COURT OF APPEALS
DECISION
DATED AND FILED

April 2, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-2375

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

CITY OF MADISON,

PLAINTIFF-RESPONDENT,

V.

RICHARD K. FREYE,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Dane County: STUART A. SCHWARTZ, Judge. *Affirmed.*

DYKMAN, P.J.[1] Richard Freye appeals from a circuit court order affirming a municipal court judgment. The municipal court convicted Freye of operating a motor vehicle while intoxicated. Freye argues that: (1) a police officer's frisk of him violated the Fourth Amendment to the United States Constitution; (2) he was arrested when he was transported to the police station;

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

and (3) there was insufficient evidence to support his conviction. We affirm for reasons given in the opinion.

First, Freye argues that the trial court erred by denying his motion to suppress evidence discovered after a police officer frisked him. Freye asserts that because the officer had no belief that he was armed, the officer's frisk or pat-down violated the Fourth Amendment to the United States Constitution.

In ***State v. Morgan***, 197 Wis.2d 200, 209, 539 N.W.2d 887, 891 (1995), the court said: "We hold that an officer making a ***Terry*** stop[2] need not reasonably believe that an individual is armed; rather, the test is whether the officer 'has a reasonable suspicion that a suspect may be armed.'" (Footnote added; citation omitted.) At the suppression hearing, Freye's questions of the officer did not focus on the officer's suspicions and the reasons for them. Instead, Freye asked whether he had done anything threatening to the officer and whether he had done anything which made the officer think that he was armed and dangerous. Still, the burden to show that the pat-down met Fourth Amendment requirements is on the City. ***State v. Washington***, 120 Wis.2d 654, 663, 358 N.W.2d 304, 308 (Ct. App. 1984), *aff'd*, 34 Wis.2d 108, 396 N.W.2d 156 (1986). We do not decide, but will assume that the officer's pat-down of Freye violated the Fourth Amendment.

Relying upon ***State v. Swanson***, 164 Wis.2d 437, 475 N.W.2d 148 (1991), Freye asserts that because the pat-down violated the Fourth Amendment, the ***Terry*** stop became an arrest. In ***Swanson***, the court analyzed Swanson's detention and subsequent search and concluded that the search exceeded the

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

intrusion permitted for a ***Terry*** stop. ***Id.*** at 454-55, 475 N.W.2d at 155-56. Thus, marijuana discovered during the search of Swanson's person was the fruit of an illegal search, and Swanson's arrest for possession of the marijuana was ruled invalid. ***Id.*** at 455, 475 N.W.2d at 156.

We find nothing in ***Swanson*** which suggests that an illegal pat-down is *per se* an arrest, or an illegal arrest. Here, there is no nexus between the allegedly illegal pat-down and the subsequent arrest. Each should be judged by the standards applicable to each. The fruit of the pat-down of Freye was a knife. But Freye's possession of the knife did not result in his prosecution. It would have been a waste of time to move to suppress the evidence that Freye was carrying a knife.

Freye asserts that when the police officer frisked and searched him, took his driver's license and put him into a locked police car, he was arrested. Whether Freye's detention was a ***Terry*** stop or an arrest depends upon the circumstances of the officer's interference with his liberty. The extent and manner of an approach and detention is gauged by a reasonableness standard. ***Wendricks v. State***, 72 Wis.2d 717, 725, 242 N.W.2d 187, 192 (1976).

The test for determining the time of an arrest was adopted in ***Swanson***:

> The standard generally used to determine the moment of arrest in a constitutional sense 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. 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 446-47, 475 N.W.2d at 152 (citations omitted).

In ***Swanson***, police asked Swanson to produce a driver's license and directed him to a squad car for field sobriety tests. ***Id.*** at 442, 475 N.W.2d at 150. During a subsequent search, an officer discovered a bag of marijuana in Swanson's pocket and confiscated it. ***Id.*** The court concluded that Swanson was not arrested prior to the search. ***Id.*** at 449, 475 N.W.2d at 153. The court discussed what police actions do not result in an arrest:

> In far more intrusive circumstances than this, courts in a number of jurisdictions have found certain police action to be consistent with a ***Terry*** investigative detention. For example, this court found that an investigative stop does not become an arrest merely because the police draw their weapons. Furthermore, many jurisdictions have recognized that the use of handcuffs does not necessarily transform an investigative stop into an arrest. Additionally, the use of force does not necessarily transform an investigative stop into an arrest.

