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STATE OF WISCONSIN
C O U R T O F A P P E A L S
D I S T R I C T I V

Case No. 2017AP1419-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ANTHONY HENRY GARBACZ, JR.

Defendant-Appellant.

APPEAL FROM THE OCTOBER 20, 2016
FINAL JUDGMENT ENTERED IN THE
CIRCUIT COURT FOR CRAWFORD COUNTY,
THE HONORABLE LYNN M. RIDER, PRESIDING

**BRIEF AND SUPPLEMENTAL APPENDIX OF THE
PLAINTIFF-RESPONDENT**

TIMOTHY C. BAXTER
District Attorney
State Bar #1001694

Attorney for Plaintiff-Respondent

220 North Beaumont Road
Prairie du Chien, Wisconsin 53821
(608) 326 4802
(608) 326 6519 (Fax)
tim.baxter@da.wi.gov

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**STATEMENT ON PUBLICATION
AND ORAL ARGUMENT**

This is a case of first impression with potential future application, thus the Plaintiff-Respondent feels that publication is warranted. However, the case also presents with a very specific set of facts which are undisputed, therefore the Plaintiff-Appellant feels that oral argument is not needed.

STATEMENT OF FACTS AND CASE

On April 1, 2015, at approximately 12:00 a.m., city of Prairie du Chien, Wisconsin, Police Officer Anthony Berg, was on routine patrol in the city of Prairie du Chien, Crawford County, Wisconsin, when he observed a vehicle westbound on Blackhawk Avenue. Officer Berg observed this vehicle turn south onto South Prairie Street at a high rate of speed, squealing the tires, and turning into the oncoming lane of traffic.

Officer Berg positioned his squad so as to make a traffic stop on this vehicle. Officer Berg attempted to stop this vehicle at the intersection of Wisconsin and Main Streets by engaging his emergency lights in his fully marked Prairie du Chien Police Department squad vehicle. Officer Berg observed the vehicle turn west on Wisconsin Street and accelerates, heading toward the bridge to Iowa at a high rate of speed.

Officer Berg states that he pursued the vehicle, and at one point, with emergency lights and sirens on, his squad reached 65 miles per hour but was losing ground on the pursued vehicle. Officer Berg stated that he was in constant radio contact with Crawford County Law Enforcement Dispatch, who, in turn, was in contact with the Clayton County, Iowa, Sheriff's Department and the Mar Mac, Iowa, Police Department, detailing the pursuit.

Officer Berg states that the pursued vehicle crossed into Iowa at a continued high rate of speed and made several turns on residential streets in a perceived attempt to elude. Officer Berg states that the vehicle stopped at a residence located at 215 South Street, in Marquette, Clayton County, Iowa. Officer Berg states that the driver exited the vehicle and was walking toward a residence. Officer Berg states that while walking, the driver, identified as the above-named defendant-appellant, was approached and engaged by himself and three (3) Iowa law enforcement officers.

Officer Berg states that immediately upon engaging with the defendant-appellant, he noted a strong odor of intoxicants emanating from his person. Officer Berg asked the defendant-appellant if he had had anything to drink that evening. The defendant-appellant replied that he had. Officer Berg ultimately had the defendant-appellant performed field sobriety tests. Officer Berg states that based on the driving and the results of the field sobriety tests, the defendant-appellant was arrested.

Officer Berg states that he and one of the Iowa law enforcement officers escorted the defendant-appellant to Officer Berg's squad, assisted him into the back seat, and the defendant-appellant was transported back to Wisconsin for further processing.

On July 7, 2015, the State of Wisconsin caused to be filed a criminal complaint, Crawford County case number 15-CF-32, charging the above-named defendant-appellant with three (3) counts of crime: Attempting to Elude, a violation of Wis. Stats. § 346.04(3), a felony; Operating a Motor Vehicle While under the Influence, a violation of Wis. Stats. § 346.63(1)(a); and the corresponding Operating a Motor Vehicle with a Prohibited Alcohol Content, a violation of Wis. Stats. § 346.63(1)(b), both misdemeanors.

