COURT OF APPEALS
DECISION
DATED AND FILED

February 16, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2016AP884-CR **Cir. Ct. No. 2014CT145**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DANE C. MCKEEL,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Wood County: NICHOLAS J. BRAZEAU, JR., Judge. *Affirmed*.

¶1 KLOPPENBURG, P.J.[1] Dane McKeel appeals the judgment of conviction for operating with a prohibited alcohol content with a passenger under the age of sixteen years, first offense. McKeel argues that the circuit court erred in

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c) (2015-16) All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

denying his motion to suppress evidence of intoxication obtained following a traffic stop, because the evidence was obtained following an unlawful arrest. The State concedes that there was not probable cause to arrest McKeel at the time of the traffic stop. Accordingly, the only issues are whether the circuit court erred in concluding that: (1) McKeel was not arrested because he was transported within the vicinity of the traffic stop and the purpose in transporting him was reasonable; and (2) the conditions of the transport did not transform the stop into an arrest. I conclude that McKeel was transported within the vicinity of the stop and that the purpose in transporting him was reasonable. I also conclude that the transport did not transform the stop into an arrest because a reasonable person in McKeel's position would not have believed that he or she was in custody. Therefore, I affirm.

BACKGROUND

¶2 The following facts are taken from the hearing on McKeel's motion to suppress and are not in dispute. At approximately 11:30 p.m. on February 26, 2014, Deputy Jesse Nehls of the Wood County Sheriff's Department stopped a car that had shortly before been involved in an accident and spoke with the male passenger, later identified as McKeel.

¶3 McKeel confirmed that he had been in the accident and that he had been driving at the time of the accident. Nehls smelled an odor of intoxicants and observed that McKeel's eyes were bloodshot. McKeel also gave conflicting information about his consumption of alcohol that evening. Nehls asked McKeel to take field sobriety tests, and McKeel said that he was willing to do so.

¶4 Due to the extremely cold, windy, icy, and snowy conditions, Nehls determined that he would not be able to successfully administer all of the field

sobriety tests in the strong wind and blowing snow, and that it would be McKeel's "best opportunity" to complete the field sobriety tests indoors. Nehls informed McKeel that he would transport McKeel to a warm, dry spot to perform the field sobriety tests. Nehls told McKeel that he was not under arrest, and McKeel stated that he understood. McKeel entered the squad car freely and without the use of any restraints.

¶5 Nehls drove with McKeel approximately eight miles for approximately thirteen minutes on rural roads to the Pittsville Police Department. Along the way they passed a gas station, but it was closed and its awning provided no protection from the wind. They also passed McKeel's father's residence, but Nehls did not know McKeel's father and did not feel that it would be safe to administer the tests there. None of the establishments along the roadway leading into the City of Pittsville were open.

¶6 McKeel submitted to the field sobriety tests and a preliminary breath test at the police station, and then to a blood test at the hospital.

¶7 The circuit court denied McKeel's motion to suppress the evidence of intoxication obtained following the traffic stop. The court ruled that McKeel was "moved within the 'vicinity' of the stop" and that "the purpose for the move was clearly reasonable for both the safety of the officer and the defendant." The court also ruled that the move did not otherwise "transform[] into an arrest." The court denied McKeel's subsequent motion for reconsideration. McKeel pleaded, and this appeal followed.

DISCUSSION

¶8 The limited issue on appeal is whether McKeel was unlawfully arrested when he was transported from the traffic stop to the police station. As explained below, I conclude that McKeel was not arrested when he was transported from the traffic stop to the police station because he was transported within the vicinity of the traffic stop and the purpose of transporting him was reasonable, and because a reasonable person in McKeel's position would not have considered himself or herself to be in custody.

