

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 18, 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 No. 2008AP2927
STATE OF WISCONSIN**

**Cir. Ct. Nos. 2008TR4739
2008TR5657**

**IN COURT OF APPEALS
DISTRICT IV**

COUNTY OF ROCK,

PLAINTIFF-RESPONDENT,

V.

MICHAEL A. DESCAMPS,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Rock County:
JAMES P. DALEY, Judge. *Affirmed.*

¶1 DYKMAN, J.¹ Michael Descamps appeals from a judgment of conviction for operating a motor vehicle while under the influence of an intoxicant

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

(OWI) in violation of WIS. STAT. § 346.63. He argues that he was arrested without probable cause when he was ordered out of his vehicle to perform field sobriety tests. We conclude that Descamps was not arrested when he was ordered out of his car and therefore has not established a violation of his constitutional rights. Accordingly, we affirm.

FACTS

¶2 On April 19, 2008, Rock County Deputy Sheriff Luke Ducharme pulled Descamps over in Janesville, Wisconsin, for speeding at 12:42 a.m. Ducharme approached Descamps' vehicle and through the window smelled a "strong odor" of intoxicants. Ducharme asked Descamps if he had anything to drink prior to driving, and Descamps answered that he had "a couple" at a bar in Cherry Valley, Illinois. Ducharme first testified that he "asked" Descamps to step out of the vehicle so that he could perform field sobriety tests. Later, he testified that he "had" Descamps step out of the vehicle to perform field sobriety tests. Descamps testified that he did not believe that he was free to leave because the officer "wanted [Descamps] in front of his cruiser [to perform] field sobriety tests." After Descamps exited the vehicle, Ducharme conducted the horizontal gaze nystagmus, the walk-and-turn test, and the one-leg stand test on Descamps. Descamps had difficulty performing these tests. Ducharme testified that after the results of these tests, he concluded Descamps was intoxicated. He ordered Descamps to submit a preliminary breath test (PBT). The PBT showed that Descamps had a blood alcohol content of 0.11 percent.

¶3 Descamps moved to suppress the results of the field sobriety tests, claiming that a demand to do field sobriety tests based only on the odor of intoxicants constitutes an unreasonable seizure. The trial court denied the motion,

concluding that Descamps had the right to say no to the officer's order, and that the continued temporary detention did not amount to an arrest before the execution of the field sobriety tests. Descamps appeals.

STANDARD OF REVIEW

¶4 “In reviewing a motion to suppress, we accept the circuit court's findings of fact unless they are clearly erroneous; the correct application of constitutional principles to those facts presents a question of law, which we review de novo.” *State v. Drew*, 2007 WI App 213, ¶11, 305 Wis. 2d 641, 740 N.W.2d 404.

DISCUSSION

¶5 Descamps argues that an order to perform field sobriety tests, as opposed to a request, effects an arrest. Thus, Descamps argues, he was arrested when he was ordered out of his car. Descamps then argues that he was arrested without probable cause because “the act of speeding coupled with an odor of alcohol and nothing more” does not amount to probable cause to arrest for OWI.

¶6 The County responds that Ducharme was justified in requesting that Descamps exit the vehicle after the traffic stop based on reasonable suspicion that Descamps was intoxicated.² It argues that Ducharme's observations provided

² The County does not specifically respond to Descamps' argument that he was under arrest because the officer ordered him out of the car. Instead, the County relies on the initial testimony of the officer saying that he “asked” Descamps to get out of the car so he could perform the field sobriety tests. For that reason, the County argues only that the officer had reasonable suspicion to ask Descamps to perform the field sobriety tests. See *State v. Colstad*, 2003 WI App 25, ¶19, 260 Wis. 2d 406, 659 N.W.2d 394 (an officer may extend an initial traffic stop when he or she becomes aware of additional suspicious factors which give rise to an articulable suspicion that the person has or is committing an offense). However, the trial court stated that it would “assume” that Ducharme “ordered” Descamps out of the vehicle. Therefore,

(continued)

reasonable suspicion to suspect Descamps of driving under the influence. Therefore, the County contends, Ducharme conducted an investigatory stop and brief detention of Descamps, supported by reasonable suspicion, to determine if Descamps was operating under the influence. We conclude that the undisputed facts in the record establish that Descamps was not arrested when he was ordered out of his car, and that Ducharme's detention of Descamps was not an illegal seizure under the United States or Wisconsin Constitutions.

¶7 “The Fourth Amendment to the United States Constitution and art. I, § 11 of the Wisconsin Constitution both protect citizens from unreasonable searches and seizures.” *State v. Pallone*, 2000 WI 77, ¶28, 236 Wis. 2d 162, 613 N.W.2d 568 (footnotes omitted). A temporary detention of an individual “during the stop of an automobile by the police, even if only for a brief period and for a limited purpose, constitutes a seizure” of that person within the meaning of the Fourth Amendment. *Whren v. United States*, 517 U.S. 806, 809 (1996) (citation omitted).

¶8 Generally, a police officer may reasonably stop an automobile when the facts establish reasonable suspicion to believe that the individual is or was violating the law. *See State v. Colstad*, 2003 WI App 25, ¶8, 260 Wis. 2d 406, 659 N.W.2d 394. “After stopping the car and contacting the driver, the officer’s observations of the driver may cause the officer to suspect the driver of operating the vehicle while intoxicated.” *County of Jefferson v. Renz*, 231 Wis. 2d 293,

because we accept the trial court’s findings of fact unless they are clearly erroneous, *State v. Drew*, 2007 WI App 213, ¶11, 305 Wis. 2d 641, 740 N.W.2d 404, we will address whether the officer’s order effected an arrest, and not if the officer had reasonable suspicion to request that Descamps perform field sobriety tests based on specific and articulable facts.

