

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 06, 2005

Cornelia G. Clark
Clerk of Court of Appeals

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 WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2005AP391-CR

Cir. Ct. No. 2002CT2990

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

JOSEPH C. MENTE,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: FREDERICK C. ROSA, Judge. *Affirmed.*

¶1 KESSLER, J.¹ Joseph C. Mente appeals from a judgment of conviction for operating while intoxicated, third offense. Mente argues that the

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (2003-04). All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

evidence against him should have been suppressed because there was no probable cause to arrest him. This court rejects his argument and affirms the judgment.

BACKGROUND

¶2 The facts were developed at a motion hearing on Mente's motion to suppress and are undisputed. On March 23, 2002, off-duty sheriff's department deputy Daniel Carter called 911 to report a suspected drunk driver. Carter reported that as he was driving northbound on Interstate 43, he observed a pickup truck moving erratically between lanes, at times straddling the dotted line. Carter continued to report the truck's location to the dispatcher and followed the truck when it exited the Interstate and pulled into a bar parking lot. Carter remained in the parking lot and pointed out the driver to responding sheriff's deputy Craig McCann.

¶3 McCann pulled into the bar parking lot, spoke with Carter, and then verified the plate number of the truck with the dispatcher. After confirming that the vehicle was the same that Carter had described to the dispatcher, McCann pulled his vehicle in front of the truck. A police officer from a neighboring community who happened to be in the area pulled in behind the truck. The driver of the truck remained in the vehicle, and the truck engine was no longer running.

¶4 McCann approached the vehicle and told the driver, later identified as Mente, that McCann wanted to talk with Mente about his driving, as there had been a report of lane deviation. McCann said that he observed the following when Mente responded:

[W]hen he spoke to me, I did detect a strong odor of an alcoholic beverage on his breath. I noticed that as he was talking to me, his eyes were – I hate to use the word glazed

on over because that's kind of a common term, but he was having problems focus[ing] on me.

He would like look at me and as he is looking at me it would seem as [if] he was looking right through me.

McCann testified that Mente had difficulty retrieving his driver's license when asked to produce it. McCann explained:

He pulled his wallet from his back pocket and he had a lot of difficulty doing that. When he put his wallet in his lap to look for the license, he would grab the license itself and he had – just had a very difficult time doing the physical movements of pulling the license out of the wallet. I believe he tried it three times before he was finally able to pull it out.

¶5 McCann said that he asked Mente several questions about his driving, and that Mente “didn't make any real concrete remarks.” Then, while Mente was still seated in his vehicle, McCann asked Mente “several questions to start leading toward those field sobriety tests.” McCann testified:

I asked him how far he had gone in school and he seemed kind of confused about that question, wasn't sure how to answer it. So I asked him if he had any college. He said yes.

So I asked him first if he could recite all 26 letters of the English alphabet from A to Z without skipping any letters and he looked at me kind of confused and just said, “Huh?” So I asked him very basically can you tell me the alphabet. His response to that was he recited the alphabet from A to G and stopped.

¶6 McCann said he then asked Mente several times to get out of his truck. McCann said Mente refused the first two times. Another deputy approached the vehicle as well and McCann opened the door and ordered Mente out. McCann explained:

Knowing that there was no way we were going to allow him to drive that vehicle, we opened the door. I asked him

again, “Would you step out of the car? We want to go through some more field sobriety tests with you.”

He finally got out and when he stood up on the parking lot surface which was a clean, dry, level surface – there was no basic angle problems or anything like that. He stood up and then immediately fell down. Another deputy ... helped me pick him up. At that point, because of his drastic lack of balance, I didn’t see any reason – For safety, security reasons I didn’t see any reason to go on with any of the other tests.

Mente was arrested and charged with operating while intoxicated, third offense, and having a prohibited alcohol concentration.

¶7 Mente filed a motion to suppress, arguing that because there was a lack of probable cause to arrest him at the time he was legally arrested, the subsequent alcohol testing and observations were illegally obtained. Carter and McCann both testified. Based on this testimony, Menté conceded that there was a basis to initiate the stop, but argued that there was no probable cause to arrest him. Specifically, Menté argued that even if he was not formally placed under arrest until he fell on the ground, he was legally under arrest either when he was blocked in by the two squad cars, or when McCann ordered him from the vehicle, told him he would not be allowed to leave the parking lot and told him he was not going to be driving his car.

