COURT OF APPEALS
DECISION
DATED AND RELEASED

February 1, 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. 95-1589

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JOSEPH R. PRZYBILLA,

Defendant-Appellant.

APPEAL from an order of the circuit court for Marquette County: DONN H. DAHLKE, Judge. *Affirmed*.

DYKMAN, J. This is a single-judge appeal decided pursuant to § 752.31(2)(c), STATS. Joseph R. Przybilla appeals from an order revoking his operating privileges. The issue is whether a police chief had probable cause to arrest Przybilla for operating a motor vehicle while intoxicated (OMVWI). Przybilla argues that the chief did not, and that the fruits of the chief's search should have been suppressed. We conclude that the chief's actions were first permitted under the "community caretaker" exception to the Fourth Amendment's warrant requirement and that he eventually reasonably

suspected and then had probable cause to believe that Przybilla was guilty of OMVWI. We, therefore, affirm.

BACKGROUND

On March 7, 1995, the City of Montello Police Chief received information that a man was slumped over the wheel of a vehicle in a parking lot. He went to the lot and found a man in a station wagon with his feet underneath the steering wheel and his upper body slumped over to the passenger side of the car. He saw no open windows in the car, and noticed that the engine was running at a fast idle. He was concerned about carbon monoxide poisoning, and opened the driver's side door. He immediately noticed a very strong odor of intoxicants. He removed the man's foot from the gas pedal, reached over and put his hand on the man's neck to make sure that he was still alive. He felt a pulse and noted that the man's body was warm. He began to try to awaken him.

The chief yelled at the man, and he finally opened his eyes. The chief asked him if he needed medical attention, and the man answered with a slurred, "no." The chief then went back to his squad car and notified the dispatcher that there was no medical emergency. Upon returning to the car, he noticed that the man had shut off the car's ignition and was trying to put the keys into his pocket. He then slumped back over in the seat.

After the chief awoke the man again, he asked him for identification. The man did not produce identification; instead he demanded a lawyer. The chief asked the man if he had been drinking. The man responded that he wanted a lawyer. The chief asked the man to get out of the car and he received the same response.

The chief testified:

Finally, I did escort the gentleman out of the vehicle.

....

> I had him up against the vehicle, and he kind of leaned up, using his hands on the vehicle, and again I asked him to identify himself,—he refused,—all he stated to me, I was in big trouble, once he gets a hold of his lawyer. I requested him to do some field sobriety tests, again the response was, he wanted a lawyer.

The chief noticed that the man's balance was very poor and that he had to use the vehicle to "retain" himself. He again noticed the man's slurred speech when he asked for a lawyer, and he saw that the man's eyes were glazed over. The chief felt that from past experience, the man was very much under the influence of an intoxicant. He handcuffed the man, put him in his squad car, and took him to the Marquette County Sheriff's Department. There, the man identified himself as Joseph Przybilla and refused to take an intoxilyzer test. The chief charged Przybilla with OMVWI.

DISCUSSION

Przybilla raises three issues. In the first, he asserts: "The Constitution does not permit police officers to break into cars in order to wake people up." While that might be true in the abstract, as the facts we have recited show, that is not what happened. The chief testified that he opened Przybilla's car door to see if he was the victim of carbon monoxide poisoning. This is what has been described as the "community caretaker" exception to the Fourth Amendment to the United States Constitution which addresses police activities separate from the detection, investigation or acquisition of evidence relating to a criminal violation. ***State v. Anderson***, 142 Wis.2d 162, 166, 417 N.W.2d 411, 413 (Ct. App. 1987). In that case, we said:

> The ultimate standard under the fourth amendment is the reasonableness of the search or seizure in light of the facts and circumstances of the case. In a community caretaker case, this requires a balancing of the public need and interest furthered by the police conduct against the degree of and nature of the intrusion upon the privacy of the citizen. This

> test requires an objective analysis of the circumstances confronting the police officer, including the nature and reliability of his information, with a view toward determining whether the police conduct was reasonable and justified.... Overriding this entire process is the fundamental consideration that any warrantless intrusion must be as limited as is reasonably possible, consistent with the purpose justifying it in the first instance.

