COURT OF APPEALS DECISION DATED AND FILED

November 24, 2004

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

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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. 04-1902

Cir. Ct. Nos. 03TR021769
03TR021770

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT II

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

V.

LARISSA A. HUTCHINSON,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Racine County: STEPHEN A. SIMANEK, Judge. *Reversed and cause remanded with directions*.

¶1 BROWN, J.[1] This case arises out of an extrajurisdictional stop made by an off-duty police officer who suspected Larissa A. Hutchinson of driving while intoxicated. The State justified the stop as a "citizen's arrest" by the

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[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(g) (2001-02).

officer, but the trial court held that the stop was unreasonable. It suppressed the evidence obtained subsequent to the stop and ordered the case dismissed. We disagree and reverse. We remand with directions that the complaint be reinstated.

¶2 We will begin with a short primer of the law involved, and then we will apply the facts to the law. The idea that citizens are responsible for policing their communities dates back to before the Norman Conquest of 1066, where free male subjects were expected to constrain felons. Katherine Marsh, *Playing Police*, LEGAL AFFAIRS, July/August 2004, at 16, 16. This circumstance continued up through late nineteenth-century America as police forces were virtually nonexistent. ***Id***. at 16-17. Thus, the "citizen's arrest" is based upon a strong common-law foundation. Certainly, times have changed with the advent of institutionalized police forces, but in many states the common-law rule has not been abrogated. *See* Nicholas L. Lopuszynski, *Father Constitution, Tell the Police to Stay on Their Own Side: Can Extra-Jurisdictional Arrests Made in Direct Violation of State Law Ever Cross the Fourth Amendment's "Reasonableness" Line?*, 53 DEPAUL L. REV. 1347, 1358 (2004). In Wisconsin, it is alive and well. *See* **State v. Slawek**, 114 Wis. 2d 332, 335, 338 N.W.2d 120 (Ct. App. 1983).

¶3 In general, citizens may arrest when a felony or misdemeanor effecting a breach of the peace is committed in their presence. ***City of Waukesha v. Gorz***, 166 Wis. 2d 243, 246-47, 479 N.W.2d 221 (Ct. App. 1991). While a citizen can only arrest for breaches of the peace committed in his or her presence, the right to arrest exists "while [the breach of peace] is continuing, or immediately after it has been committed, or while there is a continuing danger of its renewal." 5 AM. JUR. 2D *Arrest* § 57 (2004) (footnotes omitted.) RESTATEMENT (SECOND) OF TORTS § 119 (1965) is in accord with this rule and provides:

> [A] private person is privileged to arrest another without a warrant for a criminal offense
>
> ….
>
> (c) if the other, in the presence of the actor, is committing a breach of the peace or, having so committed a breach of the peace, he [or she] is reasonably believed by the actor to be about to renew it.

¶4 A comment to this section explains that this citizen's arrest privilege "was confined in the early English cases to the detention of a person who was breaking the peace in the actor's presence, or was reasonably suspected of intending to renew a breach of the peace so committed …." ***Id***. at cmt. n. Thus, while the general rule requires a breach of the peace to be committed in the citizen's presence, an equally important consideration is whether the citizen reasonably believes there is a continuing danger that the offender intends to repeat or resume the breach of the peace recently committed.

¶5 Against this backdrop is the advent of the twentieth- and twenty-first-century police force. Toward the end of the nineteenth century, newly established police forces assigned police officials to patrol within specific territories. Lopuszynski, *supra*, at 1355. Along with formalizing police forces and exact police borders, the law correspondingly recognized the common-law doctrines of citizen's arrest and hot pursuit because police could not officially arrest outside of their territory. ***Id***. Thus, the law in Wisconsin and elsewhere has evolved such that law officers may make citizens' arrests outside their jurisdiction in the same manner as a private citizen. ***Slawek***, 114 Wis. 2d at 337-38. When reviewing a citizen's arrest by a police officer, we review it under an objective standard—whether a private citizen could have made the arrest. *See* ***id.*** at 335.

¶6 Having stated the general law, we now review the testimony. Sergeant Frank Johnson testified that he is a city of Racine police officer. On November 29, 2003, at about 2:37 a.m., Johnson was returning home, in uniform, from an off-duty job. He was driving his private automobile. Johnson observed the vehicle in front of him swerve in and out of its designated lane and also go left of center. He felt this was dangerous because people were out on the street and he believed such action could have killed someone. No one appears to dispute that he was in the town of Mt. Pleasant, outside the jurisdiction of the City of Racine Police Department, when he observed this activity.

