COURT OF APPEALS
DECISION
DATED AND FILED

March 26, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP1826-CR **Cir. Ct. No. 2007CT157**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DAWN M. CARROTHERS,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Waukesha County: RALPH M. RAMIREZ, Judge. *Affirmed.*

¶1 SNYDER, J.[1] Dawn M. Carrothers appeals from a judgment of conviction for operating a motor vehicle while intoxicated, contrary to WIS. STAT. § 346.63(1)(a), a fourth offense. First, she contends that the trial court erred when it concluded that the officer had reasonable suspicion under the circumstances to investigate beyond registration matters during the traffic stop. Second, she argues that the court made numerous errors regarding the exclusion and admission of evidence. Third, she asserts that the court erred in not ordering a mistrial after becoming aware of prosecutorial misconduct. Finally, she contends that the trial court erred in finding that WIS. STAT. § 343.305(2) does not violate the Privileges and Immunities clause of the Fourteenth Amendment. We disagree and affirm the judgment of the trial court.

BACKGROUND

¶2 Around 1:00 a.m. on June 6, 2006, Officer Ryan Reinders of the City of Pewaukee Police Department observed a vehicle make an abrupt turn and it drew his attention. Reinders followed the car for approximately a half mile and did not notice anything else suspicious about the driving. While following the vehicle, Reinders ran the registration to check for any violations. The check revealed that the registration was expired. Reinders stopped the car because of the expired registration.

¶3 When Reinders approached the vehicle, he saw Carrothers putting her shirt on. As he got within three feet her, he also noticed the strong smell of alcohol. Reinders noticed that Carrothers' eyes were glassy, though she was

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

wearing glasses and it was nighttime. He also noticed that her speech was slurred and that her shirt was on inside out. Reinders then asked Carrothers if she had been drinking. Carrothers responded that she had consumed "two beers" but had stopped drinking at 9:00 p.m. Reinders then asked for her driver's license and went back to his car to run a check; he discovered that Carrothers' license was suspended.

¶4 After another officer arrived to secure the scene, Reinders returned to Carrothers' vehicle and asked her to step out of the car and she complied. He noted that she had some difficulty in maintaining her balance while she was walking, and there was something about the way she moved back and forth that caught his attention. Carrothers then agreed to perform various field sobriety tests, and while she did so, Reinders observed multiple clues for intoxication. He had a preliminary breath test (PBT) kit in his vehicle, but did not use it. Carrothers made no request for a PBT.

¶5 Reinders then placed Carrothers under arrest by handcuffing and placing her in the back of his squad car. He then went to search her vehicle. No ***Miranda***[2] warnings had been given, and Carrothers screamed that Reinders did not have the right to search her car.

¶6 After the search, Reinders took Carrothers to get a blood test pursuant to WIS. STAT. § 343.305(2). Prior to the test, Reinders read the Informing the Accused form to Carrothers, who appeared to understand the contents of the form. The blood test showed that Carrothers had a blood alcohol

[2] ***Miranda v. Arizona***, 384 U.S. 436 (1966).

concentration of .217. She was charged with OWI and PAC, both as fourth offenses.

¶7 At trial, Patrick Harding, chief of the toxicology section of the Wisconsin State Laboratory of Hygiene, testified about the blood analysis procedure and results. Joseph Cannistra, the analyst who had tested Carrothers' blood sample, no longer worked for the State and had moved to Wausau. Harding testified that he had been one of Cannistra's supervisors and that he had reviewed the analysis performed on Carrothers' blood sample. He testified that the test result was accurate.

¶8 During the trial, but outside the presence of the jury, Carrothers advised the court that the prosecutor was moving her head side-to-side and up-and-down at Reinders while the defense was cross-examining him. Carrothers said that she had noticed it before, but had not said anything to the court until that time. The prosecutor stated that if she was shaking her head, it was unintentional and was caused by the defense's long, convoluted questions. The court then questioned Reinders, who admitted that he had noticed the prosecutor's head movements, but said that they were not preplanned or intended to instruct him what to say. Rather, he said that the head movements had been done during times when he was wondering what exactly the defense had asked him. The trial court warned the prosecutor about such conduct, stating that he had noticed that she had a bad habit of it in the past, and warned her that if it continued, he might call a mistrial. The trial continued and Carrothers was convicted of a fourth OWI offense.

