**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

October 30, 1997

**Marilyn L. Graves**
**Clerk, Court of Appeals**
**of Wisconsin**



**No. 96-3215**

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

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**COUNTY OF GREEN,**

**PLAINTIFF-RESPONDENT,**

**v.**

**GEOFFREY J. STOUT,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment of the circuit court for Green County: JAMES R. BEER, Judge. *Affirmed.*

EICH, C.J.[1] Geoffrey Stout appeals from a judgment finding him guilty of operating a motor vehicle while intoxicated and operating with a prohibited blood-alcohol level. The court assessed a fine of $564.50 against him, suspended his operating privileges for seven months and ordered him to undergo

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

an alcohol assessment. He argues that, at the time of his arrest, the officers lacked probable cause to arrest him. We affirm the judgment.

The dispositive issue is when the arrest occurred. To determine the time of arrest, we use an objective test, based on the totality of the circumstances and inquiring "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. Swanson***, 164 Wis.2d 437, 446-47, 453-54 n.6, 475 N.W.2d 148, 152, 155 (1991). The officers' "unarticulated plan" is irrelevant in the determination. ***Id***. at 447, 475 N.W.2d at 152.

At the hearing on Stout's motion to suppress evidence of his arrest, the two officers present at the scene testified.[2] The first, New Glarus Police Officer Robert Werren, testified that he arrived at an accident scene at 11:00 p.m., where he saw a "full-size Ford heavy van" upside-down in a roadside ditch. He said that EMS personnel were en route to the scene and that he asked Stout, the driver of the truck, whether he was injured. Stout replied that he was not. According to Werren, he "put [his] hand on [Stout's] arm and … escorted him" to Werren's squad car,[3] where he told him to "sit on my bumper, to keep off the roadway, and nothing else." EMS personnel arrived and began questioning and tending to Stout, and Werren had no contact with Stout while this was occurring. When EMS personnel finished, one of them asked Werren whether Stout was

[2] While Judge Beer presided during sentencing, we note that Reserve Judge John K. Callahan presided over the suppression hearing.

[3] On cross-examination, Werren said that he "[g]rabbed the back of [Stout's] arm and escorted him over to my squad."

under arrest. Werren replied that he was not, whereupon EMS personnel had Stout sign a release and departed.

Another officer arrived at the scene, questioned Stout, had him perform several field sobriety tests, which he failed, administered a preliminary breath test and eventually placed Stout under arrest for driving while intoxicated.

Stout argues that the arrest occurred at the point Werren placed his hand on—or "grabbed"—his arm and "escorted" him to the squad car bumper, and that, at that point, the only evidence in Werren's possession was Stout's involvement in an accident, which is insufficient to establish probable cause to arrest as a matter of law. He argues that Werren's conduct elevated the incident to more than a ***Terry***-type stop—a detention of a driver on reasonable suspicion of a traffic violation. *See* ***Berkemer v. McCarty***, 468 U.S. 420 (1984). Acknowleging that, under ***Berkemer*** and ***Swanson,*** a leading Wisconsin case discussing ***Berkemer***, noncoercive traffic stops do not render a person "in custody," Stout argues that Werren's conduct rendered him in custody for all practical purposes.

In ***Swanson***, the defendant had been driving erratically, nearly hitting a pedestrian on the sidewalk in front of a tavern. The officer approached the defendant, asked for his driver's license, noted an odor of intoxicants about his person, and "directed him over to the squad car for field sobriety tests." ***Id***. at 442, 475 N.W.2d at 150. When the defendant arrived at the squad car, the officer conducted a pat-down search, finding a bag of controlled substances. At that point the officers received a report of a domestic disturbance in the area, arrested the defendant, handcuffed him and placed him in the back of the squad car. While the officers were out of the car responding to the other call, the defendant escaped and

was apprehended later in the evening. He was charged with escape and possession of controlled substances. We affirmed the trial court's dismissal of the charges, concluding that the defendant had not been placed under arrest at the time of his search, and the supreme court affirmed our holding. ***Id***. at 443-44, 475 N.W.2d at 150-51. Invoking the totality of the circumstances test to determine whether a reasonable person in the defendant's position would have considered himself or herself to be in custody within the meaning of ***Berkemer***, the ***Swanson*** court rejected the State's argument that a reasonable person in the defendant's position would have believed he or she was in custody. ***Id***. at 449, 475 N.W.2d at 153.

In ***Swanson***, the State argued that an arrest occurred when the officer "directed" the defendant to the squad car to perform field sobriety tests.[4] Here, Werren took Stout by the arm, escorted him to the squad car and told him to stay there, off the roadway, so he would not be injured. We see little difference. Indeed, the ***Swanson*** court itself noted that much more restrictive conduct than that which occurred here did not turn an otherwise permissible stop into an "arrest":

> For example, this court has found that an investigative stop does not become an arrest merely because the police draw their weapons. Furthermore, many jurisdictions have recognized that the use of handcuffs does not necessarily transform an investigative stop into an arrest. Additionally the use of force does not necessarily transform an investigative stop into an arrest. 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.

***Id***. at 448-49, 475 N.W.2d at 153 (citations omitted).

[4] As indicated, the officers were called to a different location before the tests could be administered in ***Swanson***.

Nor do we believe in this case that taking—even "grabbing"—Stout by the arm, escorting him to the squad car and telling him to stay until EMS personnel arrived amounted to an arrest. We note in this regard that, when EMS personnel had finished with him, they were informed by Werren, in Stout's presence, that Stout was not under arrest. We do not believe it is true, as Stout asserts, that a reasonable person in his position would believe that when Werren led him to the squad car and told to stay, he was, in the words of the ***Berkemer*** court, "at the mercy of the police." ***Berkemer***, 468 U.S. at 438.

Again quoting ***Berkemer***, Stout says that his situation

> invokes precisely the principle articulated in ***Berkemer*** … and which the trial court should have applied in this case: that "[i]f a motorist who has been detained pursuant to a traffic stop thereafter is subjected to treatment that renders him 'in custody' for practical purposes, he will be entitled to the full panoply of protections prescribed by ***Miranda***" because they [sic] are in police custody.

The Wisconsin Supreme Court in ***Swanson*** had this to say about applying the "full panoply" of ***Miranda*** rights in a case such as this:

> If we were to hold [that an arrest had been made], 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 the protections provided by ***Miranda***…. Adopting the scenario posited by the State [that an arrest had occurred], 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.

***Swanson***, 164 Wis.2d at 449, 475 N.W.2d at 153.

As the State points out in this case, Werren did not tell Stout that he was under arrest—actually stating to EMS personnel in Stout's presence that he

was not; nor did he remain with Stout while EMS personnel were talking to him. Werren did not ask Stout any questions about the accident beyond asking him whether he was injured, nor did he display any show of force against Stout, other than taking—or perhaps "grabbing"—his arm to escort him to a place of safety.

On this record, we do not believe that a reasonable person in Stout's position would have considered himself in custody within the meaning expressed by the cases referred to in this opinion.

*By the Court.*—Judgment affirmed.

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