COURT OF APPEALS
DECISION
DATED AND FILED

November 08, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2005AP1318 **Cir. Ct. No. 2003TR29174**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT 1

MILWAUKEE COUNTY,

PLAINTIFF-RESPONDENT,

V.

GERILIN E. GAHAGAN,

DEFENDANT-APPELLANT.

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

¶1 KESSLER, J.[1] GeriLin E. Gahagan appeals from a judgment of conviction for operating a motor vehicle under the influence of an intoxicant,

[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.

contrary to WIS. STAT. § 346.63(1)(a). Gahagan, who pled no contest to the charge, argues the trial court should have suppressed evidence that was obtained subsequent to her illegal arrest. This court rejects her argument and affirms the judgment.

BACKGROUND

¶2 On December 5, 2003, at approximately four a.m., Gahagan, an off-duty Milwaukee Police detective, struck a light pole with her vehicle. After the accident Gahagan called her friend and colleague Anne Marie Domurat, who was on duty at the time. Domurat immediately reported to the scene.

¶3 A short time later Milwaukee Sheriff's Deputy Shara Finski[2] reported to the scene of the accident. Upon her arrival several Milwaukee police officers in civilian clothes were already at the scene. The officers on the scene delegated the investigation to the Milwaukee County Sheriff's Department because of Gahagan's position within the Milwaukee Police Department. Deputy Finski was the officer placed in charge of the investigation.

¶4 Finski began investigating the accident. Although it is disputed whether she first observed Gahagan when Gahagan was standing outside, or whether Gahagan was seated inside Domurat's vehicle, it is undisputed that Finski directed Gahagan to sit in the back of Finski's squad car, and that Gahagan did so.

[2] All references in the record but one indicate that the deputy's name is Shara Finski. The actual ticket suggests that the deputy's last name is Sharafinski. Because we are unable to resolve this conflict, and because it has no impact on our decision, we will use "Finski" as the deputy's last name in this opinion.

Finski later testified that as she made contact with Gahagan, she noticed that Gahagan smelled strongly of alcohol.

¶5 After placing Gahagan in the squad car, Finski investigated the accident scene to determine whether damage to a light pole might have exposed electrical wires, creating a hazardous situation. The parties disagree how long Gahagan was in the squad car; Finski testified that she returned to the squad car in four or five minutes, while Gahagan maintains it could have been as long as fifteen minutes. In any event, Finski returned to the squad car, asked Gahagan to exit the squad car, and conducted field sobriety tests. Gahagan was also given a preliminary breath test, which indicated an alcohol content above the legal limit. Gahagan was arrested and charged with operating a motor vehicle while intoxicated.[3]

¶6 Gahagan moved the trial court for an order suppressing evidence. She argued that she was illegally arrested when she was placed in the back of Finski's squad car, and that all evidence obtained following that arrest should be suppressed. After hearing testimony from Finski, Domurat and Gahagan, the trial court denied the motion.

¶7 Gahagan and the State then reached an agreement pursuant to which Gahagan would plead no contest, and there would be a joint recommendation that Gahagan receive a fine of $150 plus costs and surcharges, a six-month license revocation, and a mandatory drug and alcohol assessment. In addition, the parties

[3] Gahagan was also cited for failure to keep her vehicle under control and operating with a prohibited alcohol content. These citations were dismissed by agreement of the parties and are not at issue in this appeal.

recognized that Gahagan would be appealing the trial court's ruling, and agreed that the judgment would be stayed pending appeal. The trial court accepted Gahagan's no contest plea, found her guilty and imposed penalties consistent with the joint recommendation. This appeal followed.

