COURT OF APPEALS
DECISION
DATED AND RELEASED

November 16, 1995

No. 95-1021

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MICHAEL G. COSTIGAN,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Dane County: PATRICK J. FIEDLER, Judge. *Affirmed*.

VERGERONT, J.[1] Michael Costigan appeals from a judgment of conviction for driving under the influence of an intoxicant in violation of § 346.63(1)(a), STATS., and driving with a prohibited blood alcohol concentration in violation of § 346.63(1)(b). He contends: (1) the frisk conducted by the police officer violated his Fourth Amendment right to be free from unreasonable searches; (2) this unconstitutional search constituted an arrest without probable cause; and (3) because the arrest was illegal, all evidence obtained after this

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

illegal arrest, including his statements, observations of the officer, and the results of a breathalyzer test, should have been suppressed by the trial court. We affirm the judgment of conviction. We conclude that the frisk did not constitute an arrest; that the arrest occurred later, after field sobriety tests; and that there was probable cause to arrest at that later time.

The only witness at the suppression hearing was Tracy Fuller, a Wisconsin state patrol trooper. He testified that at approximately 1:30 a.m. on the day of the arrest, he was traveling northbound on East Washington Avenue in Madison when he observed the vehicle operated by Costigan drift to the shoulder of the right lane, then drift towards the left lane and onto the left shoulder without signaling, then jerk back suddenly into the left lane, then straddle the line between the center lane and the left lane, then drift over to the shoulder of the right lane before jerking back into the right lane. Fuller, who was directly behind Costigan about two or three car lengths, activated his red and blue emergency lights. Costigan continued to travel north on East Washington. After more than a half-mile, he took an exit off East Washington, turned right at an intersection, and stopped about 100 feet past the intersection. There was very little lighting and no traffic or people.

Fuller got out of his car and went to the driver's side of Costigan's car. Fuller told Costigan he stopped him because he was drifting across the road. Costigan produced his Illinois driver's license. Fuller observed an odor of alcohol coming from Costigan. Fuller told Costigan of this observation. Costigan said he was not going to lie, that he had just left Sergio's and had had a few drinks, and that he would be happy to get out of the car and walk for Fuller. Fuller said he would like Costigan to get out of the car for some field sobriety tests. Costigan agreed and got out of the car.

Fuller then patted Costigan around his waist area, pushing aside his jacket, which was open, but not going under any other clothing. This lasted no more than five or ten seconds. Fuller discovered nothing during this frisk. After observing Costigan perform the field sobriety tests, Fuller told him he was under arrest for driving while intoxicated.

The trial court denied Costigan's motion to suppress. It concluded that Fuller had reasonable grounds to suspect he might be in physical danger

from Costigan because of the early morning hours and the fact that the car continued for more than a half-mile, away from a more traveled and well-lighted area, to pull over in a spot that had little lighting and no people or traffic. The court found the frisk performed was minimal in scope and duration and reasonable for the purpose of detecting whether Costigan carried any weapon. The court also found that at the time the frisk occurred, Costigan was not under arrest, and that the arrest occurred later after the field sobriety tests.

In reviewing the denial of a suppression motion, we uphold the trial court's findings of facts unless they are clearly erroneous. *See* ***State v. Jackson***, 147 Wis.2d 824, 829, 434 N.W.2d 386, 388 (1989). Whether those facts satisfy the constitutional requirements presents a question of law, which we review de novo. *See* ***id.***

Costigan's argument on appeal has four components: (1) the frisk violated the Fourth Amendment because there are no facts from which it can reasonably be inferred that Costigan was armed and dangerous, as required by ***Terry v. Ohio***, 392 U.S. 1 (1968), and ***United States v. Brignoni-Ponce***, 422 U.S. 873 (1975);[2] (2) since Fuller conducted an illegal frisk, he "wittingly or not made an arrest"; (3) since there was no probable cause to arrest when Fuller conducted the frisk, the arrest was unlawful; and (4) since the arrest was unlawful, all evidence obtained thereafter must be suppressed.

We do not decide whether the frisk violated the Fourth Amendment because we conclude that, even if it did, that violation does not automatically transform the frisk into an arrest. Costigan has provided us with no authority for this position. We are convinced that we must apply the test articulated in ***State v. Swanson***, 164 Wis.2d 437, 475 N.W.2d 148 (1991), to determine whether an arrest occurred. The inquiry 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 in the particular circumstances. ***Swanson***, 164 Wis.2d at 446-47, 475 N.W.2d at 152. This is an objective test that assesses the totality of the circumstances, including what was communicated by

[2] Costigan does not contend that the stop itself was impermissible under ***Terry v. Ohio***, 392 U.S. 1 (1968).

the words or actions of the officer. ***Id.*** Applying this test, we conclude that the frisk did not constitute an arrest.