Id. at 448-49, 475 N.W.2d at 153 (citations omitted).

What were the circumstances at the time Freye asserts that he was arrested? On November 5, 1994, Freye reportedly backed his vehicle into a van in the parking lot of Wiggies Bar. The weather was cold, and it was raining quite heavily. A police officer saw Freye walking neither toward the bar nor toward the vehicle. She asked Freye for identification, and he gave her his driver's license. She noticed that Freye was wet and that his speech was slow and deliberate. Freye told the officer that his wife had been involved in an accident, although a witness to the accident had told the officer that Freye was driving the car. She asked Freye to accompany her back to her squad car. The officer testified that another officer briefly patted Freye down on the outside of his clothing and removed a small knife from his pocket. The squad car's back doors were set up so that they could not be

opened from the inside. The officer testified that the shield between the back and front seats of the squad car was down, although Freye disputed this. The officer explained to Freye that she was going to get a statement from the owner of the damaged car. The officer used no force or threats of force to get Freye into the squad car. He got in and stayed for about ten minutes until the officer returned.

The question we must answer is whether the officer's actions in detaining Freye were reasonable under the circumstances. We conclude that they were. It was reasonable to detain Freye while the officer investigated the accident. It was raining and cold, and the squad car was a reasonable place for the detention. Keeping Freye's driver's license was reasonable as a secondary method of keeping Freye at the scene of the accident. Freye had already shown that he was probably attempting to avoid the consequences of his accident. It was reasonable to suspect that Freye might not make himself available for further questioning or tests if he was not somehow detained. Although Freye testified that he believed he was not free to leave, that is not the test. The test is reasonableness, and we conclude that the method and duration of Freye's detention was reasonable under the circumstances. The circuit court did not err in determining that Freye had not been arrested when he was detained in the squad car.

Freye next argues that when he was transported from the scene to the police station, he was arrested. We will address this issue shortly, but we first address counsel's characterization of the facts.

Supreme Court Rule 20:3.3 (Laws. Coop. 1996) requires an attorney to exercise candor toward a tribunal. In his brief, Freye's counsel asserts that Freye was handcuffed and taken from the scene. There was only a brief mention of handcuffs in all of the testimony taken, and that was a police officer's statement

that as of the time of her second interview of Freye, she had not used handcuffs on him. Despite being alerted to an inaccuracy as to handcuffs by the respondent, counsel persisted in asserting in his reply brief that Freye was handcuffed.

This is not the first time that counsel has been warned that his brief may have violated the canons of ethics. In ***State v. Reiter***, No. 95-1926-CR, order denying petition for review (Wis. Sup. Ct. Apr. 18, 1996), the supreme court warned counsel about using inappropriate language in a petition for review, stating: "At a minimum, counsel violated the cardinal rule of effective appellate legal writing to avoid disparaging lower courts. At a maximum, this language may have moved beyond the realm of permissible zealous advocacy and failed to maintain the respect due to courts of justice." We also warned counsel's associate about misstating the record in ***State v. Przybilla***, No. 95-1589, unpublished slip op. at 8-9 (Wis. Ct. App. Feb. 1, 1996). We add to what the supreme court noted in ***Reiter***. Effective appellate advocacy does not include misstating the record, either by inadvertence or by design. An attorney cannot help his or her client by this method of brief writing. We anticipate that in the future, counsel will more carefully compare the record with his briefs.

We return to Freye's assertion that he was arrested when he was taken from the scene to the police station. The officer testified that she asked Freye to do field sobriety tests and that he nodded his assent. She asked him to accompany her to the City-County Building to do the tests. Again, Freye nodded his assent.

