STATE OF WISCONSIN
IN THE SUPREME COURT
Case No. 2014AP002701 CR
Circuit Court Case No. 2012CF000093

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ROBERT JOSEPH STIETZ,

Defendant-Appellant-Petitioner

ON REVIEW FROM AN UNPUBLISHED DECISION OF THE COURT OF APPEALS AFFIRMING THE JUDGMENT OF CONVICTION AND SENTENCE ENTERED ON MAY 28, 2014 BY THE CIRCUIT COURT FOR LAFAYETTE COUNTY, THE HONORABLE JUDGE JAMES R. BEER PRESIDING

REPLY BRIEF AND SUPPLEMENTAL APPENDIX OF DEFENDANT-APPELLANT-PETITIONER ROBERT J. STIETZ

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STATEMENT OF FACTS

Each party separately provided a statement of facts, which Stietz melds into the following undisputed statement of facts. The first portion pertains to the self-defense issues, and the second portion pertains to the trespass issues.

Self-Defense

1. Stietz was walking a parcel of land he owned on November 25, 2012, wearing camouflage. (R.113:93; R.111:181; App. 50)

2. Stietz testified that he had been walking his fence line checking for trespassers. (R.113:92, 106; App. 49, 63)

3. Stietz had had ongoing problems with trespassers on this particular parcel of uninhabited land which he had reported to the Sheriff. (R.113:110-111, 138-139; App. 67-68, 95-96)

4. Stietz testified he had more problems with trespassers during deer hunting season than other times of the year. (R.113:112; App. 69)

5. There were "no trespassing" signs posted around the property. (R.113:78-79)

6. Sunset on that date was 4:25 p.m. (R.112:9-10)

7. Shortly after 5:03 p.m., two DNR wardens dressed in blaze orange walked through a cattle gate onto Stietz's private property. (R.111:173-174; R.112:13, 95)

8. When the wardens eventually saw Stietz, it was "very nearly completely dark" and one warden turned on his flashlight and pointed it toward Stietz. (R.111:177; R.112:145) Visibility wasn't great. (R.112:95)

9. Stietz testified that he did not hear the wardens identify themselves. (R.113:122; App. 79)

10. Stietz testified he only heard "something warden" but it was mumbled. (R.113:93, 122; App. 6: ¶ 13; App. 50, 79)

11. Stietz testified he saw a glimpse of blaze orange in the distance, but did not see the persons again until they were twenty or thirty yards from him. (R.113:123, 125, 141-142; App. 80, 82, 98-99)

12. One of the men told Stietz he needed to be in orange if he was hunting, but Stietz responded more than once that he was not hunting, rather checking for trespassers. (R.112:137; R.113:94; App. 51)

13. One of the men asked Stietz if he had seen any deer, and Stietz replied he had seen seven does. (R.111:179; R.112:25, 100; R.113:94, 129; App. 51, 86)

14. Stietz had not violated any law or regulation prior to the encounter with the DNR wardens.

15. Once the three men were within arms' reach of each other, one warden asked Stietz if his rifle was loaded and Stietz confirmed that it was. (R.111:180)

16. Stietz testified he felt like the men began to circle him. (R.113:95; App. 52)

17. One warden asked Stietz to give him his rifle; Stietz refused. (R.113:96; App. 53)

18. The warden asked again if he could see the firearm and reached for Stietz's rifle. (R.111:180-181; R.113:96; App. 53)

19. The initial physical contact between one warden and Stietz was initiated by the warden when he grabbed Stietz's shirt. (R.113:96; App. 53)

20. Stietz testified that he felt both men grabbing for his rifle. (R.113:131; App. 88)

21. One warden testified that he drove his body towards Stietz, trying to take the rifle from him, and ended up on his back with the rifle in his hands. (R.111:181-182; R.113:97; App. 54)

