

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

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**CLERK OF COURT OF APPEALS
OF WISCONSIN**

Appeal No. 2017AP002305 - CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

Vs.

SCOTT H. WENGER,

Defendant-Appellant.

ON APPEAL FROM A FINAL ORDER ENTERED
ON MAY 3, 2017 IN THE CIRCUIT COURT FOR
PORTAGE COUNTY, THE HONORABLE THOMAS
T. FLUGAUR PRESIDING

BRIEF AND APPENDIX OF
DEFENDANT-APPELLANT

Kristopher Ellis
State Bar No. 1094245

995 Applegate Rd., Suite 3
Madison WI 53713
Phone: 608-852-7774
AttorneyKristopher@gmail.com

Attorney for Defendant-Appellant

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ISSUES PRESENTED

Whether there is sufficient evidence to support the resisting an officer conviction on the elements of resisting and lawful authority?

Whether Mr. Wenger forcibly resisted a peaceful arrest when he went rigid after three officers took his camera, forced handcuffs on him, picked him up after he went limp and threw him into a vehicle like a piece of wood.

CIRCUIT COURT'S RULING

The circuit court found Mr. Wenger guilty of Resisting an Officer after a bench trial on May 3, 2017. (R 91: 198). The circuit court ruled that Mr. Wenger's actions fit the definition of resisting. (R 91: 197). The circuit court also ruled that a reasonable person would have known that the police officers were acting with lawful authority. (R 91: 197).

The circuit court denied Mr. Wenger's motion to dismiss the charge of Resisting an Officer since Wisconsin no longer recognizes the common law privilege to forcibly resist an unlawful arrest in the absence of unreasonable force. (R 78: 18-19).

POSITION ON ORAL ARGUMENT AND PUBLICATION

Publication may be warranted to clarify what constitutes forcible resistance and a peaceful arrest when a suspect is unlawfully arrested. Additionally, Mr. Wenger does not request oral argument because the circuit court thoroughly explained the facts found at trial.

STATEMENT OF THE CASE

This is an appeal from a judgment of conviction in the Circuit Court for Portage County, the Honorable Thomas T. Flugaur presiding.

On September 24, 2014, the State charged Scott H. Wenger with one count of Disorderly Conduct in violation of Wis. Stat. § 947.01(1) and one count of Resisting an Officer in violation of Wis. Stat. § 946.41(1). (R 3: 2).

Mr. Wenger moved to dismiss the charges stating the charges were in violation of his First Amended right. (R 18; R 21). The circuit court stated the motion would more accurately be a motion to suppress evidence, as a result of an unlawful arrest. (R 78: 2). The circuit court then dismissed the Disorderly Conduct charge for lack of probable cause. (R 78: 16-19). The circuit court denied Mr. Wenger's motion to dismiss the charge of Resisting an Officer since Wisconsin no longer recognizes the common law privilege to forcibly resist an unlawful arrest in the absence of unreasonable force. (R 78: 18-19).

Mr. Wenger was found guilty of Resisting an Officer after a bench trial on May 3, 2017. (R 91: 198). The circuit court placed Mr. Wenger on probation for nine months. (R 91: 202). Mr. Wenger filed a timely notice of intent to pursue postconviction relief and a timely notice of appeal. (R 61; R 73).

STATEMENT OF FACTS

On September 20, 2014, the city of Stevens Point had a social event called Art in the Park at Pfiffner Park. (R 91: 5-6, 112). During the event, Mr. Wenger had the director of Art in the Park call the police to report an incident. (R 91: 15). During the first encounter with Mr. Wenger, Officer Brooks called Mr. Wenger a creep. (R 91: 27; R 56: D2, MVI_4635 at 0:00:16-0:00:22). After speaking with Mr. Wenger, the police left without arresting Mr. Wenger. (R 91: 18-19).

