COURT OF APPEALS
DECISION
DATED AND RELEASED

February 27, 1997

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.

NOTICE

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

No. 96-0302

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

CITY OF MIDDLETON,

Plaintiff-Respondent,

v.

DANIEL L. BARRETT,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Dane County: PATRICK J. FIEDLER, Judge. *Affirmed*.

VERGERONT, J.[1] Daniel Barrett appeals from the circuit court's judgment that affirmed the municipal court judgment convicting Barrett of operating a motor vehicle while under the influence of an intoxicant in violation of a local ordinance conforming with § 346.63(1)(a), STATS. Barrett contends that: (1) the circuit court's decision violated his due process rights because he did not have an opportunity to be heard by the circuit court; (2) the arresting officer patted Barrett down in violation of the Fourth Amendment; (3) he was arrested for battery without probable cause; and (4) the evidence was

[1] This appeal is decided by one judge pursuant to § 752.31(2)(c), STATS.

insufficient to sustain a conviction for driving while under the influence of an intoxicant. We reject each contention and affirm.

BACKGROUND

On February 4, 1992, at 6:30 a.m. David Kasdorf, a police officer for the City of Middleton, issued a citation to Barrett for operating a motor vehicle while under the influence of an intoxicant (OWI) and operating a motor vehicle with an alcohol concentration of .10 or more (BAC).[2] At the trial before the City of Middleton municipal court, Barrett's counsel began by making a motion to suppress evidence based on an unlawful arrest. It appears that a written motion had previously been filed, but a copy of the motion is not part of this record. The municipal court first heard the testimony relating to the motion to suppress, which consisted solely of Kasdorf's testimony.

Kasdorf testified that at approximately 4:56 a.m. on January 22, 1993, he and Officer Michael Ash responded to a report of a man and woman fighting in the street in the 500 block of Parmenter Street in Middleton. Kasdorf arrived at that location within a couple of minutes and saw a female in a vehicle pulling out of the driveway and a male standing on the sidewalk approximately fifteen feet away from the vehicle. Officer Ash stopped the vehicle to talk to the female and Kasdorf approached the male. There were no other persons in the area. Barrett identified himself to Kasdorf. Kasdorf smelled a strong odor of intoxicants on Barrett's breath and saw blood running from his nose. Kasdorf asked Barrett to have a seat in his squad car. It was cold out; it was still dark; and Barrett was dressed only in a pair of shorts, deck shoes without socks, a light shirt and a light jacket. Before Barrett entered Kasdorf's squad car, Kasdorf did a pat-down search of Barrett, checking only for weapons because he wanted to make sure Barrett had no weapons before he got into the squad car.

After Barrett was in the squad car, Kasdorf asked what had happened. According to Kasdorf, Barrett said that the female was Amy Martin, his girlfriend, and they had been at the Hotel Bar in Middleton earlier that

[2] Section 346.63(1)(b), STATS., provides:

> The person has a prohibited alcohol concentration.

morning after he got off work. Barrett had been drinking there. He drove to his home in Madison and she drove to her home in Middleton. When Barrett got home he called Martin and asked her to come to his residence in Madison, which she did. At his home, they got into a verbal argument and Martin left. He left also and drove his car to her residence to further confront her and continue the argument.

After Kasdorf had testified to this point, Barrett's counsel suggested to the court that the direct testimony stop at that point and cross-examination be permitted, and the motion to suppress then be argued based on that testimony. According to Barrett's counsel "the motion stops at that point." Counsel for the City of Middleton and the municipal court agreed.

On cross-examination Barrett's counsel established that Kasdorf did not see any weapons on Barrett and no one had told him over the dispatch that there were weapons. Kasdorf testified he did not know if Barrett was armed or not. Kasdorf did not know at that point what Barrett's involvement in the altercation was.

The municipal court heard argument on the motion to suppress. Barrett's counsel argued that when Kasdorf patted Barrett down, he did not have a reasonable suspicion to believe Barrett was armed and dangerous. The combination of a pat-down not justified by a legal suspicion and being placed in the squad car constituted an arrest, Barrett's counsel argued, and the arrest was illegal because there was no probable cause to believe that Barrett was driving while intoxicated at that point or that he had committed any crime. After counsel for the City of Middleton argued that the pat-down was reasonable because of safety concerns and that no arrest occurred at that point, the trial court decided to withhold ruling on the suppression motion until the trial testimony was completed.

