

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 5, 2009

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 Nos. 2008AP1592-CR
2008AP1593-CR**

**Cir. Ct. Nos. 2006CM2921
2006CT2927**

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

RONALD L. GANTNER,

DEFENDANT-APPELLANT.

APPEAL from judgments of the circuit court for Dane County:
JAMES L. MARTIN, Judge. *Affirmed.*

¶1 LUNDSTEN, J.¹ Ronald Gantner appeals two circuit court judgments, one convicting him of possession of cocaine and possession of drug

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2007-08). All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

paraphernalia, and the other convicting him of operating a motor vehicle under the influence of a controlled substance (fourth offense). His challenge goes to the circuit court's denial of his motion to suppress. He argues that the police should have given him *Miranda* warnings before asking him if he had been drinking, lacked probable cause to administer a preliminary breath test (PBT), and improperly searched his vehicle incident to arrest. We affirm the judgments.

Background

¶2 The sole witness at the suppression hearing was the police officer who initially stopped Gantner. The officer testified that he and a second officer were on patrol in their squad car when a motorist gave him a look of "surprise and nervousness." The officer also noticed the motorist drift for a few seconds into a bicycle lane that was clearly marked with a painted line.

¶3 While following the vehicle, the police determined that it was registered to Gantner, a white male approximately fifty years old, six feet tall, and one hundred seventy-five pounds. The description matched that of the person the officer had seen driving the vehicle. The officer also determined that the driver's license of the vehicle's registered owner was revoked. As the police continued to follow the vehicle, it seemed that the driver was trying to evade them by making frequent turns within a residential area that was not the area in which the vehicle's owner lived.

¶4 The officer stopped the vehicle, approached it, and identified the driver as Gantner. He asked Gantner if Gantner's license was valid, and Gantner admitted that it was not. In response to further questioning, Gantner told the officer that the reason for the revocation was an OWI.

¶5 The officer had Gantner step out of his vehicle and frisked him for weapons. The officer told Gantner that the officer was going to cite him for operating the vehicle with a revoked driver's license. Because Gantner would not be able to drive his vehicle, the officer asked Gantner to have a seat in the back of the squad car. The officer told Gantner that he was not taking him to jail, that Gantner was not under arrest, and that the officer would just be completing the citation and releasing Gantner from the scene, although they would have to figure out what to do with Gantner's vehicle. The officer placed Gantner in the back seat of the squad car and returned to the front seat of the squad car. The squad car doors were closed and the windows were rolled up. Gantner was not handcuffed.

¶6 As the officer was completing paperwork for Gantner's citation, he smelled the odor of intoxicants coming from the back of the squad car's passenger compartment. The officer asked Gantner if he had had anything to drink, and Gantner admitted that he had a mixed drink with vodka an hour earlier. The officer checked Gantner's driving record and found that he had three prior convictions for OWI. Knowing that the standard for a fourth-offense OWI was only a 0.02 blood alcohol concentration (BAC), the officer called a sergeant to administer a PBT. The PBT showed a result of 0.022. Based on that result, the officer arrested Gantner.

¶7 The officer returned to Gantner's vehicle to search it incident to the arrest. The officer saw a backpack on the front passenger seat and, upon opening the backpack, discovered "knotted off plastic baggy corners." The officer testified that, based on his training and experience, these are used to package illegal controlled substances. A subsequent search of the backpack revealed that it also contained crack cocaine and other drug paraphernalia. In addition, the police investigation led to the discovery that Gantner was operating his vehicle while

under the influence of cocaine. As indicated above, Gantner was convicted of possession of cocaine, possession of drug paraphernalia, and operating a motor vehicle under the influence of a controlled substance (fourth offense).

Discussion

¶8 When reviewing a motion to suppress, we affirm the circuit court’s findings of fact unless they are clearly erroneous. *State v. Pallone*, 2000 WI 77, ¶27, 236 Wis. 2d 162, 613 N.W.2d 568. We review *de novo*, however, the circuit court’s application of constitutional principles to the facts. *Id.* Gantner raises three issues regarding his motion to suppress. We address each of these issues below.

*1. Whether Police Should Have Given Gantner **Miranda** Warnings Before Asking Him If He Had Been Drinking*

¶9 There is no dispute that the police properly subjected Gantner to a temporary detention. Gantner argues, however, that the circumstances went beyond a mere temporary detention by the time the police asked him in the squad car if he had been drinking. He argues that he was in custody by that time and, therefore, should have received *Miranda* warnings. We disagree.