¶9 When an appellate court reviews a decision on a motion to suppress evidence, it upholds the circuit court's findings of historical fact unless they are clearly erroneous. ***State v. Blatterman***, 2015 WI 46, ¶16, 362 Wis. 2d 138, 864 N.W.2d 26. However, it independently reviews whether those facts satisfy constitutional principles. ***Id.***

¶10 A temporary detention following a traffic stop constitutes a seizure within the meaning of the Fourth Amendment to the United States Constitution and article I, § 11 of the Wisconsin Constitution, and implicates the constitutional protections against unreasonable searches and seizures. ***State v. Guzy***, 139 Wis. 2d 663, 674-75, 407 N.W.2d 548 (1987).

¶11 "Pursuant to ***Terry v. Ohio***, 392 U.S. 1[, 22] (1968), a police officer may, under certain circumstances, temporarily detain a person for purposes of investigating possible criminal behavior even though there is not probable cause to make an arrest." ***Blatterman***, 362 Wis. 2d 138, ¶18. A person who is detained under ***Terry*** investigation may be moved "in the general vicinity of the stop without converting what would otherwise be a temporary seizure into an arrest" if (1) the person was moved within the vicinity of the stop, and (2) the purpose in

moving the person within the vicinity was reasonable. ***State v. Quartana***, 213 Wis. 2d 440, 446, 570 N.W.2d 618 (Ct. App. 1997).

¶12 The first prong of the ***Quartana*** test is whether McKeel was transported within the vicinity of the original stop. "Within the vicinity" means "within 'a surrounding area or district,' or the 'locality.'" ***Blatterman***, 362 Wis. 2d 138, ¶¶24-26 (citing ***Quartana***, 213 Wis. 2d at 447). In ***Blatterman***, our supreme court "decline[d] to determine the precise outer limits of the 'vicinity' for purposes of transportation during an investigatory detention." ***Id.*** In declining to set a bright-line rule, the court indicated that determining whether a transport is "too distant a transportation to be within the vicinity" is not only a matter of miles. ***Id.***, ¶26. It makes sense that such a determination also involves considering related relevant facts, such as the rural or urban environs of the transport. For example, while it took thirteen minutes to go eight miles "on rural roads" here, it can take thirteen minutes to go just a mile or two in an urban area. Therefore, neither the miles traveled nor the time taken can alone be dispositive.

¶13 The pertinent facts as found by the circuit court are that McKeel was stopped in a rural area, that he was driven eight miles to the Pittsville Police Department, and that the police station was the closest available location to safely administer the field sobriety tests. There were no open establishments before reaching the police station, and the transport to the station took approximately thirteen minutes. The circuit court noted that "in everyday language if a reasonable person was asked 'was the stop in the vicinity of the Pittsville Police Department?' The answer would be 'yes'." From this comment, it is evident that in the environs of this stop, the eight-mile, thirteen-minute drive to the Pittsville police station was within the surrounding area or locality of the stop. Based on the

undisputed facts, in the circumstances specific to this stop, I conclude that McKeel was transported within the vicinity of the stop.

¶14 McKeel does not dispute the facts set forth in the preceding paragraph. He argues that eight miles is in and of itself, independent of those facts, too distant to be in the vicinity. However, as explained above, "the precise outer limits of the 'vicinity' for purposes of transportation during an investigatory detention" depend on more than just the number of miles. ***Blatterman***, 362 Wis. 2d 138, ¶¶25-27. McKeel cites four cases in support of his argument to the contrary, but those cases do not help him.

¶15 In ***Blatterman***, 362 Wis. 2d 138, ¶¶9-11, 26, the court held that the defendant was transported outside the vicinity of the stop when, because of "physical and psychological medical concerns," police drove him ten miles to the hospital where he told them his doctor was associated, and then after the medical assessment was completed, administered field sobriety tests and took a blood sample. Based on those facts, the court ruled that ten miles was beyond the vicinity of the stop for purposes of continuing an investigatory detention. ***Id.***, ¶26. However, the court found the transport lawful because it was supported by probable cause to arrest and was a reasonable exercise of the community caretaker function. ***Id.*** ¶¶28, 60. Unlike in ***Blatterman***, here the officer transported McKeel eight miles in a rural area for the sole purpose of safely administering field sobriety tests. McKeel does not explain how ***Blatterman*** supports his argument that under the facts here McKeel was not transported within the vicinity of the stop.

