COURT OF APPEALS
DECISION
DATED AND FILED

August 11, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 99-0607-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

FRANK J. OBUCHOWSKI,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Racine County: DENNIS J. BARRY, Judge. *Affirmed.*

NETTESHEIM, J. Frank J. Obuchowski appeals from a judgment of conviction for operating a motor vehicle while intoxicated (OWI) pursuant to § 346.63(1)(a), STATS. On appeal, Obuchowski contends that the police officer's transport of him from the scene of the traffic stop to a local police department for purposes of field sobriety tests converted the lawful ***Terry***[1] detention into an

[1] ***Terry v. Ohio***, 392 U.S. 1 (1968)

illegal custodial arrest. We hold that the change in locale did not convert Obuchowski's temporary detention into a custodial arrest. We affirm the judgment.

FACTS AND PROCEDURAL HISTORY

The controlling facts are not in dispute. During the evening hours of February 21, 1997, Racine County Deputy Sheriff Michael Benish was patrolling in the village of Waterford. He observed a vehicle speeding. He followed the vehicle and stopped it in the town of Rochester. Upon approaching the vehicle, Benish recognized Obuchowski as the operator. Later information revealed that the stop occurred a few hundred feet from the driveway to Obuchowski's residence. According to Benish, the weather conditions were "terrible" due to a "snowstorm" and "very high winds."

Benish obtained Obuchowski's driver's license. During this exchange, Benish detected an odor of intoxicants, slurred speech and problems with eye-hand coordination. Benish suspected that Obuchowski might be intoxicated. However, because of the weather conditions, Benish did not ask or require Obuchowski to perform field sobriety tests at the scene. Instead, Benish asked Obuchowski if he would prefer to perform the tests at the Waterford police department. Obuchowski agreed. Before leaving the scene, Benish moved Obuchowski's vehicle to his nearby driveway. Obuchowski then accompanied Benish to the police department. Obuchowski was not handcuffed or otherwise restrained during this transport. Following the field sobriety tests and a preliminary breath test at the police station, Benish arrested Obuchowski for OWI. Obuchowski then submitted to a chemical test. This prosecution ensued.

Obuchowski brought a motion to suppress evidence of the field sobriety tests and the ensuing chemical test. He contended that his removal from the scene of the initial stop to the local police department converted a lawful ***Terry*** detention into an unlawful custodial arrest under ***Florida v. Royer***, 460 U.S. 491 (1983), and related law. The trial court rejected the motion to suppress, ruling that since Obuchowski had agreed to the transport, the situation was a "voluntary continuation by the defendant of a legitimate ***Terry*** type stop." Later, a jury found Obuchowski guilty of OWI[2] and the court entered a judgment of conviction. Obuchowski appeals the trial court's ruling denying his suppression motion.

DISCUSSION

Where the facts are undisputed, "custody" is a question of law and this court reviews the issue de novo. *See* ***State v. Swanson***, 164 Wis.2d 437, 445, 475 N.W.2d 148, 152 (1991). Nonetheless, we value a trial court's decision even in the face of our de novo standard of review. *See* ***Scheunemann v. City of West Bend***, 179 Wis.2d 469, 475, 507 N.W.2d 163, 165 (Ct. App. 1993).

Wisconsin law uses an objective test for determining whether an arrest has occurred. This test inquires 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. *See* ***Swanson***, 164 Wis.2d at 446-47, 475 N.W.2d at 152; *see also* ***Berkemer v. McCarty***, 468 U.S. 420, 441-42 (1984). "The circumstances of the situation including what has been communicated by the police officers, either by their words or actions, shall be

[2] The jury also found Obuchowski guilty of the companion charge of operating a motor vehicle with a prohibited alcohol concentration pursuant to § 346.63(1)(b), STATS.

controlling under the objective test." ***Swanson***, 164 Wis.2d at 447, 475 N.W.2d at 152.

Wisconsin's ***Terry*** statute, § 968.24, STATS., envisions that the temporary questioning might not occur in the exact location where the stop occurred. The statute says, "Such detention and temporary questioning shall be conducted *in the vicinity where the person was stopped."* ***Id***. In ***State v. Quartana***, 213 Wis.2d 440, 570 N.W.2d 618 (Ct. App. 1997), *review denied*, 215 Wis.2d 426, 576 N.W.2d 282 (1997), this court addressed a situation in which an OWI suspect was initially detained in his home, but then removed to the scene of the nearby accident which was under investigation. *See* ***id***. at 443, 570 N.W.2d at 620. After examining ***Terry*** and its progeny, we said, "[I]t is clear that the law permits the police, if they have reasonable grounds for doing so, to move a suspect in the general vicinity of the stop without converting what would otherwise be a temporary seizure into an arrest." ***Id***. at 446, 570 N.W.2d at 621. In determining whether such a move is permitted, we make two inquiries. First, we examine whether the temporary stop and questioning was within the "vicinity" where the person was stopped. *See* ***id***. Second, we inquire whether the purpose in moving the person within the vicinity was reasonable. *See* ***id***.

