

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 20, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

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.

No. 00-1785-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

WILLIAM C. ROSENBERG,

DEFENDANT-APPELLANT.

APPEAL from judgments of the circuit court for Waukesha County:
PATRICK C. HAUGHNEY, Judge. *Affirmed.*

Before Brown, P.J., Nettesheim and Anderson, JJ.

¶1 PER CURIAM. William C. Rosenberg has appealed from judgments convicting him of operating a motor vehicle while intoxicated (OWI),

sixth offense, in violation of WIS. STAT. § 346.63(1)(a) (1999-2000),¹ and of bail jumping in violation of WIS. STAT. § 946.49(1)(a). Rosenberg contends that the trial court erred when it permitted two prior municipal court OWI convictions to be considered in enhancing his sentence for the current OWI offense. Rosenberg also contends that the judgments must be reversed because the arresting officer was outside his jurisdiction when he made the traffic stop that led to Rosenberg's convictions. We affirm the judgments.

¶2 Rosenberg's first two OWI convictions arose from offenses which occurred in 1989 and 1996. Both cases involved civil forfeitures and were adjudicated in municipal court. No contest pleas were entered in both cases. Rosenberg contends that neither judgment was based upon a knowing, voluntary and intelligent plea and that based on *State v. Baker*, 169 Wis. 2d 49, 45 N.W.2d 237 (1992), he may collaterally attack those convictions in this proceeding.

¶3 After the judgments were entered in this case and Rosenberg's appellant's brief was filed, the Wisconsin Supreme Court revisited the holding of *Baker* in *State v. Hahn*, 2000 WI 118, 238 Wis. 2d 889, 618 N.W.2d 528, *modified on reconsideration*, 2001 WI 6, 241 Wis. 2d 85, 621 N.W.2d 902. In *Hahn*, the supreme court concluded that a circuit court may not determine the validity of a prior conviction during an enhanced sentence proceeding predicated on the prior conviction unless the offender alleges that a violation of the constitutional right to counsel occurred in the prior conviction. *Hahn*, 2000 WI 118 at ¶28. "Instead, the offender may use whatever means available under state

¹ All references to the Wisconsin Statutes are to the 1999-2000 version.

law to challenge the validity of a prior conviction on other grounds in a forum other than the enhanced sentence proceeding.” *Id.*

¶4 Rosenberg did not assert in the trial court, and does not assert on appeal, that a violation of a constitutional right to counsel occurred in the first two OWI proceedings. Based upon *Hahn*, it is therefore clear that Rosenberg may not challenge his first two OWI convictions in this proceeding.

¶5 In his reply brief, Rosenberg contends that *Hahn* should be given only prospective application. However, it is well-settled that new rules of criminal procedure are applied retroactively in all cases pending on direct review or not yet final. *State v. Koch*, 175 Wis. 2d 684, 694, 499 N.W.2d 152 (1993). In the exceptional case where courts prospectively apply a new judicial holding, it must be done for a compelling reason. *See Jacque v. Steenberg Homes, Inc.*, 209 Wis. 2d 605, 624, 563 N.W.2d 154 (1997).

¶6 Rosenberg contends that he and other similarly situated defendants relied on and benefited from *Baker*, and will suffer a hardship if *Hahn* is applied retroactively. However, courts do not prospectively apply a new judicial holding because of reliance on an old rule unless the reliance gives rise to an inequity or considerable harm or hardship to the relying party. *See Jacque*, 209 Wis. 2d at 624-25.

¶7 It cannot reasonably be contended that Rosenberg relied on *Baker* at the time of his first two OWI convictions, entering no contest pleas because he believed that he would be able to collaterally challenge the convictions in an enhanced sentencing proceeding if he were charged with new offenses in the future. Rosenberg’s reliance on *Baker* did not occur until he challenged the use of

the first two OWI convictions in this proceeding. It is not the type of hardship-inducing reliance that compels the prospective application of *Hahn*.

¶8 We also reject Rosenberg’s claim that his judgments of conviction should be reversed because the traffic stop that led to the charges occurred outside the jurisdiction of the arresting officer. Rosenberg was arrested by Jason Pfeiffer, a city of Brookfield police officer. At trial, Pfeiffer conceded that he stopped Rosenberg in the town of Brookfield, approximately seven-hundredths of a mile from the city of Brookfield border.

¶9 Pursuant to WIS. STAT. § 175.40(2), a police officer “may, when in fresh pursuit, follow anywhere in the state and arrest any person for the violation of any law or ordinance the officer is authorized to enforce.” In determining whether an officer was in fresh pursuit at the time of an arrest, a court must consider whether the officer acted without unnecessary delay, and whether the pursuit was continuous and uninterrupted. *See City of Brookfield v. Collar*, 148 Wis. 2d 839, 842-43, 436 N.W.2d 911 (Ct. App. 1989). The court must also consider the relationship in time between the commission of the offense, the commencement of the pursuit, and the apprehension of the subject. *See id.* “The greater the length of time, the less likely it is that the circumstances under which the police act are sufficiently exigent to justify an extrajurisdictional arrest.” *Id.* at 843.

¶10 The evidence at trial indicated that while both he and Rosenberg were inside the Brookfield city limits, Pfeiffer observed Rosenberg weaving in his lane of traffic. Pfeiffer testified that he observed Rosenberg’s driver’s side tires cross the center line into the lane of oncoming traffic. He testified that he then observed Rosenberg weave back across the lane, with his passenger side tires

crossing the solid white line on the other side of the road. Pfeiffer testified that before stopping Rosenberg, he followed him for approximately two and a half miles and observed two additional and similar lane deviations, also within the city of Brookfield limits. Pfeiffer also testified that he ran a license plate check as he drove behind Rosenberg, and that as he was stopping Rosenberg, he learned that the vehicle's license plate registration was suspended.

¶11 Under these circumstances, the trial court properly determined that Pfeiffer was in fresh pursuit of Rosenberg within the meaning of WIS. STAT. § 175.40(2) when he stopped him. Pfeiffer observed Rosenberg's vehicle weaving in its lane while in the city of Brookfield, and thus he had a reasonable suspicion that a traffic violation had occurred, warranting a traffic stop.² He commenced the license plate check while in the city. In addition, he commenced following Rosenberg immediately upon observing the suspicious lane deviations. The stop was made only seven-hundredths of a mile from the city border, after Pfeiffer had followed Rosenberg for only two and a half miles, and at the time the response on the license plate check indicated that the license plate registration on the vehicle was suspended.

¶12 Under these circumstances, it is clear that Pfeiffer acted without unnecessary delay in stopping Rosenberg. Because it is also clear that Pfeiffer's pursuit of Rosenberg was continuous, and that the time between Pfeiffer's

² Rosenberg relies on Pfeiffer's statement that he did not stop Rosenberg earlier because he was "attempting to gather further probable cause" for the stop. However, Pfeiffer's desire to gather more information by continuing to observe Rosenberg did not deprive him of a reasonable basis for stopping Rosenberg's vehicle.

observation of the lane deviations and the traffic stop was very short,³ no basis exists to conclude that Pfeiffer acted outside his authority in stopping and arresting Rosenberg.

By the Court.—Judgments affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

³ Pfeiffer testified that he and Rosenberg were traveling at about 40 miles per hour, and that he followed Rosenberg for approximately two and a half miles. Based upon this testimony, it is clear that only about five to ten minutes passed between Pfeiffer's initial observation of Rosenberg and the stop.

