

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 30, 2015

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

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

Appeal No. 2014AP2601-CR

Cir. Ct. No. 2013CT398

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RICHARD S. FOLEY,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Dodge County:
STEVEN G. BAUER, Judge. *Affirmed.*

¶1 HIGGINBOTHAM, J.¹ This appeal requires us to determine whether a police officer's decision to place an individual suspected of operating

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c) (2013-14). All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

while intoxicated (OWI) in the back of her squad car while interviewing another person suspected of having committed the same offense amounted to an unlawful arrest. Richard S. Foley appeals his OWI, third offense, conviction and an order denying his motion to suppress evidence of his arrest. Foley argues that his detention in the back of a locked squad car for thirty-two minutes was both an unreasonable investigative detention and an unlawful arrest. We disagree, and conclude that Foley's detention was reasonable and did not amount to an unlawful arrest. Accordingly, we affirm the circuit court.

BACKGROUND

¶2 The facts underlying this appeal are not disputed. At approximately 10:20 p.m., police officer Amy Yahnke observed two motorcycles accelerate past her squad car. She testified that she thought the exhaust seemed loud. She also testified that the motorcyclists appeared to be traveling around forty miles per hour in a twenty-five mile per hour zone. Officer Yahnke activated her squad lights and began to follow the motorcycles. She then noticed that one of the motorcycles had a nonfunctional taillight.

¶3 Officer Yahnke testified that the motorcyclists did not immediately pull over. She then activated her siren, but the motorcyclists continued driving. The two drivers eventually pulled into Foley's driveway. Officer Yahnke exited the squad car and identified herself and asked both individuals to show their hands. One of the drivers, Gary Thompson, cooperated, and raised his hands in the air. The other driver, Foley, kept his hands in his pockets. The officer asked Foley to take his hands out of his pockets three times before Foley removed them briefly and then placed them back into his pockets.

¶4 Officer Yahnke testified that Foley's eyes were red and bloodshot. She also testified that she could smell the odor of intoxicants coming from him and that his speech was slurred. The officer asked Foley whether he had been drinking, and he said no. The officer then asked what bars the two individuals had been to, to which Foley responded that they had not been at any bars. Thompson told the officer that he and Foley had been at bars "uptown." While Officer Yahnke continued to speak with Thompson, Foley started walking toward his house. The officer told Foley that he could not go into his house until the traffic stop was complete. Foley returned and another officer, Officer Jeremy Johnson, arrived.²

¶5 Officer Yahnke testified that she "pat searched" Foley and placed him in the back of a squad car so that the officers could continue questioning Thompson. Officer Yahnke also testified that she told Foley that she was going to detain him in the back of her car so that she could continue investigating Thompson and that she would "come back and investigate his part."

¶6 Following field sobriety testing, the officers arrested Thompson for OWI and Officer Yahnke turned her attention back to Foley. The camera on her squad car indicated that Foley had spent thirty-two minutes and fifty-two seconds in the back of the squad car. Officer Yahnke testified that she then transported Foley to the police department, which is located just thirty seconds away. She believed that the police department would be a safer place to proceed with Foley's

² At some point, a third officer arrived, but the record does not indicate when this officer arrived or what role this officer played, if any.

investigation. At the police station, Foley refused to participate in the field sobriety tests and Officer Yahnke arrested him.

¶7 The State charged Foley with OWI, third offense, and operating with a prohibited alcohol concentration, third offense. Foley filed a motion with the circuit court to suppress all evidence obtained by the officers on the grounds that Officer Yahnke did not have the “requisite reasonable suspicion to stop, detain, or restrict the defendants [sic] freedom of movement and/or did not possess the requisite probable cause to arrest.”

¶8 The circuit court denied the motion. It found that Foley’s detention in the squad car was supported by reasonable suspicion and that his arrest at the police station was supported by probable cause. The court concluded that Foley and Thompson’s contradictory statements about whether they had been drinking, combined with the officer’s other observations of intoxication (smell of alcohol, bloodshot eyes, slurred speech), gave the officer reasonable suspicion that Foley had been driving his motorcycle while intoxicated. The court concluded that the officer had probable cause to arrest after she transported Foley to the police station because he refused the field sobriety tests.