Id. at 168-69, 417 N.W.2d at 413-14 (citations and footnote omitted).

The community caretaker exception to the Fourth Amendment applies to Przybilla's case. The chief testified that the reason he opened the car door was to see if Przybilla was a victim of carbon monoxide poisoning because the engine was running at a fast idle with closed windows. This was a limited search, and a reasonable one. Indeed, had the chief decided not to check Przybilla, his inaction would have been unreasonable. At this point, the search was constitutionally permissible because it was consistent with the community caretaker exception to the Fourth Amendment.

Once the chief opened the car door, he obtained further information. He testified: "Well the first thing that hit me was a very strong odor of intoxicants ...." This is, of course, evidence that Przybilla might be intoxicated. Przybilla notes that in ***State v. Seibel***, 163 Wis.2d 164, 180-83, 471 N.W.2d 226, 233-35, *cert. denied*, 502 U.S. 986 (1991), the court determined that the crossing of the center line of a highway for no justifiable reason, the possible smell of intoxicants on the driver's breath, companions who smelled of intoxicants, and the driver's belligerent behavior provided the police with reason to suspect, but not probable cause, that the driver was operating a motor vehicle while intoxicated. Przybilla also asserts that in ***State v. Swanson***, 164 Wis.2d 437, 453 n.6, 475 N.W.2d 148, 155 (1991), the court decided that driving on a sidewalk and nearly striking a pedestrian, an odor of intoxicants, and the time of the accident constituted reasonable suspicion, but not probable cause, that a driver was guilty of OMVWI. We agree that the facts in ***Seibel*** and ***Swanson*** are not sufficient to permit a valid arrest for OMVWI. But those were not the facts confronting the chief during his investigation and arrest of Przybilla.

The chief noticed a very strong odor of intoxicants, not the possible odor of intoxicants in ***Seibel*** or the odor of intoxicants in ***Swanson.*** Next, after inquiring whether Przybilla needed medical attention, the chief noted that Przybilla slurred his speech, another indication of intoxication. As the ***Seibel*** and ***Swanson*** courts noted, a combination of factors gave the officers reason to suspect that a driver was guilty of OMVWI. We conclude that Przybilla's body position, the very strong odor of intoxicants and Przybilla's slurred speech gave the chief reason to suspect that Przybilla was guilty of OMVWI.

Once police reasonably suspect that a person has, is, or is about to commit a crime, they may stop that person. This principle originated with ***Terry v. Ohio***, 392 U.S. 1 (1968). The legislature codified ***Terry*** in § 968.24, STATS., which provides:

> 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.

In ***State v. Richardson***, 156 Wis.2d 128, 143-44, 456 N.W.2d 830, 836 (1990), a valid ***Terry*** stop permitted the police to order a man out of a vehicle and pat him down for weapons. And that, in part, is what happened to Przybilla. After he declined the chief's request to get out of his car, the chief removed him. The chief could have patted Przybilla down for weapons, though he did not testify that he did so. Instead, the chief noted that Przybilla's eyes were glazed over, that his speech continued to be slurred, he exhibited poor balance and he refused to take field sobriety tests. From having made numerous OMVWI arrests, the officer concluded that Przybilla was under the influence of an intoxicant.

Having conducted a community caretaker investigation which led to a ***Terry*** stop and investigation, the only Fourth Amendment question which remains is whether the chief had probable cause to arrest Przybilla when he handcuffed him and led him to his squad car. We conclude that a very strong odor of intoxicants, slurred speech, glazed eyes, a refusal to take field sobriety tests[1] and poor balance constitute enough evidence to give the chief probable cause to believe that Przybilla was guilty of OMVWI and to arrest him.

Przybilla's second argument asserts: "A reasonable person would not think a person sleeping in a car constituted an emergency." This an attack on what Przybilla believes was the trial court's rationale for rejecting his assertions. But we review constitutional questions *de novo*. ***State v. Woods***, 117 Wis.2d 701, 715, 345 N.W.2d 457, 465 (1984). We have already concluded that the chief's actions did not violate the Fourth Amendment and, therefore, we need not pursue this issue further.

