

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 17, 2009

David R. Schanker
Clerk of Court of Appeals

NOTICE

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

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2008AP2493-CR

Cir. Ct. No. 2007CT196

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LUKE J. KLEVESAHL,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Shawano County:
JAMES R. HABECK, Judge. *Reversed.*

¶1 BRUNNER, J.¹ Luke Klevesahl appeals a judgment of conviction for operating a motor vehicle while intoxicated, second offense. He contends the

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

court erroneously denied his motion to suppress evidence because he was under arrest before probable cause existed for the arrest. We reverse the judgment.

BACKGROUND

¶2 At 2:21 a.m. on April 22, 2007, Village of Bonduel Police Officer Eric Krause responded to a mutual aid call to assist the Shawano County Sheriff's Department with a fight involving approximately forty people at a bar. Krause was the first officer to arrive at the bar. As he pulled into the parking lot, he was informed by dispatch that the fight was over and everyone had left. Krause noticed a vehicle attempting to leave the parking lot. Instead of exiting through the driveway, the vehicle crossed the grass and went over a curb onto the highway.

¶3 Krause contacted the sheriff's department, which asked him to stop the vehicle. Krause stopped the vehicle driven by Klevesahl. Krause noticed a strong odor of alcohol coming from inside Klevesahl's vehicle and Klevesahl slurring his speech. Because Krause was outside his jurisdiction, he initially intended to hold Klevesahl until sheriff's deputies arrived. However, dispatch informed Krause that the 911 caller who had reported the bar fight was now being dragged out of his vehicle further down the road from Krause's location. Out of concern for the 911 caller's safety, Krause believed he needed to respond immediately to the call. He also believed Klevesahl might be intoxicated and did not want to leave him, fearing he might get back in his car and drive.

¶4 Krause asked Klevesahl to come with him, and Klevesahl got into the back seat of Krause's patrol car, unhandcuffed. With Klevesahl in his car, Krause went looking for the 911 caller, but his search was unsuccessful. He then drove Klevesahl back to the scene of the original traffic stop, where officers had

stopped another vehicle leaving the bar, some of the occupants of which were involved in the fight and also had warrants.

¶5 After that situation was resolved, Krause handed Klevesahl, along with Klevesahl's driver's license, over to a sheriff's deputy. The deputy's investigation, including field sobriety tests, led to Klevesahl's arrest. Altogether, Krause estimated that Klevesahl was in the back seat of his patrol car for twenty minutes to half an hour. There was no testimony that, before or during the time Klevesahl was in Krause's patrol car, Krause ever explained what was going to happen.

DISCUSSION

¶6 Klevesahl argues he was illegally arrested when placed in the back seat of Krause's patrol car. Within this argument, he contends there was no reasonable suspicion for the traffic stop, that he was under arrest when placed in the back seat of Krause's patrol car, and that Krause did not have probable cause to arrest him. The State argues Klevesahl was not in custody until after the sheriff's deputy's investigation and concedes Krause did not have probable cause to arrest Klevesahl earlier.

¶7 Because the issue of when Klevesahl was in custody is dispositive in this case, we need not address whether there was reasonable suspicion justifying the traffic stop. The State has the burden of proving that a warrantless search or seizure was reasonable and in conformity with the Fourth Amendment. *See State v. Quartana*, 213 Wis. 2d 440, 445, 570 N.W.2d 618 (Ct. App. 1997). Whether the facts as found by the trial court satisfy the constitutional requirement of reasonableness is a question of law we review independently of the trial court. *See State v. Waldner*, 206 Wis. 2d 51, 54, 556 N.W.2d 681 (1996).

¶8 In *Quartana*, 213 Wis. 2d at 443-48, we addressed whether Quartana, a suspect in an OWI investigation, was under arrest when placed in the back seat of a patrol car and transported back to the scene of an accident. We concluded that transporting Quartana did not convert an investigative stop into an arrest. *Id.* at 450-51. We noted the standard for determining whether someone is under arrest is based on what a reasonable person in Quartana’s position would believe under the circumstances. *Id.* at 449-50. We further applied case law requiring

the detention must at all times be temporary and last no longer than necessary to effectuate the purpose of the stop. In assessing the permissible length of a stop, we must determine whether the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly, during which time it was necessary to detain the person.

Id. at 448 (citations omitted). When analyzing the totality of the circumstances, we noted, “The police diligently pursued their investigation and Quartana’s detention lasted no longer than necessary to confirm their suspicions. The officer transported Quartana directly to the accident scene, and the trooper interviewed Quartana and conducted a field sobriety test as soon as Quartana arrived.” *Id.* at 450. Officers also informed Quartana that he was being temporarily detained for investigatory purposes and was being transported back to the scene of the accident. *Id.* Under the circumstances, we concluded, “Quartana had to be aware that the detention was only temporary and limited in scope,” and further he “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 450-51.

¶9 We conclude Klevesahl’s investigative stop became an arrest when he was placed in Krause’s patrol car while Krause and sheriff’s deputies pursued

other investigations. Unlike in *Quartana*, Klevesahl's detention lasted longer than necessary to resolve suspicions that he was operating while intoxicated. *See id.* at 448. At no time during Klevesahl's detention in the patrol car was there any investigation likely to compel or dispel suspicions that he was driving while intoxicated. Klevesahl was not detained in the patrol car for transportation anywhere related to the purpose for which he was detained. Instead, Klevesahl was there while Krause investigated the unrelated 911 call. Afterward, because Krause was outside his jurisdiction and wanted the sheriff's department to complete the OWI investigation, Klevesahl was held pending the resolution of the bar fight investigation.

¶10 Also unlike *Quartana*, Krause did not explain to Klevesahl what was going to happen. *See id.* at 450-51. Therefore, it cannot be said that while Klevesahl was sitting in Krause's patrol car for up to half an hour, he must have known he would be free to leave once the sheriff's department initiated and completed an OWI investigation. *See id.* Under the totality of the circumstances, a reasonable person in Klevesahl's position would believe he was under arrest. *See id.* at 449-50. Absent probable cause for an arrest, evidence obtained after Klevesahl was in custody should have been suppressed.

By the Court.—Judgment reversed.

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

