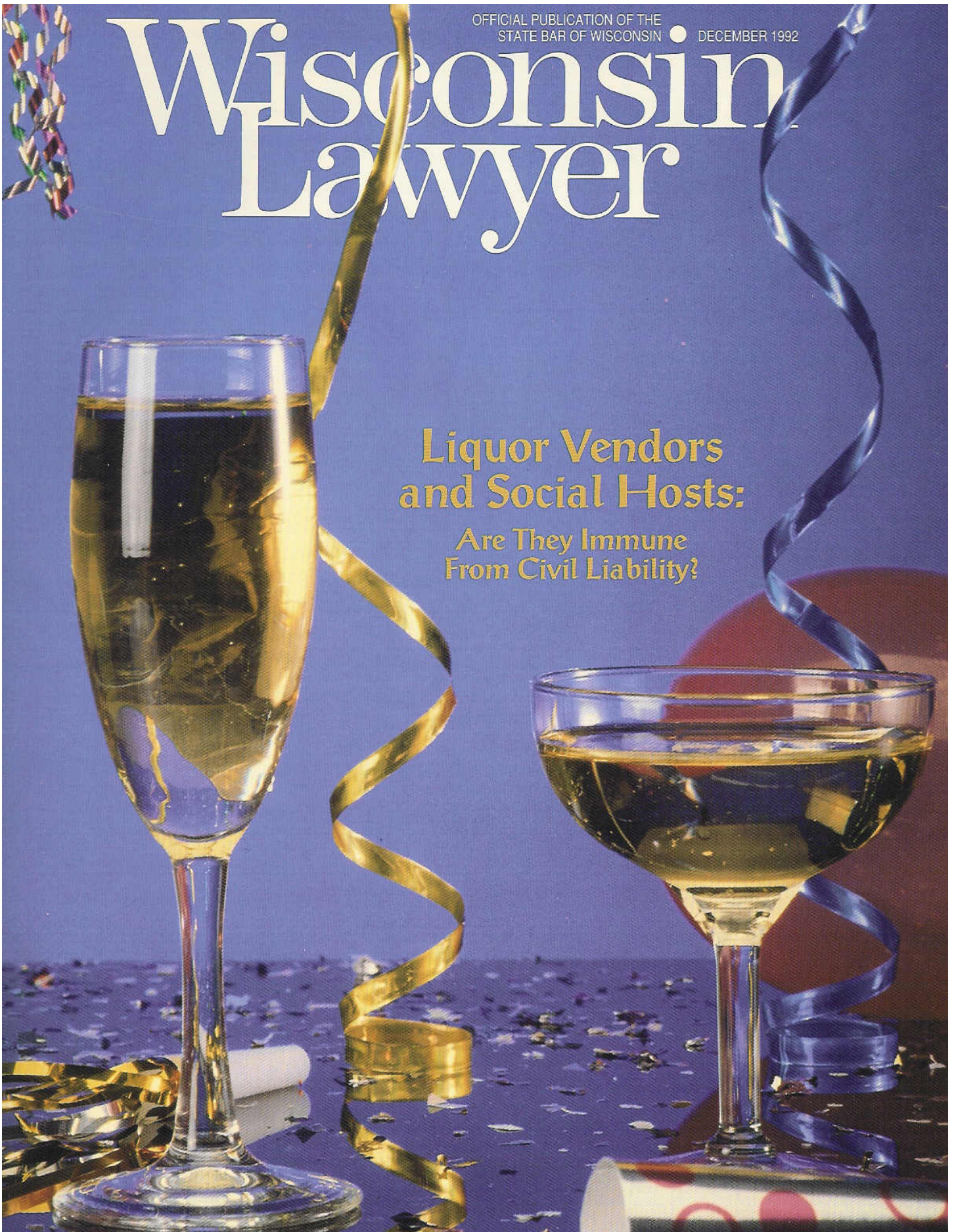


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Wisconsin Lawyer

Liquor Vendors and Social Hosts:

Are They Immune
From Civil Liability?



