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STATE OF WISCONSIN

COURT OF APPEALS

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Appeal No. 2017AP002305-CR

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STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

SCOTT H. WENGER,

Defendant-Appellant.

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

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# BRIEF OF PLAINTIFF-RESPONDENT

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Ryan Wetzsteon
Assistant District Attorney
State Bar Number 1030606
Attorney for Plaintiff-Respondent

Portage County District Attorney's Office
1516 Church St
Stevens Point, Wisconsin 54481
(715) 346-1300
ryan.wetzsteon@da.wi.gov

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Whether the Defendant-Appellant resisted a peaceful arrest when he was using force to become rigid in order to not get into the squad car.

## CIRCUIT COURT RULING

The Defendant-Appellant was found guilty of Resisting an Officer, contrary to Wis. Stat. §946.41(1), at a bench trial on May 3, 2017. (R 91: 198). The circuit court ruled that the Defendant resisted officers when he was using force to become rigid in order to not get into the squad car. (R 91: 197). The circuit also ruled that the police officers were acting with lawful authority and that a reasonable person would have known, under all the circumstances, that the police officers were acting with lawful authority. (R 91: 191, 197).

The Circuit Court treated the Defendant-Appellant's motion to dismiss as a motion to suppress evidence based on an alleged unlawful arrest. (R 78: 2). The motion was denied because the circuit court found that there was probable cause for the arrest of the Defendant-Appellant and the Defendant-Appellant did not have a common law privilege to resist officers. (R 78: 18-19)

## POSITION ON ORAL ARGUMENT AND PUBLICATION

The State does not request oral argument because the briefs should fully present and meet the issues on appeal and fully develop the theories and legal authorities on each side. In addition, the arguments involve solely

questions of fact and the fact findings are clearly supported by sufficient evidence.

The State does not request publication because the issues present no more than the application of well-settled rules of law to a recurring fact situation. In addition, the issues asserted involve whether the evidence is sufficient to support the judgment and the briefs show the evidence is sufficient.

## STATEMENT OF THE CASE

On September 25, 2014, the State charged the Defendant with Disorderly Conduct contrary to Wis. Stat. §947.01(1) and Resisting an Officer contrary to Wis. Stat. §946.41(1). (R 3: 2). The Defendant moved to dismiss the charges in a pretrial motion alleging that the police officers violated the Defendant's constitutional rights. (R 18 and R 21). In its decision on the motion and later at trial, the circuit court held that there was probable cause and reasonable cause for the arrest of the Defendant for both Disorderly Conduct and Resisting an Officer. (R 78: 19, R 91: 189, 196). The circuit court further held that the Defendant did not have a common law privilege to resist officers. (R 78: 18-19). However, the circuit court dismissed the Disorderly Conduct charge sua sponte in its decision on the motion by ruling, "the Court simply can't find that there is really enough evidence…to support that case going to trial…" and "that it did not believe that the State would be able to prove that case beyond a reasonable doubt." (R 78: 19, R 91: 179).

On May 3, 2017, the Defendant was found guilty of Resisting an Officer after a bench trial. (R 91: 198). The circuit court sentenced the Defendant to 20 days in jail, but stayed that sentence and placed the Defendant on probation for nine months. (R 91: 202).

## STATEMENT OF FACTS

On September 20, 2014, there was an event attended by many people called Art in the Park at Pfiffner Park in Stevens Point. (R 91: 75-76, 182). During the event, police officers with the Stevens Point Police Department received a complaint that a person, suspected by the police officers to be the Defendant due to an earlier contact with the Defendant at the event, was at Art in the Park taking photographs, circling, harassing, and annoying people. (R 91: 21-22, 111, 183-186). Three officers responded to the park in their police squad cars and wearing full police uniforms. (R 91: 24, 116). Just prior to the officers' arrival, the Defendant was speaking with a person identified as Anthony Kurtz. (R 91: 125-126, 184). The Defendant told Kurtz that the police would be coming for him. (R 91: 126, 184). Upon arrival of the officers, the Defendant told Kurtz, "I want you to watch this." (R 91: 126, 184). Also upon arrival of the officers, the Defendant called out to the officers and indicated that the Defendant was the reason the officers were called to the park. (R 91: 23, 113). The officers then had a confrontation with the Defendant involving the Defendant video recording his interaction with Officer Brian Brooks and in a loud and repeated manner asking Officer Brooks, "am I being detained?" (R 91: 27, 187). The interaction between Officer Brooks and the Defendant was recorded on the Defendant's camera. (R 56: D2, MVI_4647). This interaction caused many other people at Art in the Park to look and watch what was happening. (R 91: 80, 188). Officer Brooks told the Defendant he was not being detained and the Defendant started to walk away from Officer Brooks. (R 91: 27). Officer Brooks continued to ask the Defendant questions. (R 91: 27). The Defendant then turned around and continued talking loudly and recording the interaction with Officer Brooks. (R. 91: 27). At that point, Officer Brooks decided to arrest the Defendant due to the Defendant being loud and causing a