STANDARD OF REVIEW

¶8 In reviewing a motion to suppress the court applies a two-step analysis. ***State v. Eason***, 2001 WI 98, ¶9, 245 Wis. 2d 206, 629 N.W.2d 625. First, the court reviews the trial court's findings of historical fact and will uphold them unless they are clearly erroneous. ***Id.*** Second, the court reviews the application of the relevant constitutional principles to those facts *de novo*. ***Id.***

DISCUSSION

¶9 Gahagan argues that she was under arrest at the time she was placed in the back of the deputy's squad car and that there was no probable cause for an arrest at that time. As such, she contends that all evidence collected subsequent to the alleged illegal arrest should be suppressed, including the four field sobriety tests and the preliminary breath test. As we explain in more detail below, we conclude that when Gahagan was placed in the squad car, she was not under arrest, and therefore suppression was not warranted. Because we conclude there was no arrest, we do not address whether there was probable cause for arrest.

A. Whether Gahagan waived the suppression issue by pleading no contest

¶10 As a preliminary matter, we address an issue that this court ordered the parties to address: whether Gahagan waived her right to appeal the

suppression issue when she pled no contest. In a June 29, 2005 order in this case, this court explained:

> A no contest plea is the equivalent of a guilty plea, and waives the right to raise nonjurisdictional defects and defenses, including claimed violations of constitutional rights. ***County of Racine v. Smith***, 122 Wis. 2d 431, 434, 362 N.W.2d 439 (Ct. App. 1984). In criminal cases, an exception exists for orders denying motions to suppress evidence or motions challenging the admissibility of a statement of a defendant. WIS. STAT. § 971.31(10). That exception, however, does not apply to traffic regulation cases in which the penalty is a civil forfeiture. ***County of Racine***, 122 Wis. 2d at 436.
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> Waiver, however, is not a jurisdictional bar to an appeal, but rather a principle of judicial administration. In first offense OWI matters, this court may consider: (1) the administrative efficiencies resulting from the plea; (2) whether an adequate record has been developed; (3) whether the appeal appears motivated by the severity of the sentence; and (4) the nature of the potential issue. ***County of Ozaukee v. Quelle***, 198 Wis. 2d 269, 275-76, 542 N.W.2d 196 (Ct. App. 1995).

We directed the parties to address in their briefs whether Gahagan should be barred from raising the suppression issue.

¶11 On appeal, both parties agree that Gahagan should not be barred from raising the suppression issue. The State notes that Gahagan's appeal was fully contemplated by the parties, and that an analysis of the factors in ***Quelle***, applied to this case, supports allowing the appeal. Gahagan emphasizes the similarity of the facts in ***Quelle*** to her case. This court agrees with the parties' analyses and concludes that, consistent with ***Quelle***, this court should address the merits of Gahagan's suppression argument.

B. Whether Gahagan was under arrest prior to being given field sobriety tests

¶12 Gahagan argues that she was illegally arrested when Finski directed Gahagan to sit in the back of Finski's squad car. An individual is under arrest when, given the degree of restraint under the circumstances, a reasonable person in the defendant's position would have considered himself to be in custody. ***State v. Swanson***, 164 Wis. 2d 437, 446-47, 475 N.W.2d 148 (1991), *modified on other grounds by* ***State v. Sykes***, 2005 WI 48, ¶27, 279 Wis. 2d 742, 695 N.W.2d 277. To make this determination, this court examines the totality of the circumstances. ***Swanson***, 164 Wis. 2d at 446. "The 'reasonable person' contemplated by the test is a reasonable innocent person in the defendant's position." ***Vorburger***, 2002 WI 105, ¶68 n.18, 255 Wis. 2d 537, 648 N.W.2d 829.

¶13 Gahagan bases her allegations of an improper arrest on the actions and words of the deputies on the scene and what those actions and words would have communicated to a reasonable person. Gahagan argues that although there is a factual dispute as to whether she was outside or inside her partner's vehicle just prior to being told to accompany Finski to Finski's squad car, "there is no dispute that Finski placed [Gahagan in Finski's] squad car with no ability to get out of the car."[4] She contends:

> [A]ny reasonable person in the position of GeriLin Gahagan would certainly have believed herself to be under arrest. Gahagan's liberty was restrained to a significant degree in that she was placed in a locked squad car and had no ability to leave that squad. She was led to that squad car from another location … [to] a small, confined and locked space. There would be no other reasonable conclusion that

[4] It is undisputed that the rear doors of the squad car cannot be opened from the inside of the back seat.

