

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

REPLY BRIEF AND APPENDIX OF
DEFENDANT-APPELLANT

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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. 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.

The State must show the defendant opposed an officer by force or threat of force for the State to prove the element of resisting. *State v. Dearborn*, 2008 WI App 131, ¶ 14, 313 Wis. 2d 767, 776, 758 N.W.2d 463, 467. Passive actions, such as going limp, are not enough to establish the element of resisting. *State v. Welch*, 37 Wis. 196, 202 (1875).

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 in 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 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.*

The force used by the officers caused Mr. Wenger to go rigid. 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. Mr. Wenger only went 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.

B. 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.

For an officer to be acting with lawful authority, the officer's actions must be conducted in accordance with the law. *State v. Lossman*, 118 Wis. 2d 526, 537, 348 N.W.2d 159, 164 (1984). Officer Brooks called Mr. Wenger a creep, became frustrated with Mr. Wenger, and decided to arrest him for Disorderly Conduct. (R 91: 27, 29-30). 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.

Additionally, Mr. Wenger did not believe Officer Brooks was acting with lawful authority. 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, it is clear that Mr. Wenger did not at all believe that Officer Brooks was acting with lawful authority.

II. 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.

While being escorted to the squad vehicle, Mr. Wenger stumbled, fell and went limp. (R 91: 40). The State cannot prove the resisting element by showing the defendant hindered the execution of the process. *Welch*, 37 Wis.

196, 202. The 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). Mr. Wenger went 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 *State v. Hobson*, 218 Wis. 2d 350, 577 N.W.2d 825 (1998). Mr. Wenger simply went rigid after the officers picked him up, carried him, and threw 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: April 26, 2018

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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 1,409 words.

Dated: April 26, 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: April 26, 2018

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