COURT OF APPEALS
DECISION
DATED AND RELEASED

June 26, 1997

NOTICE

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.

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

No. 96-3050-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

JOHN W. MOORE,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Dane County: MICHAEL NOWAKOWSKI, Judge. *Affirmed.*

ROGGENSACK, J.[1] John W. Moore appeals his misdemeanor conviction of two counts of disorderly conduct, arising from separate incidents at two University of Wisconsin-Madison campus libraries. Moore claims that his conviction should be overturned because: (1) his actions were provoked by

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

University personnel who requested him to identify himself and unlawfully arrested him; (2) the State failed to carry its burden of proof because it did not provide the testimony of any student who had complained about his behavior in the libraries; and (3) the State lacked authority to prosecute for conduct which occurred on University land. A review of the record and applicable law shows that Moore's arguments are without merit. Accordingly, the judgment of the trial court is affirmed.

BACKGROUND

Shortly before 9:00 p.m. on the evening of November 8, 1995, a student worker at the University of Wisconsin-Madison's Helen C. White library received a complaint from a patron about a man watching a pornographic video in the multimedia center. The student worker, Katherine Back, paged security, then approached the subject of the complaint, John W. Moore. Back asked Moore whether he was a student or faculty member, and told him that use of the multimedia center, or computer lab, was restricted to persons affiliated with the University. She explained that the procedure in the lab was to have one's i.d. card scanned upon entrance. Moore refused to produce identification.

Back contacted security officer, J.D. Rosandick, and explained the situation to him. When Rosandick approached Moore and asked for identification, Moore became agitated. He jumped up and began screaming that he could be there; that he didn't need identification; and that he would sue the officer. He told Rosandick that he would kick his ass, and asked him if he wanted to fight. The security officer felt threatened and told Moore that he was going to call the University police. Moore then left the multimedia center.

Rosandick followed Moore downstairs and observed him set off the electronic gate alarm as he passed through it. Rosandick again approached Moore and asked him to come back so that he could determine what had activated the alarm. Moore refused to come back, but dumped what he was carrying on the floor.

Four days later, on November 12, 1995, University Police Officer Anthony Curtis received a dispatch to go to the Wendt library on the Madison campus. A library staff member told him she had received several complaints from students about a man viewing pornographic material in the computer lab during the previous week, and that Moore was back again and had been warned about his actions. Curtis investigated, and observed Moore watching a "strip tease" video.

When Curtis asked Moore to identify himself, Moore pulled out a handmade, laminated, press-like i.d. He insisted that he was working on a research paper using federal depository materials, and that he had a right to be in the library. As in the prior incident, Moore became upset and confrontational, standing up to face Curtis and calling him an asshole in a loud voice. Nearby students picked up their things and moved. Curtis promptly arrested Moore for disorderly conduct, and took him to the University of Wisconsin police station, where he issued a citation.

On November 28, 1995, Moore was charged with two counts of misdemeanor disorderly conduct, contrary to § 947.01, STATS., and the prior civil forfeiture citations were dismissed.[2] After a trial to the court in which he

[2] Moore filed a *pro se* petition for supervisory writ based on double jeopardy grounds, which this court denied on July 3, 1996.

represented himself, but did not testify,[3] Moore was found guilty of both counts and was sentenced to twelve days in jail on each one. He appeals the convictions.

DISCUSSION

Standard of Review.

Ordinarily, the question of the lawfulness of an arrest presents a factual question. ***Lane v. Collins,*** 29 Wis.2d 66, 73, 138 N.W.2d 264, 268 (1965). However, whether a particular set of facts gives rise to a legal defense is a question of law that this court reviews *de novo*. *See* ***Bantz v. Montgomery Estates, Inc.***, 163 Wis.2d 973, 978, 473 N.W.2d 506, 508 (Ct. App. 1991) (whether facts fulfill a particular legal standard is a question of law).

> In reviewing the sufficiency of the evidence to support a conviction, an appellate court may not substitute its judgment for that of the trier of fact unless the evidence, viewed most favorably to the state and the conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt.