Officer Kasdorf continued his testimony. Barrett told Kasdorf in the squad car that he had driven over to Martin's house drunk. Barrett asked if Kasdorf would just give him a ride home, since his car was parked in the driveway. Barrett told Kasdorf that he had not had anything to drink since he arrived at Parmenter Street. Kasdorf testified that while Barrett was in the

squad car, he placed Barrett under arrest for domestic battery[3] and transported him back to the Middleton Police Department for processing the arrest.

At the station, Kasdorf asked Barrett to perform a series of field sobriety tests. Barrett was able to perform the tests, but he lost his balance on the heel-to-toe test and was unsteady and swayed on the one-legged test. At the conclusion of the field sobriety tests, Kasdorf formed the opinion that Barrett was impaired and under the influence of intoxicants and issued the citations described above. Kasdorf read Barrett a statement of his rights under Wisconsin's applied consent law.[4] Barrett submitted to the intoxilizer test for breath alcohol analysis. Kasdorf testified to the results of those tests.

After Kasdorf was cross-examined, the City of Middleton called Officer Ash. He testified that he spoke to Martin when he arrived at the scene of the reported altercation. When the City's counsel attempted to elicit testimony about what Martin told Ash concerning the timing of Barrett's arrival at her residence, the trial court sustained objections based on hearsay. At the close of the testimony, the trial court dismissed the BAC charge because the intoxilizer test results were not admissible without proof that Barrett had been driving within three hours of the test. *See* § 885.235(1), STATS. The trial court allowed both parties to brief the suppression motion and the sufficiency of the evidence for a conviction.

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[3] It appears that the arrest was for battery, § 940.19(1), STATS.

[4] Section 343.305(2), STATS., known as the implied consent law, states that any person who drives a vehicle on the public highways of this state is deemed to have given his consent for chemical testing when requested to do so by a law enforcement officer. Section 343.305(2) requires law enforcement to provide at its expense at least two of three approved tests to determine the presence of alcohol in the breath, blood or urine of a suspected intoxicated driver. ***State v. Stary***, 187 Wis.2d 266, 269, 522 N.W.2d 32, 34 (Ct. App. 1994). Law enforcement may designate one of those two as its primary test. ***Id.*** Once a person consents to the primary test, the person is permitted, at his or her request, the alternate test the agency chooses, at the agency's expense, or a reasonable opportunity to a test of the person's choice at the person's expense. ***Id.*** at 270, 522 N.W.2d at 34. The officer must inform the arrestee of the arrestee's implied consent to a test; that if the arrestee refuses the test his license shall be revoked; and that the arrestee may have an additional test performed. Section 343.305(4)(b) and (d).

After receiving the briefs, the trial court issued a decision denying the suppression motion and finding that the evidence was clear, satisfactory and convincing that the defendant operated his motor vehicle while under the influence of an intoxicant.

Since Barrett did not request a trial de novo in circuit court, the appeal was by review of the transcript. *See* § 800.14(5), STATS. The City appealed the dismissal of the BAC charge. The trial court affirmed the municipal court's denial of Barrett's motion to suppress based on an unlawful arrest. The trial court concluded that Kasdorf did have reasonable suspicion to temporarily stop and detain Barrett for investigative purposes based on the complaint that a man and woman were fighting in the street, and that it was reasonable for Kasdorf to conduct a brief investigative questioning inside the squad car because of the weather conditions and Barrett's attire. The pat-down for weapons prior to Barrett entering the squad car, the court concluded, was reasonable and did not convert the lawful stop into an unlawful arrest.

The circuit court also concluded that the City had proven by clear, satisfactory and convincing evidence that Barrett was guilty of operating a motor vehicle under the influence of an intoxicant. The unsteadiness and swaying Barrett exhibited in performing the field sobriety tests combined with the odor of intoxicants on his breath and his admission to driving drunk, the trial court's decided, satisfied the City's burden of proof. The trial court also affirmed the dismissal of the BAC charge.

DISCUSSION

Barrett's argument that his right to due process was violated because he was not given the opportunity to brief or argue his appeal in the circuit court is controlled by our decision in ***City of Middleton v. Hennen***, ___ Wis.2d ___, 557 N.W.2d 818 (Ct. App. 1996). In ***Hennen*** we held that a party who chooses a transcript review appeal under § 800.14(5), STATS., from a municipal court judgment is neither statutorily nor constitutionally entitled to brief or orally argue before the circuit court. Barrett states that he included the issue on this appeal to preserve it for review because a petition for review by our supreme court was filed in ***Hennen***. That petition for review was denied on January 14, 1997.

