

COURT OF APPEALS OF WISCONSIN
DISTRICT IV
APPEAL No. 17-AP-1419 CR

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**CLERK OF COURT OF APPEALS
OF WISCONSIN**

STATE of WISCONSIN

Plaintiff-Respondent,

-v.-

ANTHONY HENRY GARBACZ, JR.

Defendant-Appellant.

APPEAL FROM THE October 20, 2016, FINAL JUDGMENT OF THE
CRAWFORD COUNTY CIRCUIT COURT
IN CASE No. 15-CF-032
THE HONORABLE LYNN M. RIDER PRESIDING

RESPONDENT-APPELLANT'S BRIEF AND APPENDIX

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

I. . SHOULD EVIDENCE BE SUPPRESSED WHEN A WISCONSIN POLICE OFFICER ARRESTS A DRIVER FOR OWI IN THE STATE OF IOWA AND TRANSPORTS HIM BACK TO WISCONSIN WITHOUT FIRST APPEARING BEFORE AN IOWA MAGISTRATE TO DETERMINE THE LAWFULNESS OF THE ARREST PURSUANT TO IOWA LAW?

The Circuit Court decided it should not.

STATEMENT ON NECESSITY OF ORAL ARGUMENT AND PUBLICATION

Appellant requests oral argument. A decision in this appeal will likely meet the criteria for publication pursuant to Rule 809.23(1).

STATEMENT OF FACTS AND OF THE CASE

Nature and Procedural Status of the Case

The facts in this case are brief and undisputed.

A. On April 1, 2015, Prairie du Chien, Wisconsin, police officer Tony Berg (Officer Berg) was on patrol in his squad car shortly before midnight when he heard squealing tires. (Docket #33 App. p. 2-3). He drove toward the sound and observed a vehicle driving away at a high rate of speed into incoming traffic. (*Id.*). Officer Berg activated his emergency lights and pursued the vehicle across the Mississippi River Bridge into Marquette, Iowa. (*Id.* App. p. 2-5).

By the time Officer Berg caught up with the vehicle, it was already stopped in front of a residence in Marquette. (*Id.* App. p. 6-7). At this point, Officer Berg only had his headlights on. (*Id.* App. ¶¶ 5-8 p.7) The driver, Anthony “Tony” Garbacz (Garbacz) had exited the vehicle and was walking across the yard. (*Id.* App. ¶¶12-25 p.7). Two Officer’s from the Mar-Mac Iowa Police Department arrived at the scene as well as two agents with the Iowa Department of Justice. (Docket # 2. App. ¶4 p.2; and Docket #33 App. ¶¶ 24-25 p. 10).

Officer Berg noticed a strong odor of alcohol and Garbacz admitted to drinking. (*Id.* p. 2-3). Officer Berg conducted a field sobriety test and Garbacz failed. (*Id.*). Officer Berg arrested Garbacz for OWI 2nd, placed him in his squad car, and promptly transported him back across state lines to Crossing Rivers Hospital in Prairie du Chien where a blood draw was conducted. (*Id.* and Docket #33, App. ¶¶ 8-15 p. 9).

On March 14, 2016, a hearing was conducted before the Honorable James P. Czajkowski on Garbacz's Motion to Dismiss or Suppress Evidence. (Docket #'s 10, 11, 32 App.).

On April 15, 2016, the court filed its decision denying the subject motion. (Docket #12 App.). The Court concluded that Garbacz's Iowa arrest was *lawful* even though officer Berg violated Iowa Code § 806.2 by *unlawfully* taking Garbacz back to Wisconsin without first presenting him to an Iowa magistrate to determine the legality of his arrest. (*Id.* App. ¶3 p. 3). The court concluded that Garbacz's Constitutional rights were not violated and that the remedy for the statutory violation is not suppression of evidence, but a civil lawsuit against law enforcement by the defendant or legal action against the State of Wisconsin by the State of Iowa. (*Id.* App. ¶4 p. 4).

