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COURT OF APPEALS

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OF WISCONSIN**

DISTRICT IV

Appeal No. 2014AP002601 CR
Dodge County Circuit Court Case No. 2013CT000398

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

RICHARD S. FOLEY,

Defendant-Appellant.

ON APPEAL FROM THE JUDGEMENT OF CONVICTION AND THE
DECISION OF THE TRIAL COURT DENYING DEFENDANT-
APPELLANT'S MOTION FOR SUPPRESSION OF EVIDENCE IN THE
CIRCUIT COURT FOR DODGE COUNTY, THE HONORABLE STEVEN
G. BAUER PRESIDING

BRIEF OF THE PLAINTIFF-RESPONDENT

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STATEMENT ON ORAL ARGUMENT

The plaintiff-respondent does not request oral argument in this matter.

STATEMENT ON PUBLICATION

The plaintiff-respondent does not request the decision of this Court to be published.

STANDARD OF REVIEW

Foley correctly states the standard of review in his brief. Therefore, no further discussion of this concept is necessary.

ARGUMENT

I. OFFICER YAHNKE’S DECISION TO PLACE AN UNCOOPERATIVE SUSPECT IN THE BACK OF A SQUAD CAR FOR 32 MINUTES WAS REASONABLE UNDER THE CIRCUMSTANCES AND DID NOT TRANSFORM A LAWFUL DETENTION INTO AN ARREST

Foley begins his argument by discussing the Fourth Amendment to the Constitution of the United States and the corresponding provision in the Wisconsin Constitution (Article I, Section 11). Foley then claims that a traffic stop “is an investigative detention that triggers the protections of the Fourth Amendment”, and that a temporary detention during a traffic stop constitutes a seizure within the meaning of the Fourth Amendment. (Foley’s brief p. 7). The State agrees with the Foley’s assertion that the Fourth Amendment protects individuals from unlawful seizures. The State also agrees with Foley’s assertions that a traffic stop is an investigative detention that triggers the protections of the Fourth Amendment and that a temporary detention of an individual constitutes a seizure within the meaning of the Fourth Amendment. The State will also stipulate that when Officer Yahnke activated her lights and siren, and when Foley stopped his vehicle in the driveway, in effect submitting to the officer’s show of authority, that he was seized within the meaning of the Fourth Amendment.

Foley then turns his attention to the legal standard for an investigatory stop. Once again, the State will stipulate that Foley uses the correct standard but omits a crucial sentence from his brief. The correct standard:

For the stop of a person to pass constitutional muster as investigatory, the detention must be temporary and last no longer than is necessary to effect the purpose of the stop. Similarly, the investigative methods employed should be the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time. A hard and fast time limit rule has been rejected. In assessing a detention for purposes of determining whether it was too long in duration, a court must consider "whether the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly, during which time it is necessary to detain" the suspect. In making this assessment, courts "should not indulge in unrealistic second-guessing." In assessing a detention's validity, courts must consider the " 'totality of the circumstances-the whole picture,' "because the concept of reasonable suspicion is not " 'readily, or even usefully, reduced to a neat set of legal rules.' " *The manner in which a temporary detention of a suspect is created must be gauged by a standard of reasonableness. State v. Wilkens*, 159 Wis.2d 618, 625-626, 465 N.W.2d 206 (Ct. App. 1990). (emphasis mine).

The test, thus, is a totality of the circumstances test. In assessing the totality of the circumstances, the Court must consider whether the police diligently pursued the investigation and should not engage in unrealistic second guessing. The circumstances of the stop and detention appear below.

On September 30, 2013, Officer Amy Yahnke observed two motorcycles pass her location at about 10:20 in the evening. (R. 28:5). Officer Yahnke believed the exhaust was loud, one of the tail lights was not functionable and she estimated the speed of the motorcycles at 40 mph in a 25 mph zone. (R. 28: 6). Officer Yahnke testified that when she activated her squad lights, the motorcycles did not pull over. (R.28:6). Officer Yahnke then activated her siren and the motorcycles did not pull over. (R.28:7). The motorcycles continued to travel down the roadway until they arrived at Foley's residence where they did stop. (R.28:7). The officer was

later able to identify one operator as Foley and the other operator as Thompson. (R.28:7).

