COURT OF APPEALS
DECISION
DATED AND FILED

December 19, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 00-1867-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

JOHN A. HOLUB,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Barron County: EDWARD R. BRUNNER, Judge. *Affirmed.*

¶1 PETERSON, J.[1] John Holub appeals his judgment of conviction for operating a motor vehicle while under the influence of an intoxicant, contrary to WIS. STAT. § 346.63(1)(a). Holub argues that the circuit court erred by denying

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (1997-98). All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

his motion to suppress all of the evidence because he was illegally arrested when the police transported him to the police station to perform field sobriety tests. We reject Holub's arguments and affirm the conviction.

BACKGROUND

¶2 City of Rice Lake Police Officer Sean Virnig responded to a 911 call from a gas station clerk at 2:39 a.m. on February 4, 2000. The clerk reported that an intoxicated person had come into the gas station and purchased gas. The clerk described the vehicle and the individual who was driving. Virnig saw a vehicle matching the description leaving the gas station. He followed the vehicle and noticed it had a burned out taillight. Based on this and the description given by the clerk, Virnig pulled the vehicle over. Holub was the driver.

¶3 When asked by Virnig if he had been drinking, Holub stated he had been. Virnig noticed empty beer cans and some unopened beer cans on the floor. Virnig asked Holub to get out of the vehicle. Holub was unsteady and his speech was slightly slurred. Virnig could also smell alcohol on Holub's breath. Virnig believed he was intoxicated, but did not place him under arrest. Instead, Virnig intended to have Holub perform field sobriety tests. Because of the slippery conditions, however, Virnig asked Holub if he would go with him to the police station to conduct the field sobriety tests. Virnig told Holub that if he passed the tests, he would drive Holub back to his vehicle and apologize for the inconvenience. Holub agreed. He was frisked and placed in the back seat of the squad car. He was not handcuffed. The police station was a mile and a half away, and it took approximately six or seven minutes to get there.

¶4 At the police station, Holub performed the field sobriety tests in a hallway open to the public. After the tests were complete, Holub was placed

under arrest for operating a motor vehicle while under the influence of an intoxicant, second offense.

¶5 Holub moved that all evidence be suppressed. The circuit court denied the motion. This appeal follows.

STANDARD OF REVIEW

¶6 When we review a circuit court's denial of a suppression motion, we will uphold the circuit court's findings of fact unless they are against the great weight and clear preponderance of the evidence. *See* ***State v. Andrews***, 201 Wis. 2d 383, 388, 549 N.W.2d 210 (1996). However, whether the facts satisfy constitutional guarantees is a question of law we review independently. *See* ***id.*** at 389.

DISCUSSION

¶7 The issue on appeal is whether Holub was illegally arrested when he was transported to the police station. Holub argues that (1) the police station was not in the vicinity of the stop, and (2) it was unreasonable to transport him to the police station.[2] We disagree.

¶8 The temporary detention of a citizen arising from the stop of a car constitutes a seizure within the meaning of the Fourth Amendment and triggers Fourth Amendment protections. *See* ***State v. Harris***, 206 Wis. 2d 243, 253, 557 N.W.2d 245 (1996). A police officer may, in the appropriate circumstances,

[2] Holub also argues that he did not give consent to be transported and that the existence of probable cause to arrest him does not salvage an illegal stop. Because our resolution of the two previous issues is dispositive, we need not address these other issues. *See* ***Sweet v. Berge***, 113 Wis. 2d 61, 67, 334 N.W.2d 559 (Ct. App. 1983).

detain a person for purposes of investigating possible criminal behavior even though there is no probable cause to make an arrest. *See* ***Terry v. Ohio***, 392 U.S. 1, 22 (1968).

¶9 Wisconsin has codified the ***Terry*** constitutional standard in WIS. STAT. § 968.24:

> [A] law enforcement officer may stop a person in a public place for a reasonable period of time when the officer reasonably suspects that such person is committing, is about to commit or has committed a crime, and may demand the name and address of the person and an explanation of the person's conduct. Such detention and temporary questioning shall be conducted in the vicinity where the person was stopped.

When a person under investigation is transported from one location to another in the course of a ***Terry*** stop, two questions must be answered: (1) whether the person was moved within the vicinity; and (2) whether the purpose in moving the person within the vicinity was reasonable. *See* ***State v. Quartana***, 213 Wis. 2d 440, 445, 570 N.W.2d 618 (Ct. App. 1997). If both requirements are met, § 968.24 and ***Terry*** have not been violated.

I. Vicinity of the stop

¶10 Holub first argues that the police station was not in the vicinity of the stop. He contends that the definition of vicinity in one situation may not apply under other circumstances. We disagree.

¶11 In ***Quartana***, the defendant lost control of his car and drove into a ditch. Quartana left the scene of the accident and walked to his parent's house, approximately one mile away. The officer who came upon the scene was dispatched to Quartana's home. Once there, the officer noticed that Quartana had

bloodshot eyes and smelled of alcohol. The officer transported Quartana back to the scene of the accident for further investigation. The officer refused Quartana's request that his parents drive him to the scene. Once at the scene, Quartana performed and failed field sobriety tests and was placed under arrest. We held that "vicinity" means "surrounding area or district" or "locality." ***Id.*** at 446-47. We further held that moving the defendant one mile was "within the vicinity." ***Id.***

¶12 Holub attempts to distinguish the present case from ***Quartana*** because Holub was transported from the scene to the police station, while Quartana was transported from his home back to the scene. This, however, is a distinction without a difference under the circumstances of this case. Considering the mile and a half distance between the scene of the stop and the police station, we conclude that the police station was in the vicinity of the stop.

II. Reasonableness

¶13 Holub next argues that the police did not have reasonable grounds to transport him to the police station even if it was in the vicinity. He contends Virnig could have administered field sobriety tests that did not require him to be taken to the police station. Our supreme court in ***County of Jefferson v. Renz***, 231 Wis. 2d 293, 297-98, 603 N.W.2d 541 (1999), described five different field sobriety tests. Two of those tests, the alphabet test and the horizontal gaze nystagmus test, do not require the performance of any physical movement and can be performed in a squad car.

¶14 Virnig testified that he wanted to follow his standard procedures and have Holub perform field sobriety tests. One of those tests included walking a straight line, turning around, and walking back. Virnig was concerned, however, that it would be unfair for Holub to perform this test in slippery conditions. He

therefore asked Holub if he would go to the police station to perform the tests. Holub agreed. Had Virnig deviated from his standard procedures and performed only the tests that did not require physical movement, Holub may have argued that Virnig failed to establish probable cause by his failure to perform additional field sobriety tests or he may have attacked the sufficiency of evidence at a trial. We cannot conclude that Virnig's decision to follow his standard procedures is unreasonable.

¶15 If Virnig had followed his standard procedures and required Holub to perform the field sobriety tests at the scene, the results may have been unreliable and unfair. The slippery conditions may have prevented a reliable result. The slippery conditions also would have exposed Holub to the danger of slipping and falling. Because Holub was transported to the police station to ensure accurate results of the field sobriety tests and for his own safety, we conclude that the requirements of ***Terry*** and ***Quartana*** were met.

By the Court.—Judgment affirmed.

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