¶10 The parties agree that *State v. Gruen*, 218 Wis. 2d 581, 582 N.W.2d 728 (Ct. App. 1998), sets forth the test for determining whether a suspect is in custody for *Miranda* purposes:

The test is “whether a reasonable person in the defendant’s position would have considered himself or herself to be in custody, given the degree of restraint under the circumstances.” The totality of the circumstances must be considered when determining whether a suspect was “in custody” for the purpose of triggering *Miranda* protections.

Gruen, 218 Wis. 2d at 593 (citations omitted). 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. *Id.* at 594. The dispute here pertains to the degree of restraint. The relevant factors include:

(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.

Id. at 594-96 (footnotes omitted).

¶11 We concluded in *Gruen* that the suspect was *not* in custody when questioned in a police vehicle during a temporary detention. *See id.* at 586-89, 596-98. Gantner's primary argument is that *Gruen* is factually distinguishable and, therefore, Gantner was in custody. We are not persuaded.

¶12 The pertinent facts in *Gruen* are as follows. An officer had stopped Gruen after observing him walking away from a vehicle stuck in a snow bank. *Id.* at 586. Because the officer was outside his jurisdiction, he called for another officer from the appropriate jurisdiction. *See id.* at 586-87, 596. It was cold outside, so the officer asked Gruen if he wanted to wait in a police van. *Id.* at 587, 596. The back door to the van was closed while Gruen was waiting, but open when Gruen was questioned by the second officer. *Id.* at 597. Gruen was frisked,

but not handcuffed or removed from the scene.² *Id.* at 597-98. Two officers were involved in the questioning. *Id.* at 598. Neither officer drew a gun. *Id.*

¶13 Gantner argues that his case is distinguishable from *Gruen* for two reasons: first, an officer in *Gruen* thought that Gruen “appeared” intoxicated and second, the officer invited Gruen to sit in the police van because of the cold. Gantner asserts that there was no evidence that he appeared intoxicated and that the police here “directed” him to sit in the squad car. These differences do not persuade us that the result should be different.

¶14 As to the first asserted difference, we see little significance in whether Gantner “appeared” intoxicated to the police. The custody question for *Miranda* purposes views the facts from Gantner’s position, not the officer’s position. Gantner does not articulate any reason why he would be more likely to believe he was in custody if he was not intoxicated.

¶15 As to the second asserted difference, the reason Gantner was in the police vehicle was different than the reason in *Gruen*, but that difference does not help Gantner. The *Gruen* defendant was in the vehicle, waiting for another officer to arrive at the scene, because it was cold. Gantner was in the vehicle, waiting for the officer to finish the citation and figure out what to do with Gantner’s vehicle, because Gantner could not legally drive his vehicle. We fail to discern why one reason suggests custody more than the other.

² There was conflicting testimony as to whether Gruen was handcuffed, but we assumed fact finding in a manner supporting the circuit court’s conclusion that Gruen was not in custody. See *State v. Gruen*, 218 Wis. 2d 581, 587, 597-98, 582 N.W.2d 728 (Ct. App. 1998).

¶16 To the extent that Gantner is relying on the fact that he was “directed” to sit in the squad car, we disagree with Gantner’s characterization. The officer testified that he “asked” Gantner to sit in the back seat of the squad car and that the officer then “placed” Gantner in the squad car. The circuit court found that Gantner “was not forced or ordered to sit in the squad car.” Gantner does not, nor could he successfully, argue that this finding was clearly erroneous.

¶17 Furthermore, even if we assumed that the officer “directed” Gantner to sit in the squad car and that Gantner had less choice in the matter than Gruen, we agree with the circuit court that, under the totality of the circumstances, a reasonable person in Gantner’s position would not have considered himself to be in custody. Before placing Gantner in the squad car, the officer told Gantner that he was not taking Gantner to jail, that Gantner was not under arrest, and that the officer would only be completing the citation and releasing Gantner from the scene. It would have been apparent to a reasonable person in Gantner’s position that he was simply waiting in the squad car because of his revoked driver’s license.

¶18 Other pertinent circumstances include that Gantner was frisked but not handcuffed, that there is no evidence that any officer had drawn a weapon, that Gantner had not been removed from the scene, and that only two police officers were present. We are satisfied that a reasonable person in Gantner’s position would not have believed that he was in custody when the officer asked Gantner if he had been drinking.

2. *Whether The Police Had Probable Cause To Administer The PBT*

¶19 Gantner argues that the police lacked the requisite level of probable cause to justify a PBT in accordance with WIS. STAT. § 343.303.³ We disagree.

