

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 27, 2008

David R. Schanker
Clerk of Court of Appeals

NOTICE

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2007AP1691-CR

Cir. Ct. No. 2006CF1844

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JASON KESTLER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Dane County:
PATRICK J. FIEDLER, Judge. *Reversed.*

Before Higginbotham, P.J., Dykman and Bridge, JJ.

¶1 HIGGINBOTHAM, P.J. Jason Kestler was convicted based on a no-contest plea of fifth offense operating a motor vehicle while under the

influence of an intoxicant (OWI) and operating after revocation. The sole issue is whether the initial *Terry*¹ stop of Kestler's motor vehicle was transformed into a custodial arrest before probable cause existed to arrest Kestler. Because a reasonable person in Kestler's position would have believed that he was under arrest at some point before officials had probable cause to arrest Kestler, we conclude that the *Terry* stop was transformed into an illegal custodial arrest. We therefore conclude that the trial court erred in denying Kestler's motion to suppress evidence acquired during the illegal arrest. Accordingly, we reverse the judgment of conviction.

Background

¶2 The operative facts are undisputed. In the early evening of August 6, 2006, Wisconsin State Trooper Christopher Becker was traveling eastbound in an unmarked cruiser on Interstate 90 in the Town of Burke. The trooper received a call from dispatch that a female passenger in a white Mercedes Benz had mouthed the words "Help Me" to a passing motorist and was trying to jump out of the car.

¶3 After receiving the dispatch, the trooper drove to a service cross-over and waited for the Mercedes. He spotted the car traveling in the left lane and proceeded to follow it. He pulled his cruiser alongside the Mercedes. When the driver saw the cruiser, he quickly hit his brakes. The trooper pulled his cruiser behind the Mercedes, activated his emergency lights and siren and executed a stop of the vehicle on the left shoulder of the Interstate.

¹ *Terry v. Ohio*, 392 U.S. 1 (1968).

¶4 Once the vehicle was stopped, the trooper noticed the driver's side door crack open. The trooper cautiously approached the Mercedes and removed his side arm, pointing it at the ground. He then saw that the driver, a man later identified as Kestler, was on his cell phone. The trooper holstered his side arm and ordered Kestler to conclude the call. When Kestler continued talking on his phone, the trooper repeated in a more commanding tone his order to end the call, and Kestler finally complied.²

¶5 Kestler opened the door and the trooper smelled a strong odor of intoxicants coming from inside the vehicle. He also noticed that Kestler's eyes were glassy and bloodshot. He ordered Kestler to step out of the vehicle and walk to the back of the squad car. Kestler exited the driver's compartment but would not step to the back of the vehicle, so the trooper grabbed Kestler's arm in an escort hold³ and forcibly walked him there.

¶6 Kestler exclaimed, "What's going on?" "Why are you doing this?" The trooper informed Kestler that he was being detained. He then forcefully placed Kestler in handcuffs, and searched him for weapons, finding none. The trooper took Kestler's identification and did not return it to him during the

² The woman who mouthed the words "Help me" jumped out of the car prior to the stop, according to Trooper Becker's testimony. This fact is not relevant to our analysis of the issues in this case.

³ A training guide for law enforcement officers issued by the Wisconsin Department of Justice describes the escort hold as a technique used to safely initiate physical contact with a subject. With one hand, the officer grips above the elbow of the subject's dominant arm and, with the other, grips the subject's wrist. The officer then pulls the subject's hand and wrist toward the officer's center. The officer may then move the subject by stabilizing the subject's elbow and pushing forward on the subject's forearm and wrist. Wisconsin Department of Justice Law Enforcement Standards Board, "Defensive and Arrest Tactics: A Training Guide for Law Enforcement Officers" (March 2007).

detention. He placed Kestler in the back of his squad car, and searched Kestler's vehicle. The trooper then returned to the squad car and read Kestler his *Miranda*⁴ rights. A second member of the state patrol arrived and Kestler was transported to the DeForest State Trooper Post. The trooper testified that Kestler was moved to allow troopers to conduct field sobriety tests in a safer location than the shoulder of the Interstate. Kestler was ultimately charged with OWI and operating after revocation.

