Supreme Court No. 96927-2
(COA No. 51062-6-II)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

TIMOTHY KETCHUM,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR CLALLAM COUNTY

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Timothy Ketchum, petitioner here and respondent below, asks this Court to accept review of the Court of Appeals decision terminating review designated in Part B of this petition pursuant to RAP 13.3(a)(2)(b) and RAP 13.4(b).

B. COURT OF APPEALS DECISION

Mr. Ketchum seeks review of the Court of Appeals decision dated February 6, 2019, attached as Appendix A. He filed a motion for reconsideration and is awaiting a ruling.[1]

C. ISSUES PRESENTED FOR REVIEW

1. Under article I section 7 and the Fourth Amendment, before the police have authority to impound a car and search it without a warrant, they must first consider reasonable alternatives to impounding the car, as this Court held in *State v. Tyler*, 177 Wn.2d 690, 699, 302 P.3d 165 (2013), and the Court of Appeals explained in *State v. Froehlich*, 197 Wn. App. 831, 391

[1] For reasons explained in his motion to extension of time to file a motion for reconsideration, Mr. Ketchum filed his motion for reconsideration on February 27, 2019, one day after the due date. RAP 12.4. The Court of Appeals has not yet ruled. To avoid missing the deadline for filing a petition for review, Mr. Ketchum is filing this petition without knowing the outcome of his request for reconsideration. He will alert this Court to any ruling issued.

P.3d 559 (2017), among other cases. Here, the trial court concluded the police impounded the case without first considering whether there was another available driver as a reasonable alternative to impoundment. The Court of Appeals reversed the trial court's ruling. It cited *State v. Peterson*, 92 Wn. App. 899, 964 P.2d 1231 (1998), which held the police may impound a car as long as they have "a reason" to do so and exercise "discretion" prior to impounding the car. Should this Court grant review because the Court of Appeals opinion here and in *Petersen* conflict with other decisions, including *Tyler* and *Froehlich*?

2. The Court of Appeals in *Froehlich* expressed confusion about the extent to which *Tyler* requires police to seek the defendant's friends or relatives as alternative drivers before lawfully impounding a car. The Court of Appeals expressed similar confusion in the case at bar. Does substantial public interest favor review when the Court of Appeals expressed need for clarification in the requirement that police pursue reasonable alternatives prior to lawfully impounding and searching a car?

D. STATEMENT OF THE CASE

On Saturday March 12, 2016, at 4:30 pm, state trooper Allen Nelson was looking for speeders with a radar gun. CP 29. He saw Timothy Ketchum exceeding the speed limit. RP 8. When the trooper signaled him to stop, Mr. Ketchum pulled off the road and onto the shoulder as directed. RP 9.

Mr. Ketchum's license to drive was suspended and he had a district court warrant for driving with a suspended license in the third degree and other warrants. RP 10. Trooper Nelson knew the state patrol's policy authorized him to impound a car for 30 days if driven by a driver with a suspended license. RP 27, 50.

Mr. Ketchum was "very cooperative." RP 16-17. He told the trooper the car belonged to his girlfriend, Jessica Parker, who lived in Port Orchard, which was some distance away. RP 15, 30. The trooper arrested Mr. Ketchum, handcuffed him, and secured him in police car. RP 11, 15. He never asked Mr. Ketchum if there was another person available to move the car. RP 35. He never called the registered owner to ask her if another person could move the car. RP 36.

At the suppression hearing, Mr. Ketchum explained that both he and Ms. Parker had family and friends in the area who could have taken possession of the car. RP 52-53, 55-56.

Trooper Nelson told Mr. Ketchum that he had to impound the car and would search it first to secure any valuables. RP 15, 31. Mr. Ketchum then volunteered that he had marijuana in the car and believed it was a legal amount that he would want returned to him. RP 49. The trooper found several baggies of marijuana as Mr. Ketchum described, and also found a small baggie that contained methamphetamine. RP 20. Mr. Ketchum denied the methamphetamine was his. RP 20.

The trooper testified that he impounded the car because it was initially rainy that day, although the weather became overcast and switched from showers to clouds when he was at the scene. RP 13-14. He did not think the car should remain on the shoulder, even though it was not obstructing traffic, because bicyclists generally use a road's shoulder. RP 29. He did not think there was a nearby pull out for the car, although the car was across from a side road, Salmon Drive, which he did not investigate as a place to move the car. RP 37.

