

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 25, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

Nos. 99-0133-FT, 99-0134-FT

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RONALD J. LUBINSKI,

DEFENDANT-APPELLANT.

APPEALS from judgments and an order of the circuit court for Buffalo County: DANE F. MOREY, Judge. *Reversed and cause remanded with directions.*

MYSE, P.J. Ronald J. Lubinski appeals an order refusing to suppress evidence and subsequent judgments of conviction for operating a motor vehicle while intoxicated, first offense; driving with a prohibited blood alcohol concentration; and failure to notify police of an accident.¹ Lubinski asserts the

¹ These are expedited appeals under RULE 809.17, STATS.

trial court erred when it concluded that Lubinski was not placed under arrest until state trooper Rita Brunkow had obtained sufficient probable cause to arrest at the hospital following her investigation. This court agrees and concludes that Osseo police officer Eric Staff's prior warrantless entry into Lubinski's home, pat-down search, and transport of Lubinski to the hospital were sufficient to cause a reasonable person to believe he was under arrest. This court further concludes that the evidence Brunkow subsequently obtained at the hospital was directly related to Staff's unlawful arrest and was not sufficiently attenuated to be independently admissible. Therefore, the judgments and order are reversed, and the matter is remanded to the trial court with directions to suppress the evidence Brunkow obtained against Lubinski at the hospital.

The facts giving rise to this appeal concern a one-car accident involving Lubinski's vehicle. When Brunkow investigated the accident scene, she learned that Lubinski owned the vehicle and that a suspect involved in the accident had suffered a broken collarbone. Brunkow then proceeded to Osseo Hospital after discovering that a patient was being treated for a recent collarbone injury. Once at the hospital, Brunkow learned that the patient was Robert Lubinski, Ronald's brother, who denied any involvement in the accident. Lubinski's mother, Suzanne Lubinski, was also at the hospital. Suzanne denied any knowledge of Ronald's whereabouts. Brunkow asked Staff to determine if Ronald was at the Lubinski residence and, if so, to bring him to the hospital.

Staff went to the apartment complex where Suzanne lived. He approached the apartment with the number 4 displayed on the outside of the door, knocked and, after receiving no response, opened the door and entered the apartment. Upon entering, Staff encountered a staircase and proceeded several steps up a stairway. At this point, Staff determined that he was not in a common

area but was actually inside the apartment. Nonetheless, Staff proceeded up the remaining steps to the living room entrance where he observed two men watching television. Staff asked if either of them was Ronald Lubinski. One of the individuals acknowledged that he was Ronald Lubinski, whereupon Staff asked him if he had been involved in an accident that evening. Lubinski replied “yes,” and Staff informed him that his brother, Robert, had been injured and was in the hospital. Staff then requested Lubinski to accompany him to the hospital to talk to the trooper handling the accident.

After Staff and Lubinski left the apartment, Staff frisked Lubinski and asked him to get in the patrol car. Staff then placed him in the front of the squad car without handcuffs or other restraints and drove him to the hospital, where Brunkow interrogated Lubinski about the accident. During this interrogation, Brunkow observed that Lubinski was intoxicated, and Lubinski admitted that he was driving the car involved in the accident. Brunkow then had Lubinski perform field sobriety tests. Upon failing the field sobriety tests, Brunkow told Lubinski he was under arrest for operating a motor vehicle while intoxicated, issued a citation and read him the Informing the Accused form. A blood test revealed a .126% blood alcohol concentration. After the blood test, Brunkow further interviewed Lubinski. Because of disruptions in the hospital waiting room, Brunkow took Lubinski to her squad car where she read him his *Miranda*² rights. Lubinski proceeded to provide a written driver’s statement describing the accident.

² *Miranda v. Arizona*, 384 U.S. 436 (1966).

In reviewing the denial of a suppression motion, this court upholds the trial court's findings of fact unless they are clearly erroneous. Section 805.17(2), STATS.; *see also State v. Eckert*, 203 Wis.2d 497, 518, 553 N.W.2d 539, 547 (Ct. App. 1996). However, the application of constitutional principles to the facts is a question of law this court decides independently. *State v. Patricia A.P.*, 195 Wis.2d 855, 862, 537 N.W.2d 47, 49-50 (Ct. App. 1995).

