COURT OF APPEALS DECISION DATED AND RELEASED

October 31, 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. 96-1432-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DAVID M. MOSEL,

Defendant-Appellant.

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

VERGERONT, J.[1] David Mosel appeals from a judgment finding him guilty of operating a motor vehicle while under the influence of an intoxicant in violation of § 346.63(1)(a), STATS. We denied Mosel's counsel's motion to extend the time to file appellant's brief by one day because the motion did not show good cause because we had already in this appeal stated in an order that no other extensions were contemplated and because in other unrelated appeals Mosel's counsel had been warned that the number and

[1] This appeal is decided by one judge pursuant to § 752.31(2)(c), STATS.

grounds for motions for extensions filed by counsel were not acceptable to this court. Although we did not accept the appellant's brief, we gave the State the opportunity to file a brief if it chose, and, if it chose to do so, Mosel could then file a brief in reply. The State chose not to file a brief. There is therefore no brief before this court from any party. We could dismiss the appeal because there is no appellant's brief. *See* RULE 809.83(2), STATS. However, we choose to review the issue that Mosel informed this court he wished to raise on this appeal in the context of an earlier motion.[2] That issue is: whether the trial court should have granted Mosel's motion to suppress evidence because of an unlawful arrest. We conclude the trial court properly denied the motion and we affirm the judgment.[3]

BACKGROUND

The only witness at the suppression hearing was Frank Fenton, a police officer for the City of Monona. In the afternoon of February 18, 1994, he was dispatched to a two-vehicle accident at the intersection of Monona Drive and Femrite Drive in the City of Monona. When he arrived, there were two vehicles in the parking lot of a business. One, a Ford Bronco, had its front end in a snow bank. It was cold and snowing. The parking lot was partially icy. The driver of the Ford Bronco identified herself as Deborah Girard. She told Fenton that she had been driving her vehicle and the other vehicle had pulled out in front of her. The driver of the other vehicle was Mosel. He told Fenton he did not have a driver's license. Fenton noticed the odor of intoxicants from his breath, that his speech was slurred as he answered questions, and that he swayed as he walked.

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[2] Mosel moved to consolidate this appeal with an appeal from a forfeiture judgment for operating after suspension, Appeal No. 96-1461. Both charges arose out of the same incident. By order dated August 21, 1996, we dismissed Appeal No. 96-1461 on our own motion and denied the motion to consolidate as moot. In response to our order in the context of deciding that motion, Mosel advised us that the grounds for appeal in both Appeal No. 96-1461 and this case were the same and "emanate from the erroneous denial in the circuit court of the defendant-appellant's motion to suppress evidence." More specifically, that response identifies the issue at the suppression hearing as whether there was an unlawful arrest.

[3] We emphasize that we choose to make this review in this case. Counsel for Mosel should not assume that we will not dismiss an appeal outright in the future for failure to file a timely brief without good cause.

Fenton put both people in the rear of his squad car and asked them to make written statements, which they did. After they completed the written statements, they handed them to Fenton and he looked at them.[4] Fenton then asked Girard to get out of the vehicle. He asked her if she had smelled the odor of alcohol from Mosel and she responded that she had. She also told him that before Fenton's arrival, Mosel had told her that he had been drinking and did not think it was "a big deal." After giving Girard certain information and verifying that she was not injured, Fenton permitted her to leave.

After Girard left, Fenton went back to the car to talk to Mosel. He asked Mosel if he had been consuming alcohol and Mosel nodded and mumbled "yes." Fenton advised Mosel that he believed Mosel was under the influence of intoxicants and that Mosel would be offered the opportunity to complete field sobriety tests. Fenton said he preferred to do the tests at the police station because that was the best way to do them. Mosel said that was fine; he would be willing to go back to the police station and do the tests. Fenton determined that it was appropriate to do the field sobriety tests at the police station because of the weather conditions, the temperature and the pavement conditions. They were located in a parking lot with icy patches and Fenton did not believe that was a good set of circumstances for an individual to take the field sobriety tests.