After examining the case law and questioning the trooper, the trial court concluded the trooper failed to consider reasonable alternatives to impounding the car, including not asking Mr. Ketchum if there was another person who could safely move the car. CP 14-15. The court ruled that the officer's failure to consider reasonable alternatives rendered the impoundment invalid and would not justify the warrantless inventory search. CP 15.

The Court of Appeals reversed the trial court's ruling. It held that case law only required the officer to give a reasonable basis for impounding the car, and claimed the trial court applied the wrong standard by requiring the officer to check for family and friends who can take the car.

E. ARGUMENT

This Court should grant review because the Court of Appeals opinion conflicts with other cases and highlights the Court of Appeals' confusion about this Court's requirement that police must pursue reasonable alternatives before having authority of law to impound and search a car without a warrant.

1. *Impounding a person's car and searching it without a warrant are significant invasions of privacy that must be authorized by law.*

A state trooper's warrantless search of a car violates the Fourth Amendment and article I, section 7, unless it satisfies one of the few, narrowly drawn exceptions to the warrant requirement. *Tyler*, 177 Wn.2d at 698; *Cooper v. California,* 386 U.S. 58, 61, 87 S. Ct. 788, 17 L. Ed. 2d 730 (1967) (regardless of whether state law authorizes seizure of vehicle, search must be "reasonable under the Fourth Amendment."); U.S. Const. amend. IV; Const. art. I, § 7.

An inventory search of a car may be an exception to the warrant requirement, but only if the search occurs after the police validly and lawfully impound the car. *Tyler*, 177 Wn.2d at 698, 701. The purpose of an inventory search is to protect the property inside the car while impounded, and it is not an open-

ended invitation to search the car and may not be a pretext for a general search. *Id.* at 701. The prosecution bears the burden of proving the validity of an inventory search and the availability of the narrowly drawn exception to the warrant requirement. *Id.* at 699.

In *Tyler*, this Court set forth three reasons an officer may lawfully impound a car and search it pursuant to the impoundment: when (1) there is probable cause it was used to commit a felony or has been stolen, (2) the officer is exercising its "community caretaking" authority, or (3) the legislature expressly authorized impoundment for a traffic offense. 177 Wn.2d at 698.

"Community caretaking" authority in this context means the car needs to be moved due to public safety or threat of damage to the car, and "the defendant, the defendant's spouse, or friends" are unavailable to move the vehicle. *Id.*

Impoundments of cars have also come under scrutiny because they may lead to improper demands of forfeiture, resulting in excessive punishment. *Timbs v. Indiana,* _U.S. _,

2019 WL 691578 (2019). Accordingly, an officer's authority to impound a car is closely scrutinized by the courts.

2. Under this Court's precedent, it is unlawful for police to impound a car when reasonable alternatives exist.

Tyler reaffirmed the principle that even when a police officer has a lawful basis to impound a car as a matter of public safety or because a statute allows for impoundment due to a traffic offense, the officer "may only impound that vehicle if no reasonable alternatives to impoundment exist." *Id.* The prosecution must prove no reasonable alternatives to impound exist. *Id.* at 698-99, citing *inter alia State v. Hill*, 68 Wn. App. 300, 305-06, 842 P.2d 996 (1993) ("in Washington, impoundment is inappropriate when reasonable alternatives exist"); *Id.* at 708 (reiterating requirement "officers must consider reasonable alternatives to impoundment, and if they fail to do so, any subsequent search may be found unlawful"); *Id.* at 713 (emphasizing limited authority to conduct inventory search because "we require officers to determine that there are no reasonable alternatives to impounding a vehicle").

Tyler repeatedly explained that the "reasonable alternatives" requirement is a prerequisite to any warrantless impoundment of a car. *Id.* at 698-99, 708, 713; *see also In re Impoundment of Chevrolet Truck, WA License No.A00125A ex* rel. Registered/Legal Owner, 148 Wn.2d 145, 151 n.4, 60 P.3d 53 (2002) (noting "it is unconstitutional to impound a citizen's vehicle following his or her arrest when a reasonable alternative to impoundment exists" (internal citation omitted)).

