COURT OF APPEALS
DECISION
DATED AND FILED

July 3, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 01-3223 **Cir. Ct. No. 01-TR-9116, 01-TR-9117**

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

COUNTY OF WINNEBAGO,

PLAINTIFF-RESPONDENT,

V.

GARY A. BURNS,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Winnebago County: ROBERT A. HAASE, Judge. *Affirmed.*

¶1 NETTESHEIM, P.J.[1] Gary A. Burns appeals from a judgment of conviction for operating a motor vehicle with a prohibited blood alcohol concentration pursuant to WIS. STAT. § 346.63(1)(b). On appeal, Burns challenges

[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.

the trial court's denial of his motion to suppress based upon his claim that his arrest was not supported by probable cause. In the trial court, Burns contended that he was arrested without probable cause when he was handcuffed and placed in the backseat of a police car for over a half an hour. The State responds that Burns was subject to a lawful temporary detention pursuant to ***Terry v. Ohio***, 392 U.S. 1 (1968). We agree with the State. We affirm the judgment.

FACTS

¶2 On August 11, 2001, at approximately 9:00 p.m., the Winnebago county sheriff's department received a call reporting a motorcycle accident along County Highway HH. Anticipating a delay in getting a deputy sheriff to the scene, the sheriff's department asked the Fremont police department to assist in responding to the report. The first officer on the scene was Fremont Officer Gregory Kluck, who made contact with Burns. Kluck learned that Burns was the operator of the motorcycle and also determined that Burns was "very intoxicated." Kluck then placed Burns in the backseat of his patrol car while he checked the scene. However, Burns attempted to exit the patrol car by climbing into the front seat. Kluck then placed Burns in handcuffs and advised him that he would remove the handcuffs when a Winnebago county deputy sheriff arrived.

¶3 About thirty minutes after the initial report of the accident, Winnebago County Deputy Sheriff Timothy Schuster arrived on the scene. Kluck then removed the handcuffs from Burns and turned him over to Schuster. Schuster asked Burns what happened and Burns explained that he had hit the gravel shoulder off the pavement and the bike was forced into the ditch. During this conversation, Schuster smelled intoxicants on Burns' breath and observed that he was unsteady on his feet while standing there talking. Schuster asked Burns to

perform several field sobriety tests. Burns failed the tests and was arrested for operating while intoxicated. The State followed with the instant prosecution for operating a motor vehicle with a prohibited blood alcohol concentration.

¶4 Burns brought a motion to suppress, contending that Kluck had arrested him without probable cause when he was handcuffed and placed in the Fremont squad car. However, Kluck did not testify at the motion hearing. Instead, the State presented only the testimony of Schuster. Burns did not present any evidence. At the close of the evidence, Burns argued that Kluck had arrested him by placing him in handcuffs and the State had not presented any evidence justifying the arrest. The trial court, however, ruled that there was no evidence that Burns had been handcuffed and therefore Burns had not been detained or arrested. The trial court denied Burns' motion to suppress. At the ensuing jury trial, Burns was found guilty of operating with a prohibited alcohol concentration. Burns appeals.

STANDARD OF REVIEW

¶5 When we review a trial court's ruling on a motion to suppress, we will uphold the trial court's findings of fact unless they are clearly erroneous. ***State v. Fields***, 2000 WI App 218, ¶9, 239 Wis. 2d 38, 619 N.W.2d 279. However, whether those facts satisfy the constitutional requirement of reasonable suspicion is a question of law that we review de novo. ***State v. Waldner***, 206 Wis. 2d 51, 54, 556 N.W.2d 681 (1996).

DISCUSSION

¶6 The trial court ruled that there was no evidence presented at the suppression hearing that Burns was handcuffed. However, certain questions put to

Schuster on cross-examination referred to Burns in handcuffs when Schuster first encountered him.

> Q. And you did not observe the defendant when he was interacting with the officers from Fremont…?
>
> A. Yes. No, I didn't see any interaction there.
>
> Q. You didn't observe the defendant before he was handcuffed and placed in the squad car?
>
> A. No.
>
> Q. Okay. Before it—so then therefore, before the defendant was handcuffed and placed in the squad car, you had not spoken with him, correct?
>
> A. You're talking when he was placed in the Fremont squad?
>
> Q. That's correct.
>
> A. No, I had not spoken with him.

¶7 Although these questions never specifically asked Schuster whether Burns was in handcuffs, the questions presumed this fact and Schuster never registered any disagreement with this premise. Therefore, we will assume for the sake of argument that the evidence established, contrary to the trial court's statement, that Burns was handcuffed when Kluck turned him over to Schuster. However, this does not save the appellate day for Burns because the trial court record nonetheless establishes a proper basis for the temporary detention of Burns pursuant to WIS. STAT. § 968.24 and ***Terry***.