After the first encounter with Mr. Wenger, the Stevens Point Police Department received complaints that a person was harassing people by taking pictures. (R 91: 110-111). Due to the prior incident, the police knew the complaint involved Mr. Wenger before they arrived. (R

91: 111). Three police officers arrived back at the park in police uniforms. (R 91: 24, 116). After the police arrived at the park, Mr. Wenger announced where he was and indicated that the police were looking for him. (R 91: 23, 113). When the police spoke with Mr. Wenger this time, Officer Brooks asked Mr. Wenger “Why am I here?” and Mr. Wenger asked, “What did you call me?” (R 91: 25; R 56: D2, MVI_4647 at 0:00:00-0:00:10). Officer Brooks eventually stated that he called Mr. Wenger a creep. (R 91: 27). Mr. Wenger then asked if he was being detained. (R 91: 27; R 56: D2, MVI_4647 at 0:00:10-0:00:38). Officer Brooks then told Mr. Wenger that he was not being detained. (R 91: 27; R 56: D2, MVI_4647 at 0:00:35-0:00:38). Mr. Wenger then began to walk away from the police. (R 91: 27; R 56: D2, MVI_4647 at 0:00:38-0:00:40). Officer Brooks continued to follow Mr. Wenger asking him questions. (R 91: 27; R 56: D2, MVI_4647 at 0:00:40-0:00:48). Mr. Wenger then turned around and started talking to Officer Brooks. (R 91: 27). Mr. Wenger kept talking and not answering Officer Brooks’ questions. (R 91: 27; R 56: D2, MVI_4647 at 0:00:48-0:01:06). During this interaction, Officer Brooks became frustrated and decided to arrest Mr. Wenger for disorderly conduct. (R 91: 30; R 56: D2, MVI_4647 at 0:01:06). Officer Brooks told Mr. Wenger that he is no longer free to go and is being detained. (R 91: 30; R 56: D2, MVI_4647 at 0:01:06-0:01:10). Officer Brooks then grabbed Mr. Wenger’s hand to detain him. (R 91: 37; R 56: D2, MVI_4647 at 0:01:17). One of the officers took Mr. Wenger’s camera, and another officer started handcuffing Mr. Wenger. (R 91: 30, 104). The police had to use two sets of handcuffs on Mr. Wenger because he is a bigger guy and could not get his arms completely around his back. (R 91: 114).

After the police handcuffed Mr. Wenger, they started to escort Mr. Wenger to the squad vehicle. (R 91: 114). The squad car was a Ford Explorer SUV. (R 91: 119). When the police escorted Mr. Wenger to the squad vehicle, Mr. Wenger began shouting that the police were violating his rights and going limp. (R 91: 39, 114). Mr. Wenger fell to the ground when he went limp. (R 91: 82-83, 124). Mr. Wenger stumbled and fell more than once. (R 91: 86).

The officers picked Mr. Wenger up and started carrying him to the squad vehicle. (R 91: 40). The officers struggled to get Mr. Wenger in the squad vehicle. (R 91: 114). The officers picked Mr. Wenger up and threw him into the vehicle like a piece of wood. (R 91: 89). The door to the squad vehicle was about knee high. (R 91: 120). Some people may have difficulty getting into the squad vehicle due to the height. (R 91: 120). After the officers threw Mr. Wenger in the squad vehicle, Officer Brooks turned Mr. Wenger around, Mr. Wenger then put his feet on the ground, stood up and became rigid. (R 91: 42, 102-103, 116). The officers then had to push Mr. Wenger in the squad car a second time. (R 91: 42, 116). The circuit court found that Mr. Wenger resisted the officers when he became rigid and would not get back into the vehicle. (R 91: 197). The circuit court found that Mr. Wenger used some force by being rigid and that fits the definition of resisting. (R 91: 197).

ARGUMENT

- I. **The State did not present sufficient evidence to show that Mr. Wenger resisted an officer acting with lawful authority by going rigid after officers arrested Mr. Wenger for personal reasons, picked Mr. Wenger up and threw him into a vehicle like a piece of wood.**

A. Circuit Court Ruling.

The circuit court found Mr. Wenger guilty of Resisting an Officer after a bench trial on May 3, 2017. (R 91: 198). The circuit court ruled that Mr. Wenger's actions fit the definition of resisting. (R 91: 197). The circuit court also ruled that a reasonable person would have known that the police officers were acting with lawful authority. (R 91: 197).