On or about March 14, 2016, the above-named defendant-appellant filed a “Motion to Dismiss or Suppress Evidence Unlawful Arrest”. On or about March 21, 2016, the plaintiff-respondent filed a brief in opposition to the defendant-appellant’s motion to suppress/dismiss. The Suppression hearing was held in Crawford County Circuit Court, the Honorable Judge James P. Czajkowski presiding on March 23, 2016.

On April 15, 2016, the trial court issued a written decision denying the defendant-appellant’s motion.

The State does not believe these facts are in dispute.

LAW

The uniform law on close pursuit.

At first blush, this fact scenario seems like it should be governed solely by Wis. Stats. Chapter 976, entitled “Uniform Acts in Criminal Proceedings”, specifically Wis. Stats. § 976.04 entitled “Uniform Act on Close Pursuit”. (Attached as Exhibit A). Iowa Code Chapter 806 (attached as Exhibit B) mirrors the language of Wis. Stats. § 976.04.

Wis. Stats. § 976.04 generally provides authority for a law enforcement officer from one state, while in “close pursuit” of a person who has committed a felony, to continue that pursuit into another state and, upon apprehension, arrest that person.

In the present case, Officer Berg’s initial observation at approximately 12:00 a.m. in the downtown area of Prairie du Chien was of the defendant-appellant’s vehicle squealing its tires and accelerating rapidly into a turn and turning into the opposite oncoming lane of travel. The plaintiff-respondent concedes this is not felonious activity. However, when Officer Berg, in his fully marked squad vehicle attempted to perform a routine traffic stop this vehicle, the vehicle sped up and headed toward the bridge connecting

Prairie du Chien to Marquette, Iowa. Officer Berg pursued this vehicle and the vehicle was reaching great speeds and pulling away from Officer Berg into the state of Iowa. The plaintiff-respondent feels this activity by the driver of the pursued vehicle (ultimately identified as the defendant-appellant) fits the elements of Wis. Stats. § 346.04(3), attempting to elude, a felony in the state of Wisconsin.

After the vehicle stopped, Officer Berg arrested the defendant-appellant and transported him back to Wisconsin. Now, at this point, Wis. Stats. § 976.04(2), states that the officer “shall without unnecessary delay take the person arrested before a judge of the county in which the arrest was made (in this case, Clayton County, Iowa), who shall conduct a hearing for determining the lawfulness of the arrest.” It is clear from the record that Officer Berg did not follow this procedure, but instead transported the defendant-appellant directly back to Crawford County, Wisconsin, for processing.

Mutual aid agreement.

Wisconsin Statutes § 175.46 is entitled “Mutual Aid Agreements” (attached as Exhibit C). In relevant part, Wis. Stats. § 175.46(2) authorizes Wisconsin law enforcement agencies to enter into mutual aid agreements with border counties of physically adjacent states. These mutual aid agreements grant Wisconsin law enforcement officers general powers of arrest within those border counties of physically adjacent states.

In May, 1995, law enforcement officials from all law enforcement agencies of Crawford County, Wisconsin, and its border county Clayton County, Iowa, entered into such a mutual aid agreement, which remains to this day (attached as Exhibit D).

ARGUMENT

The plaintiff-respondent asserts that the case at bar is not whether this was a “legal arrest”. Clearly, given the “Uniform Law on Close Pursuit”, coupled with the mutual aid agreement between Crawford County, Wisconsin, and Clayton County, Iowa, Officer Berg had full authority to arrest the above-named defendant-appellant. The issue here is what happened post-arrest.

By Wis. Stats. § 976.04(2), Officer Berg was mandated to bring the defendant-appellant before a judge in the county of the arrest – here being Clayton County, Iowa – who would have then made a finding on the lawfulness of the arrest. This statutory procedure was not followed.

The defendant-appellant moved the trial court for suppression/dismissal based on an “unlawful arrest”, but it has already been established that this was not an “unlawful arrest”. The question is, then, what is the remedy for failing to follow the procedure set out in Wis. Stats. § 976.04(2).

The plaintiff-respondent, although admittedly not a research expert, did not find any Wisconsin appellate cases that address this issue. The plaintiff-respondent did, however, locate, cite, and rely upon State of Iowa v. Dentler, 742 N.W.2d 84 (2007) (attached as Exhibit E). The facts in Dentler are similar, if not basically identical, to those at the case at bar.

