COURT OF APPEALS
DECISION
DATED AND RELEASED

February 27, 1997

NOTICE

No. 96-2407

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

COLUMBIA COUNTY,

Plaintiff-Respondent,

v.

KEITH A. BALLWEG,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Columbia County: RICHARD REHM, Judge. *Reversed and cause remanded with directions*.

DEININGER, J.[1] Keith Ballweg appeals from a judgment convicting him of first offense operating a motor vehicle while intoxicated (OMVWI), in violation of § 346.63(1), STATS. He claims the trial court erred in denying his motion to suppress evidence. We agree, concluding that: (1) Ballweg was arrested at the scene of the traffic stop; and (2) the county has failed to establish that the officer at the scene had probable cause to arrest Ballweg for OMVWI. Accordingly, we reverse.

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

BACKGROUND

In the early evening of December 20, 1995, Village of Fall River Police Officer Shawn Finnegan clocked Ballweg's vehicle travelling at 73 mph in a 55 mph zone on State Highway 16. Finnegan pursued the speeding vehicle. The officer testified that while in pursuit, he observed Ballweg's vehicle make an "erratic" right turn. During cross-examination, Finnegan clarified this by saying that the pursued vehicle did not fishtail, skid or make any lane deviations, but that in his opinion the right turn was made too fast.

After stopping Ballweg, Finnegan detected an odor of intoxicants coming from the vehicle and observed that Ballweg's eyes were red, bloodshot and glassy. In response to Finnegan's question, Ballweg admitted that he had been drinking at a birthday party with co-workers. Finnegan testified that Ballweg's speech was "very slurred."

Due to the pursuit, the traffic stop was actually accomplished in the City of Columbus. Finnegan therefore radioed for assistance from the Columbus Police Department, and two officers from that agency responded to the scene. The Columbus officers, for reasons that are not entirely clear, then contacted the Columbia County Sheriff's Department. The decision was made to transport Ballweg to the Columbus Police Department where a Columbia County sheriff's deputy would administer field sobriety tests. There is nothing in the record explaining why field sobriety tests were not conducted at the scene of the stop.

Officer Finnegan then asked Ballweg to get out of his car. Finnegan handcuffed him behind his back and transported him to the Columbus Police Station. Finnegan testified that he told Ballweg that he was *not* under arrest but that the handcuffs were required by departmental policy for a squad car transport. Finnegan further testified that Ballweg was not under arrest for either OMVWI or for speeding, but he acknowledged that Ballweg was not "free to leave" at the scene, during the transport or at the Columbus Police Station.

Subsequently, the Columbia County deputy conducted field sobriety tests at the Columbus Police Station and issued a citation for OMVWI. Another officer gave Ballweg an Intoxilyzer breath test. Ballweg moved to suppress all evidence obtained after the point at which he was handcuffed and transported, claiming he was arrested at the scene of the stop without probable cause for OMVWI. The trial court denied the motion, concluding that Ballweg had not been arrested at the scene but only later by the deputy at the police station. Ballweg then pleaded no contest and was convicted of OMVWI.

ANALYSIS

a. No Contest Plea—Waiver Rule

Although the county has not raised the issue, we note at the outset that Ballweg, unlike a criminal defendant,[2] waived his right to appeal the denial of his suppression motion by pleading no contest to a civil forfeiture offense. *See* ***County of Racine v. Smith***, 122 Wis.2d 431, 434, 362 N.W.2d 439, 441 (Ct. App. 1984). The waiver rule is not a matter of appellate subject matter jurisdiction, however. On a proper record, we may exercise our discretion and consider the merits of the appeal despite the no contest plea. ***State v. Riekkoff***, 112 Wis.2d 119, 123-24, 332 N.W.2d 744, 747 (1983).

