COURT OF APPEALS DECISION DATED AND FILED

December 23, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

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

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, STATS.

No. 99-1516-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JEFFREY R. SCHERTZ,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Waupaca County: JOHN P. HOFFMANN, Judge. *Affirmed in part; reversed in part and cause remanded with directions.*

¶1 VERGERONT, J.[1] Jeffrey Schertz appeals his judgment of conviction for disorderly conduct and resisting or obstructing an officer. He contends there was insufficient evidence to uphold the jury verdict on the charge

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[1] This appeal is decided by one judge pursuant to § 752.31(2)(f), STATS.

of resisting or obstructing an officer because, he argues, the officer did not act with lawful authority. We agree the officer unlawfully entered Schertz's home by placing his leg across the threshold without consent, and Schertz's acts of resisting the officer at that point did not, therefore, violate § 946.41, STATS.[2] However, we conclude the record nevertheless supports the jury's finding that Schertz did violate § 946.41 at some point during the incident and we therefore affirm the conviction. Schertz also argues that two of the conditions of probation the court imposed—not engaging in any picketing activity against the Clintonville Police Department and not generating any publicity regarding the police department—are overly broad and unreasonably violate Schertz's First Amendment rights. We agree with Schertz that the ban on generating any publicity regarding the police department is an overly broad condition of probation, and we are unable to decide on this record whether the restriction on Schertz's picketing activity is reasonably related to his rehabilitation effort and therefore permissible. We therefore remand for the trial court to determine what changes are necessary for Schertz's conditions of probation consistent with this opinion.

BACKGROUND[3]

¶2 The events that led to the charges of disorderly conduct and resisting or obstructing an officer occurred in the late night hours of January 2, 1998, and

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[2] Section 946.41, STATS., provides, in pertinent part:

> **Resisting or obstructing officer.** (1) 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.

[3] The jury in this case was presented with two very different versions of the facts that led to Schertz's arrest. Because the issue on appeal that relates to these facts is sufficiency of the evidence, we relate the evidence in the light most favorable to the verdict.

the early morning hours of January 3. Officer Robert McMillin of the Clintonville Police Department testified at Schertz's trial that Sheela Powers and her son Jacob both called the police to report a disturbance. Powers had previously dated Schertz, but she did not want to see him or talk to him on January 2. According to the information Officer McMillin heard over the police radio, Powers had indicated that Schertz was attempting to enter her apartment without her permission, using a credit card.

¶3 Officer McMillin heard that two other officers were dispatched to Power's apartment, so he decided to go directly to Schertz's residence. He went to the back door, which consisted of a storm door (exterior door) that was closed and an interior door, which was open. He saw Schertz through the storm door and asked him to step outside. Officer McMillin testified that Schertz indicated he would and that Schertz commented that it was probably about the incident that had just happened at Power's apartment. Officer McMillin said he opened the storm door as he was explaining to Schertz what he was there for, and that his whole leg was in the threshold of the door. Schertz then came toward the door and swung the interior door shut, pinning Officer McMillin's leg between the door and the jam.

¶4 Officer McMillin testified that he was not able to get his leg out because Schertz had wedged his body against the door. At that point, Officer McMillin reached around the corner and sprayed his pepper spray towards Schertz. Schertz continued pushing on the door, so Officer McMillin delivered a second spray into Schertz's face. After the second spray, Officer McMillin felt less resistance on the door, and was able to reach in and grab Schertz and pull him out of the house and down onto the ground to put a compliance hold on Schertz's head with his knee until backup arrived.

¶5 The officer who arrived as backup, Officer Patrick McGinty of the Clintonville Police Department, assisted Officer McMillin in putting handcuffs on Schertz. Officer McGinty testified that Schertz resisted having the handcuffs put on—that he would not give the officers his second hand—and they "had to struggle a little."

¶6 The jury found Schertz guilty of disorderly conduct for the incident at Power's apartment and of resisting or obstructing an officer for the events at Schertz's residence.[4] At the sentencing hearing, charges of disorderly conduct and bail jumping from a later case, arising from an incident that occurred when Schertz was picketing outside Officer McMillin's home, were dismissed and read in. The court withheld Schertz's sentence and ordered a two-year term of probation. Among other restrictions, the court ordered, as conditions of probation, that Schertz not engage in any picketing activity and not otherwise generate any publicity about the Clintonville Police Department. Schertz filed a postconviction motion, arguing there was insufficient evidence for the resisting conviction because Officer McMillin had unlawfully entered his home, and the conditions of his probation were overly broad.[5]

¶7 The trial court denied the motion. It concluded that Officer McMillin's actions of placing his leg over Schertz's threshold did not constitute an entry, or if that were an entry, it was "so slight that it would not be appropriate to dismiss the charge of resisting an officer." In regard to the contested conditions of probation, the trial court recognized that Schertz believed he was treated poorly by

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[4] Schertz does not appeal the disorderly conduct conviction.