State of Iowa v. Dentler, 742 N.W.2d 84 (2007).

In Dentler, defendant Dentler was operating a vehicle on a highway in Wayne County, Iowa. A Wayne County, Iowa, Sheriff's Deputy Charles Henderson observed that defendant Dentler "tested the speed of his car" and "peeled around". Deputy Henderson stated that he heard the "roar" of the engine of the Dentler vehicle as it was gaining speed. Deputy Henderson attempted to stop of the vehicle. Deputy Henderson, in a fully marked squad, engaged his emergency lights and siren. The Dentler vehicle did not stop, but continued on until it crossed the border just into the state of Missouri. Dentler, 742 N.W.2d 84 at 86.

Deputy Henderson radioed the Missouri law enforcement officers who arrived shortly thereafter, as did another Wayne County, Iowa, Deputy Sheriff. Deputy Henderson and the Missouri officers processed the scene which resulted in an OWI investigation concerning defendant Dentler. It was decided between all the officers present that the Iowa officers would proceed with defendant Dentler. Defendant Dentler was arrested by the Wayne County, Iowa, Deputy Sheriffs and transported back to the Wayne County Sheriff's Department for processing. Defendant Dentler was subsequently charged with several offenses in Wayne County, Iowa, District Court. Id.

Defendant Dentler moved to exclude all evidence obtained after his removal from the state of Missouri. Defendant Dentler argued that the failure to be brought before a judge or magistrate in Missouri prior to his removal from Missouri should result in the suppression of all evidence received as a result thereof. Defendant Dentler relies in Missouri Revised Statutes § 544.155.

Missouri Revised Statutes § 544.155, entitled Uniform Fresh Pursuit Law (attached as Exhibit F) essentially mirrors both Iowa Code Chapter 806 and Wisconsin Statutes

§ 976.04. The Wayne County District Court granted defendant Dentler's motion to suppress. The Iowa Supreme Court subsequently took up this issue. Dentler at 87.

The Iowa Supreme Court stated, "The sole issue presented in this case is whether the evidence obtained by Iowa officials after Dentler's arrest in Missouri should be excluded because of the failure of Iowa authorities to present Dentler to a Missouri magistrate." The Iowa Supreme Court noted that there was no case law on this issue, so it looked to other states for guidance. Id.

While the Iowa Supreme Court found that "The courts in other states are split" on this issue, they held that Dentler's rights were not violated, and reversed the District Court's suppression order.

The Dentler court noted that some states have applied an "exclusionary rule" for this exact situation. Dentler specifically cited Commonwealth v. Sadvari, 561 Pa. 588 (2000). In Sadvari, defendant Sadvari had been arrested the state of Delaware by Pennsylvania authorities and brought back to Pennsylvania in violation of the Delaware Uniform Fresh Pursuit Statute. The Pennsylvania Supreme Court held "that the violation of the magistrate provision of Delaware's Fresh Pursuit Statute required application of the exclusionary rule as a demonstration of comity and vindication of Delaware's "important state interest" in its "sovereignty"". Dentler at 87. The Sadvari court, as noted by Dentler, "believed the exclusionary rule was necessary in light of the "unlawful seizure" of the defendant". Id. See also, People v. Jacobs, 67 Ill. App.3d 447, 385 N.E.2d 137 (1979).

The Dentler court, however, also recognized that some states have refused to apply the exclusionary rule for such violations. Dentler cited, and ultimately relied upon, State v. Ferrell, 218 Neb. 463, 356 N.W.2d 868 (1984) as authority. Dentler at 87.

In Ferrell, the defendant was arrested in the state of Iowa by Nebraska law enforcement officers, but was not brought before an Iowa magistrate as required by Iowa's Fresh Pursuit law. Dentler at 87. The Ferrell court found "that the validity of the arrest was not affected by the failure to present the accused to an Iowa magistrate". Id., State v. Ferrell, 356 N.W.2d at 871. The Ferrell court went further and held "that the failure to comply with the magistrate provision did not amount to a due process violation that required the exclusion of evidence." Id. See also State v. Bonds, 98 Wn2d 1, 653 P.2d 1024 (1982).