¶9 In July 2014, Foley entered a no-contest plea to OWI, third offense. The circuit court entered a judgment of conviction and Foley filed a notice of intent to pursue postconviction relief. Foley appeals the judgment and the court’s order denying his motion for suppression of evidence.

DISCUSSION

¶10 This case requires us to determine whether Foley’s detention in the back of a squad car for approximately thirty-two minutes amounted to an unlawful

arrest. Specifically, at issue is whether his detention for investigatory purposes was proper and whether a reasonable person in Foley's position would conclude that he or she was under arrest.

1. Standard of Review

¶11 Whether police conduct violates the constitution's protection against unlawful search and seizure is a question of constitutional fact. *State v. Griffith*, 2000 WI 72, ¶23, 236 Wis. 2d 48, 613 N.W.2d 72. In reviewing a motion to suppress evidence, the circuit court first makes findings of evidentiary or historical fact and then applies constitutional principals to those facts. *State v. Vorburger*, 2002 WI 105, ¶32, 255 Wis. 2d 537, 648 N.W.2d 829. "We review a circuit court's denial of a motion to suppress in two steps. We examine the circuit court's findings of historical fact under the clearly erroneous standard, and then review de novo the application of constitutional principles to those facts." *Id.*

2. The Circuit Court's Findings of Fact and Conclusions

¶12 The circuit court concluded that officers had reasonable suspicion that Foley was operating while intoxicated. It also found that officers properly detained Foley while they conducted an investigation. The court concluded that Foley was lawfully arrested after he declined to complete field sobriety testing. The court based its conclusions on the following findings of fact. It found that Foley was held in the back of the quad car for thirty-two minutes. It also found that Officer Yahnke observed Foley as having bloodshot eyes, smelling of intoxicants, and slurring his speech. In addition, it found that Foley and Thompson gave conflicting answers when asked if they had been drinking that night. It also found that Foley was uncooperative with officers and had tried to walk into his home during the traffic stop.

¶13 Foley does not contest any of the circuit court’s factual findings. In addition, we are satisfied that the court’s factual findings are supported by the record. Specifically, the circuit court’s factual findings are supported by Officer Yahnke’s testimony at the motion hearing. Accordingly, the circuit court’s factual findings are not clearly erroneous.

3. Foley’s Detention

A. Whether Foley’s Detention for Investigative Purposes was Unreasonable

¶14 Foley first argues that his detention was unreasonable because the traffic stop was not temporary and lasted significantly longer than necessary. The State asserts that the officers’ actions were reasonable considering that Foley was uncooperative and that officers were dealing with two individuals suspected of OWIs.

¶15 The Fourth Amendment to the United States Constitution provides protection against unreasonable seizures:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV. The protections of the Fourth Amendment are implicated during traffic stops. *State v. Brown*, 2014 WI 69, ¶19, 355 Wis. 2d 668, 850 N.W.2d 66 (“Traffic stops are considered seizures and thus must be reasonable to pass constitutional muster.”). When there is reasonable suspicion to believe a person is violating a law or a traffic ordinance, a police officer may, consistent with the Fourth Amendment’s protection against unreasonable seizures, detain the

person for an investigative stop. *See State v. Colstad*, 2003 WI App 25, ¶8, 260 Wis. 2d 406, 659 N.W.2d 394.

¶16 In *State v. Wilkens*, 159 Wis. 2d 618, 465 N.W.2d 206 (Ct. App. 1990), we set forth the test to determine whether an investigatory stop is reasonable:

For the stop of a person to pass constitutional muster as investigatory, the detention must be temporary and last no longer than is necessary to effect the purpose of the stop. Similarly, the investigative methods employed should be the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time. A hard and fast time limit rule has been rejected. In assessing a detention for purposes of determining whether it was too long in duration, a court must consider whether the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly, during which time it is necessary to detain the suspect. In making this assessment, courts should not indulge in unrealistic second-guessing. In assessing a detention's validity, courts must consider the totality of the circumstances—the whole picture, because the concept of reasonable suspicion is not readily, or even usefully, reduced to a neat set of legal rules.

Id. at 625-26 (footnotes and quotation marks omitted).

