

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 22, 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. 2011AP320

**Cir. Ct. Nos. 2010TR12050
2010TR12052**

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

V.

BLAIR T. DAVIS,

DEFENDANT-RESPONDENT.

APPEAL from judgments of the circuit court for Winnebago County: ROBERT HAWLEY, Judge. *Reversed.*

¶1 REILLY, J.¹ The State of Wisconsin appeals from a decision of the circuit court dismissing the operating a motor vehicle while intoxicated (OWI) and

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

the operating with a prohibited alcohol concentration (PAC) charges against Blair T. Davis. The circuit court dismissed the charges after it found that the UW-Oshkosh police officers were not in “fresh pursuit” of Davis and thus did not have the authority to arrest Davis outside of campus property. We hold that the campus police did have the authority to arrest Davis off-campus and thus reverse the circuit court.

FACTS

¶2 On the evening of September 18, 2010, UW-Oshkosh Police Officer Trent Morgan was on foot patrol on the second floor of the “student success center” when he noticed Davis take a can of beer out of his parked car and apparently sell it to someone who appeared to be between eighteen and twenty-one years old. The sale occurred on a street bordering the UW-Oshkosh campus. The record seems to indicate that Morgan then left the student success center and confronted the individual who purchased the beer. When Morgan indentified the buyer as an eighteen year old, Morgan gave him a ticket for underage drinking.

¶3 At some point—the record is not clear when—Morgan informed Sergeant Donald Kernler of the UW-Oshkosh police department that Davis had driven away. Kernler pursued Davis and eventually pulled him over. Davis was subsequently arrested for OWI, and eventually charged with OWI, PAC, and providing alcohol to an underage person.

¶4 Davis filed a motion to suppress the evidence and dismiss the charges on the grounds that the sale of alcohol and the subsequent stop of Davis did not occur within the officers’ jurisdiction. As the arrest occurred off UW-Oshkosh’s campus, Davis argued that the UW-Oshkosh police did not have

authority to arrest him, regardless of whether the officers were in “fresh pursuit” or whether they were making a “citizen’s arrest.”

¶5 The fresh pursuit doctrine states that any Wisconsin peace officer may pursue and arrest a suspect “anywhere in the state” for a violation of any law or ordinance that the officer is authorized to enforce as long as the officer is in “fresh pursuit.” WIS. STAT. § 175.40(2). To determine whether an officer was in fresh pursuit, courts must consider three criteria: (1) the officer must have acted without unnecessary delay; (2) the pursuit must have been continuous and uninterrupted, although there need not have been continuous surveillance of the suspect; and (3) the time between the commission of the crime and the commencement of the pursuit is important; the greater the length of time, the less likely it is that a court will find the officer was in fresh pursuit. *State v. Haynes*, 2001 WI App 266, ¶6, 248 Wis. 2d 724, 638 N.W.2d 82. The fresh pursuit doctrine therefore applies when an officer witnesses a crime in his or her jurisdiction and follows a suspect into another jurisdiction.

¶6 A citizen’s arrest, however, occurs when an officer acts outside of his or her jurisdiction, such as when the officer is in another municipality. *See City of Waukesha v. Gorz*, 166 Wis. 2d 243, 245-46, 479 N.W.2d 221 (Ct. App. 1991). When the officer is outside of his or her jurisdiction and witnesses “a felony or a serious misdemeanor affecting a breach of the peace,” the officer is entitled to make a citizen’s arrest. *Id.* at 246-47. Misdemeanors that amount to a breach of the peace are “acts which involve, threaten, or incite violence.” *Radloff v. National Food Stores, Inc.*, 20 Wis. 2d 224, 237b, 123 N.W.2d 570, *on motion for rehearing* (1963). Drunk driving is considered a breach of the peace but theft is not. *Compare Gorz*, 166 Wis. 2d at 247, *with Radloff*, 20 Wis. 2d at 237b. The Wisconsin Supreme Court has, however, noted that one state’s highest court held

that the illegal sale of alcohol was a breach of the peace. *See Radloff*, 20 Wis. 2d at 237b (citing *State ex rel. Thompson v. Reichman*, 188 S.W. 225, 229 (Tenn. 1916)).

¶7 The circuit court dismissed the OWI and PAC charges after it concluded that the sale of alcohol to a minor did not constitute an “incitement of violence.” The State appeals.

