COURT OF APPEALS
DECISION
DATED AND FILED

February 3, 2010

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2009AP2406-CR **Cir. Ct. No. 2009CT30**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

BRADLEY A. KRAHN,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Sheboygan County: JAMES J. BOLGERT, Judge. *Affirmed*.

¶1 NEUBAUER, P.J.[1] Bradley A. Krahn appeals from a judgment of conviction for operating a motor vehicle while under the influence of an intoxicant

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

(OWI), third offense, contrary to WIS. STAT. § 346.63(1)(a). Krahn contends that the trial court erred in denying his motion to suppress evidence stemming from his illegal arrest. Krahn does not challenge the initial stop of his vehicle; however, he argues that the temporary detention was converted to an arrest when he was transported less than a mile from the scene of a traffic stop to the police station for the administration of field sobriety testing because of hazardous road conditions. Based on the totality of the circumstances, we conclude that the police acted within the scope of a temporary detention and that a reasonable person in Krahn's position would have understood that he or she was not under arrest. We affirm the judgment.

FACTS

¶2 The facts underlying Krahn's conviction were testified to at the hearing on his motion to suppress by both officers involved. Officer Steven Falk of the City of Plymouth Police Department testified that on December 7, 2008, at approximately 1:40 a.m., he was patrolling Eastern Avenue, the main thoroughfare of Plymouth, when he noticed Krahn's vehicle. Krahn's vehicle, which was about 200 yards in front of Falk and traveling in the same direction, did not have its lights on. Falk sped up to the vehicle, activated his lights and siren, and Krahn pulled over immediately. Falk made contact with Krahn, the driver of the vehicle, and asked if Krahn knew why he had been stopped. He did not. After talking to Krahn "for a while," Falk smelled the odor of intoxicants and, when asked, Krahn admitted to having "a few beers." At Falk's request, Krahn produced his license. When returning to his vehicle, Falk noticed that Officer Justin Daniels of the City of Plymouth Police Department had arrived at the scene. Because Daniels is a full-time officer and Falk a part-time officer, Daniels continued the investigation.

¶3 Daniels testified that he received a dispatch call regarding Falk's traffic stop. He went to assist Falk. Falk informed Daniels that he stopped Krahn's vehicle for operating without its lights on and that he noticed an odor of intoxicants. Daniels approached Krahn, who was still seated in his vehicle, and explained who he was. Daniels noticed "an odor of intoxicants emitting from his person" and asked Krahn if he had been drinking that evening. Krahn replied that he had, but was not sure how much. Daniels asked Krahn to step out of the vehicle and looked for a place to perform field sobriety testing. Daniels testified that there had been a snowstorm and "the sidewalks were covered in snow and ice, and the road was very slushy, and it was also fairly cold outside. So to give [Krahn] a proper arrangement to perform the tests, I decided it wouldn't be proper to do it at the scene of the traffic stop." Daniels testified that "we usually take [drivers] to the police department" for field sobriety testing.

¶4 According to Daniels, the police department is about one mile, "[m]aybe less," from the scene of the traffic stop. Daniels testified:

> I advised [Krahn] due to the circumstances, I was going to be detaining him pending further investigation. Per department policy and for my safety, he was handcuffed in the back. I advised him he was not in custody; and if we would go to the [police department] and he would perform his tests satisfactory, I would transport him back to his vehicle, and he would be free to go.

When placing him in the back of his squad car, Daniels specifically informed Krahn that he was being handcuffed for safety reasons and to comply with department policy. Daniels, who was the sole officer in the squad car, transported Krahn to the police department in approximately one minute. Krahn was taken to the main hallway where his handcuffs were removed and he was asked to perform field sobriety testing.

¶5 Krahn was later arrested and charged with OWI and operating with a prohibited alcohol concentration, third offense. Krahn filed a motion to suppress evidence based on an illegal arrest resulting from the use of handcuffs and being transported in the back of the police squad from the scene of the traffic stop. Following a motion hearing on April 28, 2009, the trial court denied Krahn's motion based on its determination that "the detention was brief and narrow considering the circumstances" and that because of the weather conditions "which [Krahn] could plainly see, objectively he should have known he was not under arrest, but being detained to do field tests." Krahn subsequently pled no contest to OWI, third offense. He now appeals.