Initially, as Yahnke approached both operators she asked if she could see their hands. (R.28:8). Thompson complied with the request and raised his hands while Foley did not. (R.28:8). Yahnke then asked Foley to take his hands out of his pockets a total of three times. (R.28:8). Foley's reaction was to quickly remove his hands from his pockets and then put his hands back into his pockets. (R.28:8). During this initial encounter, Officer Yahnke noticed that Foley's eyes were red and bloodshot, she could smell an odor of intoxicants coming from him, and his speech was slurred. (R.28:8).

Yahnke then asked Foley if he'd been drinking and Foley responded by saying no. (R.28:9). Yahnke asked Foley how many drinks he had and Foley responded that he didn't have any drinks. (R.28:9). Yahnke asked Foley where Foley was coming from. (R.28:9). Foley responded by saying that he was from "uptown". (R.28:9). Yahnke asked Foley what bars he was at in uptown. (R.28:9). Foley stated that he was not at any bars. (R.28:9). Thompson then indicated, in direct contradiction to Foley, that they were at the two bars that were uptown. (R.28:9).

When Yahnke began speaking with Thompson, Foley attempted to leave the scene by walking away from the officer and toward Foley's house. (R.28:10). Yahnke asked Foley where Foley was going. (R.28:10). Foley's response was that he was going into his house. (R.28:10). Yahnke told Foley that he could not go into his

house until the traffic stop was completed. (R.28:10). Yahnke walked after Foley and indicated that “we stopped and we sat there and I brought him back”. (R.28:10).

At this point Officer Johnson arrived on the scene. (R.28:10). After Officer Johnson arrived and Officer Jahnke brought Foley back, Foley took off his coat and threw it behind Foley’s motorcycle. (R.28:10). During this time Yahnke and Johnson decided that they were going to place Foley in the back of the squad car for safety reasons and deal with Thompson. (R.28:11). Yahnke indicated that while Thompson was being cooperative, she had noticed similar signs of intoxication on Thompson and so there would need to be OWI follow up with both individuals. (R.28:11). Foley was not handcuffed and was told by Yahnke that Foley was being detained in the back of the squad car. (R.28:11). Yahnke told Foley that the officers were going to continue on with this part of the investigation and then they were going to come back and investigate his part. (R.28:11). At some point Lt. Roy, a third officer, came on scene but it is not entirely clear from the record when that occurred. (R.28:20).

Officer Johnson then runs Thompson through the field sobriety tests. (R.28:12). Officer Yahnke is the backup officer observing the tests. (R.28:12). Ultimately, Thompson is arrested for OWI. (R.28:12). Thompson is handcuffed and placed in the back of Officer Johnson’s squad car. (R.28:12). Once Thompson is safely in the back of Johnson’s squad car, Yahnke returned to her squad car to and transported Foley to the police station in order to continue the investigation with respect to Foley. (R.28:12-13). Foley had been in the squad car for approximately

thirty two minutes. (R.28:19). Yahnke indicated that she transported Foley to the police department, about thirty seconds away, because that was a more safer environment. (R.28:13). Officer Yahnke indicated that she made this decision due to the fact that Foley tried to go into his house during the traffic stop and Foley's uncooperativeness. (R.28:13). When Foley is let out of the squad car, Yahnke asked him if he wanted to perform any of the field sobriety tests. (R.28:14). Foley refused the tests. (R.28:14). Foley was then placed in handcuffs and arrested. (R.28:14).

Under these circumstances, the actions by the law enforcement officers were reasonable. From the very start, Officer Yahnke was faced with an uncooperative suspect. Foley did not pull over immediately despite the officer's lights and siren. Foley refused to take his hands out of his pockets despite numerous requests to do so and then only did so for a short period of time. At one point, Foley tried to flee into his home in order to terminate the encounter with the officer. Further, Officer Yahnke noticed signs of intoxication on both parties which made further investigation necessary. For officer safety reasons, the officers made the decision to place an uncooperative Foley in the back of a squad car while they investigating Thompson's suspected drunk driving. After Thompson was arrested, Yahnke continued the investigation with respect to Foley. The officers diligently pursued their OWI investigation involving two suspected drunk drivers.

Foley, however, contends that this court should engage in the "unrealistic second guessing" prohibited under *Wilkins*. Foley believes that Yahnke could have

immediately transported an uncooperative Foley to the police station despite her concerns for officer safety. (Foley's brief p. 10). The Court should decline to engage in this type of unrealistic second guessing. The officer's actions were justified because of Foley's behavior.