DISCUSSION

The scope of the traffic stop

¶9 Carrothers contends that since her driving was completely normal, Reinders' alcohol-related questions and request that she perform field sobriety tests unlawfully expanded the scope of the investigation beyond registration matters. The temporary detention of an individual during the police stop of a vehicle, even if only for a brief period of time and for a limited purpose, constitutes a seizure within the meaning of the Fourth Amendment. ***State v. Malone***, 2004 WI 108, ¶24, 274 Wis. 2d 540, 683 N.W.2d 1. Whether the circumstances of a stop or detention meet constitutional standards is a question of law, which we review de novo. ***State v. Gammons***, 2001 WI App 36, ¶6, 241 Wis. 2d 296, 625 N.W.2d 623.

¶10 We evaluate the reasonableness of the stop under principles similar to those used to analyze a ***Terry***[3] stop. ***Malone***, 274 Wis. 2d 540, ¶24. The stop must be justified at its inception and it must be reasonably related in scope to the circumstances that justified the stop. ***Id.*** However, if, during a valid traffic stop, an officer becomes aware of suspicious factors or additional information that would give rise to an objective, articulable suspicion that further criminal activity is afoot, the police need not terminate the stop simply because further investigation is beyond the scope of the initial stop. ***Id.*** We consider both the nature and the duration of the police investigation in order to determine whether a

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

stop remained reasonable within the meaning of the Fourth Amendment. *See* ***id.***, ¶26.

¶11 If, during a lawful traffic stop, an officer becomes aware of suspicious factors or additional information that gives rise to an "objective, articulable suspicion [of] criminal activity," this can start a "new, distinct investigation." ***Id.***, ¶24. In ***Malone***, the officer pulled over a vehicle for speeding. ***Id.***, ¶5. During the stop, the officer noticed that the car had an unusual number of air fresheners, and knew that this is one way people mask the smell of narcotics. ***Id.***, ¶36. The court reasoned that even though the initial stop was for speeding, the officer's observations did reasonably justify further inquiry into the matter. ***Id.***, ¶¶36-37.

¶12 Reinders, during the initial contact with Carrothers, noticed the strong smell of alcohol, the glassy eyes and slurred speech. He also observed her fumbling with her clothing when she pulled over and when he approached, he noticed Carrothers' shirt was on inside out. All of these observations combined to justify Reinders' further inquiry to ascertain whether criminal activity was afoot. *See* ***State v. Betow***, 226 Wis. 2d 90, 95, 593 N.W.2d 499 (Ct. App. 1999). "The validity of the extension is tested in the same manner, and under the same criteria, as the initial stop." The trial court's holding that Reinders reasonably expanded the scope of the traffic stop was proper.

Evidentiary holdings by the trial court

¶13 Carrothers next contends that the trial court made numerous evidence-related errors: (1) excluding evidence regarding Carrothers not receiving a preliminary breath test, (2) admitting roadside statements made by Carrothers to Officer Reinders, and (3) allowing the lab supervisor's testimony, which included

his opinion regarding a blood test that he did not perform and relied on hearsay. Because the trial court's decision to admit or exclude evidence is discretionary, we will uphold it if the trial court: (1) examined the relevant facts, (2) applied the proper legal standard, and (3) demonstrably rationally reached a reasonable conclusion. ***State v. Mayo***, 2007 WI 78, ¶31, 301 Wis. 2d 642, 734 N.W.2d 115.

¶14 Carrothers first asserts that since a refusal to take a PBT is admissible as evidence of the suspect's consciousness of guilt, the failure to offer a PBT should also be admissible to show that the officer did not do everything possible to establish probable cause to arrest. We reject Carrothers' proposition that offering a PBT is mandatory or that failure to do so is relevant when the totality of the circumstances establish probable cause for arrest. WISCONSIN STAT. § 343.303 uses the word "may" rather than "must" and gives law enforcement personnel the option to use PBTs if needed to help establish probable cause to arrest. The statute states in relevant part, "If a law enforcement officer has probable cause to believe that the person is violating [a drunk driving law] … the officer, prior to an arrest, *may* request the person to provide a sample of his or her breath for a preliminary breath test using [an approved device]." ***Id.*** (emphasis added).

¶15 No law requires an officer to use or even offer a PBT during an OWI arrest. Therefore, Reinders properly used his discretion to decide whether to conduct the PBT. Neither the fact that he had the necessary test equipment in his truck nor the fact that his department had a policy against using PBTs changes that assessment. The trial court properly excluded the evidence as irrelevant.

¶16 Carrothers next argues that from the moment Reinders stopped her car, she was not free to leave; therefore, any evidence gathered during that time

was inadmissible because she had not been advised of her ***Miranda*** rights. She supports this through Reinders' own testimony that she was not free to leave when he first stopped the car. At trial, the court distinguished statements made after the arrest from those made prior to the arrest and stated that it would not allow any statements made in response to interrogation after the arrest. We read Carrothers' brief to challenge the admission of statements she made after the investigatory stop but before her formal arrest. Although she never explicitly states this in her brief, we understand her complaint to be with the court's admission of Reinders' testimony that Carrothers told him she had "had two beers."