¶8 The appellate record in this case includes the incident report of Kluck.[2] When reviewing an order on a motion to suppress evidence, we are not

[2] The incident report apparently was an exhibit at the jury trial because it carries an exhibit sticker with an exhibit number and the date of the jury trial.

limited to the facts as presented at the suppression hearing; we may take into account the evidence at trial as well. ***State v. Griffin***, 126 Wis. 2d 183, 198, 376 N.W.2d 62 (Ct. App. 1985), *aff'd*, ***State v. Griffin***, 131 Wis. 2d 41, 388 N.W.2d 535 (1986), *aff'd*, ***Griffin v. Wisconsin***, 483 U.S. 868 (1987).[3]

¶9 Wisconsin's ***Terry*** statute, WIS. STAT. § 968.24, states that a police officer may stop a person for a reasonable period of time when the officer reasonably suspects that a person is committing or has committed a crime. The reasonable suspicion test asks whether the suspicion was grounded in specific, articulable facts and reasonable inferences from those facts that the individual was committing a crime. ***Fields***, 2000 WI App 218 at ¶10. Reasonable suspicion under ***Terry*** and § 968.24 is a commonsense test. ***Waldner***, 206 Wis. 2d at 56. It inquires as to what a reasonable police officer would reasonably suspect in light of his or her training and experience. ***Id***. If reasonable suspicion exists, the officer may temporarily detain the suspect in order to freeze the situation while further investigation is conducted. *See* ***id***. at 53.

¶10 As our recital of the facts reveals, Kluck encountered Burns when he arrived on the scene. Kluck determined that Burns was the operator of the motorcycle that was involved in the accident and also that Burns was "very intoxicated." This information would lead a reasonable police officer to reasonably suspect that Burns had operated the motorcycle in an intoxicated condition. *See* ***id***. at 56.

[3] We also note that we may affirm on different grounds than those relied on by the trial court. *See* ***Vanstone v. Town of Delafield***, 191 Wis. 2d 586, 595, 530 N.W.2d 16 (Ct. App. 1995).

¶11 Burns further argues that this detention became an arrest when he was handcuffed and placed in the squad car for over a half an hour. A temporary seizure under ***Terry*** can become an unlawful arrest if the seizure has "the essential attributes of a formal arrest" and is not supported by probable cause. ***State v. Vorburger***, 2001 WI App 43, ¶11, 241 Wis. 2d 481, 624 N.W.2d 398 (quoting ***Michigan v. Summers***, 452 U.S. 692, 700 (1981)), *review granted*, 2001 WI 88, 246 Wis. 2d 165, 630 N.W.2d 219 (Wis. May 8, 2001) (No. 00-0971-CR). Wisconsin law uses an objective test for determining whether an arrest has occurred. The standard articulated for this 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." ***State v. Swanson***, 164 Wis. 2d 437, 446-47, 475 N.W.2d 148 (1991). "The circumstances of the situation, including what has been communicated by the police officers, either by their words or actions, shall be controlling under the objective test." ***Id.*** at 447.

¶12 The facts of this case do not support Burns' argument that he was under arrest when Kluck handcuffed him and placed him back in the squad car. Initially, Kluck simply placed Burns in the back of the squad car, without handcuffs, while he checked on the scene. However, the need to further restrain Burns arose when Burns attempted to get out of the squad car by climbing into the front seat. Kluck then placed Burns in handcuffs, but he did not articulate any words of arrest. Nor did he read Burns any ***Miranda***[4] rights. In fact, Kluck

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

informed Burns that the handcuffs would be removed when the sheriff's department arrived on the scene.

¶13 Certainly, the fact that Burns was handcuffed is a factor in support of his claim that he was arrested. However, our supreme court has recognized that handcuffs do not necessarily transform a lawful detention into an arrest. ***Swanson***, 164 Wis. 2d at 448. When assessing the duration of the detention and the investigative methods employed, we do not employ hard and fast rules. *See* ***State v. Wilkens***, 159 Wis. 2d 618, 625-26, 465 N.W.2d 206 (Ct. App. 1990). This means that we properly look to the collective facts and circumstances of the case. Thirty minutes of handcuffed temporary detention in another case under different facts might constitute an arrest. But here, the time of the detention was warranted by the necessary wait for the arrival of the Winnebago sheriff's department. Moreover, the handcuffing was the result of Burns' own conduct in trying to exit the patrol car, and Kluck expressly told Burns that the handcuffs would be removed when the Winnebago county authorities arrived. Under all the circumstances, including Kluck's words and actions, we hold that Burns' lawful ***Terry*** detention was not converted into an illegal arrest without probable cause.

CONCLUSION

¶14 Based upon the entire appellate record, we conclude that Kluck properly detained Burns pursuant to ***Terry*** and WIS. STAT. § 968.24. We therefore uphold the trial court's denial of Burns' motion to suppress.

By the Court.—Judgment affirmed.

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