

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 14, 2014

Diane M. Fremgen
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. 2013AP2352-FT

Cir. Ct. No. 2013CV1592

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

CITY OF NEW BERLIN,

PLAINTIFF-RESPONDENT,

V.

JOHN FRANCIS DOWNEY,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Waukesha County:
KATHRYN W. FOSTER, Judge. *Affirmed.*

¶1 BROWN, C.J.¹ John Downey appeals from his citations for operating a vehicle while intoxicated and with a prohibited alcohol concentration,

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(b) (2011-12). All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

arguing that the traffic stop leading to those citations violated statutory and constitutional law because it was conducted by a West Allis police officer outside the boundaries of West Allis. The municipal court determined that the officer, following up on a citizen complaint about a serious emergency—a vehicle proceeding west in the eastbound lane of traffic—had the right to conduct this traffic stop just outside of the boundaries of West Allis. The circuit court affirmed. We do as well.

Facts

¶2 At about 3:15 a.m. on August 27, 2011, a West Allis police officer on patrol driving a marked squad car westbound on Oklahoma Avenue, approximately where it crosses 116th Street, was flagged down by an eastbound motorist. The motorist “was honking his horn and flashing his lights,” and the officer stopped his vehicle right in the road, as there was no one behind him. The motorist rolled down his window and told the officer, “You’d better go up. There’s a vehicle that’s travelling westbound in the eastbound lanes of travel.”

¶3 Within seconds the officer, concerned about preventing an accident, radioed dispatch to tell them he was proceeding westbound looking for the reported vehicle. Because he was close to the New Berlin boundary, the officer asked the dispatchers to alert New Berlin about the situation too. The officer proceeded westbound on Oklahoma Avenue, which turns into National Avenue at 124th Street, looking for any sign that the vehicle had caused an accident. He drove for about one minute and crossed into New Berlin without seeing the vehicle.

¶4 The officer had driven six blocks into New Berlin and was about to turn back to West Allis when he saw the taillights of a vehicle “heading

westbound in the wrong lane” up ahead. The officer “felt that this was an emergency situation” and that he “could not let this vehicle proceed westbound in the eastbound lanes of travel,” so he caught up to the vehicle. The vehicle crossed back over into its own lane, and the officer signaled it to pull over, near 150th Street and National Avenue. He spoke to the driver, Downey, asked for his license, and told him that he thought he was going the wrong way. He observed that Downey had glassy eyes, slurred speech, and smelled like alcohol. Downey admitted he had been drinking alcohol.

¶5 New Berlin officers reached the scene of the traffic stop within two minutes. The entire incident—from the moment the motorist flagged down the officer to the time when the New Berlin officers arrived at the scene—took five minutes at the most. Once the New Berlin officers arrived, they took over the investigation, and it was they who issued Downey’s citations.

¶6 Downey moved to dismiss his citations and suppress the evidence from his traffic stop, arguing that the stop was “jurisdictionally defective.” The municipal court rejected Downey’s arguments, finding that the officer followed the proper protocols under West Allis police department policy for responding to emergency situations in another jurisdiction and was in fresh pursuit of Downey from West Allis. Downey attempted to have that decision reviewed de novo by the circuit court and then by this court, but was informed that the decision was not a final judgment ready for appeal. Downey’s untimely appeal was voluntarily withdrawn and the case remanded for trial. The municipal court found Downey guilty on both citations. The circuit court affirmed that outcome in all respects. Downey now appeals to this court.

Analysis

¶7 In Wisconsin, an on-duty² law enforcement officer outside his or her jurisdiction may “arrest a person or provide aid or assistance anywhere in the state” if he or she is (1) on duty and on official business, (2) taking action that would be authorized under the circumstances in the officer’s own jurisdiction, and (3) acting to respond to an emergency situation that poses a significant threat of bodily harm or to life.³ WIS. STAT. § 175.40(6)(a). This extra-territorial authority may only be exercised consistent with the adopted policy of the officer’s jurisdiction, which must include “at least a policy on notification to and cooperation with” other jurisdictions. Section 175.40(6)(b) and (d). In addition, if in “fresh pursuit” of a violation of law, an officer may “follow anywhere in the state.” Sec. 175.40(2).