In *Tyler*, an officer stopped a car for speeding and learned the driver's license was suspended. The State claimed two grounds for impounding the car: community caretaking and the statutory authority of the driver's suspended license. 177 Wn.2d at 695, 699. The officer arrested the driver due to her suspended license, so she was not available to move the car. *Id.* at 700. The passenger also lacked a valid license. *Id.* The officer instructed the defendant to allow the passenger to borrow her cell phone and try to locate someone else to retrieve the car but that effort was unsuccessful. *Id.* The car could not remain where it was because it posed a public safety hazard. *Id.* at 699.

Because the officer engaged in a variety of efforts to locate an available driver or other alternative, and the car posed a clear public safety hazard if left at the scene, this Court ruled the officer had authority to search and impound the car for both reasons. *Id.* at 700, 703.

Froehlich applied the holding of *Tyler* to evaluate the legality of the State's warrantless inventory car search under either the community caretaking authority or the statutory authority to impound based on the driver's lack of valid license. 197 Wn. App. at 838, 841. In *Froehlich*, the driver crashed her car and was suspected to being intoxicated. After the police spoke to the driver, she went to the hospital and the police impounded her car. The police had the opportunity to speak to the driver, both at the scene and at the hospital, but never asked her if another person could move the car to safety. The Court of Appeals ruled the prosecution had not proven it pursued reasonable alternatives to impounding the car.

Froehlich and *Tyler* rest on longstanding case law placing a clear obligation on the police to prove "that no reasonable alternatives existed" to impoundment, and this includes

checking for another driver when feasible. For example, in *State v. Hardman*, 17 Wn. App. 910, 914, 567 P.2d 238 (1977), the court explained the prosecution does not meet its burden justifying a valid impoundment without showing the police "first explored and thereafter reasonably discarded other alternatives" to impoundment. *Id.* The exploration of reasonable alternatives includes demonstrating the officer "attempted, if feasible, to get from the driver the name of someone in the vicinity who could move the vehicle; and then reasonably concluded from his deliberation that impoundment was in order." *Id.*

3. The Court of Appeals decision conflicts with Tyler and Froehlich.

Here, the Court of Appeals read *Tyler* to impose a diluted obligation to explore "reasonable alternatives" before impounding a car if impoundment occurs based on a statute pertaining to a traffic offense, rather than the community caretaking function. Slip op. at 6-7. It interpreted *Tyler* to only require asking about another available driver if the impoundment is solely predicated on community caretaking. This interpretation of *Tyler* is inaccurate, because *Tyler* made

plain that the State must prove no reasonable alternatives to impoundment in any case where the police impound a car without a warrant. 177 Wn.2d at 699, 708, 713.

Froehlich also held that when the impoundment is justified by traffic laws, the police still must inquire into reasonable alternatives. 197 Wn. App. at 841. This inquiry necessarily mandates speaking to the driver, if the driver is available. *Id.* at 841-42. "Although an officer is not required to exhaust all possibilities, the officer must at least consider alternatives; attempt, if feasible, to obtain a name from the driver of someone in the vicinity who could move the vehicle." *Id.* at 845, quoting *State v. Coss*, 87 Wn. App. 891, 899, 943 P.2d 1126 (1997). In *Froehlich,* the officer's failure to ask the driver about alternatives showed that he did not consider reasonable alternatives to impoundment as legally required.

The trial court adhered to *Froehlich* and *Tyler*. CP 14-15. It found Mr. Ketchum was cooperatively present at the scene throughout, yet the trooper never asked him whether there was an available driver, never told him there was an alternative to

impoundment, and never asked the car's registered owner if there was an alternative driver. *Id.* This flaw was fatal, the trial court concluded, because it showed the officer did not pursue reasonable alternatives in these circumstances. *Id.*

The Court of Appeals reversed the trial court. It contended that the police are only required to check for other available drivers when the community caretaking rationale is the sole basis for impoundment. Slip op. at 9. And it contended that because the officer was authorized to seize Mr. Ketchum's car due to his suspended driver's license, and not just community caretaking, the police were not obligated to inquire into other available drivers. This is incorrect.

Instead of following *Tyler* and *Froehlich*, the Court of Appeals insisted it must follow *Peterson*, a split decision from Division Three decided years before *Tyler*. *Peterson* is a cursory opinion where the two-judge majority simply asked whether the officer had "a reason" for impounding the car. 92 Wn. App. at 903. Despite the existence of a dissenting opinion, the appellant did not seek review in this Court. 92 Wn. App. at 903-05 (Schultheis, J., dissenting).

