

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**March 10, 2011**

A. John Voelker  
Acting 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. 2010AP1240**

**STATE OF WISCONSIN**

Cir. Ct. Nos. 2009TR3147,  
2009TR3148

**IN COURT OF APPEALS  
DISTRICT IV**

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**WAUPACA COUNTY,**

**PLAINTIFF-RESPONDENT,**

**v.**

**HEATHER M. KRUEGER,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment of the circuit court for Waupaca County:  
JOHN P. HOFFMANN, Judge. *Affirmed.*

¶1 LUNDSTEN, J.<sup>1</sup> Heather Krueger was convicted of operating a motor vehicle while under the influence of an intoxicant. She complains that the

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<sup>1</sup> This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c) (2009-10). All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

circuit court erroneously denied her suppression motion. More specifically, Krueger argues that she was unlawfully detained by a citizen and that this unlawful detention should result in the suppression of all subsequently obtained evidence of her intoxicated driving. I disagree and, therefore, affirm the circuit court.

### ***Background***

¶2 In August 2009, Krueger was driving on a rural road in Waupaca County. A citizen named Sparks was driving behind Krueger. Sparks observed Krueger cross the center line many times, including times she obstructed oncoming traffic in the opposite lane. Sparks called 911, and then took action to force Krueger to stop. He activated strobe lights he used in his off-road towing business, he drove past Krueger, he positioned his vehicle in front of hers, and he slowed down, eventually forcing Krueger to a stop. Sparks got out of his vehicle, went to Krueger's driver's side window, reached in, and took Krueger's keys. Sparks refused to return the keys, and waited for police to arrive.

¶3 After the police arrived on the scene, an officer smelled a heavy odor of intoxicants coming from within Krueger's vehicle, and observed that Krueger's eyes were bloodshot and glossy. The officer had Krueger perform field sobriety tests, after which Krueger was placed under arrest and transported to the county jail, where she consented to a breath test. The breath test revealed that Krueger's blood alcohol content was .19%.

¶4 Krueger moved to suppress all evidence obtained after Sparks forced her vehicle to a stop. The circuit court denied the suppression motion.

### *Discussion*

¶5 Krueger seeks suppression of evidence of her intoxicated driving obtained after she was stopped by Sparks, a citizen acting on his own with no law enforcement involvement. Krueger asserts that, under the applicable common law, Sparks acted illegally and his illegal actions require suppression of evidence, just as if a police officer had stopped her illegally. Krueger is mistaken. The legality of Sparks's actions do not matter for purposes of analyzing whether suppression is required under the Fourth Amendment. As we explained in *State v. Butler*, 2009 WI App 52, ¶12, 317 Wis. 2d 515, 768 N.W.2d 46, *review denied*, 2009 WI 99, 319 Wis. 2d 213, 775 N.W.2d 101 (No. 2008AP1178-CR), Fourth Amendment protections apply only to government action.

¶6 In *Butler*, a private security guard saw Butler driving recklessly in a parking lot. The security guard detained, handcuffed, and searched Butler. The guard called the police when he discovered that Butler was wearing an empty gun holster. Police officers who arrived on the scene found a loaded pistol in Butler's glove compartment. *Id.*, ¶¶4-6. Among other arguments, Butler contended that suppression was required because the security guard acted unlawfully. We explained that it was not necessary to resolve whether the guard acted lawfully in detaining Butler because the guard did not act in concert with the government. *Id.*, ¶12. We wrote: "unless state-action is involved, a defendant detained by another citizen has no right to suppress the fruits of the citizen's search." *Id.* It follows that Krueger is not entitled to suppression here because Sparks, like the security guard in *Butler*, acted on his own.

¶7 Krueger points to language in *Butler* stating: "We leave for another day whether a citizen is privileged to detain another whom he or she sees

breaching the peace by doing something that is not a ‘crime’ ....” *Id.* Krueger says that day has come, suggesting that we must reverse the suppression order because here it is plain that Sparks acted illegally. But Krueger misunderstands why we left that question for another day. She seemingly fails to appreciate the meaning of the “because” clause in the full sentence in *Butler*:

We leave for another day whether a citizen is privileged to detain another whom he or she sees breaching the peace by doing something that is not a “crime,” however, *because* unless state-action is involved, a defendant detained by another citizen has no right to suppress the fruits of the citizen’s search.

*Id.* (emphasis added). The reason that there was no need to resolve the legality of the citizen stop in *Butler* was precisely because the stop was made by a citizen acting apart from the government.

¶8 I note that, before the circuit court and this court, Krueger is not alone in her misunderstanding. There and here, the State also seems to believe that it matters whether citizen Sparks acted lawfully. In this regard, a brief discussion of our decision in *State v. Keith*, 2003 WI App 47, 260 Wis. 2d 592, 659 N.W.2d 403, is appropriate.

¶9 In *Keith*, a police officer outside his jurisdiction stopped a suspected drunk driver. *Id.*, ¶2. The defendant, Keith, argued that all evidence obtained as a result of the stop must be suppressed because: (1) the officer had no authority to act as a police officer outside his jurisdiction; (2) the officer was acting as a private citizen; and (3) the stop was illegal because a private citizen may not detain a suspect based on mere reasonable suspicion of a crime. *Id.*, ¶7. In sum, Keith argued that he had been illegally stopped by a private citizen and this illegal citizen action required suppression. Rejecting this argument did not require

resolving whether the “citizen” acted illegally. And, the reason was the same as in *Butler*—the absence of an alleged constitutional violation. Although not expressly stated in *Keith*, the underlying reasoning was the same as in *Butler*, that the defendant had failed to allege illegality by a government actor. Addressing two of the cases that Krueger relies on here, the *Keith* panel wrote:

We acknowledge that at least two prior Wisconsin decisions seemingly support the type of analysis suggested by Keith. See *State v. Slawek*, 114 Wis. 2d 332, 338 N.W.2d 120 (Ct. App. 1983) (police officers outside their jurisdiction arrested defendant after observing him commit a burglary); *City of Waukesha v. Gorz*, 166 Wis. 2d 243, 479 N.W.2d 221 (Ct. App. 1991) (officer outside his jurisdiction stopped a suspected drunk driver). However, neither case holds that suppression is required merely because a police officer acts without authority outside his or her jurisdiction and neither case suggests any reason to ignore the well-established rule that suppression is required only when evidence is obtained in violation of a constitutional right or in violation of a statute providing suppression as a remedy. See [*State v. Raflik*, 2001 WI 129, ¶15, 248 Wis. 2d 593, 636 N.W.2d 690].

*Keith*, 260 Wis. 2d 592, ¶9. We might have added, as we later did in *Butler*, that “unless state-action is involved, a defendant detained by another citizen has no right to suppress the fruits of the citizen’s search.” *Butler*, 317 Wis. 2d 515, ¶12.

¶10 For the reason above, I affirm the circuit court.

*By the Court.*—Judgment affirmed.

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