¶7 Kestler moved to suppress evidence on grounds that his detention escalated into a custodial arrest before the investigation yielded sufficient evidence to justify an arrest. The circuit court denied the motion, finding that the temporary detention did not become an illegal arrest. Kestler entered a no-contest plea to both counts, and now appeals.

Discussion

¶8 When reviewing a circuit court's order denying a motion to suppress evidence, we examine the court's findings of historical fact under the clearly erroneous standard, and we review de novo the application of constitutional standards to those facts. *State v. Eason*, 2001 WI 98, ¶9, 245 Wis. 2d 206, 629 N.W.2d 625.

¶9 An arrest and a *Terry* investigative stop are both seizures under the Fourth Amendment. *See, e.g. Laasch v. State*, 84 Wis. 2d 587, 595, 267 N.W.2d 278 (1978) (arrest); *State v. Post*, 2007 WI 60, ¶10, 301 Wis. 2d 1, 733 N.W.2d 634 (stop). Police may stop an individual and conduct a limited investigation

⁴ *Miranda v. Arizona*, 384 U.S. 436 (1966).

without probable cause to arrest. *Post*, 301 Wis. 2d 1, ¶10. However, police may not seek to verify their suspicions by means that approach the conditions of arrest. *Florida v. Royer*, 460 U.S. 491, 499 (1983); *State v. Quartana*, 213 Wis. 2d 440, 448, 570 N.W.2d 618 (Ct. App. 1997). Every seizure having the essential attribute of a formal arrest is unreasonable unless it is supported by probable cause. *Michigan v. Summers*, 452 U.S. 692, 700 (1981).

¶10 The standard to determine the moment of arrest is whether a reasonable person in the defendant's position would have considered himself 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 (1991), *abrogated on other grounds by State v. Sykes*, 2005 WI 48, 279 Wis. 2d 742, 695 N.W.2d 277. The inquiry considers the totality of the circumstances facing the accused, "including what has been communicated by the police officers, either by their words or actions" *Id.* at 447. Where the facts are undisputed, custody is a question of law and no deference is owed to the decision of the circuit court. *State v. Clappes*, 117 Wis. 2d 277, 280-81, 344 N.W.2d 141 (1984).

¶11 We begin by noting that the circuit court concluded that there was no probable cause to arrest Kestler on either charge before he was transported to the trooper post. The State does not challenge this conclusion. Kestler does not challenge the legality of the stop of his motor vehicle or his initial detention. Instead, his challenge focuses on what ensued after the trooper initially detained him. Thus, the issue presented is whether the valid *Terry* stop was transformed into a custodial arrest within the meaning of the Fourth Amendment.

¶12 Kestler argues that at some point prior to his transport to the trooper post the trooper's actions transformed the *Terry* stop into a custodial arrest.

Kestler relies on the following facts: that the trooper (1) ordered him to get off his cell phone in a commanding tone; (2) grabbed his arm to escort him to the rear of the vehicle; (3) told Kestler that he was being detained, forcefully handcuffed him, and searched him for weapons; (4) placed Kestler in the back of his unmarked cruiser and kept his identification; (5) searched Kestler's vehicle; (6) read him his *Miranda* rights; and (7) transported Kestler to the trooper post. Kestler argues that a reasonable person subjected to this combination of restraints would believe that he or she was under arrest. We agree.

¶13 We are to look to an officer's words as well as his or her actions to determine whether an individual is under arrest. *Swanson*, 164 Wis. 2d at 447. Here, the record establishes that the trooper told Kestler that he was being detained, and that the trooper read him his *Miranda* rights after placing him in the cruiser. The record does not indicate that the trooper told Kestler why he was being detained, even after Kestler asked what was going on. Had the trooper informed Kestler that he was taking him to the trooper post to conduct field sobriety tests in a safer area, a person in Kestler's position might have had reason to believe that he was not under arrest but merely still under investigation for OWI. *See Swanson*, 164 Wis. 2d at 448 (officer's request of suspect to perform field sobriety test implied that suspect was free to go if he passed test, and therefore suspect's belief that he was under arrest was unreasonable).

