COURT OF APPEALS
DECISION
DATED AND FILED

September 20, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal Nos. 2006AP898-CR
2006AP899-CR

Cir. Ct. Nos. 2005CT1
2005CM8

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

EDWARD W. RUZGA,

DEFENDANT-APPELLANT.

APPEAL from judgments of the circuit court for Walworth County: JOHN R. RACE, Judge. *Affirmed*.

¶1 ANDERSON, J.[1] Edward W. Ruzga appeals from judgments of conviction for operating a motor vehicle with a prohibited alcohol concentration

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

and misdemeanor bail jumping. Ruzga contends that the investigatory stop and detention were conducted in violation of his Fourth and Fifth Amendment rights. We disagree and affirm the convictions.

Facts

¶2 In January 2005, the State filed criminal complaints against Ruzga charging him with operating a motor vehicle with a prohibited alcohol concentration, fourth offense, and misdemeanor bail jumping. Ruzga filed a motion to suppress, alleging that the Walworth County Sheriff's Department had stopped, detained and arrested him in violation of his Fourth and Fifth Amendment rights. Three members of the Walworth County Sheriff's Department testified at the motion hearing.

¶3 Sheriff's Deputy Daniel Long was working at the Walworth county courthouse on the morning of December 29, 2004. While walking prisoners between the holding area and the courtroom, Long noticed Ruzga twice enter and exit the men's bathroom. On one of those occasions, Ruzga was standing in the doorway of the bathroom using his heel to keep the door propped open. Long observed Ruzga's sweaty face. To Long, Ruzga "seemed like he was pacing, like he was kind of fidgety," and he was looking out the window as if he was waiting for someone. Long conceded that it would not be unusual for people to be nervous prior to a court appearance and, in the past, he had seen people pacing in the hallways or looking for other people.

¶4 In any event, after making the observations of Ruzga, Long stopped Ruzga and asked him some questions. Long indicated that up until this point, he had not observed any criminal activity. One of his concerns was that Ruzga was

sick. Long first asked Ruzga for identification and Ruzga presented him with a Wisconsin driver's license. Ruzga informed Long that he had a hearing that day and was waiting for his attorney to arrive. As he spoke with Ruzga, Long noticed that Ruzga's eyes were very red and glassy and that Ruzga's breath smelled of intoxicants. Long asked Ruzga how he arrived at the courthouse and Ruzga indicated that he had driven. Long asked Ruzga where he had parked his vehicle and where he placed the keys to the vehicle. Ruzga pointed out the window towards a vehicle parked out on the street and handed Long the keys. Long then asked Ruzga when he last consumed alcohol and how much he consumed. Ruzga told Long that he consumed a couple cocktails for lunch the previous day, but denied drinking any alcohol while at the courthouse. At some point during these preliminary questions, Long recommended that Ruzga come with him to a small conference room, stating something like "let's step over into the conference room here."

¶5 Long called for further assistance from a Sergeant Hausner and asked him to bring a preliminary breath testing unit. It took Hausner approximately ten to fifteen minutes to join Long and Ruzga in the conference room. Hausner asked Ruzga to submit to a preliminary breath test and Ruzga complied. Ruzga's breath sample showed an alcohol content of .07. Because the court security division was short on manpower that day, Long and Hausner called in officers out on regular patrol to address the situation further. Long concluded that he had a reasonable basis for detaining Ruzga until the other officers arrived given Ruzga's admission of driving, the odor of intoxicants, the blood shot and glassy eyes and the results from the PBT.

¶6 Walworth County Sheriff's Deputy David York responded to Long's request. Walworth County Deputy Sheriff James Green, who was York's field training officer, also responded to Long's appeal for assistance. From their own observations of Ruzga's appearance and of Ruzga's failure to properly perform field sobriety tests, York and Green concluded that Ruzga was intoxicated and they arrested him. Following the arrest, Ruzga was transported to a medical clinic for a blood draw. Ruzga refused and a nonconsensual blood draw was performed.

¶7 Following the testimony, the circuit court denied the motion to suppress. Ruzga pled no contest to the PAC and bail jumping charges. He now appeals.

Standard of Review

¶8 When we review a motion to suppress evidence, we will uphold the circuit court's findings of fact unless they are clearly erroneous. *See* WIS. STAT. § 805.17(2); ***State v. Eckert***, 203 Wis. 2d 497, 518, 553 N.W.2d 539 (Ct. App. 1996). However, whether those facts establish reasonable suspicion to stop or probable cause to arrest are questions of law which we review de novo. *See* ***State v. Waldner***, 206 Wis. 2d 51, 54, 556 N.W.2d 681 (1996); ***State v. Babbitt***, 188 Wis. 2d 349, 356, 525 N.W.2d 102 (Ct. App. 1994).