In *Peterson*, the majority opinion did not ask the same question as required by *Tyler* – that no reasonable alternative existed. It never mentioned the State's burden of proving no reasonable alternative existed. Instead, the majority stated the rule required only that officers "exercise discretion when deciding whether to impound a vehicle." *Id.* at 902. The court concluded that because there was no passenger in the car when stopped, impoundment "was reasonable." *Id.* at 903.

Peterson's analysis is cursory. It contains no description of the car's location, to indicate whether it posed a hazard or whether it was far from other available drivers. It notes the driver was stopped at "2:00 A.M." but does not indicate this time of day made it unreasonable to seek another driver. *Id.* at 903. It rests on the notion that the owner was not present and therefore could not authorize anyone else to make other arrangements for the car. *Id.*

The Court of Appeals reasoning conflicts with other decisions. This Court should grant review due to the conflict between the Court of Appeals decision and other decisions from this Court and the Court of Appeals. RAP 13.4(b)(i) & (ii).

4. Substantial public interest favors review.

In *Froehlich*, the Court of Appeals noted it was "somewhat unclear" in *Tyler* if the State needed to "strictly" comply with the second requirement of checking the availability of the defendant, defendant's spouse, or friends. 197 Wn. App. at 839. *Froehlich* observed that it may not be reasonable to consult with these specific people in all circumstances. But it construed *Tyler* to "suggest[ ] that an officer should at least *consider* whether the defendant can make arrangements for someone to remove the vehicle before impounding it. Otherwise, the second community caretaking requirement would be superfluous." *Id.* (emphasis in original).

To the extent the Court of Appeals opinion reflects confusion about whether the police are obligated to consider other available drivers, substantial public interest favors review. In *Froehlich*, the Court of Appeals was also unclear in how strictly the case law mandates the police to look for other available drivers. This Court has recently granted review of a statute that purports to mandate impoundment in certain

situations. *State v. Joel Villela*, S.Ct. No. 96183-2. Because of the on-going public interest and potential court confusion regarding the scope of the basic constitutional requirement that the police pursue reasonable alternatives prior to impounding a person's car, including considering other available drivers, this Court should grant review under RAP 13.4(b)(4).

F. CONCLUSION

Based on the foregoing, Petitioner Timothy Ketchum respectfully requests that review be granted pursuant to RAP 13.4(b).

DATED this 7th day of March 2019.

Respectfully submitted,

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APPENDIX A

Filed
Washington State
Court of Appeals
Division Two

February 6, 2019

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Appellant, v. TIMOTHY CARSELL KETCHUM, Respondent.	No. 51062-6-II UNPUBLISHED OPINION

WORSWICK, J. — Timothy Carsell Ketchum was charged with possession of a controlled substance—methamphetamine. The State appeals the trial court's suppression of methamphetamine discovered during an inventory search of a vehicle driven by Ketchum. The State argues that Ketchum did not have standing to contest the search and that even if he did, the search was a lawful inventory search following a lawful impoundment of the vehicle. Ketchum argues that, regardless of the lawfulness of the impoundment, law enforcement should have allowed him to waive civil liability in lieu of allowing an inventory search of the vehicle.

We hold that Ketchum had standing to contest the search, but that the trial court erred in ordering the evidence to be suppressed because the search was a proper inventory after the vehicle's lawful impoundment. Further, because the impoundment of the vehicle was lawful, we hold that Ketchum could not avoid an inventory search by waiving civil liability. We reverse the suppression order and remand to the trial court for further proceedings.

FACTS

On March 12, 2016, Washington State Patrol Trooper Allen Nelson stopped Ketchum for speeding near Forks around 4:30 P.M. Ketchum told Trooper Nelson that the vehicle he was driving belonged to his girlfriend who lived in Port Orchard.[1] Trooper Nelson discovered that Ketchum was driving with a suspended license and had five active arrest warrants, including one for third degree driving with a suspended license. Another law enforcement officer arrived at the scene for officer safety reasons. Trooper Nelson arrested Ketchum for third degree driving with a suspended license and for a local warrant.

Ketchum had stopped the vehicle over the fog line on the shoulder of a two-lane portion of State Route 101. At the time of Ketchum's arrest, it was raining hard, water was "bouncing off the pavement," and there was standing water on portions of the pavement. Verbatim Report of Proceedings (VRP) (Sept. 14, 2017) at 13. Visibility on the roadway was poor at times.

