COURT OF APPEALS
DECISION
DATED AND FILED

April 6, 2017

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

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. 2016AP2172 **Cir. Ct. No. 2016TR294**

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

COUNTY OF DODGE,

PLAINTIFF-RESPONDENT,

V.

ALEXIS N. UNSER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Dodge County: JOSEPH G. SCIASCIA, Judge. *Affirmed*.

¶1 LUNDSTEN, J.[1] Alexis Unser appeals the circuit court's judgment convicting her of 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). All references to the Wisconsin Statutes are to the 2015-16 version.

intoxicant. During the stop that led to this charge, the officer transported Unser to another location, about six miles away from the initial stop, in order to perform field sobriety tests. Unser argues that she was unlawfully transported outside the vicinity of the stop and, on that basis, seeks suppression of evidence and reversal of her conviction. I reject Unser's argument, and affirm.

Background

¶2 The sole witness at the suppression hearing was the officer who stopped Unser. The facts come from his testimony. Unser stipulated that the officer had a reasonable basis to stop her and a reasonable basis to conduct field sobriety tests.

¶3 The stop occurred around 9:25 p.m. on Highway 151 in a rural area between Waupun and Beaver Dam. Weather conditions at the time were cold with "blowing snow"; the roads were covered in snow and ice. Unser was attired in a short dress and thin coat. Based on these circumstances, the officer concluded that it was not feasible to have Unser perform field sobriety tests at the location of the initial stop. The officer instead transported Unser approximately six miles to Waupun Memorial Hospital to perform the tests.[2]

¶4 Unser argued that she was unlawfully transported outside the "vicinity" of the stop within the meaning of WIS. STAT. § 968.24 and, therefore, that evidence from the stop must be suppressed. The circuit court disagreed,

[2] The officer's testimony varied as to the precise distance between the location of the initial stop and the hospital, but the distance was no more than 6.1 miles.

concluding that Unser remained within the vicinity of the stop. I reference additional facts as needed below.

Discussion

¶5 As noted above, Unser challenges the circuit court's "vicinity" conclusion. I reject that challenge for the reasons that follow.

¶6 WISCONSIN STAT. § 968.24 has been called "our codification of the ***Terry*** stop." *See* ***State v. Quartana***, 213 Wis. 2d 440, 443, 570 N.W.2d 618 (Ct. App. 1997). The statute provides as follows:

> 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.*

WIS. STAT. § 968.24 (emphasis added). Courts interpret this statute by applying ***Terry v. Ohio***, 392 U.S. 1 (1968), and cases following ***Terry***. *See* ***State v. Post***, 2007 WI 60, ¶11, 301 Wis. 2d 1, 733 N.W.2d 634.

¶7 In ***State v. Blatterman***, 2015 WI 46, 362 Wis. 2d 138, 864 N.W.2d 26, our supreme court adopted a two-part test from ***Quartana*** that Unser cites as providing the applicable framework here:

> "First, was the person moved within the 'vicinity' [of the stop]? Second, was the purpose in moving the person within the vicinity reasonable?"

Blatterman, 362 Wis. 2d 138, ¶24 (quoting ***Quartana***, 213 Wis. 2d at 446; bracketed material in original).

¶8 Unser focuses on the first part of this test, challenging only the circuit court's conclusion that she was transported within the vicinity. Unser does not challenge the reasonableness of the purpose for transporting her.

¶9 "'Vicinity' is commonly understood to mean 'a surrounding area or district' or 'locality.'" ***Quartana***, 213 Wis. 2d at 446 (quoting dictionary definitions). Whether a suspect was moved within the vicinity is a question of law for de novo review. *See* ***Blatterman***, 362 Wis. 2d 138, ¶26 n.9.

¶10 Case law discussion on what may fall within the "vicinity" is sparse. In ***Quartana***, the court concluded, with little discussion, that one mile was within the vicinity. ***Quartana***, 213 Wis. 2d at 447. In ***Blatterman***, the supreme court concluded, also with little discussion, that ten miles was "too distant a transportation to be within the vicinity." ***Blatterman***, 362 Wis. 2d 138, ¶26; *see also* ***id.***, ¶27 ("the vicinity is less than a ten-mile distance"). The court in ***Blatterman*** declined to provide further guidance but, as support for its conclusion, cited two unpublished cases involving shorter distances. *See* ***id.***, ¶27.