Municipal police officers right to stop and arrest in foreign jurisdictions

E. Joseph Kershek

Over the last several years, the Wisconsin Court of Appeals District II has dealt with cases involving challenges by defendants who have been stopped and arrested by municipal police officers who are clearly outside of their geographic jurisdiction. The court recently has completed a trilogy of cases involving similar issues with each having a distinctly different factual setting. In each case the court has ruled against the defendant and has greatly expanded the rights of municipal police officers to enter foreign jurisdictions to make stops and arrests. This article discusses the new guidelines established and the circumstances under which municipal police officers may step out of their geographical jurisdiction to make stops and arrests.

City of Brookfield v. Collar

The first such case the court of appeals faced dealt with the right of municipal police officers to make extrajurisdictional stops and arrests while in close or fresh pursuit, particularly where the probable cause itself occurred within the officer's own jurisdiction, but the stop and arrest occurred in another. *Brookfield v. Collar*¹

E. Joseph Kershek, Marquette 1979, also received a B.A. cum laude in political science. He currently is the prosecuting attorney for the City of Brookfield and Town of Delafield, responsible for all municipal and circuit court prosecutions of municipal traffic and nontraffic ordinance violations. He also is engaged in private practice with Kershek Law Offices, Milwaukee.

New guidelines permit municipal officers to stop and arrest outside their jurisdiction in limited circumstances

involved a city of Brookfield police officer who initially observed a defendant's vehicle speeding and operating with expired plates. The officer immediately commenced following the defendant for about one-half mile, where the officer also saw the defendant weaving within his own lane and crossing the center line. All of the above observations occurred within the Brookfield city geographical corporate limits.

Both vehicles then stopped for a red light at an intersection that separated Brookfield from the village of Elm Grove. The officer did not at that time turn on her emergency lights or siren for purposes of making the stop, because the officer felt that the defendant might attempt to enter the intersection and create a potential safety problem for oncoming traffic. Both vehicles travelled into Elm Grove, however, the officer again was not able to activate her siren or lights due to substantial road construction that created another potential hazard for this stop. After safely passing the construction site and after travelling approximately one mile into Elm Grove, the officer stopped the defendant's vehicle. The defendant then was requested to perform field sobriety tests in Elm Grove and was arrested by the Brookfield officer for operating a motor vehicle while under the influence of an intoxicant.

The defendant argued that all evidence obtained from the stop and arrest should be dismissed because the Brookfield officer had

WISCONSIN LAWYER

no authority to arrest the defendant outside of the officer's geographical jurisdiction. In upholding the stop and arrest, the *Collar* court reasoned that section 175.40 of the Wisconsin Statutes² clearly gives police officers the right, while in fresh pursuit, to follow a suspect anywhere in the state where there has been a violation of any ordinance that the officer is authorized to enforce. The *Collar* court also promulgated the following three guidelines to determine whether an officer had acted in fresh pursuit and, therefore, effectuated a lawful arrest in a foreign jurisdiction.³

- 1) The police must act without unnecessary delay⁴;
- 2) The pursuit must be continuous and uninterrupted, but there need not be a continuous surveillance of the suspect or uninterrupted knowledge of the suspect's whereabouts⁵; and
- 3) A final consideration is the relationship in time between commission of the offense, the commencement of the pursuit and the apprehension of the suspect. The greater the length of time, the less likely it is that the circumstances in which the police acted were sufficiently exigent to justify an extrajurisdictional arrest.

The *Collar* court found that the Brookfield officer responded immediately to the defendant's driving, reasonably delayed the stop of the defendant due to safety factors, and conducted a continuous and uninterrupted pursuit resulting in the apprehension of the defendant within a short period. As a result, the defendant's motions were denied and the defendant's conviction was upheld as a lawful arrest.