Based on the arrest, ownership of the vehicle, and weather and road conditions, Trooper Nelson told Ketchum he had to impound the vehicle because Ketchum was driving with a suspended license. Trooper Nelson believed that it was not feasible for another law enforcement officer to move the vehicle because they would have to leave a patrol vehicle unattended and there were logging trucks on the road at that time of day. Further, bicyclists often used the shoulder of the road where the vehicle was located, and there was no place to push the vehicle to get it off the shoulder. Trooper Nelson, believing that the legal owner of the vehicle was over 100 miles away in Port Orchard, did not discuss with Ketchum if anyone could come and move the vehicle.

[1] Port Orchard is approximately 137 miles from Forks.

Prior to the vehicle being towed, Trooper Nelson conducted an inventory search of the vehicle and discovered suspected methamphetamine. After the tow truck arrived, but before it was hooked up to the vehicle, Trooper Nelson received a call from Sergeant John Ryan. Sergeant Ryan had spoken with Ketchum's girlfriend who stated that Ketchum took the vehicle without her permission, but she did not want to press charges. She also said that Ketchum was soon to be her ex-boyfriend. She did not give Sergeant Ryan instructions regarding the vehicle or say anything about not wanting the vehicle impounded.

The State charged Ketchum with possession of a controlled substance—methamphetamine. Before trial, Ketchum moved to suppress the evidence discovered as a result of the inventory search, arguing that the impoundment was improper. After conducting a CrR 3.6 hearing, the trial court issued a memorandum opinion, finding the impoundment and resulting inventory search were unlawful. Accordingly, the trial court suppressed the evidence. The trial court then entered a minute order stating that the court's order suppressing the evidence had the practical effect of terminating the case. The State appeals.

ANALYSIS

I. AUTOMATIC STANDING AND THE EXCLUSIONARY RULE

As a threshold matter, the State argues that Ketchum cannot benefit from the exclusionary rule because he had no rights to assert regarding the search of his girlfriend's

vehicle.[2] The trial court did not address either Ketchum's standing or whether he could benefit from the exclusionary rule.

Although both the State and Ketchum raised these issues, the trial court did not address standing or the exclusionary rule in its memorandum opinion. Even though the trial court did not address the standing or privacy interests arguments directly, we assume that the trial court implicitly found that Ketchum had standing to assert a privacy interest because the trial court ruled on the merits of the motion to suppress.

In 1960, the United States Supreme Court created an "automatic standing" rule. *Jones v. United States*, 362 U.S. 257, 265-66, 80 S. Ct. 725, 4 L. Ed. 2d 697 (1960), *overruled by United States v. Salvucci*, 448 U.S. 83, 85, 100 S. Ct. 2547, 65 L. Ed. 2d 619 (1980). The doctrine of automatic standing provides a defendant automatically has standing to contest an allegedly illegal search where his possession of the seized evidence is an essential element of the charged offense. *State v. Evans*, 159 Wn.2d 402, 407, 150 P.3d 105 (2007). In 1980, the Supreme Court overturned the automatic standing rule in *United States v. Salvucci*, 448 U.S. at 83. Washington, however, continues to adhere to the automatic standing rule based on article I, section 7 of the Washington Constitution. *Evans*, 159 Wn.2d at 407. Thus, a driver of a borrowed vehicle charged with a possessory offense as a result of a search has standing to raise a claim objecting to that search. *State v. Vanhollebeke*, 190 Wn.2d 315, 322, 412 P.3d 1274 (2017).

[2] In its reply brief, the State argues that the trial court used the wrong legal standard by failing to address whether Ketchum could benefit from the exclusionary rule. To the extent the State is raising a different argument for the first time in its reply brief—that the trial court used the wrong legal standard—we decline to consider it. RAP 10.3(c).

Here, Ketchum was charged with the possessory offense of possession of a controlled substance—methamphetamine, that was found during a search of the borrowed vehicle he was driving. Consequently, he had standing to contest the search.[3]

II. IMPOUNDMENT AND INVENTORY SEARCH

The State argues that the trial court erred when it granted Ketchum's motion to suppress. Specifically, the State argues that the impoundment and resulting inventory search were lawful because Trooper Nelson considered the requisite reasonable alternatives to impoundment.[4] In addition to arguing that the search was unlawful, Ketchum argues that even if the impoundment was lawful, he should have been given the opportunity to waive civil liability prior to the inventory search. We hold that the trial court erred in suppressing the evidence because the impoundment and inventory search were lawful and because Ketchum could not have avoided an impound search by waiving civil liability.

