COURT OF APPEALS
DECISION
DATED AND FILED

April 5, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 00-2675-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

BRIAN W. EASTON,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Rock County: DANIEL T. DILLON, Judge. *Affirmed*.

¶1 DEININGER, J.[1] Brian Easton appeals a judgment convicting him of third offense operating a motor vehicle while under the influence of an

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c) (1999-2000). All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

intoxicant (OMVWI). He claims the trial court erred in denying his motion to suppress evidence grounded on an alleged ***Miranda*** violation.[2] We conclude that Easton was not subjected to a custodial interrogation at the time he made the statements he moved to suppress. Accordingly, we affirm the appealed judgment.

BACKGROUND

¶2 The arresting deputy sheriff gave the following testimony at the hearing on Easton's motion to suppress. She was dispatched to the scene of a one-vehicle accident at approximately 3:30 p.m. on New Year's Eve. Upon arrival, she found an abandoned pick-up truck in the intersection of two county trunk highways. About ten minutes later, another pick-up truck arrived with two occupants, one of whom was Easton. In response to the deputy's inquiries, Easton acknowledged that he owned the abandoned truck and had been driving it at the time of the accident. He also told the deputy that he was alone at the time and was not injured in the accident, which had occurred at about 3:30 p.m.

¶3 During this initial conversation, the deputy noted that Easton exhibited "delayed reaction and slowed speech," so she inquired if he had been drinking any intoxicants. Easton replied that he had been drinking both before and after the accident, and that his post-accident consumption consisted of a "couple of sips" of beer, but much less than a full can. The deputy then requested Easton to perform field sobriety tests, to which he agreed. Due to his poor and incomplete performance on several tests, the deputy concluded that Easton was "legally impaired," and she arrested him for OMVWI and transported him for a blood test. She testified that she did not believe that the few sips of beer Easton admitted

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

having during the twenty-five minutes between the accident and his arrival at the scene would account for the level of intoxication and impairment she observed during the field sobriety tests.

¶4 On cross-examination, the deputy acknowledged that she formed a belief that Easton was under "some level of intoxication" before she administered the field sobriety tests, based on his unsteady movements, slurred speech and claimed lack of injuries. She also said that if Easton had requested to leave prior to the field tests, she would have "asked him to stay" and would have detained him, if necessary, in order to complete her investigation. The deputy also verified that she did not inform Easton of his ***Miranda*** rights until after his arrest and transport for alcohol testing; that she had gained information from him regarding the accident during her initial contact with him; and that after informing him of his rights, she asked no further questions and Easton gave her no further information. The deputy testified on redirect that her pre-arrest contact with Easton occurred "outdoors" at the scene of the accident, with traffic passing and Easton's father present, and that she neither physically restrained Easton during this time nor drew her handgun.

¶5 Easton testified briefly at the hearing. He acknowledged that his father had driven him to the scene of the accident, where he "got out and talked to [the] Deputy." He said that he did not "feel … free to leave the scene again." Initially, he said that this was because "after we did the field sobriety tests, she told me to get in the back of her car." On further questioning from his counsel, however, Easton said that after he said "hello, to [the] Deputy," he did not think he could "then turn around and leave," but he gave no explanation of the basis for this belief.

¶6 The trial court denied Easton's motion to suppress all statements he made to the deputy after she formed a belief that he was under some level of intoxication at the time of the accident. He subsequently pleaded no contest to OMVWI, third offense, and he appeals his conviction, citing as error the court's denial of his suppression motion.[3]

ANALYSIS

¶7 When a defendant moves to suppress evidence on the basis of an alleged ***Miranda*** violation, the burden is on the State to "establish by a preponderance of the evidence whether a custodial interrogation took place." ***State v. Armstrong***, 223 Wis. 2d 331, 345 ¶21, 588 N.W.2d 606, *modified on other grounds,* 225 Wis. 2d 121, 591 N.W.2d 604 (1999). The relevant facts in this case are not in dispute, and we decide de novo whether those facts "meet the appropriate legal standards." *See* ***id***. at 353 ¶31.

¶8 We conclude that the State met its burden to establish that, at the time Easton made the statements he sought to suppress, he was not being subjected to a custodial interrogation. The deputy's undisputed testimony shows that she engaged in a virtual textbook example of a pre-arrest, noncustodial investigation into the circumstances of the accident in question, and subsequently, of a suspected OMVWI.

¶9 A law enforcement officer may stop and detain a person "in the vicinity where the person was stopped" for "a reasonable period of time" in order to investigate possible criminal conduct. WIS. STAT. § 968.24. We note first that

[3] A criminal defendant may appeal the denial of a motion to suppress evidence following a plea of guilty or no contest. *See* WIS. STAT. § 971.31(10).

Easton was not even "stopped" in the traditional sense—he voluntarily came to the deputy while she was conducting her investigation of the accident and responded to her initial inquiries regarding who owned and drove the accident vehicle, and what had happened. When Easton's responses and her observations aroused a reasonable suspicion that he may have committed OMVWI, the deputy promptly and properly requested that he perform field sobriety tests. After Easton's performance on those tests confirmed her suspicions that he was intoxicated to the point of impairment, she arrested and transported him for blood alcohol tests.

¶10 The supreme court has rejected precisely the claim Easton makes in this appeal—that a driver who is detained for the purpose of performing field sobriety tests based on an officer's reasonable suspicion of OMVWI is "under arrest." *See* ***State v. Swanson***, 164 Wis. 2d 437, 444, 475 N.W.2d 148 (1991) ("Viewed objectively, a reasonable person … 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."). Although the arguments Easton now makes were voiced by the State and not the defendant in ***Swanson***, and although the court there considered a Fourth Amendment challenge and not a ***Miranda*** violation, its reasoning is clearly applicable here:

> [W]e 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.
>
> 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***. The ***Berkemer*** 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 … could refuse to perform a field sobriety test consistent with their rights against self-incrimination under the fifth amendment.

Id. at 449.

¶11 More recently, this court has considered whether, despite the absence of an "arrest" during a traffic stop, a "custodial interrogation" may nonetheless occur due to the degree of restraint imposed on an OMVWI suspect during the stop. *See* ***State v. Gruen***, 218 Wis. 2d 581, 582 N.W.2d 728 (Ct. App. 1998). We acknowledged that the fact that "questioning occurred during a valid ***Terry*** stop does not end the inquiry."[4] ***Id***. at 593. We cited the ***Swanson*** test ("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"), and applied it to the facts before us. ***Id***. at 593-98. As in the present case, the officer in ***Gruen*** was investigating a one-car accident when he encountered the defendant. And, even though the officer conducted a pat-down search, the defendant was asked to sit in a police van with its doors closed to await a second officer, and questioning was conducted by two different officers, we concluded that a reasonable person in those circumstances would not have considered himself to be in custody, and thus ***Miranda*** did not apply. ***Id***. at 598.

¶12 In short, if there was no ***Miranda*** violation in ***Gruen***, there is none here.

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

By the Court.—Judgment affirmed.

This opinion will not be published. WIS. STAT. RULE 809.23(1)(b)4.