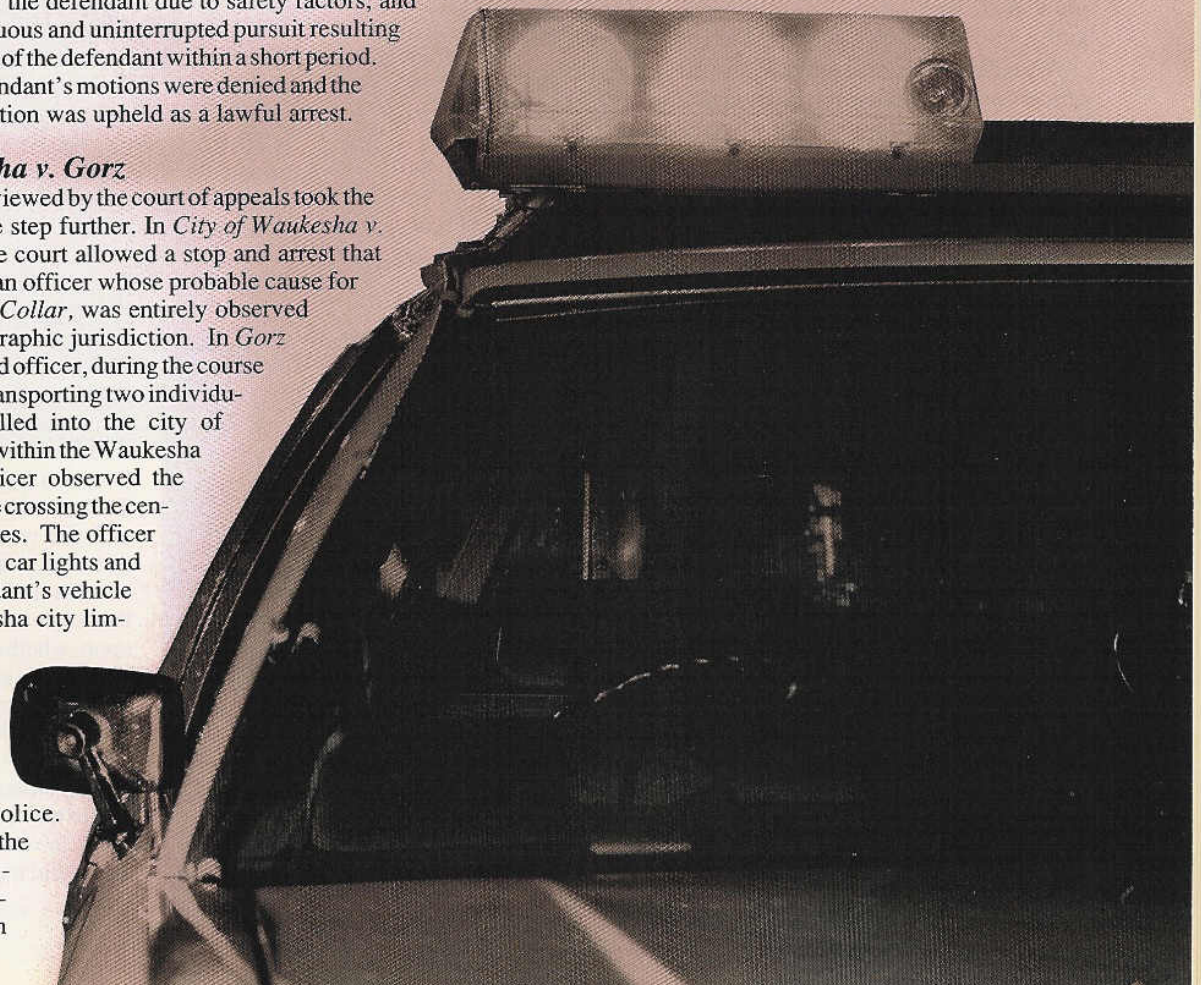
City of Waukesha v. Gorz

The second case reviewed by the court of appeals took the *Collar* concept one step further. In *City of Waukesha v. Gorz*,⁶ the appellate court allowed a stop and arrest that was performed by an officer whose probable cause for the stop, unlike in *Collar*, was entirely observed outside of his geographic jurisdiction. In *Gorz* a town of Brookfield officer, during the course of his duties, was transporting two individuals and had travelled into the city of Waukesha. While within the Waukesha city limits the officer observed the defendant's vehicle crossing the center line several times. The officer activated his squad car lights and stopped the defendant's vehicle within the Waukesha city limits. The Brookfield officer, while in full uniform, detained the defendant and called for the Waukesha city police. When they arrived the defendant performed field sobriety tests, was taken