B. Standard of Review.

The only question for this court, for sufficiency of the evidence presented on appeal in a criminal case, is whether the evidence presented, believed and rationally

considered by the jury, was sufficient to prove the defendants' guilt beyond a reasonable doubt. This ultimate test is the same whether the trier of the facts is a court or a jury. *Gauthier v. State*, 28 Wis. 2d 412, 416, 137 N.W.2d 101, 103 (1965). The briefs and arguments on this issue debate what the trier of the facts could have found or what this court should determine. *Lock v. State*, 31 Wis. 2d 110, 114, 142 N.W.2d 183, 185 (1966). The test is not whether this court is convinced of the defendant's guilt beyond a reasonable doubt but whether this court can conclude the trier of the facts could, acting reasonably, be convinced to the required degree of certitude by the evidence which it had and accept as true. *Id.* at 115. The evidence when considered most favorably to the state, the conviction must be so insufficient in probative value that no trier of the facts acting reasonably could be convinced beyond a reasonable doubt. *Id.* Sufficiency of evidence is a question of law that this Court reviews de novo. *State v. Booker*, 2006 WI 79, ¶ 12, 292 Wis. 2d 43, 54, 717 N.W.2d 676, 681.

C. Applicable Legal Standard.

The three elements of Resisting an Officer under Wis. Stat. § 946.41(1), are:

- (1) the defendant resisted an officer;
- (2) the officer was doing an act in his or her official capacity with lawful authority; and
- (3) the defendant resisted the officer knowingly; that is, that defendant knew or believed that he or she was resisting the officer while the officer was acting in his or her official capacity and with lawful authority.” *State v. Lossman*, 118 Wis. 2d 526, 532, 348 N.W.2d 159, 162 (1984).

Furthermore, resisting an officer under Wis. Stat. § 946.41(1), requires as one of its elements that the accused know that the officer was acting with lawful authority. *Id.* at 547.

Words alone cannot establish resistance. *State v. Welch*, 37 Wis. 196, 202 (1875). It is not enough that the execution of the process is hindered, the officer must be

resisted. *Id.* The resistance must be active and direct towards the officer. *Id.* To prove the resisting element, the State must prove a defendant opposed an officer by force or threat of force. *State v. Dearborn*, 2008 WI App 131, ¶ 14, 313 Wis. 2d 767, 776, 758 N.W.2d 463, 467. Resisting excludes creating passive or indirect difficulties. *Welch*, 37 Wis. 196, 202.

To show that the officer was acting in his official capacity, the conduct must have some relation to his employment as a deputy. *Lossman*, 118 Wis. 2d 526, 537.

A defendant must have knowledge that the officer was both acting in an “official capacity” and acting with “lawful authority” when the defendant resisted the officer. *Id.* at 536. An officer is acting with lawful authority if the officer’s actions are conducted in accordance with the law. *Id.* at 537. Wis. Stat. § 946.41(1) requires an element that the defendant know that the officer was acting with lawful authority at the time the defendant resisted the officer. *Id.*

D. Legal Argument.

- i. Mr. Wenger did not forcibly resist the officers when Mr. Wenger went rigid after three officers picked him up and threw him into a vehicle like a piece of wood.**

After the police officers arrested Mr. Wenger, Mr. Wenger began shouting that the police were violating his constitutional rights. (R 91: 39, 114). According to the Supreme Court of Wisconsin, words alone cannot establish resistance. *Welch*, 37 Wis. 196, 202. While being escorted to the police squad vehicle, Mr. Wenger also went limp. (R 91: 39, 114). In order for the State to prove the element of resisting, the State must show the defendant opposed an officer by force or threat of force. *Dearborn*, 2008 WI App 131, ¶ 14. Passive actions, such as going limp, are not enough to establish the element of resisting. *Welch*, 37 Wis. 196, 202.