On May 18, 2017, Garbacz filed a Notice of Appeal. (Docket # 34 App.)

Statement of Relevant Facts

The evidence presented at preliminary hearing on August 27, 2015, and the defendant's motion to dismiss/suppress evidence hearing on March 23, 2016, established that:

- 1] Officer Tony Berg is employed by the Prairie du Chien, Wisconsin Police Department and was on duty in his squad car around 11:31 P.M. on April 1, 2015, in downtown Prairie du Chien. (Docket #33 App. p. 2 and Docket #2 App. p.2).
- 2] Officer Berg pursued a vehicle across the Mississippi River Bridge connecting Prairie du Chien, Wisconsin and Marquette, Iowa for traffic violations. (*Id.* #33 App. p. 2-5; #2 App. p. 2-3);
- 3] The closest Officer Berg got to the vehicle was one half city block away, the vehicle accelerated when transitioning from a 25 mph to 55 mph zone, the vehicle reached a speed of 65 mph, and Officer Berg is uncertain if the driver knew he was being pursued. (Docket #33 App. ¶2 p. 12 – ¶14 p. 13; Docket #32 App. ¶¶17-24 p. 2).
- 3] Officer Berg located the vehicle and its driver, Tony Garbacz Jr., at Garbacz’s residence in Marquette, Iowa. (*Id.* #33 App. p. 6-7; #2 App. p. 3-4).
- 4] Officer Berg arrested Garbacz for the misdemeanor offense of OWI second pursuant to Wis. Stat. § 346.63(1)(a). (*Id.* #33 App. p. 6-7; #2 App. p. 3-4).
- 5] Officer Berg immediately transported Garbacz from Iowa to Wisconsin where a blood draw was conducted. (*Id.* #2 App. p. 4).
- 6] Officer Berg violated Iowa law by failing to first take Garbacz before an Iowa Magistrate as required under Iowa Code § 806.2 Uniform Act on Close Pursuit.

ARGUMENT

I. THE TRIAL COURT ERRED BY FAILING TO SUPPRESS EVIDENCE OBTAINED CONSEQUENT TO AN UNLAWFUL ARREST IN IOWA BY A WISCONSIN POLICE OFFICER.

Summary of the Argument

Iowa Code § 806 grants out of state police officers limited authority to make arrests within its borders following a fresh pursuit. The authority to determine if such an arrest is lawful is statutorily reserved to the State of Iowa.

The defendant's rights were denied when he was arrested in Iowa by a Wisconsin police officer who failed to take him before the Iowa Court to determine the legality of his arrest prior to transporting him back to Wisconsin for a blood test and processing.

The Wisconsin Circuit Court had no authority to disregard Iowa's sovereignty and jurisdictional powers and later rule that the defendant's arrest was lawful and erred by failing to suppress the defendant's alcohol/blood test.

Standard of Review

The Court's review of an order granting or denying a motion to suppress evidence presents a question of constitutional fact." *State v. Tullberg*, 2014 WI 134, ¶27, 359 Wis. 2d 421, 857 N.W.2d 120. A question of constitutional fact is a two-step inquiry: First, the circuit court's findings of fact will be upheld unless those findings are clearly erroneous. Second, an independent review is conducted by de novo analysis of the application of constitutional principles to the facts found. *State v. Robinson*, 2010 WI 80, ¶22, 327 Wis. 2d 302, 786 N.W.2d 463.

An erroneous exercise of discretion occurs if the circuit court makes an error in law, or fails to base its decision on the facts of record. *Meyer v. Meyer*, 2000 WI 132, 15, 239 Wis.2d 731, 620 N.W.2d 382.

ANALYSIS

The relevant facts in this case are not in dispute.

Anthony Garbacz Jr. was arrested in the State of Iowa by Prairie du Chien, Wisconsin police officer Anthony Berg for OWI 2nd pursuant to Wisconsin Statute 346.63(1)(a).

