COURT OF APPEALS
DECISION
DATED AND FILED

August 2, 2007

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP44-CR **Cir. Ct. No. 2004CT44**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LUCAS R. MCELWEE,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Richland County: EDWARD E. LEINEWEBER, Judge. *Affirmed.*

¶1 DYKMAN, J.[1] Lucas McElwee appeals from a judgment of conviction for operating while intoxicated (OWI)—third offense. McElwee pled

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c) (2005-06). All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

no contest after the trial court denied his motion to suppress. McElwee contends that the arresting officer's use of physical force and handcuffs to detain him, and a pat-down search converted a temporary stop into an arrest not supported by probable cause. He contends that the arrest was invalid and seeks to suppress all evidence gathered after the arresting officer used the handcuffs.

¶2 We hold that the arresting officer possessed a reasonable suspicion, which justified the temporary stop. We agree with the trial court that the arresting officer may use handcuffs and a pat-down search within the context of an investigatory stop to ensure officer safety while conducting the temporary questioning. We hold that the arresting officer, after conducting a field sobriety test and a preliminary breath test, had probable cause to arrest McElwee.

Background

¶3 On June 12, 2004, around 10:23 p.m., Officer Andrew Kurek, of the Spring Green and Village of Lone Rock Police Departments, was on routine patrol in the Village of Lone Rock. Kurek saw a blue vehicle going south on County Line Road. He turned right and followed the car, and saw it cross over the centerline twice so that the car was completely on the wrong side of the road. When the blue car reached a stop sign at Highway 130, it slowed to around fifteen miles per hour but failed to stop. The car continued south on Highway 130 with its left tires on the centerline. At Whitewater Street, Kurek observed the car make a quick, almost last-second turn without signaling.

¶4 Kurek activated his lights and siren to stop the vehicle. The blue car slowed down and then accelerated for another block and a-half before stopping. Once the car stopped, the driver opened the door, got out of the car, and started to walk away. Kurek told the driver to get back in the car. The driver of the blue car

continued to walk away, pointing away from the officer and saying, "I'm almost there." Kurek grabbed the driver of the car in a hold similar to a bear hug and pulled him back so that McElwee was behind his car door. McElwee was combative the entire time Kurek was trying to handcuff him—Kurek testified McElwee was "kind of fighting me, resisting me, yelling and screaming the whole time." There was also another occupant in the car.

¶5 Kurek recognized the driver of the car as Lucas McElwee, whom he knew from previous interactions. During Kurek's previous interactions with McElwee, McElwee had always been decent towards Kurek. Kurek thought McElwee's behavior was out of character and odd and, together with the driving behavior he had observed, caused him to believe that McElwee was intoxicated. After handcuffing McElwee, Kurek ran information through Richland County dispatch and waited for additional officers to arrive. Kurek also performed a pat-down search to determine if McElwee had any dangerous weapons. Kurek observed a strong odor of intoxicants on McElwee's breath. Kurek did not inform McElwee whether he was free to leave. He left the handcuffs on because McElwee was fighting and trying to leave the scene.

¶6 Kurek observed that McElwee's eyes were bloodshot and that he had urinated on himself. Kurek performed a field sobriety test, the Horizontal Gaze Nystagmus test, on McElwee. He noted that McElwee's eyes did not follow smoothly. Kurek noted, in his police report, that McElwee would not follow his fingertip without moving his head so Kurek was unable to test for distinct jerkiness at maximum deviation. McElwee refused to do an additional field sobriety test, but did consent to a Preliminary Breath Test test which yielded a result of .28.

¶7 The district attorney charged McElwee with OWI, third offense, contrary to WIS. STAT. § 346.63(1)(a); operating a motor vehicle while having a prohibited alcohol concentration (PAC), third offense, contrary to WIS. STAT. § 346.63(1)(b); and operating after revocation, contrary to WIS. STAT. § 343.44(1)(b).

¶8 McElwee filed a motion to suppress, alleging an unlawful detention and arrest. The trial court denied McElwee's motion, finding that there was sufficient evidence for an investigatory stop.[2] The court found that McElwee could be legally detained at the scene by using handcuffs, and that there was probable cause for the defendant to be arrested for resisting an officer. The court also found that the observations of the officers and the information gained from dispatch provided probable cause to arrest the defendant for operating while intoxicated.