scene. (R 91: 30). Officer Brooks told the Defendant he is no longer free to go and is being detained. (R 91: 30). Officers proceeded to handcuff the Defendant with two sets of handcuffs due to the resistance the police officers felt when bringing the Defendant's arms back and the Defendant's size. (R 91: 37, 114, 194).

After being handcuffed, the Defendant was being escorted to a police squad car when the Defendant began shouting to the crowd at Art in the Park that officers were violating his rights. (R 91: 39, 114). While being escorted, the Defendant went limp and flopped to the ground. (R. 40, 114). The three police officers lifted the Defendant off the ground and carried the Defendant to the squad car as the Defendant continued shouting. (R. 91: 40- 41). Upon arrival at the squad car, the Defendant became rigid, resistive, and would not get into the car willingly. (R 91: 41, 102, 115, 195). In order to get the Defendant into the squad car, the police officers physically lifted and put the Defendant into the squad car resting on his stomach and side. (R 91: 41, 102, 115-116, 195). At that point, the Defendant became calm and asked Officer Brooks to be sat up. (R. 91: 42, 195-196). As Officer Brooks helped the Defendant to sit up, the Defendant sprung up out of the squad car and began shouting to the crowd again. (R. 91: 42, 102, 196). The officers then pushed the Defendant's head and shoulders down and into the squad car again. (R. 91: 42, 102-103). The circuit court determined that the Defendant resisted officers when he was using force to become rigid in order to not get into the squad car. (R. 91: 197).

## ARGUMENT

**1. The evidence presented at trial was sufficient to support the Defendant-Appellant's conviction for Resisting an Officer on the elements of resisting and lawful authority.**

a. Circuit Court Ruling

The Defendant-Appellant was found guilty of Resisting an Officer, contrary to Wis. Stat. §946.41(1), at a bench trial on May 3, 2017. (R. 91: 198). The circuit court ruled that the Defendant resisted officers when he was using force to become rigid in order to not get into the squad car. (R 91: 197) The circuit court also ruled that the police officers were acting with lawful authority and that a reasonable person would have known, under all the circumstances, that the police officers were acting with lawful authority. (R 91: 191, 197).

b. Standard of Review

In assessing the sufficiency of the evidence, the test applied upon appeal is whether the evidence adduced, believed, and rationally considered by the jury was sufficient to prove the defendant's guilt beyond a reasonable doubt. *See Gauthier v. State*, 28 Wis.2d 412, 416, 137 N.W.2d 101, 103 (1965). As the burden of proof is the same whether the trial is to the court or to a jury, the test to be applied to determine sufficiency of the evidence is the same. *See id.* In testing the sufficiency of the evidence, the appellate court is not required to be convinced of the guilt of the defendant beyond a reasonable doubt, but only that the court could find the defendant guilty beyond a reasonable doubt. *See id.* The credibility of witnesses is properly the function of the trier of fact and it is only when the evidence that the trier of fact has relied upon is inherently or patently incredible that the appellate court will substitute its judgment for that of the trier of fact. *See id.* In conducting a review of a finding based upon the evidence, the evidence shall be viewed in the light most favorable to the finding. *See State v. Lossman*, 118 Wis.2d 526, 541, 348 N.W.2d 159, 166-167 (1984), *quoting Bautista v. State*, 53 Wis.2d 218,

223, 191 N.W.2d 725 (1971). Reasonable inferences drawn from the evidence can support a finding of fact and if more than one inference can be drawn from the evidence, the inference which supports the finding is the one that must be adopted. *See id.*

c. Applicable Legal Standard

The crime of Resisting an Officer, contrary to Wis. Stat. §946.41(1), has the following elements that must be proven at trial prior to conviction:

(1) the defendant resisted an officer.
(2) the officer was doing an act in in his or her official capacity with lawful authority.
(3) the defendant resisted the officer knowingly; that is, that the 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. *See Lossman* at 532.

In addition, the knowledge of the defendant must include that he or she (1) resisted the officer, (2) that the officer was acting in an official capacity, and (3) that the officer was acting with lawful authority. *See id.* at 536.