When the historical facts are undisputed, whether a defendant was “under arrest” is a question of law this court resolves independently of the trial court's determination. *State v. Clappes*, 117 Wis.2d 277, 280-81, 344 N.W.2d 141, 143 (1984). The standard to determine the moment of arrest 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. *State v. Swanson*, 164 Wis.2d 437, 446-47, 475 N.W.2d 148, 152 (1991). The totality of the circumstances, including what has been communicated by the police officer, either by words or action, is controlling. *Id.* Because the test is an objective one, neither the belief of the person detained nor the officer's belief are relevant in determining whether the defendant was placed in custody. *Id.*

To determine if a person would reasonably believe he was under arrest, this court reviews the record to ascertain the degree of restraint Staff exercised over Lubinski. This court first considers Staff's entry into the apartment. Here, Staff entered Suzanne Lubinski's home without authority or permission. He knocked on a closed door and, receiving no response, nevertheless opened the door and entered, albeit believing he was entering a common area. Staff did not know at this point whether Ronald Lubinski was even at this location. When he realized that he was inside the residence without permission, Staff did not leave but continued up the stairs, announced himself as an officer with the

Osseo Police Department and apologized for entering the apartment. He did not then seek permission to be in the residence and did not offer to leave. This court concludes that Staff's entry was illegal. Not only was there no permission granted or warrant authorizing entry, but none of the exceptions to warrantless entries was present in this case. *Welsh v. Wisconsin*, 466 U.S. 740, 748-49 (1984). The State makes no argument that probable cause to arrest and exigent circumstances justified the entry. To the extent the State suggests Lubinski voluntarily consented to the entry, the record fails to support this argument.

This court next considers Staff's pat-down search of Lubinski. Staff frisked Lubinski after leaving the apartment and before entering the squad car for the trip to the hospital. A frisk is improper without a reasonable suspicion or belief that the search is necessary for the officer's safety or the safety of others. *Terry v. Ohio*, 392 U.S. 1, 27 (1968). Staff, however, testified that he did not feel threatened and had no reason to believe Lubinski was armed or dangerous. Therefore, this court concludes that the frisk was illegal.

Finally, this court considers Lubinski's transport in a squad car to the hospital. The law permits police, if they have reasonable grounds, to move a suspect in the general vicinity of the stop without converting what would otherwise be a temporary seizure into an arrest. *State v. Quartana*, 213 Wis.2d 440, 446, 570 N.W.2d 618, 621 (Ct. App. 1997). The determination requires a two-part inquiry: (1) was the person moved within the vicinity; and (2) was the

purpose in moving the person within the vicinity reasonable. *Id.*³ This court concludes that it was unreasonable to move Lubinski to the hospital for purposes of investigating the accident and, consequently, this court need not address the first inquiry.

While the police may be empowered to move a suspect, they may only do so on reasonable grounds. *Id.* Staff had no basis to believe Lubinski was guilty of an offense, only that he had been involved in an accident. Consequently, Staff's transport of Lubinski to the hospital was unreasonable and unauthorized. Further, while Staff was assisting Brunkow in locating Lubinski, Brunkow had left the accident scene to question Lubinski's brother in the hospital. There is no reason Brunkow could not have gone to the Lubinski residence herself to continue the investigation and left Staff at the hospital. Brunkow was not securing or preserving the accident scene like the trooper in *Quartana*. *Id.* at 449, 570 N.W.2d at 622.

Courts have held that police may move a suspect for a variety of reasons that are considered reasonable grounds. This court, however, concludes

³ *Quartana* involved factual circumstances with some similarity to the case at bar. After losing control of his car and driving into a ditch, Quartana left the scene of the accident and walked to his parents' house. *State v. Quartana*, 213 Wis.2d 440, 570 N.W.2d 618 (Ct. App. 1997). A trooper arrived at the scene and determined the vehicle belonged to Quartana. *Id.* at 444, 570 N.W.2d at 620. A city police officer was dispatched to Quartana's residence. The officer questioned Quartana and informed him that he would have to return to the accident scene to talk to the investigating trooper. *Id.* Quartana was transported to the accident scene where the trooper interviewed him and conducted field sobriety tests. *Id.* After failing the tests, Quartana was placed under arrest and taken to the police station for further testing. *Id.* This court held that it was reasonable for police to detain and transport Quartana to the scene of the accident in order to continue their investigation. *Id.* at 448-49, 570 N.W.2d at 622. This court reasoned that the officer had observed signs of intoxication and that Quartana had admitted to driving at the time of the accident thereby providing grounds to investigate further, the officer was only assisting the investigating trooper who had to remain at the accident scene, and Quartana was not transported to an institutional setting such as a police station. *Id.*

none of those reasons present here. For example, there was no apparent necessity for Lubinski to be transported to the hospital to allow for a victim identification, *see People v. Davison*, 127 A.D.2d 680, 681-82 (1987), or for security or safety reasons, *see Florida v. Royer*, 460 U.S. 491, 504-05 (1983), or for an on-the-scene identification, *see State v. Flynn*, 190 Wis.2d 31, 42, 527 N.W.2d 343, 347 (Ct. App. 1994). Therefore, transporting Lubinski to the hospital was not reasonable, and doing so converted the temporary detention into an arrest.