The crux of Foley's appeal, however, is that he was arrested without probable cause when he was placed in the back of Yahnke's squad car for thirty two minutes minutes. (Foley's brief p. 7). Foley contends that :

he could not go into his house, they told him he was being detained, and subsequently locked him in the rear of a squad car for thirty-two minutes and transported him to the police department. Based on the level of restraint, duration of the custody, and diminished potential for release, a reasonable person in Mr. Foley's position would have concluded that he was not free to leave and under arrest. (Foley's brief p. 11).

In Wisconsin, the test of whether an individual has been placed under arrest is “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. *State v. Marten-Hoye*, 307 Wis.2d 671, 681, 764 N.W.2d 498 (Wis.App. 2008); *State v. Swanson*, 164 Wis.2d 437, 448, 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 circumstances of the situation including what has been communicated by the police officers, either by their words or actions, shall be controlling under the objective test. *Id.* at 446 – 447.

In this case, Foley was told the following by Officer Yahnke:

I told him we were just gonna detain him in the back of the squad car, continue on with this part of the investigation, and then come back and investigate his part. (R.28:11).

The fact that Foley was not told he was under arrest, but was only detained and the fact that he was told exactly what was going to happen including that the officer would be coming back to investigate Foley's part in it, works against Foley's contention that he was arrested when he was put in the squad car.

Foley argues that he was under arrest because he was told that he could not go into his house until the investigation was completed. (Foley's brief p. 11). Foley does not provide any legal support for the proposition that an individual being detained during a traffic stop retains the right to enter his home or he's considered to be arrested. This contention should be rejected as Foley does not have the right to terminate the encounter. *State v. Goyer*, 157 Wis.2d 532, 537, 460 N.W.2d 424 (Wis.App. 1990). From the Court's decision in *Goyer*:

Goyer contends that he had the right to terminate Officer Gasse's investigation. We presume his argument is founded upon the idea that since the initial encounter was consensual and since there was no probable cause to believe he had committed a crime, he was free to walk away. We hold, however, that a person does not control the duration of an initially consensual encounter once that person becomes a valid suspect. At that point, the Terry rule applies. The rule states that "an investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop." *Florida v. Royer*, 460 U.S. 491, 500, 103 S.Ct. 1319, 1325, 75 L.Ed.2d 229 (1983). If a consideration of all the circumstances shows that the investigation has not been completed, a suspect does not have a right to terminate the investigation. *Id.*

Officer Gasse's investigation of Goyer was not finished when Goyer refused to follow Officer Gasse's command to stop. Officer Gasse still had unanswered questions about how the truck had arrived at its location against the tree and why the keys were in the ignition. Without any evidence that someone else had put the keys in the ignition or that someone else had driven the truck into the tree, it was reasonable for the officer to stop the owner of the vehicle to ask him these questions. While Goyer could have refused to answer Officer Gasse's questions, he could not simply walk away. *Id.* at 537-538.

The state contends that Officer Gasse had the right to physically restrain Goyer in order to continue the investigation. We agree. An officer conducts a Terry stop when there is not yet probable cause to arrest a suspect. The right to make a Terry stop would mean little if the officer could not restrain a suspect who attempts to walk away from the investigation. *Id.*

When Foley attempted to leave the area of the stop and walk into his house, Officer Yahnke's investigation had not been completed. Since Officer Yahnke's investigation had not been completed, Foley did not have the right to terminate the investigation by fleeing into his house. Officer Yahnke had every right to stop Foley. The stop was not transformed into an arrest due to Foley's desire to terminate the encounter. A reasonable person in Foley's position would not believe that he was under arrest under these circumstances.

Foley's last contention is that the duration of the thirty two minute detention in the back of the squad car transforms the investigation into an arrest. (Foley's brief p.11). Two cases, which Foley cites to in his own brief, refute his contention. For instance, in *Florida v. Royer*, 460 U.S. 491, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983), the United States Supreme Court found that a fifteen minute detention amounted to an arrest.

By the time Royer was informed that the officers wished to examine his luggage, he had identified himself when approached by the officers and had attempted to explain the discrepancy between the name shown on his identification and the name under which he had purchased his ticket and identified his luggage. The officers were not satisfied, for they informed him they were narcotics agents and had reason to believe that he was carrying illegal drugs. They requested him to accompany them to the police room. Royer went with them. He found himself in a small room—a large closet—equipped with a desk and two chairs. He was alone with two police officers who again told him that they thought he was carrying narcotics. He also found that the officers, without his consent, had retrieved his checked luggage from the airlines. What had begun as a consensual inquiry in a public place had escalated into an investigatory procedure in a police interrogation room, where the police, unsatisfied with previous explanations, sought to confirm their suspicions. The officers had Royer's ticket, they had his identification, and they had seized his luggage. Royer was never informed that he was free to board his plane if he so chose, and he reasonably believed that he was being detained. At least as of that moment, any consensual aspects of the encounter had evaporated, and we cannot fault the Florida Court of Appeal for concluding that *Terry v. Ohio*

and the cases following it did not justify the restraint to which Royer was then subjected. As a practical matter, Royer was under arrest. *Royer* at 502-503.