In ***Swanson***, police officers stopped a car after seeing it drive onto the sidewalk and almost hit a pedestrian. The officers detected a strong odor of alcohol on Swanson's breath and directed him to come over to the squad car for field sobriety tests. Before he got into the squad car, an officer conducted a pat-down search because department policy required a pat-down search before placing someone in a squad car. The officer discovered a bag of marijuana in Swanson's pocket in the pat-down. The court concluded that the scope of the pat-down exceeded that justified as a frisk for weapons under ***Terry***. ***Swanson***, 164 Wis.2d at 454-55, 475 N.W.2d at 155-56. It also concluded that the search was not a search incident to an arrest because Swanson was not under arrest at that time. ***Id.*** at 452, 475 N.W.2d at 155.

In analyzing whether Swanson was under arrest at the time of the pat-down, the court noted the brief duration and public nature of the usual traffic stop. ***Swanson***, 164 Wis.2d at 447, 475 N.W.2d at 152. It also noted that the officers did not tell Swanson he was under arrest, give him ***Miranda*** warnings, handcuff him or draw weapons. ***Id.*** at 448, 475 N.W.2d at 153. The court concluded that a person in Swanson's position would not believe he was under arrest simply because he was asked to perform field sobriety tests. ***Id.*** Rather, reasonable people would understand that the request means that if they pass the test, they are free to leave. ***Id.*** at 452, 475 N.W.2d at 155. The court rejected as unreasonable the view that the request to perform field sobriety tests transformed the stop into a search. ***Id.*** at 449, 475 N.W.2d at 153. In reaching this conclusion, the court noted that other jurisdictions have held that more intrusive circumstances--such as the use of handcuffs or physical force--do not transform a ***Terry*** stop into an arrest. ***Id.*** at 448, 475 N.W.2d at 153. It also referred to ***Jones v. State***, 70 Wis.2d 62, 233 N.W.2d 441 (1975), which held that a ***Terry*** stop does not become an arrest merely because police draw their weapons.

In this case, Fuller found nothing when he patted Costigan around the waist. And the scope of the frisk he conducted was more limited than the pat-down search in ***Swanson***. But the ***Swanson*** court's analysis on the issue of arrest is instructive here. At the time Fuller frisked Costigan, he had stopped Costigan's car, asked for his identification, asked him to get out of the car to take

field sobriety tests, and told him he had been drifting over the road and smelled of alcohol. Costigan willingly got out of the car to take the field sobriety tests. Fuller did not tell Costigan he was under arrest, give him ***Miranda*** warnings, handcuff him, or draw a weapon either before, during or immediately after the frisk. He used no physical force. Immediately after the frisk, Fuller proceeded to conduct the field sobriety tests.

The facts in this case are significantly different than those in ***Dunaway v. New York***, 442 U.S. 200 (1979), on which Costigan relies. Dunaway was taken to police headquarters in a police car and placed in an interrogation room; he would have been physically restrained if he had refused to accompany them. ***Id.*** at 212-13. The facts also differ significantly from those in ***State v. Pounds***, 176 Wis.2d 315, 500 N.W.2d 373 (Ct. App. 1993). Relying on the ***Swanson*** test, the court in ***Pounds*** held that a reasonable person in Pounds' position would not have believed he was free to leave the patrol car. ***Id.*** at 322, 500 N.W.2d at 376. The officers told Pounds he was free to leave, then a short time later located him, ordered him to the floor at gunpoint, handcuffed him and put him in the patrol car. ***Id.*** at 321-22, 500 N.W.2d at 376.

We reject Costigan's argument that the brief and limited frisk conducted by Fuller would make a reasonable person conclude that he was not free to leave if he passed the tests. We conclude that an arrest did not occur by virtue of the frisk.

We agree with the trial court that Costigan's arrest took place after the field sobriety tests, when Fuller told him he was under arrest and handcuffed him. Costigan does not argue that a reasonable person would not believe himself or herself under arrest at that time. Nor does he contend that there was not probable cause to arrest at that time. We conclude therefore that Costigan is not entitled to the suppression of any evidence.

By the Court.—Judgment affirmed.

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