To the extent the State suggests Lubinski voluntarily consented to be taken to the hospital, the record again fails to support this argument. Consent cannot be found by a showing of mere acquiescence and a person need not object to an officer's presence to gain Fourth Amendment protection. *State v. Johnson*, 177 Wis.2d 224, 234, 501 N.W.2d 876, 880 (Ct. App. 1993). Staff appeared inside the apartment without warning. He presented himself in full uniform, though neither his baton nor his weapon were displayed. He announced that he was an Osseo police officer and inquired whether Lubinski had been in an accident that evening. Upon receiving an affirmative answer, Staff requested Lubinski go to the hospital to speak with the trooper investigating the accident. Staff did not, by words or conduct, give Lubinski reason to believe he could decline or had any alternative. At no time did Staff inform Lubinski that he was not under arrest, that he need not accompany him to the hospital or suggest in any other way that Lubinski had a choice whether to comply with Staff's request. This factor weighs against a determination of voluntary consent. *State v. Phillips*, 218 Wis.2d 180, 197, 577 N.W.2d 794, 804 (1998).

At best, Lubinski's conduct reflects acquiescence that supports the conclusion that Lubinski believed he did not have a choice whether to go with Staff. Considering the totality of the circumstances, this court cannot conclude

that Lubinski's appearance of cooperation constituted voluntary consent and was not instead simply acquiescence rooted in Lubinski's conclusion that he had no choice.

This court considers the circumstances in their totality to determine whether Lubinski was "in custody," including the warrantless entry, the illegal frisk and the unreasonable transportation to the hospital. *See Swanson*, 164 Wis.2d at 446-47, 475 N.W.2d at 152. Together, these facts lead to the conclusion that a reasonable person would believe he had been placed under arrest by Staff. Exercising this extraordinary degree of dominion and control over an individual is sufficient to lead a reasonable person to believe that he is in the custody and control of the officer. Therefore, the trial court erred when it concluded that Staff had not taken Lubinski into custody.

Because the evidence Brunkow discovered was obtained following the illegal arrest, that evidence is not admissible unless sufficiently attenuated from the illegality to be independently admissible. *Phillips*, 218 Wis.2d at 205, 577 N.W.2d at 805. The question of attenuation involves an analysis of the following: "(1) the temporal proximity of the official misconduct and the seizure of evidence; (2) the presence of intervening circumstances; and (3) the purpose and flagrancy of the official misconduct." *Id.* This court concludes that each of these factors weighs against attenuation. Therefore, the trial court should have suppressed the evidence.

The length of time between Lubinski's illegal apprehension and Brunkow's examination was between seven and eight minutes. This was the amount of time between Staff's knock on Lubinski's door and their subsequent arrival at the hospital. Lubinski was delivered to Brunkow directly upon his

arrival at the hospital, and Brunkow then began her examination. This brief period is insufficient to support a claim that Brunkow's discovery of evidence at the hospital was independent of Lubinski's unlawful arrest.

This court also considers the conditions existing between the time of the misconduct and the seizure of evidence. *Id.* at 206, 577 N.W.2d at 806. In this instance, the custodial conditions existing at the time indicate a finding that the taint was not dissipated by the time of Brunkow's discovery of evidence at the hospital. Staff, in full uniform, entered the apartment unannounced, identified himself as a police officer, requested Lubinski accompany him to the hospital to speak to the officer investigating the accident Lubinski had just admitted involvement in, unlawfully frisked him, and unreasonably transported him to the hospital. The lack of more aggravating threatening circumstances is insufficient to support a conclusion that the conditions present dissipated the taint of Brunkow's illegal seizure. This court concludes that the existing conditions demonstrate sufficient custodial conduct to weigh against attenuation.

There were no intervening circumstances supporting a claim of attenuation. Lubinski was illegally arrested and immediately presented to Brunkow, who promptly elicited sufficient information to form an admission. She also secured sufficient evidence based upon her observations and the field test results to place him under arrest for operating a motor vehicle while intoxicated. No act or event intervened or otherwise separated Brunkow's observations and the evidence subsequently obtained from the illegality of the arrest.

Finally, this court examines the purpose and flagrancy of the official misconduct. *Id.* at 209, 577 N.W.2d at 807. While this court does not conclude that Staff intended to effect an illegal arrest, he made an illegal entry into

Lubinski's residence and improperly exercised dominion and control over Lubinski by conducting an unauthorized and illegal search of his person and then unreasonably transporting him to the hospital. Staff neither explained to Lubinski that he was not under arrest nor that he had a choice whether to comply with Staff's request. These circumstances are sufficient to weigh against the attenuation of Staff's illegal conduct and the information obtained shortly thereafter. Staff's subsequent apologies for illegally entering the residence notwithstanding, he made an illegal entry of a residence and asserted illegal dominion and control over an individual resident without authority or justification. This is a sufficiently flagrant abuse of police power to reject any claim of attenuation.

This court therefore concludes that the trial court erred when it concluded that Lubinski was not placed under arrest until Brunkow arrested him at the hospital following her investigation. This court further concludes that the evidence obtained was directly related to the officer's illegal arrest and is not sufficiently attenuated to be independently admissible. Therefore, the judgments of conviction are reversed, and the matter is remanded to the trial court with directions to order suppression of the evidence Brunkow obtained against Lubinski at the hospital.

By the Court.—Judgments and order reversed and cause remanded with directions.

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

