COURT OF APPEALS
DECISION
DATED AND FILED

March 3, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-0585-CR

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

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

v.

DAVID P. GASCOIGNE,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Kenosha County: MICHAEL S. FISHER, Judge. *Affirmed.*

SNYDER, P.J. The State of Wisconsin appeals from an order suppressing evidence obtained when David P. Gascoigne was searched following a noncriminal traffic stop. The State contends that the trial court erred because Gascoigne was subject to a search incident to an arrest even though the officer intended to release Gascoigne after issuing him traffic citations. We cannot agree and affirm the order.

The essential facts are not disputed. City of Kenosha Police Officer Julie Peterson stopped Gascoigne on December 25, 1997, after she observed his van "fishtailing" and failing to stop for two stop signs. Peterson requested that Gascoigne perform field sobriety tests, which he passed. Gascoigne explained to Peterson that he had not slept in a couple of days and was tired. Peterson offered to drive him home after she had prepared and issued citations for failing to obey a stop sign and driving too fast for conditions. Gascoigne agreed. While Peterson was preparing the citations, she noticed Gascoigne "moving around a lot" in his van and asked Officer Jeffrey Nelson to place him in her squad car. Nelson searched Gascoigne before placing him in Peterson's patrol car and found what he suspected was cocaine in a breast pocket. Gascoigne was then handcuffed and placed in the patrol car. Nelson searched Gascoigne's van where he found marijuana and a gun.

Gascoigne was charged with possession of cocaine in violation of § 961.41(3g)(c), STATS., possession of marijuana in violation of § 961.41(3g)(e) and carrying a concealed weapon in violation of § 941.23, STATS. He moved to suppress the drug and gun possession evidence because of an illegal search and seizure. After concluding that Gascoigne had been invited to ride in Peterson's squad car and that Nelson's search was not a lawful exception as a search incident to arrest, the trial court suppressed the drug and weapon evidence.

"Whether evidence should be suppressed because it was obtained pursuant to a Fourth Amendment violation is a question of constitutional fact." ***State v. Bermudez***, 221 Wis.2d 338, 346, 585 N.W.2d 628, 632 (Ct. App. 1998). Questions of constitutional fact are treated as mixed questions of fact and law, and a two-step standard is applied when reviewing lower court determinations of fact. *See* ***State v. Phillips***, 218 Wis.2d 180, 189, 577 N.W.2d 794, 798-99 (1998). First,

the trial court's findings of evidentiary or historical facts "will not be upset on appeal unless they are contrary to the great weight and clear preponderance of the evidence." ***State v. Woods***, 117 Wis.2d 701, 715, 345 N.W.2d 457, 465 (1984). Second, an appellate court, when reviewing the trial court's determination of constitutional questions, "independently determines the questions of 'constitutional' fact." ***Id.***

The State contends that Gascoigne was subject to a search incident to arrest because a warrantless arrest was made pursuant to § 345.22, STATS. Section 345.22 provides that:

> A person may be arrested without a warrant for the violation of a traffic regulation if the traffic officer has reasonable grounds to believe that the person is violating or has violated a traffic regulation.

Once a warrantless arrest is made for the violation of a traffic regulation, "the arresting officer shall issue a citation under 345.11." Section 345.23, STATS. The State concludes that Gascoigne was lawfully arrested and subject to a search even though the arrest was for noncriminal traffic violations.

Whether a person is under custodial arrest is a question of law that is reviewed ab initio, without deference to the lower court. *See* ***State v. Swanson***, 164 Wis.2d 437, 445, 475 N.W.2d 148, 152 (1991). An objective standard is used to determine "the moment of arrest." ***Id.*** at 446, 475 N.W.2d at 152. The test 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." ***Id.*** at 446-47, 475 N.W.2d at 152.

In ***Swanson***, the defendant was observed at 2:00 a.m. driving onto the sidewalk in front of a bar, nearly hitting a pedestrian. *See* ***id.*** at 442, 475

N.W.2d at 150. Although he smelled of intoxicants, Swanson had no trouble standing and did not have slurred speech. *See* ***id.*** Before placing Swanson in his squad car to take field sobriety tests, the officer performed a pat-down search and discovered marijuana on him. *See* ***id.*** Swanson was then arrested, handcuffed and placed in the back of the squad car. *See* ***id.*** at 442-43, 475 N.W.2d at 150-51. The court determined that upon stopping Swanson for erratic and dangerous driving, the officer had detained him only for investigatory purposes as part of a routine traffic stop. *See* ***id.*** at 447-48, 475 N.W.2d at 152-53. The court concluded that a reasonable person in Swanson's position, where he was merely asked to perform sobriety tests, was not told that he was under arrest, was not given ***Miranda*** warnings and was not handcuffed, would not have believed that he or she was under arrest or in legal custody prior to the search. *See* ***Swanson***, 164 Wis.2d at 448, 475 N.W.2d at 153.

