COURT OF APPEALS
DECISION
DATED AND FILED

November 12, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-1902-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOHN E. PROCHASKA,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Dane County: JACK F. AULIK, Judge. *Reversed.*

EICH, J.[1] John Prochaska appeals from a judgment finding him guilty of causing injury by the intoxicated use of a motor vehicle. He claims that evidence of a blood test administered without his consent should have been suppressed. While Prochaska raises alternative arguments, we see the dispositive issue as whether he had been "arrest[ed]" by the police prior to administration of

[1] This appeal is decided by a single judge pursuant to § 752.31(2)(f), STATS.

the test, which the supreme court stated in ***Scales v. State***, 64 Wis.2d 485, 494, 219 N.W.2d 286, 292 (1974), "must precede the taking of the blood sample." And we conclude that, on this record, Prochaska had not been arrested by the officers prior to the non-consensual drawing of his blood.[2]

After being involved in a one-car rollover accident in which one or more persons were injured, Prochaska was found at his home and taken to the hospital for treatment of injuries he sustained in the accident. Dane County Sheriff's Deputies Kurt Pierce and Mark Olson, after being dispatched to the scene, where they had noticed a smell of intoxicants on Prochaska's person and learned that, by his own admission, he had consumed three beers earlier in the evening, followed Prochaska to the hospital. According to the State's brief, the deputies then "told [Prochaska] that they would be charging him with causing injury by [operating a vehicle while intoxicated]," to which he replied: "For what? Only having four beers?" Olson then read Prochaska the "Informing-the-Accused" form required by the Implied Consent Law, and filled out a Uniform Traffic Citation charging him with the violation and notifying him to appear in court at a specified later date. Because Prochaska was being seen by a doctor at the time, Olson placed the citation with his personal belongings (which, we gather, were in the immediate area), and told him that a blood sample would be taken, which it was shortly thereafter. After completing the citation, Olson told Prochaska that a blood sample would be taken without his consent, which it was. Pierce and Olson departed as soon as the blood was drawn, leaving Prochaska at the hospital, from which we presume he was released following treatment for his

[2] Because we so rule, we need not consider Prochaska's alternative argument that the officers lacked probable cause to arrest him in any event.

injuries.[3] At no time did either officer tell Prochaska that he was being placed under arrest, nor was that word used in any of their conversations with him, either at his home or at the hospital.

The State does not dispute Prochaska's assertion that, under ***Scales***, a valid arrest must precede the taking of a blood sample. Rather, the State argues that, under the applicable law, Prochaska was under arrest when the sample was taken.

Whether a person is "in custody" or under arrest—especially where, as here, the material facts are undisputed—is a question of law subject to independent review on appeal. ***State v. Swanson***, 164 Wis.2d 437, 445, 475 N.W.2d 148, 152 (1991). The test 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. Gruen***, 218 Wis.2d 581, 593, 582 N.W.2d 728, 732 (Ct. App. 1998). We consider "the totality of the circumstances" in making that determination, and we have said that those circumstances

> include[] such relevant factors as the defendant's freedom to leave the scene; the purpose, place and length of the interrogation; and the degree of restraint. In exploring the degree of restraint, courts have also considered as relevant factors: (1) whether the defendant was handcuffed; (2) whether a gun was drawn on the defendant; (3) whether a … frisk was performed; (4) the manner in which the defendant was restrained; (5) whether the defendant was moved to another location; (6) whether the questioning

[3] The State does not indicate in its brief that either Pierce or Olson returned to the hospital, that any other officers remained there when they left, that Prochaska was ever detained at the hospital for non-medical reasons, or jailed, or in any way restricted from returning home after receiving treatment.

> took place in a police vehicle; and (7) the number of police officers involved.

Id. at 593, 594-95, 582 N.W.2d at 732-33 (citations omitted).

The State puts forth the following arguments to establish Prochaska's arrest. First, citing ***Swanson*** for the proposition that another circumstance to be considered in such an inquiry is "what has been communicated by the police officers … by their words or actions," ***Swanson***, 164 Wis.2d at 447, 475 N.W.2d at 152, the State contends that Prochaska's "For what?" response to Deputy Pierce's statement that he was going to be charged with causing injury by intoxicated use of a vehicle is conclusive evidence that he believed himself to be in custody at the time—especially in light of the fact that he was promptly given a traffic citation. We disagree. All Prochaska was told was that he would be charged—not that he was being arrested or detained—and he was simply given a copy of a Uniform Traffic Citation stating on its face that he was to appear in court on a specified date, and, on the reverse side, providing information to assist him in making that appearance.[4] And the officers left the hospital shortly thereafter, presumably leaving Prochaska to make the court appearance, some two weeks hence, on his own.

The State also argues that because Prochaska was "in the hospital being treated by medical person[ne]l and had no indication that he would not be there for some period of time," a reasonable person in his position would consider

[4] The reverse side of the citation does not appear on the officer's copy in the record. That copy does, however, contain a statement—immediately under the scheduled court date—stating: "Read the reverse side of this citation for court information." He was also provided with a copy of an Implied Consent Law notice, a "companion" citation for operating a motor vehicle with a prohibited blood-alcohol level, and one for driving after suspension—all containing a similar court-appearance notice.

himself under arrest because he would "understand that even were he able to leave the hospital, he would not be able to do so without the deputies[']s permission." What the State does not suggest is why Prochaska—or anyone in his position—would understand any such thing. There is no evidence that the officers ever told Prochaska he was not free to leave the hospital after receiving treatment for his injuries; nor do their actions—leaving the traffic citation with his belongings and departing the premises—suggest any police-imposed restrictions on his freedom. Indeed, they suggest the opposite. And to the extent Prochaska, at that time, lacked any precise knowledge as to when he would be released from the hospital, that release would be determined by the hospital physicians, not by Pierce, Olson or any other law enforcement officer.

Prochaska has satisfied us that the criteria for determining custody were simply not met in this case, and in the absence of any showing by the State that the supreme court's statement in ***Scales*** that a valid arrest must proceed the blood-draw should not apply here, we assume that is the law; and it follows that the test results should have been suppressed.

By the Court.–Judgment reversed.

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