The resistance prohibited by the statute has been further defined to mean "to oppose by direct, active, and quasi forcible means." *See State v. Welch*, 37 Wis. 196, 201 (1875). The resistance must be active and directed towards the officer. *See id.* at 202. There need not be actual force or even a common assault upon the officer, and resistance may be found without actual violence or technical assault. *See id.* In fact, while mere words alone cannot constitute resistance, threats, accompanied with present ability and apparent intention to execute the threat, can constitute resistance. *See id.*

In order for the officer to be acting in his or her official capacity, the conduct of the officer must have some relation to his or her employment as an officer. *See Lossman* at 537. In order for the officer to be acting with lawful authority, the officer's actions must be conducted in accordance with the law. *See id.*

d. Legal Argument

i. The Defendant-Appellant resisted officers when he was using force to become rigid in order to not get into the squad car.

Since the trial in this case was to the court, the circuit court articulated its findings of fact made from the evidence presented at trial and offered its conclusions based on those findings. (R 91: 178-198). In fact, the circuit court assessed each of the individual actions of the Defendant after his arrest to determine whether the Defendant resisted the officers in those actions. First, the circuit court determined that the Defendant's actions in "going limp" while the Defendant was being escorted to the squad car were not resisting the officers. (R 91: 192-193). This determination was based on the circuit court's review and assessment of *State v. Welch*, *supra*. and the definition of resisting, meaning "to oppose by direct, active, and quasi-forcible means." (R 91: 193). The circuit court was clear that the Defendant's actions in "going limp" did not meet the definition of resistance. (R 91: 193). Second, the circuit court determined that the resistance experienced by the officers while putting handcuffs on the Defendant would not be the circuit court's basis for a finding that the Defendant resisted officers. (R 91: 194-195). This appeared to be as a result of conflicting testimony of the officers on whether two sets of handcuffs were used on the Defendant due to resistance by the Defendant or the Defendant's size. (R 91: 194-195). Finally, the circuit court pointed to the

testimony of all three officers regarding the Defendant's actions at the squad car while trying to get the defendant in the squad car:

> And that he was rigid and resisting and not cooperating. He – so that to the point that he had to be physically lifted and put into the back seat, like a piece of lumber. He did not bend his legs, he did not bend the rest of his body and get into a car like somebody who would normally go in. And there was testimony that he was laying on the seat and he calmed down and he asked Officer Brooks in a cooperative fashion, if Officer Brooks would help him. An because he was on his stomach, he said – Officer Brooks testified that the defendant said, "Don't shut the door on my feet. Please help me sit up." And when Officer Brooks did help him sit up, he sprung up and got back out of the car…But this, what took place at the car, in terms of his unwillingness to just cooperate, get into the car, he was, in the Court's estimation, using some force by being rigid. And that, in the Court's estimation, does fit the definition of resistance. (R 91: 195-197).

Clearly, in making its finding and ruling, the circuit court accepted the testimony of the officers and properly applied the proper definition of resistance to make its determination that the Defendant resisted officers. Certainly the circuit court's assessment that the Defendant was using force by being rigid in order to not get into the squad car is not inherently or patently incredible such that the circuit court's finding should be overturned.

ii. The police officers were acting with lawful authority and the Defendant-Appellant knew the police officers were acting with lawful authority.

The circuit court likewise made findings of fact and offered its conclusions regarding the lawful authority of the police officers in their dealings with the Defendant.

The circuit court determined from all of the evidence that the Defendant was at Art in the Park with his camera and was taking photographs. (R 91: 182). There was a complaint of the Defendant's behavior made to law enforcement because the Defendant was taking pictures of people, circling a woman with his camera, and people became annoyed by it. (R 91: 183-186, 191). In addition, the circuit court noted that there were children present and it may have been thought by some of the adults that perhaps the Defendant was taking photographs of children. (R 91: 186-187). This led to people getting "worked up" and, from a law enforcement perspective, a disturbance being created. (R 91: 187). Prior to the arrival of law enforcement officers, the Defendant told Anthony Kurtz that "the police officers would be coming soon and I want you to watch this." (R 91: 184). When law enforcement made contact with the Defendant he was talking very loudly and kept repeating himself and stating, "Am I being detained? Am I being detained? Am I being detained?" (R 91: 187). While the circuit court found that a disturbance was being created, there wasn't a significant disturbance going on. (R 91: 187). Anthony Kurtz was taken aback by the bizarre incident and thought that the Defendant instigated it. (R91: 184). Kurtz further testified that he was disturbed by what had happened. (R 91: 196). The circuit court also noted that it was a rare circumstance that a person would want to have the police come after them in the hope of obtaining an opportunity to vindicate themselves later in a court proceeding. (R 91: 185). The circuit court noted that an arrest is lawful when the officer has reasonable grounds to believe a person has committed a crime. (R 91: 189). The circuit court, then taking these circumstances into consideration, determined that the officers did have reasonable grounds to make an arrest of the defendant and were acting with lawful authority. (R 91: 189, 191, 196). Furthermore, the circuit court found that, while it can't look into a person's mind to find knowledge, knowledge must be found, if at all, from the

