COURT OF APPEALS
DECISION
DATED AND FILED

July 19, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 00-0482

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

COUNTY OF MANITOWOC,

PLAINTIFF-RESPONDENT,

v.

DEBORA A. ACKLEY,

DEFENDANT-APPELLANT.

APPEAL from a judgment and orders of the circuit court for Manitowoc County: DARRYL W. DEETS, Judge. *Affirmed.*

¶1 SNYDER, J.[1] Debora A. Ackley appeals from a conviction for operating a motor vehicle with a prohibited blood alcohol concentration contrary to WIS. STAT. § 346.63(1)(b). Ackley contends that City of Manitowoc Police

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(g) (1997-98). All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

Officer Jeff Hyler lacked the authority to arrest her outside the Manitowoc city limits because the city of Manitowoc (the city) did not have jurisdiction over her (1) pursuant to a "Mutual Assistance Agreement" between the city and the County of Manitowoc (the County), (2) based on Hyler's status as a citizen, or (3) pursuant to WIS. STAT. § 59.26. Ackley also claims that the trial court improperly reopened the record of her motion to dismiss after her motion had previously been denied. We reject Ackley's arguments and conclude that Hyler was authorized to make an extrajurisdictional arrest under WIS. STAT. § 66.305 concerning the mutual assistance of law enforcement agencies. We therefore affirm the trial court's judgment and orders.

BACKGROUND

¶2 On December 20, 1998, Ackley was driving north of the Manitowoc city limits when she skidded off the road and into a ditch on Highway Q. Ackley called for a tow truck. When the tow truck arrived, the driver called the county sheriff's department for assistance because there was damage to Ackley's vehicle. After the county sheriff's dispatcher received the tow truck driver's call, the dispatcher contacted the city police department because none of the county sheriff's units were presently available. The city dispatcher replied that it had an officer in the vicinity who could respond to the accident. Ten minutes later, at approximately 10:00 p.m., city police officer Hyler arrived at the scene.

¶3 When Hyler approached Ackley, he detected an odor of intoxicants on her breath and requested that she perform field sobriety tests and a preliminary breath test. Ackley failed the tests and Hyler issued her a citation for operating while under the influence of alcohol. The citation indicated that the plaintiff was the city and the location for the court appearance was at city hall.

¶4 Prior to Ackley's court date, Hyler served her with an amended citation which indicated that she had committed an offense under the County's jurisdiction with the arresting agency being the County, not the city. At her court appearance, Ackley objected to the court's jurisdiction and subsequently filed a motion to dismiss.

¶5 On April 28, 1999, the trial court heard Ackley's motion. Ackley asserted that Hyler could not legally arrest her because she was outside the city limits at the time of the arrest. The State argued that it had jurisdiction to make an arrest because Hyler was properly deputized and because such an arrest was contemplated by the County and the city's Mutual Assistance Agreement (the agreement). The court ruled against Ackley. The court observed that the agreement referenced WIS. STAT. § 66.305 (addressing mutual assistance between police agencies), that Hyler was deputized but that his deputization did not exclusively relate to the agreement, that the statutory sections referenced by the agreement "go[] beyond what the mutual assistance agreement [provides]," that the agreement does not limit what a deputized officer can do, and that Hyler admittedly made a mistake by issuing a citation under the auspices of the city but that such a mistake did not have any bearing on the issue of jurisdiction. The court concluded that Hyler properly made the arrest as a deputized police officer and that if the agreement were to be "brought into play," it would also permit Hyler's arrest of Ackley.

¶6 On September 14, 1999, the court on its own initiative conducted a hearing to address its concern that there was insufficient information in the record "to make it clear that … Officer Hyler had been deputized and that [the jurisdictional issue] was not controlled by the mutual assistance agreement." The court permitted the State to take the testimony of Kenneth Petersen, an inspector at

the county sheriff's department. Petersen confirmed that Hyler had been deputized to act on behalf of the county sheriff's department. The State was also allowed to call Kelly Bubolz, who was employed as a dispatcher for the sheriff's department at the time of Ackley's arrest. After hearing the testimony, the court upheld its ruling that Hyler properly arrested Ackley under his power as a deputy. The court found support in WIS. STAT. § 59.26(2), which permits a sheriff to appoint "as many other deputies as the sheriff considers proper." The court, however, modified its decision as to the agreement, holding that it did not come into play in this case.

¶7 Ackley subsequently brought a motion for reconsideration. The court denied this motion. In January 2000, a trial was held before the court and Ackley was found guilty of operating a motor vehicle with a prohibited blood alcohol content. Ackley appeals.

DISCUSSION

¶8 We first consider Ackley's argument that the trial court exceeded its discretion in reopening the jurisdictional issue by permitting the State to present additional testimony. We are persuaded that the law permits the court to conduct such discretionary acts in the interest of justice. In ***State v. Hanson***, 85 Wis. 2d 233, 237, 270 N.W.2d 212 (1978), our supreme court observed:

> It has been consistently held that a litigant has no automatic right to reopen a case in order to produce additional testimony, but this limitation is not applicable to the trial court. The court may on its own motion reopen for further testimony in order to make a more complete record in the interests of equity and justice.

