COURT OF APPEALS
DECISION
DATED AND FILED

March 21, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 01-1954 **Cir. Ct. No. 01-CT-299**

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

IN THE MATTER OF THE REFUSAL OF GREGORY A. MUELLER:

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

V.

GREGORY A. MUELLER,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Dane County: MORIA KRUEGER, Judge. *Reversed and cause remanded with directions.*

¶1 LUNDSTEN, J.[1] The State of Wisconsin appeals an order of the circuit court granting Gregory A. Mueller's motion to suppress evidence obtained as a consequence of the stop, detention, and arrest of Mueller on January 19, 2001. For the following reasons, we reverse and remand.

Background

¶2 In reviewing an order suppressing evidence, we will uphold a circuit court's findings of fact unless they are against the great weight and clear preponderance of the evidence. ***State v. Richardson***, 156 Wis. 2d 128, 137, 456 N.W.2d 830 (1990). Furthermore, this court will follow its normal practice of assuming facts, reasonably inferable from the record, in a manner that supports the circuit court's decision. *See* ***State v. Wilks***, 117 Wis. 2d 495, 503, 345 N.W.2d 498 (Ct. App.), *aff'd*, 121 Wis. 2d 93, 358 N.W.2d 273 (1984).

¶3 In its order granting Mueller's motion to suppress, the court stated that it found the testimony of Officer Kari Olsen, the sole testifying witness at the suppression hearing, to be credible and accurate in its description of Officer Olsen's interaction with Mueller. Officer Olsen's testimony is as follows.

¶4 On January 19, 2001, at approximately 11:50 p.m., Officer Olsen was stopped at a red light at the intersection of Dayton Street and Park Street when she observed a vehicle traveling northbound on Park Street without its lights on. Officer Olsen turned north on Park Street and followed the vehicle with her emergency lights and siren activated. Officer Olsen testified that she had to use

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c) (1999-2000). All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

various sirens to get the driver's attention to pull over. The driver continued north on Park Street to University Avenue, where the vehicle turned west and came to a stop in front of Chadbourne Hall.

¶5 Officer Olsen stated that she approached the driver and informed him that she stopped him because he was traveling without his headlights on. At that time, Officer Olsen noticed a strong odor of intoxicants. She asked the driver how much he had to drink that evening, to which he replied that he had a couple of drinks. Officer Olsen identified the driver as Mueller by his driver's license. Officer Olsen then returned to her vehicle to call for a second officer to assist her in administering field sobriety tests to Mueller.

¶6 Officer Olsen testified that Officer Trisha Meinholz arrived at the scene as backup. Officer Olsen then returned to Mueller's vehicle and asked him to step outside to perform field sobriety tests. Officer Olsen escorted Mueller into Chadbourne Hall, a residence hall for students attending the University of Wisconsin-Madison, located approximately 150 feet from Mueller's vehicle. At the hearing, Officer Olsen was posed the following question: "Why did you ask Mr. Mueller to go into Chadbourne Hall to perform these field tests?" Officer Olsen responded that she was concerned because it was very cold out. Officer Olsen testified that while she retained Mueller's license during the field sobriety tests, she did not take his car keys, she did not indicate that he was under arrest, and she did not handcuff him.

¶7 Officer Olsen testified that she conducted the field sobriety tests in a lounge, approximately 500 square feet in size, connected to the lobby of the residence hall. The tests took approximately fifteen minutes. Officer Olsen also stated that while the doors to the lounge were closed, they were unlocked so that

anyone in the lobby of the residence hall would have access to the lounge. While in the process of administering the field sobriety tests, Lieutenant Todd Kueschel arrived at the residence hall. At approximately 12:15 a.m. on January 20, 2001, Officer Olsen placed Mueller under arrest.

¶8 On cross-examination, Officer Olsen agreed that January 20 was two days prior to the start of the spring semester at the University, and that less students are generally on campus during semester breaks than during those times classes are in session. Officer Olsen also agreed that the doors to Chadbourne Hall, at least at night, were locked, and that Officer Meinholz, a liaison to the residence hall, opened the door directly to the lounge from outside the building with a key. Officer Olsen also stated that she did not see anyone else in the residence hall besides herself, Mueller, and the other two officers.

¶9 On redirect, Officer Olsen agreed that, based on her experience, on the Friday evening before the semester begins, students are living in the residence halls. She stated that the residence halls are open for the students' access.

