to search for the keys. Officer Olson, Bruski and Smith were standing together at the driver's side door and Beauchamp was five or six feet away on the other side of the car (28:10, 24). Beauchamp heard Bruski say he did not have the keys (28:8, 28). This means Bruski was able to hear Beauchamp tell Smith he was going to look for the keys (28:33). Also, the fact that Olson saw Beauchamp enter and search the car means that Bruski could also see Beauchamp search the car since they were both standing by the driver's door (28:9-10). Because a circuit court finding that Bruski was not aware of Beauchamp searching the car would be clearly erroneous, an appellate court would not be bound if the circuit court had made that finding.

d. Cases cited by Bruski are based on law inapplicable to this case.

Bruski cites *United States v. Edwards*, 242 F.3d 928 (10th Cir. 2001), and *People v. Young*, 843 N.E.2d 489 (Ill. App. Ct. 2006), for the proposition that a defendant who does not have a reasonable expectation of privacy in a car can still have a reasonable expectation of privacy in his personal belongings that are in the car. Brief of Defendant-Respondent-Petitioner at 11-12.

Edwards is distinguishable from this case on the facts. In *Edwards*, 242 F.3d at 936-37, the court noted that Edwards had a reasonable expectation of privacy in his luggage that was in the trunk of the car that was rented to someone else, at least in part, because his bags contained "items such as clothing and toiletries in addition to the contraband seized by the police, and were being used to transport Edwards' personal belongings while traveling." In this case, there is no evidence that the travel case contained any items other than drug paraphernalia

and marijuana. There is no evidence that the travel case contained Bruski's personal belongings.

Edwards and *Young* are both distinguishable from this case in that they both are based on faulty foundations because of the authorities on which they rely to find that the defendants had a reasonable expectation of privacy. Some of the authorities cited in *Edwards* and *Young* ultimately rely on cases that found a defendant had standing to challenge a search solely because he owned or possessed the item that was searched or seized. In other words, those authorities relied on the automatic standing rule that was repudiated in *Salvucci* and in *State v. Callaway*, 106 Wis. 2d 503, 519-20, 317 N.W.2d 428 (1982), and *State v. Wisumierski*, 106 Wis. 2d 722, 727-28, 317 N.W.2d 484 (1982). Other authorities relied upon facts or legal theories not applicable to this case. Because the holdings in *Edwards*[4] and

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[4]In *United States v. Edwards*, 242 F.3d 928, 937 (10th Cir. 2001), to support the conclusion that Edwards had a reasonable expectation of privacy in his luggage that was in the trunk of a car rented by someone else, the court cited *Arkansas v. Sanders*, 442 U.S. 753, 761 n.8 (1979), and *United States v. Buchner*, 7 F.3d 1149, 1154 (5th Cir. 1993). The following summary of the authorities ultimately relied upon by *Edwards* shows that those authorities do not support a finding that Bruski had a reasonable expectation of privacy in the travel case.

To show that the defendant had standing to challenge the search of his luggage that was in the taxi, the Court in *Sanders*, 442 U.S. at 761 n.8, relied on *Simmons v. United States*, 390 U.S. 377 (1968). In *Simmons*, 390 U.S. at 389-90, the Court relied on the automatic standing rule of *Jones v. United States*, 362 U.S. 257 (1960).

In *Buchner*, 7 F.3d at 1154, the court cited *United States v. Kelley*, 981 F.2d 1461, 1467 n.1 (5th Cir. 1993), to support the conclusion that the owner of a suitcase in another's car may have a legitimate expectation of privacy with respect to the contents of the suitcase.

In *Kelley*, 981 F.2d at 1467 n.1, the court cited *Rakas v. Illinois*, 439 U.S. 128, 142 n.11 (1978), and *United States v.*

(Footnote continued)

Young[5] are ultimately based on theories that a passenger

Martinez, 808 F.2d 1050, 1056 (5th Cir. 1987), to support the conclusion that Kelley had a legitimate expectation of privacy with the respect to the contents of his suitcase in the trunk of another person's car.

In *Martinez*, 808 F.3d at 1056, the court found that the passenger could challenge the search of the trunk of the car because the owner said she had his permission to use the car. *Martinez* is distinguishable from this case because there is no evidence that Bruski had the owner's permission to use the car in which he and the case were found.

In *Rakas*, 439 U.S. at 142 n.11, the Court indicated that visitors at a residence could contest the lawfulness of a search of their own property. The subsequent decisions in *Rawlings* and *Salvucci* show that ownership and possession alone do not provide reasonable expectation of privacy.

[5]In *Young*, 843 N.E.2d at 491-92, the court relied on *People v. Manke*, 537 N.E.2d 13, 15 (Ill. App. Ct. 1989), to support the conclusion that the passenger in a car has standing to challenge the search of his own suitcase.

In *Manke*, 537 N.E.2d at 15, the court cited *United States v. McGrath*, 613 F.2d 361 (2d Cir. 1979), and *United States v. Salazar*, 805 F.2d 1394 (9th Cir. 1986), to support the statement that a passenger in an automobile has standing to challenge a search of his or her property or containers in that automobile.

In *McGrath*, 613 F.2d at 365-66, the court only held that others in a car do not have standing to challenge the search of a briefcase that was owned by a different passenger. That holding is not applicable to this case.

In *Salazar*, 805 F.2d at 1396, the court cited *Sanders*, 442 U.S. at 761 n.8, to support the conclusion that a passenger in a car had standing to challenge the search of his paper bag that was in the car.

To show that the defendant had standing to challenge the search of his luggage that was in the taxi, the Court in *Sanders*, 442 U.S. at 761 n.8, relied on *Simmons*, 390 U.S. 377. In *Simmons*, 390 U.S. at 389-90, the Court relied on the automatic standing rule of *Jones*, 362 U.S. 257.

(Footnote continued)

has a reasonable expectation of privacy based on ownership or possession, those cases should not be given any weight by this court in light of *Rawlings*, 448 U.S. at 105 (reasonable expectation of privacy cannot be based on ownership alone), and *Salvucci*, 448 U.S. at 92 (reasonable expectation of privacy cannot be based on possession alone).

e. Bruski failed to prove he had a reasonable expectation of privacy in the travel case.

Despite Bruski's arguments to the contrary, Bruski failed to carry his burden of proving that he had a reasonable expectation of privacy in the travel case. Other than his ownership of the case, no evidence supports his claim of reasonable expectation of privacy. Ownership alone does not prove reasonable expectation of privacy in the case. Because Bruski failed to satisfy his burden of proof, the court of appeals correctly concluded that he did not show that he had a reasonable expectation of privacy in the car or in the travel case. Because Bruski failed to show that he had a reasonable expectation of privacy in the travel case, he cannot assert that his rights under the Fourth Amendment or under art. I, § 11 of the Wisconsin Constitution were violated when the police searched the car or the travel case for the keys to Smith's car. Because Bruski cannot assert a claim under the Fourth Amendment or under art. I, § 11, the court of appeals correctly reversed the circuit court orders that granted Bruski's suppression motion.

Thus, *Salazar*, and ultimately, *Young*, relied on the repudiated automatic standing rule to find that the passenger could challenge the search of his or her luggage that is in a car.

III. ARTICLE I, § 11 OF THE WISCONSIN CONSTITUTION DOES NOT GRANT AUTOMATIC STANDING FOR A PERSON CHARGED WITH A CRIME OF POSSESSION TO CHALLENGE A SEARCH OR SEIZURE.

A. Bruski asks this court to grant him automatic standing under the Wisconsin Constitution.

If this court concludes that Bruski failed to prove that he had a reasonable expectation of privacy in the car or travel case, Bruski asks this court to rule that he had automatic standing under art. I, § 11 of the Wisconsin Constitution to challenge the search. Brief of Defendant-Respondent-Petitioner at 13-21.

Bruski acknowledges that this court in *Callaway*, 106 Wis. 2d at 519-20, declined to adopt a rule of automatic standing under the Wisconsin Constitution. Brief of Defendant-Respondent-Petitioner at 13. In *Callaway*, 106 Wis. 2d at 520, this court endorsed the reasoning set forth in *Salvucci*, 448 U.S. 83, and held "that the criminal defendants charged with crimes of possession must first prove that their own constitutional rights have been infringed upon by a search or seizure before they can challenge the constitutionality of that search and/or seizure." Subsequently, a series of cases has recognized that *Callaway* rejected the automatic standing rule. *See Wisumierski*, 106 Wis. 2d at 728; *State v. Fry*, 131 Wis. 2d 153, 173, 388 N.W.2d 565 (1986); *State v. Tompkins*, 144 Wis. 2d 116, 131-32 n.3, 423 N.W.2d 823 (1988); and *State v. Abramoff*, 114 Wis. 2d 206, 208-09, 338 N.W.2d 502 (Ct. App. 1983).

Despite the holding in *Callaway*, Bruski asks this court to interpret art. I, § 11 of the Wisconsin Constitution to allow him automatic standing to challenge the search of

the car and the travel case. Brief of Defendant-Respondent-Petitioner at 21.

B. Two sets of criteria must be considered in deciding whether to overrule *Callaway* and to interpret art. I, § 11 different from the Fourth Amendment.

1. Criteria for overruling decisions.

To adopt an automatic standing rule under the Wisconsin Constitution, this court would have to overrule its decision in *Callaway*; but "this court will rarely overturn prior decisions and only when certain criteria are met." *Progressive Northern Ins. Co. v. Romanshek*, 2005 WI 67, ¶44, 281 Wis. 2d 300, 697 N.W.2d 417. Because he requests that a decision be overruled, Bruski has the burden of providing justification for overturning the prior decision. *Progressive Northern,* 281 Wis. 2d 300, ¶46.

Bruski failed to satisfy his burden of proof because he failed to show that any of the following criteria were satisfied to justify overruling a decision:

> (1) changes or developments in the law that undermine the rationale behind a decision; (2) the need to make a decision correspond to newly ascertained facts; (3) a showing that a decision has become detrimental to coherence and consistency in the law; (4) a showing that a decision is unsound in principle; and (5) a showing that a decision is unworkable in practice.

State v. Young, 2006 WI 98, ¶51 n.16, __ Wis. 2d __, __ N.W.2d __, citing *Johnson Controls, Inc. v. Employers Ins. of Wausau*, 2003 WI 108, ¶¶98-99, 264 Wis. 2d 60, 665 N.W.2d 257.

The criteria are applied when the court considers overruling a decision on a constitutional issue as evidenced by the court's use of the criteria in *Young*, 2006 WI 98, ¶51 n.16 (court cited the criteria in considering

whether to overrule decision adopting the Fourth Amendment's definition of seizure as the definition of seizure under the Wisconsin Constitution), and *State v. Dubose*, 2005 WI 126, ¶33 n.9, 285 Wis. 2d 143, 699 N.W.2d 582 (court cited the satisfaction of some of the criteria as justification for overruling a decision that approved the use of showup identification procedures).

"It is not a sufficient reason for this court to overrule its precedent that a large majority of other jurisdictions, with no binding authority on this court, have reached opposing conclusions." *Johnson Controls*, 264 Wis. 2d 60, ¶100. Bruski asked this court to join thirteen states that have construed their state constitutions to allow for automatic standing. Brief of Defendant-Respondent-Petitioner at 13-14. *Johnson Controls* makes it clear that this court will not adopt an automatic standing rule just because other courts cited by Bruski have done so. Not only is this court not bound to follow the other courts, but Bruski has apparently miscounted the number of jurisdictions that have adopted the automatic standing rule under their state constitutions. Among the cases cited at pages 13-15 of Bruski's brief, six jurisdictions have adopted the automatic standing rule under their state constitutions. *State v. Owen*, 453 So. 2d 1202, 1205 (La. 1984); *Commonwealth v. Amendola, Jr.*, 550 N.E.2d 121, 125 (Mass. 1990); *State v. Bullock*, 901 P.2d 61, 68-69 (Mont. 1995); *State v. Alston*, 440 A.2d 1311, 1320 (N.J. 1981); *Commonwealth v. Sell*, 470 A.2d 457, 468 (Pa. 1983); and *State v. Wood*, 536 A.2d 902, 908 (Vt. 1987). In two cases cited by Bruski at page 14 of his brief, the pluralities of the respective courts, but not majorities, approved the automatic standing rule. *State v. Settle*, 447 A.2d 1284, 1286, 1289 (N.H. 1982); *State v. Simpson*, 622 P.2d 1199, 1206 (Wash. 1980); and *State v. Zakel*, 812 P.2d 512, 514 (Wash. Ct. App. 1991) (Court declines to follow the *Simpson* plurality because it does not represent binding precedent). Finally, in *State v. Maia*, 703 A.2d 98 (Conn. 1997), which is cited at page 14 of Bruski's brief, the court in its per curiam opinion said: "Whether the state

constitution embraces the principle of automatic standing remains an open question."[6]

Juxtaposed to the six jurisdictions cited by Bruski that adopted the automatic standing rule are at least six other jurisdictions that have rejected the rule under their state constitutions: *State v. Juarez*, 55 P.3d 784, 790 (Ariz. Ct. App. 2002); *State v. Tau'a*, 49 P.3d 1227, 1240 (Haw. 2002); *Gahan v. State*, 430 A.2d 49, 55 (Md. Ct. App. 1981); *People v. Smith*, 360 N.W.2d 841, 842-43, 852-53 (Mich. 1984); *State v. Lind*, 322 N.W.2d 826, 833 (N.D. 1982); and *People v. Ponder*, 429 N.E.2d 735, 737 (N.Y. 1981).[7]

2. Criteria for interpreting the Wisconsin Constitution.

A different set of criteria are examined in deciding whether the art. I, § 11 of the Wisconsin Constitution should be interpreted different from the Fourth Amendment of the United States Constitution. The court considers the similarity of the texts of the corresponding provisions in the two constitutions, the protections afforded by the corresponding provisions, the state's history in construing its constitution relative to the United States Constitution and the similarities or differences of state and federal policies promoted by the interpretations of the two constitutions. *State v. Pitsch*, 124 Wis. 2d 628, 646, 369 N.W.2d 711 (1985); *Jones v. State*, 745 A.2d 856, 864-56 (Del. 1999); *Commonwealth v. Matos*, 672 A.2d 769, 772 n.3 (Pa. 1996); *State v. (Kevin) Young*, 957 P.2d 681, 686 (Wash. 1998).

