COURT OF APPEALS
DECISION
DATED AND RELEASED

November 14, 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. 96-2006

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

GLENN R. REETZ,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Marquette County: RICHARD O. WRIGHT, Judge. *Affirmed*.

EICH, C.J.[1] Glenn R. Reetz appeals from a judgment finding him guilty of operating a motor vehicle while intoxicated.[2] After being involved in an accident, Reetz walked home and was later found there by police, who eventually arrested and charged him.

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[1] This appeal is decided by one judge pursuant to § 752.31(2)(c), STATS.

[2] Judge Donn Dahlke denied Reetz's suppression motion, and Judge Richard O. Wright signed the order of judgment, which was stayed pending this appeal.

Reetz's appeal is confined to the trial court's denial of his motion to suppress all evidence relating to his arrest, which he claimed was illegal.[3] He argued, in essence, that the officers had unlawfully entered the home to effectuate his arrest.

The trial court ruled that the police had Reetz's wife's consent to enter the home and that, in any event, no arrest occurred at that time. Reetz appeals.

Two police officers testified at the suppression hearing. The first, Marquette County Deputy Sheriff Jeff Tomlin, stated that he found Reetz's car at the scene of a one-car accident and that emergency personnel at the scene said they had seen Reetz walk away. According to Tomlin, he and another deputy, Gary Skolarz, went to Reetz's home—which was about two miles from the accident scene—and explained the situation to Reetz's wife, who "offered to let us in and to search for him." After an unsuccessful search of the house, the officers returned to the accident scene. Feeling that Reetz was somewhere in the area, Tomlin returned to the Reetz home, arriving there only about ten minutes after he and Skolarz had left. Walking around the house, Tomlin saw Reetz inside and radioed Skolarz, who arrived within minutes. Without knocking or otherwise making their presence known, the two men walked into the house through the unlocked front door and entered the kitchen where Reetz was standing with his wife. Reetz, wet and muddy from the rain, was drinking from a bottle of schnapps, which Skolarz asked him to put down. Tomlin told Reetz he was "needed" at the accident scene and that he and Skolarz would like to "escort" him back in their squad car. Reetz agreed and, after changing his clothes, left with the officers.

[3] His motion to the trial court, entitled "Motion to Suppress Unlawful Arrest," sought "an Order dismissing this action on the grounds the Court lacks jurisdiction because the defendant has been brought before the Court as a result of an illegal arrest." At the hearing on his motion, he asked the court to grant his "motion to suppress based on unlawful arrest ...," and he renews the request "[t]hat [the] entry and the resulting arrest of the defendant was in violation of his fourth amendment protections and must be suppressed."

Both officers stated that they did not inform Reetz he was under arrest or give him any ***Miranda*** warnings while at the house—although both stated that he was being "detained."

Reetz testified that he was standing in his kitchen when Skolarz suddenly appeared there and told him in a "real loud" voice to put down the bottle he was drinking from. He said that both Tomlin and Skolarz told him they would handcuff him "if he gave them any trouble," and that one of the officers followed him "partway down the hallway" when he went to another room to change his clothes before accompanying them to the scene. He said they never gave him "any choice" as to whether he could or could not go with them. On cross-examination, Reetz acknowledged that neither deputy had ever said he was under arrest and that neither imposed any physical force whatsoever on him—or even touched him, other than to help him into the car.

Reetz's wife's testimony was much the same as Reetz's. She stated that the officers told him he would be cuffed if he gave them any trouble[4] and that they did not give him any "choices" other than to accompany them to the accident scene.

At the conclusion of the testimony, Reetz argued that his arrest was unlawful and should be suppressed because the officers, lacking a warrant, had illegally entered his house. The State contended that the officers' conduct at Reetz's house did not meet the legal definition of an "arrest," and that they were properly in the house pursuant to the consent obtained from Reetz's wife on their first visit to the premises.

The trial court agreed with the State, holding that Reetz's wife's earlier consent to the search of their home carried over to the officers' second visit and, further, that no arrest had occurred.[5] Then, based on the parties'

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[4] Deputy Tomlin testified that he did not recall making such a statement, and Skolarz was not questioned on the subject.

[5] The court's ruling, in its entirety, follows:

> [T]he Court does believe that [the officers] did have consent and they definitely had consent when they went in the first time.

stipulation as to the requisite facts, Reetz was found guilty of driving while intoxicated, reserving his suppression arguments for appeal.

