COURT OF APPEALS
DECISION
DATED AND FILED

September 23, 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. 2009AP180 **Cir. Ct. No. 2007CF194**

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

IN THE MATTER OF THE REFUSAL OF KEVIN D. BURTON:

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

KEVIN D. BURTON,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Manitowoc County: PATRICK L. WILLIS, Judge. *Affirmed.*

¶1 SNYDER, J.[1] Kevin D. Burton appeals from an order for revocation of his operating privileges for a period of three years. He contends that the circuit court erred in revoking his operating privileges because his arrest for operating a motor vehicle while intoxicated was not supported by probable cause. We disagree and affirm the order.

BACKGROUND

¶2 On April 10, 2008, Manitowoc County Sheriff's Deputy Jeff Horneck received a dispatch advising of a hit-and-run accident involving a motorcycle and another vehicle. Dispatch also advised that the male motorcycle operator had gone to a nearby garage and hid inside for some time and that a vehicle, a black Cadillac, pulled up and a male left the garage and entered that vehicle and left the scene. The information was provided by witnesses who identified themselves to dispatch, and they were continuously reporting their observations by cell phone. Dispatch informed Horneck that the motorcycle operator was wearing a darker colored jacket, was possibly in his fifties, had frizzy hair, and that the Cadillac was traveling eastbound on Highway V.

¶3 Shortly after receiving the information, Horneck arrived in the area and observed a black Cadillac travelling on Highway V. Horneck activated the emergency lights and initiated a traffic stop. After Horneck pulled in behind the Cadillac, he observed that the passenger, later identified as Burton, was a male who matched the description given by the witnesses.

[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.

¶4 Horneck approached on the passenger side of the vehicle with his weapon drawn and ordered the passenger out of the vehicle.[2] Burton did not comply right away, so Horneck placed his hand on him and ordered him out of the vehicle. Once Burton exited the vehicle, Horneck ordered him to lay face down on the ground and place his hands behind his back to be handcuffed. Burton was handcuffed and patted down for weapons. Before putting handcuffs on Burton, Horneck holstered his weapon and it remained holstered throughout the remainder of the stop.

¶5 Horneck informed Burton that he received a complaint of a hit-and-run involving a motorcycle and a vehicle and that Burton was identified as the operator of the motorcycle. When Horneck questioned Burton about operating a motorcycle, Burton initially denied operating his motorcycle, saying that it was at his shop. However, after Horneck informed Burton that witnesses saw him operating the motorcycle, Burton admitted that he had been driving drunk that night, but denied hitting anyone or being involved in an accident.

¶6 Horneck then advised Burton that he would be investigating the matter further and transported Burton, while still handcuffed, to a bank parking lot near the scene of the accident. The bank is located less than one mile from the location of the traffic stop of the Cadillac. At the bank, Horneck learned from the witnesses that there was no other vehicle involved and that the operator of the motorcycle crashed the motorcycle on his own. The witnesses reported that they called the sheriff's department after they observed Burton driving erratically.

[2] Horneck explained that several factors led him to "elevate [his] level of caution," most particularly, the subject's flight from the scene of the accident.

Horneck testified that from the moment he initiated the questioning on the scene, he noticed that Burton had a strong odor of intoxicants and bloodshot glassy eyes.

¶7 Horneck then drove Burton to a local hospital for further investigation. Horneck noted that the crash occurred when there were no other factors involving weather or traffic that would have caused it. He asked Burton if he felt impaired, and Burton stated that he did. Upon observing that Burton was unsteady, Horneck asked Burton to submit to field sobriety tests. When Burton refused to perform the Horizontal Gaze Nystagmus test and the Walk-and-Turn test, Horneck advised him that he would take it as a refusal to complete the tests. Burton then refused to perform the One Leg Stand test, but a preliminary breath test showed a result of .209 percent.

¶8 Horneck advised Burton that he was under arrest for OWI. Horneck provided Burton with the information required by Wisconsin's implied consent statute, *see* WIS. STAT. § 343.305(4), and Burton checked the "no" box on the Informing the Accused form, thereby refusing to submit to an evidentiary chemical test.