As to the "vicinity" requirement, the record does not expressly advise as to the actual distance between the scene of the initial stop and the Waterford police department. However, we take judicial notice that the town of Rochester is adjacent to the village. In ***Quartana***, we adopted the dictionary definition of "vicinity" and concluded that it meant "surrounding area or district" or "locality." *See* ***id***. Obuchowski contends that Benish should have removed him to his nearby residence. Assuming this was a viable alternative, the question before us is whether the locale actually selected met the vicinity requirement of

the statute. We hold that it did. Benish was on patrol in the village of Waterford when he first spotted Obuchowski's vehicle. While the vehicle was not stopped until it had traveled into the adjoining town of Rochester, there is no suggestion that Obuchowski was fleeing or evading the police. A reasonable reading of the evidence is that the Waterford police department was not a far distance from the scene of the initial stop.

We also note that Benish's headquarters would have been the Racine County Sheriff's Department or a substation of that department. Yet, Benish utilized the headquarters of the nearby Waterford police department. A fair inference from this evidence is that Benish selected the closest police facility to conduct the field sobriety tests. We hold that the "vicinity" requirement of ***Quartana*** was satisfied in this case.

We also hold that the "reasonable purpose" of ***Quartana*** was satisfied in this case. In fact, we do not read Obuchowski to quarrel with Benish's suggestion that the field sobriety tests be performed in a more favorable environment in light of the inclement weather conditions.

Although the requirements of ***Quartana*** were satisfied in this case, our discussion is not completed. We still must determine whether a reasonable person in Obuchowski's position would consider himself or herself in custody under ***Swanson***. There, our supreme court held that the mere request for performance of field sobriety tests, coupled with no show of force or arms, does not reasonably connote an arrest. *See* ***Swanson***, 164 Wis.2d at 448, 475 N.W.2d at 153. The court also noted that in far more intrusive circumstances (the drawing of weapons, the use of handcuffs), the courts nonetheless have concluded that a custodial situation did not exist. *See* ***id***.

In this case, Benish did not pronounce any words of arrest prior to the transportation of Obuchowski to the police station. He never brandished a weapon, and he engaged in no other show of force. He did not order—rather he asked—Obuchowski to accompany him to the police department. He did not handcuff Obuchowski or place him under any other form of restraint prior to or during the transport. Obuchowski's ready agreement to the change in locale also suggests a noncustodial situation. In short, we agree with the trial court that both Benish and Obuchowski simply agreed to move the further investigation of the matter to a more favorable setting.

When assessing a temporary detention situation, we are not to employ hard and fast rules. *See* ***State v. Wilkens***, 159 Wis.2d 618, 626, 465 N.W.2d 206, 210 (Ct. App. 1990). Instead, we look to see if the police "diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly, during which time it is necessary to detain" the suspect. ***Id***. (quoted source omitted). We are not to engage in "unrealistic second guessing" and we look to the "whole picture." ***Id***. (quoted source omitted). We read this law to say that each case must be examined under its own facts. Here, the inclement weather allowed (perhaps required) Benish to deviate from the usual ***Terry*** procedures in an OWI setting. Those procedures were reasonable under the circumstances of this case.

This is not a ***Royer*** case. There, the United States Supreme Court determined that the police conduct exceeded the limits of a ***Terry*** investigation. *See* ***Royer***, 460 U.S. at 504. The police had removed Royer from the public area of an airport to a small closet-like room for purposes of pursuing an investigation to confirm their suspicions because they were not satisfied with Royer's explanations. *See* ***id***. at 502-03. The police had already seized Royer's airline

ticket, identification and luggage. *See* ***id.*** at 503. In addition, the Court noted that there were no legitimate reasons for moving Royer from one location to another during the investigatory detention. *See* ***id***. at 504-05.

This case is similar to ***Royer*** only in that Benish had custody of Obuchowski's driver's license. But we do not deem that fact controlling and ***Royer*** does not so instruct. Moreover, this was a routine OWI traffic stop. An ordinary person in Obuchowski's position would not find it remarkable that the officer would request field sobriety tests, nor equate such a request with a custodial arrest. Nor, given the prevailing weather conditions, would a reasonable person construe a request to conduct the tests at a nearby police station as the equivalent of a custodial arrest. To the contrary, a reasonable person would construe such a request exactly as Benish intended it—as an accommodation.

CONCLUSION

We uphold the trial court's rejection of Obuchowski's motion to suppress. We affirm the judgment of conviction.

By the Court.—Judgment affirmed.

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