COURT OF APPEALS DECISION DATED AND RELEASED

June 13, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

NOTICE

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No. 96-0144

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

COUNTY OF DODGE,

Plaintiff-Respondent,

v.

BRYAN E. HARNED,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Dodge County: DANIEL W. KLOSSNER, Judge. *Affirmed*.

EICH, C.J.[1] Bryan Harned, appealing from a judgment finding that he had operated a motor vehicle while intoxicated, raises a single issue on appeal: whether the trial court erred in determining that he had not been placed

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[1] This appeal is decided by one judge pursuant to § 752.31(2)(b), STATS.

under arrest before he was asked to perform field sobriety tests.[2] We reject his arguments and affirm the judgment.

The results of several field sobriety tests administered to Harned after he had been stopped by police formed the primary basis for the trial court's finding that he had been driving while intoxicated. Prior to trial, Harned moved to suppress the results of the test, arguing that he had in fact been placed under arrest when he was briefly held at gunpoint and handcuffed by the officer after his vehicle was stopped. He maintained that at the time the officer cuffed him, there were no reasonable grounds to believe that he had committed or was committing any offense, civil or criminal.

The trial court denied the motion and, after a trial on the merits, Harned was found to have violated the Dodge County drunk driving ordinance. His appeal challenges only the trial court's denial of his suppression motion, and the underlying facts are not in dispute.

[2] While Harned phrases his argument in terms of "probable cause to arrest," it is clear from his brief, as it was in his presentation to the trial court, that he is challenging only the timing of the arrest.

Dodge County Deputy Sheriff James Engels was on patrol on a rural county road at approximately 1:40 a.m. when he "clocked" an approaching vehicle (Harned's) traveling at an excessive rate of speed. Engels turned his squad car around, activated the emergency and "wigwag" headlights and began to follow the car. Engels saw Harned's car turn onto a local road, and then appear to drive off the road into a field. As he got closer, he saw the car stopped, with all lights out, in the middle of the field, some 300 to 400 feet from the roadway. Engels stopped, and when he shone his spotlight into the field, the car's headlights came on and it drove out of the field, coming to a stop partly on the road and partly in the adjacent ditch. When Harned got out of his car, Engels, not knowing whether others were in the car or what the "circumstances" were,[3] drew his weapon and told Harned to keep his hands at his side.

After patting Harned down for weapons, Engels told him he was going to handcuff him for his (Engels's) own safety, specifically informing Harned "that he was not under arrest, that it was for my safety." According to Engels, Harned "was cooperative and understood that." After handcuffing Harned, Engels performed a more thorough search of Harned and his car, and once he was satisfied that there were no weapons on Harned's person or in his car--and that the car was unoccupied--Engels removed the cuffs,[4] telling Harned, "as I told him before, [that] he wasn't under arrest. I placed him in the handcuffs for my safety because I don't know the circumstances and I told him I appreciated his ... cooperation, and that I was going to ask him to do some field sobriety tests." Engels then asked Harned why he had attempted to "[e]lude" him, and Harned replied that he had just come from a bar and became scared when he saw the squad car turn around because he knew he had been speeding and because he was driving on a commercial license.

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[3] Engels testified:

> Well, I wasn't sure what the circumstances were around the vehicle trying to [e]lude me. I was unsure if the driver was scared, if they had just committed a crime, if there were people in the car against their will. I didn't know what the circumstances were. And at that point for my safety I wasn't going to take any chances.

[4] Engels testified at one point that Harned was in handcuffs for "[m]aybe a minute; maybe two," and at another point approximately three minutes, or "five, maybe."

Before Engels could testify as to the field sobriety tests, the attorneys, feeling enough testimony had been adduced to determine Harned's motion, argued to the court about the timing of the arrest. The county attorney argued that Engels's act of handcuffing Harned was not an arrest but only a temporary detention for his own safety. Harned's counsel argued that he had been arrested when he was handcuffed by Engels.

The trial court ruled that, considering all of the circumstances, the handcuffing was reasonable and did not constitute an arrest. As indicated, that ruling is the only one Harned challenges on this appeal, and it is a legal question, which we review de novo. *See* ***State v. Jackson***, 147 Wis.2d 824, 829, 434 N.W.2d 386, 388 (1989) (constitutional reasonableness of a law enforcement officer's action presents a question of law where material facts are undisputed).

Citing ***State v. Swanson***, 164 Wis.2d 437, 446-47, 475 N.W.2d 148, 152 (1991), for the general rule that a person is considered under arrest in the constitutional sense when the facts are such that "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," Harned argues that that point was reached when Engels first placed him in handcuffs. The trial court disagreed, as do we.

Immediately following its statement of the rule we have just quoted, the ***Swanson*** court went on to state: "The circumstances of the situation *including what has been communicated by the police officers,* either by their words or actions, shall be controlling under [this] test." ***Id***. at 447, 475 N.W.2d at 152 (emphasis added). The court made several other points relevant to our inquiry in this case. It first noted that a request that the person being detained submit to field sobriety tests does not "transform the routine traffic stop into a formal arrest." ***Swanson***, 164 Wis.2d at 449, 475 N.W.2d at 153. The court then cited to other cases, reaching the same conclusion with respect to the officers' use of force or the drawing of weapons. ***Id***. at 448-49, 475 N.W.2d at 153 (citing ***United States v. Glenna***, 878 F.2d 967, 972 (7th Cir. 1989)); ***United States v. Taylor***, 716 F.2d 701, 708-09 (9th Cir. 1983); and ***United States v. Laing***, 889 F.2d 281, 285 (D.C. Cir. 1989), *cert. denied*, 494 U.S. 1008 (1990). In ***Taylor***, the court stated that even the use of handcuffs, if reasonably necessary, does not turn an investigative stop into an arrest. ***Taylor***, 716 F.2d at 709. *See also* ***Glenna***, 878 F.2d at 972-73, where the court said that while handcuffs are "restraints on

freedom of movement *normally* associated with arrest," common sense and "`ordinary human experience'" dictate that officers may reasonably believe such action to be necessary in order to "effectuate[] safely an investigative stop," and in such circumstances courts will not substitute their judgment for that of the officer and will not hold an arrest to have been made (quoted source omitted).

Applying these principles to this case, the totality of the circumstances--including Harned's unusual conduct after Engels began his pursuit and Engels's assurances to Harned that he was not under arrest but was being briefly handcuffed only for reasons of safety--satisfy us that a reasonable person in Harned's position would not have believed he was under arrest at the time.

Accordingly, we see no error in the ruling of the trial court Harned challenges on this appeal.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)4, STATS.