

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III

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**CLERK OF COURT OF APPEALS
OF WISCONSIN**

Case No. 2015AP001004-CR

STATE OF WISCONSIN,
Plaintiff-Respondent,

vs.

DONALD R. WESO,
Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION AND ORDER DENYING
POSTCONVICTION RELIEF ENTERED IN SHAWANO COUNTY, THE
HONORABLE JAMES R. HABECK, PRESIDING

BRIEF OF THE PLAINTIFF-RESPONDENT

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ISSUE PRESENTED

Must the domestic abuse surcharge be vacated because the record does not establish that Weso and the complainant resided together within the meaning of the domestic abuse surcharge statute?

The trial court answered: No.

**STATEMENT ON ORAL ARGUMENT
AND PUBLICATION**

The offense of conviction is a misdemeanor; therefore, this case will be decided by a single court judge pursuant to Wis. Stats. § 752.31(2) and (3). Publication is not warranted pursuant to Wis. Stat. § 809.23(1)(b)4. The state does not request oral argument. The state agrees with the statement of the case

as contained within the brief of the defendant-appellant with the following additional facts:

The court clearly informs the defendant, Donald Weso, that the nature of his charge is domestic abuse. Record Pg. 39, Lines 21, 22. The defendant, Mr. Weso, during the colloquy also acknowledges the nature of the charges being domestic violence by indicating that he “I suppose I probably will be going to have to end up having to go to DV classes for this”. Record Pg. 48, Lines 17, 18 & 19. The prosecution also made it clear to the defendant that the allegations in the criminal complaint included that he had struck his girlfriend, specifically his live-in girlfriend, and that this action was witnessed by another individual. Record Pg. 51, Lines 5, 6 & 7. Finally, counsel for the defendant during her statement to the court and argument regarding sentencing specifically stated “They used to reside together and as a result he lost his residence. He is now staying with friends”. Record Pg. 52, Lines 23, 24 & 25. It is important to note that the defendant did exercise his right of allocution prior to sentencing and at no time did he dispute his own attorney’s admission that he had resided with the victim in this matter.

ARGUMENT

The defendant, Donald Weso, entered a plea of guilty to the charge at issue in this appeal; Battery with a Domestic Abuse Enhancer. The general rule is that a guilty, no contest, or Alfred Plea waives all non-jurisdictional defects including constitutional claims. *State v. Multaler*, 252 Wis. 2d 54, 643 N.W. 2d

437. No argument has been made by the defendant that the imposition of the domestic abuse surcharge constitutes a jurisdictional defect or constitutional claim. Therefore, application of the guilty plea waiver rule should preclude any further discussion as to the merits of this appeal.

If the court wishes to address the claim of the defense that the record in this case does not establish that Weso and the complainant resided together within the meanings of the domestic abuse surcharge statute the state argues that factual finding was made by the court that the defendant, Mr. Weso, was spending five to six nights a week ordinarily at the residence of the complainant, that he had clothes there on a regular basis, and that the complainant laundered them. The court further found that they clearly had a domestic relationship that extended for months and that it was not something temporary or a very occasional visit, including that the surcharge was clearly valid under the facts of the case. Record 57, Pgs. 18 through 19. The court came to these conclusions after hearing the plea colloquy that it engaged in with the defendant. The colloquy included admissions by counsel that the defendant and the complainant resided together. The court also relied upon the testimony of the complainant at the post-conviction motion hearing. (Findings of fact, whether oral or documentary evidence, shall not be set aside and was clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses). *Cooter and Gell v. Hartmarx Corp.*, 496 US 384, 401 (1990).

The present case is very similar to the situation in which individuals reside in university residence halls. This fact scenario was considered in an opinion of the attorney general issued June 15, 1990, 79 Wis. Op. Atty. Gen. 109. In that opinion the Attorney General of Wisconsin concluded that the domestic abuse statute and surcharge “Is aimed at providing equal protection in enforcement of the laws for those involved in certain relationships, either familial or household, irrespective of the permanency or duration of their relationship. The statute does not turn on whether the parties are living in a permanently legal domicile, but rather whether there exists a familial or household relationship with all the attendant stresses. I conclude, therefore, that resides together for purposes of Section 968.075 includes college dormitory roommates regardless of their place of legal domicile”. Id.

CONCLUSION

For the reasons argued above the state asks that the court affirm the findings of the trial court and require that Donald R. Weso pay the domestic abuse surcharge it imposed.

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CERTIFICATION

I hereby certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is proportional spaced font. The length of the brief is 5 pages containing 904 words.

Dated this 24th day of November, 2015.

Catharine D. White
Assistant District Attorney

**CERTIFICATE OF COMPLIANCE
WITH WIS. STATS. §(RULE) 809.19(12)**

I hereby certify that:

I have submitted an electronic copy of this brief and appendix, if any, which complies with the requirements of Wis. Stats. §(Rule) 809.19(12).

I further certify that:

This 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.

Dated this 24th day of November, 2015.

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