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[6]In 2001, the question still remained open in Connecticut. *See State v. Cooper*, 783 A.2d 100, 111 (Conn. App. Ct. 2001).

[7]New York has retained an automatic standing rule where a defendant is charged with a possessory crime in which possession is based upon a statutory presumption. *People v. Tejada*, 613 N.E.2d 532, 533 (N.Y. 1993).

An application of the above criteria dictates that this court reaffirm *Callaway's* refusal to adopt an automatic standing rule under art. I, § 11 of the Wisconsin Constitution.

C. Textual, historical and policy reasons dictate that this court should reaffirm *Callaway's* refusal to adopt an automatic standing rule under art. I, § 11 of the Wisconsin Constitution.

1. The texts of art. I, § 11 and the Fourth Amendment are virtually identical.

The text of art. I, § 11 of the Wisconsin Constitution is virtually identical to the Fourth Amendment. *Fry*, 131 Wis. 2d at 171-72.

"[W]here the language of the state constitutional provision at issue is virtually identical with that of its federal counterpart, as here," this court has traditionally interpreted the Wisconsin Constitution consistent with the protections of the federal constitution as interpreted by the United States Supreme Court. *Tompkins*, 144 Wis. 2d at 133. This is particularly true of this court's interpretation of the Wisconsin search and seizure provision. *Id.*

As pointed out in *Tompkins*, the fact that the corresponding state and federal search and seizure provisions are worded virtually the same is a reason to reject the automatic standing test under the Wisconsin Constitution as it has been rejected under the Fourth Amendment. In *Ponder*, 429 N.E.2d at 737, where the court abrogated the automatic standing rule as part of New York law, the court cited the fact that the language in the New York Constitution conformed to that in the Fourth Amendment as supporting a policy of uniformity in both state and federal courts.

Bruski argues that the Wisconsin Constitution should be interpreted the same as the Massachusetts Constitution so that this court approves the automatic standing rule as the court did in *Amendola*, 550 N.E.2d at 125. However, the text of the Massachusetts Constitution[8] differs from the Fourth Amendment and art. I, § 11, which can account for a different interpretation.

2. The Wisconsin Supreme Court consistently conforms the Wisconsin Constitution to the Fourth Amendment.

This court has consistently and routinely conformed the law of search and seizure under the Wisconsin Constitution to that developed by the United States Supreme Court under the Fourth Amendment. *See Young*, 2006 WI 98, ¶30; *State v. Sykes*, 2005 WI 48, ¶13, 279 Wis. 2d 742, 695 N.W.2d 277; *State v. Ward*, 2000 WI 3, ¶55, 231 Wis. 2d 723, 604 N.W.2d 517; *State v. O'Brien*, 223 Wis. 2d 303, 316-17, 588 N.W.2d 8 (1999); *State v. Phillips*, 218 Wis. 2d 180, 195, 577 N.W.2d 794 (1998); *State v. Richards*, 201 Wis. 2d 845, 850-51, 549 N.W.2d 218 (1996); *Tompkins*, 144 Wis. 2d at 131; and *Fry*, 131 Wis. 2d at 172.

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[8]As set forth in *Commonwealth v. Ramos*, 721 N.E.2d 923, 926 n.6 (Mass. 2000), Article 14 of the Declaration of Rights of the Massachusetts Constitution, adopted in 1780, reads as follows:

> "Every subject has a right to be secure from all unreasonable searches, and seizures, of his person, his houses, his papers, and all his possessions. All warrants, therefore, are contrary to this right, if the cause or foundation of them be not previously supported by oath or affirmation; and if the order in the warrant to a civil officer, to make search in suspected places, or to arrest one or more suspected persons, or to seize their property, be not accompanied with a special designation of the persons or objects of search, arrest, or seizure: and no warrant ought to be issued but in cases, and with the formalities prescribed by the laws."

In an effort to overcome Wisconsin's history of construing art. I, § 11 in conformity with the law developed under the Fourth Amendment, Bruski cites four cases where he claims Wisconsin law provided citizens greater protection than the corresponding provision of the United States Constitution. Bruski cites *Carpenter v. Dane*, 9 Wis. 274, 276 (1859) (defendant entitled to counsel at public expense in criminal case); *Hoyer v. State*, 180 Wis. 407, 193 N.W. 89 (1923) (court adopts exclusionary rule to enforce art. I, § 11 of Wisconsin Constitution); *State v. Eason*, 2001 WI 98, ¶74, 245 Wis. 2d 206, 629 N.W.2d 625 (court adopts a good faith exception to exclusionary rule with more requirements for state to satisfy than are found in good faith exception to federal exclusionary rule); and *State v. Knapp*, 2005 WI 127, ¶¶2, 22-23, 285 Wis. 2d 86, 700 N.W.2d 899 (in a case about the exclusionary rule, the court orders the exclusion of physical evidence obtained as a result of an intentional violation of a defendant's *Miranda* rights). Brief of Defendant-Respondent-Petitioner at 17-19.

The cases cited by Bruski do not provide support for interpreting the substance of art. I, § 11 different from the Fourth Amendment in order to adopt an automatic standing rule under the Wisconsin Constitution. *Carpenter* did not involve an interpretation of art. I, § 11.

Hoyer supports the state's position because in *Hoyer*, 180 Wis. at 413, 415, the court conformed Wisconsin search and seizure law to that developed under the Fourth Amendment when it elected to stand with federal courts in adopting the exclusionary rule. This court noted in *Tompkins*, 144 Wis. 2d at 135, that "the interpretation of the Wisconsin Constitution in *Hoyer* was based exclusively upon federal cases, particularly United States Supreme Court decisions interpreting the fourth amendment." In *Eason*, 245 Wis. 2d 206, ¶41, the court again pointed out that "*Hoyer* relied solely upon federal law."

In *Eason*, 245 Wis. 2d 206, ¶63, the court required that for the good faith exception to the Wisconsin exclusionary rule to apply, "the State must show that the process used attendant to obtaining the search warrant included a significant investigation and a review by a police officer trained in, or very knowledgeable of, the legal vagaries of probable cause and reasonable suspicion, or a knowledgeable government attorney." The government is not required to make those showings for the good faith exception to the Fourth Amendment's exclusionary rule to apply. The court acknowledged that the typical interpretation of art. I, § 11 to be uniform with the Fourth Amendment was "fostered more by the substantive requirements of search and seizure law. The additional procedural requirement of a significant investigation and a review of the search warrant application will not impede that uniformity." *Eason*, 245 Wis. 2d 206, ¶63 n.30. The court, therefore, distinguished between substantive and procedural search and seizure law and considered the exclusionary rule procedural law for which uniformity with the Fourth Amendment was not as important as in the case of substantive law. The reasonable expectation of privacy test for being able to assert a violation of the Fourth Amendment or art. I, § 11 is part of substantive search and seizure law. *See Rakas v. Illinois*, 439 U.S. 128, 139 (1978) (type of standing requirement discussed in *Jones v. United States*, 362 U.S. 257 (1960) (adopting automatic standing rule), "is more properly subsumed under substantive Fourth Amendment doctrine"); and *Callaway*, 106 Wis. 2d at 520 (adopting the legitimate expectation of privacy test under the Wisconsin Constitution). Because the issue of the exclusionary rule in *Eason* involved a procedural issue for which uniformity is not as important as for a substantive law issue, and because the issue in this case involves a substantive search and seizure issue for which uniformity is more important, the decision in *Eason* to interpret the Wisconsin good faith exception different from the federal good faith exception does not provide precedent for interpreting art. I, § 11 different from the Fourth Amendment on the substantive issue in this case.

For three reasons, *Knapp* is not precedent for this court to interpret art. I, § 11 different from the Fourth Amendment. First, because *Knapp* was not a search and seizure case, it did not involve art. I, § 11 and the Fourth Amendment. Second, *Knapp* was another case about the exclusionary rule, *Knapp*, 285 Wis. 2d 86, ¶¶22-23; and as explained in *Eason*, the court is more willing to apply the Wisconsin exclusionary rule differently from the federal exclusionary rule than it is to interpret substantive search and seizure law differently in the two constitutions. Third, the court pointed out that the circumstances in which it employed the exclusionary rule were particularly repugnant because the police officer intentionally violated Knapp's *Miranda* rights to obtain the physical evidence. *Knapp*, 285 Wis. 2d 86, ¶75. There are no similarly repugnant circumstances in this case.

Wisconsin's history of construing art. I, § 11 to conform to the law developed by the United States Supreme Court under the Fourth Amendment and this court's reluctance to overrule decisions, as explained in *Young*, 2006 WI 98, ¶51, *Johnson Controls* and *Progressive Northern*, provide more reasons for rejecting Bruski's request to adopt the automatic standing rule under the Wisconsin Constitution.

3. Article I, § 11 protects the same interests as the Fourth Amendment.

In *Fry*, 131 Wis. 2d at 172, 174, this court pointed out that the standard and principles surrounding the Fourth Amendment are generally applicable to the construction of art. I, § 11, and that the two provisions are intended to protect the same interests. This court was "unconvinced that the [United States] Supreme Court provides less protection than intended by the search and seizure provision of the Wisconsin Constitution." *Fry*, 131 Wis. 2d at 174.

The history of Wisconsin's art. I, § 11 is similar to the history of the Texas Constitution's search and seizure provision, which the Texas Court of Criminal Appeals concluded showed that the Texas provision was intended to protect the same interests as the Fourth Amendment. As was the Texas constitutional provision, art. I, § 11 was adopted before the Fourth Amendment was made applicable to the states in *Wolf v. Colorado*, 338 U.S. 25, 27-28 (1949). When the two state constitutions were adopted, the only way to protect citizens from state actions in the same way they were protected from federal authority was through state provisions. *Johnson v. State*, 912 S.W.2d 227, 233 (Tex. Crim. App. 1995). In light of those circumstances, the court said in *Johnson*, 912 S.W.2d at 233-34:

> It is not unreasonable to conclude from these facts that the framers of the Texas Constitution chose to draft Art. I, § 9 to protect Texas citizens from unreasonable searches and seizures by the state in the same way they were protected from unreasonable searches and seizures by the federal government. If they had intended to grant to citizens greater protection from state actions than they enjoyed from federal actions, then they could have drafted Art. I, § 9 at that time to reflect that intent.

A similar analysis was employed in *Ash v. Commonwealth*, 236 S.W. 1032, 1035 (Ky. Ct. App. 1922), to explain the adoption of search and seizure provisions in state constitutions. *Ash* was one of the cases that had followed the federal exclusionary rule and with whom this court elected to stand in *Hoyer*, 180 Wis. at 413, 415. In *Ash*, 236 S.W. at 1035, the court explained that, because the Fourth Amendment was a limitation only upon the federal authorities, "the respective states adopted similar provisions in their Constitutions for the protection of their citizens against arbitrary power exercised by the state."

Bruski seems to argue that because Chief Justice Edward V. Whiton was from Massachusetts and played a leading part at the Wisconsin constitutional convention,

art. I, § 11 should be interpreted the same way that Article 14 of the Declaration of Rights of the Massachusetts constitution is interpreted. Brief of Defendant-Respondent-Petitioner at 20-21. Bruski wants art. I, § 11 interpreted like the Massachusetts Constitution because Massachusetts has an automatic standing rule under its state constitution. *See Amendola*, 550 N.E.2d at 125.

Article I, § 11 of the Wisconsin Constitution was part of the declaration of rights drafted by the constitutional convention in 1847-48. As originally introduced on December 22, 1847, by the committee on general provisions, of which Whiton was not a member,[9] § 11 read:

> The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated; and no warrants to search any place or seize any person or thing shall issue without describing, as near as may be, nor without probable cause, supported by oath or affirmation.

Journal and Debates of the 1847-48 Constitutional Convention, reprinted in State Historical Society of Wisconsin, *The Attainment of Statehood* 226, 228 (M. Quaife ed. 1928).

On January 18, 1848, Whiton was appointed to serve on the committee on revision and arrangements. *Id.* at 595. On January 22, 1848, that committee suggested several changes in the declaration of rights. *Id.* at 713-16. Among other things, the committee redrafted art. I, § 11 to track the language of the Fourth Amendment. *Id.* at 714. The change was made to use words "that conveyed the meaning most fully and as were most generally used in

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[9]The members of the committee on general provisions were identified in Journal and Debates of the 1847-48 Constitutional Convention, reprinted in State Historical Society of Wisconsin, *The Attainment of Statehood* 206 (M. Quaife ed. 1928), and Whiton was not a member.

constitutional law." *Id.* at 715. After the changes, art. I, § 11 provides:

> The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated; and no warrant shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.

By selecting words that "were most generally used in constitutional law" and that were virtually identical to the Fourth Amendment, the drafters showed an intent to conform the meaning of Wisconsin's search and seizure provision to the Fourth Amendment and an intent that art. I, § 11 provide the same protection as the Fourth Amendment. That the committee on which Whiton served introduced changes in § 11 so that it was virtually identical to the Fourth Amendment and vastly different from Article 14 of the Massachusetts Declaration of Rights (*see* footnote 8 above) shows that Whiton either never attempted or he failed in an attempt to have the Wisconsin search and seizure provision be like the one in Massachusetts.

