COURT OF APPEALS
DECISION
DATED AND RELEASED

March 28, 1996

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

NOTICE

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

No. 95-2162

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MICHAEL J. LARSON,

Defendant-Appellant.

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

DYKMAN, J. This is a single-judge appeal decided pursuant to § 752.31(2)(c), STATS. Michael J. Larson appeals from an order revoking his driving privileges after the trial court concluded that there was probable cause to believe that he was operating a motor vehicle while under the influence of an intoxicant (OMVWI) and that he unlawfully refused to take a breath test. Larson argues that: (1) a police officer's request to perform field sobriety tests transforms a ***Terry***[1] stop into an arrest; (2) he did not refuse to take the field sobriety tests but, instead, made a request for counsel; and (3) there was no

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

probable cause to arrest him for OMVWI. We reject his claims and, therefore, affirm.

BACKGROUND

The following facts are taken from the refusal hearing. At about 9:40 p.m. on January 25, 1995, Police Officer Jimmy Milton was dispatched to the scene of an automobile accident in Madison. The road appeared to be dry and the intersection was lighted by street lamps and controlled by four-way stop signs.

Upon arriving at the scene, Officer Milton discovered a two-vehicle accident. The driver of one vehicle told him that as he was moving through the intersection, Larson's vehicle failed to stop at a stop sign and hit him.

Officer Milton approached Larson who was still in his vehicle, asked him for identification and to exit his vehicle. Larson did so and Officer Milton detected a strong odor of intoxicants on his breath. He also noticed that Larson's eyes were watering, that his shirt was unbuttoned and loose at the collar and that his tie was also loosened. Larson told Officer Milton that he believed that he had stopped at the stop sign before entering the intersection. Officer Milton asked Larson to perform some field sobriety tests but Larson would not take the tests and indicated that he wanted to speak with his attorney. Based upon Officer Milton's observations of Larson's physical condition, the strong odor of intoxicants on Larson's breath, the statement by the other driver as to how the accident occurred, and the overall accident scene, Officer Milton placed Larson under arrest for OMVWI and for failure to obey a stop sign.

Officer Milton brought Larson to the police station where he read him the Informing the Accused form. He asked Larson to take a test to measure his alcohol concentration but he would not take the test without his attorney. Officer Milton told Larson that he did not have the right to counsel during that portion of the procedure but Larson still would not take the test. Officer Milton

concluded that Larson was refusing to take the test and issued a notice of intent to revoke his operating privileges.

The trial court concluded that Officer Milton had probable cause to believe that Larson was guilty of OMVWI. The court also concluded that Larson's refusal to take a breath or chemical test was unreasonable. Accordingly, it revoked Larson's operating privileges for one year. Larson appeals.

I.

Larson first argues that a failure to perform field sobriety tests cannot contribute to a probable cause determination for OMVWI because the request to take such tests transforms an investigative stop into an arrest. He asserts that under ***Terry v. Ohio***, 392 U.S. 1 (1968), any seizure of a person which exceeds the scope, intensity, or duration of a brief detention violates the Fourth Amendment to the United States Constitution unless it is supported by probable cause. He notes that in ***State v. Babbitt***, 188 Wis.2d 349, 359-60, 525 N.W.2d 102, 105 (Ct. App. 1994), we concluded that a person's refusal to take field sobriety tests was evidence of consciousness of guilt, did not violate a person's right against self-incrimination, and could be used as evidence for determining whether probable cause existed. But, he asserts, ***Babbitt*** only considered Fifth Amendment implications and not the Fourth Amendment issue at hand. He asserts that the request to perform field sobriety tests exceeds the scope of a ***Terry*** stop and cannot be requested based upon reasonable suspicion alone. We disagree.

Terry stops are temporary detentions of a person for a reasonable period of time permitted when an officer reasonably suspects that the person is committing, is about to commit or has committed a crime. Section 968.24, STATS. The stop and temporary questioning must be conducted in the vicinity where the person is stopped. ***Id.*** The stopped person, however, does not control the duration of a valid encounter and if consideration of all of the circumstances shows that the investigation has not been completed, a suspect does not have a right to terminate the investigation. ***State v. Goyer***, 157 Wis.2d 532, 537, 460 N.W.2d 424, 426 (Ct. App. 1990).

Officer Milton had reason to suspect that Larson had been operating a motor vehicle while under the influence of an intoxicant. He, therefore, was permitted to require Larson to perform some field sobriety tests to aid in his investigation. This, in light of the information which Officer Milton already possessed, did not transform the investigatory stop into an unreasonable seizure. In ***State v. Swanson***, 164 Wis.2d 437, 444, 475 N.W.2d 148, 151 (1991), the supreme court held that a person is not under arrest when asked to perform field sobriety tests for Fourth Amendment purposes because a reasonable person would not believe that the degree of restraint exercised to perform such tests during a routine traffic stop is similar to that of a formal arrest.[2] The right to make a ***Terry*** stop of an OMVWI suspect would mean little if an officer could not demand that a person perform field sobriety tests as part of the investigation. While the officer cannot compel a person to perform them, the person's failure to take the tests, for whatever reason, is a proper consideration for determining whether probable cause exists to support an arrest.