¶8 The trial court rejected Menté’s argument and denied the motion to suppress. Menté pled guilty and was convicted. This appeal followed.

DISCUSSION

¶9 At issue is when Menté was legally “under arrest” and whether there was probable cause to arrest him at that time. An arrest occurs when, given the degree of restraint, a reasonable person in the suspect’s position would have

considered him or herself to be in custody. *State v. Mosher*, 221 Wis. 2d 203, 211, 584 N.W.2d 553 (Ct. App. 1998). In determining whether a person is in custody, this court must consider the totality of the circumstances, including factors such as the suspect's freedom to leave; the purpose, place and length of the interrogation; and the degree of restraint. *State v. Morgan*, 2002 WI App 124, ¶12, 254 Wis. 2d 602, 648 N.W.2d 23. Because each case must be examined under its own facts, we are not bound by hard and fast rules. See *State v. Wilkens*, 159 Wis. 2d 618, 626, 465 N.W.2d 206 (Ct. App. 1990). Whether a person is in custody is a question of law that this court reviews *de novo*. *Mosher*, 221 Wis. 2d at 211.

¶10 Probable cause to arrest exists when, at the time of the arrest, an officer has within his or her knowledge reasonably trustworthy facts and circumstances sufficient to warrant a reasonably prudent person's belief that the suspect has committed or is committing a crime. *State v. Kiekhefer*, 212 Wis. 2d 460, 484, 569 N.W.2d 316 (Ct. App. 1997). This is an objective standard; the officer's subjective opinion is irrelevant. *Id.* This court considers the information available to the officer from the standpoint of one versed in law enforcement. *State v. Pozo*, 198 Wis. 2d 705, 712, 544 N.W.2d 228 (Ct. App. 1995).

¶11 *Mente* argues first that he was under arrest when squad cars blocked his vehicle in the front and back. This court concludes, after considering the totality of the circumstances, including factors such as *Mente*'s freedom to leave; the purpose, place and length of the interrogation; and the degree of restraint, see *Morgan*, 254 Wis. 2d 602, ¶12, that *Mente* was not under arrest at the time the officers parked their vehicles in front of his truck.

¶12 “A police officer may, in the appropriate circumstances, approach an individual for purposes of investigating possible criminal behavior even though there is no probable cause to make an arrest.” *State v. Powers*, 2004 WI App 143, ¶7, 275 Wis. 2d 456, 685 N.W.2d 869. In such cases, the officer has the power to restrict the individual’s movement. While under the facts presented a reasonable person may have felt required to remain so that the police could conduct their investigation, a person in Mente’s position would not consider himself under arrest at the time his vehicle was blocked. He was not immediately ordered from the vehicle. No weapons were displayed. No one shouted at him to exit the vehicle. Rather, the officer approached Mente’s vehicle and engaged in conversation with him. A reasonable person would not believe that he was “in custody” in this situation. See *Mosher*, 221 Wis. 2d at 211.

¶13 Mente argues in the alternative that he was under arrest at the time McCann asked Mente to exit his vehicle. Assuming for purposes of this appeal that this is true, this court affirms the judgment because there was probable cause to arrest Mente at that time.

¶14 When McCann asked Mente to exit his vehicle, McCann had been provided with first-hand information from Carter about Mente’s erratic driving. McCann had also observed Mente’s bloodshot eyes and smelled alcohol on Mente’s breath. Indeed, McCann testified that the odor of alcohol on Mente’s breath was “extremely strong” and that Mente’s eyes were “extremely bloodshot.”

¶15 McCann also had the opportunity to observe Mente attempt to remove his driver’s license from his wallet and respond to McCann’s questions about Mente’s education. McCann listened as Mente tried to recite the alphabet and stopped at the letter G. Mente then had to be asked three times to exit his

vehicle. Based on Mente's undisputed responses and actions, this court concludes that McCann had within his knowledge "reasonably trustworthy facts and circumstances sufficient to warrant a reasonably prudent person's belief" that Mente had committed a crime, *i.e.*, operating while intoxicated. *See Kiekhefer*, 212 Wis. 2d at 484. Thus, McCann had probable cause to arrest Mente at the time he told Mente to exit the vehicle.

By the Court.—Judgment affirmed.

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