While Iowa permits a Wisconsin police officer to make such an arrest if in "fresh pursuit" of a suspected felon, it requires the officer to take the person arrested before an Iowa magistrate "without unnecessary delay" for a hearing to determine the lawfulness of the arrest.

Officer Berg did not do this. Instead, Garbacz was immediately returned to the State of Wisconsin for the purpose of extracting evidence from his body.

The Wisconsin Circuit Court subsequently ruled that while the removal of defendant Garbacz from Iowa by Wisconsin police officer Berg was indeed *illegal*, the underlying arrest was *legal*, and therefore the exclusionary rule did not apply to evidence seized resulting from the arrest.

The glaring problem with the Court's findings, however, is that a Wisconsin trial court's personal jurisdiction over a criminal defendant is dependent upon the defendant's physical presence before the court pursuant to a lawful arrest. *Walberg v. State*, 73 Wis. 2d 448, 457-58, 243 N.W.2d 190, 195 (1976). But here, with the arrest being in Iowa, the only entity with the power to determine if the arrest was lawful in the first place was the Iowa Court, and it was not allowed to do so. *See* Iowa Code, § 806.2.

Simply put, the Wisconsin Circuit Court overstepped its boundaries and made a ruling it is incapable of making - if an arrest is made in Iowa by an officer of another state in the State of Iowa, the determination of the validity of the arrest is reserved exclusively to the jurisdiction of the Iowa Court. *Id.*

Iowa Code § 806 is very clear on the procedures that must be followed relevant to an arrest by an out of state police officer within its borders and substantially mirrors Wisconsin Statute § 976.04.

(1) Any member of a duly organized state, county, or municipal law enforcing unit of another state of the United States who enters this state in fresh pursuit, and continues within this state in such fresh pursuit, of a person in order to arrest the person on the ground that the person is believed to have committed a felony in such other state, shall have the same authority to arrest and hold such person in custody, as has any member of any duly

organized state, county, or municipal law enforcing unit of this state, to arrest and hold in custody a person on the ground that the person is believed to have committed a felony in this state.

(2) If an arrest is made in this state by an officer of another state in accordance with the provisions of section 806.1, the officer shall without unnecessary delay take the person arrested before a magistrate of the county in which the arrest was made, who shall conduct a hearing for the purpose of determining the lawfulness of the arrest. If the magistrate determines that the arrest was lawful the magistrate shall commit the person arrested to await for a reasonable time the issuance of an extradition warrant by the governor of this state or admit the person to bail for such purpose. If the magistrate determines that the arrest was unlawful the magistrate shall discharge the person arrested.

It is easy to glean from this that an arresting out of state officer may only be discharged once the Iowa Court has found the arrest to be lawful, and that a defendant may only be transported back to Wisconsin as the result of such a finding. It is impossible under Iowa law to legally do the latter without having first done the former.

Again, despite the plain meaning of the Iowa law, the Wisconsin Court ruled that Garbacz's arrest was lawful, but his removal back to Wisconsin to gather blood test evidence against him without a hearing in Iowa to determine the lawfulness of his arrest was not.

The Court reached its conclusion by deciding that because there was no specific statutory rule on what to do with evidence seized under such circumstances, that the matter was one of first impression and guidance could be found under Wisconsin and federal law pertaining to the Uniform Criminal Extradition Act, to wit:

The Wisconsin Supreme Court in *State ex rel Niederer v. Cady*, 72 Wis. 2d 311, 317 (1975) stated: The statutory extradition process is a right conferred upon the asylum State whereby, as a sovereign, it may assert its rights to protect its own citizens or

persons within its boundaries from unjust criminal actions that may be brought by a sister sovereign state. It is apparent, therefore, that a defendant has no constitutional right to extradition. Only the asylum state has any rights in that regard.”

