

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 9, 2000

Cornelia G. Clark
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 WIS. STAT. § 808.10 and RULE 809.62.

No. 00-1274-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

GREGORY L. CUNDY,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Dodge County:
DANIEL W. KLOSSNER, Judge. *Affirmed.*

¶1 ROGGENSACK, J.¹ Gregory L. Cundy appeals his convictions for operation of a motor vehicle while intoxicated (OMVWI) and operating with a

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c) (1997-98). Additionally, all further references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

prohibited alcohol content (PAC). He claims that the circuit court erred in denying his motion to suppress evidence obtained in an encounter between Cundy and a Mayville police officer because the police officer stopped him outside the city of Mayville. We conclude that the circuit court's finding that Cundy was stopped within the city limits of Mayville was not clearly erroneous. In addition, we conclude that the police officer was in fresh pursuit of Cundy when the stop occurred. Therefore, the evidence obtained was properly admitted, and we affirm the judgment of the circuit court.

BACKGROUND

¶2 At 1:30 a.m. on April 13, 1997, Officer Dennis Walston of the Mayville Police Department was parked near the Mayville city limits. He observed a white pickup truck slowly travelling west on State Highway 28, plowing snow along the shoulder. The truck entered the Mayville city limits, made a u-turn, and left the city heading east. Walston knew the truck was a private vehicle because the city snowplows are bright orange and have flashing lights. Finding the driver's behavior suspicious, Walston pulled out and followed the truck. The truck turned left into Slag Road, then made a u-turn. Pushing snow in front of it, it went back to Highway 28 and turned right, again heading west toward the Mayville city limits along the shoulder, and passed Walston's patrol car. Walston recognized the driver as Gregory Cundy, whose license he knew had been revoked, so he stopped the truck. When Cundy failed field sobriety tests, Walston arrested him for OMVWI. When Cundy failed a blood test, he was also charged with driving with a PAC.

¶3 Cundy moved to suppress all evidence relating to the encounter, claiming Walston had stopped him outside the city limits of Mayville. The circuit

court concluded that the stop took place within the city limits,² and that, even if the stop had been outside the city limits, Walston was in fresh pursuit. Therefore, it denied the motion. Cundy appeals.

DISCUSSION

Standard of Review.

¶4 When we review a motion to suppress evidence, we will uphold the circuit court's findings of fact unless they are clearly erroneous. *See* WIS. STAT. § 805.17(2); *State v. Eckert*, 203 Wis. 2d 497, 518, 553 N.W.2d 539, 547 (Ct. App. 1996). Whether Walston was in fresh pursuit of Cundy pursuant to WIS. STAT. § 175.40(2) involves the application of a statute to a particular set of facts. As such, it is a question of law that we decide without deference to the circuit court's decision. *See City of Brookfield v. Collar*, 148 Wis. 2d 839, 841, 436 N.W.2d 911, 913 (Ct. App. 1989).

Location of the Stop.

¶5 Cundy argues that the circuit court erred in finding that the stop had taken place within the city of Mayville. Because the stop took place outside Walston's jurisdiction, he contends, the circuit court should have suppressed all evidence resulting from the stop. We disagree.

² In its response to Cundy's motion to dismiss, the State did not contest Cundy's assertion that the stop took place outside the Mayville city limits. In denying the motion, the circuit court wrote, "[T]his Court's review of the record reveals some doubt as to whether the stop actually was outside the city limits." The court then denied the motion on the alternative grounds that Walston was in fresh pursuit of Cundy when the stop occurred.

¶6 Police officers may stop and arrest any person within their jurisdiction who is violating any state law or city ordinance. *See* WIS. STAT. § 62.09(13)(a); *Collar*, 148 Wis. 2d at 841, 436 N.W.2d at 913. The circuit court concluded that Walston stopped Cundy within the city of Mayville. It based this conclusion on Walston’s testimony at the suppression hearing.

Q. Once you recognized the driver as Mr. Cundy, what did you do?

A. I conducted a traffic stop.

Q. And where did that take place?

A. Right at the city limits on Highway 28, west of Slag Road.

No other testimony at the suppression hearing addressed the location of the stop, and the record does not include a copy of the trial transcript. The circuit court interpreted Walston’s statement that the stop occurred “right at the city limits” to mean that the stop occurred barely within the city limits. The statement is certainly ambiguous; it could also be interpreted to mean that Walston stopped Cundy directly outside the city limits. Since the factual finding is not clearly erroneous, however, it provides a basis for the judgment of the circuit court.

Extrajurisdictional Pursuit.

¶7 Even if one could question whether the circuit court made a firm finding that Cundy was stopped inside the Mayville city limits, we see no grounds to reverse Cundy’s conviction. Cundy contends that Walston lacked the authority to stop him outside the city limits of Mayville because Walston did not meet the requirements for an extrajurisdictional arrest set forth in WIS. STAT. § 175.40(6). However, based on the record before us, we conclude that Walston was in fresh pursuit of Cundy when he made the stop.

¶8 WISCONSIN STAT. § 175.40(2) states: “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.” In *Collar*, 148 Wis. 2d at 842-43, 436 N.W.2d at 913 (citations omitted), we interpreted the doctrine of fresh pursuit to require the following:

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 relationship 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.

¶9 Walston’s stop of Cundy meets these criteria. First, Walston developed the suspicion needed to justify a stop when he observed Cundy driving a private vehicle slowly on the shoulder of Highway 28 at 1:30 a.m. while plowing snow. The combination of Cundy’s unusual actions and the time of night raised a reasonable suspicion that the driver might be intoxicated. Walston observed this behavior while Cundy was within the Mayville city limits. Walston testified that the delay in stopping Cundy was necessary because of the time it took to exit the parking lot where he first observed Cundy. Second, the parties do not dispute that Walston continually observed Cundy from the time he saw him driving on the shoulder until the stop. Third, there is a close relationship in time between the observation of Cundy’s suspicious behavior, the commencement of the pursuit, and Cundy’s apprehension. Walston saw him driving on the shoulder plowing snow; he left the parking lot; pursued him and stopped him as soon as he could. Therefore, we conclude that Walston was in fresh pursuit of Cundy and that the stop was therefore lawful.

CONCLUSION

¶10 We conclude that the circuit court's finding that Cundy was stopped within the city limits of Mayville was not clearly erroneous. In addition, we conclude that the police officer was in fresh pursuit of Cundy when the stop occurred. Therefore, the evidence obtained was properly admitted, and we affirm the judgment of the circuit court.

By the Court.—Judgment affirmed.

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

