COURT OF APPEALS
DECISION
DATED AND RELEASED

July 27, 1995

No. 95-0533

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

THOMAS R. KELSO,

Defendant-Appellant.

APPEAL from an order of the circuit court for Dane County: ROBERT DECHAMBEAU, Judge. *Affirmed*.

EICH, C.J.[1] Thomas Kelso appeals from an order declaring his refusal to submit to a test of his blood-alcohol content to be unjustified and revoking his driving privileges for one year.

[1] This appeal is decided by one judge pursuant to § 752.31(2)(c), STATS.

He raises a single issue: whether the trial court erred in determining that Kelso had been placed under arrest prior to being requested to submit to testing. We see no error and affirm the order.

The facts are not in dispute and were brought forth through the testimony of the arresting officer, Middleton Police Officer Michael Ash, at the hearing on Kelso's refusal to permit his breath to be tested.

Ash stopped Kelso's car in the early morning hours of August 16, 1994, after observing that the car's taillights were not working. Kelso stumbled and fell twice upon leaving the vehicle, and Ash noted that his breath had the odor of intoxicants, his speech was slurred and his eyes were bloodshot. Kelso acknowledged consuming intoxicants that evening.

Ash asked Kelso to perform several field sobriety tests. Attempting to recite the alphabet, Kelso slurred the letters and swayed back and forth. He could not follow Ash's instructions with respect to the "horizontal gaze" test, and stumbled while attempting to perform the "heel-to-toe" walking test.

The prosecutor asked Ash what he did after administering the sobriety tests to Kelso, and Ash responded: "At that point I arrested Mr. Kelso for operating while intoxicated." Kelso's counsel objected and moved to strike the answer, arguing that whether a person is "arrested" is "a matter of objective fact not [] the officer's opinion." The court overruled the objection, stating that while the testimony "may not be particularly relevant," it would be allowed "as a foundational question as to what he did."

Ash then testified that he proceeded to handcuff Kelso, placed him in the squad car (having to overcome Kelso's resistance to do so) and took him to the Middleton police station where he issued him a citation for driving while intoxicated, contrary to a Middleton ordinance enacted in conformity with the state drunk-driving statute, § 346.63(1)(a), STATS. Ash then advised Kelso of his rights and obligations under the implied consent law, giving him a copy of the form. Finally, when Ash asked him to submit to a chemical test of his breath, Kelso refused.

At the conclusion of the hearing, Kelso argued that § 343.305(3), STATS., requires that a defendant be placed under arrest for driving while intoxicated before he or she may be asked to submit to a chemical test for blood-alcohol content,[2] and that the evidence--particularly Ash's conclusory testimony--was insufficient to establish that fact. The trial court disagreed, concluding that, under the totality of the circumstances, an arrest within the meaning of the statute had occurred. We agree.

Kelso's argument on appeal may be summarized as follows: (1) under § 343.305, STATS., the state must prove at a refusal hearing that the officer arrested the defendant for violation of the drunk driving laws; (2) Ash's statement at the hearing that he had "arrested" Kelso is insufficient to establish that such an arrest had occurred;[3] and (3) the state failed to establish compliance with § 343.305(3) because there was no evidence that Ash had specifically informed Kelso that he was being arrested "for drunk driving" (or some "equivalent communication"), although he had handcuffed him and taken him to the police station.

Explaining the basis for the argument, Kelso states in his brief:

> Absent such a showing [that he was told he was under arrest for drunk driving], the defendant could not know that the provisions of the Implied Consent Law applied to him. Thus, [he] could not know that he was legally

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[2] The statute provides:

> Upon arrest of a person for violation of s. 346.63(1) ... 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 [testing] ....