¶16 In ***State v. Burton***, No. 2009AP180, unpublished slip op. ¶¶14-15, 19, 24-25 (Ct. App. Sep. 23, 2009), the court held that the defendant was arrested

when he was transported in handcuffs eight miles from the scene of an accident to the hospital to continue an OWI investigation, and that the arrest was lawful because it was supported by probable cause. The court did not, as McKeel asserts, consider whether the transport took the defendant beyond the vicinity of the stop. Rather, the court concluded that a reasonable person in the defendant's position would believe he was in custody, and that "the level of restraint, duration of custody, and diminishing potential for release amounted to a formal arrest." ***Id.*** ¶19. This is a separate topic, addressed below. McKeel points to no similar indicia of arrest here. Accordingly, ***Burton*** is not persuasive on the issue of whether the transport here was within the vicinity of the stop.

¶17 In ***State v. Doyle***, No. 2010AP2466-CR, unpublished slip op. ¶¶2, 5-6 (Ct. App. Sep. 22, 2011), the defendant was transported between three and four miles from a field to a police station for field sobriety tests. The court concluded that the defendant was transported within the vicinity of the stop because "the stop occurred in a rural area, and the suspect was transported to the nearest municipality at which the investigation could reasonably take place under the circumstances.... [T]here was nothing but highway and countryside before the deputy reached the Village of Belleville." ***Id.***, ¶13. While McKeel focuses on the three-to-four mile distance, the court did not consider that distance in isolation, but in the context of the other facts before it. ***Id.***

¶18 McKeel does not dispute that, as in ***Doyle***, there was nothing but road and countryside before the officer reached the City of Pittsville. McKeel does note that the officer passed both a gas station and McKeel's father's residence along the way and argues that the field sobriety tests could have been administered at the closed gas station or McKeel's father's residence. However, the officer testified that the gas station was closed and the awning did not provide

sufficient protection from the weather to allow for the safe and fair administration of the field sobriety tests. Indeed, in ***Doyle***, the court found based on similar testimony that a "gas station overhang did not provide sufficient shelter from the elements to properly conduct field sobriety tests." ***Id.*** The officer here also testified that he had safety concerns with continuing the intoxication investigation at McKeel's father's residence. McKeel does not explain how, based on this testimony, the circuit court's finding that "there was no safe location closer than the Pittsville Police Department" was clearly erroneous.

¶19 McKeel points to the language in ***Doyle*** that "three to four miles is at the outer limits of the definition of 'vicinity.'" ***Id.*** ¶13. However, as noted above, more recently our supreme court has declined to determine the outer limits of the "vicinity." ***Blatterman***, 362 Wis. 2d 138, ¶26. In light of the ***Doyle*** court's consideration of relevant facts together with the distance of the transport, its "outer limits" language does not compel the conclusion that, based on all the relevant facts here, the eight-mile transport of McKeel was not within the vicinity of the stop.

¶20 Finally, in ***State v. Adrian***, No. 2013AP1890, unpublished slip op. ¶¶2, 8 (Ct. App. Mar. 6, 2014), a Janesville police officer, seeking a clear place to administer field sobriety tests in cold, windy, and icy conditions, transported the defendant one and one-half blocks to the police department. The defendant did not dispute that he was transported within the vicinity of the stop. ***Id.***, ¶8. McKeel does not explain how the ruling in that case means that transporting him eight miles to the police station here was not in the vicinity.

¶21 The second prong of the ***Quartana*** test is whether the purpose for transporting McKeel was reasonable. 213 Wis. 2d at 446.

