

**Affirmed and Majority and Dissenting Opinions filed March 8, 2001.**

**In The**  
**Fourteenth Court of Appeals**

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**NO. 14-98-01236-CR**

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**PAMELA SUE KUNKEL, Appellant**

**V.**

**THE STATE OF TEXAS, Appellee**

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**On Appeal from the County Criminal Court at Law No. 5  
Harris County, Texas  
Trial Court Cause No. 9820753**

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**DISSENTING OPINION**

D. CAMILLE HUTSON-DUNN, Justice, dissenting.

Because I believe that the conduct observed by the wrecker driver did not constitute a breach of the peace, I respectfully dissent.

A survey of DWI related “breach of the peace” cases reveals a consistent pattern requiring more than simple moving violations or erratic driving to support a citizen’s arrest. There must be some demonstration of actual or threatened harm to the community. In *Pierce*

*v. State*, 32 S.W.3d 247 (Tex. Crim. App. 2000), the arresting citizen, Miller, testified that he saw the defendant's vehicle overtake him and then swerve in front causing him to apply his brakes to avoid the defendant's vehicle. On these facts, the court held that the arrest was improper because "the only offense for which Miller could have arrested the appellant was driving while intoxicated [but b]efore he stopped her, Miller had no evidence that the appellant was intoxicated." *Id.* at 253.

Similarly, in *Perkins v. State*, 812 S.W.2d 326 (Tex. Crim. App. 1991), the court held that speeding and running a red light were insufficient acts to support detaining the driver for a breach of the peace. *Id.* at 329, n. 4. And, in *Reichaert v. State*, 830 S.W.2d 348 (Tex. App.—San Antonio 1992, pet. ref'd), the court held that speeding and almost hitting a retaining wall were insufficient evidence on which to arrest someone for a breach of the peace. *Id.* at 352. Like *Pierce*, both of these cases involved a police officer outside of his jurisdiction and thus acting as a private citizen. Regardless, the cases are all on point because they specifically deal with the same issue as the present case, i.e. the application and interpretation of the phrase "offense against the public peace" in Article 14.01(a) of the Texas Code of Criminal Procedure.

The cases on the other end of the spectrum, wherein the courts found the citizen's arrest to be proper, further support the proposition that something more than mere erratic driving or moving violations is required. In *Romo v. State*, 577 S.W.2d 251 (Tex. Crim. App. 1979), the defendant drove erratically and committed a traffic violation (speeding), but then also swerved at the arresting citizen's vehicle causing him to drive into the curb to avoid a collision. *Id.* at 252. In *Ruiz v. State*, 907 S.W.2d 600 (Tex. App.—Corpus Christi 1995, no pet.), the defendant committed a traffic violation (driving wrong way on highway), but also caused oncoming motorists to swerve out of his way to avoid a head-on collision. *Id.* at 604. In *McGuire v. State*, 847 S.W.2d 684 (Tex. App.—Houston [1<sup>st</sup> Dist.] 1993, no pet.), the arresting citizens (several wrecker drivers) actually witnessed a traffic accident

involving the defendant. *Id.* at 685.

In the present case, Pittman only observed Kunkel drive two wheels over a curb, bump the curb a couple of times, and cross the center line a few times. Based on Pittman's testimony, the police officers testified that Kunkel committed only minor moving violations. Furthermore, there was no testimony that any pedestrians or motorists were actually in danger of being hit by Kunkel's vehicle. Pittman's testimony, therefore, does not support the conclusion, as necessary to establish a breach of the peace, that Kunkel's conduct caused anyone to be actually harmed or threatened with harm. *See Woods v. State*, 158 Tex.Crim. 338, 213 S.W.2d 685, 687 (1948). Under these facts, there was no immediate threat of danger or disaster to the community and, therefore, no breach of the peace. *See Pierce*, 32 S.W.3d at 253.

Although private citizens are authorized to make arrests when they observe a felony or a breach of the peace in progress, they are not imbued with general police powers. *See TEX. CODE CRIM. PROC. ANN. art. 14.01(a)*. A police officer in the proper execution of his duties may have been able to stop and detain Kunkel that night, if he or she had observed what Pittman observed. After further investigation, the officer may then have been able to arrest Kunkel for DWI. *See Pierce*, 32 S.W.3d at 253 (evidence of intoxication obtained after the stop could not justify the stop). Pittman, however, had no authority to arrest her on the basis of his observations.

Simple erratic driving and misdemeanor moving violations do not constitute a breach of the peace. In holding to the contrary, the majority opinion could be read as authorizing or even encouraging wrecker drivers, or anyone else, to follow and attempt to arrest motorists who commit simple moving violations or weave in the roadway. Such a result would cause a greater potential for violence, between the arresting citizen and the motorist, than the erratic driving or moving violations themselves. It would, therefore, be contrary to the best interests of the state and against public policy.

I believe the trial court erred in denying the motion to suppress. Accordingly, I would reverse the judgment of the trial court and remand with instructions to grant the motion to suppress in accordance with this opinion.

/s/ D. Camille Hutson-Dunn  
Justice

Judgment rendered and Majority and Dissenting Opinions filed March 8, 2001.

Panel consists of Justices Sears, Cannon, and Hutson-Dunn.<sup>1</sup>

Publish — TEX. R. APP. P. 47.3(b).

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<sup>1</sup> Senior Justices Ross A. Sears, Bill Cannon, and D. Camille Hutson-Dunn sitting by assignment.