State code covering petty offenses needs update

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 chatzpath 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.

Illinois’s Constitution’s prohibition against unreasonable searches and seizures is simply “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.