DISCUSSION

¶6 Krahn does not challenge the initial stop of his vehicle under ***Terry v. Ohio***, 392 U.S. 1 (1968), nor does he challenge the underlying facts relating to the weather and road conditions or the information provided to him by the police during the incident. Therefore, the narrow issue on appeal is whether Krahn was under arrest when he was transported from the scene of his original detention to the police station or whether the police were acting within the scope of a temporary investigative detention. Our review is de novo and is limited to whether the facts as found by the trial court satisfy the reasonable requirement for a warrantless search and seizure under the Fourth Amendment. *See* ***State v. Quartana***, 213 Wis. 2d 440, 445, 570 N.W.2d 618 (Ct. App. 1997).

¶7 Our decision in ***Quartana*** sets forth "the analysis to be conducted when a person under a ***Terry*** investigation is removed from one place to another." ***Quartana***, 213 Wis. 2d at 443. We begin with a review of ***Terry***, which provides that a police officer may, in the appropriate circumstances, detain a person for

purposes of investigating possible criminal behavior even though there is no probable cause to make an arrest. ***Quartana***, 213 Wis. 2d at 445 (citing ***Terry***, 392 U.S. at 22). WISCONSIN STAT. § 968.24, which codified ***Terry***, provides that the police may temporarily detain and question an individual "in the vicinity where the person was stopped." "[I]t is clear that the law permits the police, if they have reasonable grounds for doing so, to move a suspect in the general vicinity of the stop without converting what would otherwise be a temporary seizure into an arrest." ***Quartana***, 213 Wis. 2d at 446.

¶8 Generally, when a person under investigation pursuant to a ***Terry*** stop is moved from one location to another, we employ a two-step inquiry: (1) Was the person moved within the "vicinity"? and (2) Was the purpose in moving the person within the vicinity reasonable? ***Quartana***, 213 Wis. 2d at 446. However, Krahn does not challenge either the distance or the purpose of the transport.[2] Rather, Krahn challenges the conditions of transport and destination. Therefore, we look to the totality of the circumstances to determine whether a reasonable person would have believed himself or herself under arrest in light of the degree of restraint under the circumstances. ***Id.*** at 449-50.

¶9 Both parties look to ***Quartana*** for guidance on the question of when a valid temporary detention is transformed into an arrest. At the outset, the ***Quartana*** court observed that "[a] restraint of liberty does not ipso facto prove that an arrest has taken place." ***Id.*** at 449. In ***Quartana***, the defendant lost control

[2] We note that Krahn was transported approximately one mile or less from the scene of the traffic stop to the police department. This is the same distance the defendant in ***State v. Quartana***, 213 Wis. 2d 440, 570 N.W.2d 618 (Ct. App. 1997), was transported and which the court concluded fell within the definition of "vicinity." *See* ***id.*** at 446-47 (adopting the dictionary definition of "vicinity" as "surrounding area" or "locality").

of his car and drove into a ditch. ***Id.*** at 443. He immediately abandoned the vehicle and walked approximately one mile to his parents' house. ***Id.*** at 443-44. The officer who later arrived at the scene determined that the vehicle belonged to Quartana, and another officer was dispatched to Quartana's residence. ***Id.*** at 444. The officer found Quartana at home, asked to see his driver's license, and obtained Quartana's admission that he had been driving at the time of the accident. ***Id.*** Because the officer observed indicia of intoxication when talking to Quartana, the officer informed Quartana that he would have to return to the scene of the accident to talk with the investigating officer. ***Id.*** Quartana later argued that he had been placed under arrest without probable cause when the officer kept his driver's license and transported him against his will from his residence to the accident scene. ***Id.*** at 444-45. Like Krahn, Quartana argued that the conditions of his transportation amounted to an arrest. ***Id.*** at 449. The ***Quartana*** court rejected his arguments concluding a reasonable person in Quartana's position would not have believed he or she was under arrest. ***Id.*** at 450.

¶10 Krahn contends that the facts of his case are distinguishable from those presented in ***Quartana*** because (1) he was transported to a police department, an institutional setting, for further investigation and (2) his hands were handcuffed behind his back during the transport, restricting his movement. While the ***Quartana*** court did consider the fact that the defendant was not transported to "a more institutional setting, such as a police station or interrogation room," it was but one factor in the totality of circumstances analysis. ***Id.*** Also considered by the ***Quartana*** court were the length of the detention, which "lasted no longer than was necessary to confirm their suspicions," and the information provided to Quartana by the officer that he was being temporarily detained for purposes of investigation. ***Id.*** And while courts recognize that the use of

handcuffs greatly increases the intrusiveness of a ***Terry*** stop, the officer in this case explained that the handcuffs were used only for safety during transport and that the handcuffs were removed at the police station. *See* ***State v. Pickens***, 2010 WI App 5, ¶30, No. 2008AP1514-CR (the use of handcuffs must be justified and is not justified when a suspect is secured in a nonmoving squad car).[3] In sum, we see nothing in ***Quartana*** which dictates that the location of the temporary detention and the use of handcuffs for safety purposes are to be considered in any other manner than as part of the totality of the circumstances.[4]