¶10 The court issued an oral ruling from the bench. In so doing, the court stated its finding that Chadbourne Hall is not a public building.[2] The court also stated that it could not find as a matter of fact that Mueller did not think he was under arrest when he was escorted into Chadbourne Hall. The court noted that while the 150 feet between the vehicle and the residence hall was not a great distance, it would appear to be to someone who did not know where he was going

[2] We note that while we may not have similarly concluded that Chadbourne Hall is not a public building, we cannot say that the circuit court's finding on this point is against the great weight and clear preponderance of the evidence. Thus, for purposes of this appeal, we will assume that Chadbourne Hall is not a public building.

or whether he was free to leave. Finally, the court stated that the move to the residence hall was not reasonable because the court could not conclude it was so cold that nobody could perform the tests outside, and because Officer Olsen never explained to Mueller the reason for the move such that Mueller would have believed he was not under arrest. Accordingly, the court granted Mueller's motion to suppress. The State appealed.

Discussion

¶11 The sole issue we must decide is whether the circuit court erred in granting Mueller's motion to suppress. This issue necessarily requires us to determine whether the move of Mueller from the public street to Chadbourne Hall converted what would otherwise have been a temporary seizure into an arrest.

¶12 As noted above, we will uphold the circuit court's factual findings unless they are against the great weight and clear preponderance of the evidence. *See* ***Richardson***, 156 Wis. 2d at 137. Nonetheless, whether a stop meets statutory and constitutional standards is a question of law that we review *de novo*. ***Id.*** at 137-38.

¶13 Pursuant to ***Terry v. Ohio***, 392 U.S. 1 (1968), a police officer may temporarily detain a person for the purpose of investigating possible criminal activity even though there is no probable cause to arrest. *See* ***id.*** at 22. Such "seizures" are justifiable under the Fourth Amendment if there is articulable suspicion that a person has committed or is about to commit a crime. ***Florida v. Royer***, 460 U.S. 491, 498 (1983).

¶14 The parties do not dispute the validity of the initial stop and detention. Rather, they dispute whether the move of Mueller to Chadbourne Hall

to perform field sobriety tests turned a permissible temporary seizure into an impermissible arrest lacking probable cause.

¶15 To support its contention that the court erred in granting Mueller's motion to suppress, the State cites ***State v. Quartana***, 213 Wis. 2d 440, 570 N.W.2d 618 (Ct. App. 1997). In ***Quartana***, the court stated that WIS. STAT. § 968.24,[3] pertaining to the temporary questioning of a suspect without arrest, specifically authorizes police to move a suspect short distances during the course of a temporary investigation. ***Id.*** at 446. The ***Quartana*** court concluded that the move of a suspect during a temporary investigation does not convert a seizure into an arrest when: (1) the person is moved within the "vicinity" and (2) the purpose in moving the person within the vicinity is reasonable. ***Id.***

¶16 Mueller responds that the State's reliance on ***Quartana*** is misplaced. According to Mueller, the issue is not one of "distance," but of "place." In so arguing, Mueller has inherently acknowledged that Chadbourne Hall was in the vicinity of the stop and the purpose of the move was reasonable. We think this admission appropriate. In ***Quartana***, the defendant was moved a mile from his

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[3] WISCONSIN STAT. § 968.24 provides as follows:

> 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.*

(Emphasis added).

home to the location of an accident. ***Id.*** at 443-44. In this case, Mueller was moved just 150 feet from his vehicle. Additionally, we think it not unreasonable to direct a suspect to perform field sobriety tests in the warmth of a building rather than on the street on a cold January night in Wisconsin.

¶17 With respect to his argument that the issue here is one of "place" and not "distance," Mueller suggests that while certain police actions, such as excessively detaining an individual or moving a suspect a material distance from the stop, may turn a temporary seizure into an arrest, the taking of a suspect into a private location, hidden from public view, always does so. Mueller cites to no case, however, and we find none, specifically holding that the move of a suspect to a private location to continue an investigation always turns a temporary seizure into an arrest.

¶18 Indeed, the Supreme Court has stated that there is no litmus-paper test for determining when a seizure exceeds the bounds of an investigative stop. ***Royer***, 460 U.S. at 506. Additionally, the Supreme Court has also acknowledged that there are "undoubtedly reasons of safety and security that would justify moving a suspect from one location to another during an investigatory detention, such as from an airport concourse to a more private area." ***Id.*** at 504-05. And, in ***Michigan v. Summers***, 452 U.S. 692 (1981), the Court held that the move of the defendant from his front steps to the inside of his home, while a significant restraint on his liberty, did not turn a lawful investigatory detention into an unlawful arrest. ***Id.*** at 701-02; *see also* ***United States v. Vanichromanee***, 742 F.2d 340, 344-45 (7th Cir. 1984) (move of the defendants from parking garage to inside of apartment did not vitiate the investigatory nature of the stop in light of fact that, among other things, transfer was not to "a more institutional setting, such as a police station or interrogation room").