22. The other warden (Webster) yelled something then drew his firearm on Stietz. (R.102:35-36; R.111:183)

23. Stietz saw Warden Webster's handgun coming up and thought "my God, he's going to shoot." (R.113:98; App. 55)

24. Warden Frost then drew his gun as well and pointed it at Stietz. (R.111:183; R.113:99; App. 56)

25. Warden Frost and Stietz drew their handguns at "about the same time." (R.111:184; R.113:99; App. 56)

26. At that point, Stietz testified that he still did not know who these two people were. (R.113:114; App. 71)

27. Stietz testified he was studying their faces because he did not know them; he did not see a badge or a shoulder patch because it was dark and he was trying to study their faces. (R.113:126-127; App. 83-84)

28. Stietz testified that he was fearful for his life. (R.113:89; App. 46)

29. The two wardens and Stietz all agreed that Stietz said to the wardens that he was exercising his right to defend himself and his property. (R.112:111, 138; R.113:30, 99; App. 56)

Trespass

1. When the wardens first saw Stietz's car, it was parked off of the roadway on private property. (R.111:165)

2. Neither warden had any information as to why a car was parked a quarter mile off the road on private land. (R.111:166) One warden thought maybe it was abandoned, the other didn't agree. (R.112:12)

3. There is no evidence or reason that a car should not have been parked there.

4. The wardens circled around the sector surrounding the car, stopped a few different times to look with binoculars and a scope to see if they could see anybody either in orange, a blind or a tree stand. They did not. (R.111:166-167; R.112:12)

5. The wardens drove onto the private property to look at the car. (R.111:167)

6. The wardens checked the car's registration at 4:58 PM and it came back to Bob and Sue Stietz, the adjacent property owners. (R.111:167-169).

7. One warden saw an empty rifle case, a tree seat and scent killer spray, all secured inside the car. (R.111:168-169)

8. Stietz's property was clearly posted with "no trespassing" signs everywhere around it. (R.113:78-79)

9. The wardens walked along the property's fence line, then went through Stietz's cattle gate at approximately 5:03 p.m. (R.112:95)

10. After walking through the gate, the wardens continued to walk onto Stietz's fully enclosed and fenced pastureland. (R.111:174; R.112:13)

11. When they wardens saw Stietz, both of them were inside Stietz's enclosed, fenced-in property. (R.111:174-176, 186)

12. When the DNR wardens made initial verbal contact with Stietz, they were on Stietz's land. (R.111:174-177)

13. When the wardens encountered Stietz it was "very nearly completely dark;" one warden turned on his flashlight and pointed it toward Stietz. (R.111:177; R.112:145) Visibility wasn't great. (R.112:95)

14. Stietz had not violated any law when confronted by the wardens.

15. During subsequent conversation and confrontation, the two DNR wardens and Stietz all ended up right outside of Stietz's gate, on an easement. (R.110:15)

16. The access easement crossed land owned by Stietz's neighbor and uncle. (R.113:73; R.58:Ex. 12)

17. Stietz had possessory rights to the easement. (R.58:Ex. 12)

18. When Deputy Broge arrived for backup, he admitted he knew he was entering private property when he turned up the field lane. (R.113:28)

ARGUMENT

I. SUFFICIENT EVIDENCE WAS PRESENTED TO SUPPORT STIETZ'S CONSTITUTIONAL RIGHT TO A SELF-DEFENSE JURY INSTRUCTION.

A. Stietz Met His Minimal Burden to Produce Evidence to Establish His Right to A Self Defense Instruction; It Was the Role of the Jury to Decide Whether or Not to Accept the Proof of That Theory.

A defendant need only produce "some" evidence in support of his privilege of self-defense to cross the established minimal threshold. State v. Peters, 2002 WI App 243, ¶¶ 27-28 and n.4. The State concedes this. (State's Brief 14) An accused is entitled to the instruction even if the supporting evidence is "slight." State v. Schuman, 226 Wis. 2d 398, 404 and n.3 (Ct. App. 1999) Stietz presented an abundance of evidence to support his right to instruct the jury on his privilege of self-defense.