¶9 Prior to trial, Burton moved to suppress any evidence obtained during and following the traffic stop on grounds his arrest was not supported by probable cause and to suppress any statements he made on grounds that he was not provided with the requisite ***Miranda***[3] warnings prior to custodial interrogation. The circuit court granted Burton's motion seeking suppression of statements he made prior to a ***Miranda*** warning, but denied his motion to suppress all evidence

[3] ***Miranda v. Arizona***, 384 U.S. 436 (1966).

for lack of probable cause to arrest. On September 8, 2008, a jury acquitted Burton, finding that he had not operated while intoxicated or with a prohibited alcohol concentration.

¶10 The circuit court subsequently took up the issue of Burton's license revocation stemming from his refusal to submit to the chemical blood test under WIS. STAT. § 343.305(4). At the refusal hearing held on November 21, 2008, the circuit court concluded that Burton unreasonably refused to submit to the test. The court revoked Burton's driving privilege for a period of thirty-six months. Burton appeals.

DISCUSSION

¶11 Burton asserts that the circuit court erred in finding that he improperly refused to submit to an evidentiary chemical test of his blood. Under Wisconsin law, when a driver is alleged to have improperly refused to submit to a blood test, the issues are limited to (1) whether the officer stopping the driver had probable cause to believe the driver was operating a motor vehicle while under the influence of alcohol, (2) whether the officer properly informed the driver of his or her rights and responsibilities under the implied consent law, and (3) whether the defendant improperly refused the test. WIS. STAT. § 343.305(9)(a)5.

¶12 Burton narrows the issue to the first factor: probable cause. He contends that Horneck did not have probable cause to arrest for OWI at the moment custody ensued; that is, at the traffic stop when Horneck approached the Cadillac with his weapon drawn, physically took Burton out of the car, instructed Burton to lie face down, and handcuffed him. This requires us to examine two questions: (1) At what point was Burton arrested for OWI and (2) were the

totality of the circumstances at that point such that Horneck had probable cause to arrest Burton for OWI.

¶13 We begin by identifying the moment of arrest for OWI.[4] For an inquiry such as this, there is no bright-line rule. ***State v. Marten-Hoye***, 2008 WI App 19, ¶27, 307 Wis. 2d 671, 746 N.W.2d 498, *review denied*, 2008 WI 40, 308 Wis. 2d 610, 749 N.W.2d 661. For example, the Wisconsin Supreme Court has stated that an investigative stop does not become an arrest simply because the police draw the weapons. ***State v. Swanson***, 164 Wis. 2d 437, 448, 475 N.W.2d 148 (1991), *abrogated on other grounds by* ***State v. Sykes***, 2005 WI 48, 279

[4] At the pretrial motion hearing, the circuit court held in relevant part:

> Burton, here, was stopped at gunpoint. He was forced to lay on the ground, frisked and handcuffed. He was questioned while handcuffed, in the backseat of a squad car, with the doors to the squad car closed. He was never told he was free to leave. After initial questioning, he was transported back to the scene of the accident and then to Holy Family Memorial Medical Center, before being formally placed under arrest.
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> ….
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> Deputy Horneck did notify Burton, after placing him in handcuffs, of the report that Horneck had received from dispatch and the reason for stopping Burton. However, the totality of the circumstances here would have left Burton with the clear impression he was in custody.

Because Burton was subjected to custodial interrogation without the benefit of ***Miranda*** warnings, the court suppressed all statements made by Burton prior to his arrest and the provision of ***Miranda*** warnings. However, the existence of custodial interrogation does not resolve the question of whether Burton was under arrest. We have acknowledged the confusion between an arrest as a seizure under the Fourth Amendment and the ***Miranda*** concept of being "in custody." *See* ***State v. Morgan***, 2002 WI App 124, ¶13 n.8, 254 Wis. 2d 602, 648 N.W.2d 23; *see also*, Richard A. Williamson, *The Virtues (and Limits) of Shared Values: The Fourth Amendment and* ***Miranda****'s Concept of Custody*, 1993 U. ILL. L. REV. 379, 405 ("A lawful [traffic] stop is not rendered unreasonable simply because the suspect believes he or she has been arrested or is uncertain as to his or her fate during the period of that temporary detention."). The circuit court correctly noted that "custody" and "arrest" pose different questions.

Wis. 2d 742, 695 N.W.2d 277. The court also recognized that the use of handcuffs does not necessarily transform an investigative stop into an arrest. ***Swanson***, 164 Wis. 2d at 448. Thus, the question of arrest turns on the facts of each case.

