

Kenosha County

Petitioner

v.

2020 FO 620

2020 FO 702

2020 FO 754

Jaleel Dent

Shavonna Furguson

Patrick J.L. Gattie

Respondents

Findings and Order

On August 31, 2020, the Kenosha County District Attorney's Office filed an ordinance in these matters alleging a violation of Wis. Stat. § 323.28/323.11. A number of various motions for injunctive relief, dismissal, and summary judgement have been filed in these matters. The crux of the matter surrounds the Kenosha County Sheriff's authority to declare a curfew.

It is uncontroverted by the parties that the Kenosha County Sheriff declared a curfew on various nights between August 23, 2020 and September 2, 2020 after declaring an emergency on those evenings. Although specific testimony regarding actions of each night has not been provided, it is also undisputed that in late August after a police involved shooting there was a number of nights of rioting which led to property destruction and other criminal acts.

The Defendants/Respondents have challenged the Sheriff's ability to declare a curfew or an emergency based upon Wis. Stat. ch 323. Wis. Stat. ch 323 entitled emergency management, states specifically in the declaration of policy in 323.01(1) that the chapter is

[t]o prepare the state and its subdivisions to cope with emergencies resulting from a disaster, or the imminent threat of a disaster, it is declared to be necessary to establish an organization for emergency management, conferring upon the governor and others specified the powers and duties provided by this chapter.

The statute confers certain powers to the Governor and local governments to declare emergencies. Wis. Stat. §§ 323.10 and 323.11. Absent from the statute is any

direct mention of the Sheriff or curfews. It is clear that this statute subsection does not confer upon the Sheriff the ability to declare an emergency or issue a curfew.

The Sheriff is a constitutional officer. See Article IV section 4. However, the Wisconsin Constitution does not delineate all the powers, rights, and duties of the office of the Sheriff. See Kocken v. Wisconsin Council 40, AFSCME, AFL-CIO, 301 Wis.2d 266, 2007 WI 72. ¶33 (Wis. 2007). Wisconsin case law helps in determining those powers. *Id.*

Wisconsin Statute Section 59.28 states in relevant part:

Sheriffs and their undersheriffs and deputies shall keep and preserve the peace in their respective counties and quiet and suppress all affrays, routs, riots, unlawful assemblies, and insurrections; for which purpose, and for the service of processes in civil or criminal cases and the apprehending or securing any person for felony or breach of the peace they and every coroner and constable may call to their aid such persons or power of their county as they consider necessary.

However, there are powers, rights and duties that belong to the sheriff's office outside of statute. These are the "...those generally recognized legal duties and functions belonging to it in this country, and in the territory, when the constitution was adopted." State ex rel. Kennedy v. Brunst, 26 Wis. 412, 414 (1870). These duties and functions which existed from "time immemorial" are also constitutional even if not conferred by the legislature. See Kocken at ¶45.

The sheriff's responsibility to "maintaining the law and order and preserving peace" is one of those duties and functions that predate the constitution. See id. at ¶ 57. (In America, the most important traditional responsibility of the sheriff has been keeping the peace) See David B. Kopel, *The Posse Comitatus And The Office Of Sheriff: Armed Citizens Summoned To The Aid Of Law Enforcement*, 104 J. Crim. L. & Criminology 761, 787 (2015).

"If the duty is one of those immemorial principal and important duties that characterized and distinguished the office of sheriff at common law, the sheriff 'chooses his own ways and means of performing it.' " *Id.* (quoting *WPPA I*, 106 Wis.2d at 314, 316 N.W.2d 656)

Milwaukee Deputy Sheriff's Ass'n v. Clarke, 2009 WI App 123, ¶ 10, 320 Wis. 2d 486, 492-93, 772 N.W.2d 216, 220.

The ability to impose a temporary curfew to maintain law and order and to preserve the peace is an appropriate way to maintaining law and order and preserving the peace to suppress riots. This power has been approved previously as constitutional when exercised by other public officials.

The temporary imposition of a curfew, limited in time and reasonably made necessary by conditions prevailing, is a legitimate and proper exercise of the police power of public authority.

Ervin v. State, 41 Wis. 2d 194, 201–02, 163 N.W.2d 207, 211 (1968)

Therefore, the Kenosha County Sheriff had the authority and power granted to him by the nature of his office and the Wisconsin Constitution when declaring a state of emergency and imposing a curfew for a limited time. The ability to challenge the curfew by a writ or injunction is available to the public to guard against the improper use of this power by the Sheriff and to provide neutral review of a curfew.

Kenosha County has cited the above respondents with a violation of Wis. Stat. § 323.28. Wisconsin Statute Section 323.28 states:

Whoever intentionally fails to comply with an order issued by an agent of the state or of a local unit of government who is engaged in emergency management activities under this chapter, including training exercises, is subject to a forfeiture of not more than \$200

This statute does not apply to the violation of the Sheriff's curfew, the power of the Sheriff to declare the curfew does not fall under the 323 chapter of the Wisconsin Statutes and the penalty is limited to "emergency management activities under this chapter." As the Sheriff's curfew was a lawful order any disobedience of that order would be more properly submitted under Wis. Stat. §946.47. The Sheriff was not engaged in activities under 323 and therefore, the citation can not be sustained and must be dismissed.

Similarly, based on the above decision, the request for injunctive relief is also dismissed.

This order is final for appeal.

Dated this 21st Day of July 2021

Hon. Jason A. Rossell