Stietz had ongoing problems with trespassers and reported those problems to the Sheriff. (R.113:138-139; App. 95-96) He believed that the two men he spotted walking his land, wearing blaze orange, were trespassing hunters. (R.113:123; App. 80) Since it was dark, he could not read the small patch on the outer shoulder of the wardens' jackets, even as the two men came closer. Stietz testified he was focused "trying to study their face[s]" because he "did not know them when [he]

did see them." (R.113:126-127; App. 83-84) All he heard from them was a question about how many deer he had seen (a question likely to be posed by a hunter) and that one of them said "something warden." (R.113:93, 94, 122; App. 50-51, 79) It never occurred to Stietz that they could be wardens until well after the encounter ended.[1]

The video referenced in the State's brief confirms it was pitch dark in the field. Even as the wardens walk directly past the headlights of the car, they look like hunters. The shoulder patches are not legible; there are no markings on the fronts or backs of their jackets; no 'hat patch' is visible. This video shows exactly how much the wardens appeared like random hunters; nothing about their attire clearly identified them to Stietz as wardens.

State v. Frey, 440 N.W.2d 721 (S.D. 1989), relied on by the State, is completely inapposite. In Frey, the defendant testified he did *not* feel he was in danger and identified the two men on his property as law enforcement officers. Id. at 727-728. The evidence, on its face, didn't support a self-defense instruction. Id. at 728. In contrast, Stietz testified that he absolutely felt he was in danger, that he could not

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1 The State argues Stietz conceded he knew they were wardens when one used his shoulder radio. That is incorrect. Stietz testified that even when one used his portable radio, he still "really didn't know positive for sure . . . because I never seen no credentials.. . ." (R.113:114; App. 71)

identify the men he saw, believing they were more trespassers, not officers. He "was scared, darn scared." (R.113:116; App. 73)

Stietz lowered his gun as soon as he felt the threat against his life was subsiding. When a deputy arrived, the wardens backed away from Stietz with their handguns still drawn at 5:19:45 p.m. (R.113:15, 18; R.58:Ex. 12); 41 seconds later, at 5:20:26 p.m., Stietz lowered his gun, never raising it again. (R.58: Ex. 12; R.111:193)

B. Courts May Not Weigh Evidence When Assessing an Accused's Request for a Self-Defense Instruction.

State v. Mendoza, 80 Wis. 2d 122 (1977), explicitly prohibits courts from weighing credibility or conflicting evidence when considering an accused's request for a self-defense instruction. Once Stietz's minimal threshold burden was met, it was then the sole province of the jury to determine whether or not the evidence established Stietz's theory of self-defense. Id. at 152. There is no way to reach the conclusions urged by the State other than by weighing arguably different inferences from evidence and Stietz's testimony. That is precisely what Mendoza commands that courts cannot do.

C. The State Misinterprets and Incorrectly Relies on Hobson.

The Court of Appeals erred when it based its denial of a self-defense instruction on State v. Hobson, 218 Wis. 2d 350, 380

(1998) (App. 6 ¶ 14) Hobson only abrogated a person's common law privilege to forcibly resist a peaceable arrest; the court made it clear that its conclusion was "limited to the narrow and peculiar facts presented." Hobson, ¶ 10, fn.7. The facts stand in direct contrast:

Hobson	Stietz
Hobson knew she was dealing with uniformed police officers.	Stietz did not know who was on his land - they were far away and he couldn't decipher any identification.
The officer pulled up to Hobson's house in a marked car, within view of the front door. Id. at ¶¶ 3-4.	No visible marked car, only two men on foot, wearing hunter blaze orange coats and hats.
Hobson arrested. Id. at ¶ 6.	No arrest.
Hobson was the initial aggressor, pushing and striking one officer as they attempted to peaceably handcuff her. Id. at ¶ 7.	The wardens were the initial aggressors; one grabbed Stietz by the shirt then forcibly took his gun.

The Court of Appeal's decision conflicts with Hobson and its reliance on Hobson is misplaced.