Id.

¶9 Here, upon reviewing the record the court believed that there was insufficient testimony to show that Hyler was deputized and that the agreement did not apply to the case. The court therefore requested additional evidence from the State to determine whether its prior ruling should stand. The interests of justice and equity were served because the court sought a more complete record on the fundamental issue of jurisdiction. Although the court's motion to reopen prejudiced Ackley because the court ultimately sustained its ruling against her, she was nonetheless given the same opportunity to present further evidence to support her position. We conclude that the court did not misuse its discretion in reopening the jurisdictional issue.

¶10 Next, Ackley claims that Hyler did not have the authority to make an arrest outside the city limits (1) based on the agreement, (2) as a citizen, or (3) based on WIS. STAT. § 59.26. On appeal, the State does not rely on the agreement or Hyler's citizen status in order to make the extrajurisdictional arrest. Instead, it looks to § 59.26 and, separately, to WIS. STAT. § 66.305. We are convinced that Hyler's arrest was lawful under § 66.305;[2] therefore, we need not address § 59.26.

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[2] Ackley asserts that the State waived its argument under WIS. STAT. § 66.305 because it failed to present this issue before the trial court. The waiver rule, however, does not apply to the State because as the respondent it is seeking to affirm the trial court's decision. As we explained in ***State v. Holt***, 128 Wis. 2d 110, 124-25, 382 N.W.2d 679 (Ct. App. 1985):

> [A] respondent on appeal seeks to uphold rather than reverse the result reached at trial. The very policies of judicial efficiency which underlie the general waiver rule argue against the rule's being applied to deny the respondent the right to assert a ground for upholding the trial court's decision. The respondent does not ask that the matter be tried again but merely asserts that the appellant's argument in favor of reversal is without merit.
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> It is well-established that if a trial court reaches the proper result for the wrong reason, it will be affirmed. *See* ***State v. King***, 120 Wis.2d 285, 292, 354 N.W.2d 742, 745 (Ct. App. 1984).… An appellate court may sustain a lower court's holding on a theory or on reasoning not presented to the lower court.

(continued)

¶11 WISCONSIN STAT. § 66.305 states the following:

> **Law enforcement; mutual assistance. (1)** Upon the request of any law enforcement agency, including county law enforcement agencies as provided in s. 59.28 (2), the law enforcement personnel of any other law enforcement agency may assist the requesting agency within the latter's jurisdiction, notwithstanding any other jurisdictional provision. For purposes of ss. 895.35 and 895.46, such law enforcement personnel while acting in response to such request, shall be deemed employes of the requesting agency.

As the trial court noted in its April 28, 1999 decision, this provision permits law enforcement agencies to create mutual assistance agreements, as the County and the city have done, but such agreements are not the exclusive function of the statute. Because assistance may be obtained under § 66.305(1) simply by "request," the statute covers both formal written agreements and informal calls for help.

¶12 In applying WIS. STAT. § 66.305, we first consider whether there was a request for assistance from a law enforcement agency. As directed by WIS. STAT. § 59.28(2), the requesting law enforcement agency may include county law enforcement agencies. Section 59.28(2) provides: "County law enforcement agencies may request the assistance of law enforcement personnel or may assist other law enforcement agencies as provided in ss. 66.305 and 66.315." In the present case, at the April 28, 1999 hearing, Hyler testified that he was instructed to report to Ackley's vehicle outside the city limits by the city police department dispatcher. He stated that the dispatcher "informed me that there were no … county units available, then I did make my own determination that I was going to handle the situation."

Liberty Trucking Co. v. DILHR, 57 Wis.2d 331, 342, 204 N.W.2d 457, 463-64 (1973).

¶13 At the September 14, 1999 hearing, Bubolz testified that on December 20, 1998, she took a call about a vehicle in a ditch off of Highway Q. Bubolz stated that she decided to send an officer because

> [w]e didn't have a county [officer] available and with the dispatch the way that it is, city officer dispatcher is right behind us. And where this accident was at, it was closer for the city to respond than it would be for us to pull … county officer[s] who were already on calls and busy at the time, it would have been a longer response to get the report generated because they go and take the information.

Bubolz observed that she then contacted the city dispatcher and asked if there was an officer available in the vicinity of the accident. Bubolz testified that the city "had somebody who was available to go over [to the accident site] so they were to do that, to assist other law enforcement agenc[ies] is what you do. That means that they're going to go and respond for our call because we don't have anybody of ours available to go."

¶14 The testimony of Hyler and Bubolz is convincing that a specific request was made from the county sheriff's department to the city police department for assistance at the site of Ackley's accident. Consistent with WIS. STAT. § 66.305(1), law enforcement personnel from the city, here Hyler, appropriately provided help within the County's jurisdiction. We therefore conclude that Hyler had the authority to respond to the accident scene and was not jurisdictionally barred from making an arrest.

By the Court.—Judgment and orders affirmed.

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