¶11 In arguing that she was transported outside the vicinity, Unser relies primarily on one of the unpublished cases cited in ***Blatterman***, ***State v. Doyle***, No. 2010AP2466-CR, unpublished slip op. (WI App Sept. 22, 2011). In ***Doyle***, an officer made a traffic stop in a rural area and, due to winter weather conditions, transported the suspect to another location three to four miles away in order to perform field sobriety tests. *See* ***id.***, ¶¶2, 6, 13. Based on several factors, the ***Doyle*** court concluded that this three- to four-mile distance was within the vicinity, but then went on to opine that such a distance was "at the outer limits of the definition of 'vicinity.'" ***Id.***, ¶13. Picking up on this language from ***Doyle***, Unser argues that "if three to four miles is at the outer limits, then at least five

miles to six plus miles under almost identical facts and circumstances, is just plain out."

¶12 To begin, I am not bound by ***Doyle*** and do not find its "outer limits" commentary persuasive. *See* WIS. STAT. RULE 809.23(3)(b). In a rural area, why is a three- or four-mile drive significantly different from a five- or six-mile drive? I see little sense in saying that, in a rural area, three or four miles is okay but six is not. More to the point, neither ***Doyle*** nor ***Blatterman*** supports the proposition that six miles is *always* too far. On the contrary, ***Doyle***'s underlying reasoning actually supports a conclusion that a six-mile distance may be permissible depending on the circumstances and, in particular, depending on whether there is no location that is closer where the officer can reasonably conduct field sobriety tests. The ***Doyle*** court relied not only on the weather conditions and rural area of the stop, but also on undisputed evidence that the suspect was transported to the closest location where the officer could reasonably conduct field sobriety tests. *See* ***Doyle***, No. 2010AP2466-CR, ¶13; *see also* ***State v. Isham***, 70 Wis. 2d 718, 728, 235 N.W.2d 506 (1975) (suggesting that the permissibility of transporting a suspect a given distance as part of a ***Terry*** stop depends on whether the transport is "reasonable under the[] circumstances").

¶13 Similarly, here the officer's testimony showed that the officer transported Unser to the closest location where the officer could reasonably conduct field sobriety tests, Waupun Memorial Hospital. The officer acknowledged in testimony that there were two other closer locations with shelter, but the officer determined that neither was suitable. One location was a tavern very close to the initial stop; the other was a 24-hour Wal-Mart distribution center that the officer knew was not open to the public and that was located 4 1/2 miles

away in the opposite direction from the hospital. Based on this testimony, there was no reason to think that either of these two locations was suitable.

¶14 Unser argues that the officer should have investigated further to determine whether either of these two locations might have turned out to be suitable. I disagree, and instead agree with the circuit court that extending the time of the stop to further investigate two very unpromising locations was not more reasonable than simply proceeding to a relatively close and plainly appropriate location. It is apparent from the officer's testimony that he knew he could conduct the tests at the hospital.

¶15 In her reply brief, Unser makes an argument that seems at odds with her main, ***Doyle***-based argument. Unser argues that the particular circumstances of a case—such as the rural nature of the area or the existence of alternative locations—are not relevant to the determination of whether a suspect was transported within the vicinity. She argues that such circumstances become relevant to the reasonableness of the transport only if the court first determines that the suspect was transported within the vicinity. Unser provides no legal authority supporting this belated argument, and I decline to discuss it further. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992) (court of appeals need not consider inadequately developed arguments); *see also* ***A.O. Smith Corp. v. Allstate Ins. Cos.***, 222 Wis. 2d 475, 492, 588 N.W.2d 285 (Ct. App. 1998) (court of appeals generally does not address arguments raised for the first time in a reply brief).

Conclusion

¶16 For the reasons above, I affirm the judgment against Unser.

By the Court.—Judgment affirmed.

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