310, 603 N.W.2d 541 (1999). “If, during a valid traffic stop, the officer becomes aware of additional suspicious factors which are sufficient to give rise to an articulable suspicion that the person has committed or is committing an offense or offenses separate and distinct from the acts that prompted the officer’s intervention in the first place, the stop may be extended and a new investigation begun.” *Colstad*, 260 Wis. 2d 406, ¶19 (citation omitted). If the officer’s “observations of the driver are not sufficient to establish probable cause for arrest for OWI violation, the officer may request the driver to perform various field sobriety tests.” *Renz*, 231 Wis. 2d at 310.

¶19 We first reject Descamps’ argument that his subjective belief as to whether he was free to leave is relevant to our arrest analysis. Descamps points to the subjective test in *State v. Doyle*, 96 Wis. 2d 272, 282, 291 N.W.2d 545 (1980), as the method for analyzing whether an arrest has occurred. However, the supreme court abrogated the subjective test previously used in *Doyle* and other cases. *State v. Swanson*, 164 Wis. 2d 437, 445-46, 475 N.W.2d 148 (1991), *abrogated on other grounds by State v. Sykes*, 2005 WI 48, 279 Wis. 2d 742, 695 N.W.2d 277. In *Swanson*, the supreme court adopted an *objective* test to determine the moment of arrest in order to provide uniformity and consistency with the United States Supreme Court’s decision to use an objective test. *Id.* at 446. Therefore, in Wisconsin, the test for whether a person is arrested is whether a reasonable person in the defendant’s position would believe he or she was in custody given the degree of restraint under the circumstances. *Id.* at 446-47. “The circumstances of the situation including what has been communicated by the police officers, either by their words or actions, [are] controlling under the objective test.” *Id.* at 447.

¶10 Using an objective test, we conclude that Descamps was not under arrest when Ducharme ordered him out of his car. Wisconsin has found more intrusive police action to effect a *Terry*³ investigative stop rather than an arrest. In *State v. Quartana*, 213 Wis. 2d 440, 443, 570 N.W.2d 618 (Ct. App. 1997), we held that an officer's ordering a defendant to ride in a police car was not an arrest. There, an officer arrived on the scene of a one-car accident and determined that the car belonged to Quartana. *Id.* at 443-44. The officer drove to Quartana's home and asked to see his driver's license. *Id.* at 444. After noticing the smell of intoxicants and observing that Quartana had bloodshot and glassy eyes, the officer informed Quartana that he would have to accompany him to the scene of the accident. *Id.* Quartana asked if he could ride with his parents to the scene. *Id.* The police officer told Quartana he would have to come with him, because he needed to keep him under observation, and that he was temporarily being detained in connection with the accident investigation. *Id.* At the scene of the accident, Quartana took and failed several field sobriety tests, refused to take a preliminary breath test, and consequently was arrested. *Id.*

¶11 Quartana argued that he had been unlawfully arrested when the police transported him to the scene of the crime. *Id.* at 449. We concluded "that a reasonable person in Quartana's position would not have believed he or she was under arrest." *Id.* at 450. We found that the facts that Quartana was not transported to an institutional setting, not detained for an unusually long period of time, and that if he passed the field sobriety test that he would be free to go, supported a conclusion that Quartana was not arrested. *Id.* at 450-451.

³ *Terry v. Ohio*, 392 U.S. 1 (1968).

¶12 Similarly, we have said that the use of handcuffs on an individual does not automatically effect an arrest. In *State v. Marten-Hoye*, 2008 WI App 19, ¶2, 307 Wis. 2d 671, 746 N.W.2d 498, police stopped the defendant to determine if she was violating a curfew ordinance. After she was told that she was free to leave, Marten-Hoye began to yell obscenities at the officers. *Id.*, ¶¶2-3. The police again approached her, told her she was under arrest for disorderly conduct, and placed her in handcuffs. *Id.*, ¶3 The police told her that she would be free to go if she cooperated while they wrote her a citation. *Id.* We concluded that a reasonable person would not consider themselves under arrest because Marten-Hoye was told that she would be issued a citation and then would be free to leave. *Id.*, ¶¶28-29.

¶13 Finally, the supreme court has found that a police order to an individual at gunpoint does not automatically effect an arrest. In *Jones v. State*, 70 Wis. 2d 62, 69-70, 233 N.W.2d 441 (1975), police stopped a car containing Jones, Walker, and another man after receiving a tip that they were involved in an armed robbery. An officer ordered Jones at gun point to get out of the vehicle and to raise his hands in the air. *Id.* at 70. The supreme court concluded that Jones was not under arrest when he was ordered out of the car at gunpoint. *Id.*

¶14 As in *Quartana*, *Marten-Hoye*, and *Jones*, a reasonable person in Descamps' position would not believe that he or she was under arrest. Like *Quartana*, Descamps was temporarily detained in connection with an investigation. Both Quartana and Descamps were given orders by the investigating police officer. Also, Descamps was not detained for an unusually long period of time or brought to a more institutional setting such as a police station or detention center. Similar to *Marten-Hoye*, Descamps was not under arrest because he would have been free to go if he passed the field sobriety tests.

Like *Jones*, Descamps was ordered out of the car so that the officer could continue an investigation. Unlike *Quartana*, *Marten-Hoye*, and *Jones*, where the police officers acted in a more intrusive manner, Descamps was never placed in the back of a police car, placed in handcuffs, told that he was under arrest, or ordered to comply with police at gunpoint. Thus, we conclude that under the totality of circumstances, Officer Ducharme's order to Descamps was not an arrest. Accordingly, we affirm.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports. *See* WIS. STAT. RULE 809.23(1)(b)4.