And,

The Wisconsin Supreme Court quoted the United States Supreme Court in *Lascelles v. Georgia*, 148 US 537, 542 (1893) in support of its holding as follows:

“The sole object of the provision of the Constitution [Art. IV, sec. 2] and the act of Congress to carry it into effect is to secure the surrender of person accused of crime, who have fled from the justice of the State, whose laws they are charged with violating. Neither the Constitution, nor the act of Congress providing for the rendition of fugitives upon proper requisition being made, confers, expressly or by implication, any right or privilege upon such fugitives... [or] exemption from trial for any criminal act done therein.” *Id.*

And,

The Wisconsin Supreme Court in *Niederer* (*Id.* at 316), further stated:

“The United States Supreme Court has gone so far as to say that, constitutionally, a prisoner may be tried even though the extradition process is totally ignored in removing him from an asylum State, and even under circumstances where he is removed by force.” (Citations omitted). (Docket #12 App. p. 2-5).

But the real issue here is not about fugitives and extraditions. The real issue is whether the scope of inquiry and statutory procedure required by Iowa Code § 806 to determine if a lawful arrest ever took place to begin with.

And it did not. A Magistrate’s review of the propriety of the actual manner of arrest is not the same thing as the extradition of a defendant who has already been determined to have been lawfully arrested. In fact, it is only *after* an Iowa Magistrate finds an arrest to be lawful that extradition can even occur. *See* Iowa Code § 806(2).

The record shows that Officer Berg was responding to squealing tires and speeding. Was it reasonable for him to believe Garbacz had committed a felony at the time he pursued him across State Lines? Was Officer Berg in fresh pursuit of Tony Garbacz? If he was, did the fresh pursuit commence before or after he crossed state lines? Why were his emergency lights off when he was in Iowa? Did Officer Berg even think Garbacz had committed a felony when he followed him into Iowa? Garbacz was cited by Officer Berg for OWI 2nd, on the night of his arrest and not charged with felony attempting to flee a traffic officer under Wis. Stat. 346.04(3) until 3 months later on July 7, 2015, after questions about the propriety of his arrest arose. (Docket #2 App.: Docket #32 App. ¶¶9-13 p. 15).

Had Garbacz been afforded his statutory and Constitutional rights and been taken before an Iowa Magistrate “without unnecessary delay” as mandated, we would know the answers to these questions, and we would also know if his arrest was in fact lawful.

Officer Berg had no authority to arrest Garbacz in the State of Iowa except for that authority granted to him under the Iowa Fresh Pursuit Law. It is only reasonable to conclude that since the State of Iowa, through its statute, created the authority to make the arrest, that the arrest can only be valid if the specific and necessary legal conditions imposed by the State of Iowa to establish the lawfulness of the arrest are followed - including Iowa’s sovereign right to determine if they were.

Because they were not, Garbacz was deprived of the procedural due process and protections afforded him by Iowa Code § 806, the rights guaranteed by the 1st, 4th, 5th, 6th, 8th, and 14th Amendments to the United

States Constitution and article I, sections 1, 3, 6, 7, 8, and 11 of the Wisconsin Constitution.

Furthermore, aside from Garbacz's individual rights, substantial matters effecting State Sovereignty are also at issue. It is long and well established that one state cannot infringe upon the sovereignty of another state by exercising direct authority over persons and property located in that other state. *Pennoyerv. Neff*, 95 U.S. 714, 24 L.Ed. 565 (1878).

While Iowa Code § 806 and Wis. Stat. § 976.04, give authority to police officers from foreign states to cross state lines and make arrests under very restrictive conditions, they offer *no* authority for the judges from those foreign states to rule on the lawfulness of such arrests.

If, as the Circuit Court has determined, Wisconsin police officers are given free license to transgress state lines and make arrests on foreign state soil in contempt of the laws of the states they have entered without consequences, then Wisconsin will have no legitimate reason to expect other states to abide by Wis. Stat. § 976.04. Police officers from neighboring states will arguably be able to arrest people in Wisconsin and spirit them away under cover of darkness – or in broad daylight for that matter – leaving arrestees with no forum in our state to promptly raise issues regarding the validity of their arrests.