However, in *State v. Wilkens*, 159 Wis.2d 618, 465 N.W.2d 206 (Ct. App.1990), in the context of an ineffective assistance of counsel analysis, the court found that a detention for an hour and twenty minutes did not amount to an arrest.

Under the circumstances of this case, Wilkens' detention for an hour to an hour and twenty minutes did not ripen into an illegal arrest. The police were diligent in their crime investigation by getting Parr's statement, finding the victim, E.E., calming her down, getting her statement of the events and establishing her identity of the garage and her clothes within the garage. They then immediately sent her to the scene of the arrest for possible identification. E.E.'s identification was immediate, and Wilkens and Gilbert were then arrested. This arrest was reasonable under the totality of the circumstances in this case. Thus, counsel was not ineffective in not attacking the arrest. *Wilkens* at 628.

As the above case law demonstrates, it is not the “duration of the custody” that matters in the analysis but the circumstances of the situation. In this situation, the officers were not faced with a situation such as in *Royer* or in *Wilkens*, with a single individual, but were faced with the prospect of investigating two individuals for suspected OWI. They chose to place the uncooperative individual, Foley, in the back of the squad car without handcuffs and told Foley that he was being detained until the investigation with Thompson was complete and then they would continue the investigation with Foley. During the thirty two minute wait, the officers were investigating Thompson’s suspected drunk driving. Once Thompson had been arrested and was in the back of another squad car, the investigation into Foley’s potential drunk driving resumed. The fact that the duration was thirty two minutes in length does not transform a lawful detention into an unlawful arrest. A reasonable

person in Foley's position would not believe that he was under arrest given the circumstances.

Once Foley is transported to the police station, he promptly refused to perform any field sobriety tests. An individual's refusal to perform field sobriety tests may be used as evidence of probable cause to arrest. *State v. Babbitt*, 188 Wis.2d 349, 363, 525 N.W.2d 107 (Wis.App.1994). Foley's refusal to perform field sobriety tests along with the slurred speech, odor of intoxicants, and bloodshot and red eyes provided ample probable cause for an arrest.

CONCLUSION

Under the circumstances of the case, a reasonable person in Foley's position would not believe that he was under arrest at the time Foley was placed in the back of the squad car. The officer's decision to do so was reasonable considering Foley's uncooperativeness and that Foley tried to flee into his house. The fact that Foley was told he could not go into his house and the fact that Foley spent thirty two minutes in the back of the squad car do not transform Foley's lawful detention into an unlawful arrest since the officer had explained to Foley that he was simply being detained and that the officer would be back to investigate Foley's part of the incident after the investigation into Thompson's portion was complete. The officer then acted in a backup capacity during the investigation into Thompson's suspected drunk driving. Once Thompson was under arrest, handcuffed, and placed in the back seat of another officer's squad car, Foley was transported thirty seconds to the police station and let

out of the squad car. Foley refused to do any field sobriety tests and was placed under arrest and handcuffed. All the activity was lawful. This Court should affirm the ruling of the trial court denying Foley's motion with regard to an illegal arrest.

Dated this 24th day of February, 2015,

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CERTIFICATION

I hereby certify that this brief meets the form and length requirements of Wis. Stat. Section 809.19(8)(b) and (c) in that I have used Times New Roman font, a proportional serif font. I have double spaced this brief . The brief starts on page 1 and ends at page 11 for a total of 11 pages. The word count is 3270. The entire document, minus the certification pages is 15 pages.

I have served three copies by mail of this brief to Attorney Walter Piel Jr., the attorney for the defendant-appellant.

Dated this 24th day of February 2015

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CERTIFICATION

I hereby certify that I have submitted one electronic copy of this brief which complies with the requirements of Wis. Stats. Section 809.19(12).

I also certify that this electronic brief is identical in content and format to the printed form filed as of this date.

A copy of this certification has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 24th day of February 2015

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