The Dentler court reiterated its position on the exclusionary rule:

This court has not hesitated to apply the exclusionary rule where fundamental constitutional rights have been violated. (Citation omitted). We have embraced the exclusionary rule to ensure that fundamental constitutional rights do not become dead letter, to deter future police misconduct, and to prevent the integrity of the courts from being undermined through the admission of unlawfully obtained evidence. Our strong commitment to the exclusionary rule where constitutional violations are present is further demonstrated by our unequivocal rejection of a good faith exception.

Dentler at 87.

Recognizing that "Dentler claims the exclusionary rule should apply because his due process were violated by the failure of the deputies to present him to a Missouri magistrate", Dentler at 88, and keeping in mind their strong belief in applying the exclusionary rule, supra, the Dentler court nonetheless rejected that claim.

Prior to his transport to Iowa, officers observed Dentler driving erratically. He then eluded officers for a time by driving into Missouri. The deputies also discovered two open cans of beer. When questioned, Dentler admitted to consuming an unknown quantity of beer. His breath smelled of alcohol, and his eyes were watery. Under the law of Missouri, we are convinced that the above facts would have supported a finding of probable cause had Dentler been taken before a Missouri magistrate. Dentler at 88 – 89.

In its analysis, the Dentler court found that Iowa law does not specifically require the exclusion of the evidence, nor does the law of the state of Missouri for violating the magistrate requirement. Nor does the law in Wisconsin. Dentler at 89. The court also found that Dentler had no fundamental right violated. Id.

The court’s final analysis focused on the fact that Dentler’s claim would necessarily result in an expansion of Iowa’s long-held current application of the exclusionary rule – the argument being that “without applying the exclusionary rule there will be insufficient deterrence to avoid future violations. Dentler at 90.

The court addressed this very succinctly:

Because the benefits of violating the magistrate provision are so small . . . we do not think the incentive for future violations is very high. If we are wrong in this assessment, the Missouri legislature may withdraw its authorization of Iowa peace officers to engage in fresh pursuit. Further, because this opinion is narrowly based on the unique facts of this case, law enforcement officials have no certainty that the exclusionary rule will be held inapplicable under a different state of facts, particularly where the record demonstrates willful misconduct. Finally, in the unlikely event that such violation become a

recurrent problem, this court reserved the right to exercise its supervisory powers to exclude evidence in future cases.

Dentler at 90.

With that, the Dentler court reversed the suppression order of the trial court.

CONCLUSION

The Plaintiff-Respondent asserts that the narrow fact scenario in Dentler is essentially identical to the fact scenario in the case at Bar, and is undisputed. The laws of Wisconsin are essentially identical as those of Iowa and Missouri when it comes to fresh pursuit.

The trial court in the present case made findings consistent with the holding in Dentler. The trial court found that Officer Berg noted erratic driving by the Defendant-Appellant and attempted to make a traffic stop. The trial court found that the Defendant-Appellant fled and attempted to elude arrest by driving into the state of Iowa, with Officer Berg in constant pursuit. The trial court found that the subsequent arrest in Iowa complied with the fresh pursuit laws of Iowa.

It was also found by the trial court that Officer Berg did not bring the Defendant-Appellant to a magistrate as directed by law, but instead, after conversing with Iowa law enforcement, transported the Defendant-Appellant back to Wisconsin.

In reliance on Dentler, the trial court held that the failure of law enforcement to bring the Defendant-Appellant before a magistrate in Iowa did not violate the Defendant-Appellant's statutory or constitutional rights, thus the suppression/dismissal motion was denied.

Therefore, the plaintiff-respondent respectfully requests that the above-named court make the same findings and affirm the trial court's decision.

Dated this 16th day of February, 2018.

Respectfully submitted,

TIMOTHY C. BAXTER
District Attorney
State Bar #1001694

Attorney for Plaintiff-Respondent

Crawford County District Attorney's Office
220 N. Beaumont Road
Prairie du Chien, WI 53821
(608) 326-4802
(608) 326-6519 (Fax)
Tim.Baxter@da.wi.gov

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 2,605 words.

Dated this 16th day of February, 2018.

TIMOTHY C. BAXTER
District Attorney

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 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 Wis. Stat. § 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.

Dated this 16th day of February, 2018.

TIMOTHY C. BAXTER
District Attorney