COURT OF APPEALS DECISION DATED AND RELEASED

NOVEMBER 12, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62(1), STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

Nos. 96-0831-CR
96-0832-CR
96-0833-CR
96-0834-CR

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

No. 96-0831-CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

RUTH WOODRING,

Defendant-Respondent.

No. 96-0832-CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

MICHAEL BREMER,

Defendant-Respondent.

No. 96-0833-CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

KARL MEYER,

Defendant-Respondent.

No. 96-0834-CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

RONALD C. RENKOSKI,

Defendant-Respondent.

APPEALS from orders of the circuit court for Ashland County: ROBERT E. EATON, Judge. *Affirmed.*

LaROCQUE, J. The State appeals orders dismissing one count of obstructing a law enforcement officer in violation of § 946.41(1), STATS., against Ruth Woodring, Michael Bremer, Karl Meyer, and Ronald Renkoski.[1] The defendants were charged with obstruction when they refused to identify themselves upon being cited for trespass. The State argues that the circuit court

[1] Section 946.41(1), STATS., states as follows:

Whoever knowingly resists or obstructs an officer while such officer is doing any act in an official capacity and with lawful authority, is guilty of a Class A misdemeanor.

erred when it ruled that the Wisconsin Supreme Court's decision in ***Henes v. Morrissey***, 194 Wis.2d 338, 533 N.W.2d 802 (1995), is controlling and dismissed the charges. This court affirms.

The relevant facts are not in dispute. The defendants were engaged in protests on the ELF site near Clam Lake when they were approached by members of the Ashland County Sheriff's Department.[2] As the deputy sheriffs attempted to issue citations to the defendants for trespass, the defendants refused to give their names or any other identifying information to the officers.[3] The defendants did not resist or oppose the officers' actions in any other way. Subsequently, the defendants were arrested, taken into custody, and charged with obstruction. *See* note 1.

At her preliminary hearing, Woodring pled not guilty. Bremer, Renkoski and Meyer moved to dismiss the complaint. After their motions were denied, Bremer pled not guilty, while Renkoski and Meyer pled no contest. Both Renkoski and Meyer were found guilty based upon their plea and the facts alleged in the complaint. Woodring and Bremer filed another motion to dismiss, which was denied. However, the State subsequently alerted the court and the two remaining defendants to the existence of ***Henes***. Based upon ***Henes***, the court granted Woodring's and Bremer's motions to reconsider the denial of their motions to dismiss. The court then dismissed the obstruction charge against both defendants, stating that ***Henes*** was controlling. Renkoski and Meyer each filed motions to vacate their judgments of conviction and to dismiss the charge, which the court granted. The State now appeals these orders.

The obstruction statute furthers the legitimate State interests of protecting peace officers, preventing the frustration of the valid enforcement of the law, promoting the orderly and peaceful resolution of disputes, and detecting and preventing crime. ***State v. Hamilton***, 120 Wis.2d 532, 535, 356 N.W.2d 169, 171 (1984). Yet, not every barrier placed in the path of an officer gives rise to a violation of that statute. ***Id.***

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[2] All defendants except Meyer were arrested after a protest on August 6, 1995, while Meyer was arrested after a similar protest on August 7, 1996.

[3] Section 943.13, STATS., prohibits trespass to land and states that a violation is a Class B forfeiture. Section 778.26, STATS., describes the citation procedure for violation of that section.

Obstructing requires proof of three elements: (1) that the defendant obstructed an officer, (2) that the officer was doing an act in his or her official capacity and with lawful authority, and (3) that the defendant knew or believed that he or she was obstructing the officer while the officer was acting in his or her official capacity and with lawful authority. ***Henes***, 194 Wis.2d at 353, 533 N.W.2d at 808. It is the first element at issue in this appeal. The term "obstructs" "includes without limitation knowingly giving false information to the officer or knowingly placing physical evidence with intent to mislead the officer in the performance of his or her duty .... Section 946.41(2)(a), STATS. "To obstruct an officer means that the conduct of the defendant prevents or makes more difficult the performance of the officer's duties." *See* WIS J I—CRIMINAL 1766.[4]

Because this case involves the application of the statute to undisputed facts, this court reviews the trial court's order de novo. ***State v. Cornelius***, 152 Wis.2d 272, 276, 448 N.W.2d 434, 435 (Ct. App. 1989). Penal statutes are to be strictly construed in favor of the accused. ***State v. Schaller***, 70 Wis.2d 107, 110, 233 N.W.2d 416, 418 (1975). Nevertheless, a strict construction shall not be used to defeat the legislature's intent with regard to the statute. ***State v. Tronca***, 84 Wis.2d 68, 80, 267 N.W.2d 216, 221 (1978).

In dismissing the obstruction charge against the defendants, the trial court relied upon ***Henes***. This court reads ***Henes*** to hold that the obstructing statute does not permit a prosecution for obstructing an officer

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[4] The Wisconsin Jury Instructions Committee's comments to WIS J I—CRIMINAL 1766 states:

> In the Committee's judgment, a refusal to answer questions, by itself, should not be considered "obstructing an officer" in violation of § 946.41. The history of Wisconsin's statute shows that the type of conduct covered has been broadened substantially over the years to extend well beyond the "direct, forcible resistance" required by previous versions of the statute. Further expansion to cover simple refusal to answer questions should be done, if done at all, only by direct and carefully focused legislative action. (Citation omitted.)

While this court is not bound by the comments contained in the Wisconsin Jury Instructions, the committee's work is respected as "the product of painstaking effort of an eminently qualified committee of trial judges, lawyers, and legal scholars" and is therefore persuasive. ***State v. Gilbert***, 115 Wis.2d 371, 379, 340 N.W.2d 511, 515 (1983).

under § 946.41, STATS., for refusing to identify himself or herself to a police officer. ***Henes*** examined this issue in context of an appeal by two law enforcement officers who invoked a defense of qualified immunity in a 42 U.S.C. § 1983 action brought against them by the plaintiff, whom they had arrested for refusing to identify himself following a ***Terry v. Ohio***, 392 U.S. 1 (1968), stop. ***Id***. at 343, 533 N.W.2d at 804. We read ***Henes*** to provide that mere silence, standing alone, is insufficient to constitute obstruction under § 946.41. ***Id***. at 354, 533 N.W.2d at 808.

The State would have us distinguish ***Henes*** on grounds that the subject in that case was merely a suspect under preliminary criminal investigation, while the subjects in this case were actually validly arrested for a violation of the law.[5] This court concludes that it would require a strained reading of ***Henes*** to suggest that the obstruction statute distinguishes between a person detained on reasonable suspicion, who need not comply with a demand to provide identity, and a person detained on probable cause, who must identify himself or herself. This is not this court's reading of ***Henes.***

Having concluded that ***Henes*** is controlling, it is unnecessary to address the constitutional questions raised.

By the Court.—Orders affirmed.

This opinion will not be published. RULE 809.23(1)(b)4, STATS.

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[5] This court concludes that whether the person is stopped for conduct that is criminal or subject only to a forfeiture is a distinction not important to the resolution of the scope of the obstructing statute.