Barrett next argues that the pat-down for weapons was a violation of his Fourth Amendment rights. Although in the municipal court he argued that the pat-down was illegal because it was not justified by a reasonable suspicion that Barrett was armed, in his main brief on appeal he argues that it was illegal because Kasdorf had not lawfully detained Barrett. There is no merit to the latter argument. Kasdorf was informed that there was a fight between a man and a woman on the street. In arriving at that location he observed a woman leaving in a vehicle and Barrett standing on the sidewalk. There was no one else in sight. Barrett smelled of alcohol and had a bloody nose. These specific and articulable facts with the rational inferences from those facts constitute a reasonable suspicion that domestic abuse or battery had occurred and that Barrett was involved. *See* ***Terry v. Ohio***, 392 U.S. 1, 21 (1968). The fact that Barrett's bloody nose may create an inference that Barrett had been injured in the altercation does not mean there was not a reasonable suspicion that Barrett had himself committed an act constituting domestic abuse under § 968.075(1), STATS., or battery under § 940.19(1), STATS. If any reasonable suspicion can be drawn from the circumstances of past, present or future criminal conduct, notwithstanding the existence of other inferences that can be drawn, an officer has the right to temporarily freeze the situation in order to investigate further. *See* ***State v. Jackson***, 147 Wis.2d 824, 835, 434 N.W.2d 386, 391 (1989).

In his reply brief, Barrett repeats the argument made before the municipal court that the pat-down was illegal because Kasdorf did not have a reasonable suspicion that Barrett was armed. *See* ***Terry v. Ohio***, 392 U.S. 1, 27-30 (1968).[5] We do not decide whether the pat-down violated the Fourth Amendment because we conclude that, even if it did, that does not transform the lawful investigative stop into an arrest as Barrett argues. Barrett has provided no authority for this proposition. The test for determining whether an arrest occurred 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 in the particular circumstances. ***State v. Swanson***, 164 Wis.2d 437, 446-47, 475 N.W.2d 148, 152 (1991). This is an objective test that assesses the totality of the circumstances, including what was communicated by the words or

[5] We ordinarily do not address issues raised for the first time in the reply brief because the respondent does not have the opportunity to respond. However, the City of Middleton argued in its brief that the pat-down was justified by a reasonable suspicion that Barrett was armed.

actions of the officer. ***Id.*** at 447, 475 N.W.2d at 152. Applying this test, we conclude that the pat-down did not constitute an arrest.

In ***Swanson***, police officers stopped a car after seeing it drive onto the sidewalk and almost hit a pedestrian. The officers detected a strong odor of alcohol on Swanson's breath and directed him to come over to the squad car for field sobriety tests. Before he got into the squad car, an officer conducted a pat-down search because department policy required a pat-down search before placing someone in a squad car. The officer discovered a bag of marijuana in Swanson's pocket during the pat-down. The court concluded that the scope of the pat-down exceeded that justified as a pat-down for weapons under ***Terry***. ***Swanson***, 164 Wis.2d at 454-55, 475 N.W.2d at 155-56. It also concluded that the search was not a search incident to an arrest because Swanson was not under arrest at that time. ***Id.*** at 452, 475 N.W.2d at 155.

In analyzing whether Swanson was under arrest at the time of the pat-down, the court noted the brief duration and public nature of the usual traffic stop. ***Id.*** at 447, 475 N.W.2d at 152. It also noted that the officers did not tell Swanson he was under arrest, give him ***Miranda*** warnings, handcuff him or draw weapons. ***Id.*** at 448, 475 N.W.2d at 153. The court concluded that a person in Swanson's position would not believe he was under arrest simply because he was asked to perform field sobriety tests. ***Id.*** Rather, reasonable people would understand that the request means that if they pass the test, they are free to leave. ***Id.*** The court rejected as unreasonable the view that the request to perform field sobriety tests transformed the stop into a search. ***Id.*** at 449, 475 N.W.2d at 153. In reaching this conclusion, the court noted that other jurisdictions have held that more intrusive circumstances--such as the use of handcuffs or physical force--do not transform a ***Terry*** stop into an arrest. ***Id.*** at 448-49, 475 N.W.2d at 153. It also referred to ***Jones v. State***, 70 Wis.2d 62, 233 N.W.2d 441 (1975), which held that a ***Terry*** stop does not become an arrest merely because police draw their weapons. ***Id.*** at 448, 475 N.W.2d at 153.