defendant's acts, words, statements, if any, and from all the facts and circumstances in the case, bearing on knowledge. (R 91: 197). From those acts, words, statements, facts and circumstances, a reasonable person would have known that the officers were acting with lawful authority. (R 91: 197).

**2. The Defendant-Appellant resisted a peaceful arrest when he was using force to become rigid in order to not get into the squad car.**

a. Circuit Court Ruling

The Circuit Court treated the Defendant-Appellant's motion to dismiss as a motion to suppress evidence based on an alleged unlawful arrest. (R 78: 2). The motion was denied because the circuit court found that there was probable cause for the arrest of the Defendant-Appellant and the Defendant-Appellant did not have a common law privilege to resist officers. (R 78: 18-19).

b. Standard of Review

In review of a denial of a motion to suppress, findings of historical fact are upheld unless found to be clearly erroneous. *See* Wis. Stat. § 805.17(2); *State v. Sykes*, 279 Wis. 2d 742, 750-751, 695 N.W.2d 277 (2005). The application of constitutional principles to those facts is reviewed de novo. *See id.*

c. Applicable Legal Standard

In order to be lawful, an arrest must be based on probable cause. *See State v. Kutz*, 267 Wis. 2d 531, 544, 671 N.W.2d 660 (Ct. App. 2003). Probable cause for arrest exists "when the totality of the circumstances within the arresting officer's knowledge would lead a reasonable police officer to believe that the defendant probably

committed a crime." *Id.* at 544-555. The probable cause standard is an "objective" standard, independent of an officer's subjective assessment. *See id.* at 545.

> Probable cause refers to the quantum of evidence which would lead a reasonable police officer to believe that defendant committed a crime. There must be more than a possibility or suspicion that defendant committed an offense, but the evidence need not reach the level of proof beyond a reasonable doubt or even that guilt is more likely than not. *State v. Mitchell*, 167 Wis. 2d 672, 681-82, 482 N.W.2d 364 (1992).

Probable cause to arrest "is to be judged by the factual and practical considerations of everyday life on which reasonable and prudent persons, not legal technicians, act." *State v. Truax*, 151 Wis. 2d 354, 360, 444 N.W.2d 432 (Ct. App. 1989). Like reasonable suspicion, "[w]hen a police officer is confronted with two reasonable competing inferences . . . the officer is entitled to rely on the reasonable inference justifying arrest." *Id.* With that standard in mind, the question becomes whether the police officers had a reasonable belief that the Defendant may have committed the crime of Disorderly Conduct, contrary to Wis. Stat. §947.01(1). A person commits Disorderly Conduct when that person engages in violent, abusive, indecent, profane, boisterous, unreasonably loud, or similar disorderly conduct and that the person's conduct occurred under circumstances where such conduct tends to cause or provoke a disturbance. *See State v. Schwebke*, 253 Wis.2d 1, 17, 644 N.W.2d 666 (2002).

While Wisconsin had previously recognized a common law privilege to forcibly resist an illegal arrest, the Supreme Court abrogated that privilege in *State v. Hobson*, 218 Wis.2d 350, 380, 577 N.W.2d 825 (1998). In that case, the Supreme Court held that a private citizen may not use force to resist a peaceful arrest by an

authorized peace officer performing his duties, regardless of whether the arrest is illegal under the circumstances. *See id.*

d. Legal Argument

> The Defendant-Appellant resisted a peaceful arrest when he was using force to become rigid in order to not get into the squad car.