Early cases interpreting art. I, § 11 demonstrate that it was intended to provide the same protection as the Fourth Amendment. In *Thornton v. State*, 117 Wis. 338, 93 N.W. 1107 (1903), the court concluded that a search incident to an arrest was permissible under art. I, § 11 because such a search was not unreasonable under the Fourth Amendment in language later adopted into the Wisconsin Constitution. In other words, the court reasoned that because the search was not unreasonable under the Fourth Amendment it was not unreasonable under art. I, § 11 because the Wisconsin Constitution adopted the language of the Fourth Amendment.

In *Hoyer*, 180 Wis. at 415, this court chose to align itself with federal courts to adopt the exclusionary rule to enforce art. I, § 11 of the Wisconsin Constitution.

In *Glodowski v. State*, 196 Wis. 265, 267-68, 269, 220 N.W. 227 (1928), this court said that the people of Wisconsin made the same guaranty against unreasonable searches and seizures as did the people of the original thirteen states and that the mandate in the Wisconsin Constitution was identical to that under the Fourth Amendment.

In *State ex rel. Meyer v. Keeler*, 205 Wis. 175, 180-81, 184-85, 236 N.W. 561 (1931), the court relied on United States Supreme Court cases interpreting the Fourth Amendment to give meaning to art. I, § 11 of the Wisconsin Constitution.

The fact that art. I, § 11 affords the same protection as the Fourth Amendment provides a strong reason for rejecting the automatic standing rule under the Wisconsin Constitution just as it has been rejected under the Fourth Amendment.

4. Adoption of the automatic standing rule conflicts with established Wisconsin policies and decisions.

Prior to *Jones*, federal courts required defendants to establish standing by claiming "either to have owned or possessed the seized property or to have had a substantial possessory interest in the premises searched." *Jones*, 362 U.S. at 261. The Court in *Jones* described two problems that arose from the standing requirement. First, a defendant faced the dilemma that to establish standing he might have to allege facts that would be used to convict him at the trial; and, he was encouraged to perjure himself if he sought to establish standing while maintaining a defense to the charge of possession of something like narcotics. *Id.* at 261-62; and *Salvucci*, 448 U.S. at 87-88. Second, the Court noted that the government was permitted to take contradictory positions by arguing that the defendant did not have possession in order to oppose

the standing argument and by later arguing that the defendant did have possession in order to convict him. *Jones*, 362 U.S. at 263-64; and *Salvucci*, 448 U.S. at 88. To solve the two problems, the Court adopted the automatic standing rule. *Jones*, 362 U.S. at 264-65; and *Salvucci*, 448 U.S. at 87.

In *Salvucci*, 448 U.S. at 85, 88-89, the Supreme Court overruled the automatic standing rule because intervening decisions had solved the problems that brought about the rule. The first problem was solved when the Court held in *Simmons v. United States*, 390 U.S. 377 (1968), "that testimony given by a defendant in support of a motion to suppress cannot be admitted as evidence of his guilt at trial." *Id.* at 88. The second problem was solved because "[d]evelopments in the principles of Fourth Amendment standing, as well, clarify that a prosecutor may, with legal consistency and legitimacy, assert that a defendant charged with possession of a seized item did not have a privacy interest violated in the course of the search and seizure." *Id.* at 88-89.

In *Callaway*, 106 Wis. 2d at 520, this court agreed with and endorsed the reasoning in *Salvucci* and rejected the automatic standing rule under the Wisconsin Constitution.

Because *Callaway* agreed with and endorsed the reasons in *Salvucci* for rejecting the automatic standing rule, it would be contrary to *Callaway* and the policies approved in that decision to now adopt an automatic standing rule under the Wisconsin Constitution.

In *Amendola*, 550 N.E.2d at 125-26, one of the court's reasons for adopting the automatic standing rule was its belief that *Simmons* did not resolve a defendant's self-incrimination dilemma since his suppression hearing testimony could be used to impeach him at a trial.

The possible use of a defendant's suppression hearing testimony to impeach him at trial provides no reason for this court to adopt an automatic standing rule because in *State v. Schultz*, 152 Wis. 2d 408, 410-11, 426-27, 448 N.W.2d 424 (1989), this court has already decided that a defendant's rights under the United States and Wisconsin Constitutions are not violated when the state uses his suppression hearing testimony to impeach him at trial. The court explained that a defendant has an obligation to tell the truth and as long as he fulfills that obligation he is not required to choose between rights. *Id.* at 426. Other courts rejecting the automatic standing rule have also concluded that the possibility of impeachment poses no constitutional problem because a defendant has no constitutional protection to lie. *Tau'a*, 49 P.3d at 1240; and *Smith*, 360 N.W.2d at 847.

This court's adoption of the reasonable expectation of privacy test in *Callaway*, 106 Wis. 2d at 520, has also eliminated the need for the government to take inconsistent positions in regard to a defendant's possession of narcotics or other items. The elimination of the contradiction was explained prior to *Salvucci* in Melvin Gutterman, *"A Person Aggrieved": Standing to Suppress Illegally Seized Evidence in Transition,"* 23 Emory L.J. 111, 125 (1974):

> This contradiction will be eliminated by a privacy standing concept since there is no inconsistency in the Government's asserting at the trial on the issue of guilt that the accused did in fact have unlawful possession of property at the time of the search, while at the hearing on the motion to suppress denying that any legitimate expectation of the accused's privacy was invaded by the search or seizure.

Other courts rejecting the automatic standing rule have recognized, consistently with the law review article, that under the reasonable expectation of privacy test there is no inconsistency in the government opposing the defendant's "standing" to challenge a search while

contending at trial that he possessed the item in question. *Salvucci*, 448 U.S. at 90; and *Tau'a*, 49 P.3d at 1237-38.

Bruski argues that the automatic standing rule should be adopted out of concern for protecting judicial integrity so that evidence obtained as a result of an illegal seizure is not used in court. Brief of Defendant-Respondent-Petitioner at 20-21.

The judicial integrity concern should not be a factor in the court's decision whether to overrule *Callaway* to adopt an automatic standing rule under the Wisconsin Constitution.

Judicial integrity is usually discussed in the context of applying an exclusionary rule to keep illegally seized evidence from being used against a defendant in court. *See, e.g.*, *Conrad v. State*, 63 Wis. 2d 616, 636-37, 218 N.W.2d 252 (1974); and *Hoyer*, 180 Wis. at 417. However, as also explained in *Hoyer* and other cases, evidence is excluded from use in court only when it is obtained in violation of the defendant's rights. *Glodowski*, 196 Wis. at 268; *Hoyer*, 180 Wis. at 417; *Meyer*, 205 Wis. at 184-85; *Tau'a*, 49 P.3d at 1239; *Gahan*, 430 A.2d at 55; *Smith*, 360 N.W.2d at 847-48; and *Lind*, 322 N.W.2d at 833.

The automatic standing rule permits a defendant charged with a crime of possession to challenge a search regardless of whether his own constitutional rights were violated by that search. *Callaway*, 106 Wis. 2d at 519. In *Smith*, 360 N.W.2d at 847-48, the court explained that the automatic standing rule is a departure from the principle that constitutional protections can only be asserted by one whose own protection was infringed.

Adoption of an automatic standing rule conflicts with the principle stated in *Glodowski*, *Hoyer* and *Meyer* that only a person whose constitutional rights are violated can assert a claim that there was a violation. Because, as explained in those cases, only a person whose rights were

violated can seek exclusion of evidence for a violation of rights, there is no issue of judicial integrity unless the rights of the person against whom the evidence will be used were violated.

In addition, the court explained in *Conrad*, 63 Wis. 2d at 636, that judicial integrity is compromised by the exclusion of reliable evidence. In light of that compromise and in light of the policy of excluding evidence only when it would be used against the person whose rights were violated, the adoption of an automatic standing rule could result in the compromise of judicial integrity because it could result in the exclusion of reliable evidence in a case where the rights of the person against whom the evidence would be admitted were not even violated.

Finally, adoption of the automatic standing rule in this case would be contrary to *Young*, 2006 WI 98, ¶58, *Johnson Controls*, 264 Wis. 2d 60, ¶¶98-99, and *Progressive Northern*, 281 Wis. 2d 300, ¶51, because Bruski has failed to satisfy any of the criteria set forth in those cases for overruling decisions. Bruski has not carried his burden of showing that changes or developments in the law had undermined the rationale behind *Callaway*; that new facts undermined the analysis in *Callaway*; that *Callaway* had become detrimental to coherence and consistency in the law; that *Callaway* was unsound in principle; or that *Callaway* was unworkable in practice.

Because the automatic standing rule would be contrary to Wisconsin decisions and policies, it should not be adopted as a test for standing under art. I, § 11 of the Wisconsin Constitution.

D. The automatic standing rule should be rejected.

For all of the reasons discussed above, this court should deny Bruski's request to adopt the automatic standing rule as a test for standing under art. I, § 11 of the Wisconsin Constitution.

IV. SMITH'S IMPLIED CONSENT FOR THE POLICE TO SEARCH THE CAR AUTHORIZED THE POLICE TO SEARCH CONTAINERS IN THE CAR, INCLUDING BRUSKI'S TRAVEL CASE.

A. By requesting the police to assist her in retrieving her car, Margaret Smith granted the police her implied consent to conduct searches necessary for her to regain possession of her car.

1. Consent is implied when a person asks the police for assistance.

Because the court of appeals concluded that Bruski did not have a reasonable expectation of privacy in the car or the travel case, the court did not have to consider whether the police had Smith's implied consent to search the car and its contents for the keys. If this court finds that Bruski had a reasonable expectation of privacy in the travel case or that he had automatic standing to challenge the search of the travel case, the court will have to consider whether the search was constitutional. If the court reaches this question, the state contends that the search was valid because the police had Margaret Smith's implied consent to search the car and its contents to find the keys so she could retrieve her car.

The circuit court granted the motion to suppress the evidence seized in the warrantless search of the car and the travel case because it found that Smith, the owner of the car, had not consented to a search prior to the search of the travel case (7:2-3; Pet-Ap. 109-10). In rejecting the state's contention that Smith granted her implied consent for the police to search the car and its contents for the keys, the court said it found no authority supporting a theory of implied or constructive consent (7:2-3; Pet-Ap. 109-10).

The state submits that the circuit court made an error of law when it stated that no authority supported a theory of implied consent. As the state will demonstrate, several cases hold that a person grants implied consent to search when he or she calls the police for assistance as Smith did in this case.

As the circuit court noted in its decision, warrantless searches are per se unreasonable under the Fourth Amendment (7:2; Pet-Ap. 109). *State v. Williams*, 2002 WI 94, ¶18, 255 Wis. 2d 1, 646 N.W.2d 834. Nevertheless, there are exceptions to the warrant requirement; and one well-established exception is a search conducted pursuant to consent. *Williams*, 255 Wis. 2d 1, ¶18; *Phillips*, 218 Wis. 2d at 196; and *State v. Douglas*, 123 Wis. 2d 13, 18, 365 N.W.2d 580 (1985).

"Consent to search need not be given verbally; it may be in the form of words, gesture, or conduct." *Phillips*, 218 Wis. 2d at 197. *See also State v. Tomlinson*, 2002 WI 91, ¶37, 254 Wis. 2d 502, 648 N.W.2d 367 ("Consent to search does not have to be given verbally. Consent may be given in non-verbal form through gestures or conduct.").

In *Brown v. State*, 856 S.W.2d 177, 181 (Tex. Crim. App. 1993), the court cited W. LaFave, *Search & Seizure*, § 8.2(l), at 219 (2d ed. 1987), for the proposition that "[c]onsent may be 'implied,' because it is found to exist

merely because of the person's conduct in engaging in a certain activity." The court also noted that "'[a]n *implied* consent to search is as efficacious and effective as an *express* consent to search.'" *Brown*, 856 S.W.2d at 181, quoting *People v. Engel*, 105 Cal. App. 3d 489, 504, 164 Cal. Rptr. 454, 463 (1980).

The conduct that provided the implied consent in *Brown* was a person summoning the police for help. *Brown*, 856 S.W.2d at 180-82. Among the cases the court cited as finding implied consent based on a call for police assistance was this court's decision in *Kelly v. State*, 75 Wis. 2d 303, 249 N.W.2d 800 (1977), which will be discussed later in this brief. *Brown*, 856 S.W.2d at 181. After reviewing the decisions in several other states, the court in *Brown*, 856 S.W.2d at 182, concluded that consent to search is implied when a person calls for police assistance:

> We therefore hold that when a crime is reported to the police by an individual who owns or controls the premises to which the police are summoned, and that individual either states or suggests that it was committed by a third person, he or she implicitly consents to a search of the premises reasonably related to the routine investigation of the offense and the identification of the perpetrator. As long as the individual is not a suspect in the case or does nothing to revoke his consent, the police may search the premises for these purposes, and evidence obtained thereby is admissible. This implied consent is valid only for the initial investigation conducted at the scene and does not carry over to future visits to the scene.

In *State v. Flippo*, 575 S.E.2d 170, 183 (W. Va. 2002), after reviewing numerous cases that found implied consent, the court announced its holding on implied consent that was similar to the holding in *Brown*.

A theory of implied consent similar to that adopted in *Brown* and in *Flippo* has been applied in Wisconsin in *Kelly* and in *Douglas*.

In *Kelly*, 75 Wis. 2d at 307, the defendant told a neighbor that a man had been shot while she was in a bedroom and another neighbor called the sheriff's department. The defendant furnished the police with the description of the deceased as "'running around outside, shot.'" *Kelly*, 75 Wis. 2d at 310. The police conducted an investigation at the home that had been shared by the defendant and the deceased. *Kelly*, 75 Wis. 2d at 308. The police suspected the defendant and, after taking her into custody, found the murder rifle under the porch. *Kelly*, 75 Wis. 2d at 308.