After Mr. Wenger stumbled, fell and went limp, the police officers started to carry Mr. Wenger. (R 91: 40). The officers then threw Mr. Wenger into the squad vehicle like a piece of wood. (R 91: 89). After the officers placed Mr. Wenger into the squad vehicle, Mr. Wenger put his feet on the ground, stood up and became rigid. (R 91: 42, 102-103, 116). The police officers then pushed Mr. Wenger into the squad car. (R 91: 42, 116). The circuit court found that Mr. Wenger resisted the officers when he became rigid and would not get back into the vehicle. (R 91: 197). The circuit court found that Mr. Wenger used some force by being rigid and that fits the definition of resisting. (R 91: 197). The State is not able to prove the resisting element by showing the defendant hindered the execution of the process. *Welch*, 37 Wis. 196, 202. Resistance must be active and toward the officer. *Id.* In this case, the court determined that Mr. Wenger resisted an officer by using some force when he was rigid after three officers took his camera, forced handcuffs on him without asking him to put his hands behind his back, picked him up after he went limp and threw him into a vehicle like a piece of wood. The actions of the officers created a very uncomfortable situation where going rigid seems very appropriate. It would have been difficult for Mr. Wenger to not become rigid when the officers were carrying and throwing him like a piece of wood.

ii. Officer Brooks was not acting with lawful authority when he decided to arrest Mr. Wenger and Mr. Wenger did not believe that Officer Brooks was acting with lawful authority.

To show that an officer was acting in his official capacity, the conduct must have some relation to his employment as a deputy. *Lossman*, 118 Wis. 2d 526, 537. Officer Brooks' actions have some relation to his employment as an officer because Officer Brooks was responding to complaints that a person was harassing people by taking pictures. (R 91: 110-111).

Officer Brooks' decision to arrest Mr. Wenger was based on Officer Brooks' personal feelings towards Mr. Wenger and not unlawful conduct by Mr. Wenger. When Officer Brooks spoke to Mr. Wenger prior to the arrest, Officer Brooks called Mr. Wenger a creep. (R 91: 27). Officer Brooks then became frustrated with Mr. Wenger and decided to arrest him for Disorderly Conduct. (R 91: 29-30). The circuit court dismissed the Disorderly Conduct charge for lack of probable cause. (R 78: 16-19). For an officer to be acting with lawful authority, the officer's actions must be conducted in accordance with the law. *Lossman*, 118 Wis. 2d 526, 537. Officer Brooks' actions were not conducted in accordance with the law, because Officer Brooks arrested Mr. Wenger based on personal motivations and not unlawful conduct by Mr. Wenger.

Furthermore, Mr. Wenger did not believe Officer Brooks was acting with lawful authority. Resisting an officer under Wis. Stat. § 946.41(1), requires as one of its elements that the accused know that the officer was acting with lawful authority. *Id.* at 547. In this case, Mr. Wenger made it very clear that he did not believe that Officer Brooks was acting with lawful authority. Mr. Wenger shouted that the police were violating his rights and asked for witnesses to testify to the officer's unlawful conduct. (R 91: 39, 114). Based on the actions of Mr. Wenger and Officer Brooks, it is clear that Officer Brooks was not acting with lawful authority and Mr. Wenger did not at all believe that Officer Brooks was acting with lawful authority.

E. Summary.

The State did not present sufficient evidence showing that Mr. Wenger resisted an officer. The circuit court determined that Mr. Wenger resisted an officer by using some force when he was rigid after three officers took his camera, forced handcuffs on him without asking him to put his hands behind his back, picked him up after he went limp and threw him into a vehicle like a piece of wood. The actions of the officers created a very uncomfortable situation were going rigid seems very

appropriate. It would have been difficult for Mr. Wenger to not become rigid when the officers were carrying and throwing him like a piece of wood.

Additionally, Officer Brooks decision to arrest Mr. Wenger was based on Officer Brooks personal feelings towards Mr. Wenger and not unlawful conduct by Mr. Wenger. Officer Brooks called Mr. Wenger a creep and decided to arrest Mr. Wenger after Officer Brooks became frustrated with Mr. Wenger. Mr. Wenger knew Officer Brooks was not acting with lawful authority due to his conduct. Mr. Wenger shouted that the police were violating his rights and asked for witnesses to testify to the officer's unlawful conduct. Based on the actions of Mr. Wenger and Officer Brooks, it is clear that Officer Brooks was not acting with lawful authority and Mr. Wenger did not at all believe that Officer Brooks was acting with lawful authority.