¶11 Finally, Krahn compares his detention to that in ***Florida v. Royer***, 460 U.S. 491 (1983).[5] While ***Royer*** involved a transport to a "police interrogation

[3] Common sense dictates that safety concerns for both the officer and the public would justify the use of handcuffs when a single officer is operating a vehicle and is therefore not able to maintain surveillance over a passenger.

[4] We also reject Krahn's contention that Daniels' retention of Krahn's driver's license during the transport weighs in favor of a determination that he was illegally seized once he was transported from the scene of the initial traffic stop. While Krahn relies on ***State v. Luebeck***, 2006 WI App 87, 292 Wis. 2d 748, 715 N.W.2d 639, in support of his argument, the facts of ***Luebeck*** are readily distinguished. In ***Luebeck***, the court examined whether a driver's consent to search given at the conclusion of a temporary detention under ***Terry v. Ohio***, 392 U.S. 1 (1968), was voluntary where the officer retained his driver's license. ***Luebeck***, 292 Wis. 2d 748, ¶¶2, 14-15. Therefore, the inquiry was whether the valid traffic stop was extended "past the point reasonably justified by the initial stop" and whether the reasonable person in the driver's position would have felt free to decline the officer's request. ***Id.***, ¶¶12, 14. Here, there is no indication that Daniels retained Krahn's driver's license past the point reasonably justified by the initial stop. *See* ***id.***

[5] Krahn additionally cites to ***Hayes v. Florida***, 470 U.S. 811, 815 (1985), and ***Dunaway v. New York***, 442 U.S. 200, 207 (1979), in support of his contention that transporting him to a police station transformed the temporary detention into an arrest. However, Krahn's reliance is misplaced. Neither ***Hayes*** nor ***Dunaway*** involved the transformation of a legal temporary detention into an illegal arrest. ***Hayes***, 470 U.S. at 814, 815 (***Terry*** does not extend to the involuntary removal of a suspect from his or her home to be detained at a police station for investigative purposes, whether for interrogation or fingerprinting, absent probable cause or judicial authorization); ***Dunaway***, 442 U.S. at 211-13 (defendant was not questioned briefly where he was found, was not informed that he was being detained temporarily or that he would be free to go following that detention, but was taken from his neighbor's home and transported to a police station where he was placed in an interrogation room).

room," the court's conclusion that "as a practical matter, Royer was under arrest," was based in part on the fact that Royer was "never informed that he was free" to leave. ***Id.*** at 503. The court also suggests that if reasons of safety or security had justified moving Royer from one location to another during the investigatory detention, the officers' actions may have been deemed necessary to effectuate an investigative detention under ***Terry***. ***Royer***, 460 U.S. at 504-05.

¶12 Here, it is undisputed that the weather and road conditions were hazardous and necessitated a move to ensure a suitable location to conduct the field sobriety tests, as well as for safety reasons, especially given the early morning hour of the stop. The police had reasonable grounds for the temporary detention and transportation to the nearby police station where they could quickly confirm or dispel their suspicions. The conditions of transportation did not transform the temporary seizure into an arrest. Krahn does not dispute the officer's testimony that he expressly informed Krahn that he was being detained only temporarily, that he was being transported to the police station for the purpose of conducting field sobriety testing, that he was being handcuffed for safety and security reasons, and that he would be free to go provided he performed satisfactorily on the field sobriety testing. We are satisfied that, under the totality of the circumstances, a reasonable person in Krahn's position would not have believed himself or herself to be under arrest. *See* ***Quartana***, 213 Wis. 2d at 449-50.

CONCLUSION

¶13 We conclude that the police officer's transport of Krahn to the police station for field sobriety testing was within the scope of the temporary investigative detention under ***Terry***. We further conclude that the conditions of

transport and location of testing did not serve to transform the investigative detention into an arrest. We therefore uphold the trial court's denial of Krahn's motion to suppress and affirm the judgment of conviction.

By the Court.—Judgment affirmed.

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