Discussion

Initial Questioning

¶9 Ruzga maintains that Long did not have the requisite reasonable suspicion of criminal activity to stop and question him. Ruzga points out that up

until the time Long initially stopped him, Long had not observed any criminal activity.

¶10 Not every police-citizen encounter involves a seizure protected by the Fourth Amendment. ***State v. Young***, 2006 WI 98, ¶18, __ Wis. 2d __, 717 N.W.2d 729. A police officer may ask questions, including asking for identification, even though there is no basis for suspecting that individual of criminal activity. ***Florida v. Bostick***, 501 U.S. 429, 434-35 (1991). A seizure occurs only if a reasonable person would have believed he or she was not free to leave considering all of the circumstances surrounding the incident. ***State v. Williams***, 2002 WI 94, ¶4, 255 Wis. 2d 1, 646 N.W.2d 834. Generally, police-citizen contact becomes a seizure within the meaning of the Fourth Amendment when an officer by means of physical force or show of authority has in some way restrained the liberty of a citizen. ***Id.***, ¶20.

¶11 Long approached Ruzga in the courthouse hallway, a public place. Long asked Ruzga for his identification and his reason for being at the courthouse. He asked Ruzga if he had consumed alcohol and if he had driven to the courthouse. Nothing at this point would indicate that Ruzga had been seized by Long. The record is devoid of any evidence that Long verbally or nonverbally compelled Ruzga to stay put when he asked Ruzga for identification and initially questioned him. Despite Ruzga's protestations to the contrary, it does not matter that at some point Long suggested to Ruzga that they move into an adjoining conference room because the crowd in the hallway made it less suitable for their

conversation.[2] *See* 4 WAYNE R. LAFAVE, SEARCH AND SEIZURE, § 9.4(a) (4th ed. 2004 & Supp. 2006) (noting that a seizure does not occur merely because the officer has for some understandable reason requested that the encounter be moved to a different yet nonintimidating location). We conclude that Long's request for identification and initial questioning did not constitute a seizure and therefore it does not matter that Long had no basis for suspecting that Ruzga was engaged in any sort of criminal activity. *See* ***Bostick***, 501 U.S. 434-45.

Continued Questioning

¶12 Ruzga contends that if he was not seized when asked for identification, he was seized for Fourth Amendment purposes when Long took his car keys and did not immediately return them. Even if we accept as true that at that point the initial encounter grew into an investigatory stop, Long then possessed the requisite reasonable suspicion that criminal activity was afoot.

¶13 An investigatory stop is constitutional if the police have reasonable suspicion that a crime has been committed, is being committed, or is about to be committed. ***Young***, 2006 WI 98, ¶19. An investigatory stop, though a seizure, allows police officers to briefly "detain a person for purposes of investigating possible criminal behavior even though there is no probable cause to make an arrest." ***Id.*** (citation omitted).

[2] On this question, we also note that Long's uncommunicated position that he would not have allowed Ruzga to leave the courthouse and drive someplace is not determinative. *See* 4 WAYNE R. LAFAVE, SEARCH AND SEIZURE, § 9.4(a) at 413 (4th ed. 2004).

¶14 Reasonable suspicion requires that a police officer possess specific and articulable facts that warrant a reasonable belief that criminal activity is afoot. ***Id.***, ¶21. A mere hunch that a person has been, is, or will be involved in criminal activity is insufficient. ***Id.*** On the other hand, "police officers are not required to rule out the possibility of innocent behavior before initiating a brief stop." ***Id.*** (citation omitted). If any reasonable inference of wrongful conduct can be objectively discerned, notwithstanding the existence of other innocent inferences that could be drawn, the officers have the right to temporarily detain the individual for the purpose of inquiry. ***Id.***

¶15 Long observed Ruzga engage in suspicious conduct in the courthouse hallway. Ruzga appeared nervous and fidgety as he looked out the window. Ruzga entered and exited the bathroom multiple times. As Long spoke with Ruzga after he stopped and questioned him, Long observed several indicators of intoxication—red and glassy eyes and odorous breath. Ruzga informed him that he had driven to the courthouse, pointed to his vehicle and handed Long the keys. Ruzga then informed Long that he had not consumed alcohol since arriving at the courthouse. Although, as Ruzga contends, there may have been innocent inferences that could have been drawn from Ruzga's red and glassy eyes and odorous breath, Long did not have to rule out innocent explanations for Ruzga's conduct and appearance. Based on the totality of the circumstances, we conclude that it was reasonable for Long to suspect that Ruzga had driven to the courthouse intoxicated. The stop was justified under the Fourth Amendment.

Custodial Interrogation[3]

¶16 Ruzga complains that the sheriff's department subjected him to a custodial interrogation without advising him of his ***Miranda*** rights. Ruzga contends that Long took him into custody when Long took his driver's license and his keys and moved him into the conference room.

