

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**February 28, 2007**

A. John Voelker  
Acting Clerk of Court of Appeals

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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. 2006AP1814**

**STATE OF WISCONSIN**

Cir. Ct. Nos. 2005TR1389  
2005TR1390

**IN COURT OF APPEALS  
DISTRICT II**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**DIANE C. COLLINS,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment of the circuit court for Kenosha County:  
DAVID M. BASTIANELLI, Judge. Affirmed.

¶1 NETTESHEIM, J.<sup>1</sup> Diane Collins appeals from a forfeiture judgment of conviction for operating a motor vehicle while intoxicated (OWI) pursuant to WIS. STAT. § 346.63(1)(a). Collins argues that the trial court erred in ruling that probable cause supported her arrest, in barring her defense of legal justification for her operation of the motor vehicle, and in rejecting evidence that would have permitted her to argue for an acquittal based on “fairness.” We affirm the trial court’s rulings. Consequently, we affirm the judgment.

¶2 We will recite the relevant facts as we discuss the issues.

### **Probable Cause to Arrest**

¶3 Collins filed a motion to suppress, contending that she was arrested without probable cause. The arresting officer, Deputy Timothy Hackbarth, was the only witness at the suppression hearing and testified as follows. On February 5, 2005, Hackbarth was dispatched to the scene of a disturbance at a tavern in the Town of Bristol in Kenosha County. Upon arrival, he observed a vehicle with two occupants backing out of a parking space. Further investigation revealed that Collins was the driver. About ten to fifteen people were standing on the porch of the tavern, and some of them were pointing at the vehicle saying, “[T]hat’s them, that’s them.” Hackbarth activated the squad car lights and shined a spotlight on the vehicle. Two people then placed themselves in front of the vehicle, blocking it from leaving.

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<sup>1</sup> This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(g) (2005-06). All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

¶4 As Hackbarth was exiting his squad, some of the witnesses stated that the male passenger in Collins' vehicle was the original reason for the police dispatch because he had been in a physical altercation, a "choking incident," in a snowbank with Collins' daughter, Katie. The passenger later was identified as John Shurla, Collins' boyfriend. During questioning by Hackbarth, Collins denied that any physical altercation had taken place, instead saying that Shurla and Katie had only verbally argued over "house rules." Collins also stated that the people in the bar had started the incident and were "trying to fight with them." Hearing this explanation, some of the people in the crowd responded, "[T]hat's not what happened." About this time, Deputy Gilley and another officer arrived on the scene, and they conducted further interviews of people inside and outside of the tavern. Meanwhile, Hackbarth asked Collins to telephone Katie in order to determine if she was okay. Collins refused, and Hackbarth arrested her for obstructing an officer. Collins then placed the telephone call to Katie. Shortly thereafter, Gilley administered field sobriety tests and a preliminary breath test to Collins, and she was further arrested for OWI.<sup>2</sup>

¶5 The trial court denied Collins' motion to suppress, ruling that Hackbarth had probable cause to arrest Collins for obstructing an officer. Collins challenges this ruling. She contends that she was under no affirmative duty to assist Hackbarth in his investigation by placing a telephone call to Katie. She also contends her arrest was premature because the officers were still investigating the

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<sup>2</sup> In the trial court, the State alternatively argued that probable cause also existed to arrest Collins for OWI when she initially was detained in the squad car. The trial court rejected this argument, and the State does not challenge this ruling on appeal.

conflicting versions of what had occurred regarding the “choking incident” involving Shurla and Katie.

¶6 Appellate review of a trial court’s decision on a motion to suppress invokes two levels of review. We uphold the trial court’s factual findings unless they are clearly erroneous, but we independently evaluate whether those facts support the constitutional requirement of probable cause. *State v. Matejka*, 2001 WI 5, ¶16, 241 Wis. 2d 52, 621 N.W.2d 891.

¶7 We agree with Collins that she was under no affirmative duty to assist Hackbarth in his investigation. Accordingly, her initial refusal to telephone Katie, standing alone, would not support the arrest for obstructing an officer. The trial court made the same observation. “She had no obligation really to provide the officer with any information ....” But the court hit the nail on the head when it went on to state, “[B]ut once she did she has to provide truthful and accurate information.”

¶8 The law of probable cause was summarized by our supreme court in *State v. Paszek*, 50 Wis. 2d 619, 184 N.W.2d 836 (1971), as follows:

Probable cause to arrest refers to that quantum of evidence which would lead a reasonable police officer to believe that the defendant probably committed a crime. It is not necessary that the evidence giving rise to probable cause be sufficient to prove guilt beyond a reasonable doubt, nor must it be sufficient to prove that guilt is more probable than not. *It is only necessary that the information lead a reasonable officer to believe that guilt is more than a possibility*, and it is well established that the belief may be predicated in part upon hearsay information. The quantum of information ... must be measured by the facts of the particular case.

