COURT OF APPEALS
DECISION
DATED AND RELEASED

February 22, 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

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No. 95-1926-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

VERONICA L. REITER,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Dane County: MARK J. FARNUM, Judge. *Affirmed*.

SUNDBY, J. Defendant Veronica L. Reiter appeals from a judgment denying her motion to suppress "for use as evidence at trial all evidence obtained, directly or indirectly, as a consequence of the taking into custody of the defendant" on September 9, 1994, on the following grounds: (1) Madison police officer Aileen Seymour arrested Reiter without probable cause in violation of her right to be free from an unlawful search and seizure; (2) there is a direct causal connection between Reiter's arrest, statements which she made, observations of Officer Seymour of the defendant, and a chemical test administered to determine her blood alcohol content; and (3) the injuries

suffered by Reiter in a traffic accident which Officer Seymour was investigating rendered Officer Seymour's field sobriety tests after Reiter's arrest "unreliable" as *indicia* of intoxication. We[1] affirm the order.

It is undisputed that Officer Seymour placed Reiter in her squad car so that she could investigate Reiter's possible intoxication after a back-up officer arrived. She testified that at this point, she "took [the defendant] into custody." Officer Seymour testified that she placed Reiter in her squad car so that "she would not be walking into traffic."

When the back-up officer arrived, Officer Seymour took Reiter in the squad car to an area approximately 200 yards from the scene of the accident to perform field sobriety tests. Seymour did not ask Reiter whether she would agree to be so transported. Officer Seymour then performed standard field sobriety tests and concluded that Reiter failed the tests. After these tests, Officer Seymour told Reiter that she was under arrest and put her back into the squad car.

The trial court denied Reiter's motion, relying principally on ***State v. Swanson***, 164 Wis.2d 437, 475 N.W.2d 148 (1991). In ***Swanson***, the police officer detected an odor of intoxicants on Swanson's breath and directed him to the squad car for field sobriety tests. Before placing Swanson in the squad car, the officer performed a pat-down search. Departmental policy required the officer to perform a pat-down search prior to placing anyone in the squad car. ***Id***. at 442, 475 N.W.2d at 150. Officer Seymour testified that she routinely patted down any person she intended to place in the squad car.

However, the officers in ***Swanson*** did not conduct field sobriety tests because they were dispatched to provide back-up assistance at a domestic disturbance. The officers therefore arrested Swanson without conducting field sobriety tests, handcuffed him and placed him in the squad car, took him to the place where the domestic disturbance had occurred where Swanson escaped when the officers left him alone. ***Id***. at 442-43, 475 N.W.2d at 150-51. Thus,

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[1] This appeal is decided by one judge pursuant to § 752.31(2)(c), STATS. "We" and "our" refer to the court.

many of the facts of ***Swanson*** are present in this case. Presumably, therefore, ***Swanson*** is at least persuasive on the issues Reiter raises.

The ***Swanson*** court concluded: "Viewed objectively, a reasonable person in Swanson's position would not believe that the degree of restraint exercised to perform a field sobriety test during a routine traffic stop was similar to that of formal arrest." ***Id***. at 444, 475 N.W.2d at 151. The court concluded that the "purpose of the search here was a pat down frisk for weapons before the officers placed Swanson in the squad car to perform a field sobriety test." ***Id***. at 454, 475 N.W.2d at 155. The court concluded, however, that the officer's search of Swanson exceeded its permissible scope because he had no reason to believe that Swanson's pockets contained an object that could be used as a weapon. ***Id***. at 454, 475 N.W.2d at 155-56. The court affirmed the suppression of marijuana found in one of Swanson's pockets.

While the court rejected the intrusive search made of Swanson because the officer lacked probable cause to arrest, it did not find that the pat-down search before placing a person being investigated into the squad car was unreasonable. The court abrogated the former subjective test to determine when a person was under arrest and, for "consistency and practical reasons," adopted an objective test which assesses the totality of the circumstances to determine the moment of arrest for Fourth Amendment purposes. ***Id***. at 446, 475 N.W.2d at 152. The court concluded that in the circumstances then present, a reasonable person in Swanson's situation would not have considered himself to be under arrest. ***Id***. at 448, 475 N.W.2d at 153.