Fenton believed he had probable cause at the scene of the accident to arrest Mosel for driving while under the influence of an intoxicant. He based that belief on the odor of intoxicants, his slurred speech and his swaying as he walked. Before taking Mosel to the police station, Fenton removed him from the squad car, did a pat down, handcuffed him, double locked the cuffs and put him back in the squad car. That is standard procedure for the officer's and the individual's safety which Fenton followed because he believed Mosel was intoxicated and he was a suspect.

Fenton took Mosel to the Monona Police Department which was less than two miles away. It took a few minutes to get there. When they arrived

[4] Girard's statement elaborated on her earlier comments to Fenton. Fenton could not read Mosel's statement at the hearing and stated it was illegible. This court is unable to read the statement.

at the Monona police station, Fenton removed Mosel from the squad car and they went into the police station to the squad room. Fenton took the handcuffs off and seated Mosel in a chair at a table in the squad room. Fenton administered field sobriety tests at the police station upon completion of the tests, Fenton told Mosel that he was under arrest.

At this point in Fenton's testimony, Mosel's counsel stipulated that the events which occurred at the police station--the results of the field sobriety tests--did provide Fenton with probable cause to believe that Mosel was operating a motor vehicle while intoxicated. Over Mosel's counsel's objection, Fenton was permitted to testify that at the time he administered the field sobriety tests to Mosel at the police station he did not have his weapon drawn and he was not in a locked area of the police station. The field sobriety tests took place in the hallway, an area open to police officers working at the police station. There were no other officers in the area and no other members of the public were there.

The field sobriety tests that Fenton performed at the police station were the finger-to-nose test, the thumb-to-finger test, walk and turn test, and one-legged stand test. The finger-to-nose test involves an individual standing in one place. Fenton acknowledged on cross-examination that the thumb-to-finger test could be performed by a person seated in a squad car, although that is not the way he prefers to do it. With respect to the walk and turn test, the finger-to-nose test, and the one-legged test, it was Fenton's view that the cold temperature would affect Mosel's performance and that the ground conditions would affect his ability to get a firm footing.

Mosel argued before the trial court that Fenton's act of taking him to the police station, frisking him, and handcuffing him constituted an arrest because Mosel did not consent but merely acquiesced to going to the police station, and, even if he did consent to that, he did not consent to the frisk or the handcuffing. The arrest was unlawful, Mosel contended, because it was not supported by probable cause.

The State responded that Mosel was not under arrest at the time he was taken to the police station because Mosel consented to go and consented to the frisk and search as part of being transported to the police station. The

State also argued that Fenton did have probable cause to arrest Mosel at the scene of the accident.

In a thorough written opinion, the trial court concluded that the initial detention and questioning of Mosel at the scene of the accident was permissible under ***Terry v. Ohio***, 392 U.S. 1 (1968), and that the pat-down search after Mosel agreed to go to the police station did not transform the stop into an arrest because a reasonable person in Mosel's position would not believe he was under arrest when the pat down occurred. The court also determined that Mosel consented to being transported to the police station and consented to being handcuffed as part of that transportation, and neither of those acts transformed the stop into an arrest. The court went on to state that, had Mosel not so consented, Fenton's act of handcuffing Mosel, even if pursuant to departmental policy, would have constituted an arrest at the scene. But, the court held, there was probable cause to arrest at that time.

In reviewing a trial court's denial of a suppression motion, we will not disturb the court's finding of historical facts unless they are clearly erroneous; however, the application of the facts to the constitutional requirement of consent presents a question of law, which we review de novo, ***State v. Johnson***, 177 Wis.2d 224, 233, 501 N.W.2d 876, 879 (Ct. App. 1993).