¶17 In ***State v. Goetz***, 2001 WI App 294, ¶¶12-13, 17, 249 Wis. 2d 380, 638 N.W.2d 386 (Ct. App. 2001), we held that detaining a person is not the equivalent of custody for purposes of ***Miranda***. Rather, for ***Miranda*** protections to apply, the person must be formally arrested or have "suffered a restraint on freedom of movement of the degree associated with a formal arrest." ***Goetz***, 249 Wis. 2d 380, ¶11. When reviewing whether a constitutional violation occurred, we will uphold the trial court's factual findings unless they are clearly erroneous, but we independently determine whether those facts meet the constitutional standard. *See* ***State v. Knapp***, 2005 WI 127, ¶19, 285 Wis. 2d 86, 700 N.W.2d 899. Thus, we turn to the issue of whether Carrothers was undergoing custodial interrogation at the time she made her pre-arrest statement about consuming alcohol.

¶18 To determine if a person is in custody, 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 (Ct. App. 1998) (citation omitted). We must examine the totality of the circumstances, including such

factors as the defendant's freedom to leave the scene; the purpose, place and length of the interrogation; and the degree of restraint. ***Id.*** at 594. Other relevant factors include the manner in which the defendant was restrained; the number of police officers involved, and whether guns were drawn; whether the defendant was handcuffed or frisked; whether the defendant was moved to another location; and whether the questioning took place in a police vehicle. ***Id.*** at 594-95.

¶19 Carrothers emphasizes Reinders' own characterization of the stop. Reinders acknowledged that he considered Carrothers to be restrained from the moment of the investigatory stop, stating that Carrothers "wasn't free to leave" and that he had "restricted her ability" to be on her way. Nonetheless, Reinders' characterization of the situation does not control. The determination of custody is an objective one and does not depend on the subjective view harbored by either the officer or the person being questioned. ***State v. Mosher***, 221 Wis. 2d 203, 211, 584 N.W.2d 553 (Ct. App. 1998). Therefore, even if the officer anticipates an arrest but does not communicate it to the suspect, the unarticulated plan has no bearing on whether the suspect was in custody at a particular time. ***Id.*** at 216.

¶20 Here, at the time that Carrothers made her statement about consuming two beers, she was the subject of an investigatory stop. A reasonable person would understand that he or she was temporarily detained. Carrothers was still in her own vehicle and was about to hand over her driver's license for identification when she made the statement. Only one officer was present, no gun was drawn, no frisk was performed, and the length of the detention at that point was quite brief. None of the trappings of a formal arrest were present at that time. We conclude that a reasonable person in Carrothers' position would not have considered herself to be in custody, given the degree of restraint under the circumstances. *See* ***Gruen***, 218 Wis. 2d at 593.

¶21 Carrothers further argues that the state laboratory supervisor's testimony and the actual lab test results were not admissible because (1) the State never proved that the original analyst was unavailable to testify; and (2) the report itself was inadmissible hearsay. She asserts that the court's decision to admit the test results without the testimony of the analyst who performed the test violated her Sixth Amendment right to confront the witnesses against her.

¶22 Similar arguments were advanced in ***State v. Williams***, 2002 WI 58, 253 Wis. 2d 99, 644 N.W.2d 919, and ***State v. Barton***, 2006 WI App 18, 289 Wis. 2d 206, 709 N.W.2d 93. In ***Williams***, a crime lab unit leader testified that a particular substance was cocaine base, although the unit leader was not the person who performed the tests on the substance. ***Williams***, 253 Wis. 2d 99, ¶4. The unit leader had formed her expert opinion based on her own training and expertise, her close connection to the tests and procedures involved in the case, and her personal review of the testing records. ***Id.***, ¶¶21-22. Our supreme court held that allowing the unit leader to testify did not violate the confrontation clause because the witness had presented her independent expert opinion. *See* ***id.***, ¶26.