This court sustained the trial court's finding that under all the circumstances the defendant had consented to the search of the premises. *Kelly*, 75 Wis. 2d at 311. The trial court based the finding of consent on the defendant reporting that the deceased was running around outside shot and on her telling one neighbor that she was in the bathroom and another that she was in the bedroom when she heard the shot, the only implication being that she was not the one who inflicted the wound. *Kelly*, 75 Wis. 2d at 311.

The supreme court concluded that the defendant had given the police her implied consent to search the home. *Kelly*, 75 Wis. 2d at 312-13. The court said:

> [T]he defendant herself . . . called the police and under circumstances that implied that the victim had shot himself or had been shot by someone other than the defendant and was running around outside. *Under such circumstances there was an implied consent not only to aid the victim but to determine what had caused the death or injury and who was responsible.*

Kelly, 75 Wis. 2d at 312-13 (emphasis added).

In *Douglas*, 123 Wis. 2d at 19, the court confirmed that it had relied on implied consent in *Kelly* because the court said: "As in *Kelly*, the consent to search the home given in the instant case was implied from the conduct of the defendant." It should be noted that the court said that

the defendant's implied consent was based on his conduct. The court then cited factors that it said "amounted to an implied consent to enter and search the house." *Douglas*, 123 Wis. 2d at 19-20.

The theory of implied consent is not limited to situations where the consent is given by the defendant. In *United States v. Hylton*, 349 F.3d 781, 783 (4th Cir. 2003), the defendant was convicted of possession of a firearm by a felon. The defendant's girlfriend had called for police assistance and reported that the defendant had a gun and would not let her into her apartment. *Hylton*, 349 F.3d at 783-84. After the defendant surrendered, the police searched the apartment and found the gun. *Hylton*, 349 F.3d at 784.

In response to the defendant's challenge to the search, the court said the circumstances and the girlfriend's (Hawanya Harper) words led to the inference that she gave consent to the police to search her apartment and thereby to enable her to return to the apartment in safety. *Hylton*, 349 F.3d at 786. The court pointed out that the girlfriend called the police for assistance following her dispute with Hylton and told the police that she wanted to get into the house; she advised officers of circumstances inside the apartment, telling them "that there was a gun in the apartment that Hylton had used only a week earlier to facilitate raping her"; and the girlfriend told the police specifically that the gun was located in the bedroom. *Hylton*, 349 F.3d at 786. The court explained that, when a tenant who is barred from entering her apartment calls for police assistance, it can be inferred that she is authorizing them to enter the apartment. *Id.*

In this case, as in *Hylton*, it can be inferred that Smith gave implied consent to the police to do what was necessary to help her regain possession of her car. Officer Olson explained that Smith wanted an officer to escort her to her vehicle to recover it (28:6). Olson said that Smith wanted to recover her vehicle and he and Officer

Beauchamp were trying to help her (28:7-8, 26-27). According to Olson, Smith wanted her keys, became very upset and asked Bruski for the keys (28:24). Olson said they searched for the keys because Smith wanted to take possession of her car and she did not have a set of keys when she came to the car with Olson (28:8). Olson explained that, prior to Smith expressly saying the police had consent to search, he assumed he had permission to search the car because of the circumstances where Smith wanted to take possession of her vehicle and she did not have keys (28:16). Officer Beauchamp testified that he felt he had permission to look for the keys based on the owner standing there wanting the keys and he (Beauchamp) was trying to find them (28:29).

As the girlfriend did in *Hylton*, Smith asked for the assistance of the police. By asking for help in entering the apartment and telling the police the defendant was using a gun to keep her out, the girlfriend in *Hylton* gave her implied consent for the police to enter the apartment and search for the gun. In this case, by asking the police for help in regaining possession of the car and by asking Bruski for the keys, Smith gave the police implied consent to assist her by searching the car for the keys so she could regain possession of her car. Thus, as in *Hylton*, the circumstances and the words of the person asking for police assistance gave the police implied consent to conduct the search.

In *United States v. Wesela*, 223 F.3d 656, 659 (7th Cir. 2000), the defendant's wife called 911 and asked the police to come to her home where she reported that her husband (the defendant) had a gun, had threatened to kill her and had killed a family cat. The police questioned the wife after she admitted them into the residence. While one officer spoke to the wife another officer went about collecting evidence. That officer did not ask the wife for permission to conduct the search, but she did not object to what he was doing. *Wesela*, 223 F.3d at 659. The defendant was convicted of being a felon in possession of a firearm that was found.

In finding that the wife gave her implied consent for the search of the house, the court noted that the wife called the agents for the express purpose of ridding her house of the threat posed by her (armed) husband, and she allowed the officers to enter her house in order to arrest him. *Wesela*, 223 F.3d at 661. The court said it was immaterial that the wife did not expressly consent to the search of the apartment because the events indicated her implicit consent. *Id.* The court said that while in the living room Mrs. Wesela was "probably aware" of the detective searching in he bedroom and "[h]ad she wished to do so, she could have objected to Detective Corbett's search." *Id.*

As did the wife in *Wesela*, Smith in this case gave her implied consent for the search of the car. As did the wife in *Wesela*, Smith asked for police assistance. The wife in *Wesela* was probably aware of the police searching and could have objected if she wished to do so. *Wesela*, 223 F.3d at 661. In this case, Smith was at least probably aware that Beauchamp was searching the car for the keys because he told her he was going to look for the keys and Smith was next to the car when Beauchamp was searching (28:9-10, 24, 29). According to Olson, Smith did not object at all when Beauchamp was searching in the car (28:12). Olson also said that at no point after Beauchamp started searching did Smith attempt to stop Beauchamp or to deny consent for the search (28:13-14). According to Beauchamp, no one told him to stop or told him he did not have permission to look for the keys (28:29-30).

In this case, as in *Wesela*, the police had implied consent to conduct the search because Smith asked for police assistance and did not object to the police searching her car while providing the requested assistance.

In *Alford v. State*, 724 S.W.2d 151, 152 (Ark. 1987), Dennis Alford (the father) lived in an apartment with his son, Richard (the defendant), and the defendant's girlfriend, Mildred Weiser, who is the victim in this case. After Weiser sustained a fatal gunshot wound to the head

one evening, the father asked a neighbor to call for an ambulance and the police. *Alford*, 724 S.W.2d at 152-53. When the police arrived, the father yelled for help and ushered officers into the apartment. Both Alfords told the police that Weiser had committed suicide. The police conducted an investigation at the apartment. *Alford*, 724 S.W.2d at 153. The Arkansas Supreme Court agreed with the trial court that, by his conduct in requesting police assistance and cooperating in the investigation, the father implicitly consented to the search. *Alford*, 724 S.W.2d at 154.

In this case, by requesting police assistance and by helping the police in asking Bruski about the keys needed for her to regain possession of her car, Smith gave her implied consent for the police to search the car to find the keys.

The *Kelly* and *Douglas* cases demonstrate that the theory of implied consent has been applied in Wisconsin. The *Hylton*, *Wesela* and *Alford* cases demonstrate that the theory of implied consent is applied to consent given by persons other than defendants. All five of the cases stand for the proposition that consent can be inferred from the circumstances of the case and the words of someone who is authorized to give consent. In all five cases, an important ingredient of the implied consent was the fact that the consenting person called for the assistance of the police. In this case, Smith asked the police to assist her in regaining possession of her car (28:6-8, 26). According to Olson, Smith wanted her keys, became very upset and asked Bruski for the keys (28:24). Olson said Bruski told Smith he did not know where the keys were (28:24). Smith was at least probably aware that Beauchamp was searching the car for the keys because he told her he was going to look for the keys and Smith was next to the car when Beauchamp was searching (28:9-10, 24, 29). In this case, when Smith asked for police assistance, when she was upset and wanted the keys, when Bruski said he did not have the keys, and when she did not object when Beauchamp told her he was going to look for the keys and

searched for them in her presence, it can be inferred from the circumstances and Smith's request for assistance that she gave her implied consent for the police to search the car and the containers in the car for the keys she needed to regain possession of the car.

2. The trial court failed to correctly apply implied consent law.

Bruski argues that the circuit court correctly granted the suppression motion because the circuit court "correctly applied the law concerning implied consent and determined there was none." Brief of Defendant-Respondent-Petitioner at 24. Bruski contends that the circuit court found that Smith did not consent to the search of the car prior to the search of the travel case and that the court's findings are supported by the evidence and reasonable inferences. *Id.*

Contrary to Bruski's argument, the circuit court failed to correctly apply the law concerning implied consent. Despite the *Kelly* and *Douglas* cases, the circuit court said it found no authority supporting a theory of implied or constructive intent (7:2-3; Pet-Ap. 109-10). In its April 18, 2005 decision, the circuit court said it could not find that the owner consented to the search of the car "in the absence of any legal authority supporting a theory of implied or constructive intent" (7:2; Pet-Ap. 109). Thus, the court concluded that there was no authority to support a finding of implied consent to search the car. In the June 13, 2005 letter, Judge Lucci said that the state's motion for reconsideration failed to point out any new "legal authority which would persuade the court to reconsider the decision that there was no consent to search the defendant's travel bag, implied or otherwise" (19:1; Pet-Ap. 114). In other words, Judge Lucci still did not believe there was legal authority for implied consent. The circuit court made an error of law in concluding that there was no legal authority for implied consent.

Bruski argues that the facts and reasonable inferences support the circuit court's conclusion that there was no implied consent. Brief of Defendant-Respondent-Petitioner at 22-23. Bruski's contention relates back to his statement that, "[w]hen a circuit court does not expressly make a finding necessary to support its legal conclusion, the appellate court can assume that the trial court made the finding in the way that supports its decision." Brief of Defendant-Respondent-Petitioner at 5-6.

The assumption that the circuit court made factual findings to support its legal conclusion does not help Bruski on the issue of Smith's implied consent to search the car and travel case. The circuit court rejected the state's implied consent argument on the ground that there was no legal authority to support the argument. Because no factual findings were necessary to support that legal conclusion by the circuit court, this court cannot assume that the circuit court made any factual findings on the issue of implied consent. In other words, the circuit court did not say that on the facts of this case there was no implied consent. Instead, the circuit court did not consider whether there was implied consent in this case because the court concluded that there was no legal authority to consider implied consent.

3. Bruski's arguments are based on an incorrect application of implied consent law.

In arguing about facts supporting the circuit court's decision, Bruski contends that there was no evidence that Bruski's presence in the car was unlawful. Brief of Defendant-Respondent-Petitioner at 22. However, the lawfulness of Bruski's presence in the car is irrelevant to implied consent. Implied consent is based on Smith's request for police assistance in retrieving the car whether Bruski was in the car lawfully or not.

Bruski argues that the court could have found Officer Beauchamp's testimony incredible when Beauchamp said he assumed Smith consented to a search of her car. Brief of Defendant-Respondent-Petitioner at 22. However, there is nothing in the trial court's decisions that indicates the court doubted the police officers' credibility. In fact, the court relied on the officers' credibility when it said the search was "for car keys which the officer was attempting to retrieve for an anxious owner" (7:1; Pet-Ap. 108).

In addition, whether or not Beauchamp assumed he had Smith's consent is irrelevant to the issue of whether Smith by her conduct granted the police implied consent to search the car and its contents to find the keys. Consent is implied based on the circumstances and the conduct of the person found to have given the consent. *Douglas*, 123 Wis. 2d at 19 ("As in *Kelly*, the consent to search the home given in the instant case was implied from the conduct of the defendant."); *Brown*, 856 S.W.2d at 181 (consent may be implied from the circumstances); and *Flippo*, 575 S.E.2d at 178 (consent may be implied by the circumstances surrounding the search or by the person's prior actions or agreements or by the person's failure to object to the search). In this case, Smith gave her implied consent for the police to search the car and its contents for the keys when she wanted an officer to escort her to recover her vehicle after she became concerned and worried about her vehicle and her daughter and when she was upset and wanted her keys and Bruski said he did not have them (26:8, 24).

Bruski argues that there was no evidence that Smith was aware that Beauchamp was going to search her car. Brief of Defendant-Respondent-Petitioner at 23. The evidence was that Beauchamp told Smith he was going to look for the key (28:33). More importantly, Smith's implied consent did not hinge on her being aware that Beauchamp was going to search the car. The implied consent was based on Smith asking for police assistance in retrieving her car. Smith's request for assistance, coupled

with her concern for her car and her daughter, provide compelling evidence of implied consent to search the car for the keys to retrieve the car.

Bruski tries to distinguish the implied consent given in *Kelly* and in *Flippo* on the grounds that in those cases the police had probable cause to believe that a crime had occurred and the consent was given by the defendants.

The facts in this case, however, provide stronger evidence of implied consent than the facts in *Kelly* and *Flippo*. In those cases the courts found that the defendants implicitly consented to searches that revealed evidence that could be used against them. In this case, the state contends Smith implicitly consented to the police searching the car for keys so she could retrieve the car. It is much more likely that a person in Smith's position would consent to searches than persons in the position of the defendants in *Kelly* and *Flippo*. In fact, the circuit court said that common sense suggests that Smith would have consented if asked (7:3; Pet-Ap. 110). Would common sense have so strongly suggested that Kelly and Flippo would have consented if asked? Thus, the circuit court's reference to the facts supports a finding of implied consent by Smith. The circuit court just did not believe there was legal authority for implied consent.

Bruski tries to distinguish *Wesela* on the ground that the defendant's wife summoned the police and told them where the gun was.

This case, however, is similar to *Wesela*. Smith summoned the police for assistance, she wanted her keys and she became very upset and asked Bruski for the keys (28:6, 24). Because Smith asked for police assistance and because she wanted the keys, it can be implied that she consented for the police to search the car and its contents to assist her in finding the keys.