As we did in ***County of Ozaukee v. Quelle***, 198 Wis.2d 269, 275-76, 542 N.W.2d 196, 198 (Ct. App. 1995), we decline to apply the waiver rule in this case. First and foremost, the county has not asked that we apply the waiver rule. And, as in ***Ozaukee,*** 198 Wis.2d at 275, 542 N.W.2d at 198, "since the issue raised on appeal was squarely presented before the trial court and testimony was taken regarding the issue, we have an adequate record." Finally, as was also the case in ***Ozaukee***, it does not appear that this appeal was taken to circumvent a sentence that was more severe than expected. "All indications are that this was a garden-variety first offender driving while intoxicated case and the penalty assessed was no greater or lesser than usual." ***Id***. at 276, 542 N.W.2d at 198.

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[2] *See* § 971.31(10), STATS.

b. Probable Cause to Arrest at the Scene of Stop

As he did in the trial court, Ballweg argues that his handcuffing and transport from the scene of the stop constituted an arrest, and that at the time of the arrest, Officer Finnegan did not have probable cause to arrest him for OMVWI. Ballweg asserts that the county conceded the lack of probable cause to arrest him for OMVWI until after the deputy had administered field sobriety tests at the Columbus Police Station, because the county took the position in the trial court that no arrest occurred until that point in time.

While "concession" may be too strong a word, the county never attempted in the trial court, nor does it on this appeal, to validate Officer Finnegan's actions at the scene by establishing that Finnegan had probable cause to arrest Ballweg for OMVWI before transporting him to the police station.[3] Because the trial court agreed with the county's contention that Ballweg had not been arrested at the scene, it specifically declined to address the issue of probable cause. In its brief, the county devotes but one sentence to the issue: "It is clear that Officer Finnegan certainly had probable cause to believe that Mr. Ballweg could be under the influence of an intoxicant." The county, however, fails to develop this argument with citations to authority or to the record.

Whether Officer Finnegan had probable cause to arrest Ballweg for OMVWI at the scene of the stop is a question of law which we determine de novo. ***State v. Babbitt***, 188 Wis.2d 349, 356, 525 N.W.2d 102, 104 (Ct. App. 1994). We decline to do so here, however. This issue has not been properly developed by the county, either here or in the trial court. *See* ***Swatek v. County of Dane***, 192 Wis.2d 47, 52 n.1, 531 N.W.2d 45, 47 (1995) (court of appeals has no

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[3] The county argued in the trial court that "reasonable cause," not "probable cause," governed the arrest because this was a civil forfeiture action. It quickly abandoned the argument, however, and asserted "[t]he issue is really when did the arrest happen." And, in discussing ***State v. Swanson***, 164 Wis.2d 437, 475 N.W.2d 148 (1991), which both parties concede governs this appeal, the county told the trial court "the Wisconsin Supreme Court wants the officers to conduct the field sobriety tests ... we don't want you to get them under arrest until you do the field sobriety tests." The prosecutor acknowledged that he did not know why tests were not performed at the scene, and the record provides no answer.

duty to consider issues not presented) and ***State v. Pettit***, 171 Wis.2d 627, 646, 492 N.W.2d 633, 642 (Ct. App. 1992) (we may decline to review issues inadequately briefed).

We conclude that in the absence of any meaningful attempt by the county to justify an arrest at the scene of the stop, it has failed to establish that Officer Finnegan had probable cause to arrest Ballweg for OMVWI before he handcuffed and transported Ballweg to the Columbus Police Station.

c. Officer Finnegan's Arrest of Ballweg

Our decision, as did the trial court's, turns on whether Ballweg was under arrest when Officer Finnegan handcuffed and transported him from the scene of the stop. This determination is one of law which we review de novo, owing no deference to the trial court's decision. ***State v. Clappes***, 117 Wis.2d 277, 280-81, 344 N.W.2d 141, 143 (1984). We conclude that Officer Finnegan arrested Ballweg when he handcuffed and transported him, since "a reasonable person in the defendant's position would have considered himself ... to be `in custody,' given the degree of restraint under the circumstances." ***State v. Swanson***, 164 Wis.2d 437, 446-47, 475 N.W.2d 148, 152 (1991).

