COURT OF APPEALS
DECISION
DATED AND RELEASED

MAY 14, 1996

No. 96-0116-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MARTIN PATTERSON,

Defendant-Appellant.

APPEAL from judgments of the circuit court for Outagamie County: DEE R. DYER, Judge. *Affirmed.*

CANE, P.J. Martin Patterson appeals his convictions for possession of cocaine and carrying a concealed weapon. At issue is whether Patterson was under arrest when the officer searched him and found a vial of cocaine and a knife. Because the search of Patterson was incidental to an arrest, the convictions are affirmed.

The facts are essentially undisputed.[1] Officer Jeffrey Olburg assisted a state patrol officer stop a blue Blazer that had been observed

[1] Patterson does argue the officer's testimony was internally inconsistent in several respects. However, Patterson did not testify and offered no other witnesses to refute the officer's testimony.

wandering from lane to lane on Highway 41. While the trooper approached the driver of the Blazer, Olburg simultaneously approached on the passenger's side. Olburg observed a wine cooler bottle tipped over with wine cooler still in it and laying at the feet of Patterson, the passenger. Olburg opened the door and told Patterson to get out of the car. Olburg advised Patterson that he was giving him a ticket for having an open intoxicant in a motor vehicle. When asked at the suppression hearing whether he placed Patterson under arrest for possessing the open intoxicants, Olburg replied,

A. Yeah. Well, we had been back to my squad car and I had asked him to have a seat in the back of my squad because it was kind of cool out and windy and I asked him if he had any guns, knives or needles and he stated, no, that he didn't.

Q. And you did that after you told him that he was going to be cited for open intoxicants?

A. Correct.

Prior to placing Patterson in the squad car, Olburg searched Patterson and found a vial of cocaine and a "butterfly knife." At that point, Olburg told Patterson that he was under arrest for carrying a concealed weapon and possession of a controlled substance.

Patterson does not question whether Olburg had probable cause to arrest him for possessing open intoxicants in a motor vehicle. Rather, he contends that Olburg never placed him under arrest until after the vial of cocaine and a butterfly knife were found during the search. Patterson relies partly on Olburg's testimony stating that after he found these items, he informed Patterson that he was going to be placed under arrest for carrying a concealed weapon and possession of controlled substances. Patterson also contends that the only reason he was being placed in the backseat of the officer's car was because of the weather and because the officer did not want him standing outside while the trooper conducted a field sobriety test of the driver.

The critical determination on appeal is whether the search of Patterson was incident to an arrest or merely a pat down frisk for weapons. In

the well-known case of ***Terry v. Ohio,*** 392 U.S. 1 (1968), the United States Supreme Court distinguished a search incident to arrest from a pat down frisk for weapons. The ***Terry*** Court explained that a search incident to arrest is not only necessary to protect the arresting officer, but also to discover evidence of a crime and involves a relatively extensive exploration of the subject. ***Id.*** at 25. A pat down frisk for weapons, on the other hand, is only necessary for the discovery of weapons which might be used to harm the police officer or others nearby. Thus, it must be confined in scope such that the police officer should pat down the suspect in a manner which is minimally necessary for the discovery of weapons. ***Id.*** at 30.

Here, the State contends the search was incidental to an arrest. It concedes, however, that if the seizure of the cocaine occurred upon a mere pat down frisk for weapons during an investigatory stop and not incident to an arrest, the seizure of the cocaine was unlawful under the Fourth Amendment to the United States Constitution. On the other hand, Patterson concedes that if the search and the discovery of the cocaine and the knife occurred incident to an arrest, then the search was legal under the Fourth Amendment.

Both sides agree that the standard generally used to determine the moment of arrest in the constitutional sense 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. Citing ***Berkemer v. McCarty,*** 468 U.S. 420, 441-42 (1984), the Wisconsin Supreme Court adopted this standard in ***State v. Swanson,*** 164 Wis.2d 437, 446-47, 475 N.W.2d 148, 152 (1991), in order to provide uniformity and consistency with cases decided by the United States Supreme Court and other federal and state courts. 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. ***Swanson,*** 164 Wis.2d at 447, 475 N.W.2d at 152. The officers' unarticulated plan is irrelevant in determining the question of custody. ***Id.***

Whether a person is in custody is a question of law where facts regarding whether a defendant was under arrest at the time of the search are not disputed. ***Id.*** at 445, 475 N.W.2d at 152. To the extent that the facts are disputed, we must accept the trial court's findings unless they are clearly erroneous. *See* ***State v. Guzy***, 139 Wis.2d 663, 671, 407 N.W.2d 548, 552 (1987). Where the trial court has not expressly made a finding necessary to support its legal conclusion, this court can assume that the trial court made the finding in a

way that supports its decision. *See* ***Sohns v. Jensen***, 11 Wis.2d 449, 453, 105 N.W.2d 818, 820 (1960).

Additionally, the search incident to an arrest exception applies not only to criminal matters, but also to lawful arrests for noncriminal traffic matters. A person lawfully arrested for a traffic violation may be searched without a search warrant and if the search turns up incriminating evidence of a more serious crime, the evidence is admissible against the person. ***State v. King,*** 142 Wis.2d 207, 210, 418 N.W.2d 11, 12 (Ct. App. 1987) (citing ***State v. Mabra,*** 61 Wis.2d 613, 623, 213 N.W.2d 545, 550 (1974)). Also, the United States Supreme Court has ruled that the Fourth Amendment does not bar searches incident to traffic arrests. ***Gustafson v. Florida,*** 414 U.S. 260, 265 (1973).

Here, Olburg removed the open wine cooler near Patterson's feet while Patterson remained in the car. Olburg had Patterson step out of the vehicle and informed him that he was getting a ticket for possessing open intoxicants in a motor vehicle. He told Patterson to have a seat in the back of the squad car. However, prior to entering the squad car, Olburg asked him if he had any guns, knives or needles. It is important to note that Olburg was no longer investigating Patterson for suspicion of any offense when conducting the search. He then searched Patterson before having him sit in the back of the squad car.

Although Patterson claims the officer was placing him in the backseat of the squad car as a matter of courtesy because of the weather, this was not articulated to Patterson. Nor did the officer ever use the word "arrest" prior to the search. However, it was obvious that Patterson was no longer allowed to freely wander around the site of the traffic stop. Unlike the facts in ***Swanson*** where the officer was making a routine traffic stop for a person suspected of driving while intoxicated, Olburg had already determined that Patterson had committed an offense, informed Patterson that he was getting a ticket for the offense and was placing him in the backseat of the squad car.

Viewed objectively, it would be unreasonable for Patterson to believe he was free to leave. A reasonable person in Patterson's position would believe that until he had received the citation for the traffic offense, he was not free to leave and remained in custody for the offense. Thus, he was under arrest in the constitutional sense at the time of the search. The search leading to the

discovery of the cocaine and the knife was therefore reasonable under the Fourth Amendment as a search incident to an arrest. The convictions are affirmed.

By the Court.—Judgments affirmed.

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