¶8 The officer’s actions here were justified under both of these rules. First, a citizen’s report that he had just observed a vehicle driving westbound in the eastbound side of Oklahoma Avenue in the darkness of early morning was a serious emergency situation. So, the officer had authority under WIS. STAT. § 175.40(6)(a) because he was (1) on duty, (2) taking action he would have been authorized to take in West Allis—i.e., conduct a traffic stop of a vehicle driving into oncoming traffic, and (3) responding to an emergency that threatened life or bodily harm.

² The rules for off-duty officers are different and irrelevant here. *See* WIS. STAT. § 175.40(6m).

³ Responding to a felony also justifies extra-territorial action by an officer, WIS. STAT. § 175.40(6)(a)3.b, but is irrelevant here.

¶9 Downey responds that the officer cannot rely on WIS. STAT. § 175.40(6)(a) because he failed to follow the policies of his jurisdiction (as required by § 175.40(6)(b) and (d)), in particular, that portion of the West Allis Police Department Directive 2.002 which provides that an officer conducting a general investigation “should have prior approval from their shift commander and/or his designee.” But as the circuit court noted, that rule is worded as an advisory directive—the officer “should” have the prior approval, not “shall” have it. This is in contrast with the next portion of the rule, which requires that the officer “shall” notify dispatch of his or her location. And, in any event, the officer did all he could under the circumstances to obtain prior approval—he called dispatch. The exigencies of the situation demanded he act immediately to prevent an accident, not wait to confirm with dispatch that approval was being granted. Under the circumstances the municipal court did not err in finding that the officer followed the proper protocol and had implied approval to respond to this emergency situation at the border between West Allis and New Berlin.

¶10 The court also correctly determined that the officer’s actions were justified under the “fresh pursuit” rule of WIS. STAT. § 175.40(2). That rule provides that an officer “in fresh pursuit” may “follow anywhere in the state and arrest any person for the violation of any law or ordinance the officer is authorized to enforce.” Sec. 175.40(2). For instance, a Brookfield police officer who saw a vehicle with expired license plates and then, following the vehicle, noticed it was exceeding the speed limit, weaving, and crossing the center line was justified in stopping the vehicle shortly thereafter in Elm Grove, because she was in “fresh pursuit.” *City of Brookfield v. Collar*, 148 Wis. 2d 839, 840-41, 843, 436 N.W.2d 911 (Ct. App. 1989). Downey attempts to distinguish *Collar* on grounds that the officer in Downey’s case did not see the vehicle in question until he was outside of

West Allis. This distinction is immaterial. What matters under the “fresh pursuit” doctrine is whether the officer acted without unnecessary delay and remained in continuous, uninterrupted pursuit. *Id.* at 842. There is no requirement of “continuous surveillance of the suspect.” *Id.* at 842-43. Here, a motorist in the officer’s jurisdiction was so alarmed that he honked and flashed his lights at the officer and asked him to pursue the car traveling in the wrong lane in the jurisdiction. The officer did so. The whole incident took a couple of minutes. This was fresh pursuit of conduct that happened in the officer’s jurisdiction.

¶11 Finally, Downey argues that WIS. STAT. § 175.40(6)(b) and (d) were also violated because the officer failed to follow another provision of West Allis Police Department Directive 2.002, which states that nonfelony arrests may not be undertaken unless “[p]rior to any action, officers/investigators” were assisted by the local jurisdictional agency or another relevant agency. But the directive says that implicit in an “arrest” is “not only custody, but also the aim of bringing the person arrested into the judicial process to answer for an offense.” Here, the officer was just conducting an ordinary traffic stop, which often leads to no “arrest[] into the judicial process.” An officer may stop a vehicle if he reasonably believes that the driver is violating the traffic laws, and may ask questions related to the nature of the stop. *State v. Betow*, 226 Wis. 2d 90, 93, 593 N.W.2d 499 (Ct. App. 1999). It was the New Berlin officers who made the arrest itself, in their own jurisdiction, based upon Downey’s violations of the law in New Berlin.

¶12 There is no error in the municipal court’s decision.

By the Court.—Order affirmed.

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