*Id.* at 624-25 (emphasis added; citations omitted). Moreover, the legality of an arrest generally does not depend on whether the arresting officer articulates the

correct legal basis for the arrest; even when an officer mistakenly cites a crime that does not exist, the legality of the arrest is determined by whether there is probable cause to believe, at the moment of arrest, that the defendant committed a crime. Thus, the legality of an arrest does not depend on the subjective motivation or belief of the arresting officer. See *State v. Repenshek*, 2004 WI App 229, ¶¶10-11, 277 Wis. 2d 780, 691 N.W.2d 369, review denied, 2005 WI 60, 281 Wis. 2d 113, 697 N.W.2d 472.

¶9 Collins correctly observes that Hackbarth's testimony was not always consistent as to the reason for his arrest of Collins. Slices of his testimony indicate that the arrest was based on Collins' refusal to make the telephone call to Katie, while other portions indicate that the arrest was based on Hackbarth's belief that Collins was providing untruthful information regarding the encounter between Shurla and Katie. But, as *Repenshek* teaches, we are not bound by the arresting officer's subjective grounds for an arrest. *Id.* Rather, as noted, the ultimate question of probable cause is of one law for the courts to decide. *Matejka*, 241 Wis. 2d 52, ¶16.

¶10 Here, the trial court based its ruling on the collective facts confronting Hackbarth at the moment of arrest. The question is whether those facts would lead a reasonable police officer to believe that guilt was more than a possibility. *Paszek*, 50 Wis. 2d at 625. Here, all of the witnesses, save Collins, reported to Hackbarth that there had been a physical altercation in a snowbank in which Shurla had choked Katie. Hackbarth obviously chose to believe those witnesses rather than Collins' more benign version of the encounter. Moreover, the physical evidence of the snowbank supported the other witnesses' version. From these collective facts, a police officer could reasonably conclude that Collins was probably obstructing the investigation.

¶11 We conclude this discussion by noting that probable cause deals with probabilities, not technicalities. Probable cause addresses the factual and practical considerations of everyday life on which reasonable and prudent police officers, not legal technicians, make decisions. *Id.* Unlike a courtroom setting where a fact finder can pause and reflect when making a credibility determination, a police officer will often be required to make a credibility call under the exigencies of the moment. That is precisely why we are properly cautioned to review an officer's probable cause determination from the standpoint of "the factual and practical considerations of everyday life ...." *Id.* Here, Hackbarth made the credibility call, and the collective facts reveal that his belief that Collins was obstructing his investigation was "more than a possibility." *See id.* We uphold the trial court's ruling denying Collins' motion to suppress.

### **Legal Justification Defense**

¶12 Although Collins was initially arrested for obstructing an officer, the offense actually charged and litigated in this case was OWI. Although the record is not entirely clear on the matter, it appears that Collins had signaled to the trial court and the State that her defense would rest, at least in part, on the theory that she had operated the motor vehicle out of necessity to escape the hostile crowd at the tavern. In an unreported side bar conference before the presentation of opening statements to the jury, the trial court confirmed that the State would not be introducing any evidence relating to Collins' potential obstructing. Based on that understanding, the court ruled that it would not permit Collins to defend on the basis of necessity or legal justification, fearing that such a defense would invite jury nullification. However, despite the court's ruling, Collins' attorney alluded during his opening statement to certain events that had occurred inside the tavern before the police were summoned, suggesting a necessity or legal justification

defense. In addition, Hackbarth volunteered, in answer to an open-ended question from the State, that he had arrested Collins for obstructing.

¶13 This prompted the trial court to conduct a hearing outside the presence of the jury. During this hearing, the court placed on the record the substance of the “off-the-record” discussion we have just recounted. After discussing the matter with counsel, the court indicated its inclination to declare a mistrial. Collins followed up with such a request and the court declared a mistrial.

¶14 The trial court then set a briefing schedule to have the parties further address Collins’ proposed defense of legal justification. Following receipt of the briefs, the court issued a written decision confirming its prior ruling barring such a defense.<sup>3</sup> Confronted with the court’s adverse ruling, Collins then stipulated to a pro forma bench trial at which the trial court found her guilty of OWI.

