COURT OF APPEALS
DECISION
DATED AND FILED

November 10, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 99-1782-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

COLLEEN M. THOMAS,

DEFENDANT-APPELLANT.

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

¶1 NETTESHEIM, J. Colleen M. Thomas appeals from a judgment of conviction for operating a motor vehicle while intoxicated (OWI) pursuant to § 346.63(1)(a), STATS. On appeal, Thomas contends that the police transport of her, while handcuffed, from the scene of the traffic stop to the local police department for purposes of field sobriety tests converted a lawful ***Terry***[1] detention

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

into an illegal custodial arrest. We reject Thomas's argument. We affirm the judgment.

FACTS AND PROCEDURAL HISTORY

¶2 The controlling facts are not in dispute. On January 13, 1999, at approximately 1:53 a.m., City of Lake Geneva Police Officer Keith Mulhollon observed the front end of Thomas's vehicle against a snowbank with the rear portion "sitting sideways in a northbound lane." When Mulhollon questioned Thomas about the situation, he "noticed that she had bloodshot, glassy eyes and had an odor of an intoxicating beverage emanating from her breath." These observations caused Mulhollon to suspect that Thomas might be intoxicated and he detained her for purposes of administering field sobriety tests. Thomas does not dispute that Mulhollon had a reasonable suspicion to detain her under ***Terry***.

¶3 The dispute arises because of the ensuing events. A recent snowfall had left about two inches of snow in the area, making the footing slippery. In light of these conditions and because the placement of Thomas's vehicle constituted a hazard, Mulhollon concluded that it would be unfair to require Thomas to perform field sobriety tests at the scene of the investigation. Instead, Mulhollon advised Thomas that he would be transporting her to the city police department to conduct the standard field sobriety tests. Consistent with police department policy, Mulhollon handcuffed Thomas for purposes of the transport.[2] Following the transport, Thomas submitted to the field sobriety tests. In due course, she was charged with OWI.

[2] Mulhollon did not recall if he handcuffed Thomas. However, he acknowledged the department policy that required the restraint of all persons transported in police vehicles. Thomas unequivocally testified that she was handcuffed. The trial court adopted Thomas's testimony on this point. We respect that finding in deciding this case.

¶4 Thomas brought a motion to suppress the evidence obtained following her transport to the police department. She contended that her removal from the scene of the initial stop to the local police department converted a lawful ***Terry*** detention into an unlawful custodial arrest. The trial court denied the motion. Thomas later pled guilty to the OWI charge. She now appeals the trial court's rejection of her motion to suppress.

DISCUSSION

¶5 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).

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

¶7 Wisconsin's ***Terry*** statute, § 968.24, STATS., envisions that the temporary questioning might not occur in the same location where the initial detention occurred. The statute says, "Such detention and temporary questioning shall be conducted *in the vicinity where the person was stopped."* Section 968.24

(emphasis added). In ***State v. Quartana***, 213 Wis.2d 440, 570 N.W.2d 618 (Ct. App.), *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***.

¶8 Although the evidentiary record is not clear as to the distance between the scene of the initial encounter and the police department, the trial court's bench decision noted a distance of three to four blocks consuming about two to three minutes of travel time. The State's appellate brief makes a similar reference to the travel time. Despite the murky evidentiary record on this point, Thomas does not dispute the estimates made by the trial court or the State. We therefore adopt them for purposes of this decision.

¶9 In ***Quartana***, we adopted the dictionary definition of "vicinity" and concluded that the term meant "surrounding area or district" or "locality." *See* ***id***. Given the limited distance and travel time in this case, we hold that the field sobriety tests were conducted within the vicinity requirements of § 968.24, STATS., and ***Terry***.

¶10 We also hold that the "reasonable purpose" of ***Quartana*** was satisfied in this case. Mulhollon concluded that it would have been unfair to require Thomas to perform the field sobriety tests on a slippery surface covered with about two inches of recent snowfall. He also did not want to administer the tests in the area because the placement of Thomas's vehicle represented a hazard.

¶11 That brings us to the closer issue in this case—whether a reasonable person in Thomas'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***.

¶12 In this case, Mulhollon did not pronounce any words of arrest prior to transporting Thomas to the police station. Nor did he deliver the ***Miranda*** rights which would signal to Thomas that an arrest had occurred. To the contrary, Mulhollon explained to Thomas that the purpose of the transport was to administer the field sobriety tests at the police station. Mulhollon testified that Thomas agreed to the transport and the court also made this finding. In addition, Mulhollon never brandished a weapon.

¶13 Undoubtedly, the handcuffing of Thomas represents a factor in support of her claim that she was arrested. However, 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 sources omitted).

¶14 We read this law to say that each case must be examined under its own facts. Here, we conclude that the conditions created by the inclement weather and the hazard represented by the location of Thomas's vehicle allowed Mulhollon to deviate from the usual ***Terry*** procedures in an OWI setting. And, we further conclude that the alternative procedures employed were reasonable under the circumstances of this case. Viewing the "whole picture," we are not persuaded that the additional fact of Thomas's handcuffing served to convert this ***Terry*** situation into a formal arrest, particularly where our supreme court has recognized that such restraint does not always produce an arrest. ***Swanson***, 164 Wis.2d at 448, 475 N.W.2d at 153.

¶15 Thomas also points to Mulhollon's testimony that she was not free to leave the scene. From this, Thomas reasons that she was under arrest. Thomas's argument is too simplistic. It goes without saying that a suspect detained under ***Terry***, while not under arrest, is nonetheless not free to depart the scene**.** A contrary rule would defeat the purpose of the ***Terry*** rule. In short, whether an arrest has occurred does not turn on whether the suspect is free to go. Rather, the question turns on whether a reasonable person would have considered himself or herself in custody given the degree of restraint employed as measured by the officer's words or actions. *See* ***Swanson***, 164 Wis.2d at 446-47, 475 N.W.2d at 152.

¶16 Thomas points to other cases in support of her argument. *See* ***Florida v. Royer***, 460 U.S. 491 (1983); ***Dunaway v. New York***, 442 U.S. 200 (1979); ***Hayes v. Florida***, 470 U.S. 811 (1985); and ***Davis v. Mississippi***, 394 U.S. 721 (1969). While these cases are instructive as to the legal principles involved and present some facts similar to this case, we have already noted that each ***Terry*** case must be evaluated in light of its *particular* facts. Unlike the cases cited by Thomas, this is an OWI case. Field sobriety tests are commonly administered in OWI cases to assist the police in deciding whether to arrest. A reasonable person who is asked to submit to such tests would understand that the tests are administered for such a purpose. Absent other words or conduct on the part of the police indicating otherwise, a person would not reasonably conclude that he or she is under arrest until that process is completed. In such a setting, the ***Terry*** situation endures until those tests are completed so long as the tests are administered in accord with the "vicinity" requirements of ***Terry***. As we have already held, that requirement was satisfied in this case.[3]

[3] As an alternative ground for affirmance, the State contends that Mulhollon had probable cause to arrest Thomas at the scene of the initial encounter. We are skeptical of this argument since Mulhollon, himself, acknowledged that he did not have probable cause to arrest Thomas prior to the transport. Regardless, we need not address the State's argument because we have otherwise concluded that the ***Terry*** detention was not converted to a custodial arrest. *See* ***Sweet v. Berge***, 113 Wis.2d 61, 67, 334 N.W.2d 559, 562 (Ct. App. 1983).

CONCLUSION

¶17 We uphold the trial court's rejection of Thomas'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.