Freye contends that his transport to the police station was without probable cause, and was therefore an illegal arrest. The officer's testimony raises the issue of whether Freye consented to go to the station. Freye asserts that the

burden of proving consent is on the City. He cites ***State v. Johnson***, 177 Wis.2d 224, 501 N.W.2d 876 (Ct. App. 1993), which states that the prosecution bears the burden of proving that the defendant consented to a search. ***Id.*** at 233, 501 N.W.2d at 879. Although ***Johnson*** is a search case, we agree that the same principles should apply in both search and seizure cases when consent is at issue.

Here, the trial court did not consider whether Freye consented to what he calls an arrest, but instead decided Freye's motion on another basis. When a trial court has not made an ultimate finding of fact on the issue of whether the defendant voluntary consented to a search, we must make our own independent determination on that question upon the evidence in the record. ***State v. Kraimer***, 99 Wis.2d 306, 318, 298 N.W.2d 568, 574 (1980). We will independently consider whether Freye consented to be transported to the City-County Building for field sobriety tests.

Freye likens this case to ***State v. Johnson***, 177 Wis.2d 224, 501 N.W.2d 876 (Ct. App. 1993). In ***Johnson***, police officers followed the defendant from the common hall of an apartment building into a private apartment without requesting and receiving permission to enter and without a warrant. ***Id.*** at 227-28, 501 N.W.2d at 877. We concluded that the defendant's mere acquiescence to police authority was insufficient to establish consent. ***Id.*** at 234, 501 N.W.2d at 880.

Freye also relies upon ***Bumper v. North Carolina***, 391 U.S. 543, 548 (1968). In ***Bumper***, a police officer told a homeowner that he had a search warrant, whereupon the homeowner let him in. ***Id.*** at 546. At trial, the State refused to rely upon the warrant, asserting that the homeowner consented to the

search. ***Id.*** The Supreme Court held that under these circumstances, the homeowner's consent was invalid. ***Id.*** at 548-50.

There is no analogy between searches conducted without response or by ruse and the situation here. Freye responded affirmatively when the police officer asked him to accompany her to the City-County Building. He did so by nodding his head up and down. Had Freye stated, "Let's go," he could not have been any more clear. We have explained that Freye's detention was reasonable under the circumstances. That detention was a ***Terry*** stop. There is nothing to show that Freye's affirmative response was anything but the free, intelligent, unequivocal and specific consent required by ***Johnson***, 177 Wis.2d at 233, 501 N.W.2d at 879. We specifically reject the notion that because Freye had been stopped by the police, any consent that he then gave was invalid. Such a rule would hinder ***Terry*** stops from being the investigatory tool the Supreme Court intended them to be.

Finally, Freye argues that the evidence was insufficient to convict him of operating a motor vehicle while intoxicated. He contends that the field sobriety tests were inaccurately performed according to standards established by the National Highway Traffic Safety Administration. He suggests that these standards show that the tests are *per se* invalid. But he cites no authority holding that failure to perform field sobriety tests according to National Highway Traffic Safety Administration standards requires that the results of the tests be suppressed or held invalid. We do not consider arguments unsupported by reference to legal authority. ***State v. Shaffer***, 96 Wis.2d 531, 545-46, 292 N.W.2d 370, 378 (Ct. App. 1980). Accordingly, we reject Freye's argument.

The municipal court set forth the evidence probative of Freye's intoxication:

> The evidence of intoxication is as follows: strong odor of intoxicants, bloodshot and glassy eyes, impaired coordination while walking around the parking lot, backing into a parked car, speaking slowly, deliberately and in a noncontinuous way. In addition, defendant had "lost count" of how many drinks he had imbibed.

To this we add that Freye initially lied to the officer about being the driver involved in the accident and instead told the officer that his wife was the driver. This is more than enough evidence to permit the trial court to find Freye guilty of operating a motor vehicle while intoxicated.

By the Court.—Order affirmed.

Not recommended for publication in the official reports. *See* RULE 809.23(1)(b)4, STATS.