¶14 Burton contends that he was under arrest at the moment Horneck appeared alongside the Cadillac with his gun drawn and ordered Burton to lie face down and be handcuffed. The State counters that Burton was not under arrest until he was formally placed under arrest at the hospital. It asserts that the restraint used during the hit-and-run investigation was the minimum amount necessary under the circumstances. The circuit court concluded that "once the officer transported the defendant from the scene of the accident, eight miles to the hospital, the defendant was under arrest for Fourth Amendment purposes." We agree.

¶15 During the course of a traffic stop, "officers may try to obtain information confirming or dispelling their suspicions." ***State v. Quartana***, 213 Wis. 2d 440, 446, 570 N.W.2d 618 (Ct. App. 1997). An investigatory detention is not the same as a formal arrest:

> By its express language, [WIS. STAT.] § 968.24 … authorizes the police to move a suspect short distances during the course of a temporary investigation. The statute states that the police may temporarily detain and question an individual "in the vicinity where the person was stopped." Therefore, it is clear that the law permits the police, if they have reasonable grounds for doing so, to move a suspect in the general vicinity of the stop without converting what would otherwise be a temporary seizure into an arrest.

Quartana, 213 Wis. 2d at 446 (citation omitted). More recently, our supreme court confirmed:

> The predicate permitting seizures on suspicion short of probable cause is that law enforcement interests warrant a

> limited intrusion on the personal security of the suspect. The scope of the intrusion permitted will vary to some extent with the particular facts and circumstances of each case. This much, however, is clear: an investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop. Similarly, the investigative methods employed should be the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time.

State v. Vorburger, 2002 WI 105, ¶76, 255 Wis. 2d 537, 648 N.W.2d 829 (citation omitted).

¶16 Our supreme court has adopted an objective test to determine the moment of arrest. ***Swanson***, 164 Wis. 2d at 446. 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.

¶17 Here, Horneck was responding to a dispatch about a collision that may have involved injuries and was caused by a person who fled the scene, broke into a garage, and was whisked off by someone in a Cadillac. As we read the facts, Horneck began to deescalate the conditions of Burton's detention as his investigation of the hit-and-run continued. Before placing handcuffs on Burton, Horneck holstered his weapon and it remained holstered for the rest of the investigation. After Horneck had secured Burton, he promptly explained his reason for the detention and his need to move the investigation to the scene of the accident where witnesses were present. The scene of the accident was less than one mile away, and there is no indication in the record to suggest that Horneck's investigation extended beyond a reasonable amount of time under the

circumstances. After arriving at the scene of the accident, Horneck learned that some of the information provided by dispatch was incorrect.

¶18 In the meantime, Horneck had become aware of facts that led him to conclude Burton may have been operating his motorcycle while intoxicated. If, during a valid traffic stop, an officer becomes aware of additional information that would give rise to an objective, articulable suspicion that criminal activity is afoot, that officer need not terminate the encounter simply because further investigation is beyond the scope of the initial stop. ***State v. Betow***, 226 Wis. 2d 90, 94-95, 593 N.W.2d 499 (Ct. App. 1999). Although this presents a new and distinct investigation, in reality there may not be a bright line separating the two investigations; rather, the first investigation may overlap the second without any outward indication of a shift. ***State v. Malone***, 2004 WI 108, ¶24, 274 Wis. 2d 540, 683 N.W.2d 1. That is how Horneck's investigation of Burton's driving progressed.

¶19 We conclude, as the circuit court did, that the level of restraint applied after the initial stop was such that a reasonable person would conclude that he or she was not free to leave and custodial questioning ensued. A reasonable person would have known that once the witnesses were confronted, the officer would know that a hit-and-run had not occurred and release would be imminent. The detention, therefore, did not escalate into an arrest until the investigation shifted from the hit-and-run report to Horneck's focus on OWI. At that point, Horneck advised Burton that he was going to transport him to a hospital eight miles away to continue his OWI investigation. Horneck did not remove Burton's handcuffs until they arrived at the hospital and Horneck initiated field sobriety tests. A reasonable person would conclude that the level of restraint, duration of custody, and diminishing potential for release amounted to a formal arrest. With

that in mind, we turn our attention to the question of probable cause at the moment of arrest.