¶14 The State counters that the stop never evolved into a custodial arrest because all of the trooper's actions were reasonable under the circumstances. It notes that Wisconsin courts have determined in other cases that actions like those taken by the trooper did not transform a temporary detention into a custodial arrest. *See, e.g. State v. Hart*, 2001 WI App 283, ¶19, 249 Wis. 2d 329, 639 N.W.2d 213, *overruled on other grounds by Sykes*, 279 Wis. 2d 742 (no arrest

when suspect was subjected to a pat-down and put into the back of a police car for the officer's safety); *State v. Quartana*, 213 Wis. 2d 440, 449, 570 N.W.2d 618 (Ct. App. 1997) (not an arrest when officers kept the suspect's driver's license and moved the suspect within the general vicinity of the stop for safety reasons); *State v. Vorburger*, 2002 WI 105, ¶64, 255 Wis. 2d 537, 648 N.W.2d 829 (no arrest when suspect was placed in handcuffs for a short time). We are not persuaded.

¶15 Each of the cases cited by the State concludes that one or more of the indicia of restraint that are present in this case did not turn an investigative stop into an arrest. However, in this case, all of the indicia of restraint in the above-cited cases (as well as four *additional* indicia of restraint not found in any of the cases above) are present at once. Like the defendant in *Hart*, Kestler was patted-down and placed in the back of a squad car. As in *Quartana*, officers kept Kestler's identification and transported him to a new location within the vicinity.⁵ Like the defendant in *Vorburger*, Kestler was handcuffed. In addition to these indicia of restraint, Kestler was ordered from his vehicle in a commanding voice, walked in an escort hold to the back of the vehicle, read his *Miranda* rights and subjected to a search of his vehicle. Based upon the accumulation of these factors, we must conclude that the degree of restraint to which Kestler was subjected would lead a reasonable person in his position to believe that he was under arrest.⁶

⁵ But *Quartana*, unlike Kestler, was transported to the site of an accident, not a trooper post or other institutional setting. The *Quartana* court suggested that a reasonable person in *Quartana*'s position would not have believed he was under arrest because the place he was transported to was not "a[n] ... institutional setting, such as a police station or interrogation room." *State v. Quartana*, 213 Wis. 2d 440, 450, 570 N.W.2d 618 (Ct. App. 1997).

⁶ We find persuasive support for our conclusion in two cases with facts similar to the present case. In *United States v. Ienco*, 182 F.3d 517, 525 (7th Cir. 1999), the Seventh Circuit Court of Appeals concluded that an investigative stop became a custodial arrest when the subject of the investigation was held in a locked police car for a half hour without his consent, and

(continued)

Conclusion

¶16 Based on the foregoing reasons, we conclude that the valid *Terry* stop of Kestler transformed into a custodial arrest without probable cause and that any evidence taken after his arrest should have been suppressed. We therefore conclude the circuit court erred in denying Kestler's motion to suppress evidence. Accordingly, we reverse the judgment of conviction.

By the Court.—Judgment reversed.

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officers kept his wallet and license. The *Ienco* court noted that cases from other federal circuit courts have held that retention of a suspect's driver's license turned an investigative stop into an arrest, citing *United States v. Gonzalez*, 763 F.2d 1127, 1131-32 (10th Cir. 1985), and *United States v. Miller*, 589 F.2d 1117, 1127 (1st Cir. 1978). It further concluded that holding an unarmed suspect in the back of a locked police vehicle contributed to the transformation of the stop into an arrest. See *Ienco*, 182 F.3d at 525.

Recently, a Kansas appellate court addressed whether an investigative stop became an arrest without probable cause in a case on facts that closely resemble the instant case. In *City of Norton v. Wonderly*, 172 P.3d 1205 (Kan. Ct. App. 2007), the Kansas court concluded the stop was transformed into an arrest when officers, after making a valid investigative stop, handcuffed Waverly, placed him in a sheriff's car and transported him to the sheriff's office to perform field sobriety tests. Applying an objective standard similar to Wisconsin's test for determining the moment of arrest, the *Wonderly* court concluded that a reasonable person in Wonderly's position would have believed that he was under arrest at the point when he was being transported in handcuffs in a sheriff's car to the sheriff's office. *Id.* at 1212.