¶22 The pertinent facts as found by the circuit court are that "[i]t was frigidly cold, snowy, slippery and dangerous," "it would have been unsafe to perform the field sobriety tests" at the stop, and "[i]t would be unfair to require the defendant to perform those tests in the frigid and snowy circumstances, as such a situation would have a high likelihood to create difficulties for the defendant in performing the tests whether the defendant was sober or not." The court concluded that "the purpose for the move was clearly reasonable for both the safety of the officer and the defendant and also fairness to the defendant in the performance of the field sobriety tests."

¶23 McKeel does not dispute the facts as to the weather conditions, but argues that bad weather conditions did not alone make the purpose of the eight-mile transport reasonable. However, McKeel does not dispute that the bad weather conditions weighed in favor of the reasonableness of the purpose of the transport, and he does not identify other facts that made the purpose of the transport unreasonable. In short, McKeel fails to mount a credible challenge to the conclusion that the purpose of the transport was reasonable.

¶24 As I understand McKeel's next argument, it is that even if the transport was in the vicinity and its purpose was reasonable, the circumstances surrounding the transport "transformed the initial investigatory stop into an arrest [and that] an objective reasonable person in Mr. McKeel's situation would have considered himself to be in custody." The circuit court concluded "that the transportation of the defendant to the Pittsville Police Department never transformed into an arrest."

¶25 The test for determining whether a stop has "transformed into an arrest" 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." ***State v. Swanson***, 164 Wis. 2d 437, 446-48, 475 N.W.2d 148 (1991) (quoted source omitted).

¶26 Here, the circuit court found that McKeel was not handcuffed or otherwise restrained; was clearly told, and stated that he understood, that he was not under arrest; and cooperated at all times. McKeel fails to show that these findings are clearly erroneous. In addition, the officer testified that he explained to McKeel that he intended to transport him to a warm dry spot to perform the field sobriety tests. In light of the court's findings and the unrefuted evidence, a reasonable person in McKeel's position would not have believed that he or she was in custody "given the degree of restraint under the circumstances." ***Id.***

¶27 On appeal, McKeel points to the facts that he was frisked for weapons before he entered the squad car, and that he was transported thirteen minutes away from the stop in the middle of the night on rural roads to the "institutional setting of a Police Department." However, McKeel provides no legal support for the proposition that the protective pat-down and the drive into the city on rural roads amount to an arrest. As for the "institutional" destination, McKeel cites this court's consideration in ***Quartana*** of the fact that the defendant was not taken to the police station, in assessing whether "the conditions of his transportation amounted to an arrest." 213 Wis. 2d at 449-50. In ***Quartana***, after concluding that the transport was in the vicinity and that the purpose of the transport was reasonable, the court addressed whether the defendant was in custody, and the destination was only one of the circumstances that the court considered on that topic. ***Id.*** at 448-51. Here, McKeel identifies no other circumstances regarding the police station that would have led him to reasonably believe that he was under arrest in light of all the circumstances. As in ***Quartana***,

McKeel "had to realize that if he passed the field sobriety test, any restraint of his liberty would be lifted and he would be free to go." ***Id.*** at 451. Even more so here, where the officer told McKeel that if he passed the field sobriety tests, the officer would take him back to his family.

¶28 McKeel also cites ***Dunaway v. New York***, 442 U.S. 200 (1979), in support of his transport-to-the-police station argument, but that case is easily distinguished. In that case, the United States Supreme Court held that the defendant was under arrest when he was transported to the police station and placed in an interrogation room for questioning. ***Id.*** at 212. McKeel was neither placed in an interrogation room nor interrogated. McKeel also points to several cases from other jurisdictions, but those cases are easily distinguished and not binding on this court. Therefore, I do not consider them further.

CONCLUSION

¶29 For the reasons set forth above, I conclude that McKeel was transported within the vicinity of the stop and that the purpose in transporting him was reasonable, and that the conditions of the transport did not transform the stop into an arrest. Therefore, I affirm.

By the Court.—Judgment affirmed.

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