To reduce these legislatively enacted and purposeful laws to a mere procedural technicality without consequences for those who violate them is to effectively render them meaningless.

Blurring state borders and permitting out of state police officers to cross state lines and ignore our laws while enforcing theirs is contrary to the whole notion of state sovereignty, and as a matter of public policy and an orderly society, just not a good idea.

THE EXCLUSIONARY RULE

So what is the remedy?

Garbacz argues that because the Iowa Court was not given the chance to determine if his arrest was lawful as a consequence of what everyone agrees was an unlawful act by Officer Berg, that the results of his BAC. must be suppressed and that the Court need look no further than the exclusionary rule to do so.

(Docket #'s 10, 32, 33 App.).

The Circuit Court, on the other hand, would have you believe that once the unlawful deed was done Garbacz was at the mercy of the State of Iowa and it should have made a claim for possession of the defendant, arrested officer Berg, or filed for suppression of the evidence or dismissal of the Wisconsin charges, and that Wisconsin bears no responsibility. This of course assumes that an Iowa Court would ever know about such an incident, and if it did, whether it would have the ambition, concern, or resources to actually do something about it. (Docket #12 App.)

The Wisconsin Court would likewise have you believe that it is OK for police officers to break the law as long as the victim has a civil remedy. Rather than Wisconsin remedying the problem caused by its own police officer, the Court places the tremendous burden of rectifying Officer Berg's unlawful conduct squarely on Garbacz by turning him into a civil plaintiff and suggesting that he has tort remedies available to him - presumably suing Officer Berg, the Prairie du Chien Police Department, the assisting Iowa police officers for not stopping Officer Berg from kidnapping him, or the State of Iowa for allowing his statutory and Constitutional rights to be usurped by alien agents (*Id.*).

Courts have the authority to suppress evidence based upon the unlawful conduct of officers in their investigation or apprehension of suspects absent a specific exclusionary remedy contained within the statute. *See, State v. Popenhagen*, 2008 WI 55, 90-97, 309 Wis. 2d 601, 749 N.W.2d 611, *citing Nardone v. United States*, 302 U.S. 379, 59 S. Ct. 275, 82 L. Ed. 314 (1937), and *Nardone v. United States*, 308 U.S. 338, 340, 60 S Ct. 266, 84 L. Ed. 307 (1939). Like the wiretap laws violated by the government agents in the *Nardone* decisions, or the bank records act violated by government agents in *Popenhagen*, Iowa's interstate pursuit laws violated by Officer Berg fail to enumerate any conditions or exceptions indicating when it is permissible for a police officer to break them. *See*, Wis. Stat. 346.02(5).

When the principles of the fourth amendment are jeopardized by an illegal arrest, the Court follows a long line of federal cases holding that "[t]he exclusionary rule directs what proof the government may offer against a defendant at trial [thereby] closing the courtroom door to evidence secured by official lawlessness." *State v. Smith*, 131 Wis. 2d 220, 238-39, 388 N.W.2d 601, 609-10 (1986). *See, United States v. Crews*, 445 U.S. 463 (1980).

Once the Court concludes that an arrest is unlawful, it looks to the facts to see if there exists any fruit of the illegal arrest. *Id. Smith, See, Taylor v. Alabama*, 457 U.S. 687 (1982); *Dunaway v. New York*, 442 U.S. 200 (1979). The primary purpose of the exclusionary rule is to deter unlawful police conduct while also preserving judicial integrity. *Terry v. Ohio*, 392 U.S. 1, 12-13 (1968).

None of the mandates set forth in Iowa's Uniform Fresh Pursuit Law were complied with by the arresting officer from Wisconsin. Officer Berg had been trained in the procedures necessary to affect an out of state arrest which were detailed in his police department's policy manual, yet he summarily ignored them and transported Garbacz back to Wisconsin for the intentional and immediate purpose of gathering evidence against him. (Docket #10 App. Exhibit A. p.7).