We agree with the trial court that the initial stop and questioning at the scene was proper under ***Terry***. Mosel did not argue otherwise. We also note that when an officer has reasonable grounds to suspect that a person has been driving while intoxicated, the officer may request that the person perform field sobriety tests. *See* ***State v. Swanson***, 164 Wis.2d 437, 448, 475 N.W.2d 148, 153 (1991). That does not transform the stop into an arrest. ***Id.*** The issue here focuses on transporting Mosel to the police station for those tests after patting him down and handcuffing him for the trip in the squad car. That, in turn, raises the issue of Mosel's consent. Consent in this context means consent that is free, unequivocal and specific, without any duress or coercion, actual or implied. *See* ***Johnson***, 177 Wis.2d at 233, 501 N.W.2d at 879.

The trial court found that Fenton explained to Mosel that he wanted Mosel to perform field sobriety tests and he wanted him to perform them at the police station because of the cold weather and icy conditions. The

court found that Mosel agreed to perform the tests at the police station. The trial court also found:

> Fenton removed Mosel from the squad car, patted him down and placed him in handcuffs. Fenton explained that, when suspects are transported in squad cars, department policy requires suspects to be handcuffed. Mosel agreed to this and was subsequently handcuffed and transported to the police department.

These findings are not clearly erroneous. There was no evidence contradicting Fenton's testimony that Mosel agreed to take the tests at the police station. Mosel's counsel on cross-examination focused on a particular sentence in Fenton's police report: "I then told Mosel that I would be transporting him to the Monona Police Department where he would be allowed if he chose to perform field sobriety tests." Mosel's point is that Fenton did not give him an option but instead said or implied that Mosel *had* to go to the police station. However, when the sentences directly following this sentence are read, Fenton's report does not contradict his testimony and it supports the trial court's finding that Mosel consented to go to the police station to take field sobriety tests:

> I explained that I did not want to do them [the field sobriety tests] in the parking lot of this business and felt that performing them at the police department would be the best option. Mosel said that yes, he agreed to do that and would be willing to perform the field sobriety tests at the Monona Police Department.

We conclude that Mosel freely, intelligently, unequivocally and specifically agreed to go to the police station to take the tests without any duress or coercion, actual or implied. Fenton's explanation for wanting to perform the tests at the police station instead of in the parking lot is reasonable and does not suggest coercion. There is nothing to suggest that Mosel felt he had to agree or that his consent was equivocal. It was cold and snowy and the parking lot was

icy. It was reasonable for Mosel to want to perform the tests under the best conditions and in a warm place.

Since Mosel consented to go in the squad car to the police station, Fenton could properly do a pat-down frisk for weapons before taking Mosel in the car. *See* ***Swanson***, 164 Wis.2d 437, 442-44, 475 N.W.2d 148, 150-51 (1991) (where suspect was put in squad car, court held that limited pat-down search for weapons to protect officer is permissible in ***Terry*** stop; but more extensive search uncovering marijuana in pockets was beyond permissible scope).

The trial court's finding that Mosel agreed to be handcuffed as part of being transported to the police station for the tests is also not clearly erroneous. Fenton's report, directly following the passage cited above states:

> I then took Mosel out of the rear of my squad car, patted him down and placing him in handcuffs, double locking the cuffs. I explained to him that it is policy of the Monona Police Department, under circumstances like this, that suspects not be transported in the squad car without first being handcuffed. It should be noted that Mosel was very cooperative with this and posed no problems to me.

Fenton's testimony at the hearing did not contradict his report. He removed the handcuffs once he and Mosel were at the police station.

We conclude that Mosel freely, intelligently, unequivocally and specifically agreed to be handcuffed for the purpose of being taken to the police station to perform the field sobriety tests. There is no evidence that he equivocated about going to the police station once he learned he would need to be handcuffed while in the squad car. There is no evidence of duress coercion, express or implied, which would be necessary here to support a conclusion of "mere acquiescence."

Because Mosel consented to go to the police station in the squad car to take the field sobriety tests and consented to be handcuffed while being

transported, and because the limited pat-down search was within the scope of a ***Terry*** stop, an arrest did not occur at that time. We therefore do not decide the other issues addressed in the trial court's opinion.

By the Court.—Judgment affirmed.

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