COURT OF APPEALS
DECISION
DATED AND FILED

December 11, 1997

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-1673

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

SHAWN P. KRAWCZYK,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Dane County: STUART A. SCHWARTZ, Judge. *Affirmed*.

DEININGER, J.[1] Shawn P. Krawczyk appeals an order declaring his refusal to submit to a test of his blood-alcohol content to be in violation of § 343.305, STATS., and revoking his driving privileges for one year. Krawczyk claims that because he was unlawfully arrested he was justified in refusing a test

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

of his blood-alcohol content, and therefore the court erred in revoking his license under § 343.305(9)(d). Specifically, he claims that he was placed under arrest before the arresting officer acquired probable cause to arrest him. We conclude the trial court did not err in concluding Krawczyk was lawfully arrested for operating a motor vehicle while under the influence of an intoxicant (OMVWI) and we therefore affirm.

BACKGROUND

At approximately 2:39 a.m. on November 30, 1996, a security guard on duty at the Lake and Frances parking ramp in the City of Madison, observed a Toyota truck driven by Krawczyk back out of a parking stall and strike an automobile parked opposite it. After hitting the car, Krawczyk's truck continued toward the ramp exit but was stopped by the security guard and the guard's supervisor. As Krawczyk and the passenger got out of the truck, the security guard asked Krawczyk if he was aware he had hit the other vehicle. Krawczyk did not respond but the passenger informed the security guards that he and Krawczyk "didn't have to stay there, and that they were going to leave." The security guard testified at the refusal hearing, "I dialed 911, and I told them who I was and they started to leave the ramp. My supervisor and I followed." The two security guards followed Krawczyk and the passenger as they left the ramp on foot to State Street, and then onto Langdon Street, where Krawczyk began running.

Police officers were first dispatched to the parking ramp to check on the accident reported there, but as they drove down State Street toward the ramp, dispatch advised the officers that the individuals involved in the accident had left the scene and were being chased by security guards in the Langdon Street area. The officers then turned onto Langdon and saw one of the guards chasing

Krawczyk. By the time the officers caught up to them, the guard had already stopped Krawczyk and was holding him by the arm. The security guard told Officer Vilas that Krawczyk was the driver of the truck and that his supervisor was still chasing the passenger.

Vilas testified at the refusal hearing that Krawczyk appeared "unsteady on his feet" at this time and she detected "a strong odor of alcohol on his breath." Officer Vilas stated that she "wasn't sure why [Krawczyk] had been running so I put him in handcuffs and walked him back to my car, patted him and had him have a seat." After handcuffing Krawczyk, the officer "took [Krawczyk's] wallet out of his pocket to get the driver's license." The officer "advised [Krawczyk] that [she] was detaining him for an incident that happened at the Lake Street ramp." The officer asked Krawczyk if she could take him back to the ramp and he stated that was "fine."

The transport back to the parking ramp took less than two minutes. There, Krawczyk got out of the police car and Officer Vilas removed his handcuffs while the other officer inspected the accident scene. Vilas observed Krawczyk to still be unsteady on his feet, and he in fact "used the car to lean on in order to maintain his balance." She also noted that Krawczyk's speech was slurred. The officer who had been investigating the accident returned to the police car and reported that Krawczyk was the driver of the truck. Officer Vilas then asked Krawczyk to perform field sobriety tests. Krawczyk failed these tests and was placed under arrest for OMVWI. Vilas escorted Krawczyk back to the police car, and upon conducting a search incident to arrest, found the keys to the Toyota truck. Krawczyk was then taken to the police station, placed in a holding area and read the Informing the Accused form. Krawczyk refused to submit to an Intoxilyzer test.

A refusal hearing was held on May 12, 1997, during which Krawczyk argued that Officer Vilas's actions of placing him in handcuffs; patting him down and removing his wallet from his pocket; removing his driver's license from within the wallet; and transporting him, while still in handcuffs, back to the parking ramp; all amounted to an arrest without probable cause. The trial court ruled, however, that Krawczyk was not placed under arrest until after field sobriety tests had been conducted at the parking ramp. The trial court concluded that when the officer placed Krawczyk in handcuffs she was merely "temporar[ily] freezing" the situation while the officers conducted their investigation. The court accepted the reason given by the officer for placing the handcuffs on Krawczyk as "predicated completely and totally on the fact of the information provided to her regarding [Krawczyk's] fleeing." The trial court also noted that there was no evidence that Krawczyk objected to the officer reaching into his pocket and removing his wallet to obtain his drivers license.