[3] The state acknowledges, and we agree, that under the "objective test" for determining the existence of an arrest adopted in ***State v. Swanson***, 164 Wis.2d 437, 446, 447, 475 N.W.2d 148, 152 (1991), a case we discuss in more detail below, the officer's "subjective understanding[]" or "unarticulated plan" is "irrelevant in determining the question ...." Instead, as in this case, we must look to what the officer communicated to the defendant by words *or* actions, and whether a reasonable person in the defendant's position would consider himself or herself in custody. ***Id***.

> obligated, in fact, to submit to testing, both frustrating the purpose of the [law] and sandbagging the defendant by giving him a lesser incentive than is legally required to submit to testing.

Determining from the undisputed facts whether an arrest has been made is a question of law which we review *ab initio*, owing no deference to the trial court's decision. ***State v. Swanson***, 164 Wis.2d 437, 445, 475 N.W.2d 148, 152 (1991). And we employ an objective test in making that determination:

> The standard ... 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. 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 446-47, 475 N.W.2d at 152 (citations omitted).

The issue in ***Swanson*** was whether the defendant, Swanson, had been arrested so as to justify a charge of escape from custody. Two police officers had observed Swanson drive onto a sidewalk and stopped his car. While his physical coordination and speech appeared normal, there was an odor of intoxicants about Swanson's person, and the officers asked him to perform some field sobriety tests. As he approached the squad car, one of the officers performed a pat-down search, discovering a bag of marijuana in his pocket. At that point, the officers received an emergency radio call, arrested Swanson for possession of marijuana, placed him in the squad car and took off on the emergency call. When they reached the scene and were dealing with the emergency, Swanson fled.

Swanson moved to dismiss the escape charge on grounds that he was not legally in custody at the time he left the squad car--and that issue depended on whether he had been placed under arrest prior to the pat-down

search.[4] The trial court granted the motion and the supreme court affirmed, concluding that "a reasonable person in Swanson's position would not have believed that he was under arrest or in legal custody prior to the search ...." ***Id***. at 448, 475 N.W.2d at 153. The court grounded its decision on the fact that all Swanson had been asked to do prior to the search was to perform some field sobriety tests (which never were administered); and, additionally, that he had never been informed that he was under arrest and the officers had not employed any force or threats prior to the search. ***Id.*** at 448, 475 N.W.2d at 153.

In this case, Kelso maintains that he had to have been under arrest prior to being asked to submit to a breath test at the Middleton police station. By that time, the following events had occurred: (1) he had been asked to perform several field sobriety tests (and failed them); (2) he was handcuffed and placed in the squad car, physically resisting the officers' efforts to do so; (3) he was taken to the police station and issued a citation indicating that he was being charged with "operating while intoxicated" in violation of a Middleton ordinance adopting § 346.63(1)(a), STATS., and (4) he had been read and provided with an "Informing the Accused" form indicating that, under the implied consent law, he was deemed to have consented to a chemical test for the purpose of "determin[ing] the presence or quantity of alcohol or other drugs in [his] blood or breath."

On those facts, it matters not that Kelso was never orally informed by the officers that he was under arrest for driving while intoxicated. First, he was so informed in writing by the issuance of the citation. Second, under the totality of the circumstances in the case it cannot be said that a reasonable person in Kelso's position would not have known he had been arrested for that offense prior to being asked to submit to the test.[5]

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[4] The analysis proceeds as follows: (1) whether Swanson was legally in custody so as to support the escape charge depended on the validity of his arrest for possession of marijuana; (2) his arrest for marijuana possession depended, in turn, on the validity of the pat-down search in which the marijuana was found; (3) the pat-down search could be valid only if Swanson had previously been placed under arrest for drunk driving or some other offense; and (4) because, under the facts of the case, Swanson had *not* been placed under arrest prior to the search, the charge must be dismissed.

[5] We note that Kelso was informed of his arrest by the citation and the form containing

By the Court.--Order affirmed.

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

(..continued)
all necessary information as to his rights with respect to testing. The form was read to him by the officers and he was given a copy of it. He does not challenge the sufficiency of the form to fulfill its purpose of "informing the accused."