4. Smith gave the police her implied consent to search the car and its contents.

This court should conclude that the circuit court erred as a matter of law when it found that there was no legal authority in Wisconsin to support a theory of implied consent. Such authority (*Kelly* and *Douglas*) exists in Wisconsin. On the basis of that authority and the other cases cited above and on the basis of Smith's request for assistance and the circumstances of this case, this court should find that Smith gave the police her implied consent to search the car and the containers in the car for the keys.

B. Smith's consent to search the car for the keys authorized the police to search Bruski's travel case that was on the floor in the car.

After finding that Smith gave the police her implied consent to search the car for the keys, the next question is whether the scope of her consent extended to a search of containers in the car, including Bruski's travel case that was on the floor in front of the front passenger seat.

In the circuit court and in the court of appeals, the state relied on *Matejka* to support its argument that Smith's consent to search the car authorized the police to search the travel case that was in the car (28:38-40).

In his brief in this court, Bruski contends that the circuit court correctly concluded that the police did not have Smith's implied consent to search the car and its contents. Brief of Defendant-Respondent-Petitioner at 22-24. Bruski, however, does not argue that Smith's implied consent, if given, would not extend to the travel case in Smith's car. *Id.*

In *Matejka*, 241 Wis. 2d 52, ¶3, the police officer stopped a van because it had no front license plate. When

the officer asked the driver for permission to search the van for guns and drugs, the driver consented. *Matejka*, 241 Wis. 2d 52, ¶¶7-8. The officer searched the van as well as jackets that were in the van. *Matejka*, 241 Wis. 2d 52, ¶9-11. In Matejka's jacket, the officer found a container with marijuana. *Matejka*, 241 Wis. 2d 52, ¶11.

When Matejka, a passenger in the van, challenged the search of her jacket, this court concluded that the scope of the driver's consent to search the van extended to the jackets in the van. *Matejka*, 241 Wis. 2d 52, ¶35.

In this case, Smith as the car's owner had authority over the vehicle and, because her access and use of the interior of the car in relation to Bruski was at least as great as the driver/owner's access and use of the interior was in relation to Matejka, Smith's consent to search the car encompassed Bruski's travel case found in the van.

In *Matejka*, 241 Wis. 2d 52, ¶41, the court concluded that the driver/owner's consent to search the van for guns, drugs and other contraband extended to Matejka's jacket because it could hold the objects sought. So too in this case, Smith's implied consent to the police to search the car for the keys extended to the travel case because it could contain the keys.

In conclusion, just as the driver/owner's consent to search the van extended to Matejka's jacket that was in the van, Smith's implied consent to the police to search the car for the keys extended to the travel case in the car. Officer Beauchamp, therefore, legally looked into the travel case while searching for the keys. Because Beauchamp was justified in looking in the travel case, he was justified in seizing the evidence inside the travel case under the plain view doctrine. *State v. Guy*, 172 Wis. 2d 86, 101, 492 N.W.2d 311 (1992).

The circuit court, therefore, should have denied the motion to suppress the evidence seized from the travel case and the evidence found on Bruski's person after

Bruski was arrested based on the evidence that was found in the travel case.

CONCLUSION

For the reasons discussed above, the State of Wisconsin requests this court to reverse the decision of the court of appeals that affirmed the circuit court orders granting the motion to suppress and to remand the case to the circuit court for further proceedings.

Dated this 14th day of July, 2006.

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CERTIFICATION

I certify that this brief meets the requirements of the Rules of Appellate Procedure for a document printed in a proportional font. The brief contains 16,715 words.

Stephen W Kleinmaier

STEPHEN W. KLEINMAIER
Assistant Attorney General

APPENDIX

INDEX TO APPENDIX

STATE OF WISCONSIN CIRCUIT COURT COUNTY OF DOUGLAS

STATE OF WISCONSIN,

Plaintiff,

FILED
JUN 03 2005
Joan Osty
Clerk of Circuit Court

vs.

05 CF 60

DAVID ALLEN BRUSKI,

Defendant.

TRANSCRIPT OF MOTION HEARING

BEFORE THE HONORABLE MICHAEL T. LUCCI
Circuit Judge

April 14, 2005
Superior, Wisconsin

APPEARANCES:

FOR THE PLAINTIFF: Mr. Daniel W. Blank
District Attorney

FOR THE DEFENDANT: Defendant present in person and by
Mr. Fredric B. Anderson
Asst. State Public Defender
1310 Belknap Street
Superior, WI 54880

EXAMINATION INDEX

* * *

P R O C E E D I N G S

THE COURT: All right. This is State of Wisconsin versus David Bruski, 05 CF 60. Mr. Blank is present for the state. Are you David Bruski?

THE DEFENDANT: Yes, Your Honor, I am.

THE COURT: Okay. Mr. Bruski is present with Mr. Anderson.

MR. ANDERSON: Yes.

THE COURT: And this is the time set for a motion -- to hear a motion filed. The motion is one for suppression.

Is the state ready to proceed?

MR. BLANK: Yes.

THE COURT: Defense ready?

MR. ANDERSON: Yes.

THE COURT: Okay. All right. Mr. Blank, you may proceed.

MR. BLANK: Jim Olson.

MR. ANDERSON: I would ask the witnesses be sequestered.

THE COURT: All right. If there are any more than one -- if there's any other witnesses in the courtroom, they'll have to be outside until called.

MR. BLANK: Okay.

(Witnesses sequestered)

JAMES OLSON,

called as a witness and having been first duly sworn, testified as follows:

THE CLERK: Please be seated, state your full name and spell your last name.

THE WITNESS: Full name is James Olson, O L S O N.

DIRECT EXAMINATION

BY MR. BLANK:

Q. And Mr. Olson, your occupation, please?

A. I'm a police officer with the City of Superior, Wisconsin, Douglas County.

Q. And asking you to go back to March 3, 2005 at about 8:00 a.m. Did you make contact with a Mr. Bruski in a vehicle here in Superior?

A. Yes, I did.

Q. Do you remember the approximate location?

A. I made contact with Mr. Bruski at the rear of 1326 John Avenue.

Q. And what were the circumstances that led you to have contact with him?

A. We had received a report of a suspicious male and suspicious vehicle at the rear of that address at 1326 John Avenue.

Q. And did you find a person in a vehicle at that location?

A. Yes, I did.

Q. Did you identify the person?

A. Yes, I did.

Q. And is that the person in court here today?

A. Yes, it is.

Q. Did you have some initial contact with Mr. Bruski -- Bruski?

MR. ANDERSON: Bruski.

Q. Mr. Bruski, initial verbal contact with him?

A. Yes, I did.

Q. And did you identify the vehicle that he was in?

A. Yes, I did.

Q. Do you remember who it was registered to?

A. It was registered to a Margaret Smith.

Q. And did you make contact with Ms. Smith?

A. I had the communications center contact Ms. Smith and let her know of the status of her vehicle.

Q. Did she ask you to take any action regarding the vehicle at that time?

A. Not at that time. Originally she told the communications center that her daughter was supposed

to be in possession of the vehicle, and that she may be allowing a friend to operate the vehicle.

Q. Did you have contact with Ms. Smith again a little bit later?

A. Yes, I did, approximately 10:20 that morning.

Q. And what were the circumstances at that time?

A. Ms. Smith became concerned and worried about her vehicle and her daughter, and she wanted an officer to escort her over to her vehicle location to recover it.

Q. Is that what you did?

A. Yes, I did.

Q. And did you find Mr. Bruski in the vehicle again in the same location?

A. Yes, he was still seated in the vehicle.

Q. What transpired with you and Ms. Smith and Mr. Bruski?

A. When we pulled up, I asked Mr. Bruski to step out of the vehicle. He stepped out of the vehicle. I asked Mr. -- or Ms. Smith, Margaret Smith, if she had ever seen Mr. Bruski before, and she told me that she had never seen or met him before, and that she had never heard his name before

mentioned by her daughter.

Q. Did he have permission to have possession of her vehicle?

A. No, he did not.

MR. ANDERSON: I'm going to object to that.

THE COURT: On what grounds?

MR. ANDERSON: The officer's not in a position to state whether or not my client had permission to be in the vehicle or have possession of the vehicle. Continued possession, perhaps. But the officer's already testified that Ms. Smith initially stated that her daughter was using the car, and may have let a friend borrow it. So in terms of the conclusion as to whether or not he had permission to be in the car --

THE COURT: Well, I think you're giving a long explanation for an objection based on lack of foundation.

MR. ANDERSON: Correct.

THE COURT: All right. Sustained.

BY MR. BLANK:

Q. What did Ms. Smith indicate was her intention relating to her vehicle while you were there that day?

A. Ms. Smith wanted to recover her vehicle and

take it back into her possession.

Q. Did you try to facilitate that?

A. Yes, I did.

Q. By doing what?

A. We weren't quite sure where the vehicle keys were. I asked Mr. Bruski if he had the vehicle keys. He told me that he did not. And at that time we began searching for the vehicle keys.

Q. When you say we, who are you talking about?

A. Officer Jerry Beauchamp.

Q. So the two of you as officers were present at that time?

A. Yes.

Q. And what caused you to search for the keys?

A. What caused us to search for the keys?

Q. Right.

A. Ms. Smith wanted to take her vehicle into possession, and in order to do so, she had to use the keys to start the vehicle and drive it away.

Q. Okay. So I take it that Ms. Smith did not appear on the scene with you with a set of car keys?

A. No, she did not.

Q. And you had just finished testifying that you asked Mr. Bruski for the keys to the vehicle?

A. Yes, I did.

Q. And his response was what?

A. That he did not have the keys.

Q. Was there any other conversation with Ms. Smith before you started looking for the keys in the vehicle? Let me ask it this way. Did you ask Ms. Smith for permission to search her vehicle for the keys at that time?

A. No.

Q. Did Ms. Smith give any verbal indication that you had permission or did not have permission to go into her vehicle and look for the keys?

A. During -- during this moment I continued interviewing Mr. Bruski and asking him questions, questioning him. Officer Jerry Beauchamp began searching for the vehicle keys. At that time he went inside the passenger side of the vehicle and began looking around for the vehicle keys on the floor, up in the visor and such.

Q. Okay. So was Officer Beauchamp on the scene when Ms. Smith indicated her plan to take her car back into her possession?

A. Yes.

Q. Okay. And then also when you asked Mr. Bruski for the keys?

A. Yes. Ms. Smith was standing right next to

me. Mr. Bruski was standing directly in front of me. We were standing at the vehicle driver's side door, and Officer Jerry Beauchamp was on the other side of the vehicle, and Ms. Smith was totally aware of the conversation we were holding.

Q. Okay. So Officer Beauchamp would have been able to hear?

A. Yes.

Q. And he started searching for the keys while you were in the conversation?

A. Yes.

Q. Okay. Going back to my couple of questions, then, would Officer Beauchamp have heard if you asked for consent?

A. I can't say whether or not he would have heard if I would have asked Ms. Smith for consent.

Q. Okay. Was the conversation loud enough that you think in his position Officer Beauchamp -- that he would have heard what you were saying?

A. Yes, I believe he heard exactly what we were saying.

Q. So your testimony is that you did not ask for consent before Officer Beauchamp started searching?

A. Exactly, correct.

Q. And Ms. Smith did not on her own give consent or deny consent?

A. Correct.

Q. Did Mr. Bruski say anything about searching the vehicle for the keys at that time?

A. No.

Q. Did he say anything when Officer Beauchamp began searching the car for the keys?

A. No. No.

Q. Do you know if Mr. Bruski was watching Officer Beauchamp go into the vehicle to look for the keys?

A. I can't state whether or not he had knowledge that we were searching the vehicle at that time. We were all in a conversation, Ms. Smith, myself, Mr. Bruski and Officer Beauchamp. We were all in a conversation as a group looking for the vehicle keys.

Q. Do you know what direction Mr. Bruski was facing?

A. He was facing toward the hood of the car, standing to my right. I am standing facing the vehicle looking inside the vehicle. Mr. Bruski's on my right facing the left toward the hood. Ms. Smith is on my left standing toward Mr. Bruski.

Q. What did you hear or see Officer Beauchamp do when he started searching the vehicle?

A. Officer Beauchamp -- I saw Officer Beauchamp enter the vehicle. I was observing him while he was looking for the vehicle keys. He searched down between seats, on the seats, under the seats, ashtray. He also I -- or he saw and I saw a silver gray what appeared to be a makeup travel case. Officer Beauchamp opened up the travel case in search of the vehicle keys and found drug paraphernalia.

Q. Okay. Let me take you a step back, then. As you described the different places that Officer Beauchamp was searching, did you hear or see any reaction by Mr. Bruski to that situation?

A. No, none.

Q. Did he say anything about Officer Beauchamp being in the car at all?

A. No, he did not.

Q. Did Ms. Smith give any objection at all?

A. No.

Q. Was there any direct conversation by you or Officer Beauchamp during the search that Officer Beauchamp was doing where there was a request for continued consent of Ms. Smith?

A. Yes. After we -- after Officer Beauchamp

opened the travel case and found the drug paraphernalia, he also found in a Marlboro cigarette box a green leafy substance which appeared to be marijuana. It smelled like marijuana. I placed Mr. Bruski under arrest. I handcuffed him properly behind the back. We asked Ms. Smith if the travel case belonged to her. She said no, she had never seen the travel case before. There were clothes, her daughter's clothes were in the back seat, and the entire situation just seemed real strange and suspicious, and Officer Beauchamp then asked if we had permission to search the trunk.

Q. So that was the only direct question from either you or Officer Beauchamp to Ms. Smith on the issue of consent to search the vehicle?

