STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I

Appeal No: 2015-AP-1322 CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

TORY C. JOHNSON

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION
AND ORDER DENYING POSTCONVICTION
RELIEF, ENTERED IN THE
MILWAUKEE COUNTY CIRCUIT COURT,
THE HONORABLE M. JOSEPH DONALD, PRESIDING

REPLY BRIEF

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I. The State failed to prove Mr. Johnson resisted an officer.

A. The physical resistance during the escort hold cannot support the guilty verdict because this was no longer a temporary stop and the escort hold was unlawful.

Mr. Johnson was tried on the State's theory that he resisted the officer's attempt to stop and question him regarding traffic violations. The evidence, however, showed the officer made no attempt to stop Mr. Johnson at the time he was in the vehicle. Rather, the stop and question occurred when Mr. Johnson was standing on a private porch at the door of his sister's home. The officer approached, demanded his name and demanded he come off the porch. To these demands, Mr. Johnson merely refused. No physical encounter occurred at all. (Appellant's Br. 2). Without proof of physical interference during this stop and questioning, there is no offense of resisting an officer. (Appellant's Br. 10). Thus, the evidence on the first element of the offense of resisting an officer fails as insufficient.

While, as the State asserts, (Brief p. 5), the standard for insufficiency of the evidence allows a search of the record for evidence to support the verdict and permits conflicting testimony to be resolved in favor of the verdict, this is not so where the evidence is insufficient as a matter of law. See, State v. Poellinger, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990). Here, there was no evidence of physical resistance until the officer entered the yard, grabbed Mr. Johnson and escorted him in a compliance hold from the porch to the street. The State asserts that this evidence can be used to support the verdict by resolving conflicts in the officer's testimony such that at the time of the escort from the porch Mr. Johnson "was still temporarily 'stopped'" for the purpose of conducting an investigation of traffic violations. (State's Brief, p. 6).

This ignores that Mr. Johnson had already refused to cooperate with the questioning. There is no purpose for a stop at this point. Furthermore, the purpose in forcibly moving a person within the vicinity of a stop must be reasonable. State v. Quartana, 213 Wis. 2d 440, 446, 570 N.W.2d 618 (Ct. App.

1997). Since the stop, question and refusal had already occurred, and there was no probable cause of a crime or arrestable offense, the forcible removal of Mr. Johnson from the porch could serve no reasonable purpose.

B. The officer acted without lawful authority in conducting the stop and questioning on the porch inside the fenced front yard of Mr. Johnson's sister's house because it was not a public place and there was no crime or arrestable offense.

The State acknowledges that temporary stops must be conducted in a public place but argues around the fact that the stop here was on a porch -- thus, a private place. It asserts a home's threshold has been found to be a public place in a case where the police had "legal justification" to approach the threshold. (State's Brief, p. 10). However, this was not a threshold, it was an enclosed porch -- part of the home's curtilage and the officer did not have probable cause to enter.

As to a case which does involve a porch and finds such porch is not a public place, namely, State v. Popp, 2014 WI App. 100, ¶¶ 7, 20, 357 Wis. 2d 696, 855 N.W.2d 471, the State asserts it is inapposite on the basis the porch was a rear porch, not a front porch as here. (State's Brief, p. 10). The State is silent on the fact that the Court considered the officers to have trespassed when they proceeded up the back steps onto the porch. Here, given that the yard was fenced, a trespass upon entry through the gate without permission is obvious. (See, Appellant's Br. p. 11).

Pointing to Florida v. Jardines, 133 S.Ct. 1409, 1515 (2013), the State asserts police may approach a front door on business like any other member of the public. (State's Brief, p. 10). However, the Court made clear that the implicit license to visitors is dependent upon the purpose for the visit. Thus, the Court warned, the implied license might not apply to police activity without a warrant at the home, such as to gather evidence. (Appellant's Br. p. 11-12). Clearly, under the facts of this case, the officer acted without lawful authority in

demanding identification from Mr. Johnson on his sister's porch rather than in a public place..

The State asserts the two parking violations observed by the officers were moving violations for which demerit points are assessable. (State's Br, p. 8). This is incorrect. The traffic violations were not crimes or arrestable offenses. Wis. Stats. s. 939.12. By definition, non-moving violations include parking violations. Wis. Stats. s 345.28(1). An officer is authorized to arrest without a warrant a person who violates a "traffic regulation." Wis. Stats. s. 345.22. "Traffic regulation" does not include non-moving violations. Wis. Stats. ss. 345.20(1)(b), 345.28(1). It is the State's burden to prove a stop is constitutionally reasonable. (Appellant's Br. p. 13). Other than a footnote asserting the police had probable cause on two arrestable traffic offenses, the State fails to do so. (State's Br. p. 11, n. 2). Clearly, the officer was acting without lawful authority because he had no probable cause of a crime or arrestable offense.

II The trial court did commit reversible error in instructing the jury.

The State argues that the trial court accurately instructed the jury that 1. "the police had legal authority to request identification when they stopped Johnson for a traffic violation" and 2. "'[i]f a person refuses to provide an identification, they can be detained to obtain the subject's identification.'" (State"s Br. p. 13).

The full text of the trial court's instruction to the jury states:

> Police officers may stop, detain and question a person when they reasonably believe that the person has committed a traffic violation, such as a failure to wear seat belt. <u>The police officers had the legal authority to request identification.</u> <u>If a person refuses to provide an identification, they can be detained to obtain the subject's identification</u>.

(56:63)(emphasis added.).

The State's assertion that part 1 of the instruction is a correct statement of the law must be rejected. Clearly, Wis. Stats. s. 968.24 by its plain terms provides an officer with lawful authority to request identification only when the person is stopped in a public place. Without knowledge of this requirement, the jury is precluded from determining whether the officers were acting with lawful authority in demanding identification from Mr. Johnson on the porch. The State argues that based upon Santana, 427 U.S. at 42, the porch was a public place and thus there is no real controversy requiring reversal. (State's Br. p. 15). As noted above, however, Santana concerned entry upon the threshold of a house with probable cause. It did not involve a porch in a fenced yard, as in Popp, supra., which noted the entry constituted a trespass. In addition, lack of implicit license is raised by the police purpose in this case, as noted in Jardines, supra. Unlike the case here, furthermore, the officers in Santana were acting with probable cause. Clearly, the real controversy of whether the officer was acting with lawful authority when he demanded identification from Mr. Johnson on the porch was not tried. Further, the instructional error is not forfeited as argued by the State. Rather, as discussed below, the instructional errors require a conclusion that all of the juror's findings are vitiated. Reversal is necessary.

As to the second part of the instruction, that a person can be detained for refusal to provide identification, the State is essentially silent. (see, State's Br. 13-15). Various cases clearly hold that a person during a temporary investigatory stop is free to refuse to answer or cooperate without repercussions such as detention or seizure. (Appellant's brief, p. 15-16, 23). It is obviously clear that the jury was precluded from determining the element of 'lawful authority' and the instructions relieved the State of its burden to prove the element of lawful authority. Thus, the instruction was unconstitutional. (Appellant's Br. p. 21). Since the jury was prevented from deciding the 'lawful authority' element, all of its findings are vitiated. The verdict cannot stand. (See, Appellant's Br. 25-26).

CONCLUSION

For the foregoing reasons, the defendant-appellant respectfully requests the Court set aside the verdict and vacate the Judgment of Conviction.

Dated this 26th day of January, 2016

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8) for a brief produced with a proportional font. The length of this brief is 1,416 words.

Dated 11/4/2015 _____

CERTIFICATION

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

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