

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 4, 2007

A. John Voelker
Acting 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. 2006AP1619

Cir. Ct. No. 2005CV2010

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

CITY OF RACINE,

PLAINTIFF-RESPONDENT,

V.

JOHN P. RABUCK,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Racine County:
STEPHEN A. SIMANEK, Judge. *Affirmed.*

¶1 SNYDER, P.J.¹ John P. Rabuck appeals from a forfeiture judgment convicting him of operating a motor vehicle while intoxicated (OWI), contrary to

¹ This is a one-judge appeal pursuant to WIS. STAT. § 752.31(2)(c) (2005-06). All references to the Wisconsin Statutes are to the 2005-06 version.

WIS. STAT. § 346.63(1)(a). He contends the court erred when it denied his motion to suppress evidence due to an unlawful arrest. Specifically, Rabuck claims that he was illegally arrested without probable cause because he was immediately handcuffed, and there were at least five uniformed police officers and a patrol squad present at the time of the stop. We affirm the judgment.

¶2 The facts are undisputed. City of Racine Police Officer Chad Stillman observed Rabuck operating his vehicle in an erratic manner on West Boulevard and activated his emergency lights and siren. Rabuck's vehicle continued down West Boulevard and turned onto Kinzie Avenue where it stopped. According to Stillman, Rabuck did not respond to his "audible lights and sirens for about the 800 feet on West Boulevard and 500 feet it took him to stop on Kinzie." Stillman testified that Rabuck did not pull his vehicle over appropriately, and "had driven probably long enough to where other squads in the area thought that I was actually in vehicle pursuit." Stillman opined that Rabuck's failure to stop his vehicle immediately was the reason other police squads and officers were at the scene of the stop.

¶3 When he confronted Rabuck in his vehicle, Officer Stillman noticed a strong odor of intoxicants and observed that Rabuck had glassy, red eyes, exhibited slow and slurred speech, and admitted to having "a few drinks." Stillman stated that when Rabuck stepped out of his vehicle, he was initially handcuffed "just before the officer safety pat-down." After the safety pat-down, Rabuck was released from the handcuffs and subjected to field sobriety tests. Stillman administered the horizontal gaze nystagmus test and the one-leg balance test. Stillman testified that after those field tests Rabuck was placed under arrest and transported to the police department for an intoxilyzer test. The intoxilyzer test result was .15 percent.

¶4 Rabuck does not challenge the lawfulness of the traffic stop. Under certain circumstances, police may stop a vehicle and detain its occupants for investigation even if the police lack probable cause to arrest. *State v. Guzy*, 139 Wis. 2d 663, 675, 407 N.W.2d 548 (1987). However, Rabuck contends that his immediate handcuffing in the presence of at least five uniformed police officers and a patrol wagon waiting to take him to the police station resulted in his arrest without probable cause. The test applied when we review an investigative stop is one of reasonableness, in which we seek to balance the individual's interest in protection against unwarranted governmental intrusion against society's interest in enabling the police to solve crimes and enforce the law. *See id.* at 676. Whether Rabuck was handcuffed and the number of police officers present at the time are relevant factors in examining the totality of the circumstances and determining whether the degree of restraint constituted an arrest.² *See State v. Gruen*, 218 Wis. 2d 581, 594-96, 582 N.W.2d 728 (Ct. App. 1998) (determining if Gruen was in custody for *Miranda* purposes).

¶5 We first note that Rabuck was handcuffed after Officer Stillman followed the Rabuck vehicle for approximately one-quarter mile with the squad emergency lights and siren operating. While mere flight alone does not give rise to probable cause for arrest, flight in the presence of law enforcement officers coupled with other circumstances suggesting that a law violation has occurred are

² In exploring the degree of restraint, courts have also considered as relevant factors: (1) *whether the defendant was handcuffed*, (2) *whether a gun was drawn on the defendant*, (3) *whether a Terry frisk was performed*, (4) *the manner in which the defendant was restrained*, (5) *whether the defendant was moved to another location*, (6) *whether the questioning took place in a police vehicle*, and (7) *the number of police officers involved*. *State v. Gruen*, 218 Wis. 2d 581, 594-96, 582 N.W.2d 728 (Ct. App. 1998) (citations omitted; emphasis added) (referencing *Terry v. Ohio*, 392 U.S. 1 (1968)).

proper factors to be considered in the decision to make an arrest. *State v. DiMaggio*, 49 Wis. 2d 565, 574, 182 N.W.2d 466 (1971). Stillman testified, however, that he initially handcuffed Rabuck prior to conducting a safety pat-down and not due to Rabuck's failure to stop his vehicle appropriately in response to the squad lights and siren.

¶6 Law enforcement officers may take such steps as are “reasonably necessary to protect their personal safety and to maintain the status quo during the course of the stop.” *United States v. Hensley*, 469 U.S. 221, 235 (1985). During a stop for investigative purposes, officers are allowed to take necessary measures for their own protection. *Wendricks v. State*, 72 Wis. 2d 717, 725, 242 N.W.2d 187 (1976). Necessary measures may even include detention with weapons drawn. *Id.* Handcuffing during an investigative stop does not necessarily convert the stop into an arrest. *United States v. Taylor*, 716 F.2d 701, 709 (9th Cir. 1983).

¶7 In *United States v. Bautista*, 684 F.2d 1286 (9th Cir. 1982), the court held that the defendants were not automatically under arrest once they were handcuffed just because they were not, from that moment, free to leave. The *Bautista* court stated that a brief but complete restriction of liberty, if not excessive under the circumstances, is permissible and does not necessarily convert a stop into an arrest. *Id.* at 1289.

¶8 While Rabuck concedes that handcuffing does not automatically transform a detention into an arrest, he cites to *Gruen* to support his argument. In *Gruen*, the court referenced several factors, including handcuffing and the number of police officers present during a detention, but concluded that in the context of the totality of the circumstances Gruen was not in custody for the purpose of *Miranda*. *Gruen*, 218 Wis. 2d at 596.

¶9 Rabuck also cites to *New York v. Quarles*, 467 U.S. 649 (1984), in support of his contention. *Quarles*, like *Gruen*, is a Fifth Amendment case dealing with *Miranda*. The *Quarles* court held that the safety of the officer and the public “must be paramount to the literal language of the prophylactic rules enunciated in *Miranda*.” *Quarles*, 467 U.S. at 653. It concluded that Quarles was in custody when he was interrogated because he was handcuffed and surrounded by four officers. *Id.* at 655. We are satisfied that *Quarles* and *Gruen* are not dispositive of whether an unlawful arrest occurred under the circumstances presented here.

¶10 The use of handcuffs does not necessarily transform an investigative stop into an arrest. *State v. Swanson*, 164 Wis. 2d 437, 448, 475 N.W.2d 148 (1991). The circumstances in this case, including the failure of Rabuck to respond promptly to the emergency lights and siren of the police squad, support the number of police officers present at the scene of the stop and Officer Stillman’s initial handcuffing of Rabuck for a safety pat-down search. We conclude that the initial use of handcuffs for a safety purpose was reasonable and did not covert the investigative traffic stop into an arrest. Accordingly, we affirm the judgment.

By the Court.—Judgment affirmed.

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