¶17 Even during a ***Terry*** stop, a defendant may be considered "in custody" for Fifth Amendment purposes and entitled to ***Miranda*** warnings prior to questioning. ***State v. Gruen***, 218 Wis. 2d 581, 593, 582 N.W.2d 728 (Ct. App. 1998). We must determine, given the totality of the circumstances, whether a reasonable person in the suspect's position would not have considered himself or herself to be in custody given the degree of restraint under the circumstances. ***Id.***; ***State v. Quartana***, 213 Wis. 2d 440, 449-50, 570 N.W.2d 618 (Ct. App. 1997). An examination of the totality of the circumstances includes such relevant factors as the defendant's freedom to leave the scene; the purpose, place and length of the interrogation; and the degree of restraint. ***Gruen***, 218 Wis. 2d at 594.

¶18 We conclude that a reasonable person would not have believed he or she was in custody. Again, Long detained Ruzga after observing Ruzga's behavior in the hallway and the indicia of intoxication and discovering that Ruzga had driven to the courthouse. When questioning him, Long did not transport

[3] While the court did deny Ruzga's motions to suppress, the court did not specifically address the question of whether Ruzga was in custody for ***Miranda*** purposes. *See* ***Miranda v. Arizona***, 384 U.S. 436, 444 (1966). However, whether a defendant is "in custody" for purposes of ***Miranda*** is a question of law we review without deference to the trial court's determination. ***State v. Pounds***, 176 Wis. 2d 315, 320, 500 N.W.2d 373 (Ct. App. 1993). Further, we may affirm if we agree with the trial court's results, regardless of how it may have reasoned. *See* ***Lecander v. Billmeyer***, 171 Wis. 2d 593, 602, 492 N.W.2d 167 (Ct. App. 1992).

Ruzga to a more institutional setting, such as a police station or an interrogation room. Long merely suggested that they move their conversation to the adjoining conference room, a more suitable location given the hallway traffic. There is no evidence to suggest that Long ordered Ruzga to go into the conference room or that he closed the door once inside.[4] Further, neither Long nor the other officers communicated to Ruzga that he was under arrest and not free to leave, placed him in handcuffs or drew their guns. Also, Ruzga was not detained for an unusually long period of time. Long contacted Hausner and he arrived within ten to fifteen minutes and performed the PBT. The officers then called for the back-up officers. Simply stated, the officers diligently pursued their investigation and Ruzga's detention lasted no longer than necessary to confirm their suspicions. *See* ***id.***

¶19 As noted, in making his custody argument, Ruzga hangs his hat on Long's failure to return his driver's license and car keys. Ruzga directs us to ***State v. Luebeck***, 2006 WI App 87, ¶16, __ Wis. 2d __, 715 N.W.2d 639, where the court held that the fact that a person's driver's license or other official documents are retained by the officer is a key factor in assessing whether the person is "seized" for Fourth Amendment purposes. ***Luebeck*** is readily distinguishable. First, the issue in ***Luebeck*** was whether there was an illegal seizure at the time the defendant gave his consent to search his vehicle and not whether the defendant was in custody for ***Miranda*** purposes. These are two distinct inquiries. *See*

[4] Ruzga suggests that at the motion hearing the State conceded that he was in custody when he was taken to the conference room. The State did no such thing. The State conceded that the initial questioning turned into a detention in the conference room when, after observing the signs of intoxication and obtaining the admissions of prior consumption of alcohol and driving to the courthouse, Long stood in the doorway to the conference room and waited for the back-up officers.

Gruen, 218 Wis. 2d at 593-94. Second, the ***Luebeck*** court specifically narrowed its holding to "traffic stop[s]." ***Luebeck***, 2006 WI App 87, ¶16. Finally, the ***Luebeck*** court recognized that the withholding of the identification and documents was a "key factor" to consider when addressing the totality of the circumstances. *See* ***id.*** Thus, the court still looked at the totality of the circumstances surrounding the traffic stop. *See* ***id.***, ¶17. While Long's retention of the keys and license is certainly a factor, when viewed within the totality of the circumstances mentioned above, we are satisfied that a reasonable person in Ruzga's position would not have considered himself or herself in custody. *See* ***Quartana***, 213 Wis. 2d at 449 (stating that "[a] restraint of liberty does not ipso facto prove that an arrest has taken place…. Nor do we believe the fact that the officer kept [the defendant's] driver's license leads to a conclusion that an arrest has taken place.").

Conclusion

¶20 In sum, the initial encounter between Ruzga and Long did not trigger the safeguards of the Fourth Amendment. By the time the encounter blossomed into a ***Terry*** detention, Long possessed the requisite reasonable suspicion that Ruzga had engaged in criminal activity. Because Ruzga was not in custody during the ***Terry*** detention, ***Miranda*** warnings were not required. The trial court properly denied Ruzga's motions to suppress. We affirm the judgments of conviction.

By the Court.—Judgments affirmed.

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