STANDARD OF REVIEW

¶8 The question of whether the UW-Oshkosh police officers were engaged in fresh pursuit or whether they made a lawful citizen’s arrest is a question of law that we review de novo. *See City of Brookfield v. Collar*, 148 Wis. 2d 839, 841-42, 436 N.W.2d 911 (Ct. App. 1989); *Gorz*, 166 Wis. 2d at 245.

DISCUSSION

¶9 This case comes down to whether Davis’s arrest was the result of fresh pursuit or a citizen’s arrest by the UW-Oshkosh police department. If Davis sold the beer within the jurisdiction of the UW-Oshkosh police department, we would apply the fresh pursuit doctrine. If the sale occurred outside of the campus police’s jurisdiction, we would apply a citizen’s arrest analysis. The circuit court, unfortunately, did not decide whether the sale occurred within the jurisdiction of the campus police.² We therefore must examine whether the arrest was lawful under either the fresh pursuit doctrine or a citizen’s arrest analysis. As we hold

² The sale occurred on a street bordering the UW-Oshkosh campus. WISCONSIN STAT. § 175.40(4) extends the boundaries of a peace officer’s jurisdiction to surrounding highways. As the circuit court did not actually determine where the beer was sold, we cannot ascertain whether the UW-Oshkosh police officers exercised their authority under § 175.40(4).

that the UW-Oshkosh police officers acted appropriately under either test, we reverse the decision of the circuit court.³

¶10 Assuming Davis sold the beer within the UW-Oshkosh police department's jurisdiction, we examine three criteria to determine whether his arrest was the result of fresh pursuit by the campus police: (1) did the officers act without unnecessary delay?; (2) was the pursuit continuous and uninterrupted, bearing in mind that there need not have been continuous surveillance of Davis?; and (3) was the time between the sale of beer and the commencement of the pursuit reasonable? See *Haynes*, 248 Wis. 2d 724, ¶6. We hold that the officers complied with the fresh pursuit doctrine requirements. Morgan informed Kernler that Davis had driven away. Kernler then pursued Davis and eventually pulled him over. While the record does not provide an exact time line of the events, we see nothing to indicate that Morgan and Kernler acted with "unnecessary delay" or that the time between Davis's sale of the beer and the pursuit by Kernler was "unreasonable." And contrary to Davis's argument, it does not matter that Morgan witnessed the sale but Kernler pursued—*Haynes* specifically states that the fresh pursuit doctrine does not require continuous surveillance of the suspect. See *id.* Furthermore, it is irrelevant that the initial pursuit of Davis was for selling beer to an underage person but that Davis was subsequently arrested for OWI and PAC. An officer can engage in fresh pursuit for one crime and later investigate a separate crime if there are "additional suspicious factors." *Id.*, ¶¶11-12. As Davis smelled of intoxicants and admitted to Kernler that he was drinking, Kernler was

³ We note that the circuit court confused the fresh pursuit doctrine with a citizen's arrest analysis. The fresh pursuit doctrine *does not* require "incitement of violence" or threats "involving security." That is the test for a citizen's arrest. See *City of Waukesha v. Gorz*, 166 Wis. 2d 243, 245-46, 479 N.W.2d 221 (Ct. App. 1991).

justified in conducting a new investigation for OWI. We hold that Morgan and Kernler were in fresh pursuit.

¶11 If the sale of beer occurred outside of the UW-Oshkosh police department's jurisdiction, we hold that the officers had authority to make a citizen's arrest. An officer can make a lawful citizen's arrest when he or she witnesses "a felony or a serious misdemeanor affecting a breach of the peace." *Gorz*, 166 Wis. 2d at 246-47. Any misdemeanor that involves, threatens, or incites violence amounts to a breach of the peace. *Radloff*, 20 Wis. 2d at 237b. We hold that Davis's sale of beer to a minor falls within this category. Providing alcohol to a minor late in the evening on a college campus threatens public order. As our supreme court has noted, another state has held that the illegal sale of alcohol is a breach of the peace. *See id.* (citing *Reichman*, 188 S.W. 225, 229). A citizen's arrest was appropriate.

CONCLUSION

¶12 As we hold that the UW-Oshkosh police department had the authority to arrest Davis, we reverse the circuit court's decision to dismiss the OWI and PAC charges.

By the Court.—Judgments reversed.

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

