COURT OF APPEALS
DECISION
DATED AND FILED

April 14, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-3118

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

MICHAEL J. COREY,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Walworth County: JAMES L. CARLSON, Judge. *Affirmed.*

NETTESHEIM, J. Michael J. Corey appeals from an order revoking his driving privileges for one year based on a circuit court determination that he improperly refused to submit to a chemical test pursuant to § 343.305(3) and (9), STATS. On appeal, Corey argues that his refusal was not improper because the officer did not have probable cause to arrest him for operating while

intoxicated (OWI) and because the arrest occurred on private property. We reject Corey's arguments and affirm the revocation order.

On May 25, 1998, at approximately 12:00 a.m., Officer Kenneth R. Mulhollon of the Village of Williams Bay Police Department was traveling north on Cedar Point Drive. He observed a vehicle traveling south and obtained a radar reading indicating that the vehicle was exceeding the speed limit. Mulhollon turned his vehicle around, activated his emergency lights and pursued the vehicle. He followed the vehicle as it turned west onto Birch Walnut Road and then into a driveway and into a garage. Mulhollon pulled into the driveway behind the vehicle, stopping just outside the open garage door. At no time did Mulhollon lose eye contact with the vehicle.

Mulhollon observed a person, later identified as Corey, exit the vehicle. The two met at the rear of the vehicle. Mulhollon immediately noticed that Corey's eyes were very bloodshot and glassy. Mulhollon asked for identification and Corey produced an Illinois license. Mulhollon advised Corey that he was being stopped for traveling in excess of the speed limit. He asked Corey if he was aware of the violation. Corey responded that he was not and inquired as to how he could be stopped in his own garage. During this exchange, Mulhollon noted that Corey's speech was slow and exaggerated. Mulhollon asked whether Corey had been drinking that night. Corey denied any drinking. Mulhollon did not notice any odor of intoxicants at this time.

Mulhollon instructed Corey to remain at the rear of his vehicle while he ran a check on Corey's license. Corey attempted to follow Mulhollon to the squad car. Mulhollon directed Corey to return to the rear of his vehicle and remain there. Corey stated that he was on his own property and would stand

wherever he pleased. At this time Officer John Wrzeszcz arrived and stood with Corey at the rear of Corey's vehicle.

Mulhollon wrote out a citation against Corey for exceeding the posted speed limit. He exited his squad car and explained the citation to Corey. Mulhollon now noticed an odor of intoxicants coming from Corey's person and again asked Corey if he had been drinking. Corey replied that it did not matter based on his belief that he could not be arrested in his own garage.

Mulhollon requested Corey to perform field sobriety tests. Corey stated that he would not cooperate in any way because he could not be arrested in his own garage. Mulhollon advised Corey that if he did not submit to the tests he would be arrested for OWI. Corey again stated that he could not be charged with OWI because he was in his garage. Corey was handcuffed, searched and placed in the squad car.

Corey was then transported to the Williams Bay police department where he was issued a citation for OWI. He was also advised pursuant to the Informing the Accused form and asked to submit to a breathalyzer test. Corey refused. Mulhollon completed and explained to Corey the Notice of Intent to Revoke form. He then asked Corey to respond to the questions on the Alcohol Influence Report. Corey refused.

A refusal hearing was held on October 14, 1998. The circuit court found that there were articulable reasons for the stop and that there was probable cause to arrest Corey for OWI. Based on these findings, the court revoked Corey's license for a one-year period.

On appeal, Corey first contends that Mulhollon did not have authority to conduct a traffic stop pursuant to ***Terry v. Ohio***, 392 U.S. 1 (1968), while on private property. We are unpersuaded. We conclude that the stop was lawful because Mulhollon had reasonable and articulable facts to believe that Corey had violated a traffic law.

Stopping an automobile and detaining its occupants constitutes a seizure under the Fourth Amendment. *See* ***State v. Baudhuin***, 141 Wis.2d 642, 648, 416 N.W.2d 60, 62 (1987). The validity of the seizure depends upon whether the individual was lawfully stopped. *See* ***id***. The legality of the initial stop is a question of law which we review de novo. *See* ***id***. at 648-49, 416 N.W.2d at 62.

Section 345.22, STATS., provides: "A person may be arrested without a warrant for the violation of a traffic regulation if the traffic officer has reasonable grounds to believe that the person is violating or has violated a traffic regulation." "Implicit in the authority to arrest for a traffic violation is the authority to stop the vehicle where the officer has reasonable grounds to believe the violation has occurred." ***Baudhuin***, 141 Wis.2d at 648, 416 N.W.2d at 62.

Here, Mulhollon testified that he used a radar unit to clock the speed of Corey's vehicle. Corey was traveling forty miles per hour in an area with a posted twenty-five miles per hour speed limit. Mulhollon pursued Corey with the intent of issuing a traffic violation for traveling in excess of the posted speed limit. Based on the information provided by his radar unit, Mulhollon had reasonable grounds to believe that Corey had violated a traffic regulation.

Corey focuses on the fact that Mulhollon did not make contact with him until he had driven onto his private property. While conceding that an investigatory stop is permissible when the person's conduct may constitute only a

civil forfeiture, *see* ***State v. Krier***, 165 Wis.2d 673, 678, 478 N.W.2d 63, 65-66 (Ct. App. 1991), Corey nevertheless maintains that there could be no ***Terry*** stop in this case because his vehicle was on private property before the officer initiated the stop. In so arguing, Corey relies on § 968.24, STATS., which permits temporary questioning without a warrant *in a public place*.