¶23 In ***Barton***, we applied ***Williams*** to hold that a crime lab unit leader's testimony was properly admitted where the analyst who had performed the tests was unavailable. ***Barton***, 289 Wis. 2d 206, ¶16. There, the unit leader had examined the results of the other analyst's tests, had performed a peer review of those tests, and formed his opinion based on his own expertise and his own analysis. ***Id.*** The unit leader presented his conclusions to the jury and was available for cross-examination. ***Id.*** We concluded that no violation of Barton's right to confront witnesses occurred. ***Id.***

¶24 The record facts here lead to a similar conclusion. Former lab analyst Joseph Cannistra no longer worked for the state laboratory and was living and working in Wausau when the trial took place. Patrick Harding presented the test results to the jury. The record demonstrates that Harding had been Cannistra's supervisor at the lab. It further demonstrates that Harding was qualified and familiar with the test procedures and that he independently reviewed the test report using the same information Cannistra had at the time of the original analysis. Harding formed his own expert opinion as to the test result, testified based on that opinion, and was available for cross-examination.

¶25 As for Carrothers' argument that the court improperly allowed Harding to testify from the lab report, which is inadmissible hearsay, our supreme court has answered that as well. In ***Williams***, the court held that the lab supervisor's opinion was admissible even though it was based in part on inadmissible hearsay. ***Williams***, 253 Wis. 2d 99, ¶28. The court observed that it would be "rare indeed that an expert can give an opinion without relying to some extent upon information furnished by others." ***Id.***, ¶29.

¶26 In sum, we reject Carrothers' challenge to Harding's testimony because

> [t]he presence and availability for cross-examination of a highly qualified witness, who is familiar with the procedures … [and] supervises or reviews the work of the testing analyst, and renders [his or] her own expert opinion is sufficient to protect a defendant's right to confrontation, despite the fact that the expert was not the person who performed … the original test.

Williams, 253 Wis. 2d 99, ¶20.

Prosecutorial misconduct and mistrial

¶27 Carrothers argues that the court erred when it denied her motion for a mistrial because the prosecutor was nonverbally signaling to Reinders while he was being cross-examined by the defense. A motion for a mistrial is not warranted unless, in light of the entire proceeding, the basis for the mistrial motion is sufficiently prejudicial to warrant a new trial. ***State v. Bunch***, 191 Wis. 2d 501, 506, 529 N.W.2d 923 (Ct. App. 1995). The decision whether to grant a mistrial lies within the sound discretion of the trial court. ***Id.*** Not all errors warrant a mistrial and "the law prefers less drastic alternatives, if available and practical." ***Id.*** at 512. A mistrial is appropriate only when a "manifest necessity" exists for the termination of the trial. ***Id.*** at 507.

¶28 When Carrothers made the trial court aware of the situation, the court promptly sent the jury out of the courtroom. The following courtroom exchange occurred:

> [DEFENSE COUNSEL]: I want to move for a mistrial on the grounds that the district attorney is signaling to the witness by shaking and nodding her head from side to side or up and down to the answer that she wants given. That's a nonverbal communication that the record can't show.
>
> My client had tapped me … several times because this was going on last week when there was no jury. I know Your Honor wouldn't be persuaded by that, but now we [have] a jury here, and they may be, and I'm moving for a mistrial. I ask this case be dismissed for prosecutorial misconduct ….
>
> THE COURT: [Prosecutor]?
>
> [PROSECUTOR]: Well, Your Honor, if I was shaking my head, it's because of [the defense attorney's] convoluted questions. I didn't realize I was. I apologize.

It certainly was not intended to signal to the officer anything.

Perhaps the Court can ask the officer.

THE COURT: I will.

Officer, had [the prosecutor] been making any signals to you in terms of how to answer or respond to questions?

THE WITNESS: She hadn't been making any signals to me. I had noticed the shaking of the head, so forth, and generally that's been [contemporaneous] with me wondering what the question was per se….

THE COURT: Was she making … any movement of her head or in any way signaling you as to how you should respond to a question?

THE WITNESS: Not as I've noted, no.

THE COURT: All right. And had you at any time discussed with her prior to the trial any process or procedure whereby she would make any signal to you … to demonstrate how to answer a question?

THE WITNESS: No.

THE COURT: All right. Now, here's what I'm going to do. I'm going to deny the motion for the mistrial, but I will admonish [the prosecutor] … you've tried cases in front of me many times in the past, and you do have a … very bad habit of nodding your head, making faces, and doing things along those lines. And I can see very clearly how Miss Carrothers could interpret that to be making signals to the witness.

I have not noticed that. I noted that I have seen, as [defense counsel] asked long questions, and he's acknowledged he's asked long and sometimes convoluted questions I think, and he's rephrased them, that you have shaken your head; or whether you made faces today, you've done it in the past … I think because Miss Carrothers hasn't necessarily seen you other than the last few hearings in her case, she doesn't know that it's very common and inappropriate for you to do that … and I do not blame her in any way for coming to some conclusion or surmising that that is what is happening.

