

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 9, 2008

David R. Schanker
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. 2008AP875

Cir. Ct. No. 2007CV2547

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

CITY OF MADISON,

PLAINTIFF-RESPONDENT,

V.

ELI WEINSTEIN,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Dane County:
STUART A. SCHWARTZ, Judge. *Affirmed.*

¶1 HIGGINBOTHAM, P.J.¹ Eli Weinstein appeals a judgment against him for operating a motor vehicle under the influence of an intoxicant and for

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

operating a motor vehicle with a prohibited alcohol concentration, contrary to WIS. STAT. §§ 346.63(1)(a) and 346.63(1)(b). The circuit court found Weinstein guilty after denying his motion to suppress evidence gathered as a result of the traffic stop. Weinstein argues that the stop was unlawful because the officer lacked reasonable suspicion to believe that he had committed a traffic violation. In the alternative, he argues that if the stop was legal initially, it later became an illegal arrest when the investigating officer transported him to the parking garage of the City-County Building to conduct field sobriety tests. Because we conclude that the stop was supported by reasonable suspicion, and that the transport of Weinstein to the City-County Building did not transform the stop into an arrest, we affirm the judgment of conviction.

Background

¶2 On the evening of February 17, 2006, Officer Marine Yoo was stationed at the intersection of West Washington Avenue and Fairchild Street in Madison. Yoo observed a vehicle driven by Weinstein traveling southbound on Fairchild. Yoo testified that he saw the vehicle continue through the intersection of West Washington and Fairchild after the traffic light had turned red. Yoo then initiated a traffic stop of the vehicle.

¶3 Yoo observed that Weinstein's eyes were glassy and his speech was slurred. Yoo smelled the odor of alcohol coming from inside the vehicle. Yoo decided to conduct field sobriety tests and informed Weinstein he would administer the tests at the City-County Building because of frigid temperatures. Yoo then parked Weinstein's vehicle, placed Weinstein in the back seat of the squad car, and drove him to the basement parking garage of the City-County

Building to conduct the tests. Yoo later arrested Weinstein for operating while intoxicated.

¶4 The case was first heard in the municipal court, which denied Weinstein's initial motion to suppress and found him guilty of running a red light and operating a motor vehicle while intoxicated. Weinstein then requested a trial de novo before the circuit court. Weinstein renewed his motion to suppress in the circuit court, which denied the motion upon finding that Officer Yoo had reasonable suspicion to stop Weinstein for running the red light, and that the transport of Weinstein to the City-County Building did not transform the investigatory stop into an arrest without probable cause. The court found Weinstein guilty following a stipulated trial. Weinstein appeals.

Discussion

Reasonable Suspicion for Traffic Stop

¶5 A temporary detention for investigative purposes implicates the constitutional protections against unreasonable searches and seizures contained in the Fourth Amendment of the United States Constitution and art. I, § 11 of the Wisconsin Constitution.² *State v. Williams*, 2001 WI 21, ¶18, 241 Wis. 2d 631,

² The Fourth Amendment to the United States Constitution provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Article I, § 11 of the Wisconsin Constitution provides:

(continued)

623 N.W.2d 106. An officer may make a traffic stop in the absence of probable cause if the officer has a reasonable suspicion, under the totality of the circumstances, to believe that a traffic violation has occurred. *State v. Post*, 2007 WI 60, ¶13, 301 Wis. 2d 1, 733 N.W.2d 634.

¶6 Determining whether reasonable suspicion existed for an investigatory stop is a question of constitutional fact. *Id.*, ¶8. We apply a two-step standard of review to questions of constitutional fact. *Id.* First, we examine the circuit court's findings of historical fact, and uphold them unless they are clearly erroneous. *Id.* Second, we review the determination of reasonable suspicion de novo. *Id.*

¶7 Weinstein contends that the stop was not justified by reasonable suspicion. First, he argues that Yoo lacked an objective basis for the stop because he could not have observed the traffic light and Weinstein's vehicle at the same time. Weinstein notes that this view was bolstered by the testimony of an expert witness. Second, Weinstein notes that the light was yellow as he approached the intersection, and argues that stopping on the yellow would have been hazardous because the street was partially covered in ice. He asserts that this places his

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We ordinarily interpret Article I, § 11 of the Wisconsin Constitution in accordance with the United States Supreme Court's interpretation of the Fourth Amendment. *State v. Phillips*, 218 Wis. 2d 180, 195, 577 N.W.2d 794 (1998).

actions within the inability-to-stop-safely exception to the red light violation statute. *See* WIS. STAT. § 346.37(1)(b). We reject both contentions.

¶18 These arguments challenge the circuit court’s finding of historical fact that Weinstein ran the red light, which was based upon the testimony of Officer Yoo. Yoo testified that he observed Weinstein run the red light, and that he relied on his familiarity with the intersection and his experience and training in determining that a traffic violation took place. The circuit court found Yoo’s testimony to be credible. The circuit court also found that Yoo credibly determined that Weinstein’s vehicle could have stopped for the red light. Weinstein fails to demonstrate that these findings were clearly erroneous, and we therefore may not disturb them. *See* WIS. STAT. § 805.17(2).