[5] In his postconviction motion, Schertz also argued that the court improperly considered Schertz's lack of remorse in sentencing. He does not, however, renew this contention on appeal.

the police department and wanted to see some change in the department. However, the court concluded it was reasonable, considering Schertz's past activity, to restrict the methods Schertz can use to bring about such change. The court noted that Schertz may pursue any civil remedies in court he believes he has, or claims through the City of Clintonville.

DISCUSSION

Sufficiency of the Evidence

¶8 In reviewing whether there was sufficient evidence for the jury to convict Schertz of resisting or obstructing an officer, we are not to evaluate and weigh the evidence, nor are we to explore the defendant's theories of innocence; instead, we must search the record for reasonable evidence that supports the jury's finding of guilt beyond a reasonable doubt. *See* ***State v. Poellinger***, 153 Wis.2d 493, 503-04, 451 N.W.2d 752, 756 (1990). Therefore, if any possibility exists that the jury could have drawn reasonable inferences from the evidence adduced at trial to find the requisite guilt, we will not overturn a verdict even if we believe a jury should not have found guilt based on the evidence before it. ***State v. Bellows***, 218 Wis.2d 614, 635, 582 N.W.2d 53, 62 (Ct. App. 1998).

¶9 The jury was instructed that, in order to find Schertz guilty of resisting or obstructing an officer, it needed to be satisfied beyond a reasonable doubt that the following four elements were present:

> [F]irst, that the defendant resisted an officer; second, that the officer was doing an act in an official capacity; third, that the officer was doing an act with lawful authority; fourth, that the defendant knew that Robert McMillin was an officer acting in an official capacity and with lawful authority and that the defendant knew his conduct would resist the officer.

¶10 If an officer's actions violate the Fourth Amendment, he or she is acting without lawful authority under § 946.41, STATS. *See* ***State v. Barrett***, 96 Wis.2d 174, 181, 291 N.W.2d 498, 501 (1980). Schertz contends that when Officer McMillin placed his leg over the threshold of Schertz's door, he unlawfully entered Schertz's home without Schertz's consent and, therefore, Officer McMillin was not "doing an act with lawful authority" when Schertz closed the door on the officer's leg.[6] Schertz cites ***State v. Johnson***, 177 Wis.2d 224, 501 N.W.2d 876 (Ct. App. 1993), as support for this argument.

¶11 In ***Johnson*** police officers were assigned to interview anyone they encountered near an apartment building because of high drug traffic in the building. As Johnson entered the building, the officers asked him for identification and his reason for being there. Johnson told the officers his identification was inside one of the apartments and they asked him to retrieve it. As he entered the apartment to get his identification, one of the officers placed his foot on the threshold, approximately four to six inches, so that Johnson could not shut the door. We concluded, "as a matter of law, [the officer's] step clearly constituted 'entry'" and that entry, although perhaps only a "slight deviation[] from [a] legal mode[] of procedure," was in violation of the Fourth Amendment's "firm line at the entrance to the house." ***Id.*** at 231-32, 501 N.W.2d at 879 (citations omitted).

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[6] The jury was not instructed on what constitutes a lawful entry into a home. Instead, they were given an instruction on the legal amount of force that can be used by an officer during a "stop and question" situation. *See* WIS J I—CRIMINAL 1765 n.8. Whether the jury instructions were appropriate is not an issue on this appeal, and was not raised before the trial court.

¶12 The State argues that because the evidence shows that Officer McMillin placed his leg over the threshold as part of his act of opening the storm door as a courtesy, "as [he] would for anyone," it does not constitute entering the home. The State contends this case is distinguishable from ***Johnson*** because Officer McMillin testified that he did not put his foot in the door to prevent it from being closed or to step completely into the house, but rather as a polite gesture as he waited for Schertz to step outside. We disagree with the State's interpretation of ***Johnson***. In ***Johnson*** we concluded that the officer's step into the threshold was an entry because it prevented Johnson from closing the door—not that it was an entry because the officer intended to prevent the door from being shut. ***Johnson***, 218 Wis.2d at 232, 501 N.W.2d at 879. The State does not provide us with any authority to support its premise that the intent of the officer is relevant to the determination of whether the officer has entered a home, nor are we aware of any.

