

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**June 28, 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. 2006AP87-CR**

**Cir. Ct. No. 2004CT726**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT II**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**CHRISTOPHER J. BURT,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment of the circuit court for Walworth County:

JOHN R. RACE, Judge. *Affirmed.*

¶1 NETTESHEIM, J.<sup>1</sup> This is a fresh pursuit case. Christopher J. Burt appeals from an amended judgment of conviction for operating a motor vehicle while intoxicated (OWI), second offense, contrary to WIS. STAT. §§ 346.63(1)(a) and 346.65(2)(b). On appeal, Burt challenges the trial court's denial of his motion to suppress evidence based on his claim that the arresting officer was acting outside his jurisdiction at the time of Burt's arrest.

### **Background**

¶2 The essential facts are not in dispute. On September 11, 2004, at approximately 2:15 a.m., Village of Darien police officer Chad Olson observed a truck traveling at a high rate of speed as the vehicle passed through the intersection of Wisconsin and Madison Streets in the village. Olson took up pursuit of the vehicle, heading northbound on Wisconsin Street, which eventually becomes Old Highway 89. The posted speed limit in this area is twenty-five miles per hour. Olson estimated the vehicle's speed at approximately twenty to thirty miles over this limit.

¶3 At approximately this same time, another village officer, Jonathan Caucutt, also observed the speeding truck from his location. Caucutt immediately radioed Olson about his observation. Olson responded that he was already aware of the situation and was in pursuit of the truck. A few seconds later, Caucutt observed Olson pass the same area where Caucutt had seen the truck. Caucutt also took up pursuit.

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<sup>1</sup> This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2003-04). All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

¶4 According to Olson, the intersection of Wisconsin and Madison Streets is approximately five to six hundred feet from the village limits, and the truck traveled for only three to four seconds following Olson's initial observation before reaching these limits. After the truck left the village limits, Olson temporarily lost sight of it for approximately five seconds due to the truck's speed and the hilly conditions of the roadway. Olson regained sight of the truck as he was traveling over the bridge that spans Interstate Highway 43. At this time, Olson observed that the truck was now proceeding westbound on Creek Road. Olson stopped at the stop sign at Old Highway 89 and Creek Road, and then continued the pursuit traveling westbound on Creek Road. When his squad was approximately one-quarter mile behind the truck, Olson activated his emergency lights. Olson stated that he waited to activate his emergency lights until this time because he had not yet caught up to the vehicle and he believed the operator of the truck would not have noticed the lights earlier.

¶5 After the emergency lights were activated and Olson was still on Creek Road, Olson observed the truck turn onto Highway 14. Olson stopped at the stop sign at Creek Road and Highway 14, and then continued his pursuit on Highway 14. The truck eventually stopped on Highway 14 near Christie Road after traveling approximately a mile and a half on Highway 14. Olson estimated that the total time of his pursuit was approximately four to eight minutes but, in any event, not more than ten minutes. After stopping the truck, Olson identified the driver as Burt. Soon thereafter, a Walworth county deputy sheriff and Caucutt arrived on the scene. Caucutt estimated the distance from the village and Christie Road at approximately 3 to 4.2 miles. Burt estimated this distance at 4.6 miles.

¶6 The ensuing investigation resulted in Burt's arrest for OWI. The State charged Burt with both OWI and operating a motor vehicle with a prohibited

blood alcohol content (BAC), contrary to WIS. STAT. § 346.63(1)(b). Burt filed a motion to suppress the evidence resulting from his arrest, contending that Olson's pursuit violated the law of fresh pursuit resulting in an illegal stop beyond Olson's jurisdiction. The trial court denied the motion. Burt then pled no contest to the OWI charge and the State dismissed the BAC charge. Burt appeals from the judgment of conviction.

### Discussion<sup>2</sup>

¶7 On review of a trial court's ruling on a motion to suppress, we will uphold the trial court's findings of fact unless they are clearly erroneous. *State v. Eckert*, 203 Wis. 2d 497, 518, 553 N.W.2d 539 (Ct. App. 1996). However, the application of a statute to a particular set of facts presents a question of law, which we review de novo without deference to the trial court's reasoning. *City of Brookfield v. Collar*, 148 Wis. 2d 839, 841, 436 N.W.2d 911 (Ct. App. 1989).

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<sup>2</sup> The State argues that Burt's appeal is based solely on a statutory challenge under WIS. STAT. § 175.40(2) and not on a constitutional challenge. Therefore, the State concludes that Burt has not established a basis for suppression of the evidence. The State bases this argument on *State v. Keith*, 2003 WI App 47, ¶8-9, 260 Wis. 2d 592, 659 N.W.2d 403, where the court of appeals held that suppression is not required when a police officer acts without authority outside of his or her jurisdiction where the defendant has failed to allege the violation of a constitutional right or a statute requiring suppression.

We agree that, except for a brief reference to "constitutional protected rights" in the conclusion of his brief, Burt does not expressly ground his argument in constitutional terms. Instead, his argument is limited to *City of Brookfield v. Collar*, 148 Wis. 2d 839, 436 N.W.2d 911 (Ct. App. 1989), and related case law that address WIS. STAT. § 175.40(2). That said, we read *Collar* and the related cases to set out the constitutional test for a valid fresh pursuit. We also take note that Burt's motion to suppress was grounded in both the Wisconsin and federal constitutions and on WIS. STAT. § 968.24, which authorizes so-called *Terry* stops under *Terry v. Ohio*, 392 U.S. 1 (1968). We therefore will assume that if Olson violated § 175.40(2), suppression would be the proper remedy.

¶8 We do not read Burt's brief to challenge any of the trial court's factual findings. Rather, Burt's challenge is that those findings do not satisfy the law of fresh pursuit. The applicable statute is WIS. STAT. § 175.40(2), which states in relevant part:

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.

¶9 In *Collar*, the court of appeals set out the test for fresh pursuit:

First, the officer must act without unnecessary delay. Second, the pursuit must be continuous and uninterrupted, but there need not be continuous surveillance of the suspect. Finally, the relation in time between the commission of the offense, the commencement of the pursuit, and the apprehension of the suspect is important. 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.

*Collar*, 148 Wis. 2d at 842-43 (citations omitted).

¶10 Burt understandably does not challenge the first two components of this test. The undisputed evidence reveals that Olson immediately took up pursuit upon observing the speeding truck. This same evidence reveals that Olson's pursuit was continuous and uninterrupted. Instead, Burt's challenge focuses on the third component of the test. Burt argues that the length of time between Olson's initial pursuit and eventual stop was too long. He contends that Olson should have activated his emergency lights earlier during the pursuit.

¶11 However, the evidence well explains why Olson did not activate his emergency lights sooner. Burt was operating the truck at a high rate of speed. Olsen activated the lights when he had caught up to the truck and when he

adjudged that the operator would be in a position to observe them. In fact, Olson's concern was corroborated by Burt, who testified that when he noticed the emergency lights, he was unsure whether they were directed at him. We also observe that a premature and distant activation of emergency lights might tempt the operator of the pursued vehicle to flee. Safety considerations can bear on a fresh pursuit analysis. *See id.* at 843. Under the circumstances of this case, we will not substitute our judgment for that of Olson as he was conducting the fresh pursuit of Burt.

¶12 We hold that the relation in time between the commission of the suspected offense, the commencement of Olson's pursuit, and Olson's eventual apprehension satisfy the requirements of *Collar*. Therefore, Burt's arrest was valid under WIS. STAT. § 175.40(2). We affirm the judgment of conviction.

*By the Court.*—Judgment affirmed.

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