¶7 Initially, Johnson blew his horn and flashed his lights. He followed the vehicle through several stoplights, hoping the lights would change so that he could get out and confront the driver. When a light did turn red, Johnson jumped out of his vehicle, ran up to the vehicle in front of him and made contact with the driver, Hutchinson. He testified that he asked for her keys and she reluctantly gave them to him. At this point, a sheriff's deputy pulled up and, ultimately, a Mt. Pleasant officer did as well. Johnson testified that when he walked up to the car, he stepped ahead of the operator's window so that she could see his uniform.

¶8 A sheriff's deputy also testified. On cross-examination, Hutchinson's attorney asked:

> And in your report, would you dispute that you stated that, in your report, "When I asked Sergeant Johnson how many times the vehicle did this," which relates to deviating from the lane, "and where this occurred, Sergeant Johnson advised that it happened many times, and was practically continuous from State Street to when he took the keys from Hutchinson on Newman Road"?

The deputy agreed that this is what Johnson had told her. The deputy also testified that she noticed a strong odor of alcohol on Hutchinson's breath, her eyes were

glassy and she appeared to have trouble focusing. She also appeared to be slightly disoriented. Hutchinson failed her field sobriety tests and was issued a citation for operating while intoxicated.

¶9 Hutchinson, for her part, testified that she noticed a car following her excessively closely, honking and flashing lights. She testified that she was attempting to keep an eye on that car. It was not a marked police car. At an intersection, the occupant of the other car approached her, pounded on her window and demanded her keys. At first, she could not see who it was and was reluctant to comply. She did not see that it was an officer although he said he was and produced a badge. Eventually, she complied. On cross-examination, she admitted that she had been drinking that evening and was unsure about how much she had to drink.

¶10 Applying the facts to the law, the State argues that this case is closely analogous to ***Gorz***. There, a town of Brookfield police officer was transporting two persons to a city of Waukesha destination when he observed an automobile cross the center line several times, all within the city. ***Gorz***, 166 Wis. 2d at 245. The officer activated his squad lights and initiated a stop. ***Id.*** He approached the vehicle while in full uniform and called for Waukesha police to facilitate the stop. ***Id.*** The trial court validated the stop based on the "citizen's arrest" doctrine. ***Id.*** This court affirmed. ***Id.*** at 244. We rejected Gorz's claim that a citizen's arrest may only be made by a police officer if the officer is dressed like a citizen and is using an unofficial vehicle to make the stop. ***Id.*** at 246. We reasoned:

> Police officers may cease to be police officers when they leave their jurisdiction, but they do not cease to be persons. Even though they are considered as mere persons, they have been trained in criminal law enforcement and have

> special expertise beyond the normal citizen. It makes no sense that, as citizens, they should be prohibited from using their expertise or the equipment they may properly avail themselves of.

Id. (citation omitted).

¶11 Gorz also argued that a breach of the peace may only include commission of a felony or a serious misdemeanor. ***Id.*** He claimed that an operating while intoxicated situation did not qualify. ***Id.*** at 247. We disagreed and wrote that operating a vehicle while intoxicated threatens public security and involves violence. ***Id.*** "As such, it amounts to a breach of the peace." ***Id.***

¶12 The trial court acknowledged ***Gorz***, but distinguished it. A major difference relied upon by the trial court was that the officer in ***Gorz*** initiated the stop by use of a squad car with flashing squad lights while Johnson initiated the stop using his own private vehicle—an unmarked car—and the flashing lights from his car did not announce police presence and authority. In the trial court's estimation, with so many instances of people impersonating officers, Hutchinson was justified in ignoring the flashing of lights and tooting of the horn when she was "alone in her car at two in the morning." In fact, the trial court remarked that while Hutchinson did roll down the window for Johnson, the court doubted it would have done the same thing under those circumstances. The court concluded that using a private vehicle to initiate the stop, in the manner Johnson employed, "take[s] it one step too far."

¶13 The trial court was also critical of Johnson for stopping the Hutchinson car in the middle of traffic, resulting in two cars sitting in the lane of traffic, which the court deemed "about as dangerous as someone who is deviating in a lane." The trial court opined that

> [T]he proper way to do this—because everyone has cell phones now—you call 911. You get a description of the vehicle. You get a license plate. You maintain surveillance and wait until the officers get there, who are empowered to make the arrest.
>
> I think that's what should have been done here.

This is especially so, the trial court thought, where there were virtually no other cars on the roadway, it was 2:30 in the morning and there was no imminent danger of an accident.

¶14 Some of the trial court's remarks appear to take issue with the citizen's arrest doctrine. We get this from the court's comments about numerous instances of people impersonating police officers, sometimes making victims of ordinary citizens. Certainly, the trial court's view is not groundless. With the predominance of cell phones in today's world, it appears that the justification for the common-law citizen's arrest doctrine is less tenable. Also, there are plenty of examples where citizens have not only overstepped the bounds of reasonableness, but they have also risked breaking the law, offending propriety and creating free-for-alls. Marsh, *supra*, at 17. Perhaps, this is why states such as South Carolina have abrogated the common law at least so far as they pertain to nonfelonies. *See* ***State v. McAteer***, 532 S.E.2d 865, 865 (S.C. 2000). As we said above, however, there has been no abrogation of the common-law citizen's arrest in Wisconsin.