¶9 McElwee pled no contest and was convicted of OWI as a third offense and the State dismissed the PAC and operating-after-revocation charges. McElwee appeals the denial of his motion to suppress.

Standard of Review

¶10 When reviewing a motion to suppress, we will uphold the trial court's findings of fact unless they are clearly erroneous. ***State v. Fields***, 2000 WI App. 218, ¶9, 239 Wis. 2d 38, 619 N.W.2d 279. The application of constitutional standards to the facts is a question of law we decide without deference to the trial court. ***State v. Rutzinski***, 2001 WI 22, ¶12, 241 Wis. 2d 729, 623 N.W.2d 516.

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

Discussion

¶11 A police officer may detain a suspect for a reasonable period if the officer believes the suspect has committed, is committing, or will commit a crime.[3] WIS. STAT. § 968.24. Section 968.24 is the codified version of the U.S. Supreme Court's decision in ***Terry v. Ohio***, 392 U.S. 1 (1968). ***State v. Gruen***, 218 Wis. 2d 581, 590, 582 N.W.2d 728 (Ct. App. 1998). We have recognized that in ***Terry***, "the United States Supreme Court determined that the Fourth Amendment is not violated when law enforcement officers, in appropriate circumstances, detain and temporarily question a suspect, without arrest, for investigative purposes." ***Gruen***, 218 Wis. 2d at 589-90. Under ***Terry*** and § 968.24, law enforcement officers may conduct brief questioning and investigation without the formal requirements necessary for an arrest. Officers may also perform a pat-down of the suspect being detained for officer safety if they reasonably believe the suspect is armed and dangerous. ***Terry***, 392 U.S. at 27-31.

¶12 Thus, if an officer has reason to believe that an individual may be involved in the commission of a crime, the officer may stop the individual for questioning. ***State v. Flynn***, 92 Wis. 2d 427, 433, 285 N.W.2d 710 (1979). To

[3] WISCONSIN STAT. § 968.24 describes the procedures for temporary questioning without arrest:

> After having identified himself or herself as a law enforcement officer, 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.

detain an individual, an officer needs to have specific and articulable facts, together with reasonable inferences from those facts, which, in light of his or her experience, would lead a reasonable person to believe criminal activity is taking place or has taken place. ***State v. Richardson***, 156 Wis. 2d 128, 139, 456 N.W.2d 830 (1990). Whether a pat-down is justified is based on "whether a reasonably prudent [person] in the circumstances would be warranted in the belief that his [or her] safety or that of others was in danger." ***Terry***, 392 U.S. at 27. Reasonableness is based on the totality of the circumstances. ***State v. Morgan***, 197 Wis. 2d 200, 209-10, 539 N.W.2d 887 (1995).

¶13 A person has been seized for purposes of the Fourth Amendment "only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he [or she] was not free to leave." ***California v. Hodari D.***, 499 U.S. 621, 627-28 (1991) (citation omitted). If an officer has in some way restrained, through means of physical force or a show of authority, the liberty of a citizen, then a seizure of that suspect has occurred under the Fourth Amendment. ***Terry***, 392 U.S. at 19 n.16. The reasonableness of the police officer's approach and detention of the suspect are gauged by whether "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant" the forcible stop. ***Wendricks v. State***, 72 Wis. 2d 717, 723, 242 N.W.2d 187 (1976) (citation omitted). Thus, when determining if an investigatory stop was justified, we are to look to what a reasonable police officer would suspect in light of his or her training. ***State v. Anderson***, 155 Wis. 2d 77, 83-84, 454 N.W.2d 763 (1990).

¶14 The detention of a suspect must be temporary and last no longer than is necessary to complete the purpose of the stop. ***Gruen***, 218 Wis. 2d at 590. If a police officer detains a suspect through an investigatory stop, we must consider

whether the police officer "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 suspect." ***Id.*** at 590-91 (citation omitted). A detention should also employ the least intrusive techniques to reasonably verify or dispel the officer's suspicion. ***Id***. at 590.