¶13 We therefore conclude the bright-line interpretation of what constitutes an entry for Fourth Amendment purposes in ***Johnson*** is controlling and that Officer McMillin did enter Schertz's home when his leg crossed the threshold. The State does not argue that Officer McMillin had consent or that entry was lawful for any other reason. We therefore further conclude Officer McMillin did unlawfully enter Schertz's home by placing his leg over the threshold, and Schertz's act of closing the door on the officer's leg did not, as a matter of law, violate § 946.41, STATS.[7]

[7] We are not concluding that Schertz's act of pinning Officer McMillin's leg in the door was lawful—only that it did not violate § 946.41, STATS. As we discuss later in this opinion, this conduct does provide probable cause to believe Schertz was committing a crime.

¶14 Although the specific act of closing the door on Officer McMillin's leg did not violate § 946.41, STATS., we must search the record for any reasonable evidence to support the jury verdict that Schertz did violate § 946.41 that night. *See* ***Bellows***, 218 Wis.2d at 635, 582 N.W.2d at 62. After Officer McMillin got his leg out of the door, Schertz struggled with Officers McMillin and McGinty as they attempted to place him in handcuffs. The jury could have considered this action as a violation of § 946.41. To determine whether such a finding is reasonable, we consider whether the evidence would support the four elements of the crime. The jury could have reasonably found that Schertz resisted by physically struggling with the officers and that the officers were acting in an official (as opposed to a personal) capacity of investigating a possible crime at Power's apartment and arresting Schertz for pinning Officer McMillin's leg in the door.

¶15 We also conclude the jury could have found the officers' act of arresting and handcuffing Schertz was done with lawful authority. Although we have concluded that Officer McMillin unlawfully placed his leg across Schertz's threshold, that does not justify Schertz's act of pinning the officer's leg in the door and does not mean that act was not a crime for which Schertz could be lawfully arrested. The supreme court has held that a person does not have the right to forcibly resist an unlawful arrest. *See* ***State v. Hobson***, 218 Wis.2d 350, 353, 577 N.W.2d 825, 826 (1998). If one cannot forcibly resist an officer who has made an arrest that is unlawful, certainly Schertz cannot forcibly resist an officer who unlawfully placed his leg over the threshold of Schertz's house, an action much less intrusive than arrest. Since Schertz's act of forcibly pinning Officer McMillin's leg in the door was not legally justified, we conclude there was sufficient evidence for a jury to find that Officer McMillin had probable cause to

arrest Schertz for his criminal conduct.[8] Officer McMillin's act of arresting Schertz was, therefore, lawful conduct.

¶16 Finally, we conclude that the evidence supports a finding that Schertz knew that he was resisting an officer acting in an official capacity and with lawful authority (the fourth element of resisting an officer). Therefore, we conclude the evidence, viewed in a light most favorable to the verdict, is sufficient to support the jury's finding that Schertz violated § 946.41, STATS.

Conditions of Probation

¶17 After the events of January 2 and 3, 1998, Schertz wore a sign that said "Clintonville Police Department is corrupt, brutal and unjust" and picketed near Officer McMillin's residence. Neighbors complained and charges of disorderly conduct and bail jumping were filed against Schertz in a case separate from that of this appeal. It is not clear from the record precisely what conduct by Schertz was the basis for these charges, which were dismissed and read in for sentencing in the case before us.

¶18 As part of Schertz's sentence, the court imposed the following two conditions of probation:

> Not engage in any picketing activity against the Clintonville Police Dept.

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[8] For example, the evidence that Schertz forcibly pinned Officer McMillin's leg in the door provided probable cause that Schertz committed the crime of disorderly conduct, a crime for which the jury was instructed on the elements. Section 947.01, STATS., provides:

> **Disorderly conduct.** Whoever, in a public or private place, engages in violent, abusive, indecent, profane, boisterous, unreasonably loud or otherwise disorderly conduct under circumstances in which the conduct tends to cause or provoke a disturbance is guilty of a Class B misdemeanor.

> Not generate any publicity of any type in re: to Clintonville Police Dept. via mass media including print media, radio or television or by generating any publicity to the general public. Courts intent does not include one on one private conversation.

During the postconviction hearing, the court clarified, "it was not the court's intent to prevent the defendant from having a one-on-one private conversation with an individual relating to his [belief that he was treated improperly], but I think it tends to make the situation or potential situation worse if he's out doing it through the mass media or speaking to groups or picketing in some way." Schertz argues these conditions of probation unreasonably violate his First Amendment rights to free speech and assembly.