into custody and arrested by the Waukesha police officers for operating a motor vehicle while under the influence of an intoxicant. The parties stipulated that at no time did the Brookfield officer observe the defendant operating his motor vehicle in Brookfield. It is important to note that because the Brookfield officer did not observe the defendant's driving in Brookfield, the case did not involve an issue concerning close or fresh pursuit.

The defendant challenged the stop as illegal, claiming that the officer was without authority to effect a stop outside of his official jurisdiction and, therefore, all evidence obtained therefrom was subject to suppression.⁷ The defendant further argued that even as a private citizen, the Brookfield officer can only make a citizen's arrest for a felony or a serious misdemeanor affecting a breach of the peace committed in his presence, while outside his official jurisdiction.⁸ The defendant additionally argued that it was not reasonable to give the officer the status of a private citizen when he was operating a marked squad car with flashing lights, wearing an official uniform and otherwise using the authority of his position to effect a stop.

It is interesting to note that prior to *Gorz* there had never



been a ruling by the Wisconsin courts that the violation of operating a motor vehicle while intoxicated constituted a breach of the peace. More notably, the *Gorz* court was faced with a defendant who was charged with a noncriminal, first offense charge of operating a motor vehicle while intoxicated.

In rejecting the defendant's arguments, the *Gorz* court noted that as a general rule police officers acting outside their jurisdiction do not act in an official capacity and do not have official power to arrest. However, the court further stated that under certain circumstances, police officers who venture outside their territorial jurisdictions still remain citizens and may in fact effect valid arrests under circumstances in which any private citizen could have made them.⁹ The court specifically rejected the argument that an officer is not an ordinary citizen merely because official police indicia are used. The court held that "police officers may cease to be police officers when they leave their jurisdiction, but they do not cease to be persons." Although an officer is trained in criminal law enforcement and may have special expertise beyond the average citizen, it made no sense to the court that officers should be prohibited from using their expertise or equipment to make extrajurisdictional stops.

More importantly, the court specifically found that a civil and nonjailable charge of operating a motor vehicle while under the influence of an intoxicant amounted to a breach of the peace involving an activity "which threatens the public security and involves violence." In citing both state and federal supreme court precedents, the *Gorz* court emphasized the tragedy, "slaughter" and "carnage" caused on our highways by intoxicated drivers.¹⁰ The court concluded by reiterating that driving while intoxicated is an inherently dangerous activity having a reasonably foreseeable result of death to an individual. The trial court's judgment of finding the defendant guilty was, therefore, upheld by the court of appeals.

Whether the rationale of the *Gorz* court will permit police officers outside of their jurisdiction to stop and detain drivers for minor traffic offenses, such as speeding or improper turns, is questionable and doubtful. However, under the *Gorz* rationale, the same officer who, outside of his or her jurisdiction, observes one drive recklessly creating potential hazards of substantial injury or death to the driver or another would be justified to stop and detain the driver under the theory that such conduct amounts to a breach of the peace.

City of Brookfield v. Berghauer

The most recent case expanding the rights of municipal officers outside their jurisdiction occurred in *Brookfield v. Berghauer*,¹¹ wherein the appellate court upheld the right of police officers to make stops and arrests outside their jurisdictions while travelling on the foreign side of a boundary highway. One aspect of this case involved the constitutionality of section 175.40(4) of the Wisconsin Statutes, which permits a police officer whose boundary is a border highway, to enforce laws or ordinances that he or she otherwise is authorized to enforce by arrest or issuance of a citation on the entire width of a highway lo-

cated in an adjacent jurisdiction.¹² Prior to *Berghauer* the Wisconsin courts had not been called upon to render an opinion concerning the enforceability of section 175.40(4).

