

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 20, 2010

David R. Schanker
Clerk of Court of Appeals

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 WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2009AP2393-CR

Cir. Ct. No. 2007CT647

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CODY R. DEWITT,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Sauk County:
GUY D. REYNOLDS, Judge. *Affirmed.*

¶1 VERGERONT, J.¹ Cody Dewitt appeals the judgment of conviction for operating a motor vehicle while intoxicated (OWI) and operating

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) and (3) (2007-08). All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

with a prohibited alcohol concentration (PAC) of .08 or more, in violation of WIS. STAT. § 346.63(1)(a) and (b) (2007-08), second offense. He contends that his detention by an off-duty police officer for ninety minutes until the arresting officer arrived was not a de facto arrest supported by probable cause, as the circuit court ruled, but rather was an unreasonably long investigative detention. According to Dewitt, the circuit court therefore erred in denying his motion to suppress evidence. For the reasons we explain below, we conclude that the investigative detention was not unreasonably prolonged, and we affirm on this ground.

BACKGROUND

¶2 Dewitt was pulled over by off-duty Hillsboro police officer Steven Johnson at approximately 4 a.m. on June 16, 2007. At the evidentiary hearing on Dewitt's motion to suppress evidence, Officer Johnson and the arresting officer, Summer Geffert, of the Reedsburg Police Department, testified, as did Dewitt.

¶3 Officer Johnson testified as follows. He was driving home from his job at the Hillsboro Police Department when he saw Dewitt's pickup truck driving fast toward a red light where other cars were stopped, then lock its brakes and swerve into the oncoming lane of traffic to avoid hitting the vehicles. Dewitt's truck then passed Officer Johnson, who observed the truck jump the curb, nearly hitting a flag pole, and return to the road where it hit the curb several more times. Officer Johnson, who was driving his personal vehicle and still wearing his uniform, followed Dewitt for approximately two miles, pulled alongside him, and motioned to Dewitt to pull over. Dewitt pulled over and parked at the side of the road. Officer Johnson called the Reedsburg Police Department, whose dispatcher informed him that their officers were busy and it would be awhile before they

could send a car. Officer Johnson told the dispatcher that he would remain parked behind Dewitt “for safety reasons,” until an officer was available.

¶4 Officer Johnson walked up to Dewitt’s truck and noted that Dewitt’s knuckles were bloody. Dewitt explained that he had been drinking earlier in a tavern and got into a fight. During this initial exchange, Officer Johnson noticed that Dewitt’s eyes were bloodshot and his speech was slurred. He also noticed the odor of intoxicants coming from the vehicle. Officer Johnson informed Dewitt that he was an off-duty police officer acting as a civilian and, while he was unable to keep Dewitt there, he would stay with Dewitt until a Reedsburg police officer arrived. Dewitt replied that he would wait for the police to arrive and apologized for his driving behavior. On cross-examination, Officer Johnson testified that, while he told Dewitt he did not have to stay, he also told him that, due to his driving behavior, he would not allow him to leave in his vehicle. Officer Johnson testified that he did not arrest Dewitt or read him his *Miranda*² rights during the time they waited for a Reedsburg police officer to arrive. He explained that he also works as a Sauk County deputy jailer and that county policy does not allow him to make arrests for traffic violations.

¶5 Dewitt testified that he asked Officer Johnson if he could leave because he had to get to work by 7 a.m. in Port Washington, which was about a three and one-half hour drive away, and the officer said no, he had to wait until the other officer arrived.

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

¶6 Officer Geffert testified that she received the call concerning Dewitt at about 4:40 a.m. but was busy with a domestic disturbance and could not arrive on the scene until about 5:30 a.m. Upon arrival, Officer Geffert spoke with Officer Johnson about the circumstances leading up to the stop, and then spoke to Dewitt. Officer Geffert then administered field sobriety tests and arrested Dewitt.

¶7 The circuit court partially granted a motion to suppress evidence. The court concluded that, although Officer Johnson did not make a formal arrest, there was a de facto arrest that was supported by probable cause.³ Because Officer Johnson did not read Dewitt his *Miranda* rights, the court concluded that Dewitt's statements made before Officer Geffert's formal arrest must be suppressed. However, the circuit court denied the motion as it pertained to suppression of the field sobriety test results because they are not testimonial evidence and, thus, not subject to suppression on *Miranda* grounds.

DISCUSSION

¶8 On appeal Dewitt contends that the circuit court erred in concluding that his detention by Officer Johnson was a de facto arrest, or any type of arrest. His position is that there was no arrest but, rather, an investigative stop that was unreasonably long and therefore a violation of his Fourth Amendment right to be free from unreasonable seizure. The State responds that it conceded in the circuit court that Dewitt could have reasonably believed he was in custody. According to

³ The circuit court used the term "implied arrest," but we use instead the term "de facto arrest," the term used in cases discussing whether a detention has become an arrest because it is unreasonably long. See *State v. Colstad*, 2003 WI App 25, ¶18, 260 Wis. 2d 406, 659 N.W.2d 394; *United States v. Sharpe*, 470 U.S. 675, 680 (1985).

the State, the court properly concluded that there was a de facto arrest and properly concluded the de facto arrest was supported by probable cause.⁴

¶9 When we review a decision on a motion to suppress evidence, we uphold the circuit court’s findings of fact unless they are clearly erroneous, and we review de novo the application of the constitutional principles to those facts. *State v. Kramer*, 2008 WI App 62, ¶8, 311 Wis. 2d 468, 750 N.W.2d 941.