> So I will strongly admonish you to refrain from that behavior…. I'm going to ask my clerk to watch and make note—I'll stop the proceedings and I will sanction you, because … it causes problems, and it could cause a mistrial in this case.

¶29 The touchstone of due process in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor. ***Smith v. Phillips***, 455 U.S. 209, 219 (1982). In determining whether mistrial is appropriate, the trial court must conclude that the claimed error is sufficiently prejudicial such that mistrial is necessary to protect the rights of the parties. *See* ***Oseman v. State***, 32 Wis. 2d 523, 528-29, 145 N.W.2d 766 (1966). In exercising discretion on whether to grant a mistrial, the trial court is in a particularly good "on-the-spot" position to evaluate factors such as influence on a witness or impact on a jury. *See* ***Schultz v. Darlington Mut. Ins. Co.***, 181 Wis. 2d 646, 657, 511 N.W.2d 879 (1994) (citation omitted).

¶30 The trial court was clearly troubled by the nonverbal acts of the prosecutor, but made such inquiry as satisfied it that answers from the witness were not improperly influenced. Rather than a mistrial, the law prefers less drastic alternatives. *See* ***Bunch***, 191 Wis. 2d at 512. Here, the trial court chose to resolve the problem by admonishing the prosecutor and threatening sanctions if the behavior continued. We agree that this was a proportionate response to the problem and that the prosecutor's conduct was not sufficiently prejudicial to warrant a new trial. *See* ***id.*** at 506. Given the court's prompt resolution of the problem and our deference to the court's ability to ascertain the impact on the proceedings, we will not quibble with its decision to continue the trial.

Constitutionality of Wisconsin's implied consent statute

¶31 Carrothers contends that Wisconsin's implied consent law violates the Privileges and Immunities clause.[4] She presents an extended history of the development of constitutional law over the past two centuries. As best we can tell, Carrothers argues that WIS. STAT. § 343.305(2) is unconstitutional because it subjects citizens of a state other than Wisconsin to our implied consent law. The State's response brief captures the issue well when it states:

> Carrothers' challenge of the statute's constitutionality boils down to an assertion that the U.S. Supreme Court has voided a state law elsewhere on the grounds that it violated "the right of a citizen of one State to enter and leave another State" under the U.S. Constitution's privileges and immunities clause (***Saenz v. Roe***, 526 U.S. 489, 500 (1999)); therefore, the argument continues, this court can and should void [the implied consent law] because Carrothers believes citizens "should have the privilege and immunity to drive without pledging … their blood to the state." (Footnote omitted.)

¶32 The argument is puzzling in light of the fact that Carrothers is, by all indications in the record, a Wisconsin resident and was driving with a suspended Wisconsin driver's license. In return for the privilege of driving on Wisconsin roads, she implicitly consented to such blood tests; moreover our supreme court has recently confirmed that such blood tests are constitutional. *See* ***State v. Krajewski***, 2002 WI 97, ¶3, 255 Wis. 2d 98, 648 N.W.2d 385 (warrantless,

[4] "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." U.S. CONST. art. IV, §2.

nonconsensual blood draw is constitutional); ***State v. Faust***, 2004 WI 99, ¶3, 274 Wis. 2d 183, 682 N.W.2d 371. Carrothers, for all of her constitutional rhetoric, has failed to explain how the Privileges and Immunities clause protects her from an otherwise reasonable and constitutional blood draw under WIS. STAT. § 343.305(2). She seeks "the development of state and federal constitutional law" but fails to present a specific claim or clearly articulated goal based on the record facts. Thus, the issue does not merit further consideration on appeal. *See* ***State v. Pettit***, 171 Wis. 2d 627, 647, 492 N.W.2d 633 (Ct. App. 1992) (court of appeals may decline to review an issue inadequately developed). If it is an overhaul of the implied consent law on broad constitutional and theoretical grounds she seeks, Carrothers must take her arguments to the legislature.

CONCLUSION

¶33 We conclude that the investigative stop, which was for a registration violation, properly expanded in scope when Reinders observed factors associated with drunk driving. We further conclude that the trial court did not erroneously exercise its discretion when making evidentiary rulings during the trial. The court also responded to allegations of prosecutorial misconduct promptly and avoided the need for a mistrial by assuring that no improper influence on a witness occurred. We reject Carrothers' constitutional challenge as undeveloped, overbroad and more appropriately directed to the legislature. Having encountered no error, we affirm the judgment of conviction.

By the Court.—Judgment affirmed.

This opinion will not be published. See WIS. STAT. RULE 809. 23(1)(b)4.