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OF WISCONSIN

NO. 2017AP002367-CR

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

KEITH A. WALL,

Defendant-Appellant.

On Appeal From The Circuit Court For Columbia County
The Honorable Judge Todd J. Hepler
Circuit Court Case No. 2013CT000125

REPLY BRIEF OF DEFENDANT-APPELLANT KEITH A. WALL

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State v. Krause, 168 Wis. 2d 578, 848 N.W.2d 347 (Ct. App. 1992), does not do the work the government claims for it. Indeed, the circuit court distinguished *Krause*: "[Wall] did not demonstrate the same level or degree of violence as was initially found in the *Krause* case. . . ." (App. 6.) In other words, Wall was, at most, passively noncomplying. See *Cyrus v. Town of Mukwonago*, 624 F.3d 856, 863 (7th Cir. 2010) (no evidence suggesting that the plaintiff "violently resisted" officers even if plaintiff refused to release arms for handcuffing).

The legal standard, since at least *Faust*, has been the totality of the circumstances of each individual case. 2004 WI 99, at ¶43 ("The accepted principle of law is that exigent circumstances are determined by examining the totality of the circumstances."). As found by the circuit court, Wall was not actively resisting the officers. (App. 6.) He complied with the officers instructions to enter the hospital and to sit in the restraint chair. (R. 75 at 11:24-12:3, 13:8-13, 70:3-22). There was no fighting at all. The officers thus had time to get a warrant. This was not a "now or never" situation. *Roaden v. Kentucky*, 413 U.S. 496, 505 (1973) (Exigent circumstances justify a warrantless, nonconsensual search only if "police action literally must be 'now or never' to preserve the evidence of the crime.").

There are cases in which, although the police may conduct a search otherwise lawfully, the manner in which they do so violates the Fourth Amendment. *Illinois v. Caballes*, 543 U.S. 405, 407 (2005) ("a seizure that is lawful at its inception can violate the Fourth Amendment if its manner of execution unreasonably infringes interests protected by the Constitution."). In determining the reasonableness of the manner of execution courts have considered whether the suspect was merely passively noncomplying. See, e.g., *Becker v. Elfreich*, 821 F.3d 920, 929 (7th Cir. 2016) ("Case law makes clear that officers cannot use significant force on a nonresisting or passively resisting suspect."). The officers in this case used significant force on the non-resisting or passively noncomplying Wall. See *Smith v. Ball State Univ.*, 295 F.3d 763, 771 (7th Cir. 2002) (finding that what the officers perceived as willful noncompliance was not the same as "actively resisting" but instead a passive "resistance *requiring the minimal use of force*.") (emphasis added).

The government still has not explained why Wall's conduct justified use of significant force. The closest the government comes is saying that "the police had to use more force against Mr. Krause. . . ." (Resp. Br. at 15.) Wall's doctor's opinion is that "the neropraxia caused by the restraints that the police applied could take months to heal or that he might have permanent loss of feeling." (R. 86 at 11.) That Wall's injuries differ from those described in *Krause* do not prove the point.

Similarly, the government fails to explain why it was necessary to forcibly draw blood after the officers had already obtained a lot of evidence of impairment. See *Faust*, 2004 WI 99, ¶32 (further testing may be unreasonable). All the government says is the complaint alleges that "Wall would not provide a sufficient breath sample for a reading." (Resp. Br. at 12.) The government did not even try to prove that assertion at the hearing. Deputy Cory Miller ("Deputy Miller") testified that Wall was given "[t]he Horizontal Gaze Nystagmus, eye test, the walking test, a walk and turn test and a one leg stand test as well as a preliminary breath test." (App. 26.) Deputy Miller testified that he determined that "Wall was impaired." (*Id.*) And that the only reason for the forcibly drawing Wall's blood was because "[i]t was a third offense OWI." (App. 28.) Investigation of a third offense does not create exigent circumstances.

CONCLUSION

For all of the above reasons, and those previously argued, this Court should reverse the decision of the circuit court.

Dated in Milwaukee, Wisconsin, on this 24th day of April, 2018.

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with proportional serif font. The length of this brief is 1,116 words.

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ELECTRONIC BRIEF CERTIFICATION

I hereby certify that I have submitted an electronic copy of this brief 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 Court and served on all opposing parties.

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MAILING CERTIFICATION

I certify that I have mailed three paper copies of this brief by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within three calendar days to the following counsel of record for plaintiff-respondent:

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