The trial court also concluded that Officer Vilas had proper grounds to conduct field sobriety tests at the parking ramp after making observations of Krawczyk, and after her fellow officer had determined from his investigation that Krawczyk was indeed the driver of the Toyota truck that had struck the parked automobile. Finally, the court determined that, after Krawczyk failed the field sobriety tests, Officer Vilas had probable cause to arrest Krawczyk for OMVWI. The court then ordered Krawczyk to undergo a mandatory alcohol assessment and revoked his driving privileges for twelve months. Krawczyk appeals the revocation order.

ANALYSIS

An officer may request a person to submit to chemical testing for blood alcohol content upon his or her arrest for OMVWI. Section 343.305(2), STATS. Krawczyk refused to consent to chemical testing after his arrest for OMVWI, and upon receiving notice of the State's intent to revoke his driver's license, he requested a refusal hearing under § 343.305(9). The only issues before the court at a refusal hearing are: "(1) whether the officer had probable cause to believe that the person was driving under the influence of alcohol [and lawfully placed the suspect under arrest]; (2) whether the officer complied with the informational provisions of § 343.305[(4)]; (3) whether the person refused to permit a blood, breath or urine test; and (4) whether the refusal to submit to the test was due to a physical inability unrelated to the person's use of alcohol." ***State v. Willie,*** 185 Wis.2d 673, 679, 518 N.W.2d 325, 327 (Ct. App. 1994) (citation omitted). If at least one of the issues is determined in favor of the defendant, "the court shall order that no action be taken on the operating privilege on account of the person's refusal to take the test in question." Section 343.305(9)(d).

Krawczyk concedes that the police had reasonable suspicion to make a ***Terry*** stop,[2] and he stipulated in the trial court that he was read the "informing the accused" form after which he refused to take the test. The only element in dispute is whether Krawczyk "was lawfully placed under arrest" for OMVWI as required under § 343.305(9)(a)5.a., STATS. Specifically, Krawczyk contends that Officer Vilas's actions at the Langdon Street location--placing Krawczyk in handcuffs, searching the wallet removed from his pocket, and transporting him, in

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

handcuffs, to the accident scene--amounted to an arrest. Krawczyk claims that, since Officer Vilas lacked probable cause at that time for an arrest, Krawczyk was not lawfully arrested as required by § 343.305(9)(a)5.a. The State counters that the handcuffing, search of the wallet, and transportation back to the accident scene were all part of an investigatory ***Terry*** stop, justified by reasonable suspicion that Krawczyk had committed an offense.

(a) Standard of Review

The Supreme Court has not established a bright-line rule for determining what police conduct is permissible during a ***Terry*** stop, ***United States v. Sharpe,*** 470 U.S. 675, 685-86 (1985), but has stated that each case turns on its particular facts. ***Terry v. Ohio,*** 392 U.S. 1, 29 (1968). The necessary inquiry is twofold: (1) whether the action was justified at its inception; and (2) whether it was reasonably related in scope to the circumstances which justified the interference initially. ***Id***. at 19-20. The issue here is whether or when the ***Terry*** stop became an arrest. Determining from undisputed facts when an arrest has occurred is a question of law which we review *ab initio,* owing no deference to the trial court's decision. ***State v. Swanson,*** 164 Wis.2d 437, 445, 475 N.W.2d 148, 152 (1991).

The principle that police may stop a person whom they reasonably suspect has committed, is committing or is about to commit a crime largely originated with ***Terry***. The ***Terry*** holding has been codified in § 968.24, STATS., which states:

> 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.

The test when reviewing a ***Terry*** stop is one of reasonableness, in which we seek to balance the individual's protection against unwarranted governmental intrusion against society's interest in enabling the police to solve crimes. ***State v. Guzy,*** 139 Wis.2d 663, 676, 407 N.W.2d 548, 554 (1987). Moreover, "the law must be sufficiently flexible to allow law enforcement officers under certain circumstances, the opportunity to temporarily freeze a situation, particularly where failure to act will result in the disappearance of a potential suspect." ***Id***. (citation omitted); *See also* ***State v. Anderson,*** 155 Wis.2d 77, 88, 454 N.W.2d 763, 768 (1990) (where police officer reasonably believes suspect intends to flee from police he may "temporarily freeze" the situation in order to conduct an investigative inquiry).