A. Right. Actually I think Officer Beauchamp asked Ms. Smith, we have permission to search the vehicle, right?

Q. At what point?

A. And that was after the drug paraphernalia and marijuana was located.

Q. Okay. And at any point after Officer Beauchamp started searching for the keys did Ms. Smith attempt to stop or not consent to the search?

A. No. Ms. Smith was in favor of us searching for the vehicle keys.

Q. Was there any point where Mr. Bruski --

MR. ANDERSON: I'm going to object to that conclusion. Lack of foundation.

THE COURT: Read back the question, Ginny.

(Last question read back by reporter)

THE COURT: Your objection is --

MR. ANDERSON: To the answer, which was that she wanted us to search for the keys.

THE COURT: All right. Well, I agree the answer is not necessarily responsive to that question.

MR. ANDERSON: I wasn't objecting to the question.

THE COURT: Pardon?

MR. ANDERSON: I did not object to the question.

THE COURT: The response? Okay. Objection sustained. The response was not responsive to the question.

BY MR. BLANK:

Q. Do you remember the question that was read back?

A. The question that was read back to me, to

us?

Q. Yeah.

A. Not word for word.

Q. Neither do I. Let's see. Let me ask it this way. After the search by Officer Beauchamp started, did Ms. Smith say anything about continuing the search for the keys or not?

A. After Officer Beauchamp began searching the vehicle and the paraphernalia and drugs were found, we started to become more suspicious of the welfare or concerned about the welfare of Ms. Smith's daughter, seeing her clothes in the back seat and Mr. Bruski stating that he has --

MR. ANDERSON: I'm going to object to that as unresponsive to the question.

THE COURT: I agree. Sustained. Your question is specifically whether Mrs. Smith said anything or indicated anything with respect to the continuing the search. That's the question as I understand it.

BY MR. BLANK:

Q. Okay. My sense, Officer, is that Ms. Smith indicated permission when Officer Beauchamp asked, we have permission to search, right?

A. Yes. She said we have permission to search.

Q. Okay. I think before that point what your response triggered was -- and correct me if I'm wrong -- that you assumed that you had permission to search because of the circumstances where she wanted to take possession of her vehicle and she did not have keys?

A. Correct.

Q. Thank you. Did Mr. Bruski say anything at the scene when Officer Beauchamp went to the travel case?

A. No.

Q. Did you notice any visible nonverbal response by Mr. Bruski when Officer Beauchamp went to the travel case, went into the travel case?

A. None that stood out.

Q. Okay. Did you -- did Mr. Bruski say or do anything when Officer Beauchamp opened the travel case and discovered drug paraphernalia?

A. Not that I recall.

Q. Earlier you testified that there was some conversation with Ms. Smith about recognizing or owning that travel case?

A. Yes.

Q. Did she say anything about, don't go into that travel case, or stop searching that travel case?

A. No, she did not.

Q. So Mr. Bruski was placed under arrest because of Officer Beauchamp's discovery of paraphernalia and marijuana in the travel case?

A. Yes.

Q. And then was searched incident to arrest, Mr. Bruski's person, then, at that point?

A. Yes.

Q. And further evidence was found --

A. Yes.

Q. -- on his person?

A. Yes.

Q. And that was suspected methamphetamine?

A. Correct.

Q. And he made a statement when you found methamphetamine?

A. I can't recall if he made a statement or not, but he didn't look happy.

Q. Was there -- do you recall prior testimony or do you recall Mr. Bruski saying something to the effect of just shoot me?

A. Yes. After Mr. Bruski was handcuffed, I was walking him to the squad car, my marked squad car, and Mr. Bruski stated, just shoot me.

Q. Was that in relation to the discovery of the

methamphetamine?

A. Yes.

Q. And did he also ask to negotiate something with a narcotics officer?

A. Yes, he did.

MR. BLANK: I don't believe I have anything further from Officer Olson, Your Honor.

THE COURT: Mr. Anderson.

CROSS-EXAMINATION

BY MR. ANDERSON:

Q. Once Mr. Bruski was arrested, what did you do with him?

A. Repeat the question?

Q. Once Mr. Bruski was arrested, what did you do with him?

A. I escorted him to my marked squad car.

Q. And then did he remain on the scene in the squad car while further search took place, or was he removed from the scene?

A. No, no further search had taken place after he was placed in the squad car.

Q. At some point Mr. Bruski's belongings were gathered from the car, is that correct?

A. Yes.

Q. And those were further searched?

A. Yes.

Q. When did that take place in relation to his arrest?

A. The property that was taken out of the vehicle was the silver gray makeup travel case. That case, along with Mr. Bruski, was taken to the Douglas County Jail.

Q. Was there anything -- any of his property in addition to the case, or not?

A. Repeat the question?

Q. Was there any of his property that was taken or searched in addition to the silver case that you've already testified about?

A. I don't know what you're asking me.

Q. You said Mr. Bruski was taken to the jail?

A. Yes.

Q. The silver case, as you've testified about, was taken to the jail?

A. Correct.

Q. Was there any other property of his seized from the car at that point or any point?

A. There was no other property seized from the vehicle.

Q. Okay. Thank you. Now your initial contact with Mr. Bruski, the first contact you did speak with

him, correct?

A. Yes.

Q. And he had indicated he was waiting for a friend?

A. Yes.

Q. And he identified himself?

A. Yes.

Q. You ran his name?

A. Yes.

Q. The second contact with Mr. Bruski, Ms. -- either Ms. Smith or law enforcement had asked if he knew her daughter, correct?

A. Yes.

Q. And he had indicated that her daughter's name was Jessica?

A. Yes.

Q. And that was correct?

A. Yes.

Q. But he didn't give a last name?

A. Correct.

Q. At any point did Mr. Bruski acknowledge having driven the car?

A. No. Mr. Bruski had no idea how he got there.

Q. And no one else -- you hadn't talked to

anyone else who had seen him driving the car around or anything like that, correct?

A. No.

MR. ANDERSON: Nothing further. Thank you.

THE COURT: Mr. -- Mr. Blank, before you have any further questions, just a couple questions, Officer.

THE WITNESS: Yes.

EXAMINATION

BY THE COURT:

Q. When you first saw Mr. Bruski, he was inside this vehicle?

A. Yes.

Q. And can you tell us where he was seated in the vehicle?

A. When I made initial contact with Mr. Bruski, he was in the driver's seat of the vehicle, and -- okay.

Q. Go ahead. You were going to say?

A. Mr. Bruski's condition appeared to be impaired, I guess you could say. He was kind of sleeping, nodding off, had difficulty answering my questions, and in fact it was kind of hard to understand what Mr. Bruski was saying.

Q. Okay. He was seated in the driver's seat?

A. Yes.

Q. And you indicated that he did not -- that he had said to you that he did not know how he got there?

A. Yes.

Q. Okay. And did you -- you indicated that you asked Mr. Bruski whether he had the keys?

A. Yes, I did.

Q. And his answer was what?

A. No.

Q. Was the vehicle running?

A. No, it was not.

Q. Okay. When this -- who found this travel case, was it you or Officer Beauchamp?

A. Officer Beauchamp.

Q. All right. Did you see Officer -- did you, prior to Officer Beauchamp taking hold of the travel case, did you see the travel case?

A. Yes, I did.

Q. And where was it located when you first saw it?

A. The travel case was located on the floor in the front of the vehicle in front of the passenger seat.

Q. It was sitting on the floor?

A. Yes.

Q. Can you just indicate how large a case or object this was, can you estimate?

A. Yeah. The case was approximately maybe 10 to 12 inches wide, about 16 inches in length, and about eight inches deep or so.

Q. Did you know -- did you notice how it -- whether it had a pockets or a zipper or anything like that?

A. No, it had no pockets or zippers. It was a hard case.

Q. It was a hard case? All right. And when it was -- when you made that observation, was Mr. Bruski still in the vehicle or was he outside the vehicle?

A. He was -- I saw the travel case in the vehicle when Mr. Bruski was in the vehicle.

Q. Okay. And at some point Mr. Bruski got out of the vehicle when you were questioning him?

A. Correct.

Q. All right. And when you were questioning him, Mrs. Smith was there?

A. Yes, she was.

Q. And also the other officer?

A. Yes.

Q. And were you in one -- would you say in one

grouping, or were you within a -- within a certain distance of each other?

A. Yes, we were in a group, Ms. Smith, myself and Mr. Bruski were in a close group, approximately one or two feet apart from each other. Officer Beauchamp was on the other side of the vehicle, approximately five or six feet away.

Q. All right. And Mrs. Smith indicated to you that she did not -- did she say anything about the keys prior to the search?

A. Yes. Ms. Smith wanted her keys. She became very upset, and then she began asking Mr. Bruski for the keys. Where are my keys, is what she was asking Mr. Bruski.

Q. And did you hear his response?

A. Yes. He said, I don't know.

THE COURT: All right. Okay. Mr. Blank, anything else?

MR. BLANK: No, thank you.

THE COURT: Mr. Anderson?

RECROSS-EXAMINATION

BY MR. ANDERSON:

Q. When you said Mr. Bruski was seated in the driver's seat, was he seated looking forward, or more slouched in in that area of the car?

A. Mr. Bruski appeared to be passed out. He had a sandwich in his lap and a piece of sandwich in his mouth, passed out.

Q. That was the first or second time?

A. First contact I had with him.

Q. How about when you approached the second time?

A. When I approached the second time he was still seated in the vehicle, same position.

Q. Also appeared passed out or sleeping?

A. Yes.

Q. You had to wake him both times?

A. The first time I thought he may have been dead. I had to shake him, I had to ask him to wake up, wake up, wake up, and it took what seemed to be a very long time to wake him up. The second time we approached the vehicle, he seemed to be a little more alert.

Q. But you still had to roust him the second time?

A. I don't recall if I had to shake him or say anything to him, but he appeared to be sleeping when I walked up, and he just kind of woke up.

MR. ANDERSON: Thank you.

THE COURT: Anything else, Mr. Blank?

MR. BLANK: No.

THE COURT: You may step down.

THE WITNESS: Thank you.

(Witness excused)

MR. BLANK: State's calling Gerald Beauchamp.

Your Honor, based on the completion of Officer Olson's testimony, may he be excused from the sequestration order?

THE COURT: I have no problem with that. Any objection?

MR. ANDERSON: No objection.

THE COURT: All right. Sure.

GERALD L. BEAUCHAMP,

called as a witness and having been first duly sworn, testified as follows:

THE CLERK: Please be seated, state your full name and spell your last name.

THE WITNESS: Gerald with a G, L. Beauchamp, B E A U C H A M P.

DIRECT EXAMINATION

BY MR. BLANK:

Q. And Mr. Beauchamp, your occupation, please?

A. Superior police officer.

Q. Did you assist Officer Olson on March 3,

2005 in the morning behind a John Avenue address?

A. Yes, I did.

Q. And do you remember the approximate time and circumstances when you arrived there?

A. I'm guessing it was 10:30, 11:00 in the morning, somewhere in there. I could look on my report and get the specific time, but just off the top of my head I'd say that's what time it was.

Q. What was going on when you arrived there?

A. Well, Officer Olson asked me to keep an eye on this person sitting in his car while he went and got the car's owner, so I said okay, so I waited until he came back.

Q. So you were -- was this in an alley or driveway or something?

A. It was parked in back of a house, 1326 John.

Q. Okay. So you were keeping an eye on a vehicle and a person in a vehicle?

A. Yes.

Q. And Officer Olson was somewhere else?

A. He went back to the police department to get the owner of the car.

Q. Okay. So you were there together at the car scene?

A. Right.

Q. Then he left and came back?
A. Right.
Q. And he came back with the car owner?
A. Right.
Q. And were you involved in a conversation about what was going on there?
A. Yes.
Q. And did you observe the person that was in the car?
A. Yes.
Q. Male or female?
A. Male.
Q. Driver's side, passenger side?
A. Driver's side.
Q. Okay. What did you first do when you got there after Officer Olson and the owner came back?
A. Well, we -- the owner said, that's my car, and she wanted the keys so she could leave, and the person in the car said he didn't have 'em and he didn't know how the car got there and --
Q. So what did you do?
A. Well, I figured, well, the keys's got to be here somewhere, 'cause the car's here and he's sitting in it, so I started looking for the keys.
Q. Do you remember if you said -- or asked

anybody for permission to look in the car before you started looking for the keys?

A. No, I didn't.

Q. Do you remember if anybody said anything to stop you or to say that you didn't have permission to look for the keys?

A. No one said anything.

Q. Did you feel that you had permission to look for the keys?

A. Yes.

Q. Based on what?

A. On the owner was standing right there wanting her keys. I'm, well, I'll see if I can find 'em.

Q. So where did you look?

A. I looked in the seats, looked in the glove compartment, then there was this, well, it looked like a makeup case to me.

Q. Okay.

A. And, well, the keys could be in there. And I opened it up and the keys weren't in there.

Q. You found some evidence of a crime?

A. Yes.

Q. Did you say anything about that to Officer Olson or --

A. Yes, I did. I said, look what we have here. And at this point in time the person that was in the car wasn't in the car anymore, he was standing outside. But I said, look what we've got here. And then Officer Olson arrested him and handcuffed him.

Q. And do you know if that person, that man said anything to you while you were searching in the car?

A. Didn't say anything to me.

Q. Did you hear anybody trying to stop you from looking inside the travel case?

A. Nope.

Q. And you were present then when Officer Olson arrested turns out to be a Mr. Bruski?

A. Yes.

Q. Mr. Bruski say anything about the travel case to you or Officer Olson at that time?

A. Nope.

Q. Was there, I don't know if it's an official request for consent, but did you have a conversation or make statements to the car owner during the search?