However, we disagree with Corey's premise that this was a ***Terry*** situation. Mulhollon used a radar device which clocked Corey's vehicle at a speed in excess of the posted speed limit. Based on that information, Mulhollon was fully entitled to execute a traffic stop. This was not a situation which called for Mulhollon to temporarily freeze the situation in order to resolve whether Corey had committed, or was about to commit, an offense. *See* § 968.24, STATS. To the contrary, Mulhollon had witnessed a completed speeding offense under the motor vehicle code. As such, Mulhollon was entitled to pursue and detain Corey and, in his discretion, to issue a citation. That Corey did not stop his vehicle until he drove onto his own property did not convert this episode into a ***Terry*** situation.[1] We conclude that Mulhollon's stop of Corey was authorized by § 345.22, STATS., which is not limited by the constraints of ***Terry*** or § 968.24.

Corey next challenges the trial court's finding that Mulhollon had probable cause to arrest him for OWI. One of the issues to be determined at a refusal hearing is whether the officer had probable cause to believe that the person was driving under the influence of alcohol. *See* § 343.305(9)(a)5.a, STATS. The State need only present enough evidence to show that the officer's determination of probable cause was plausible. *See* ***State v. Wille***, 185 Wis.2d 673, 681, 518

[1] Corey testified that he did not see the squad car until he exited his vehicle after pulling into the garage.

N.W.2d 325, 328 (Ct. App. 1994). The trial court is not to weigh the evidence for and against probable cause or determine the credibility of the witnesses; it need only determine if the State's account is plausible. *See* ***id***.

Here, Mulhollon had observed Corey operating a motor vehicle in excess of the posted speed limit. When he made initial contact with Corey, Mulhollon noted that Corey's eyes were bloodshot and glassy and his speech was exaggerated and slurred. When asked, Corey denied having had anything to drink. Corey failed to follow Mulhollon's instructions to remain at the rear of his vehicle and instead tried to follow Mulhollon to the squad car. After writing out the citation for speeding, Mulhollon approached Corey and noted an odor of intoxicants. Corey was then asked, and refused, to perform field sobriety tests. He was then placed under arrest for OWI. We conclude that Mulhollon's observations established plausible probable cause. *See* ***id***.

Corey argues, however, that he was under arrest from the moment Mulhollon told him to remain at the rear of his vehicle and that Mulhollon's observations up to that point were insufficient to form a basis for probable cause. We are unpersuaded.

An arrest occurs when 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. *See* ***State v. Swanson***, 164 Wis.2d 437, 446-47, 475 N.W.2d 148, 152 (1991). The circumstances include "what has been communicated by the police officers, either by their words or actions." ***Id***. at 447, 475 N.W.2d at 152.

Corey contends that he reasonably believed that he was in custody and under arrest from the moment he was ordered to remain at the rear of his

vehicle. However, in ***Swanson***, the supreme court held that a reasonable person would not believe that an arrest had occurred after merely being asked to perform some field sobriety tests when the suspect was never told that he or she was under arrest nor given any ***Miranda*** warnings, and not handcuffed. *See* ***Swanson,*** 164 Wis.2d at 448, 475 N.W.2d at 153. In this case, Mulhollon had only asked Corey to remain at the rear of his vehicle. He had not yet asked Corey to perform field sobriety tests, had not told him that he was under arrest, had not given ***Miranda*** warnings and had not handcuffed him. We conclude that a reasonable person in Corey's position would not have believed that an arrest had occurred.

As a final challenge, Corey contends that the police possessed no legal authority to enter his private property and to later arrest him. In support, Corey relies on the United States Supreme Court's ruling in ***Welsh v. Wisconsin***, 466 U.S. 740 (1984). There, the Court held that the Fourth Amendment prohibits the police from making a warrantless night entry of a person's home in order to arrest for a violation of a nonjailable traffic offense absent probable cause and exigent circumstances. *See* ***id***. at 749.

However, the facts of ***Welsh*** are readily distinguishable from those presented here. There, the police arrested Welsh in the privacy of his own bedroom for a noncriminal traffic offense. *See* ***id***. at 753. The information underlying the arrest was provided by a citizen witness who had earlier observed Welsh driving erratically and then swerve off the road. *See* ***id***. at 742. Because Welsh had abandoned his vehicle and walked home before the police arrived at the scene, the police did not have contact with Welsh prior to arriving in his home. *See* ***id***. In declining to find that the search was reasonable based on the "hot-pursuit doctrine," the Court noted that "there was no immediate or continuous pursuit of the petitioner from the scene of a crime." ***Id***. at 753.

The facts of this case are markedly different from those in ***Welsh***. Here, Mulhollon had obtained a radar reading indicating that Corey was traveling in excess of the posted speed limit. As we have already held, this gave Mulhollon reasonable grounds to execute a traffic arrest pursuant to § 345.22, STATS. Most importantly, Mulhollon never lost contact with Corey after observing the violation and pursued him in an effort to issue a citation. Finally, Mulhollon's contact with Corey did not involve a warrantless entry into his home. Instead, the contact took place in Corey's driveway and garage.

The State contends, and we agree, that the facts of this case are more akin to those presented in ***United States v. Santana***, 427 U.S. 38 (1976). There, the Court held that a person standing in the threshold of his or her residence does not have an expectation of privacy and therefore is not a subject of Fourth Amendment protection. *See* ***id***. at 42. In further deciding whether a person's retreat into the residence could thwart an otherwise proper arrest, the Court held that "a suspect may not defeat an arrest which has been set in motion in a public place … by the expedient of escaping to a private place." ***Id***. at 43.

We conclude that Mulhollon had the authority to pursue Corey into his driveway for purposes of detaining him in order to issue a speeding citation. When that detention revealed additional facts establishing probable cause to believe that Corey had committed an OWI offense, Mulhollon had the further authority to arrest Corey for that offense. We affirm the revocation order.

By the Court.—Order affirmed.

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