

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 12, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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 § 808.10 and RULE 809.62, STATS.

No. 98-2585-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

NICHOLAS J. JOHNSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Marinette County:
TIM A. DUKET, Judge. *Affirmed.*

CANE, C.J. Nicholas Johnson appeals his conviction for a second offense of operating a motor vehicle while intoxicated, contending that the arresting officer was outside his jurisdiction and without authority to collect evidence relating to the OWI charge. Because the arresting officer was acting in fresh pursuit, the conviction is affirmed.

The underlying facts are undisputed. Officer Corry Eick, of the Village of Coleman, Marinette County, received anonymous information that there were customers at a local restaurant who were acting intoxicated and were about to leave the restaurant. Eick, who was in sight of the restaurant, observed two cars leave the restaurant and head southbound on U.S. Highway 41. While still within the village limits, Eick observed the first vehicle, a Toyota truck driven by Johnson, cross the centerline and jerk back crossing the white fog line near the side of the road. He also observed the second car weaving very slowly within its own lane. After approximately traveling a quarter of a mile from entering the highway, the two cars drove outside the village limits.

Eick testified that although he had probable cause to stop either car while still in the village limits, he did not make a stop because he was trying to decide which vehicle posed a greater danger. While trying to decide which vehicle to stop, Eick continued to follow the cars until he heard over his CB radio a truck driver complain about Johnson's car following too closely. Over the radio, Eick informed the Marinette County Sheriff's Department what had occurred and received permission to arrest Johnson. Eick then stopped Johnson's truck approximately three miles outside the Coleman village limits, but still in Marinette County. He questioned Johnson, performed field sobriety tests and, after advising him under the "Informing the Accused" form, administered a preliminary breath test. Eick arrested Johnson for OWI and transported him to a local hospital where a blood test was performed.

The sole issue on appeal is whether Eick had authority to arrest Johnson outside the village limits. Johnson contends that the arrest was not made in fresh pursuit, but even if it were valid as a citizen's arrest, the collection of the evidence was beyond the officer's authority while acting as a citizen. The trial

court concluded that the arrest was lawful under three alternate theories: the officer was acting in fresh pursuit; the officer could make a citizen's arrest; or the officer could make the arrest under the mutual assistance doctrine, § 66.305, STATS.

This court will first address the fresh pursuit doctrine contained in § 175.40(2), STATS., which provides: "For purposes of civil and criminal liability, any peace officer may, when in fresh pursuit, follow anywhere in the state and arrest any person for the violation of any law or ordinance the officer is authorized to enforce."

The application of a statute to undisputed facts raises a question of law which this court decides without deference to the trial court's decision. *Minuteman, Inc. v. Alexander*, 147 Wis.2d 842, 853, 434 N.W.2d 773, 778 (1989). The issue here is whether the officer, by delaying the stop, continued in fresh pursuit of Johnson outside the village of Coleman. In *City of Brookfield v. Collar*, 148 Wis.2d 839, 842-43, 436 N.W.2d 911, 913 (Ct. App. 1989), this court outlined three criteria commonly used in determining whether the officer acted in fresh pursuit.

First, the officer must act without unnecessary delay. *Id.* Second, the pursuit must be continuous and uninterrupted, but there need not be continuous surveillance of the suspect. Finally, the relationship in time between the commission of the offense, the commencement of the pursuit, and the apprehension of the suspect is important. *Id.* at 842-43, 436 N.W.2d at 913. Regarding the third factor, the greater the length of time, the less likely it is that the circumstances under which the police act are sufficiently exigent to justify an extrajurisdictional arrest. *Id.* at 843, 436 N.W.2d at 913.

In *Collar*, a Brookfield police officer observed a car speeding, crossing over the centerline and weaving in its lane. The officer waited to find a safe place to pull the car over, and as a result, the stop occurred outside Brookfield city limits. Applying the three-factor test for fresh pursuit, this court concluded that the officer acted to pursue Collar without delay, the pursuit was continuous and the several minute delay between the commission of the offense and the subsequent stop was reasonable based on the officer's concerns about finding a safe place to effect the stop. *See id.*, 148 Wis.2d at 842-43, 436 N.W.2d at 913.

In this case, under the *Collar* criteria, the officer acted in fresh pursuit. First, the arresting officer, Eick, responded immediately to an anonymous phone call and observed Johnson's vehicle being driven in a manner consistent with alcoholic impairment. He continued to follow both cars and observed the erratic driving which gave him probable cause to arrest either driver, pausing only to decide which car posed the greater danger. Under these circumstances, there was no unreasonable delay in the officer's pursuit and Johnson's arrest. Additionally, it is undisputed that the pursuit was continuous and uninterrupted, the second criteria. Finally, the periods of time between the commission of the offense, the commencement of the pursuit, and the apprehension of the suspect were very short, spanning several minutes at most. Any delay in Eick's decision to stop Johnson was reasonable in light of the officer's safety concerns about which car posed the greater danger. To hold otherwise would encourage peace officers to stop and arrest in situations where safety dictates they wait.

This court agrees with the trial court that the officer was in fresh pursuit of Johnson and that the officer's extrajurisdictional arrest of Johnson was proper. Therefore, the trial court properly refused to suppress any evidence collected by Eick as a result of the stop. In light of this holding, it is unnecessary

to address the trial court's alternate theories of a citizen's arrest and mutual assistance supporting its rationale for denying Johnson's motion to suppress the evidence. *See Sweet v. Berge*, 113 Wis.2d 61, 67, 334 N.W.2d 559, 562 (Ct. App. 1983) (only dispositive issues need be addressed).

By the Court.—Judgment affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)4, STATS.