¶15 That said, at its core, the trial court's rationale is less a discourse on the merits of common-law citizen's arrest and more a commentary on the reasonableness of the officer's actions. As the trial court impliedly stated, it saw its duty as engaging in a balancing act—weighing the interest in protecting society from criminal behavior and protecting society from extreme, dangerous and unbridled police behavior. The trial court obviously believed that flashing the

lights of a private automobile at another vehicle in front, honking the horn, and following the car closely, all at 2:30 in the morning, is an unreasonable and scary way to address a concern that a driver may be operating the vehicle while intoxicated.

¶16 We certainly do not feel that the trial court's rationale is unsound. In fact, the trial court's view seems to be close to how Yale's Professor Akhil Reed Amar classifies Fourth Amendment jurisprudence. "Professor Akhil Reed Amar believes that [t]he core of the Fourth Amendment … is neither warrant nor probable cause, but reasonableness. He argues that reasonableness is not defined by probability: Common sense tells us to look beyond probability to the importance of finding what the government is looking for, the intrusiveness of the search, the identity of the search target, [and] the availability of other means of achieving the purpose [pursued] …." Lopuszynski, *supra*, at 1372 (footnotes and internal quotation marks omitted). As we read the trial court's decision, the court was looking at the intrusiveness of Johnson's actions in comparison to what he was trying to do—stop someone who was deviating from the traffic lane. The court saw no impediment to securing a stop and obtaining the identity of the target person by use of a different, less intrusive method. Johnson obviously had a cell phone in his possession because he called dispatch after he had stopped Hutchinson and retrieved her keys. The trial court plainly thought Johnson's method to be too intrusive, too unbridled and too dangerous.

¶17 We begin our response with our standard of review: Whether a lawful citizen's arrest occurred is a question of law we review independently. ***Gorz***, 166 Wis. 2d at 245. We noted above that we apply this law objectively. *See* ***Slawek***, 114 Wis. 2d at 335. As we said earlier, this analysis requires us to look at whether a breach of the peace was committed in the citizen's presence. ***Gorz***, 166

Wis. 2d at 246-47. Another consideration is whether the citizen reasonably believes that the offender intends to repeat or resume the breach. *See* 5 AM. JUR. 2D *Arrest* § 57 (2004); RESTATEMENT (SECOND) OF TORTS § 119(c) and cmt. n (1965).

¶18 The record is clear that there were people out on the street where the incident unfolded. A reasonable citizen could believe that the operator was in danger of hitting someone. In fact, Johnson testified that this was the major consideration for his action. Further, Johnson testified that at the time of the stop, a vehicle was actually headed toward Hutchinson and Johnson in the opposite direction. So, this is not a situation where there was no element of danger to others.

¶19 A second consideration is the fact that if the officer had used the cell phone to call authorities and followed Hutchinson until squads converged, the risk that an accident might occur in the meantime was still alive. Just because it was 2:30 in the morning and there were few cars on the road does not mean that Hutchinson's impaired state was any less dangerous to herself or to some other vehicle or pedestrian that may have come along Hutchinson's route.

¶20 A third consideration is that this was not an ordinary citizen attempting to meddle in the work of professional police. This was a police officer. Johnson was presumably trained in law enforcement and had special expertise beyond that of a normal citizen. For all that has been written about stops made outside an officer's jurisdiction, the training and expertise do not stop at the border. We wonder what the claim would be if Johnson were driving his private automobile and saw the errant driving within the city limits. We doubt that the analysis could or should change.

¶21 Thus, as to whether Johnson's actions can be considered reasonable, Fourth Amendment "reasonableness" is defined objectively as whether a person "of reasonable caution" is warranted in the belief that the action taken was appropriate in light of the particular circumstances of each case and based on "the facts available to the officer at the moment of seizure." ***Terry v. Ohio***, 392 U.S. 1, 21-22 (1968). We conclude that Johnson's actions were not too arbitrary, too extreme or too unreasonable. Johnson's response to Hutchinson's driving was such that a person of reasonable caution would believe that the action taken was appropriate. While it is true that Johnson was not in a squad car when the incident occurred, his response was to protect society from Hutchinson's driving in an effective and efficient manner equal to using his cell phone.

¶22 So, while we certainly value the trial court's consideration of the issue and fully understand the trial court's concerns, we conclude that Johnson effectuated a valid citizen's arrest under the facts in this case. We reverse and remand with directions that the complaint be reinstated.

By the Court.—Order reversed and cause remanded with directions.

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