A. Yes.

Q. Do you remember about when and what it was that you said?

A. After we found the narcotics.

Q. And when you say narcotics --

A. Well, what we believed to be marijuana and the implement to smoke it with.

Q. Okay.

A. At this point in time I began to wonder, where is this girl? I didn't have any idea. So I was going to look in the trunk. And I asked I believe her name was Mrs. Smith, I says, it's okay to look in your vehicle, right? And she says, yeah, by all means. So then we opened the trunk and there was nothing in there of any interest, so --

Q. So that was mostly directed to the trunk --

A. Yes.

Q. -- that question of Mrs. Smith?

A. Right.

Q. You hadn't asked for permission to go into the travel case?

A. Nope.

Q. Did you -- were you a part of any conversation about the ownership or possession of the travel case?

A. No.

Q. Okay. Did you have anything else to do with the incident after finding the evidence and Officer

Olson making the arrest?

A. I helped to catalog the evidence afterwards.

Q. Did you find a cell phone?

A. I think Officer Olson found the cell phone.

Q. Okay. And was it you that found the suspected methamphetamine, or Officer Olson?

A. Officer Olson.

Q. Okay. Did you take Mr. Bruski to the jail or did Officer Olson?

A. Officer Olson.

Q. And did you find the keys for the vehicle?

A. I didn't, no.

Q. Were they found while you were there?

A. Yes, yes.

Q. Where were they?

A. They were on Mr. Bruski's person.

Q. And on his person meaning what?

A. I don't know. Officer Olson searched him and found the keys.

MR. BLANK: Thank you. Nothing further.

THE COURT: Mr. Anderson.

CROSS-EXAMINATION

BY MR. ANDERSON:

Q. When you went into the vehicle, which door did you go through?

A. Passenger, I believe the front passenger door, I believe.

Q. And where were the other three standing, what were they doing when you went in the passenger door?

A. They were on the driver's side outside.

Q. So when you had said, I'll see if I can find them, that was something you said to yourself, and not to the owner?

A. No, I told -- I says, well, I'm going to look for the keys, or words to that effect.

Q. That's what you told her?

A. Yeah.

Q. And at the point that you asked to go into the trunk, you still hadn't found the keys, correct?

A. That's correct.

MR. ANDERSON: Nothing further.

EXAMINATION

BY THE COURT:

Q. Was your purpose looking inside the car for anything else other than looking for the keys?

A. Nope.

THE COURT: Anything further?

MR. BLANK: No.

THE COURT: Okay. You can step down.

(Witness excused)

MR. BLANK: Nothing further from the state, Your Honor.

THE COURT: Mr. Anderson?

MR. ANDERSON: Defense will not be presenting evidence.

THE COURT: All right. Any argument or statements you wish to make?

MR. ANDERSON: Yes. Well, obviously, Judge, it's not a warrant situation. It's not a situation where there's probable cause that a crime has been committed.

I understand that there are suspicious circumstances. Certainly law enforcement has the right to be there, to be asking questions. But it's not a situation where there's probable cause that there's been a crime committed or that there's evidence of a crime inside the vehicle or anywhere else. So if the state is going to be able to justify the search in this case, they have to show some type of exception to the warrant or probable cause requirement, and that obviously being consent.

The state is -- I haven't heard the argument yet, but obviously the questioning of the officers, they're saying that it was reasonable to assume

permission, given the overall circumstances. And that would truly be breaking new ground.

There has never been a case I'm aware of that says that law enforcement can assume permission, and use that as the same as a given, spoken, written, or consent as we normally think of it. And I think that law enforcement here doesn't believe that assumed permission is good enough, because as they testified later then did ask for specific permission to continue the search, specifically to go into the trunk. So I don't think that they think that assumed permission is good enough, either, and that there is no case that I'm aware of that would support that. And the Fourth Amendment has been chipped away at by the courts for 20 years now, 25 years, maybe, but I don't think that the court has chipped that far.

What the state is really doing is doing a burden switching. They're saying it's okay for law enforcement to start searching, as long as no one objects. And that's just not the way the law is. With a consent search, law enforcement's free to ask for a consent to search a car, whatever it happens to be, and the person is free to give or not give that consent. They're free to restrict the consent. But the point in that is that law enforcement first has

to ask for permission to do the search. That just simply wasn't done in this case.

I understand they're looking for the keys. Mr. Bruski apparently responded that he didn't know where they were. Interestingly, there's no indication at this point, other than his just being present in the car, there's no indication that he had driven the car, or that he would have the keys. I mean at that point what they know is that he was in the car at eight o'clock in the morning sleeping, and was in the car sleeping at 10:30 approximately whenever they arrived the second time. There's no indication by his statements, his conduct or anyone else's statements or conduct that he had ever driven the car.

Um, there's also of course the issue of the search of the container itself. There was no permission for that specific search. There was no request made. There's no indication from Ms. Smith that the container belonged to her or her daughter. There's no probable cause to open up the container.

So I think that the search in this case fails, I mean 'cause there clearly was a search. Mr. Bruski has an expectation of privacy in his personal effects; arguably the car also, since he was

possessing it, but I don't think I need to go that far. He certainly has an expectation of privacy in his personal effects, which were searched. Any substances or other items that were found on Mr. Bruski himself were obviously fruit of the arrest, which but for the illegal search here there wouldn't have been an arrest, so I believe that those items need to be suppressed as well.

THE COURT: Mr. Bruski was found seated -- sitting in the driver's seat. The case -- this travel case was sitting on the floor in front of the passenger seat. The owner of the vehicle was there, looking -- obviously looking for -- looking to get her car back.

MR. ANDERSON: Correct.

THE COURT: Looking for the keys. There was a request for the keys. Mr. Bruski was asked about the keys. He didn't know anything about the keys. The officers started to look for the keys. What expectation of privacy would, under those circumstances, would he have in this particular travel case inside someone else's car who wanted the car back?

MR. ANDERSON: Well, it's his travel case. He has an expectation in the travel case -- an

expectation of privacy in the travel case.

THE COURT: You don't think the owner gave consent in this case?

MR. ANDERSON: I'm sure the owner didn't give consent until -- verbally give consent until law enforcement -- or at least by their testimony they did not ask for consent and they did not receive verbal consent to search until after the travel case had been opened and paraphernalia found.

THE COURT: Mr. Blank, your response?

MR. BLANK: I don't think Mr. Bruski has any standing at all to challenge the search of the vehicle. He's clearly not the owner. He has no expectation of privacy in someone else's vehicle.

The search of the travel case that turns out to be his, if he had an expectation of privacy, it was almost completely wiped away by the circumstances where the car owner gave permission, if not formally, verbally, but by the circumstances impliedly by going to law enforcement, asking for assistance to recover her vehicle, and asking Mr. Bruski in the officers' presence, where are my keys? And clearly indicating she wants her keys and she wants her car and she wants to know where her daughter is and she wants to know who this guy is and why he's in her car. The

search of the container was for the purpose of finding the keys.

I mentioned to Mr. Anderson the case I think closest on point to this circumstance is 2001 Wisconsin Supreme Court case State v. Matejka, M A T E J K A, that's 241 Wis. 2d 52, and 621 N.W.2d 891.

THE COURT: What's the 241 Wis. 2d, what's the page number?

MR. BLANK: Fifty-two. And basically that was a woman whose coat was in a car, a passenger's coat was searched after permission was given by the car owner and driver, and drug paraphernalia, et cetera, were found. And the Wisconsin Supreme Court talked about the history of a reduced Fourth Amendment protections in vehicles. It goes on to say that passengers possess a reduced expectation of privacy regarding their property that they transport in cars. Goes on to hold that that challenge was not valid, and the location of the controlled substance and paraphernalia was legitimate, based on the consent by the owner of the vehicle.

There's some minor distinguishing facts, but I think the law and the analysis are directly on point; that the third party, in this case Mrs. Smith,

who owns the vehicle, gave consent for all practical purposes to the officer to find her keys. The case was a place where the keys could be located. While looking for the keys, the evidence that can be tied to Mr. Bruski is located. He's arrested, and further evidence is found search incident to arrest.

So I think that the law, based on that 2001 Wisconsin Supreme Court case, is as good as it's going to get on this particular issue.

THE COURT: Well, the issue that I think comes up, at least kind of rises to the surface here, is one of under these particular set of circumstances is standing, his standing to challenge the search.

MR. ANDERSON: If I could address that.

THE COURT: Yes.

MR. ANDERSON: That's the first thing the court looks at, is do you have standing to even challenge the case? In the case Mr. Blank cited, where evidence was found in a passenger's belongings, issue of standing doesn't arise, because a person has standing to challenge the search of their own belongings.

The Supreme Court cases -- and I can't find a case that's specifically on point to our situation here where there's assumed consent -- but the Supreme

Court cases that deal with container searches of vehicles or search of passengers in vehicles, standing's never brought up as an issue. I think it's never brought up as an issue because of course a person has standing to object to or challenge the search of their own personal effects and property. And that's what we have here.

The case that Mr. Blank cites would be a very good case for -- maybe even a dispositive case if in this situation, as in that case, law enforcement had asked for permission to search the vehicle, which wasn't done.

The other distinguishing feature on that case, I mean the key part is the consent, but the other distinguishing feature on that case is the court talks about how the driver was also the owner, and that person and the passenger had a shared occupancy of the vehicle, and relied on that at least in part on the consent to search the vehicle extending to consent to search the passenger's effects also, because they were in the vehicle together when the vehicle was stopped, which is obviously different than our case.

But in any event, the key point from that case and the other, the Supreme Court case, is

standing's not brought up in these cases because a person has standing, has an expectation of privacy in their personal effects, and because of that they have standing to object to the search and seizure of their personal property. And that's what happened here.

And here again the state wants law enforcement to be able to assume permission under a set of facts, a set of circumstances, and there's just no case law that allows for an assumed permission. It would be very reasonable to ask for permission to search the car for the keys. That wasn't done. If that had been done, then the state would have a much better argument.

THE COURT: All right. Well, have you gentlemen found any cases on the -- on consent that would support the proposition that there can be under certain circumstances implied consent, constructive consent?

MR. ANDERSON: I have not.

MR. BLANK: I haven't researched that issue, Your Honor.

THE COURT: Okay. Well, that's an interesting -- it's an interesting set of circumstances.

All right. I'll review this, the evidence,

and I'll review the case that you cited, and have a decision for you very shortly.

Is this set for any further hearings?

MR. ANDERSON: We're scheduled.

THE COURT: Pardon?

MR. ANDERSON: We're scheduled.

THE COURT: Scheduled for --

MR. ANDERSON: Trial in late May.

THE COURT: Okay. Well, I should have something to you very soon.

MR. ANDERSON: Thank you.

MR. BLANK: Thank you.

THE COURT: Okay.

(Recess)

* * *

STATE OF WISCONSIN)
) ss.
COUNTY OF DOUGLAS)

I, Virginia Walker, hereby certify that the within and annexed is a true and correct transcript of all the testimony taken and proceedings had in the above-entitled matter; that I have compared the same with the original machine shorthand notes made by me at the time of said hearing and that it is a true copy therefrom and the whole thereof.

Dated: May 31, 2005.

V. Walker

Virginia Walker

APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with Wis. Stat. § (Rule) 809.19(2); that is, the record documents contained in the respondent's supplemental appendix fall into one of the categories specified in sub. (2).

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 first names and last initials 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 14th day of July, 2006.

Stephen W. Kleinmaier

STEPHEN W. KLEINMAIER
Assistant Attorney General

STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2005AP1516-CR

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Plaintiff-Appellant,

v.

DAVID ALLEN BRUSKI,

Defendant-Respondent-Petitioner.

ON REVIEW OF A DECISION OF THE COURT OF APPEALS, DISTRICT III, REVERSING THE ORDERS SUPPRESSING EVIDENCE AND DENYING RECONSIDERATION ENTERED IN THE CIRCUIT COURT FOR DOUGLAS COUNTY, THE HONORABLE MICHAEL T. LUCCI, PRESIDING

REPLY BRIEF OF DEFENDANT-APPELLANT-PETITIONER

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ARGUMENT

I. THE WARRANTLESS SEARCH OF BRUSKI'S TRAVEL CASE WAS UNREASONABLE UNDER THE STATE AND FEDERAL CONSTITUTIONS.

A. The circuit court's conclusion that Bruski had a reasonable expectation of privacy in his travel case is supported by facts and reasonable inferences.

Bruski used the term "travel bag" in his brief-in-chief because that is the term that the circuit court used in its decision. *See* Record Document 7; Defendant-Respondent-Petitioner's Appendix ("Def. Res. Pet. App.") 108-11. The state points out the officers used the term "travel case" in their testimony. There is no meaningful distinction between the two terms. Both describe a piece of personal luggage. Bruski will hereafter refer to the "travel case" to conform to the testimony,

The state argues that Bruski failed to prove that he had a reasonable expectation of privacy in the car. The circuit court did not rule on Bruski's reasonable expectation of privacy in the car. The court specifically "noted that this decision relates only to the search and seizure of evidence from defendant's travel bag." (7:1; Def. Res. Pet. App. 108). Bruski believes this court can resolve this appeal by ruling on the issue of his reasonable expectation of privacy in his travel case. If this court determines the legality of the search of the car must first be determined, Bruski relies on his automatic standing argument on pages 13-20 of his brief in chief to challenge the warrantless search of the interior of the car.

Nevertheless, the circumstances concerning Bruski's presence in the car are relevant to the analysis of whether Bruski had a reasonable expectation of privacy in his travel case. The state claims that Bruski did not have a reasonable expectation of privacy because

> [w]hile Bruski was sleeping (28:21, 24-25), anyone could have opened the unlocked[3] passenger door and opened or moved the case.