D. Stietz Had the Right to Resist Unlawful Attempts of Trespassing Agents to Forcibly Disarm Him.

Stietz's Second Amendment assertions were fully developed in his opening brief. (Stietz Brief 27-29) Stietz had a constitutional right to bear arms when the DNR wardens unlawfully demanded he

surrender his rifle and then forcibly wrested it from him when he refused. The State's response seems to be that Sections 23.58 and 23.59, Stats., preempt the Second Amendment. That claim fails for two reasons: a statute may not override the Constitution, and Sections 23.58 and 23.59 are only applicable in *public places*. The State's unfounded proposition that Stietz's remote, enclosed, and posted property somehow qualifies as a public place is addressed in Section III.

II. STIETZ HAD A CONSTITUTIONAL RIGHT TO PRESENT A DEFENSE THAT THE DNR WARDENS WERE UNLAWFULLY TRESPASSING.

A. Stietz Has Standing to Allege Trespassing Because Possession, Not Ownership, is the Controlling Factor in Trespass.

The State incorrectly relies on the trial court's holding that "at the time that all the confrontation took place, they weren't trespassers. They were on Mr. Loeffelholz's property." (State's Brief 10) Unfortunately, the trial court mis-stated Wisconsin law relating to trespassing, property and easements. The trial court and the State were sidetracked by the issue of who holds title, but title is irrelevant. Possession, not ownership, is the issue in trespass:

> "[The plaintiff in a trespass action need establish only a right to possession of the land, and not ownership of the land . . ."

Manor Enters., Inc. v. Vivid, Inc., 228 Wis. 2d 382, 391, n.2 (Ct. App. 1999).

> "TRESPASSER: DEFINITION
> A person who enters or remains upon property in possession of another without express or implied consent is a trespasser."

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When the wardens moved from inside Stietz's land to just outside the gate, they simply moved onto an adjacent easement he possessed. Stietz was the legal occupant and possessor of his land and easement and therefore has standing to assert trespass.

B. DNR Wardens Are Capable of Committing Trespass.

DNR wardens do not by virtue of their position hold any higher power than any other citizen or law enforcement officer. Their office does not place them above the Constitution and the laws of the land and confer a unique privilege to go wherever they please; to walk wherever their curiosity may pull them. The legislature considered this matter and only allowed one circumstance where an entry onto private land without a warrant may be justifiable. Wis. Stat. § 29.924(5) (allowing DNR wardens to enter private land only *after making* reasonable efforts

to notify the owner or occupant and only to retrieve dead or diseased wild animals in order to prevent the spread of disease).

The State fails to cite any controlling legal authority to support its assertion that DNR wardens can go wherever they please whenever they please for whatever reason (or no reason at all). Rather, it attached near-century-old opinions written by its own department's predecessor attorney general. One, from 1926, opines that a warden may arrest someone "detected in the actual violation, or whom such officer has reasonable cause to believe guilty of the violation of any of the provisions of this chapter . . ." and may enter a place without warrant if "they have reason to believe that wild animals are taken or held in violation of the statute . . ." (State's Brief 33-34; R-App.113-114) Putting aside its viability in the 21st century, this opinion is not relevant; there was no evidence that Stietz was in violation of any statute prior to the wardens entering his private land.

That 1926 opinion analogizes policing power to taxing power: "It is well known that under the taxing power searches may be made for property without search warrants." (State's Brief 34; R-App. 115) The State uses this to further an astonishing syllogism:

> Wardens are charged with protecting fish & wildlife;
> Fish and wildlife are everywhere;
> Therefore, wardens may go everywhere without limitation.

That logic is absurd. Under the same reasoning, the following would also be true:

> IRS agents are charged with enforcing tax laws;
> The state has broad powers of taxation;
> Therefore, IRS agents may have unfettered access to all of a person's financial records.

The State's logic would swallow the Fourth Amendment and Wisconsin's corollary.

The State cites another OAG opinion (1924) which addressed the ability of the State to enter private lands to "rescue" stranded fish and "carry on rescue work." (R-App. 118) There is no evidence, nor has there been any argument that the DNR wardens trespassed onto Stietz's property to carry out rescue work.

