COURT OF APPEALS
DECISION
DATED AND FILED

April 2, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP1149 **Cir. Ct. No. 2006CV3153**

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

VILLAGE OF MCFARLAND,

PLAINTIFF-RESPONDENT,

V.

RICHARD J. KEASTER,

DEFENDANT-APPELLANT.

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

¶1 LUNDSTEN, J.[1] Richard Keaster appeals a judgment finding him guilty of violating a Village of McFarland ordinance adopting the state statute that

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(b) (2007-08). All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

prohibits driving under the influence of an intoxicant or controlled substance. Keaster challenges the validity of the police search of his vehicle that led to the evidence against him. I affirm the circuit court.

¶2 The pertinent facts are undisputed. At approximately 11:45 p.m., a Village police officer stopped Keaster's vehicle for an apparent expired license plate violation. Keaster and a passenger in the vehicle were both not quite nineteen years old. After some preliminary investigation, the officer discovered that the passenger had been drinking. The officer informed the passenger that he was under arrest for underage drinking, handcuffed him with his hands behind his back, searched his person, and placed him in a patrol car. The officer proceeded to search Keaster's vehicle. The search led to evidence that Keaster had been driving under the influence of a controlled substance and to the citation underlying this appeal. The circuit court concluded that the search was a valid search incident to arrest because Keaster's passenger was under arrest at the time.

¶3 The parties agree that the dispositive issue on appeal is whether Keaster's passenger was under arrest at the time Keaster's vehicle was searched. *See* ***State v. Pallone***, 2000 WI 77, ¶32, 236 Wis. 2d 162, 613 N.W.2d 568 ("For the search incident to arrest exception to apply, there must be an arrest."). When the facts are undisputed, as here, this issue presents a question of law that appellate courts review *de novo*. *See* ***State v. Marten-Hoye***, 2008 WI App 19, ¶5, 307 Wis. 2d 671, 746 N.W.2d 498, *review denied*, 2008 WI 40, 308 Wis. 2d 610, 749 N.W.2d 661 (No. 2006AP1104-CR). The test for an arrest is an objective one: whether a reasonable person in the passenger's position would have considered himself "in custody," given the degree of restraint under the circumstances. ***Id.***, 307 Wis. 2d 671, ¶14. Relevant circumstances include what police have communicated by their words or actions. *See* ***id.***

¶4 Keaster relies on the facts and result in ***Marten-Hoye***. In that case, police stopped the defendant on State Street in Madison to confirm that she was not violating a curfew ordinance, then told her she was free to leave. ***Id.***, ¶2. As Marten-Hoye walked away from police, she waved her hands and shouted obscenities. ***Id.***, ¶3. This prompted police to re-approach her, tell her she was under arrest for disorderly conduct, and place her in handcuffs. ***Id.*** The police also told her that she would only receive a citation for a city ordinance violation and would be free to go if she remained cooperative. ***Id.***, ¶¶3, 28. The majority in ***Marten-Hoye*** concluded that, in light of the "contradictory" message that Marten-Hoye would be free to go if she remained cooperative, a reasonable person in Marten-Hoye's position would not have considered herself to be in custody. ***Id.***, ¶28.

¶5 In my view, ***Marten-Hoye*** was wrongly decided. Marten-Hoye was told she was under arrest, told why she was under arrest, and handcuffed. No reasonable person treated in this way would not consider himself or herself to be in custody. The fact that Marten-Hoye was also told that she would receive only an ordinance citation and be released if she cooperated is not a contradictory message. To the contrary, it reinforced the message that she was in custody. A reasonable person would understand there is no need to be "released" if you are not being held.

¶6 Though I believe ***Marten-Hoye*** is a clear misapplication of the arrest test used when an arrest is offered as the justification for a search, I am bound by it and will address Keaster's reliance on it.

¶7 Keaster argues that, like Marten-Hoye, his passenger would have known that he was not headed to jail. Keaster seems to believe it is so commonly

known that underage drinkers are not taken to a police station and held in detention for some period of time that no reasonable person would think the arrest in this case would lead to detention in some sort of facility. I disagree. Perhaps more to the point, this is not something so commonly known that one may assume such knowledge as a fact. Even if a young person knows of multiple other young persons who have been ticketed and not taken to a police station, they would not know with any confidence that that is always how it is handled. In contrast, Marten-Hoye was specifically told she would be released if she cooperated. The majority in ***Marten-Hoye*** did not need to speculate about what people commonly know about what police do in particular circumstances. Even allowing that ***Marten-Hoye*** is controlling law, it only applies when police send a particular "contradictory" message. That is, it applies when, in circumstances comparable to those in ***Marten-Hoye***, police tell the "arrested" person that he or she will be released.[2]

¶8 Apart from his reliance on ***Marten-Hoye***, Keaster argues that a reasonable person being detained for a relatively minor offense would be less likely to consider himself in custody than a person detained for a more serious offense. I agree that this is true. But this is only one factor and it is heavily outweighed by other factors. Whether the alleged offense is littering or homicide,

[2] There are other distinctions that weigh against Keaster. For example, the defendant in ***State v. Marten-Hoye***, 2008 WI App 19, 307 Wis. 2d 671, 746 N.W.2d 498, *review denied*, 2008 WI 40, 308 Wis. 2d 610, 749 N.W.2d 661 (No. 2006AP1104-CR), remained on the street while handcuffed, and Keaster's passenger was handcuffed and placed in the back of a patrol car. *See* ***id.***, 307 Wis. 2d 671, ¶¶2-3, 29. However, because I would conclude that Keaster's passenger was under arrest even if all other facts directly tracked those in ***Marten-Hoye***, the only distinction that matters here is the absence of a "contradictory" message.

reasonable persons who are told they are under arrest and are handcuffed and placed in a squad car will consider themselves in custody.

¶9 Keaster points out that the officer admitted that he never intended to take Keaster's passenger to jail and intended only to issue him a citation. This argument conflicts with the general rule that an officer's subjective intent is not relevant when deciding search and seizure questions. In particular, an officer's "unarticulated plan is irrelevant in determining the question of custody." ***State v. Swanson***, 164 Wis. 2d 437, 447, 475 N.W.2d 148 (1991), *overruled on other grounds by* ***State v. Sykes***, 2005 WI 48, ¶27, 279 Wis. 2d 742, 695 N.W.2d 277.

¶10 Finally, Keaster understandably expresses concerns about a rule that allows police, as they did here, to conduct a full-blown vehicle search because of an arrest for a relatively minor offense. He cites extensively to the dissenting opinion in the supreme court's ***Pallone*** decision, but at the same time implicitly acknowledges that binding case law cuts the other way. Thus, I address this argument no further, except to say that although Keaster and the dissent in ***Pallone*** make several good points, this area of search and seizure law is particularly complex and crafting a new, clear workable rule that protects both privacy interests and legitimate police safety and investigative interests would be no small feat.

¶11 For these reasons, the judgment of the circuit court is affirmed.

By the Court.—Judgment affirmed.

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