In *Berghauer*, while on routine patrol a Brookfield police officer, while travelling north on 124th Street, paced the defendant's vehicle travelling in excess of the 35-mile-per-hour posted speed limit. The officer stopped the defendant's vehicle on northbound 124th Street and issued the defendant a speeding citation. At this location, northbound 124th Street is the boundary highway between the city of Brookfield on the west and the city of Wauwatosa on the east. There was no dispute that the officer's observations occurred while he was in Wauwatosa; all of the defendant's driving occurred in Wauwatosa; 124th Street not only separates Brookfield from Wauwatosa but also it separates Milwaukee County from Waukesha County; and that the stop and citation issuance all occurred in Wauwatosa.

The defendant argued, among other things, that the city of Brookfield had no authority to prosecute him under its ordinances for an offense occurring in Wauwatosa. The defendant further argued that section 175.40(4) only permits a foreign arrest for an offense committed in the officer's jurisdiction, and not the enforcement of an ordinance for an offense committed in a foreign jurisdiction. The defendant's position was that an officer must first be in close or fresh pursuit of a person within that officer's jurisdiction, to later make a stop or arrest in another municipality on a border highway. The defendant also argued that section 66.32 of the Wisconsin Statutes prohibits cities and villages to legislate and regulate highways located within the corporate limits of another.¹³

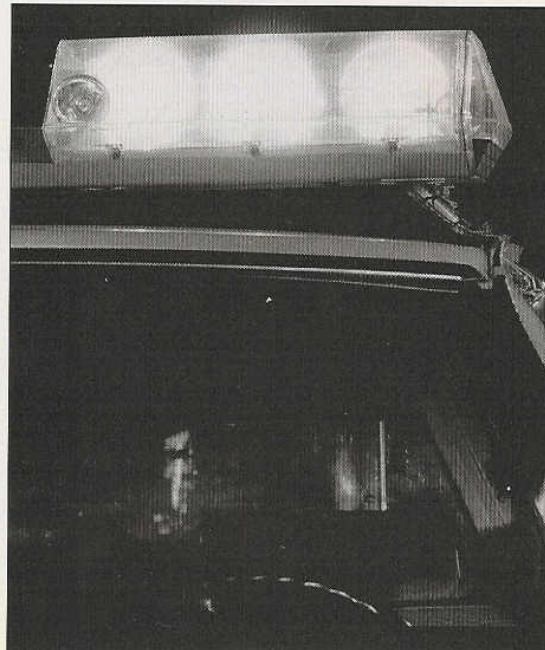
In rejecting all three of the defendant's arguments, the *Berghauer* court held that section 175.40(4) was clear and unambiguous on its face in permitting police officers to enforce an ordinance of his or her jurisdiction on the entire width of a boundary highway. All actions of the officer were found to have followed the statute. Moreover, the court noted that it was not the Brookfield Common Council that presumed to regulate conduct in Wauwatosa, but rather, it was the Wisconsin Legislature that enacted section 175.40(4) giving Brookfield ordinances limited extraterritorial application.

The *Berghauer* court noted that the posted speed limit on both the Brookfield and Wauwatosa sides of 124th Street in the area where the offense occurred, were the same. At a footnote,

the appellate court acknowledged the defendant's argument, stating that the court's ruling would permit Brookfield to enforce lower speed limits on 124th Street where Wauwatosa permitted a higher speed limit.¹⁴ The court further noted that such an issue was not before it, and therefore was not required to address it. The court indicated that such an issue may depend upon whether the Wauwatosa ordinance operated to suspend the extraterritorial provisions of section 175.40(4). To avoid such a challenge to the statute or the arrest, adjacent municipalities would be wise to keep the speed limits the same on both sides of the boundary highways.

(continued on page 60)

WISCONSIN LAWYER



Police

(from page 20)

Conclusion

As a general rule, police officers who venture outside their jurisdiction do not act in an official capacity and, therefore, do not have official power to arrest. However, the Wisconsin appellate court has established new guidelines and has upheld state statutes permitting the right of municipal police officers to stop and arrest outside of their jurisdictions in limited instances.