Whether an arrest has occurred depends on "whether a reasonable person in the defendant's position would consider himself or herself to be `in custody,' given the degree of restraint under the circumstances." ***State v. Swanson***, 164 Wis.2d 437, 446-47, 475 N.W.2d 148, 152 (1991). "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 ... test. The officers' unarticulated plan is irrelevant in determining the question of custody." ***Id***. at 447, 475 N.W.2d at 152.

The defendant in ***Swanson***, after being involved in an automobile accident, was approached by police, who asked him for his license and, smelling intoxicants on his breath, "directed him ... to the squad car," for the purpose of administering field sobriety tests. ***Swanson***, 164 Wis.2d at 442, 475 N.W.2d at 150. Arriving at the squad car, the officers searched the defendant for weapons, finding a packet of controlled substances in his pocket. ***Id***. At that moment the officers received an emergency call. They immediately arrested the defendant, cuffed him, placed him in the car and left the scene. ***Id***. at 442-43, 475 N.W.2d at 150-51. The defendant moved to suppress the fruits of the search and the State, opposing the motion, argued that the search was proper because it was incident to the defendant's arrest. The supreme court rejected the State's argument, holding that no arrest had occurred because, under the

(..continued)

> I think the Court would think that would be continuous for certainly a short period of time. If I go visit somebody's house and they invite me in, and I get inside, sitting down and I say I forgot my cigarettes, and I go out to the car, and come back in, I don't necessarily knock and get readmitted again. I don't know what period of time this involved, but I do feel it would certainly cover the period of time in question here. They do have consent.
>
> I don't feel there was an arrest. The deputies allowed the defendant to go to his room without following him right in there. And as to the going to the scene, the wife's testimony, exactly as I have it here, states that they said they would like him to come down to the scene with him. There does not appear to be any ... forceful orders.

circumstances of the case, at the time the defendant was searched a reasonable person in the defendant's position would not have believed he or she was being taken into custody. ***Id***. at 449, 475 N.W.2d at 153.

In so ruling, the ***Swanson*** court emphasized that the defendant "was never told that he was under arrest nor given any ***Miranda*** warnings, and not handcuffed," and that "[n]o force, threats, or weapons were used by the officers ...." ***Id***. at 448, 475 N.W.2d at 153. The court also noted that several cases in Wisconsin and elsewhere involving "far more intrusive circumstances than this"—cases where the police had drawn their weapons or used handcuffs or physical force against the defendant—have refused to find an arrest. ***Id***. (citing ***United States v. Laing***, 889 F.2d 281, 285 (D.C. Cir. 1989), *cert. denied*, ***Martin v. United States***, 494 U.S. 1008 (1990); ***United States v. Glenna***, 878 F.2d 967, 972 (7th Cir. 1989); ***United States v. Taylor***, 716 F.2d 701, 709 (9th Cir. 1983); ***Jones (Hollis) v. State***, 70 Wis.2d 62, 233 N.W.2d 441 (1975)).

Our consideration of the facts and circumstances of this case in light of these rulings leads us to a similar conclusion. The officers did not tell Reetz he was being arrested, use physical force or handcuffs, draw weapons, give orders (except perhaps to put down the bottle of schnapps), or either threaten or undertake other forms of coercion. We are satisfied that, on this record, Reetz was not under arrest at any time while in his house or leaving it to accompany the officers to the accident scene.

Because we so hold, whether the officers had consent to re-enter the house is immaterial to Reetz's appeal from the denial of his suppression motion. His motion was solely one challenging the legality of his purported arrest, and that is all that is before us. Nothing in the record suggests that the police seized physical evidence from the house—or from Reetz's person—while they were inside, much less that any such evidence was used against him. Indeed, Reetz stipulated that the evidence gathered much later in the evening, including the blood-alcohol tests, was sufficient to support the finding of guilt on the charge of driving while intoxicated. In other words, even if he is correct

in arguing that the officers lacked consent to enter the house a second time, which we do not here decide, there is nothing to suppress.[6]

By the Court.—Judgment affirmed.

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

[6] If Reetz continues to feel the officers' brief presence in his house was illegal, and if he believes he was injured in some other context by that presence, he is, of course, free to pursue whatever redress he feels he may be entitled to. No such questions are before us on this appeal, however.