COURT OF APPEALS
DECISION
DATED AND FILED

August 21, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-3336 **Cir. Ct. No. 01-TR-20369**

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

IN THE MATTER OF THE REFUSAL OF GARY L. DEMARS:

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

GARY L. DEMARS,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Dane County: STEVEN D. EBERT, Judge. *Affirmed.*

¶1 LUNDSTEN, J.[1] Gary DeMars appeals the circuit court's order revoking his driver's license for refusal to submit to a test for intoxication.

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c) (2001-02). All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

DeMars argues that the court erred in denying his motion to dismiss the refusal hearing because (1) there is no basis to apply WIS. STAT. § 343.305, Wisconsin's implied consent law, because at the time of his refusal DeMars was not under arrest within the meaning of § 343.305 and, alternatively, (2) the actual arrest that did occur violated the Fourth Amendment because it was not supported by probable cause. We reject these arguments and affirm.

¶2 On October 25, 2001, a Wisconsin State Patrol trooper stopped DeMars near a construction site. Because the trooper was responsible for monitoring the construction area, he requested assistance from a Town of Madison police officer. The second officer transported DeMars to the Town of Madison police station for field sobriety testing. At the station, DeMars declined to perform field sobriety tests. The officer then transported DeMars to the Dane County Jail for a chemical testing. At the county jail, the officer read DeMars an "Informing the Accused" form, and DeMars refused to submit to a chemical breath test. As a consequence of his refusal, DeMars's license was revoked for one year.

¶3 On appeal, DeMars argues that the circuit court erred in denying his motion to dismiss the refusal hearing on two grounds.

¶4 First, DeMars argues that application of WIS. STAT. § 343.305 is contingent on a formal arrest, but there was no formal arrest because the officer never actually told DeMars he was under arrest. The State argues there is no such requirement. We agree with the State.

¶5 DeMars is correct that there must be a valid arrest. WISCONSIN STAT. § 343.305(3)(a) provides, in relevant part:

> REQUESTED OR REQUIRED. (a) Upon arrest of a person for violation of s. 346.63(1), (2m) or (5) or a local ordinance in conformity therewith … a law enforcement officer may request the person to provide one or more samples of his or her breath, blood or urine for the purpose specified under sub. (2).

However, DeMars's argument fails because the test for whether an arrest occurs is not dependent on whether the subject of the arrest is told he or she is under arrest. The test for when an arrest occurs is an objective test that looks to the totality of the circumstances. ***State v. Swanson***, 164 Wis. 2d 437, 446, 475 N.W.2d 148 (1991). The key inquiry is whether a reasonable person in the defendant's position would consider himself or herself to be "in custody," given the degree of restraint under the circumstances. ***Id.*** at 446-47. Further, "[t]he 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 (emphasis added).

¶6 DeMars argues that the ***Swanson*** test for an arrest does not apply to an "arrest" under WIS. STAT. § 343.305 because ***Swanson*** addresses whether certain constitutional rights apply. DeMars contends that ***Swanson*** is not, *per se*, the test for whether a person is arrested. DeMars seems to be saying that the legislature intended that all arrests under § 343.305 be effectuated, at least in part, by the formal announcement: "You are under arrest," or words to that effect. DeMars, however, fails to provide any legal authority or reasoned legal argument to support such a position. We need not address this argument further, but we do note the State correctly points out that DeMars *was* informed he was under arrest when an officer read to him from the informing the accused form.

¶7 DeMars, of course, does not assert that he was not actually arrested. In fact, he argues that suppression is required because he was arrested without

probable cause at the point in time the officer transported him to the Town of Madison police station for field sobriety tests. Thus, we address whether moving DeMars to the police station to perform field sobriety tests turned a permissible temporary seizure into an impermissible arrest lacking probable cause. We agree with the State and conclude that the act of transporting DeMars to the station did not constitute an arrest.

¶8 DeMars's argument here is purely legal. He does not discuss the particular facts of his case. Rather, he asserts that when a person is removed from public view and taken to a police station, the result is an arrest. DeMars, however, does not point to a single case that holds that these two factors always produce an arrest. There is no such authority because the jurisprudence on this topic is clear: there is no litmus test for determining when a seizure exceeds the bounds of an investigative stop. *See* ***Florida v. Royer***, 460 U.S. 491, 506-07 (1983). To repeat, the test for an arrest is an objective test that looks to the totality of the circumstances. ***Swanson***, 164 Wis. 2d at 446.

¶9 Taking this case as an example, the circuit court reasonably concluded that a reasonable person in DeMars's position would not have believed he was under arrest when he was told he was being transported to the station for sobriety tests. The poor weather and construction site made the location of the stop an inhospitable environment, and this would have been apparent to DeMars. Indeed, when the officer asked DeMars whether he would participate in field sobriety tests at the station, DeMars agreed, stating: "Good, I can prove I'm not drunk." Thus, even though we use a reasonable person standard, in this case it seems DeMars actually understood he could leave if he demonstrated that he was not intoxicated.

¶10 We need not address the point, but we also agree with the State that probable cause existed to support an arrest prior to the time DeMars was transported to the police station. The State lists the following factors, which DeMars does not dispute: (1) at about 12:20 a.m., DeMars failed to follow the traffic signs and drove into a closed construction area; (2) DeMars did not respond to the state trooper who yelled at him to stop; (3) DeMars delayed in pulling over even after he had been followed by a patrol car with an activated siren and flashing lights; (4) DeMars emitted a strong odor of intoxicants; (5) DeMars's eyes were bloodshot and glassy; (6) DeMars's speech was thick and slurred; (7) DeMars had difficulty locating his license; (8) when asked if he had anything to drink, DeMars answered "a little, but not too much"; and (9) DeMars was unsteady on his feet.

By the Court.—Order affirmed.

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