In *Brookfield v. Collar* the court of appeals articulated new guidelines to be used by circuit and municipal courts to determine whether a municipal police officer effectuated a lawful arrest in a foreign jurisdiction after a fresh or close pursuit. This case dealt with a specific factual setting where the probable cause for stop and arrest occurred within the officer's own jurisdiction, but the stop and arrest itself occurred outside of the officer's jurisdiction.

In *Waukesha v. Gorz* the appellate court expanded the right of a municipal police officer to effect a stop in another jurisdiction even when the officer is not in a fresh or close pursuit commencing in his or her own municipality. The *Gorz* court for the first time ruled that a noncriminal violation of operating under the influence of an intoxicant constituted a serious breach of the peace thereby permitting an officer outside of his or her jurisdiction to make a valid stop or arrest under the same circumstances in which any private citizen could have made them.

In *Brookfield v. Berghauer* the court of appeals for the first time rendered a decision concerning the enforceability of the Wisconsin statute dealing with a municipal officer's jurisdiction over both sides of a boundary highway. In upholding the validity of section 175.40(4), the Wisconsin court specifically permitted the right of municipal police officers to enforce an ordinance of his or her jurisdiction on the entire width or intersection of a boundary highway. In so doing the appellate court appeared to continue the trend of expanding the right of municipal police officers to make stops and arrests in foreign jurisdictions.

Finally, it is interesting to note that two of the above three cases involved a defendant charged and convicted of operating a motor vehicle while intoxicated. Given the potential and inherent dangers of one who drives intoxicated, particularly as expressed in no uncertain terms in *Gorz*, this author believes that the courts will continue to expand the

rights of municipal police officers to make stops and arrests in foreign jurisdictions for these types of offenses or related offenses, both criminal and noncriminal. Given the same potential for causing a dangerous situation while operating a motor vehicle even while not intoxicated, the Wisconsin courts may continue to expand the rights of municipal police officers to enter other jurisdictions for stops and arrests involving other types of major traffic violations such as reckless driving, operating after revocation, operating while suspended, eluding an officer and failing to stop after an accident (with personal injury). Additionally, the Wisconsin courts may expand the above rights of municipal police officers in other noncriminal areas where the defendant's conduct clearly amounts to a breach of the peace involving a serious threat to public security or any type of violence against person or property.

Endnotes

¹*Brookfield v. Collar*, 148 Wis. 2d 839, 436 N.W.2d 911 (Ct. App. 1989). For a discussion of this case in relation to the concepts of close, fresh and hot pursuit, see Kershek, *Stops and Arrests Outside a Municipal Officer's Jurisdiction*, 62 Wis. Law. 19 (Sept. 1989).

²Wis. Stat. section 175.40(2) provides that: "For purposes of civil and criminal liability, any peace officer may, when in fresh pursuit, follow anywhere in the state and arrest any person for the violation of any law or ordinance which the officer is authorized to enforce."

³The Wisconsin Court of Appeals basically adopted the three criteria used in determining an officer's rights under fresh pursuit, which originally were set forth in *Charnes v. Arnold*, 600 P.2d 64, 66 (Colo. 1979).

⁴See *Schindelar v. Michaud*, 411 F.2d 80 (10th Cir. 1969).

⁵*United States v. Oaxaca*, 569 F.2d 518 (9th Cir. 1978); *People v. Clark*, 46 Ill. App. 3d 240, 4 Ill. Dec. 785, 360 N.E.2d 1160 (5th Dist. 1977); *United States v. Getz*, 381 F. Supp. 43 (E.D. Pa. 1974); and *Reyes v. Slayton*, 331 F. Supp. 325 (W.D. Va. 1971).

⁶*Waukesha v. Gorz*, 166 Wis. 2d 243, 479 N.W.2d 221 (Ct. App. 1991).