State v. Holtz, 173 Wis.2d 515, 518, 496 N.W.2d 668, 669 (Ct. App. 1992).

[3] Because he did not testify, many of the assertions which Moore makes in his brief rely on facts not of record. For example, we do not address Moore's claim that his arrest obstructed his preparation for a federal case because it has no support in the record.

Lawfulness of Arrest.

Moore claims the officers provoked him, causing the breaches of the peace; and therefore, his arrests were unlawful. A police officer cannot provoke a person into a breach of the peace and then arrest him without a warrant. ***Lane***, 29 Wis.2d at 72, 138 N.W.2d at 267. If provocation has occurred, it renders the arrest unlawful. ***Id***. at 73, 138 N.W.2d at 268.

Typically, a provocation defense arises when an officer has engaged in name-calling or other offensive conduct which would tend to provoke retaliatory conduct of the same nature. ***Id***. However, in this case, the appellant claims that he was "provoked" when he was asked to identify himself in a campus library multimedia center. Moore contends that the request, itself, was unlawful because it was based on his mere presence at the library as opposed to a violation of any government regulation, and that it was also unconstitutional because he had an equal protection right to access all facilities in any library serving as a federal repository. We disagree that the request qualified as provocation for Moore to breach the peace, regardless of whether Moore had a right to be present in either of the multimedia centers.

Being asked for identification is a common, everyday occurrence in a campus computer lab, and would not tend to provoke a reasonable person to breach the peace. It is true that when police officers require a person to identify himself and prevent him from leaving unless he does so, they perform a seizure of the person subject to the requirements of the Fourth Amendment. ***Brown v. Texas***, 443 U.S. 47, 50 (1979). And, such a seizure, if unsupported by any reasonable suspicion, might well provoke a hostile response from the person illegally seized. However, there is nothing in the Constitution which prevents

police officers from addressing questions to anyone on the street, or in this case, in a computer lab. ***United States v. Mendenhall***, 446 U.S. 544, 552 (1980) (opinion of Stewart, J.). As long as the person to whom the questions are addressed remains free to disregard the questions and walk away, no constitutional violation has occurred.

Here, Moore was free to leave the White library lab at any time. In fact, he did so. And, he could have left the Wendt lab as well, prior to causing the disturbance which led to his arrest. He objects, not because the security personnel or University police tried to detain him in the lab; but rather, because they asked him to leave. Nothing in the conduct of either Rosandick or Curtis was provocative in nature, and the trial court properly concluded that Moore had failed to establish facts sufficient to show provocation caused his arrest to be unlawful.

Sufficiency of the Evidence.

Wisconsin's disorderly conduct statute is straightforward. Section 947.01, STATS., provides:

> 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.

The statute thus creates two elements for disorderly conduct: (1) conduct of the type enumerated in the statute; and (2) circumstances in which the conduct would tend to cause a disturbance. ***City of Oak Creek v. King***, 148 Wis.2d 532, 540, 436 N.W.2d 285, 288 (1989).

The evidence, viewed most favorably to the State, shows that Moore engaged in conduct that was disorderly, loud and abusive. Moore's shouting in a library; taunting Rosandick about fighting; and his repeated insults of "asshole" and the like, satisfy the standards of § 947.01, STATS.

Authority to Prosecute.

Moore contends that his prosecution under the state statute was barred by administrative code provisions prohibiting the same conduct. However, Moore cites no legal authority for this contention, and we conclude that it has no basis. *See, e.g.,* ***State v. McMaster***, 206 Wis.2d 30, 556 N.W.2d 673 (1996) (approving state prosecution under drunk driving laws after administrative suspension of driver's license arising from the same incident).

CONCLUSION

Moore's conduct was disorderly, loud and abusive and it tended to cause disturbances in both campus libraries. Neither of Moore's two breaches of the peace was provoked by simple requests that he identify himself. He was properly prosecuted by the State for violations of § 947.01, STATS., and his convictions are affirmed.

By the Court.—Judgment affirmed.

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