¶10 The Fourth Amendment to the United States Constitution protects against unreasonable searches and seizures, and an investigative detention is a seizure under the Fourth Amendment. *State v. Post*, 2007 WI 60, ¶10, 301 Wis. 2d 1, 733 N.W.2d 634. “An investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop.” *Florida v. Royer*, 460 U.S. 491, 500 (1983).

¶11 In determining whether a detention is too long to be justified as an investigative stop, courts “examine whether the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly, during which time it was necessary to detain the defendant.” *United States v. Sharpe*, 470 U.S. 675, 686 (1985) (citations omitted) (reversing lower court decision that twenty- to forty-minute detention alone transformed an investigative stop into a de facto arrest). If an investigative stop continues indefinitely, at some point it can no longer be justified as an investigative stop and it becomes a de facto arrest. *See id.* at 685. However, “a hard and fast time limit rule has been

⁴ Neither party addresses the court’s ruling that, because there was a de facto arrest by Officer Johnson, certain statements Dewitt made to him before the *Miranda* warning had to be suppressed. Accordingly, we do not discuss this aspect of the court’s ruling.

rejected.” *State v. Wilkins*, 159 Wis. 2d 618, 626, 465 N.W.2d 206 (1990) (citing *United States v. Place*, 462 U.S. 696 (1983)). In deciding whether a stop was unreasonably long, courts must consider the “law enforcement purposes to be served by the stop as well as the time reasonably needed to effectuate those purposes.” *Sharpe*, 470 U.S. at 685.

¶12 The unstated premise of Dewitt’s argument is that, if the seizure was an unreasonably long investigative detention, it did not thereby become an arrest, which would be lawful if supported by probable cause. His premise, as we understand it, is that an unreasonably long detention is unlawful regardless of whether there is probable cause. Indeed, Dewitt does not contend that there was not probable cause to arrest him. We need not rule on the correctness of this premise because we conclude the investigative detention was not unreasonably prolonged.

¶13 We assume for purposes of discussion that Dewitt was “seized” within the meaning of the Fourth Amendment when Officer Johnson pulled behind Dewitt’s vehicle and informed him that he [Dewitt] would “be waiting for the Reedsburg Police Department.”⁵ We conclude that Officer Johnson’s detention of Dewitt until a Reedsburg police officer was available was not unreasonable.

¶14 In assessing whether the stop was unreasonably prolonged, we look to the law enforcement purposes of the stop and the time reasonably needed to accomplish those purposes. *State v. Griffith*, 2000 WI 72, ¶54, 236 Wis. 2d 48, 613 N.W.2d 72 (citing *Sharpe*, 470 U.S. at 685). Officer Johnson testified that he

⁵ While Officer Johnson testified that he told Dewitt he could not hold him there, both Dewitt and the State agree that Dewitt reasonably believed he was not free to leave the scene.

stopped Dewitt because his driving behavior was unsafe, and he told Dewitt he would not allow him to drive off because of the risk he posed. Officer Johnson also testified that, although he was a Sauk County deputy jailer, he was not allowed to make arrests in Sauk County for traffic violations. He therefore called the Reedsburg Police Department to conduct the investigation, who said their officers were all busy but would respond as soon as possible. Officer Geffert testified that they were short-handed and very busy that day, and that she arrived on the scene as soon as she finished with another call.

¶15 Dewitt has presented no evidence to show that Officer Geffert, or any other Reedsburg police officer, could have arrived any earlier; nor does he argue that it was unreasonable for Officer Johnson to rely on his understanding of county policy in not conducting the field sobriety tests and arrest himself. Finally, Dewitt has not shown that the ninety-minute delay was longer than reasonably needed to accomplish the purpose of the stop. *See State v. Vorburger*, 2002 WI 105, ¶63, 255 Wis. 2d 537, 648 N.W.2d 829 (seventy-minute detention period not unreasonable where the period of detention related to the procurement and execution of the search warrant); *State v. Colstad*, 2003 WI App 25, ¶¶17-18, 260 Wis. 2d 406, 659 N.W.2d 394 (it was reasonable for officer to direct defendant to wait thirty to forty-five minutes while officer attended to injured child and investigated the scene); *Wilkins*, 159 Wis. 2d at 628 (sixty- to eighty-minute detention prior to arrest was reasonable under the circumstances).

¶16 We conclude that it was reasonable for Officer Johnson to detain Dewitt for safety reasons and to avoid breaking department rules by waiting for an available on-duty officer to perform field sobriety tests and arrest Dewitt. The ninety-minute delay, while inconvenient, was “temporary and last[ed] no longer than is necessary to effectuate the purpose of the stop.” *Royer*, 460 U.S. at 500.

CONCLUSION

¶17 Although our analysis differs from that of the circuit court, we affirm the court's partial denial of Dewitt's motion to suppress evidence and therefore affirm the judgment of conviction.

By the Court.—Judgment affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)4.