¶19 Mueller argues that the implication of the Supreme Court's holding in ***Berkemer v. McCarty***, 468 U.S. 420, 436-37 (1984), is that a traffic stop which is or becomes non-public in nature necessarily renders the stop an arrest. We disagree. In ***Berkemer***, the Court was required to determine whether "a traffic stop exerts upon a detained person pressures that sufficiently impair his free exercise of his privilege against self-incrimination to require that he be warned of his constitutional rights." ***Id.*** at 437. The Court concluded that the presumptively temporary and brief nature of a traffic stop, as well as its public nature, "mitigate the danger that a person questioned will be induced 'to speak where he would not otherwise do so freely.'" ***Id.*** at 437-38.

¶20 The ***Berkemer*** Court never set forth a bright-line test suggesting that a detainee is "in custody" for ***Miranda*** purposes any time a traffic stop becomes more private in its setting. The public nature of traffic stops was just one factor the Court considered in determining whether persons detained due to traffic stops must be given a ***Miranda*** warning. In determining whether the defendant in ***Berkemer*** was "in custody," the Court also considered a variety of other factors, including whether the defendant was subject to restraints comparable to those associated with a formal arrest, the length of time between the stop and arrest, and whether the defendant was informed his detention would not be temporary. ***Id.*** at 441-42.

¶21 It is clear that the test is not whether a suspect is moved from a public location to an admittedly more private setting, but rather, under the totality of the circumstances, 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. ***Quartana***, 213 Wis. 2d at 449-50; ***State v. Swanson***, 164 Wis. 2d 437, 446-47, 475 N.W.2d 148 (1991). This is an objective,

not a subjective test. In other words, the question is not whether *this* particular defendant believed himself to be in custody, but whether a reasonable person in the defendant's position would have believed so. *See* ***Swanson***, 164 Wis. 2d at 447.

¶22 In so deciding, one of the factors we consider is whether the detention was at all times temporary, and whether it lasted no longer than necessary to effectuate the purpose of the stop. *See* ***Royer***, 460 U.S. at 500. Similarly, we consider whether the investigative methods employed are the least intrusive means reasonably available to verify the officer's suspicions in a short amount of time. ***Id.***

¶23 Here, the circuit court concluded that a reasonable person in Mueller's position would have believed he was under arrest, because the court inferred from Officer Olsen's testimony that it was never explained to Mueller why he was being moved to the residence hall. While we might have drawn a different inference, based on the officer's testimony, even assuming Officer Olsen failed to explain to Mueller that they were moving to get out of the cold, we conclude that a reasonable person in Mueller's situation would have understood that to be the case from the circumstances. Officer Olsen had asked Mueller whether he would participate in field sobriety tests. We can only assume from Officer Olsen's testimony that Mueller agreed and, it appears, the circuit court also assumed he agreed.[4] Because Mueller was asked to perform field sobriety tests

[4] If instead, the court believed Mueller had refused, then the court's explanation of why an arrest occurred would have taken a different track. In that event, it would have been the officer's act of forcing Mueller to move to a different location to take field sobriety tests against his will that would have presented reason to conclude that an arrest had occurred.

and agreed to do so, it would have been apparent to a reasonable person in his position that they were moving to the residence hall to conduct the tests. This reasonable belief would have been confirmed when, once inside the hall, Officer Olsen had Mueller perform field sobriety tests.

¶24 Additionally, we note that Officer Olsen made no statements that would have caused a reasonable person in Mueller's position to believe that he was under arrest. Nor did Officer Olsen brandish a weapon or use any show of force in directing Mueller into Chadbourne Hall. Mueller was not handcuffed or subjected to restraints comparable to those associated with formal arrest. Prior to Mueller's formal arrest, there was no indication that his detention would not be temporary. Mueller retained his car keys until after he was formally arrested. Although Officer Olsen retained Mueller's driver's license during the tests, we cannot conclude that this action would have led a reasonable person to believe he was under arrest. Additionally, the 500 square foot lounge, which was accessible to anyone in the lobby of Chadbourne Hall, was not an institutional setting such as an interrogation room at a police station. Finally, Mueller was detained in Chadbourne Hall for no more than the fifteen minutes that it took to perform the field sobriety tests. Given the circumstances, we conclude that a reasonable person in Mueller's position would have recognized that he was directed to Chadbourne Hall due to the weather, and would have realized that if he successfully completed the field sobriety tests he would be free to leave.

¶25 In conclusion, we hold that the mere move of Mueller from a public street to Chadbourne Hall did not, by itself, convert what was otherwise a permissible detention into an impermissible arrest. We also hold that under the totality of the circumstances, no reasonable person in Mueller's position would have believed he was in custody, simply because he was moved from the cold

outdoors to the interior of a nearby student residence hall to perform field sobriety tests. Accordingly, we reverse the circuit court's order granting Mueller's motion to suppress and remand this matter for further proceedings consistent with this opinion.

By the Court.—Order reversed and cause remanded with directions.

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