The State asks this Court to grant an unrestricted 'all-access pass' to DNR wardens to investigate hunting violations, even without a shred of evidence that one has been or may be committed because without unfettered power to drive and walk upon whatever land they desire, "it would be exceedingly difficult to determine if a hunter on private land had a proper license." (State's Brief 35) However, a landowner doesn't even need a license to hunt many species of wildlife

on their own private lands and may legally hunt at night:

> "The owner or occupant of any land . . . without a license and subject to all other restrictions except seasons, hunt or trap on their open property for . . . unprotected species causing damage or a nuisance . . ."

Wisconsin DNR, 2016 Small Game Hunting Regulations, "Unprotected Species Regulations," pp. 10, 20. (App. 103-105)

DNR wardens cannot walk onto private lands simply to check for valid hunting licenses. Likewise, police officers cannot randomly pull over cars just to check for valid driver's licenses.

C. The DNR Wardens Did Commit Trespass.

A trespasser is a person who enters or remains upon land in the possession of another without consent. Grygiel v. Monches Fish & Game Club, 2010 WI 93, ¶41. The wardens were on Stietz's land when they first encountered him. (R.111:174-176, 186) Testimony confirmed that at all times, the wardens and Stietz were either inside Stietz's fenced-in private property or directly outside his gate on property in Stietz's possession. Neither warden ever had Stietz's consent to be there.

The United States Supreme Court recognized that a private landowner's right to exclude others from his/her land is "one of the most essential sticks in the bundle of rights that are commonly

characterized as property." Jacque v. Steenberg Homes, 209 Wis. 2d 605, 617 (1997) (citing Dolan v. City of Tigard, 512 U.S. 374, 384 (1994)).

The State cites State v. Frey, 440 N.W.2d 721 (S.D. 1989), where the South Dakota Supreme Court upheld the disallowance of requested jury instructions on trespass. In Frey, two slaughtered goats were hung in plain view of the roadway. A citizen, thinking the carcasses may be illegally hunted deer, called in a tip and a conservation officer and policeman responded, spotting the animals from the public roadway. Id. at 722-723. The court noted that:

> "[T]he officers here did not conduct a warrantless search because Frey chose to display the carcasses in a conspicuous manner, thus eliminating any expectation of privacy."

Id. at 726. The decision hinged upon the fact that the defendants hung carcasses in an open farmyard clearly visible from either of two appurtenant roads. Id. at 727. There is no evidence that wardens observed anything suspicious prior to trespassing onto Stietz's land and they were not following up on any tips. Also notable in Frey was that there "was no dispute that the officers were acting in the performance

of their duty" (Id. at 726, fn. 8), a notion disputed by Stietz.[2] The wardens saw an empty car, trespassed onto private land to check its registration, and learned the car belonged to the landowners, Bob and Sue Stietz. Any curiosities should have been immediately quashed. Instead, they continued to poke around, looking inside the car, seeing an empty gun case, a camouflaged portable tree seat and buck lure spray. (R.111:168-169) An active hunter wouldn't leave his tree seat and spray in the car as those are items used *while* hunting. (R.113:27)

The State argues no more than *maybe* those things indicate a "possible hunting violation" or "could be" someone hunting or someone "potentially" hunting. (State's Brief 1, 2, 5) But a parked car on a private field lane is not actual evidence of anything. Rather, it is commonplace in rural Wisconsin, not an oddity that should create an unheard of exception to the principles of trespass.

A DNR or conservation warden engaged in a trespass loses his legal authority. State v. Gaulke, 177 Wis. 2d 789, 792 (Ct. App. 1993); Wallner v. Fidelity & Deposit Co. of Maryland, 253 Wis. 66, 70 (1948)

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2 The State also cites Betchart v. Department of Fish & Game, 158 Cal. App. 3d 1104 (Cal. Ct. App. 1984), which is not relevant because Betchart was merely a partial owner of range land who objected to game wardens patrolling the property. In California, open ranges are common, can be extremely vast and are typically unenclosed, allowing for the free range of livestock, other animals, or people.

