Appeal No. 2006AP1104-CR **Cir. Ct. No. 2004CF2220**

WISCONSIN COURT OF APPEALS
DISTRICT IV

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TANYA L. MARTEN-HOYE,

DEFENDANT-APPELLANT.

FILED

MAY 31, 2007

David R. Schanker
Clerk of Supreme Court

CERTIFICATION BY WISCONSIN COURT OF APPEALS

Before Dykman, Vergeront and Higginbotham, JJ.

This case presents a possible overlapping of the bright-line rules established in the United States Supreme Court's decision in ***Knowles v. Iowa***, 525 U.S. 113 (1998), and its progeny, and ***State v. Swanson***, 164 Wis. 2d 437, 475 N.W.2d 148 (1991), *abrogated on other grounds by* ***State v. Sykes***, 2005 WI 48, 279 Wis. 2d 742, 695 N.W.2d 277, a Wisconsin Supreme Court decision, concerning the constitutionality of a search of a person allegedly arrested with the intent to issue a citation for disorderly conduct.

We certify the following question: whether a search is incident to an arrest, and is therefore constitutional under ***Swanson***, or incident to the issuance of a citation and therefore unconstitutional under ***Knowles***, where the officer tells the person that she is under arrest for disorderly conduct under a city ordinance, places the person in handcuffs, but informs the person that after she is issued the citation,

she will be released. To answer this question, a threshold question must be addressed, namely: was the person in this case placed under custodial or non-custodial arrest under the facts of this case? The answer to these questions is likely to result in the extension of ***Knowles*** or ***Swanson*** to situations likely to occur with greater frequency in the City of Madison. This prediction rests on testimony presented by the arresting officer regarding what appears to be a policy of the Madison Police Department to arrest persons for ordinance violations with a promise to release but only after a full field search is performed incident to arrest.

The facts are undisputed and uncomplicated. Tanya Marten-Hoye was stopped by a police officer and told that she was being placed under arrest for disorderly conduct. The officer placed her in handcuffs and told her that she would be released after a citation for an ordinance violation was issued. While Marten-Hoye was handcuffed, the officer conducted a full field search of her, which ultimately turned up evidence of a crime. Marten-Hoye moved to suppress the evidence, but her motion was denied.

There are two distinct analytical frameworks in the case law that appear to apply to the circumstances presented here, each of which leads to a different result. Under the United States Supreme Court's opinion in ***Knowles***, the search here does not appear to be permissible under the Fourth Amendment. Under the Wisconsin Supreme Court's decision in ***Swanson***, which relies on ***Berkemer v. McCarty***, 468 U.S. 420, 441-42 (1984), the search here appears to be permissible under the Fourth Amendment. The facts in this case meet at the intersection of ***Knowles*** and ***Swanson***, and highlight a possible overlapping of the bright-line rules established in both cases. In short, the facts here lie somewhere between ***Knowles*** and ***Swanson***.

Marten-Hoye contends the search was unconstitutional under ***Knowles***. In ***Knowles,*** an Iowa police officer stopped Patrick Knowles for speeding and issued him a citation, although under Iowa law the officer may have arrested him. ***Knowles,*** 525 U.S. at 114. The officer then, as permitted by Iowa law, conducted a full search of his car, finding evidence of an unrelated crime that Knowles moved to suppress. ***Id.*** The United States Supreme Court ruled unanimously that the police may not perform a full search of a person when the person is held and issued a citation, but not arrested. ***Id.*** at 113-14, 119. The Supreme Court explained that the two historical rationales for allowing searches without a warrant incident to arrest are the need to disarm the suspect for the officers' safety and the need to preserve evidence for trial. ***Id.*** at 116, citing ***United State v. Robinson***, 414 U.S. 218 (1973). The Supreme Court refused to expand the exception to the warrant requirement to encompass a full field search pursuant to the issuance of a citation because the underlying justifications for a search incident to arrest are not present to the same degree in a citation situation. ***Id.*** at 118-19 ("[T]he concern for officer safety is not present to the same extent and the concern for destruction or loss of evidence is not present at all.").

Marten-Hoye contends that this case is controlled by ***Knowles*** because the officer said she would be issued a citation for disorderly conduct and released, and the officer did not intend, based on her testimony at the suppression hearing, to bring Marten-Hoye to the police station or keep her in custody. Marten-Hoye also cites cases from other jurisdictions where the courts have held that the police may not conduct a full search incident to arrest when a defendant is given a citation and released. *See, e.g.*, ***People v. Bland***, 884 P.2d 312, 317-19 (Colo. 1994) (due to a state statute that requires an officer to issue a written notice or summons for possession of one ounce or less of marijuana, the police are not

authorized to effect a custodial arrest, which is required for a full search of the person incident to that arrest); ***State v. Radka***, 83 P.3d 1038, 1040-41 (Wash. Ct. App. 2004) (where police intended to release a person with a citation for a traffic violation, a full search was unlawful because it was not incident to a full custodial arrest); ***State v. McKenna,*** 958 P.2d 1017, 1020-21 (Wash. Ct. App. 1998) (search by police allowed only incident to full custodial arrest).

