

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 13, 2002

Cornelia G. Clark
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. 01-2443-FT

Cir. Ct. No. 00-TR-9279

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

KAREN A. SALM,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Fond du Lac County:
STEVEN W. WEINKE, Judge. *Affirmed.*

¶1 SNYDER, J.¹ Karen A. Salm appeals from an order revoking her driver's license for one year after the trial court found that her refusal to submit to chemical testing was unreasonable. Salm argues that because she was never

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.

placed under arrest, the prerequisites of the implied consent law were not satisfied and she cannot be deemed to have unlawfully refused an implied consent test. We disagree, concluding that Salm was under arrest at the time the officer asked her to submit to chemical testing.

FACTS

¶2 The relevant facts in this case are undisputed. Salm did not testify at her implied consent refusal hearing. The only testimony on record comes from Ranger Kevin Koelbl. Koelbl testified that on the evening of July 1, 2000, he was on patrol at the Long Lake recreational area in the Kettle Moraine State Forest in Fond du Lac county. At 10:55 p.m., Koelbl received a cell phone call from his wife, who was camping nearby in the park. Koelbl's wife allegedly informed him that she had heard the sound of a vehicle hitting a tree and had seen a vehicle driving around the campground "loop." She described the vehicle as a silver Grand Prix/Grand Am with a "busted" passenger side taillight.

¶3 Koelbl testified that ten seconds after the report, he saw what he believed to be the vehicle driving on the campground loop. The vehicle was heading towards him so he performed a U-turn and pursued the vehicle. The car was thirty to forty yards ahead. Koelbl then turned on his emergency flashing lights and activated his siren. After approximately twenty to twenty-five seconds of pursuit, the vehicle stopped. Koelbl described it as a Pontiac Grand Am or Grand Prix. Koelbl identified himself as a park ranger to the driver, who was later identified as Salm. He explained his reasons for executing the stop and asked her if she would be willing to exit the vehicle and examine the damage to the automobile. Koelbl testified that the car had a "busted" passenger side taillight, a bent gas cap, and a fairly large dent in the rear quarter panel.

¶4 Koelbl stated that Salm was unsteady while exiting the vehicle, but her balance “wasn’t too bad” when she walked to the rear of the car. He detected the odor of intoxicants on her breath. Salm then admitted to consuming two drinks that evening while visiting a friend at the campground. Koelbl administered the alphabet field sobriety test. Salm was allegedly “nervous,” but her speech was not slurred. She recited “A” through “F” and quit. Salm was given a second chance and it is unclear from the record whether she completed the test or not. However, Salm recited “M, M, N, O,” repeating the letter “M.” Next, Koelbl asked her to perform the ten-step heel-to-toe sobriety test on level blacktop, and then walk back towards him. Koelbl testified that Salm took six steps with four- to six-inch gaps, stopped and stood in place saying nothing. He stated that he decided to give her a preliminary breath test (PBT) because he feared she would fall and injure herself. However, he did not convey this reasoning to her. Salm took the PBT and registered a 0.21% blood alcohol concentration. Koelbl testified that Salm acknowledged that she hit the tree.

¶5 Another officer who arrived at the scene thought Salm should be transported to Fond du Lac county for an intoxilyzer meter test. Koelbl called the county, but was informed that the intoxilyzer room was not operational. He then decided to transport Salm to St. Agnes Hospital in Fond du Lac for a blood draw. Koelbl handcuffed Salm and had her enter the back of the locked cage-equipped squad belonging to the other officer. Koelbl then asked Salm if she would like the handcuffs off. She said, “Yes,” and then she recanted and said, “No.”

¶6 Koelbl testified that the trip to St. Agnes Hospital took approximately twenty-five minutes. After arriving at the hospital, Koelbl took the handcuffs off of Salm because he did not consider her to be a threat. He then read the Informing the Accused form aloud to Salm twice verbatim. Salm responded

“no” to both requests for submission to chemical testing. Koelbl then asked the Fond du Lac police officer in the room what the procedure was for refusal. The officer stated that it was two years’ loss of license. Salm became upset and said she did not understand the question. Koelbl then finished filling out the Intent to Revoke form and he released Salm to a friend.

¶7 According to the record, Koelbl testified that this was the first time he had an “actual arrest” for operating a motor vehicle while under the influence of intoxicants (OWI). He stated that he had seen people under the influence in his personal life on more than one occasion and that he had the ability to form opinions about the condition based on observations. He stated that in his opinion, he believed Salm to be “under the influence.” However, he testified that even after the PBT reading he did not know if Salm was “drunk.” He said that she was not “free to leave” at any point during the incident. However, he stated that he never said the words, “You are under arrest.”

DISCUSSION

¶8 The sole question before us is whether Salm had been arrested before she was asked to provide a blood sample. Where the facts are undisputed, whether a suspect was under arrest presents a question of law that we review de novo. *State v. Swanson*, 164 Wis. 2d 437, 445, 475 N.W.2d 148 (1991). Salm contends that an OWI arrest is a prerequisite for requesting a blood alcohol test under WIS. STAT. § 343.305(3)(a) and that she was never arrested.

¶9 Salm cites to *Swanson* in support of her contention that she was never placed under arrest. In *Swanson*, our supreme court established an objective, totality-of-the-circumstances analysis to determine the moment of arrest for Fourth Amendment purposes. Under the *Swanson* objective test, an arrest has

occurred if “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.” *Swanson*, 164 Wis. 2d at 446-47. While *Swanson* was not an implied consent case, the State does not challenge the *Swanson* Fourth Amendment test as applicable here.

¶10 We conclude that applying the *Swanson* objective test, in light of the totality of the circumstances surrounding this incident, a reasonable person in Salm’s position would have known that he or she was under arrest for purposes of complying with the implied consent law. Salm’s stop was effected by the use of emergency flashing lights and siren, she was advised that she was suspected of having a vehicle accident and she admitted that she had hit a tree. Salm was asked to exit her vehicle and examine the damage, admitted that she had been drinking alcohol at the campground and submitted to requests for field sobriety and PBT tests. She was handcuffed and transported in the back of a locked cage-equipped squad to St. Agnes Hospital in Fond du Lac for a blood draw. Salm does not challenge Koelbl’s probable cause to arrest her for OWI under the above circumstances; she argues only that she was never told that she was under arrest for OWI and, therefore, the WIS. STAT. § 343.305(3)(a) arrest prerequisite had never been fulfilled.

¶11 However, we read WIS. STAT. § 343.305(3)(a) to require only that a person be arrested for OWI *prior* to the request for a chemical test sample (“Upon arrest of a person for [OWI] ... a law enforcement officer may request the person to provide ... samples of his or her ... breath, blood or urine”). Salm was read the Informing the Accused form verbatim twice prior to being requested to provide

a blood sample,² and the first sentence of that form specifically advised Salm that she was under arrest.³ We conclude that this advice, provided by Koelbl to Salm prior to the request for a blood sample, was sufficient to meet the § 343.305(3)(a) arrest prerequisite. Accordingly, we affirm the order revoking Salm's operating privilege for one year based on the finding that Salm's refusal to provide a blood sample was unreasonable.

By the Court.—Order affirmed.

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

² The Informing the Accused form was marked and received into evidence as Exhibit 1.

³ The first full paragraph of the Informing the Accused form states in relevant part: “*You have ... been arrested* for an offense that involves driving or operating a motor vehicle while under the influence of alcohol or drugs, or both”