⁷The defendant in *Gorz* argued that section 66.315 of the Wisconsin Statutes and *State v. Barrett*, 96 Wis. 2d 174, 291 N.W.2d 498 (1980), stood for the proposition that the town of Brookfield officer's attempt to exercise his official powers as a police officer outside of his municipality of employment, absent special circumstances (such as fresh pursuit or mutual assistance), did not constitute "acting within the scope of his employment."

⁸In support of the defendant's argument that officers can only make a citizen's arrest for a felony or a serious misdemeanor affecting a breach of the peace, which is committed in the officer's presence outside his official jurisdiction, the defendant cited *State v. Hart*, 539 A.2d 551 (Vt. 1987), *People v. Lahr*, 566 N.E.2d 12 (Ill. App. 2d Dist. 1991), and *State v. Slawek*, 114 Wis. 2d 332, 338 N.W.2d 120 (Ct. App. 1983).

⁹In *State v. Slawek*, supra note 8, the court of appeals reversed a trial court that had dismissed a complaint against a defendant for burglary where

Illinois police officers arrested the defendants in Wisconsin for a burglary occurring in Wisconsin. The *Slawek* court stated that the arrest was not invalidated by the police officers' lack of official capacity, and that the officers as private citizens were entitled to arrest the defendants when they observed them commit burglary. This case dealt with the commission of a felony.

¹⁰In holding that operating a motor vehicle while intoxicated is an activity that amounts to a breach of the peace, the *Gorz* court commented at page 247: "Those who drive while under the influence put their own lives plus the lives of those they encounter on the road in serious danger. As early as 1957, the U.S. Supreme Court recognized that '[t]he increasing slaughter on our highways [caused by intoxicated drivers], most of which should be avoidable, now reaches the astounding figures only heard of on the battlefield.'" *Breithaupt v. Abram*, 352 U.S. 432 (1957). More recently, the Court commented:

"The situation underlying this case — that of the drunk driver — occurs with tragic frequency on our nation's highways. The carnage caused by drunk drivers is well documented and needs no detailed recitation here. This Court, although not having the daily contact with the problem that the state courts have, has repeatedly lamented the tragedy."

See also Wis. Stat. § 967.05(5)(1)(a). "The Legislature intends to encourage the vigorous prosecution of offenses concerning the operation of motor vehicles by persons under the influence of an intoxicant, a controlled substance or both, under the influence of any other drug to a degree which renders him or her incapable of safely driving, or under the combined influence of an intoxicant and any other drug to a degree which renders him or her incapable of safely driving or having a blood alcohol concentration of 0.1% or more."

¹¹*City of Brookfield v. Berghauer*, No. 92-0192-FT (Wis. Ct. App., Aug. 19, 1992) (publication ordered Sept. 22, 1992).

¹²Section 175.40(4) provides: "A peace officer whose boundary is a highway may enforce any law or ordinance that he or she is otherwise authorized to enforce by arrest or issuance of a citation on the entire width of such a highway located in an adjacent jurisdiction. This subsection does not extend an officer's jurisdiction outside the boundaries of this state."

¹³Wis. Stat. section 66.32 states: "The extraterritorial powers granted to cities and villages by statute, including ss. 30.745, 62.23(2) and (7a), 66.052, 146.10 and 236.10, shall not be exercised within the corporate limits of another city or village. Wherever such statutory extraterritorial powers shall overlap, the jurisdiction over said overlapping area shall be divided on a line all points of which are equidistant from the boundaries of each municipality concerned so that not more than one municipality shall exercise such power over any area."

¹⁴The *Berghauer* court at footnote 3, specifically commented: "Although the posted speed limits on both sides of North 124th Street in the area where this offense occurred are the same, *Berghauer* contends that our ruling would permit Brookfield to enforce its lower speed limit in those other areas of North 124th Street where Wauwatosa permits a higher speed limit. Such a hypothetical situation is not before us and we are not required to address it. However, the resolution of such a case would, perhaps, turn upon whether the Wauwatosa ordinance operated to qualify or suspend the extraterritorial provision of sec. 175.40(4), Stats. See generally, 1A N. Singer, *Sutherland on Statutes and Statutory Construction*, § 23.18 (rev. 4th ed. 1985)." ■