Effect of Transport on Temporary Detention

¶19 Weinstein contends that Officer Yoo transformed the investigative stop into an arrest by transporting him to the City-County Building for field sobriety tests. WISCONSIN STAT. § 968.24³ permits temporary detention of an individual to determine whether a crime has been committed. The statute specifically allows for detention “in the vicinity” of the location of the stop. Detention beyond what is called for in § 968.24 requires probable cause pursuant

³ WISCONSIN STAT. § 968.24 provides:

After having identified himself or herself as a law enforcement officer, a law enforcement officer may stop a person in a public place for a reasonable period of time when the officer reasonably suspects that such person is committing, is about to commit or has committed a crime, and may demand the name and address of the person and an explanation of the person’s conduct. Such detention and temporary questioning shall be conducted in the vicinity where the person was stopped.

to the Fourth Amendment of the United States Constitution and art. I, § 11 of the Wisconsin Constitution.

¶10 A totality of the circumstances analysis is used to determine whether a reasonable person would have considered himself to be under arrest considering the degree of restraint under the circumstances. *State v. Quartana*, 213 Wis. 2d 440, 449-50, 570 N.W.2d 618 (Ct. App. 1997). “The ‘reasonable person’ contemplated by the test is a reasonable innocent person in the defendant’s position.” *State v. Vorburger*, 2002 WI 105, ¶68 n.18, 255 Wis. 2d 537, 648 N.W.2d 829. When a suspect is moved during a temporary detention, we apply the two-part inquiry set forth in *Quartana* to determine whether moving the suspect converted a temporary seizure into an arrest. *Quartana*, 213 Wis. 2d at 446. First, we determine whether the suspect was moved “within the vicinity” of the stop. *Id.* Second, we examine whether moving the suspect was reasonable under the circumstances. *Id.*

¶11 Weinstein argues that a reasonable person in his position would have believed he was under arrest when he was moved to the City-County Building garage. Weinstein cites the following evidence to support his argument: the investigating officers were in uniform and armed; the officers did not inform Weinstein that he was free to leave; Weinstein was frisked and transported in the back of a squad car; Yoo admitted he would have arrested Weinstein for resisting arrest if he had tried to leave the City-County Building’s garage; and the door on the garage was closed.

¶12 We conclude that the transport of Weinstein did not transform the investigative detention into an arrest under the two-part *Quartana* test. Concerning the “vicinity” prong of the *Quartana* test, the record demonstrates that

the City-County Building is less than three blocks from where the original stop occurred. We have previously found that distances of a mile from the stop were considered in the “locality.” *Quartana*, 213 Wis. 2d at 447. The trip to the City-County Building was of very short duration. Yoo estimated it took one minute to drive there. We therefore conclude that the location to which Weinstein was transported was in the “vicinity” of stop as required by *Quartana*.

¶13 Turning to the “reasonableness” prong of the *Quartana* test, the record establishes that the temperature at the time of the stop was well below freezing, and that Yoo was concerned that the cold could make the field sobriety test unnecessarily difficult for Weinstein. We note that convenience and safety are both reasonable reasons to transport a suspect to a different location to continue an investigation. See *Quartana*, 213 Wis. 2d at 448. Because of the frigid temperatures, it was both safer and more convenient for Yoo to administer the field sobriety tests to Weinstein in the City-County Building’s garage. This satisfies the second part of the *Quartana* test.

¶14 Weinstein protests that the institutional nature of the place to which he was transported, the City-County Building, transformed the stop into a custodial arrest. He calls our attention to several cases, including *Hayes v. Florida*, 470 U.S. 811, 815 (1985), *Florida v. Royer*, 460 U.S. 491, 502-03 (1983), and *Dunaway v. New York*, 442 U.S. 200, 207, 99 S. Ct. 2448 (1979), in which the nature of the place to which the defendant was transported turned a temporary detention into a custodial arrest. However, in each of these cases, the place of transport was a police station (*Hayes*, *Dunaway*) or an airport interrogation room (*Royer*). By contrast, Weinstein was transported to a parking garage within a government building. We acknowledge that the building which contained the garage houses a police station among other facilities. However, Yoo

did not take Weinstein to the police station or to any other government office within that building. Instead, he conducted the field sobriety tests in an environment that was less suggestive of custodial detention. Under these circumstances, we conclude that the location to which Weinstein was transported, the parking garage of the City-County Building, did not transform the investigative stop into a custodial arrest.

¶15 As for Yoo's admission that he would have arrested Weinstein if he had tried to leave, it is well-established that an officer's unarticulated plans have no bearing on the question of whether a person is actually under arrest. *See Berkemer v. McCarty*, 468 U.S. 420, 442 (1984).

Conclusion

¶16 In sum, we conclude that the traffic stop was supported by reasonable suspicion. We further conclude the transport of Weinstein to the City-County Building garage did not transform the investigative stop into an arrest because the garage was in the vicinity of the traffic stop and the move was reasonable under the circumstances. Moreover, we conclude that the nature of the place to which Weinstein was transported, the parking garage of the City-County Building, did not transform the stop into an arrest. We therefore affirm.

By the Court.—Judgment affirmed.

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