("[W]here an authority given by law is exceeded, the officer loses the benefit of his justification, and the law holds him a trespasser ab initio although to a certain extent he acted under the authority given.")

III. THIS CASE DOES NOT INVOLVE A 'PUBLIC PLACE'.

The State's reliance on Secs. §§ 23.58 and 23.59, Stats., to attempt to justify what is essentially a Terry stop gone awry is incorrect and misplaced. (State's Brief 25-26) These statutes are inapplicable because they are expressly limited to stops "in a public place." Neither Stietz's private, fenced-in land nor the access easement he possessed are a "public place."

> "[T]he expression 'public place' is not occult. It is part of the English language, and the words are common and ordinary in usage, and that, too, in their legal designation, namely, a place where the public resort . . ."

Wilson v. Sheboygan, 230 Wis. 483, 492 (1939). The State promotes a baseless argument that Stietz's remote rural property could be a 'public place'. (State's Brief 31) A public place, whether privately or publicly owned, is a place to which the public has access by right or invitation, express or implied, but not a place clearly posted "no trespassing."

The State's own evidence belies its claim that Stietz's land was a public place. One warden admitted that it was "not public land and that he knew it wasn't State land." (R.112:23-24) The spot where they were located was so far off the roadway that responding deputies had a hard time finding them. (R.111:191; R.112:166) One responding deputy admitted that when he turned into the field, he knew he was entering private property. (R.113:28) No one at the scene claimed that this incident occurred in a public place.

IV. FOURTH AMENDMENT PROTECTIONS EXTEND TO PERSONS.

The State argues that the Fourth Amendment has no bearing on this case because of the "open fields doctrine." (State's Brief 37) Putting aside that police intrusion on an "open field" may not constitute a Fourth Amendment search even though it is a trespass, the State ignores the fact that the protection of the Fourth Amendment extends to not only houses and curtilage, but to 'persons.' "[T]he Fourth Amendment protects people, not places." Katz v. U.S. 389 U.S. 347, 351 (1967). Terry v. Ohio, 392 U.S. 1, 16 (1968), recognized that whenever a police officer accosts an individual and restrains his freedom to walk away, he has seized that person. U.S. v. Mendenhall, 446 U.S. 544, 554-55 (1980), detailed circumstances that would

indicate a seizure, including the threatening presence of several officers, physical touching of the person, and the use of language or tone of voice indicating that compliance with the officer's request might be compelled. Stietz's person was unlawfully seized when the warden grabbed Stietz's shirt and pulled his rifle from him. While the open fields doctrine might have made the Fourth Amendment inapplicable to the wardens' intrusion onto Stietz's land, it cannot justify the forcible seizure of Stietz's person.

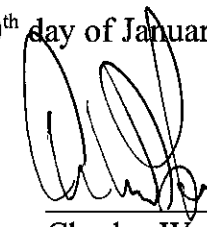
V. THE TRIAL COURT'S ERROR WAS NOT HARMLESS.

The State must but has not shown that it is "clear beyond a reasonable doubt that a rational jury, properly instructed, would have found the defendant guilty." State v. Beamon, 2013 WI 47, ¶3. Rather, the jury accepted Stietz's testimony over that of the DNR wardens when it acquitted him on four of six counts. The jury convicted only on two counts, both specific to Warden Webster, who was the first to draw and point his gun at Stietz before Stietz drew his. (R.111:183) A lack of instruction on self-defense was clearly harmful error.

CONCLUSION

Robert Stietz respectfully requests that this Court enter an order vacating his conviction and remanding this matter for further proceedings.

Submitted this 10th day of January, 2017.



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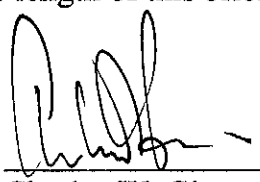
CERTIFICATION ON FORM

I hereby certify that this brief conforms to the rules contained in Section 809.19(8)(b) and (c), Stats., for a brief produced with a proportional serif font. The length of this brief is 2,997 words.



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CERTIFICATION OF COMPLIANCE WITH RULE 809.19(12), STATS.

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

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

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

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