¶20 We review probable cause under a de novo standard of review. *See* ***County of Jefferson v. Renz***, 231 Wis. 2d 293, 316, 603 N.W.2d 541 (1999). Here, the issue arises in the context of a refusal.[5] The test for probable cause under the refusal hearing statute is 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. ***Id.*** at 314; ***State v. Wille***, 185 Wis. 2d 673, 681, 518 N.W.2d 325 (Ct. App. 1994) ("The State's burden of persuasion at a refusal hearing is substantially less than at a suppression hearing."). We look only to see if the State established that the arresting officer had probable cause to believe that Burton was operating a motor vehicle while under the influence of an intoxicant. *See* ***State v. Nordness***, 128 Wis. 2d 15, 35, 381 N.W.2d 300 (1986). The evidentiary scope of the refusal hearing is narrow, and the court simply ascertains the plausibility of the arresting officer's account. *See* ***id.*** at 35-36.

¶21 At the refusal hearing, the circuit court held that its ruling on Burton's pretrial motion to suppress was the law of the case. The court had determined that the arrest occurred when Horneck transported Burton to the hospital, which was located eight miles away. Burton reiterates his position that the arrest occurred at the moment he was pulled from the Cadillac and handcuffed, and argues that Horneck had insufficient information at that time to make an OWI

[5] When a person is arrested for OWI, an officer may ask the person to provide a blood sample. *See* WIS. STAT. § 343.305(3)(a). If a person refuses to submit to the test, the officer will take possession of the person's license and issue a notice of intent to revoke the person's operating privileges by court order. *See* § 343.305(9)(a). The notice of intent to revoke the person's operating privileges advises that the person may request a hearing on the revocation. ***Id.***

arrest. He emphasizes that Horneck was "misinformed" about the hit-and-run accident and therefore the only valid information Horneck had at the time of the traffic stop was that an accident had occurred and that Burton matched an eyewitness description of the driver who had fled the scene. Burton notes that Horneck never personally observed Burton's driving, balance or speech.

¶22 The State counters that, even with the suppression of Burton's admission that he was driving drunk, probable cause supporting the arrest arose from the following circumstances: Horneck knew that there had been a traffic accident, he knew the weather was not a factor, he noticed that Burton had bloodshot and glassy eyes, he smelled a strong odor of intoxicants on Burton, and eye witnesses had reported that Burton was driving erratically before he crashed.

¶23 In ***State v. Kasian***, 207 Wis. 2d 611, 622, 558 N.W.2d 687 (Ct. App. 1996), our supreme court concluded that there was probable cause to arrest for OWI when police found Kasian injured at the scene of a one-car accident, smelled intoxicants on Kasian, and noted Kasian's speech was slurred. Similarly, in ***Wille***, 185 Wis. 2d at 683-84, we concluded that police had probable cause to arrest after Wille struck a car parked on the shoulder of a highway and the police smelled intoxicants on Wille at the hospital, knew that a firefighter had smelled intoxicants on Wille as well, and Wille told them he had "to quit doing this." Notably, neither case involved a police officer's personal observation of the defendant's driving prior to the accident and neither benefitted from clues obtained during field sobriety tests. Nonetheless, under the circumstances of each case, the officer had probable cause to make the arrest.

¶24 Probable cause in the context of an OWI arrest may be demonstrated in many ways. Here, Horneck had eyewitness reports that Burton had been

driving erratically, was involved in an accident, and fled the scene. Also, in the first moments of the traffic stop, Horneck personally noted Burton's glassy, bloodshot eyes and the strong smell of intoxicants. He had all of that information prior to transporting Burton to the hospital. That is sufficient to lead a reasonable officer to believe a violation of the law has occurred, particularly in light of the lower standard required at a refusal hearing where the court "need only be persuaded that the State's account is plausible." ***Id.*** at 681.

CONCLUSION

¶23 We conclude the circuit court properly distinguished between custody for ***Miranda*** purposes and formal arrest. We further conclude that, at the moment of arrest, Horneck had probable cause to arrest Burton for OWI and that Burton's driving privilege was properly revoked for refusal to submit to a chemical breath test under WIS. STAT. § 343.305(9)(a)5.c. We therefore affirm.

By the Court.—Order affirmed.

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