A. *Legal Principles*

When reviewing a suppression order, we consider whether substantial evidence supports the trial court's findings of fact and whether those findings of fact support the conclusions of law. *State v. Garvin*, 166 Wn.2d 242, 249, 207 P.3d 1266 (2009). Substantial evidence exists when a fair-minded person is persuaded of the truth of the stated premise. *Garvin*, 166 Wn.2d at

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[3] Because we find the trial court erred by excluding the evidence, we do not reach the State's argument that, even if the search was improper, Ketchum may not benefit from the exclusionary rule.

[4] Ketchum argues that the State failed to assign error to any findings of facts, and therefore, they are all verities on appeal. This is incorrect. The State assigns error to the trial court's "finding that Trooper Allen [Nelson] did not consider alternatives to impoundment of the vehicle." Br. of Appellant at 2.

249. On a motion to suppress, we review a trial court's conclusions of law de novo. *State v. Baird*, 187 Wn.2d 210, 218, 386 P.3d 239 (2016).

Because we presume that a warrantless search violates the Fourth Amendment to the United States Constitution and article 1, section 7 of the Washington Constitution, the State must prove the search fits within one of the narrowly drawn exceptions to the warrant requirement. *Baird*, 187 Wn.2d at 218. One such exception is a noninvestigatory, good faith inventory search in conjunction with the impoundment of a vehicle. *State v. Tyler*, 177 Wn.2d 690, 700-01, 302 P.3d 165 (2013). An inventory search is lawful only if the impoundment of the vehicle is also lawful. *State v. Duncan*, 185 Wn.2d 430, 440, 374 P.3d 83 (2016).

Impoundment is lawful when (1) the vehicle is evidence of a crime, (2) the officer is exercising a community caretaking function, or (3) "the driver committed a traffic offense for which the legislature has expressly authorized impoundment. *Tyler*, 177 Wn.2d at 698. When a law enforcement officer has a lawful reason to impound a vehicle for any of the three purposes, he or she may only impound that vehicle if no reasonable alternatives to impoundment exist. *Tyler*, 177 Wn.2d at 698. An officer need not consider all possible alternatives to impoundment and reasonableness must be assessed by the facts of each case. *Tyler*, 177 Wn.2d at 699.

Under the community caretaking function, an officer, prior to impoundment, must determine that (a) the vehicle must be moved because the vehicle is a threat to public safety or the vehicle is at risk of vandalism or theft of its contents, and (b) "the defendant, the defendant's spouse, or friends are not available to move the vehicle." *Tyler*, 177 Wn.2d at 698. However, when an officer impounds a vehicle for a reason other than the community caretaker function,

the State is not required to establish that the driver's spouse or friends are not able to move the vehicle. *State v. Froehlich*, 197 Wn. App. 831, 840, 391 P.3d 559 (2017).

Our courts have held that when an officer was acting under a statutory authority to impound because the driver had a suspended license, the owner of the vehicle was not at the scene, and there was no inquiry into whether someone could come move the vehicle, the impoundment and resulting inventory search were lawful. *State v. Peterson*, 92 Wn. App. 899, 902-03, 964 P.2d 1231 (1998). In *Peterson*, the defendant was pulled over while driving a friend's vehicle. *Peterson*, 92 Wn. App. at 900. The defendant was the sole occupant of the vehicle. *Peterson*, 92 Wn. App. at 901. Learning that the defendant's license was suspended, the officer impounded the vehicle, searched it, and found a controlled substance. *Peterson*, 92 Wn. App. at 900. The officer did not attempt to contact the vehicle's owner before deciding to impound it. *Peterson*, 92 Wn. App. at 901. The court held that the impoundment was lawful because there were no passengers to remove the vehicle and the vehicle "owner was not present to authorize a licensed and insured driver to remove the vehicle or to authorize leaving the vehicle by the side of the road." *Peterson*, 92 Wn. App. at 903.