¶19 Sentencing courts "may impose any conditions [of probation] which appear to be reasonable and appropriate." Section 973.09(1)(a), STATS. The conditions may impinge upon constitutional rights as long as they are not overly broad and are reasonably related to the defendant's rehabilitation. ***State v. Miller***, 175 Wis.2d 204, 208, 499 N.W.2d 215, 216 (Ct. App. 1993). Schertz contends that both conditions are overly broad.

¶20 In determining whether the State's infringement upon a probationer's constitutional rights is permissible, we must determine the reasonableness of the State's action under the facts of each case. ***Von Arx v. Schwarz***, 185 Wis.2d 645, 659, 517 N.W.2d 540, 546 (Ct. App. 1994). The American Bar Association's STANDARDS RELATING TO PROBATION § 3.2(b) (Approved Draft, 1970), adopted by the supreme court in 1972, states, in pertinent part:

> Conditions imposed by the court should be designed to assist the probationer in leading a law-abiding life. They

> should be reasonably related to his rehabilitation and not unduly restrictive of his liberty….

State v. Garner, 54 Wis.2d 100, 105-06, 194 N.W.2d 649, 651-52 (1972). Wisconsin courts have upheld conditions of probation that restrict the probationer's constitutional rights when the prohibited or required activity is narrowly defined and directly relates to, or tends to lead to, a criminal activity the court is trying to prevent from reoccurring. *See, e.g.,* ***Miller***, 175 Wis.2d at 210, 499 N.W.2d at 217 (Ct. App. 1993) (reasonable to prohibit probationer from making phone calls to unrelated women when probationer's past criminal conduct includes making telephone calls of a sexually explicit nature to women); ***Von Arx***, 185 Wis.2d at 660, 517 N.W.2d at 546 (reasonable to require probationer to participate in sex offender counseling notwithstanding the intrusion upon his religious freedom when his past criminal conduct includes engaging in deviant sex acts with children); ***Krebs v. Schwarz***, 212 Wis.2d 127, 131-32, 568 N.W.2d 26, 28-29 (Ct. App. 1997) (reasonable to require probationer to obtain permission from agent before engaging in a sexual relationship when he was convicted of sexual assault); ***Edwards v. State***, 74 Wis.2d 79, 83, 246 N.W.2d 109, 110-11 (1976) (reasonable to prohibit probationer's contact with co-defendant/fiancée when probationer's only criminal activity centered around her involvement with him).

¶21 We conclude the condition that Schertz not generate any publicity regarding the Clintonville Police Department is overly broad, unduly restrictive and, as now formulated, does not reasonably relate to Schertz's rehabilitation. Speaking out against government tactics that one disagrees with is not illegal and is, in fact, an encouraged and protected right for all citizens. Although Schertz's message may not be well received and may make individuals uncomfortable,

curtailing his generation of any negative publicity about the police department does not reasonably relate to preventing Schertz from reoffending. Other jurisdictions have reached similar conclusions regarding rules of probation and parole that greatly inhibit the right to publicly express one's views. *See, e.g.*, ***Porth v. Templar***, 453 F.2d 330 (10th Cir. 1971) (condition of probation prohibiting defendant from circulating material attacking income tax and federal reserve systems was overly broad); ***In re Mannino***, 92 Cal. Rptr. 880 (Cal. Ct. App. 1977) (condition of probation prohibiting defendant from joining protest organizations or advocating civil protest was overly broad); ***Hyland v. Procunier***, 311 F. Supp 749, 750 (N.D. Cal. 1970) (screening parolee's speaking engagements and denying him the opportunity to address groups based on the content of his message would have an "unwarranted chilling effect" on his First Amendment rights). There may be conduct included within the overly broad condition that could be justified under the standards we have set forth above, but we are unable to determine that on this record. We therefore remand so that the trial court may consider whether a narrower prohibition would reasonably relate to Schertz's rehabilitation.

¶22 The other disputed condition of probation—that Schertz not engage in any picketing activity against the Clintonville Police Department—is considerably more narrow. The State points out that "picketing is more than speech and establishes a locus in quo that has far more potential for inducing action or nonaction than the message the pickets convey." ***Building Serv. Employees Int'l Union v. Gazzam***, 339 U.S. 532, 537 (1950). However, we are not able to discern from the record whether this condition reasonably relates to Schertz's rehabilitation. The charges of disorderly conduct and bail jumping that were dismissed and read in at sentencing did follow an occasion where Schertz

was picketing outside Officer McMillin's house, but it is not clear from the record whether it was the picketing that led to the disturbance or if it was Schertz's presence at the officer's house. We therefore remand to the trial court to determine whether the condition prohibiting all picketing against the department is reasonably related to Schertz's rehabilitation.

By the Court.—Judgment and order affirmed in part; reversed in part and cause remanded with directions.

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