II.

Larson next argues that he did not refuse to take the field sobriety tests but that he declined to perform such tests in the absence of counsel. Citing ***United States v. Hale***, 422 U.S. 171 (1975), he argues that a person's assertion of

---

[2] Larson argues that we are bound by precedent and that ***State v. Babbitt***, 188 Wis.2d 349, 525 N.W.2d 102 (Ct. App. 1994), compels a conclusion "that the point at which an individual is asked to submit to field sobriety tests marks the demarcation between a detention and an arrest." But we cannot find support for this assertion anywhere in ***Babbitt***. In ***Babbitt***, we concluded that a person's refusal to take field sobriety tests was a proper consideration for a probable cause determination despite the Fifth Amendment's prohibition against self-incrimination. ***Id.*** at 359-60, 525 N.W.2d at 105. A fair reading of ***Babbitt*** does not hold that a police officer's request to perform field sobriety tests is unreasonable and transforms a ***Terry*** stop into an arrest.

Assuming, for arguments sake, that ***Babbitt*** is inconsistent with ***State v. Swanson***, 164 Wis.2d 437, 475 N.W.2d 148 (1991), we are bound by the supreme court when our decisions conflict with theirs. *See* ***State v. McCollum***, 159 Wis.2d 184, 196 n.6, 464 N.W.2d 44, 48 (Ct. App. 1990) ("We recognize that a court of appeals decision overruling a controlling decision of the supreme court is patently erroneous and usurpative."). Accordingly, ***Swanson***'s holding that a request to perform field sobriety tests does not transform a ***Terry*** stop into an arrest, controls the result in this case.

his or her legal rights cannot be taken as an incriminating admission by that person. While he acknowledges that he had no legal right to counsel under the Fifth or Sixth Amendment, a person in his situation could "easily understand himself to have a right to the assistance of counsel." Because he believed that he had the right to counsel, his failure to perform the field sobriety tests cannot be construed as a refusal.

The problem with Larson's claim is twofold. One, Officer Milton testified and the trial court accepted that Larson would not take the field sobriety tests and he wanted his attorney. Therefore, a conclusion that Larson refused to take the field sobriety tests is not clearly erroneous. Larson did not take the tests.

Two, Larson had no right to counsel at that point in time because the request to perform field sobriety tests was made as part of the investigatory stop and not after an arrest had take place. Larson was not in custody. A person's right to counsel under the Fifth Amendment attaches during a custodial interrogation when a person has been taken into custody or is otherwise deprived of his or her freedom of action in any significant way. ***Miranda v. Arizona***, 384 U.S. 436, 444 (1966). A person's right to counsel under the Sixth Amendment attaches only after adversary judicial proceedings have been initiated. ***State v. Long***, 190 Wis.2d 386, 393, 526 N.W.2d 826, 829 (Ct. App. 1994). What Larson believes his rights to be does not control whether a person has a right to counsel. The United States and Wisconsin Constitutions do. Therefore, the fact that Larson failed to take the tests was a proper consideration for the purpose of determining whether there was probable cause to believe that Larson had been operating a motor vehicle while under the influence of an intoxicant.

III.

Lastly, Larson argues that absent the facts surrounding his "refusal" to take the field sobriety tests, there was no probable cause to conclude that he was operating a motor vehicle while under the influence of an intoxicant. Whether undisputed facts constitute probable cause is a question of law which we review *de novo*. ***Babbitt***, 188 Wis.2d at 356, 525 N.W.2d at 104. In determining whether probable cause exists, we look at the totality of the circumstances to determine whether the arresting officer's knowledge would lead a reasonable officer to believe that the defendant had operated a motor vehicle while under the influence of an intoxicant. ***Id.*** Probable cause to arrest does not require proof beyond a reasonable doubt or that guilt is more likely than not, but only, based upon the information in the officer's possession, that the defendant probably committed the crime. ***Id.*** at 357, 525 N.W.2d at 104.

We have concluded that the facts surrounding Larson's "refusal" to take the field sobriety tests are proper considerations for a probable cause determination. There was also an automobile accident, the other driver gave Officer Milton a description of how the accident occurred, Officer Milton observed Larson's watery eyes, unbuttoned shirt and loosened tie, and he smelled a strong odor of intoxicants emanating from Larson's breath. Then, Larson would not take the field sobriety tests at Officer Milton's request. Based upon all of these facts, we conclude that Officer Milton had probable cause to believe that Larson was operating a motor vehicle while under the influence of an intoxicant.

By the Court.—Order affirmed.

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