I. Mr. Wenger did not forcibly resist a peaceful arrest when he went rigid after three officers took his camera, forced handcuffs on him, picked him up after he went limp and threw him into a vehicle like a piece of wood.

A. Circuit Court Ruling.

The circuit court denied Mr. Wenger's motion to dismiss the charge of Resisting an Officer, more accurately a motion to suppress evidence as a result of an unlawful arrest, since Wisconsin no longer recognizes the common law privilege to forcibly resist an unlawful arrest in the absence of unreasonable force. (R 78: 18-19).

B. Standard of Review.

The Wisconsin Court of Appeals reviews a motion to suppress under a two-prong analysis. *State v. Felix*, 2012 WI 36, ¶ 22, 339 Wis. 2d 670, 685, 811 N.W.2d 775, 782. First, the court reviews the circuit court's findings of historical fact and will uphold them unless they are clearly erroneous. *State v. Felix*, 2012 WI 36, ¶ 22, 339 Wis. 2d 670, 685, 811 N.W.2d 775, 782–83. Second, the

court reviews the application of constitutional principles to those facts de novo. *Id.* Whether police conduct violated a defendant's constitutional rights under Article I, Section 11 of the Wisconsin Constitution and the Fourth Amendment to the United States Constitution to be free from unreasonable searches and seizures presents a question of constitutional fact that this court independently reviews. *Id.*

C. Applicable Legal Standard.

Based upon public policy, the Supreme Court of Wisconsin decided to abrogate the common law affirmative defense of resisting an illegal arrest. *State v. Hobson*, 218 Wis. 2d 350, 353, 577 N.W.2d 825, 826 (1998). The Supreme Court of Wisconsin held that a private citizen may not use force to resist peaceful arrest when he has good reason to believe the officer is an authorized peace officer performing his duties, regardless of whether the arrest is illegal. *Id.* at 380. With modern technology and weapons, it has become highly unlikely that a suspect, using reasonable force, can escape from an arrest, whether lawful or unlawful. *Id.* at 375. The Supreme Court of Wisconsin found violent self-help is antisocial and unacceptably dangerous. *Id.* at 379. Furthermore, the Court found, there should be no right to forcibly resist an unlawful arrest in the absence of unreasonable force. *Id.* When persons resist arrest, they endanger themselves, the arresting officers, and bystanders. *Id.*

D. Legal Argument

- i. Mr. Wenger did not forcibly resist a peaceful arrest when he went rigid after three officers took his camera, forced handcuffs on him, picked him up after he went limp and threw him into a vehicle like a piece of wood.**

The Stevens Point Police Department received complaints that a person was harassing people by taking

pictures at social event called Art in the Park at Pfiffner Park. (R 91: 5-6, 110-112). Due to the prior incident, the police knew the complaint involved Mr. Wenger before they arrived. (R 91: 111). Three police officers arrived at the park in police uniforms. (R 91: 24, 116). During the interaction, Officer Brooks became frustrated with Mr. Wenger and called Mr. Wenger a creep. (R 91: 27, 29-30). After getting frustrated with Mr. Wenger, Officer Brooks decided to arrest Mr. Wenger for Disorderly Conduct. (R 91: 29-30). The circuit court dismissed the Disorderly Conduct charge for lack of probable cause. (R 78: 16-19). However, the circuit court denied Mr. Wenger's motion to dismiss the charge of Resisting an Officer since Wisconsin no longer recognizes the common law privilege to forcibly resist an unlawful arrest in the absence of unreasonable force. (R 78: 18-19).

After Officer Brooks decided to arrest Mr. Wenger for Disorderly Conduct, Officer Brooks grabbed Mr. Wenger's hand to detain him. (R 91: 37). One of the officers took Mr. Wenger's camera, another officer started to handcuff Mr. Wenger. (R 91: 30, 104). The police had to use two sets of handcuffs on Mr. Wenger because he is a bigger guy and could not get his arms completely around his back. (R 91: 114). It took the police about 20 to 30 seconds to handcuff Mr. Wenger. (R 91: 68).