The State argues that this case is controlled by ***Swanson***. In ***Swanson***, the Wisconsin Supreme Court explained that the test to determine whether a person is under arrest is "whether a reasonable person in the defendant's position would have considered himself or herself to be 'in custody,' given the degree of restraint under the circumstances." ***Swanson***, 164 Wis. 2d at 446-47, citing ***Berkemer***, 468 U.S. at 441-42.[1] The State contends that a reasonable person in Marten-Hoye's position would have considered herself to be under arrest because the officer told Martin-Hoye that she was under arrest and placed her in handcuffs.

The State points to ***State v. Wilson***, 229 Wis. 2d 256, 267, 600 N.W.2d 14 (Ct. App. 1999), where we applied the ***Swanson*** test and held that a person was arrested when the police twice refused to allow him to leave to use the bathroom, concluding that reasonable persons would believe they were under

[1] For a thorough discussion of the implications of the Wisconsin Supreme Court's adoption of the ***Berkemer*** test in ***State v. Swanson***, 164 Wis. 2d 437, 475 N.W.2d 148 (1991), *abrogated on other grounds by* ***State v. Sykes***, 2005 WI 48, 279 Wis. 2d 742, 695 N.W.2d 277, *see* ***State v. Morgan***, 2002 WI App 124, ¶13 n.8, 254 Wis. 2d 602, 648 N.W.2d 23. ***Berkemer*** addressed whether a person was in custody for ***Miranda*** purposes under the Fifth Amendment. *See* ***Morgan***, 2002 WI App 124, ¶13 n.8. In ***Swanson***, the supreme court applied ***Berkemer*** to decide whether a person who was seized had been placed under "arrest" under the Fourth Amendment. *See* ***id.***

arrest in that situation. The State also points to ***State v. Pallone***, 2000 WI 77, ¶4, 236 Wis. 2d 162, 613 N.W.2d 568, characterizing ***Pallone*** as standing for the proposition that "a simple declaration by a police officer that a person is under arrest is sufficient to effect an arrest of that person …."[2]

We note that, although the United States Supreme Court held in ***Robinson*** that searches incident to arrest are justified as an exception to the warrant requirement in order to protect the safety of police officers and to preserve evidence, ***Robinson*** created a bright-line rule for ease of application that allows searches whenever there is a custodial arrest, regardless of the particular safety and evidentiary concerns present in any given case. ***Robinson***, 414 U.S. at 235 ("A custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment; that intrusion being lawful, a search incident to arrest requires no additional justification. It is the fact of the lawful arrest which establishes the authority to search ...."). Under ***Robinson***, the search was constitutionally permissible if Marten-Hoye had been placed under custodial arrest, even though there was no evidence of disorderly conduct to be gained through the search and the officer had only minimal or no safety concerns. That is, the search would be reasonable under the Fourth Amendment if Marten-Hoye

[2] We believe that the State's characterization of ***State v. Pallone***, 2000 WI 77, ¶4, 236 Wis. 2d 162, 613 N.W.2d 568, is overly broad and that ***Pallone*** is readily distinguishable because there was a factual dispute about the arrest that does not exist in this case. In ***Pallone***, the police officer testified that he informed Riff, the driver of the car that was searched, that he was under arrest, but Riff testified that the police never informed him he was under arrest. ***Id.,*** ¶7. The circuit court resolved this factual dispute in favor of the officer based on its assessment of the relative credibility of the witnesses, and the supreme court accepted the circuit court's factual findings to conclude there was an arrest. ***Id.***, ¶45. Here, the issue is whether Marten-Hoye was placed under arrest *based on undisputed facts*, which is a question of law. *See* ***id.***, ¶44.

were under arrest regardless of whether the police officer had justification for the search based on the circumstances.

As we previously explained, the facts in this case meet at the intersection of ***Knowles*** and ***Swanson***, and highlight a possible overlapping of the bright-line rules established in these cases. Were the police prohibited from performing a full field search of Marten-Hoye based on the search incident to arrest exception to the warrant requirement because they told her that she was going to be given a citation and released (***Knowles***)? Were the police allowed to perform a full search incident to arrest because they handcuffed Marten-Hoye and told her she was under arrest, circumstances under which a reasonable person may have believed they were under arrest (***Swanson***)?

The police officer here testified that she believed she had authority to conduct a full search, rather than just a ***Terry*** pat-down, because she handcuffed Marten-Hoye and told Marten-Hoye she was under arrest, even though the officer intended to issue a citation. Does that practice meet constitutional muster? Pushing the issue further, what happens in a situation where there is no doubt that a reasonable person would believe she was under arrest based on the degree of restriction placed on her freedom (because she was handcuffed, told she was being placed under arrest and placed in a locked squad car), but the police have authority only to issue a citation for the conduct at issue and ultimately issue a citation and release? Does it matter whether a person was placed under custodial or non-custodial arrest? Which test trumps?

Because we need clarification from the supreme court about how the ***Swanson*** test for determining whether a person is under arrest applies in a ***Knowles*** citation situation, we believe that this appeal is appropriate for decision

by the supreme court. Therefore, we certify this appeal to the Wisconsin Supreme Court under WIS. STAT. RULE 809.61 (2005-06) for its review and determination.