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State code covering petty offenses needs update

Criminal Procedure

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McSurly, the world's most curmudgeonly neighbor, calls his suburb's police department at 6 a.m. He says, "I am looking out my window at a jogger running in the street instead of on the sidewalk."

The cop yawns and says, "So what? Is he bothering anyone? Is he disrupting traffic?"

"No. It's 6 a.m. There is no traffic and there is no one else on the street."

"So why are you calling?"

"Why am I calling? Because he is violating Illinois law and I want him arrested immediately!"

The cop says, "You're crazy. Go back to sleep." He then hangs up.

But is McSurly crazy?

First, look at the Illinois Vehicle Code at 625 ILCS 5/11-1007(a). This statute provides that it is an offense for a person to walk upon an adjacent roadway where a sidewalk is provided and its use is practicable. So McSurly is correct that the jogger is violating Illinois law.

You are probably thinking, "Big deal. The code also says that a violation of this statute is only a petty offense (625 ILCS 5/11-202). At worst, a cop, who for some reason had it in for the guy, could give him a citation. But an arrest? Come on!"

Think again. The 2nd District Appellate Court recently found that a police officer is always allowed to both arrest — and to completely search — anyone with the chutzpah to walk in a street when a sidewalk is available. To experience this "Great Moment in American Law," you'll have to read *People v. Fitzpatrick.* 2011 Ill. App. LEXIS 1144 (Nov. 3, 2011).

Lewis Fitzpatrick was arrested for walking in a public road where a sidewalk was available. The arresting officer searched Fitzpatrick's pockets at the scene but found nothing. But at the police station, an officer who conducted yet another search recovered cocaine from one his socks.

The defendant on appeal asked the court to find that a custodial arrest for a petty offense was unconstitutional. Fitzpatrick conceded that the U.S. Supreme Court held that such an arrest was proper under the Fourth Amendment. *Atwater v. City of Lago Vista.* 532 U.S. 318 (2001). Yet he contended that the appellate court should nonetheless find that such an arrest violates the Illinois Constitution's prohibition against unreasonable searches and seizures. Ill. Const. 1970, Art. 1, Sec. 6.

You may recall *Atwater* as the "soccer mom" case from a decade ago. Atwater was driving with her children when she was pulled over by a police officer. The suburban officer proceeded to arrest her for a seat-belt violation and take her into custody. On appeal, Atwater claimed that it was an unreasonable violation under the Fourth Amendment for a police officer to make a custodial arrest for an offense not punishable by jail time when the government could show no compelling need for immediate detention.

Justice David H. Souter's opinion for a 5-4 court conceded that, "If we were to derive a rule exclusively to address the uncontested facts of this case, Atwater might well prevail." The majority noted that "the physical incidents of [Atwater's] arrest were merely gratuitous humiliations imposed by a police officer who was (at best) exercising extremely poor judgment."

Nevertheless, the majority concluded that this was an area where police required a bright-line rule and so held that as long as police have probable cause, even an arrest for "a very minor criminal offense" was constitutionally reasonable under the Fourth Amendment.

Justice Sandra Day O'Connor's pointed dissent complained that the majority now approved of custodial arrests for offenses as minor as failure to pay a highway toll or even littering. She said that permitting a full arrest for such offenses "defies any sense of proportionality" and is unreasonable under the Fourth Amendment.

Several states subsequently agreed with O'Connor and found that their own constitutions provide more protection than does the Fourth Amendment. See e.g., *State v. Bayard.* 119 Nev. 241 (2003); *State v. Bricker.* 139 N.M. 513 (N.M. App. 2006); *State v. Brown.* 99 Ohio St. 3d 323 (2003).

Fitzpatrick contended that Illinois, too, should hold that the Illinois Constitution provides more protection than does the U.S. Supreme Court's interpretation of the Fourth Amendment in *Atwater*.

The 2nd District refused. It noted that Illinois follows a "limited lockstep" approach in interpreting Article 1, Section 6, the Illinois Constitution's analog to the Fourth Amendment. "Limited lockstep" says that Illinois courts will defer to the U.S. Supreme Court's interpretation of the Fourth Amendment unless "some specific criterion — for example, unique state history or state experience — justifies departure." Finding none, the court announced it would follow *Atwater*.

But what if the Supreme Court precedent is just plain — how can I say this — dumb? This did not faze the 2nd District. It said that "lockstep" would be meaningless if Illinois courts only followed those U.S. Supreme Court decisions with which they agreed. A "flawed federal analysis" is no basis for not following the U.S. Supreme Court. Thus, the 2nd District explicitly refused to consider whether *Atwater* is simply bad policy.

Defense attorneys should take note: The *Fitzpatrick* decision makes it clear that Illinois judges will cover their ears and hum real loud if you try to argue that the U.S. Supreme Court botched a search-and-seizure decision. "Federalism" is a word we don't use much in Illinois state criminal cases anymore.

So how to stop the madness? If the courts will not help, it is time to ask the legislature. Currently, Illinois law provides that a peace officer may arrest a person when "he has reasonable grounds to believe that the person is committing or has committed an offense." 725 ILCS 5/107-2 (1)(c). And an "offense" is defined as "a violation of any penal statute." 725 ILCS 5/102-15. The Illinois legislature is always free to restrict those offenses for which a custodial arrest is legal. See e.g., N.M. Stat. Ann. Sec. 66-8-123.

Lockstep is not the same as lockjaw. *Fitzpatrick* should be a spur to civil libertarians to petition the legislature to bring some sanity to the issue of arrests for petty offenses.