> [3]The state says that the passenger door was unlocked because Officer Beauchamp entered the car through the passenger door to look for the keys (28:32-33). Because Beauchamp did not have the keys, the door must have been unlocked if he entered the car through it.

State's brief, p. 11.

The state is indulging in speculation. There is no evidence whether the car was locked or unlocked when Officer Olson directed Bruski to get out of the car. Many automobiles have automatic locks so both the driver and passenger doors can be unlocked with one action.

In its brief in this court, the state for the first time speculates that "it is just as likely that Jessica placed the case where it was found as it is that Bruski placed it there." State's brief, p. 10. The state presented neither Smith nor her daughter as witnesses at the suppression hearing. The circuit court described the travel case as Bruski's "personal possessions." A reasonable inference from the facts Bruski is sleeping alone in the front seat of a car and the travel case is his personal possession is that Bruski placed the travel case on the floor of the car.

The state argues that a person does not have a reasonable expectation of privacy based on ownership alone and that a reasonable expectation of privacy cannot be based on possession alone. State's brief, p. 22. Bruski does not base his reasonable expectation of privacy based on ownership alone or on possession alone. Both of these factors along with the circumstances of the location of the travel case in the car and the location of the car parked at the rear of a house establish Bruski's reasonable expectation of privacy in his travel case.

B. The warrantless search of Bruski's travel case violated the reasonableness requirement of the Fourth Amendment and Article 1, § 11 of the Wisconsin Constitution.

In his brief, Bruski challenged the court of appeals' reliance on a Fourth Circuit case, ***United States v. Hargrove***, 647 F. 2d 411 (4th Cir. 1981). ***Hargrove*** would not be decided the same way today, and therefore, it is not persuasive. The reason ***Hargrove*** would be decided differently today is because in ***New York v.***

Belton, 453 U.S. 454 (1981), the United States Supreme Court held that the Fourth Amendment permits a full search of the passenger compartment, including any containers in it, pursuant to a custodial arrest.

Where there is probable cause to believe the defendant committed a crime or probable cause that the item searched contains evidence of a crime, the state's interest outweighs the individual's privacy interest. Even though there is no warrant, the search is reasonable under the "reasonableness clause" of the Fourth Amendment and Article 1, section 11 of the Wisconsin Constitution. Where there is no probable cause, which is what the circuit court found in this case (7:2; Def. Res. Pet. App 109), the individual's privacy interest outweighs any state interest.

C. Bruski had standing to challenge the search under Article 1, § 11 of the Wisconsin Constitution.

If this court concludes that under the Fourth Amendment to the United States Constitution, Bruski's did not have a reasonable expectation of privacy in his travel case, Bruski asks this court to rule that he has standing under Article I, § 11 of the Wisconsin Constitution. Without overruling any precedent, this court could rule that Bruski had standing to challenge the search of his travel case. The state conceded the travel case belonged to Bruski. ***State v. Callaway***, 106 Wis. 2d 503, 317 N.W.2d 428 (1982) is distinguishable on that basis because there was a question as to who owned the vehicle searched.

If this court believes ***Callaway*** cannot be distinguished on that basis, Bruski asks this court to overrule ***Callaway***. The state argues Bruski has not satisfied the criteria for overruling a decision. State's brief, p. 24.

Bruski disagrees. The criteria cited by the state from ***Johnson Controls, Inc. v. Employers Ins. Of Wausau***, 2003 WI 108, ¶¶98-99, 264 Wis. 2d 60, 665 N.W.2d 257 are not as rigid as the state contends. This court recently stated in ***Bartholomew v. Wis. Patients Comp. Fund***, 2006 WI 91, ___ Wis. 2d ___, ___ N.W.2d ___ :

> Five factors *typically* contribute to a decision to overturn prior case law. This court is more likely to overturn a prior decision when one or more of the following circumstances is present: (1) Changes or developments in the law have undermined the rationale behind a decision; (2) there is a need to make a decision correspond to newly ascertained facts; (3) there is a showing that the precedent has become detrimental to coherence and consistency in the law; (4) the prior decision is "unsound in principle;" or (5) the prior decision is "unworkable in practice."
>
> Furthermore, "the decision to overrule a prior case may turn on whether the prior case was correctly decided and whether it has produced a settled body of law." A court must keep in mind that it does "more damage to the rule of law by obstinately refusing to admit errors, thereby perpetuating injustice, than by overturning an erroneous decision."

Id. at ¶¶ 33-34. (Footnotes omitted; emphasis added).

As the dissent pointed out in ***State v. Callaway,*** the court's ruling on automatic standing was "brief, uninformative *obiter dicta*". ***Callaway,*** 106 Wis. 2d at 541 (Abrahamson, J., dissenting).

There has not been a body of law developed that rests on the ruling in ***Callaway*** automatic standing. This court has cited the principle only in two cases[1], ***State v. Rewolinski***, 159 Wis. 2d 1, 464 N.W.2d 401 (1990) and ***State v. Wisumierski***, 106 Wis. 2d 722, 317 N.W.2d 484 (1982). ***Rewolinski*** did not involve a crime of illegal possession. ***Wisumierski*** was decided only 4 days after ***Callaway***, so ***Callaway*** was not well established legal principle at the time. The ***Callaway*** court took a "lockstep approach"[2] and never specifically analyzed the Wisconsin Constitution.

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[1] This is the result of *Shepards* search of LexisNexis headnote 9 which reads:

Criminal defendants charged with crimes of possession must first prove that their own constitutional rights have been infringed upon by a search or seizure before they can challenge the constitutionality of that search and/or seizure. The relevant question to be answered in making this determination is whether the defendant had a legitimate expectation of privacy in the place searched. The Fourth Amendment rights are personal rights which may not be asserted by another. The inquiry as to whether these personal rights were violated requires a determination of whether the disputed search and seizure has infringed on an interest of the defendant which the Fourth Amendment was designed to protect. In making this determination, the relevant question to be answered is whether the defendant had a legitimate expectation of privacy in the invaded place

[2] The lockstep approach is one of the descriptions of state courts methodologies to formulate state constitution law. Jason J. Leeg, Comment, *High Court Study: The Green Mountain Boys Still Love Their Freedom: Criminal Jurisprudence of the Vermont Supreme Court.*, 60 Alb. L. Rev. 1799, 1803 (1997).

A reason to adopt automatic standing where a defendant is charged with possession of an illegal drug is that it is a simpler test. There is no need for the fact specific determination that accompany the reasonable expectation of privacy test. ***State v. Sidebotham,*** 474 A. 2d 1377 (N.H. 1984)[3].

The state attempts to minimize the influence Chief Justice Edward V. Whiton had at the constitutional convention in 1848. Unfortunately, Chief Justice Whiton was one of three members of the constitutional convention that did not want his remarks to be reported for publication in the journal. J.R. Winslow, *Story of a Great Court* (1912), p. 15, citing *Journal and Debates of the 1847-48 Constitutional Convention* (Reporter's Preface). However, at times the comments of other members and the reporter reflect what Chief Justice Whiton said. Whiton believed that the Wisconsin Constitution should be a primary source of law for the Wisconsin courts. He said that if the legislature and courts of Wisconsin would at all times be governed by the decision of the Supreme Court of the United States, there would be no need of the proposed amendments. *Journal and Debates*, p. 377.

The recorded comments of Charles Burchard, who also was from Massachusetts, specifically states that the members were looking to New Hampshire, Massachusetts and Vermont when discussing civil liberties. *Id.*, p. 244, 766.

The state asserts that the committee on revision and arrangements "redrafted art. I, § 11 to track the language of the Fourth Amendment. *Id.* at 714." State's

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[3] The state pointed out that there was only a plurality decision in ***State v. Settle***, 447 A. 2d 1284 (N.H. 1982). The more recent cases of ***Sidebotham*** and ***State v. Paige***, 612 A. 2d 1331, 1332 (N.H. 1992) make it clear that the New Hampshire court has interpreted its constitution as providing automatic standing.

Finally, one of the rationales given for the development of state constitutional law is that each state has its own culture[4]. If that view is taken, this court should conclude that the culture of Texas and the culture of Wisconsin at the time the state constitutions were adopted were dissimilar. The Texax Constitution of 1869 permitted the death penalty for murder. ***McInturf v. State***, 20 Tex. Ct. App. 355 (1886). The Wisconsin Constitution did not authorize the death penalty.

This court should continue the tradition of looking to the Wisconsin Constitution for protection of the rights of its citizens against governmental action. *See, e.g.,* ***State ex rel. Kellogg v. Currens***, 111 Wis. 431, 434, 87 N.W. 561 (1901)(equal protection right found in the very first paragraph of "our declaration of rights").

II. THE CIRCUIT COURT CORRECTLY RULED THAT THERE WAS NO CONSENT TO THE SEARCH OF BRUSKI'S TRAVEL CASE.

A. The state failed to carry its burden of proving consent to search.

Bruski agrees with the state that consent to search need not be verbal. For example, in one of the cases cited by the state, consent was found in the defendant's nonverbal conduct. In ***State v. Phillips***, 218 Wis. 2d 180, 577 N.W. 2d 794 (1998), an agent asked the defendant if he could search the defendant's room. The defendant opened the door, walked in, retrieved a baggie of marijuana which he gave to the agent and pointed out paraphernalia. ***Id.*** at 197. There was a request to search and consent was clearly given, albeit not in words.

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[4] Michael Schwaiger, Article: *Understanding the Unoriginal: Indeterminant Originalism and Independent Interpretation of the Alaska Constitution,* 22 Alaska L. Rev. 293, 319 (2005).

In contrast, in the present case the officers did not ask for consent before searching the interior of the car and the travel case. "Consent . . . which is not asked for cannot be knowingly or voluntarily given." ***State v. Kiekhefer***, 212 Wis. 2d 460, 475, 569 N.W.2d 316 (Ct. App. 1997).

Whenever the state relies on consent to validate a warrantless search, the state must prove the consent by clear and convincing evidence. Consent will not be lightly inferred. ***Kelly v. State,*** 75 Wis. 2d 303, 316, 249 N.W.2d 800 (1977). The state failed to carry its burden of proof.

B. The circuit court correctly applied the law.

The state contends that the circuit court made an error of law. The state argues that "[t]he circuit court rejected the state's implied consent argument on the ground that there was no legal authority to support the argument." (State's brief, p. 49).

The circuit court understood the theory of implied consent but found under the circumstances of the case that there was no implied consent. The circuit court's order granting Bruski's suppression motion was based on "the decision of this court on April 18, 2005, May 10, 2005 and on June 13, 2005." (Record Document 23; Def.-Res. Pet. App. 115). In its April 18, 2005, Memorandum Decision, the circuit court recognized that there was "an issue over whether or not the officer had the consent of the vehicle owner to search the interior of the vehicle." (7:1-2; Def.-Res. Pet. App. 108-9). The district attorney filed a motion to reconsider relying on ***Kelly v. State***. The court denied the state's motion to reconsider in its letter decision dated June 13, 2005. The circuit court ruled:

> The motion does not point out any new factors or legal authority which would persuade the court to reconsider the decision that there was no consent to

> search the defendant's travel bag, implied or otherwise. Moreover, the circumstances in the ***Kelly*** case cited in the motion in support of the proposition that there was implied consent are not analogous to the facts in this case. Under the circumstances herein, the owner of the vehicle not only did not give implied consent for the police to search the car but she also could not give such consent to search defendant's travel bag. Since he himself did not provide consent, the search was illegal.

(Record Document 19; Def. Res. Pet. App. 114).

In ***Kelly***, as here, the state argued that implied consent authorized a warrantless search which resulted in the seizure of a rifle under the porch, a shell within the rifle and a slug on the kitchen floor. The circuit court had ruled that Kelly "having requested the neighbors to call the police and having furnished the police with the description of the deceased as 'running around outside, shot," thereby gave permission for the search." 75 Wis. 2d at 310. This court upheld the lower court's decision, stating that "[u]nder such circumstances there was an implied consent not only to aid the victim but to determine what had caused the death or injury and who was responsible." ***Id.*** at 313.

The state argues that Smith's request that the police help her retrieve her car was implied consent to search in interior of the car. The state cites as authority a case where the police are investigating a crime. In ***State v. Flippo***, 575 S.E.2d 170 (W. Va. 2002), the court found the search justified by implied consent reasoning that when a person summons the police to the premises and states a crime was committed against her, she implicitly consents to a search of the premises.

The circuit court held that there was no implied consent under the circumstances of this case. The court correctly applied the law and relied on the fact that the

police were not responding to a request for assistance where a crime had been committed.

C. If the owner impliedly consented to the search of the car, the implied consent did not authorize the police to search Bruski's travel case within the car.

The circuit court ruled that even if the owner impliedly gave consent to search the interior of the car, she could not consent to the search of Bruski's travel case.

Assuming for the sake of argument that the owner impliedly consented to the search of the interior of the car, this implied consent did not authorize Officer Beauchamp to look into Bruski's travel case. The state argues that ***State v. Matejka***, 2001 WI 5, 241 Wis. 2d 52, 621 N.W.2d 891 holds that the owner's consent to search a car extends to a passenger's jacket. However, the state does not address this court's express limitation that its holding did not apply to "private, personal property," such as a purse. ***Id.*** at ¶ 36, n.6.

In order for there to be consent, the person must have apparent authority to give the consent. ***Kelly***, supra at 314-15. The owner told the police that her daughter was supposed to have the car. (28:5-6). The record does not disclose the last time Smith had control over the car. There is no basis in the record to support a conclusion that Smith had mutual use of the travel case or she had the right to authorize the search of Bruski's travel case.

CONCLUSION

Bruski respectfully requests this court to affirm the circuit court's order suppressing the evidence seized during the search of his travel case and the subsequent arrest.

Date this 28th day of July, 2006.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 3,561 words.

Dated this 28th day of July, 2006.

Signed:

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