The court approved the statement of the United States Supreme Court in ***Berkemer v. McCarty***, 468 U.S. 420, 440 (1984), that persons temporarily detained pursuant to a routine traffic stop are not "in custody." 164 Wis.2d at 447, 475 N.W.2d at 152. The United States Supreme Court explained that the usual traffic stop is more analogous to a ***Terry***[2] stop than a formal arrest; it is typically brief in duration and public in nature. ***Id***. Here, applying an objective test to the totality of the circumstances, we conclude that Officer Seymour could have had a reasonable suspicion that further investigation of Reiter's condition was justified. Reiter had just rear-ended another vehicle and

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

Officer Seymour noted a moderate odor of alcohol on Reiter's breath and rapid speech and glassy eyes.

Officer Seymour's first priority was to investigate the accident and determine the condition of the passengers in the vehicle which Reiter had rear-ended. Reiter herself expressed to Officer Seymour her concern that she may have injured someone in the other vehicle. Additionally, the accident happened at a busy night-time intersection and the weather conditions were dark and rainy. The trial court found: "[T]he detaining of Ms. Reiter ... in the back of a police vehicle, was done for her own safety" and to permit Officer Seymour to investigate. The trial court also observed that Reiter was "w[a]ndering in an unsafe manner in a very ... busy area of the City." These findings are not clearly erroneous.

Prior to ***Swanson***, a possible arrestee in Reiter's situation may well have concluded that she was under arrest. Certainly, Reiter's freedom to leave was restricted; the arresting officer intended to restrain her; and the potential arrestee reasonably believed or understood that she was in custody. *See* ***Swanson***, 164 Wis.2d at 445-46, 475 N.W.2d at 152. However, under ***Swanson's*** objective test, the totality of the circumstances leads to the conclusion that Reiter was detained solely for investigatory purposes. Thus, as in ***Swanson***, the situation presented by this appeal "is characterized as a routine traffic stop and detention." ***Id***. at 448, 475 N.W.2d at 153.

We consider it significant that ***Swanson*** was the unanimous decision of both the court of appeals and the supreme court. Undoubtedly, the members of our court and the supreme court were influenced by the fact that a person who drives a car onto a sidewalk, narrowly missing a pedestrian, cannot complain if the police take reasonable steps to investigate the cause of such unusual operation of a vehicle. *See* ***id***. at 442, 475 N.W.2d at 150. Likewise, an operator of a vehicle which rear-ends another vehicle cannot complain that it was unreasonable for the police to investigate the cause of such conduct.

Before ending this opinion, we must note that a routine pat-down of a potential arrestee before a police officer places the person in a squad car is imminently reasonable. It is a surprising suggestion that an officer conducting an investigation which requires placing a person in the officer's squad car may

not do a ***Terry*** pat-down to protect the officer from the possibility that the potential arrestee is armed. Reiter's attack on the search in this case is not based on the reasonableness of the officer's pat-down policy but on the lack of "a scintilla of evidence to justify a belief by the officer that [Reiter] was armed and dangerous." The cases Reiter relies on did not involve situations where it was necessary to place the person being investigated in a position where that person could harm the officer *if* he or she were armed. It is true that in the investigatory case, the justification for the pat-down search is created by the officer and not by the potential arrestee. However, such a search does not require a reasonable suspicion that the potential arrestee is armed, but only that the person is being placed in a situation in which the person could present an extreme danger to the safety of the officer if the search were not conducted. We conclude that the Fourth Amendment's requirement of reasonableness is satisfied by such a search.

Finally, Reiter attacks the reasonableness of the sobriety tests because she was injured and bleeding. However, Officer Seymour asked Reiter if she was suffering from any condition which would prevent her from performing the field sobriety tests and Reiter responded "No," that she was fine, but was worried about other people. Reiter could have refused to perform the tests and relied on her injuries to justify her refusal. However, she elected to perform the tests required by Officer Seymour. We conclude that, under the circumstances, Officer Seymour acted reasonably in administering the field sobriety tests to Reiter.

By the Court.--Judgment affirmed.

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