(b) Handcuffs

Krawczyk concedes that Officer Vilas had reasonable suspicion to effect a ***Terry*** stop, but he contends that she exceeded the permissible limits of a ***Terry*** stop, in part, because she handcuffed him without probable cause to arrest him or a reasonable belief that weapons were present. The supreme court in ***Swanson*** noted that "many jurisdictions have recognized that the use of handcuffs does not necessarily transform an investigative stop into an arrest." ***Swanson,*** 164 Wis.2d at 448-49, 475 N.W.2d at 153; *see also* ***United States v. Glenna,*** 878 F.2d 967, 972 (7th Cir. 1989). The use of handcuffs in the context of a ***Terry*** stop has generally been upheld where it was reasonably necessary to protect the officer's safety or to stop a suspect's attempt to flee. *See* ***United States v. Bautista,*** 684 F.2d 1286 (9th Cir. 1982) (use of handcuffs during ***Terry*** stop upheld where armed robbery suspect was still at large and handcuffs eliminated possibility of assault or

escape); ***Tom v. Voida,*** 963 F.2d 952, 958 (7th Cir. 1992) (handcuffing was justified because the suspect was fleeing the police and because the suspect's own actions necessitated such a measure).

The court in ***Glenna,*** explained that where common sense and human experience support a conclusion that an officer reasonably believed that an investigative stop could be effectuated safely only through the use of handcuffs, the court "'will not substitute [its] judgment for that of the officers as to the best methods to investigate.'" ***Glenna,*** 878 F.2d at 972 (quoted source omitted). At the time Officer Vilas handcuffed Krawczyk, she had knowledge of "specific and articulable facts which, taken together with the rational inferences from those facts," ***Terry,*** 392 U.S. at 21, allowed her to reasonably conclude that criminal activity had occurred, that Krawczyk was involved and that he would flee if not restrained. Thus, we conclude that Vilas properly handcuffed Krawczyk for purposes of temporary detention while the investigation proceeded.

Krawczyk argues, however, that Vilas should have removed the handcuffs once the pat-down frisk dispelled fears that he might be armed. However, given the circumstances and the legitimate need for police safety during transportation of a suspect, the actions of the officer in keeping the handcuffs on Krawczyk during the short car ride back to the parking ramp were consistent with police policy and common sense. Officer Vilas testified that, once Krawczyk was transported back to the parking garage, the handcuffs were removed. *See, e.g.,* ***State v. Wheeler,*** 108 Wash.2d 230, 737 P.2d 1005 (1987) (handcuffing suspected burglar for two-block ride to scene of burglary upheld).

(c) Transport

Krawczyk also challenges the appropriateness of the officer's action in transporting him away from the "vicinity" of the original stop on Langdon Street. The transportation here was done with Krawczyk's consent and reasonably related to the investigative purpose of the initial detention. *See* ***United States v. Vanichromanee,*** 742 F.2d 340 (7th Cir. 1984) (transfer from parking garage to apartment in same building reasonable; court emphasizes "the transfer here was not to a more institutional setting"); ***United States v. Medina,*** 992 F.2d 573 (6th Cir. 1993) (when suspect flees crime scene he may be apprehended and returned for identification); ***Wilkerson v. United States,*** 427 A.2d 923 (D.C. 1981) (reasonable to transport suspect since suspect consented to the transportation). Additionally, Professor LaFave's proposed requirement that all suspect transportation during a ***Terry*** stop "'should be dependent upon knowledge that a crime has been committed'" has been met here. 3 W. LAFAVE, SEARCH AND SEIZURE § 9.2(g) at 79-80 (1996) (quoted source omitted). Therefore, we conclude the scope of a ***Terry*** stop was not exceeded by Krawczyk's ride back to the parking ramp.

(d) Search of Wallet

Next, Krawczyk argues that removing his wallet and searching it for his drivers license could only be proper if he was in fact arrested at Langdon Street. In ***State v. Flynn,*** 92 Wis.2d 427, 285 N.W.2d 710 (1979), *cert denied,* 449 U.S. 846 (1980), the Wisconsin Supreme Court determined that an officer acted reasonably in removing a defendant's wallet to ascertain his identity after he refused to provide his identification to the officer. The court determined that denying an officer the ability to at least ascertain an individual's identity "could

have a perplexing effect on law enforcement efforts," ***id***. at 442, 285 N.W.2d at 716, and that the actual invasion of the defendant's privacy was "'as limited as [was] reasonably possible consistent with the purpose identifying it in the first instance.'" ***Id***. at 448, 285 N.W.2d at 719 (quoted source omitted).

In ***Flynn,*** the officer was dispatched to a break-in at 2:45 a.m. and within thirty minutes spotted two men, one of whom matched the description of the suspect. The officer approached the two men and asked for identification. One of the individuals repeatedly refused to identify himself and became abusive towards the officer. The officer frisked the suspect and during the course of the frisk removed the suspect's wallet. The officer handed the wallet to a fellow officer who opened the wallet and leafed through it until he found an item which identified the suspect. ***Id***. at 431-32, 285 N.W.2d at 711-12.