¶15 We use an objective test to determine the point at which a detention rises to the level of an arrest. ***State v. Swanson***, 164 Wis. 2d 437, 446, 475 N.W.2d 148 (1991), *abrogated on other grounds by* ***State v. Sykes***, 2005 WI 48, 279 Wis. 2d 742, 695 N.W.2d 277. "The standard generally used to determine the moment of arrest in a constitutional sense 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." ***Id.*** at 446-47. When determining whether an investigative detention rises to an arrest, we evaluate the manner of temporary detention by a reasonableness standard. ***State v. Wilkins***, 159 Wis. 2d 618, 625-26, 465 N.W.2d 206 (Ct. App. 1990). Thus, we have held that under certain circumstances, suspects may be detained in handcuffs without converting the detention into an arrest. ***Id.*** at 626-28 (placing suspects in handcuffs and into squad car upon eyewitness identification as assailants in sexual assault and robbery was reasonable while police diligently investigated and searched for victim, and did not rise to level of arrest).

¶16 We conclude that Officer Kurek had reasonable suspicion to stop McElwee to investigate the possibility of McElwee operating the motor vehicle while intoxicated. Kurek observed McElwee's car travel over the centerline twice, fail to stop at a stop sign, and fail to use a signal when turning. Kurek reasonably believed, based on McElwee's driving behavior, that he was witnessing an impaired driver.

¶17 McElwee claims, however, that Kurek's use of force and handcuffs during the detention and the pat-down search transformed the investigatory stop into an arrest, which was not supported by probable cause. He claims that the pat-down search was conducted after he was in handcuffs, and Kurek was not justified in being concerned for his safety. McElwee claims that there were no facts or reasonable inferences to be drawn concerning officer safety, just a generalized suspicion that something was different about McElwee's behavior. Thus, McElwee claims that there was no basis for the pat-down search or the detention and the detention was converted into an illegal arrest.

¶18 We agree with the trial court that, under the circumstances, the use of force and handcuffs, together with the pat-down, did not convert the temporary detention into a *de facto* arrest. Kurek had to physically restrain and handcuff McElwee to perform an investigative stop because McElwee was combative and trying to leave the scene. Moreover, Kurek was justified in performing a pat-down search because McElwee walked away from the car and did not respond to Kurek's commands to stop, was acting in a manner different from his normal interactions with Kurek, and, when restrained, was combative. Additionally, there was another passenger in the car. These facts would lead a reasonably prudent officer to fear for his or her safety. *See* ***Terry***, 392 U.S. at 27. Thus, we conclude that Kurek's use of force, handcuffs, and a pat-down for weapons were necessary to perform an investigative stop and to ensure officer safety, and did not convert the detention into an arrest.

¶19 Thus, Kurek validly obtained evidence during the investigative stop that amounted to probable cause to arrest McElwee for operating while intoxicated. "Probable cause [to arrest] exists if the facts and circumstances known to the officer warrant a prudent [person] in believing that the offense has

been committed." ***Henry v. United States***, 361 U.S. 98, 102 (1959). It exists when "the facts and circumstances within the arresting officers' knowledge and of which they had reasonably trustworthy information are sufficient in themselves to warrant a [person] of reasonable caution in the belief that an offense has been or is being committed." ***State v. Paszek***, 50 Wis. 2d 619, 625, 184 N.W.2d 836 (1971) (citation omitted). The quantum of evidence necessary for probable cause is to be measured by the facts of a particular case, ***Wong Sun v. United States***, 371 U.S. 471, 479 (1963), and does not require proof beyond a reasonable doubt or that guilt is more likely than not, ***Browne v. State***, 24 Wis. 2d 491, 503-04, 129 N.W.2d 175 (1964).

¶20 Kurek had probable cause to arrest McElwee for operating while intoxicated under the totality of the circumstances after the field sobriety tests. The information gathered from the erratic driving, the need for handcuffs, and the field sobriety tests all show that McElwee had probably committed the offense of driving while intoxicated. Accordingly, we affirm.

By the Court.—Judgment affirmed.

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