As a matter of public policy and the well defined and shared statutory laws of both Iowa and Wisconsin, foreign agents are prohibited from arresting people and carrying them off to foreign states without the due process prescribed. The Court should conclude that exclusion of evidence obtained from such actions is necessary to ensure the orderly administration of justice when a police officer acts without authority, and to deter future non-compliance in out-of-state arrests.

If evidence is obtained through the exploitation of the illegality of an arrest, it must be excluded from trial. *State v. Flynn*, 92 Wis. 2d 427, 441, 285 N.W.2d 710 (1979). In our case, this is what Garbacz is asking the Courts to do. Simply find that his BAC. is the "the fruit of the poisonous tree" and suppress it.


CONCLUSION

The Wisconsin Circuit Court had no authority to disregard Iowa's jurisdictional powers and find Officer Berg's arrest of Anthony Garbacz Jr. to be lawful in contravention of Iowa Code § 806. The clear and deliberate violation of Iowa law by Officer Berg and overreach by the Circuit Court in disregard of the State of Iowa's Sovereignty and Garbacz's statutory and Constitutional rights require that the fruits of his unlawful arrest be suppressed.

Dated this 1st day of November, 2017.

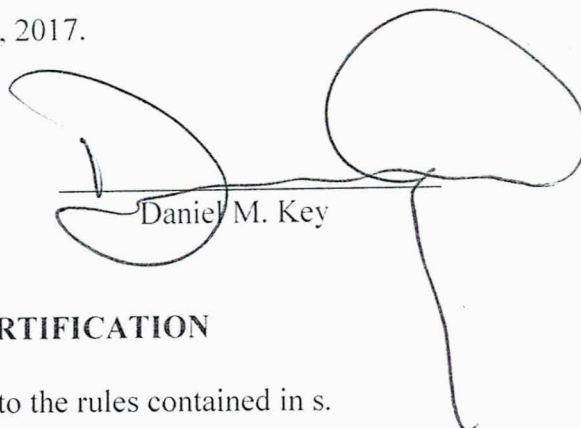
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PROOF OF FILING DATE FOR BRIEF AND APPENDIX

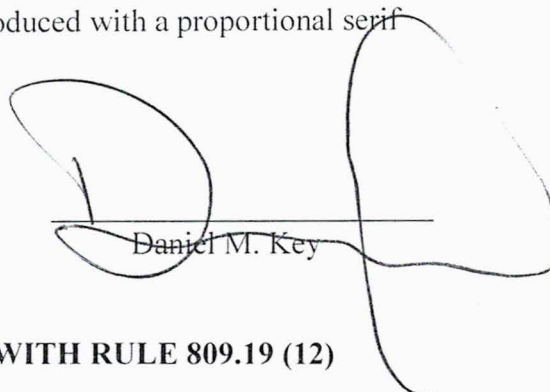
I hereby certify that this brief and appendix were filed by mailing the brief and appendix by first class mail on November 3, 2017.



Daniel M. Key

FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 4514 words.

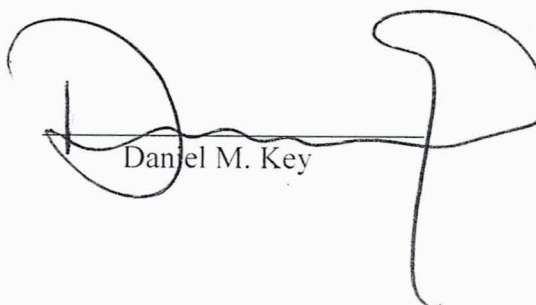


Daniel M. Key

CERTIFICATE OF COMPLIANCE WITH RULE 809.19 (12)

I hereby certify that: I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of s. 809.19 (12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date. A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.



Daniel M. Key