In determining whether Ballweg was in custody, Officer Finnegan's assertion that he had not arrested Ballweg merits our consideration, but only as a part of the totality of circumstances to which the ***Swanson*** objective test for arrest must be applied. Indeed, the supreme court opted for the objective test in part to "alleviate the need to assess the subjective understandings of the parties and ... the self-serving declarations of the police officers or suspects."[4] ***Swanson***, 164 Wis.2d at 446, 475 N.W.2d at 152. Here, the

[4] During argument in the trial court, the parties, while citing ***State v. Swanson,*** 164 Wis.2d 437, 446, 475 N.W.2d 148, 152 (1991), also referred to the three elements of the prior subjective test for arrest abandoned by the ***Swanson*** court. As a result, it appears the trial court may have given undue weight to Officer Finnegan's belief that Ballweg was not under arrest:

> I'm finding that the officer did state to the defendant that he in fact was not under arrest, that he was being transported in cuffs pursuant to department policy. And that in my mind

officer's assertion is overcome by the significant degree of restraint applied to Ballweg by handcuffing him and transporting him from the scene of the stop to the police station. Officer Finnegan acknowledged that throughout this process, Ballweg was not free to leave. We conclude that a reasonable person in Ballweg's position would have agreed with Finnegan on this point.

Section 968.24, STATS., which codifies the holding of ***Terry v. Ohio***, 392 U.S. 1 (1968), provides as follows:

> After having identified himself or herself as a law enforcement officer, a law enforcement officer may stop a person in a public place for a reasonable period of time when the officer reasonably suspects that such person is committing, is about to commit or has committed a crime, and may demand the name and address of the person and an explanation of the person's conduct. *Such detention and temporary questioning shall be conducted in the vicinity where the person was stopped.*

(Emphasis supplied). Absent a showing that weather conditions, the medical condition of the suspected intoxicated driver or some other exigency precluded further investigation at the scene, the inherently coercive handcuffed transport of Ballweg to a police station vastly exceeded the minimal intrusion of a typical traffic stop. *See* ***Swanson***, 164 Wis.2d at 447, 475 N.W.2d at 152 (traffic stop, like ***Terry*** stop, is typically brief and public in nature) (citing ***Berkemer v. McCarty***, 468 U.S. 420 (1984)).

The trial court correctly noted that Ballweg's custodial excursion for the express purpose of administering field sobriety tests is not "a wise procedure to be followed."[5] The court also observed that "[i]t is unusual to have

(..continued)

> completely, from an objective standpoint, negates the actual arrest of the defendant at the point that he was transported to the police department.

[5] In addition to the Fourth Amendment concerns such a procedure raises, the ***Swanson*** court observed that arresting OMVWI suspects prior to the administration of field sobriety tests would lead to the "absurd result" of giving suspects grounds under the Fifth

someone taken to a law enforcement station without further having been done here," and that the handcuffed transport "speaks of custody and speaks of arrest." We concur with all of these sentiments, and disagree only with the trial court's ultimate legal conclusion.

Since the county has not established probable cause for an arrest at the scene of the stop, Ballweg's custodial transport to the police station violated his Fourth Amendment right to be free from unreasonable seizure.[6] We therefore set aside the judgment of conviction and direct that all evidence obtained subsequent to Ballweg's handcuffing and placement in Officer Finnegan's squad car be suppressed.

By the Court.—Judgment reversed and cause remanded with directions.

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

(..continued)
Amendment to refuse to perform the sobriety tests. ***State v. Swanson***, 164 Wis.2d 437, 449, 475 N.W.2d 148, 153 (1991).

[6] "The right of the people to be secure in their persons ... against unreasonable searches and seizures, shall not be violated ...." U.S. CONST. amend. IV; WIS. CONST. art. I, § 11.