

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

January 12, 1999

Marilyn L. Graves  
Clerk, Court of Appeals  
of Wisconsin

**NOTICE**

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

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.

**No. 98-2448**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT III**

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**STATE OF WISCONSIN,**

**PLAINTIFF-APPELLANT,**

**V.**

**HARVEY WOODWARD,**

**DEFENDANT-RESPONDENT.**

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APPEAL from an order of the circuit court for Marathon County:  
JAMES P. JANSEN, Judge. *Affirmed in part; reversed in part and cause remanded.*

CANE, C.J. Following a single-car accident in which Harvey Woodward drove his truck into a culvert, deputy Randall Albert of the Marathon County Sheriff's Department arrived, completed his investigation, and then told Woodward to go home with his wife who had been following him in another car. Albert advised him that he would probably be cited for inattentive driving.

Shortly after that, Albert's supervisor arrived at the scene and directed Albert to go to Woodward's home which was a half mile away and return him to the accident scene for OWI field tests. After the field sobriety tests, Woodward was cited for operating a motor vehicle while intoxicated, first offense.

At a suppression hearing, the trial court found that the return of Woodward to the scene was an arrest without probable cause or exigent circumstances and, contrary to the State's argument, an involuntary return. It therefore suppressed the State's evidence gathered as a result of an unlawful arrest and dismissed the OWI charge. The State appeals, contending that Woodward returned voluntarily to the accident scene. It also contends that because there is other independent evidence to support the OWI charge, the trial court improperly dismissed the complaint. This court affirms the trial court's suppression holding, but reverses that portion of the order dismissing the OWI charge.

Here, the State premises its argument by reasoning that Woodward's return was simply part of the continuing investigation and voluntary. On appeal, this court will not reverse a trial court's factual findings unless they are clearly erroneous. Section 805.17(2), STATS. On the other hand, findings of constitutional fact, such as whether a person was arrested or in custody, is a question of law this court reviews de novo. See *State v. Santiago*, 206 Wis.2d 3, 18, 556 N.W.2d 687, 692 (1996). In this case, the trial court found that Albert released Woodward after making his initial investigation at the accident scene. However, pursuant to his supervisor's orders, Albert went to Woodward's home, met him at the door, and informed him that he was required to return to the accident scene.

The trial court found that Woodward was complying with the demand rather than making a voluntary return. Implicit in its holding was a rejection of the State's alternate argument that the sobriety tests were sufficiently attenuated from any unlawful arrest. The evidence supports such findings. Albert was directed to return Woodward to the scene, and that is exactly what he did. Woodward was placed in a locked squad car and returned to the accident scene where he was not free to leave and had to wait approximately thirty minutes for a state trooper to arrive and perform the field sobriety tests. Albert gave Woodward no options. Under these circumstances, the trial court correctly concluded that Woodward had been placed under arrest without a warrant at his home and rejected the State's suggestion that the sobriety tests were attenuated from the arrest.

The trial court also concluded that under the reasoning of *Welsh v. Wisconsin*, 466 U.S. 740 (1984), because there were no exigent circumstances to arrest Woodward at his home for a noncriminal matter, evidence gathered as a result of the unlawful arrest must be suppressed. This court agrees. Here, there were no exigent circumstances to place Woodward in custody and return him to the accident scene. The State does not dispute this finding, but instead continues to rely on its contention that Woodward's return was voluntary or the tests were attenuated from the arrest. Accordingly, because the trial court found that Woodward had been arrested at his home without a warrant or exigent circumstances, it correctly concluded that the evidence seized as a result of this arrest must be suppressed.

This court does agree, however, with the State that the trial court dismissed the OWI charge prematurely. A motion to dismiss should be granted only if under no circumstances can the State prevail. See *Evans v. Cameron*, 121

Wis.2d 421, 426, 360 N.W.2d 25, 28 (1985). Albert testified that at approximately 9:43 p.m., he found Woodward's truck lying in the ditch after it had drifted off the roadway. He also testified that Woodward's speech was slurred, that his head and shoulders were swaying from side to side and back and forth while he was stationary, that he smelled strongly of intoxicants and that he appeared intoxicated. Albert made these observations before releasing Woodward to go home. This evidence is independent of the suppressed evidence and sufficient to allow the OWI charge to proceed to trial.

Therefore, this court affirms the order suppressing the evidence gathered after the arrest at Woodward's home, but reverses that portion of the order dismissing the OWI charge and remands the matter for further proceedings.

*By the Court.*—Order affirmed in part; reversed in part and cause remanded.

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