The circuit court held a hearing on the Defendant's motion to dismiss on November 13, 2015 and issued its decision in an oral ruling on February 3, 2016. (R 79 and 78, respectively). The evidence presented at the motion hearing on November 13, 2015 was consistent with the evidence presented at trial. In addition, the circuit court's findings of fact and conclusions drawn from the evidence presented in its decision on February 3, 2016, were also consistent. The circuit court determined from all of the evidence that the Defendant was at Art in the Park with his camera and was taking photographs. (R 91: 182). There was a complaint of the Defendant's behavior made to law enforcement because the Defendant was taking pictures of people, circling a woman with his camera, and people became annoyed by it. (R 91: 183-186, 191). In addition, the circuit court noted that there were children present and it may have been thought by some of the adults that perhaps the Defendant was taking photographs of children. (R 91: 186-187). This led to people getting "worked up" and, from a law enforcement perspective, a disturbance being created. (R 91: 187). Prior to the arrival of law enforcement officers, the Defendant told Anthony Kurtz that "the police officers would be coming soon and I want you to watch this." (R 91: 184). When law enforcement made contact with the Defendant he was talking very loudly and kept repeating himself and stating, "Am I being detained? Am I being detained? Am I being detained?" (R 91: 187). While the circuit court found that

a disturbance was being created, there wasn't a significant disturbance going on. (R 91: 187). Anthony Kurtz was taken aback by the bizarre incident and thought that the Defendant instigated it. (R91: 184). Kurtz further testified that he was disturbed by what had happened. (R 91: 196). The circuit court also noted that it was a rare circumstance that a person would want to have the police come after them in the hope of obtaining an opportunity to vindicate themselves later in a court proceeding. (R 91: 185).

From this evidence and findings of fact, the circuit court ruled correctly twice that the officers had probable (or reasonable) cause to arrest the Defendant: first, in its decision on the motion on February 3, 2016 and next, in its decision at the trial on May 3, 2017. (R 78:19, R 91: 189, 196). Contrary to the Defendant-Appellant's assertion in its brief at pages 6 and 15, it was not for a want of probable cause that the circuit court dismissed the Disorderly Conduct charge. The circuit court dismissed the Disorderly Conduct charge *sua sponte* in its decision on the motion by ruling, "the Court simply can't find that there is really enough evidence…to support that case going to trial…" and "that it did not believe that the State would be able to prove that case beyond a reasonable doubt." (R 78: 19, R 91: 179). The circuit court at all times held that the police officers had probable cause to arrest the Defendant for Disorderly Conduct.

The Defendant-Appellant's argument that the Defendant did not resist officers because "[t]he actions of the officers caused Mr. Wenger to go rigid" is without any basis in the record in this matter. On the contrary, the circuit court held that the Defendant used force to become rigid in order to knowingly resist officers. (R 91: 197). Likewise, there has never been any assertion by any party prior to the Defendant-Appellant's brief that the arresting officer's used unreasonable force justifying or causing the Defendant's resistance to officers. Again, such an

assertion has no basis in the record in this matter. The circuit court's citation to *Hobson* in its decision on the motion was to clearly articulate that while there was probable cause for the arrest of the Defendant, even if the arrest was unlawful, the Defendant had no privilege to resist officers. (R 78: 18-19).

## CONCLUSION

For these reasons, the State respectfully requests that this Court affirm the rulings of the circuit court and deny the Defendant-Appellant's requests for relief.

Dated at Stevens Point, Wisconsin, this 11th day of April, 2018.


_____

Ryan Wetzsteon
Assistant District Attorney
State Bar Number 1030606
Attorney for Plaintiff-Respondent

Portage County District Attorney's Office
1516 Church St
Stevens Point, Wisconsin 54481
(715) 346-1300
ryan.wetzsteon@da.wi.gov

## FORM AND LENGTH CERTIFICATION

I hereby certify that that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 4,739 words.

Dated at Stevens Point, Wisconsin, this 11th day of April, 2018.

_____

Ryan Wetzsteon
Assistant District Attorney
State Bar Number: 1030606

## ELECTRONIC BRIEF CERTIFICATION

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 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.

Dated at Stevens Point, Wisconsin, this 11th day of April, 2018.

_____

Ryan Wetzsteon
Assistant District Attorney
State Bar Number: 1030606

STATE OF WISCONSIN

COURT OF APPEALS

Appeal No. 2017AP002305-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

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SCOTT H. WENGER,

Defendant-Appellant.

## CERTIFICATION OF MAILING

Pursuant to Wis. Stat. §809.80, the State of Wisconsin, plaintiff-respondent, by Assistant District Attorney for Portage County Ryan Wetzsteon, hereby certifies that the enclosed Brief of Plaintiff-Respondent was deposited in the US Mail as a Priority Mail item, postage prepaid, on April 11, 2018.

Ryan Wetzsteon
Assistant District Attorney
State Bar No. 1018533