In its analysis, the ***Flynn*** court cited the following language from ***Adams v. Williams,*** 407 U.S. 143, 145-46 (1972):

> "A brief stop of a suspicious individual, in order to determine his identity or to maintain the status quo momentarily while obtaining more information, may be most reasonable in light of the facts known to the officer at the time."

Flynn, 92 Wis.2d at 441, 285 N.W.2d at 716. The ***Flynn*** court stated that an officer may stop a person under such circumstances "in order to determine his identity" and noted that § 968.24, STATS., allows an officer to "demand the name and address of the person." ***Id.*** at 442, 285 N.W.2d at 716. The ***Flynn*** court further stated:

> Indeed, unless the officer is entitled to at least ascertain the identity of the suspect, the right to stop him can serve no useful purpose at all. The suspect need only wait for what may be presumed to be a reasonable time, and then proceed on his way. Ignorant of even the person's name, the officer must either attempt to follow the suspect

> in the hope that he will discover some clue as to his identity, or surrender the potential lead and continue his investigation along other lines.

Id.

The present facts are admittedly different than those in ***Flynn***, but we conclude nonetheless that Vilas's actions were consistent with the Fourth Amendment as interpreted in ***Flynn.*** Krawczyk did not "refuse" to produce his identification like Flynn did. However, Krawczyk could not have physically produced his license even if he had wanted to because, as we concluded above, the restrictions placed on Krawczyk's movements by the handcuffs were reasonably necessary during the course of this particular stop.

The police officers here were investigating a reported automobile accident and had themselves witnessed Krawczyk fleeing from a security guard who had reported the accident. Thus, as in ***Flynn,*** Officer Vilas "did not arbitrarily seize the defendant as he was walking down the street, reach into his pocket, remove his wallet, and then go leafing through it looking for evidence that could be used against him." ***Id***. at 447, 285 N.W.2d 719. Additionally, although there was no testimony that Krawczyk consented to the removal of his wallet, the trial court found no evidence that he objected to Officer Vilas reaching into his pocket and removing his wallet.

We therefore conclude that the removal of Krawczyk's wallet for the limited purpose of obtaining his drivers license for identification purposes did not convert the ***Terry*** stop into an arrest.

(e) Totality of the Circumstances

We have concluded that no one of Officer Vilas's actions converted Krawczyk's detention into an arrest. What remains, then, is a determination of whether all of the actions taken together constituted an arrest. The test for determining whether an arrest has occurred is an objective one, based on the totality of the circumstances: "[w]hether 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." ***Swanson,*** 164 Wis.2d at 446-47, 475 N.W.2d at 152 (citation omitted). Under this objective test for determining the occurrence of an arrest**,** the officer's "subjective understanding[]" or "unarticulated plan" is "irrelevant in determining the question." ***Id***. at 446-47, 475 N.W.2d at 152. Instead, we must look to what the officer communicated to the defendant by words or actions, and whether a reasonable person in the defendant's position would consider himself or herself in custody. ***Id.***

The handcuffs that were placed on Krawczyk when he was first stopped and during his transport, were removed as soon as the parties returned to the accident scene. Krawczyk gave his verbal consent when he was asked to return to the accident scene with the officers, and he did not object to Officer Vilas obtaining the identification from his wallet. Finally, the facts show that Officer Vilas did not inform Krawczyk that he was under arrest until after he failed the field sobriety tests at the parking ramp. We conclude that just as no one of these circumstances converted Krawczyk's stop into an arrest, neither did the totality of them. From all appearances, the interactions between Vilas and Krawczyk were all directed toward valid, temporary and investigatory purposes. There is no indication that Krawczyk's freedom of movement was overcome by force or intimidation, or that the officers communicated or imposed any permanent change in his custodial status.

We therefore concur with the trial court's conclusion:

> [I]t is my opinion that there was no arrest at Langdon Street, but there was a temporary freezing of the situation while the officer proceeded to conduct her investigation, and that's evidenced by the fact the cuffs were immediately removed when they got to the ramp and the defendant had indicated that he was not joining to flee. The defendant was cooperative with her taking of the license at Langdon Street, appeared to be cooperative in other regards.

The officers' actions here were "reasonably graduated response to the demands of the situation," justified at the inception and reasonable throughout the investigation. ***Glenna,*** 878 F.2d at 972. A reasonable person in Krawczyk's position would not have believed him- or herself to be in custody until the point, following the field sobriety tests, that he was properly placed under arrest for OMVWI.

By the Court.—Order affirmed.

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