¶17 Officer Yahnke detained Foley in the back of her squad car for thirty-two minutes. However, the amount of time a person is detained during an investigatory stop is not indicative of unreasonableness by itself. Instead we must look at the totality of the circumstances to determine whether Foley's detention was unreasonable. *See id.*

¶18 Here, Officer Yahnke stopped two motorcyclists, Foley and Thompson, and immediately suspected that both were driving under the influence. The stop occurred in Foley's driveway, which is located in close proximity to his

home. Foley was not cooperative during the stop—he did not follow the officer’s request to show his hands, his answers to questions conflicted with the answers given by Thompson, and at one point during the stop he started walking toward his home. From the record, it appears that shortly after Officer Yahnke made the stop and started questioning Foley and Thompson that another officer, Officer Johnson, arrived on the scene. The officers decided to conduct field sobriety testing of Thompson first. To do this they first secured Foley in the back of Officer Yahnke’s squad car. Foley was not handcuffed. As soon as the officers finished Thompson’s field sobriety testing and arrested him, Officer Yahnke returned to her squad car and drove Foley approximately one block to the police station to complete her investigation of Foley.

¶19 The means of investigation here were reasonable given Foley’s uncooperativeness and the fact that officers were investigating two individuals suspected of driving under the influence. While Officer Yahnke could have transported Foley to the police station while Officer Johnson conducted sobriety testing of Thompson, it is not our job to engage in unreasonable second guessing of the officers. Instead, we are satisfied that it was reasonable for the officers to first conduct sobriety testing of Thompson, the cooperative suspect, and then turn their attention to Foley who had been uncooperative. In addition, due to the close proximity of the stop to Foley’s home and the fact that he had starting walking toward his home during the stop, it was not unreasonable for the officers to secure Foley as they focused their attention on Thompson. In addition, there is no indication that the officers failed to diligently pursue the investigation or that they employed anything but the least intrusive investigative methods. Therefore, under the totality of the circumstances, we are satisfied that Foley’s detention for investigative purposes was reasonable.

B. Whether Foley's Detention Amounted to an Unlawful Arrest

¶20 Foley's second argument is that his detention in the back of Officer Yahnke's squad car amounted to an unlawful arrest. He argues that a reasonable person in his position would conclude he or she was under arrest at the time Officer Yahnke detained him in her squad car and that the officer did not have the required probable cause to arrest him at that point. In response, the State asserts that when Officer Yahnke detained Foley in her squad car she told him that she was detaining him to investigate Thompson and that she would return to investigate him. The State's contention is that a reasonable person would not conclude that he or she was under arrest considering the information Officer Yahnke communicated to Foley. We agree.

¶21 In Wisconsin, the test for whether a person is arrested is whether a reasonable person in the defendant's position would believe he or she was in custody given the degree of restraint under the circumstances. *State v. Swanson*, 164 Wis. 2d 437, 446-47, 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. In *Swanson*, the Wisconsin Supreme Court stated,

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. The circumstances of the situation including what has been communicated by the police officers, either by their words or actions, shall be controlling under the objective test. The officers' unarticulated plan is irrelevant in determining the question of custody.

Swanson, 164 Wis. 2d at 446-47 (citations omitted).

¶22 Here, Foley had not been cooperative with officers during the traffic stop. At one point, Officer Yahnke told him he could not go into his home. She later detained him in the back of her squad car while both she and Officer Johnson turned their attention to Thompson. Foley was secured in the squad car, but officers did not place him in handcuffs. Most importantly, Officer Yahnke informed Foley that the officers would first investigate Thompson and that she would return to investigate him. After thirty-two minutes and at the conclusion of Thompson's field sobriety testing, Officer Yahnke returned to her car and transported Foley approximately one block to the police station to conduct field sobriety testing. She estimated that the police station was thirty seconds from the location of the traffic stop. Considering these circumstances and, in particular, the fact that Officer Yahnke told Foley that she would return to investigate him and that a reasonable delay then occurred to investigate Thompson, we are satisfied that a reasonable person in Foley's position would not conclude that he or she was under arrest.³

¶23 Accordingly, we affirm the circuit court's order denying Foley's motion to suppress evidence and his judgment of conviction.

By the Court.—Judgment affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)4.

³ We need not address Foley's argument that Officer Yahnke did not have probable cause to arrest him at the time she secured him in her squad car because we are satisfied that a reasonable person in Foley's position would not conclude that he or she was under arrest at that time.