Like ***Swanson***, the officer's stop of Gascoigne for erratic driving constituted a routine traffic stop. Gascoigne did not appear to be under the influence of intoxicants and he successfully performed each of the field sobriety tests. The officers did not say they were arresting him, they did not give him ***Miranda*** warnings and he was not handcuffed. Rather, Officer Peterson simply offered to drive him home. Gascoigne accepted the invitation and waited in his van while she wrote the citations. Although he was observed "moving around a lot" in his van and was then asked to sit in the squad car, there is no indication that he was arrested or placed "in custody" prior to Officer Nelson's search. Based upon these undisputed facts, we conclude that a reasonable person in Gascoigne's position would not believe that he or she had been arrested prior to the search.

The State further contends that an officer issuing a traffic citation pursuant to § 345.22, STATS., may search a traffic violator even when the officer

intends to release the violator after issuance of the citation, regardless of whether a "custodial arrest" was made. Section 345.22, however, is discretionary: a "person *may* be arrested without a warrant for the violation of a traffic regulation." (Emphasis added.) Nonetheless, § 345.23, STATS., states that "the arresting officer *shall* issue a citation." (Emphasis added.) Here, Gascoigne was not placed under arrest but was merely offered a ride home. When he was searched, Peterson was in the process of issuing him traffic citations. In a recent United States Supreme Court decision, ***Knowles v. Iowa***, 119 S. Ct. 484 (1998), the Court ruled that a state law authorizing a search in those cases "where police elect not to make a custodial arrest and instead issue a citation" violates the Fourth Amendment. ***Id.*** at 487. Because Gascoigne's search was incident to the issuance of traffic citations, and not a search incident to an arrest, Nelson's search violated Gascoigne's Fourth Amendment rights.

Alternatively, the State contends that Gascoigne was subject to a ***Terry*** search. *See* ***Terry v. Ohio***, 392 U.S. 1 (1968). A ***Terry*** search is permissible upon reasonable suspicion that the person may be armed and "presently dangerous to the officer or others" and is limited to the discovery of "guns, knives, clubs, or other hidden instruments for the assault of the police officer." ***Id.*** at 24, 29. A ***Terry*** pat-down is lawful where

> a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger.... And in determining whether the officer acted reasonably in such circumstances, due weight must be given, not to his inchoate and unparticularized suspicion or "hunch," but to the specific reasonable inferences which he is entitled to draw from the facts in light of his experience.

State v. Guy**,** 172 Wis.2d 86, 94, 492 N.W.2d 311, 314 (1992) (quoting ***Terry***, 392 U.S. at 27).

Here, the trial court found that Gascoigne had been stopped and was in the officer's presence for at least twenty minutes before the search occurred. The trial court also found that the search was undertaken because departmental regulations required that passengers in police vehicles be searched before entering the vehicle. The record shows that neither officer on the scene believed that Gascoigne was armed or dangerous. The State argues that furtive glances on the part of Gascoigne while in his van constitute reasonable suspicion for a ***Terry*** pat-down. However, the trial court found that it was not the officer's concern for safety that precipitated Gascoigne's removal from his van and subsequent search; rather, it was his acceptance of the officer's invitation to drive him home. The court's findings are not contrary to the great weight or clear preponderance of the evidence. We are convinced that a reasonably prudent person under the circumstances would not be warranted in believing that his or her safety or that of others was endangered. Thus, Gascoigne's search was not valid under ***Terry***.

Finally, the State argues that even if the search violated the Fourth Amendment as recently addressed in ***Knowles***, the exclusionary rule should not apply because the officer acted in good faith and consistent with then-existing Wisconsin law. The exclusionary rule was first recognized in Wisconsin by ***Hoyer v. State***, 180 Wis. 407, 193 N.W. 89 (1923). Since ***Hoyer***, the United States Supreme Court has applied a good faith exception to the exclusionary rule in ***United States v. Leon***, 468 U.S. 897 (1984). Wisconsin has not adopted this exception. Because it is both the function and the privilege of the Wisconsin Supreme Court to overrule ***Hoyer***, *see* ***State v. Grawien***, 123 Wis.2d 428, 432, 367 N.W.2d 816, 818 (Ct. App. 1985), we decline the State's invitation to do so. Thus, we affirm the order of the trial court.

By the Court.—Order affirmed.

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