¶20 WISCONSIN STAT. § 343.303 authorizes an officer to administer a PBT when the officer has “probable cause to believe” that the person is violating or has violated a drunk driving law. In this context, “probable cause to believe” refers to a quantum of proof greater than the reasonable suspicion necessary to justify an investigative stop, ... but less than the level of proof required to establish probable cause for arrest.” *County of Jefferson v. Renz*, 231 Wis. 2d 293, 316, 603 N.W.2d 541 (1999); *see also State v. Colstad*, 2003 WI App 25, ¶23, 260 Wis. 2d 406, 659 N.W.2d 394. The test is a nontechnical, common-sense one:

As the very name implies, it is a test based on probabilities It is also a commonsense test. The probabilities with which it deals are not technical: “[T]hey are the factual and practical considerations of everyday life on which reasonable and prudent men [and women], not legal technicians, act.”

³ WISCONSIN STAT. § 343.303 provides, in relevant part:

Preliminary breath screening test. If a law enforcement officer has probable cause to believe that the person is violating or has violated s. 346.63(1) or (2m) or a local ordinance in conformity therewith, or s. 346.63(2) or (6) or 940.25 or s. 940.09 where the offense involved the use of a vehicle, ... the officer, prior to an arrest, may request the person to provide a sample of his or her breath for a preliminary breath screening test using a device approved by the department for this purpose. The result of this preliminary breath screening test may be used by the law enforcement officer for the purpose of deciding whether or not the person shall be arrested ... and whether or not to require or request chemical tests as authorized under s. 343.305(3).

County of Dane v. Sharpee, 154 Wis. 2d 515, 518, 453 N.W.2d 508 (Ct. App. 1990) (citations omitted).

¶21 Here, the officer testified that he believed that the odor of intoxicants provided sufficient cause to administer a PBT to Gantner because the legal limit for a fourth offense operating under the influence is only a 0.02 BAC. Gantner does not dispute that a 0.02 BAC was the applicable standard. He argues, instead, that the odor of intoxicants the police detected on him was not, by itself, sufficient to provide probable cause to believe that he had a BAC of 0.02 or higher.

¶22 Gantner’s argument is directed at the officer’s articulated reasoning, but the test is objective; we consider the totality of the circumstances known to the officer. See *State v. Kutz*, 2003 WI App 205, ¶11, 267 Wis. 2d 531, 671 N.W.2d 660 (“Probable cause for arrest exists when the totality of the circumstances within the arresting officer’s knowledge would lead a reasonable police officer to believe that the defendant probably committed a crime.”).

¶23 The totality of the circumstances known to the officer at the relevant time included not only the odor of alcohol but also that Gantner gave the officer a look of “surprise and nervousness,” that Gantner’s vehicle drifted for a few seconds into a clearly marked bike lane, that Gantner appeared to be trying to evade the police by repeatedly making turns in a residential neighborhood that was not his, and that Gantner admitted to consuming a vodka drink an hour earlier. In addition, Gantner admitted that his license was revoked because of a prior OWI, and the police knew that Gantner’s record included three previous OWI-related offenses. Gantner does not argue that the prior offenses cannot be considered in the totality of the circumstances analysis. See *id.*, ¶17 n.4 (“Nothing in [*State v. Betow* [, 226 Wis. 2d 90, 593 N.W.2d 499 (Ct. App. 1999),] suggests that a prior

arrest may not be considered as part of the totality of circumstances a reasonable officer takes into account”).

¶24 We are satisfied that, under the totality of the circumstances, the officer had the requisite “probable cause to believe” that Gantner was operating a motor vehicle with a BAC of 0.02 or more.

3. Whether The Police Properly Searched Gantner’s Vehicle Incident To Arrest

¶25 Gantner argues that the police search of his vehicle incident to his arrest was improper. Gantner does not dispute that the search occurred at the scene immediately after his arrest. He argues that a search incident to arrest was impermissible because he was already locked inside a squad car and, therefore, could not have gained access to any weapons or evidence in his vehicle.

¶26 Gantner concedes in his brief-in-chief that this argument is foreclosed by *New York v. Belton*, 453 U.S. 454 (1981), and *State v. Fry*, 131 Wis. 2d 153, 388 N.W.2d 565 (1986). And, in his reply brief, he does not respond to the State’s argument that *Fry* is controlling. Because we are bound by *Fry*, we address the issue no further. See *Cook v. Cook*, 208 Wis. 2d 166, 189, 560 N.W.2d 246 (1997) (“The supreme court is the only state court with the power to overrule, modify or withdraw language from a previous supreme court case.”).⁴

⁴ Gantner may be making sub-arguments on this issue that attempt to avoid the holding in *State v. Fry*, 131 Wis. 2d 153, 388 N.W.2d 565 (1986). If he is, his arguments lack sufficient development to permit us to determine what it is that he is arguing. Accordingly, we do not address them. See *State v. Pettit*, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992).

By the Court.—Judgments affirmed.

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