In this case, Kasdorf found nothing when he patted Barrett down, but the ***Swanson*** analysis on the issue of arrest is instructive. Kasdorf asked Barrett who he was and asked him to get into his squad car, patting him down first to check only for weapons. Kasdorf did not tell Barrett he was under arrest at that point, give him ***Miranda*** warnings, handcuff him or draw a weapon either before, during or immediately after the pat-down. He used no physical

force. Given the dark, the cold and the way Barrett was dressed, it was reasonable for Kasdorf to ask Barrett to get into the car so that he could continue his inquiries there rather than outside. We conclude that the pat-down Kasdorf performed and his request that Barrett get in the squad car would not make a reasonable person conclude that Barrett was not free to leave after he answered some questions. We conclude that an arrest did not occur by virtue of the pat-down or Kasdorf's request that Barrett get into the squad car.

Barrett next argues that Kasdorf did not have probable cause to believe that he committed a battery when Kasdorf informed him that he was under arrest for that offense and drove him to the police station. We do not decide this issue, or the validity of the underlying premise that Kasdorf needed probable cause to arrest before administering the field sobriety tests at the station, because Barrett did not present this as a ground for the suppression motion before the municipal court. Although we may decide issues on appeal that were not raised below in the proper case, *see* ***County of Columbia v. Bylewski***, 94 Wis.2d 153, 171-72, 288 N.W.2d 129, 138-39 (1980), this is not a proper case. Barrett's failure to raise this issue in the municipal court prevented the state from making a record. In particular, it is apparent from the police reports of Kasdorf and Ash contained in the record that Kasdorf obtained pertinent information from Barrett and Officer Ash, who interviewed Martin, before placing Barrett under arrest for battery. However, none of this was put into evidence by the City. We can only conclude that it was because the ground for the motion to suppress, as described by Barrett's attorney, was limited to the legality of the pat-down and, possibly, Kasdorf's request that Barrett get into the squad car. Barrett's counsel specifically stopped the state's presentation of evidence at this point, explaining that only the evidence up to that point in time was necessary to the motion to dismiss. Under these circumstances, it would be most unfair to the City to permit Barrett to raise on appeal this additional ground for suppressing evidence.

Finally, Barrett argues that the evidence was insufficient to justify a conviction on the OWI charge. Barrett contends that his statement that he drove to Martin's house drunk is essential to prove that Barrett drove a vehicle while under the influence of an intoxicant. According to Barrett, under the *corpus delicti* rule, a conviction may not rest on the uncorroborated confession of the accused.

Barrett has not fully stated the rule of *corpus delicti* applied in Wisconsin. In criminal cases some corroboration of a confession is necessary to support a conviction in order to produce confidence in the truth of the confession. ***Holt v. State***, 17 Wis.2d 468, 480, 117 N.W.2d 626, 633 (1962). However, all the elements of the crime do not need to be proved independently of the confession. ***Id.*** "The corroboration ... can be far less than is necessary to establish the crime independent of the confession. If there is corroboration of any significant fact, that is sufficient under the Wisconsin test." ***Id.***

No Wisconsin case has applied the *corpus delicti* rule in an OWI case. Assuming without deciding that it does apply in this case, we conclude there is corroboration of a significant fact. The odor of an intoxicant on Barrett's breath and his unsteadiness while performing the field sobriety tests corroborate the portion of his statement that he was "drunk," that is, under the influence of an intoxicant. As ***Holt*** makes clear, under the rule of *corpus delicti* in Wisconsin, there need not be corroboration for every element of the crime. Even if the rule applies here, there need not be independent corroboration of the fact that Barrett was under the influence of an intoxicant at the time that he drove to Martin's house.

We agree with the circuit court's analysis of the evidence. We conclude that Kasdorf's testimony that, while performing the test, Barrett was unsteady, swaying and lost his balance, coupled with Kasdorf's testimony that he smelled intoxicants on Barrett's breath and Barrett's unequivocal admission that he drove to Martin's house drunk, establish by clear, satisfactory and convincing evidence that Barrett drove his car while under the influence of an intoxicant.

By the Court.—Judgment affirmed.

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