While being escorted to the squad vehicle, Mr. Wenger stumbled, fell and went limp. (R 91: 40). The State is not able to prove the resisting element by showing the defendant hindered the execution of the process. *Welch*, 37 Wis. 196, 202. Resistance must be active and toward the officer. *Id.* After Mr. Wenger went limp, the police officers picked up Mr. Wenger, carried him to the squad vehicle, and threw him into the squad vehicle like a piece of wood. (R 91: 40, 89). After the officers threw Mr. Wenger into the squad vehicle, Mr. Wenger put his feet on the ground, stood up and became rigid. (R 91: 42, 102-103, 116). The police officers then pushed Mr. Wenger into the squad car. (R 91: 42, 116). The circuit court found that Mr. Wenger resisted the officers when he

became rigid. (R 91: 197). The circuit court found that Mr. Wenger used some force by being rigid and that fits the definition of resisting. (R 91: 197).

In *Hobson*, 218 Wis. 2d 350, the defendant struck one officer in the face after the officer tried to take hold of her arm and kicked another officer after the officers took her to the ground. When an officer tried to take hold of Ms. Hobson's arm and advise her that she was under arrest, Ms. Hobson pushed the officer away. *Hobson*, 218 Wis. 2d 350, 354–355. Ms. Hobson became combative and struck another officer across the face. *Id.* The police officer then took Ms. Hobson to the ground. *Id.* After Ms. Hobson was on the ground, she continued to fight with the officers and even kicked one of the officers. *Id.*

In this case, the court determined that Mr. Wenger resisted an officer by using some force when he was rigid after three officers took his camera, forced handcuffs on him without asking him to put his hands behind his back, picked him up after he went limp and threw him into a vehicle like a piece of wood. The actions of the officers caused Mr. Wenger to go rigid. Mr. Wenger did not push, strike or kick the officers like the defendant did in *Hobson*, 218 Wis. 2d 350. Mr. Wenger simply went rigid after the officers picked him up, carried him, and threw him like a piece of wood. The small amount of force Mr. Wenger used was in response to the arresting officers unreasonable force.

E. Summary.

In this case, the court determined that Mr. Wenger resisted an officer by using some force when he was rigid after three officers took his camera, forced handcuffs on him without asking him to put his hands behind his back, picked him up after he went limp and threw him into a vehicle like a piece of wood. Mr. Wenger did not push, strike or kick the officers like the defendant did in *Hobson*, 218 Wis. 2d 350. Mr. Wenger only went rigid after the officers picked him up, carried him, and threw him into a vehicle. The small amount of force Mr. Wenger used was in response to the arresting officers unreasonable force. It would have been difficult for Mr.

Wenger to not become rigid when the officers were carrying and throwing him like a piece of wood.

CONCLUSION

For the forgoing reasons, Scott H. Wenger respectfully requests that this Court find there is insufficient evidence to support a criminal conviction of Resisting an Officer in violation of Wis. Stat. § 946.41(1), reverse the circuit court's finding of guilty and instruct the circuit court to find Mr. Wenger not guilty of Resisting an Officer in violation of Wis. Stat. § 946.41(1).

In the alternative, Scott Wenger respectfully requests that this court reverse the judgment of conviction and the order denying the motion to dismiss, and remand the case to the circuit court with directions to dismiss the charge of Resisting an Officer in violation of Wis. Stat. § 946.41(1).

Dated: February 12, 2018

Kristopher Ellis
State Bar No. 1094245
995 Applegate Rd., Suite 3
Madison WI 53713
Phone: 608-852-7774
AttorneyKristopher@gmail.com
Attorney for Defendant-Appellant

CERTIFICATION AS TO FORM AND LENGTH

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of the brief is 4,783 words.

Dated: February 12, 2018

Kristopher Ellis
State Bar No. 1094245

CERTIFICATION OF COMPLIANCE WITH WIS. STAT. § 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § 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: February 12, 2018

Kristopher Ellis
State Bar No. 1094245