> one could draw from those circumstances other than she was under arrest.

¶14 Gahagan also relies on her testimony that another deputy returned to the squad car and opened the door, asked Gahagan a question, and then closed the door again. Gahagan asserts that this further confirmed her arrest status. Gahagan also contends that Finski's words and actions when she came to get Gahagan out of the car further confirmed that Gahagan was already under arrest. Gahagan testified:

> I get out of the vehicle, and we are standing there and she says, "I'm sorry to do this to you." [Finski] reached back [as if reaching toward her back] and she said, "You are under arrest," and I [stuck out an arm, offering to be handcuffed], and I looked back at all my friends and I said, "What am I under arrest for," and she said, "We have to do field sobriety tests."

Gahagan contends that this statement would leave no question in the mind of a reasonable person that she was under arrest.

¶15 The State agrees that many facts—including that Gahagan was asked to sit in Finski's squad car and that the squad car doors were locked—are undisputed. This court notes that the only disputed fact that Gahagan relies on is whether Finski told Gahagan she was under arrest when she asked Gahagan to exit the squad car. In contrast to Gahagan's testimony, Finski testified that she did not form an opinion about whether Gahagan was under the influence of an intoxicant until after she performed field sobriety tests, and that she did not tell Gahagan she was under arrest until after the tests were performed.

¶16 The trial court did not explicitly state that it rejected Gahagan's testimony, but such a finding is implied. The trial court noted that Gahagan "allege[d]" that she was told she was under arrest prior to the field sobriety tests,

but that Finski had not attempted to cuff Gahagan. In addition, when the trial court analyzed the facts, it did not assume that Gahagan had been told she was under arrest prior to the field sobriety tests. The trial court's implicit rejection of Gahagan's testimony is not clearly erroneous.

¶17 We must analyze whether, under the facts as found by the trial court, Gahagan was under arrest when she was placed in the squad car. The trial court, noting that a light pole had been knocked down and that there were potentially exposed electrical wires, concluded:

> Now, given that circumstance, it certainly seems reasonable to this court that the sheriff has a responsibility to secure the scene and to conduct some sort of investigation, and while the sheriff was conducting this investigation, temporarily detained the defendant and did that by placing her in the sheriff's squad, and again, I think that was appropriate given all of the circumstances that were ongoing. From all accounts, it appears to me that the detention was short. It was only for sufficient time to allow the sheriff to go over and make sure there were no exposed electrical wires, to do whatever else was necessary to secure the scene, and I don't believe that the defendant was under arrest at that time[.]

¶18 We agree with the trial court's reasoning and conclusion. In addition to allowing the investigating officer to secure the scene and check on safety concerns presented by the potentially exposed electrical wires, placing Gahagan in the vehicle ensured that Gahagan remained at the scene, out of the way of traveling cars and out of the cold weather. This court concludes that the deputy's escort of Gahagan to the squad car and Gahagan's four- to fifteen-minute detention in the back of that squad car would not lead a reasonable person to believe that she was under arrest. It was reasonable for the sheriff's deputies to want to temporarily detain Gahagan, the only person involved in a one-car accident, for a short period of time until the accident investigation concluded. A

reasonable person in the defendant's position would not interpret the detainment as an arrest but as a temporary stop to assist the deputies with their investigation.[5]

¶19 In summary, we conclude that Gahagan was not under arrest until she was formally placed under arrest after failing four field sobriety tests and a preliminary breath test. Therefore, we reject Gahagan's argument that her suppression motion should have been granted and affirm the judgment.

By the Court.—Judgment affirmed.

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

[5] This is especially true where, as here, the defendant is a law enforcement officer who is aware of the need to secure the scene and ensure the safe and continued presence of a possible defendant.