Przybilla's third issue reads: "The arrest of the defendant, which was occasioned by the officer forcibly pulling the defendant out of the vehicle and throwing him up against the car, was not based upon probable cause." We will address this issue shortly, but we first address counsel's characterization of the facts.

Supreme Court Rule 20:3.3 requires an attorney to exercise candor toward a tribunal. We contrast counsel's characterization of the facts with the testimony of the only witness, the chief, who testified on direct examination as to the circumstances surrounding Przybilla's removal from his vehicle:

> A. I continued to ask [Przybilla] to identify himself—he continued with the response he wanted a lawyer. I asked him to get out of the vehicle—he continued with the response he wanted a lawyer—asked him if he had been drinking,—he continued with the response he wanted a lawyer. Again asked him to get out of the car,—at that point I probably

[1] In ***State v. Babbitt***, 188 Wis.2d 349, 359-60, 525 N.W.2d 102, 105 (Ct. App. 1994), we concluded that the refusal to take field sobriety tests was evidence of consciousness of guilt.

> explained to him there were two ways of doing things, it was his way or my way. Finally I did escort the gentleman out of the vehicle.
>
> Q. And after you got him out of the vehicle, what happened?
>
> A. I had him up against the vehicle, and he kind of leaned up, using his hands on the vehicle, and again I asked him to identify himself,—he refused,—all he stated to me, I was in big trouble, once he gets a hold of his lawyer. I requested him to do some field sobriety tests, again the response was, he wanted a lawyer.

On cross-examination, the chief testified that he "physically removed" Przybilla from his car, and leaned him up against it. And on redirect, the chief testified to the following:

> Q. Chief, when you indicated that you—after you got the defendant out of his vehicle, you leaned him against the car?
>
> A. For his own safety.
>
> Q. Why for his own safety?
>
> A. Because I felt the individual was under the influence.

Nowhere is there testimony that the chief threw Przybilla up against a car.

The difference between the statement in Przybilla's brief and the record is significant. It goes beyond the comment to SCR 20:3.3 which provides: "The advocate's task is to present the client's case with persuasive force." We anticipate that in the future, counsel will more carefully compare the record with her brief.

We return to the merits of Przybilla's third issue. This is his first issue again, cast in a somewhat different light. Przybilla argues that the chief did not have probable cause to arrest him because all the chief observed was an odor of intoxicants, glazed eyes, and slurred speech. He asserts that ***Seibel*** and ***Swanson*** were cases with substantially more egregious facts than those confronting the chief in this case. Przybilla's argument is based upon his contention that he was arrested when he was removed from his vehicle. He asserts that because force was used on him when he was physically removed from his car and held against it, a reasonable person would have considered himself or herself to be in custody.

In ***Swanson***, 164 Wis.2d 446, 475 N.W.2d 152, the court adopted an objective test to determine when an arrest occurs. That test is whether a reasonable person in Przybilla's position would have considered himself or herself to be in custody given the degree of restraint under the circumstances. ***Id.*** at 446-47, 475 N.W.2d at 152.

Swanson is instructive because in that case, the defendant was detained as a result of a routine traffic stop and was asked to do field sobriety tests. He asserted that an arrest occurred when he was being patted down after he exited his car but before he performed field sobriety tests.[2] ***Id.*** at 447-48, 475 N.W.2d at 152-53.

Swanson is also instructive because the court's reasoning included a discussion of whether the use of force transforms a ***Terry*** stop into an arrest. The court said:

> In far more intrusive circumstances than this, courts in a number of jurisdictions have found certain police action to be consistent with a ***Terry*** investigative detention. For example, this court found that an investigative stop does not become an arrest merely because the police draw their weapons. ***Jones v.***

[2] The field sobriety tests were never attempted because during the defendant's pat down, the officers discovered a controlled substance.