¶15 On appeal, Collins argues that the trial court erred in rejecting her legal justification defense. She relies on *State v. Brown*, 107 Wis. 2d 44, 318 N.W.2d 370 (1982), where the supreme court recognized the defense of legal justification to a civil forfeiture charge of speeding, despite the strict liability nature of the offense. *See id.* at 50-57. However, in *Brown*, the conduct of the arresting officer provided the basis for the legal justification defense. *Id.* at 55. The supreme court expressly declined to answer whether its holding extended to

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<sup>3</sup> The trial court’s decision limited Collins’ evidence

to a general description that there was an altercation in the tavern which caused her to leave and testimony as to her observations of the patrons outside the tavern when she got into the car to drive from the premises. However, the reason she drove the vehicle based on her state of mind to protect herself or others from harm would not be allowed.

situations, such as in the instant case, where the causative force for the defendant's conduct was someone or something other than a law enforcement officer. *Id.* at 56. Collins asks us to extend *Brown* to this kind of situation.

¶16 The parties debate this issue under the various subcategories of privilege—coercion, necessity, and self-defense/defense of others. As to coercion and necessity, both envision that the defendant has no other means of preventing the perceived harm. *See* WIS. STAT. §§ 939.46(1), 939.47. As the trial court correctly observed, the facts here demonstrate that Collins had options short of operating a motor vehicle, e.g., she could have simply walked away. Moreover, the facts do not remotely support the notion that Collins and/or her passenger were facing the prospect of imminent death or great bodily harm, essential elements of both necessity and coercion. *See id.* Taking Collins' testimony in the most favorable light, she was faced, at best, with a hostile crowd, but not one that had threatened or demonstrated by words or conduct any "imminent" threat of such dire consequences.

¶17 We also reject Collins' reliance on the privilege of self-defense or defense of others. This privilege envisions the use or threatened use of force by the defendant against another. WIS. STAT. § 939.48(1). Collins' operation of a motor vehicle obviously did not constitute such conduct under the facts of this case. She was operating the motor vehicle to leave the premises, not as an instrument of force against any person or persons. That said, we recognize that the language of *Brown* is very broad and affords Collins a basis for contending that the supreme court intended to include self-defense in its recognition of legal justification in a case involving the operation of a motor vehicle. But the supreme court's decision never addresses the specific requirement of self-defense law that the defendant must use force, or threaten the use of force, against another. We



find it difficult to fit the round peg of *Brown* into the square hole of the self-defense statute, § 939.48(1), which expressly contemplates the use, or threatened use of force, by a defendant. Consequently, we conclude that *Brown* does not extend to this situation of claimed self-defense.

¶18 We uphold the trial court’s ruling barring Collins’ legal justification defense.<sup>4</sup>

### Unfairness/Jury Nullification

¶19 On a related theme, Collins contends that the trial court should have permitted her legal justification evidence so that she could present a “fairness” argument to the jury in support of an acquittal. The trial court saw this as a camouflaged argument for jury nullification and rejected the proffered evidence.

¶20 Collins relies on *State v. Bjerkaas*, 163 Wis. 2d 949, 472 N.W.2d 615 (Ct. App. 1991). But we see that case as supporting the trial court’s ruling. In fact, the court expressly cited to, and quoted from, *Bjerkaas*:

Thus, juries have the power to do what they want in a given case because neither the prosecution nor the court has the authority to compel them to do what they should .... But this power does not translate to a *right* to have a jury decide a case contrary to law or fact, much less a right to an instruction telling jurors they may do so or to an argument urging them to nullify applicable laws. “[A] defendant has no right to have the jury defy the law or ignore the undisputed evidence.”

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<sup>4</sup> Collins also argues that her legal justification defense was a matter for the fact finder, not for the trial court as a matter of law. We disagree. The trial court was required to determine on a threshold basis if the facts, viewed in a light most favorable to Collins, warranted a legal justification defense. We conclude they did not.

*Id.* at 960.

¶21 We have already explained why the trial court properly rejected Collins’ purported legal justification defenses. Collins’ “fairness” argument seeks an “end around” that ruling. While there is nothing improper about urging a jury to be “fair,” such does not translate into a right to have otherwise inadmissible evidence rendered admissible, thereby affording a basis to urge a jury to acquit on the grounds of fairness. In a nutshell, that constitutes jury nullification, a doctrine not recognized in Wisconsin.

### **Conclusion**

¶22 We uphold the trial court’s ruling that Collins’ arrest was supported by probable cause. We also hold that the trial court properly rejected Collins’ legal justification defense. Finally, we uphold the trial court’s rejection of Collins’ evidence that would have afforded her the opportunity to argue for jury nullification.

*By the Court.*—Judgment affirmed.

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