B. *Impoundment of the Vehicle Driven by Ketchum*

Here, the trial court found, "The trooper told Ketchum he had to impound his vehicle because he was driving with license suspended and had warrants for driving with license suspended." Clerk's Papers (CP) at 12. This finding specifies that Trooper Nelson was impounding according to statutory authority and not based on the community caretaking function. The facts here align with the statutory authority exercised in *Peterson*. *See Peterson*, 92 Wn. App. at 902-03. As a result, Trooper Nelson was not obligated to meet the additional

requirements of inquiring about or contacting a spouse or friend to remove the vehicle because the community caretaking function was not implicated. Rather, here, the State needed to prove only that Trooper Nelson considered alternatives to impoundment and made the decision to impound after determining none of the alternatives were reasonable.

The trial court noted that "[t]he trooper testified he had no reasonable alternatives to impounding the vehicle, since it would have been unsafe to leave the vehicle where it was due to hazardous road conditions and it would have been unsafe for the officers to attempt to move the vehicle." CP at 13. Put another way, the trial court found that Trooper Nelson considered two alternatives: (1) leaving the vehicle on the side of the road and (2) moving the vehicle with his fellow officer. After considering the road and weather conditions and the time of day, Trooper Nelson concluded leaving the vehicle on the side of the state highway was unreasonable. Further, because only two officers were available, it was unreasonable for the officers to move the vehicle themselves. Doing so would leave a law enforcement vehicle unattended and it was not feasible to fit two officers plus Ketchum in one law enforcement vehicle. After considering the options, Trooper Nelson concluded no reasonable alternatives to impoundment existed.

The trial court concluded that "[h]ere the record does not establish that the trooper considered alternatives to impoundment, since he did not ask Mr. Ketchum about the availability of anyone he might know who could move the vehicle." CP at 14-15. Although a reasonable alternative could have also included asking Ketchum for the name of someone in the vicinity who could move the vehicle, *see State v. Hardman*, 17 Wn. App. 910, 914, 567 P.2d 238 (1977), the State was not required to do so here. An officer need not consider all possible alternatives to impoundment, and we assess reasonableness by the facts of each case. *Tyler*, 177 Wn.2d at 699.

Here, the trial court misapplied the law by using the incorrect legal standard. The trial court concluded that contacting someone to move the vehicle is a *required* reasonable alternative for a statutorily authorized impoundment. This conclusion impermissibly applies a community custody standard to statutory authority to impound, a separate category of impoundment. Moreover, the correct test—that the officer need only consider reasonable alternatives before impounding the vehicle—is met. We hold that the trial court's conclusions regarding reasonable alternatives in this case erroneously apply the law.

Trooper Nelson, acting under statutory authority to impound the vehicle, considered alternatives to impoundment but ultimately concluded that impoundment was the only reasonable option. Thus, the findings of fact show that the motion to suppress should not have been granted on these grounds.

C. *Waiver of Civil Claim as a Reasonable Alternative*[5]

Ketchum argues, as an alternate basis to affirm the trial court, that "absent the officer first giving either the defendant or the owner of the vehicle the option of waiving a [civil] claim against the state, there is no legal basis to perform an inventory search even if there is a basis to impound the vehicle." Br. of Resp't at 11. We disagree.

Although the purpose of an inventory search is to insulate law enforcement from civil liability, "the car owner cannot waive an inventory [search] after the proper impoundment of a car." *State v. Tyler*, 166 Wn. App. 202, 212-13, 269 P.3d 379 (2012).

[5] Ketchum did not raise this issue in the trial court, but asserts that he can raise this issue for the first time on appeal because we may affirm on any grounds under RAP 2.5(a).

Setting aside the fact that Ketchum provides no argument or authority that he, as a mere possessor, had the legal ability to waive the owner's claims, Ketchum's argument blends the requirements of an impoundment with the resulting inventory search. Because the car was properly impounded, neither Ketchum nor the owner of the car was entitled to waive civil liability in lieu of an inventory search. As a result, Trooper Nelson was not required to provide an opportunity to waive a civil claim and Ketchum's argument fails.

Trooper Nelson properly impounded the vehicle and lawfully conducted an inventory search. As a result, we hold that the trial court erred when it ordered the evidence suppressed.

We reverse the suppression order and remand for further proceedings.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Worswick, J.

We concur:

, A.C.J.
Le, A.C.J.

Sutton, J.

DECLARATION OF FILING AND MAILING OR DELIVERY

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☒ petitioner

☐ Attorney for other party

MARIA ANA ARRANZA RILEY, Legal Assistant
Washington Appellate Project

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