> ***State***, 70 Wis.2d 62, 70, 233 N.W.2d 441 (1975). Furthermore, many jurisdictions have recognized that the use of handcuffs does not necessarily transform an investigative stop into an arrest. *See* ***United States v. Glenna***, 878 F.2d 967, 972 (7th Cir. 1989), and ***United States v. Taylor***, 716 F.2d 701, 709 (9th Cir. 1983). Additionally, the use of force does not necessarily transform an investigative stop into an arrest. [***United States v. Laing***], 889 F.2d 281, 285 (D.C. Cir. 1989), *cert. denied*, 110 S.Ct. 1306 (1990). With these cases in mind, we find it unreasonable to conclude that the request for a field sobriety test under these circumstances should necessarily transform the routine traffic stop into a formal arrest.

Swanson, 164 Wis.2d at 448-49, 475 N.W.2d at 153. *See also* ***State v. Washington***, 120 Wis.2d 654, 661-62, 358 N.W.2d 304, 307-08 (Ct. App. 1984) (four officers, drawn guns, an alleged blocking of a car and an intensive frisk did not rise to the level of an arrest), *aff'd*, 134 Wis.2d 108, 396 N.W.2d 156 (1986).

The court's conclusion in ***Swanson***, that a request to perform a field sobriety test is not an arrest, cannot itself govern the result here. The chief who arrested Przybilla testified that he "escorted" and "physically removed" Przybilla from the car. This is more intrusive then a request to take field sobriety tests. But, we are also persuaded by the cases holding that more intrusive circumstances than those presented in ***Swanson*** are consistent with a ***Terry*** stop. Those cases require the force to be unreasonable before a stop is transformed into an arrest. *See, e.g.,* ***Laing***, 889 F.2d at 285-86; ***Washington***, 120 Wis.2d at 662, 358 N.W.2d at 308. We conclude that the force exerted in this case, *i.e.*, the physical removal of Przybilla from his car and his being leaned up against it, was reasonable under the circumstances and did not transform the stop into an arrest.

And, we are persuaded by the reasoning the court used in ***Swanson*** to justify field sobriety tests under a ***Terry*** stop:

> If we were to hold otherwise, then the motorist that has been detained pursuant to a traffic stop and suspected of drunk driving would be considered "in custody" and entitled to all of the protections provided by ***Miranda***.[3] The ***Berkemer***[4] Court explained that, "the safeguards prescribed by ***Miranda*** become applicable as soon as a suspect's freedom of action is curtailed to a `degree associated with formal arrest.'" ***Berkemer***, 468 U.S. at 440 (quoting ***California v. Beheler***, 463 U.S. 1121, 1125 (1983)). Adopting the scenario posited by the State, police would then be forced to warn all detained motorists of their constitutional ***Miranda*** rights as they would be considered "in custody." This would produce the absurd result that motorists, such as Swanson, could refuse to perform a field sobriety test consistent with their rights against self-incrimination under the fifth amendment. Therefore, in line with the Supreme Court decision in ***Berkemer***, we hold that Swanson was not under arrest at the time of search because a reasonable person in Swanson's position would not believe that he was under arrest after merely being requested to perform a field sobriety test during a routine traffic stop.

Swanson, 164 Wis.2d at 449, 475 N.W.2d at 153 (footnotes added).

Were we to adopt Przybilla's argument, a result similar to the one rejected in ***Swanson*** would occur. An officer would be required to provide ***Miranda*** warnings to motorists the officer reasonably suspected of OMVWI because removing motorists from their cars would be an arrest. It would also permit the motorists to refuse to perform field sobriety tests consistent with their rights under the Fifth Amendment. ***Swanson***, 164 Wis.2d at 449, 475 N.W.2d at 153. This is the same "absurd result" the court refused to reach in ***Swanson***. We decline to reach it. We conclude that a reasonable person in

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

[4] ***Berkemer v. McCarty***, 468 U.S. 420 (1984).

Przybilla's position would not have considered himself or herself to be in custody until placed in the chief's car for transport to the sheriff's department. Thus, the observations the chief made after Przybilla was removed from the car could properly be considered for the purpose of determining whether probable cause existed to arrest him for OMVWI. And, as we concluded earlier, the facts, taken together, do constitute probable cause to arrest. Accordingly, we affirm.

By the Court.—Order affirmed.

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