

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 9, 2001

Cornelia G. Clark
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 WIS. STAT. § 808.10 and RULE 809.62.

No. 00-3064-CR

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT II

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

MATTHEW J. LAZAREWICZ,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Sheboygan County: JAMES J. BOLGERT, Judge. *Affirmed.*

¶1 NETTESHEIM, J.¹ Matthew J. Lazarewicz appeals from a judgment of conviction for resisting an officer pursuant to WIS. STAT. § 946.41(1). He pled no contest to the charge following the trial court's denial of his motion to

¹ This opinion is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (1999-2000). All references to the Wisconsin Statutes are to the 1999-2000 version.

suppress which challenged the legality of his arrest. The trial court determined that Lazarewicz's arrest was invalid, but that the arresting officer believed in good faith that he had lawful authority to take Lazarewicz into custody. We affirm the order denying the motion to suppress, but on different grounds. We hold that Lazarewicz's motion was precluded by *State v. Hobson*, 218 Wis. 2d 350, 577 N.W.2d 825 (1998), which abrogated the previously recognized right to forcibly resist an unlawful arrest.

¶2 The relevant facts are brief and uncontested. Lazarewicz was on probation and was living at the Attic, a transitional living facility for persons on probation or parole. An Attic employee observed Lazarewicz in an intoxicated condition and, at the direction of her superior, summoned the police. Officer Joel Clark of the City of Sheboygan Police Department responded. Clark believed that Lazarewicz's probation officer had placed a hold on Lazarewicz because of the incident and therefore he had the authority to take Lazarewicz into custody. However, the evidence revealed, and the trial court found, that no such probation hold had been issued. When Clark took Lazarewicz into custody, Lazarewicz resisted.

¶3 The State charged Lazarewicz with two counts of resisting an officer pursuant to WIS. STAT. § 946.41(1).² Lazarewicz brought a motion to suppress, contending that his arrest was unlawful. The trial court agreed based on the evidence that Lazarewicz's probation officer had not issued a probation hold on Lazarewicz. Nonetheless, the court denied the motion to suppress because Clark had acted in good faith. Lazarewicz then pled no contest to one of the charges,

² Lazarewicz was also charged as a habitual criminal offender pursuant to WIS. STAT. § 939.62(1)(a).

and the State dismissed the other charge. Lazarewicz appeals from the judgment of conviction.

¶4 The parties' briefs raise various issues. Lazarewicz disputes the trial court's good faith ruling, contending that the Wisconsin Supreme Court has declined, to date, to recognize a good faith exception to the exclusionary rule. *See State v. Longcore*, 226 Wis. 2d 1, 7 n.7, 594 N.W.2d 412 (Ct. App. 1999), *aff'd by an evenly divided court*, 2000 WI 23, 233 Wis. 2d 278, 607 N.W.2d 620.

¶5 The State argues that the question of Clark's good faith is irrelevant because Clark did not arrest Lazarewicz. The State says that Lazarewicz was an "inmate" of the Attic. As such, Clark was merely transferring Lazarewicz from one confinement setting to another. Therefore, Clark did not need a probation hold or any other formal legal authority to justify his actions. The State also argues that Lazarewicz's resisting conduct was sufficiently attenuated from any unlawful arrest such that the "fruit of the poisonous tree" doctrine should not apply. *Wong Sun v. United States*, 371 U.S. 471 (1963); *State v. Lenarchick*, 74 Wis. 2d 425, 453, 247 N.W.2d 80 (1976).

¶6 We do not address these issues because we agree with the State's further argument that Lazarewicz's suppression motion was precluded by the Wisconsin Supreme Court's opinion in *Hobson*. There, the court held that existing Wisconsin law recognized a privilege to forcibly resist an unlawful arrest. *Hobson*, 218 Wis. 2d at 380. However, the court went on to abrogate that privilege for purposes of future cases where the arrest was peaceful. *Id.* The court said, "We agree that there should be no right to forcibly resist an unlawful arrest in the absence of unreasonable force." *Id.* at 379.

¶7 Here, Lazarewicz based his motion to suppress squarely on the ground that his arrest was unlawful. But *Hobson* holds that the unlawfulness of an arrest is no longer a consideration in a resisting case if the arrest was otherwise peaceful and did not involve unreasonable force. Lazarewicz makes no claim that his arrest was not peaceful or that Clark used unreasonable force. *Hobson* precluded Lazarewicz's motion to suppress.

¶8 We appreciate that the State did not make an argument under *Hobson* in the trial court. However, we ruled in *State v. Holt*, 128 Wis. 2d 110, 382 N.W.2d 679 (Ct. App. 1985), that we will not apply waiver against a respondent who seeks to uphold the trial court's ruling based on an argument not made in the trial court. *Id.* at 124-26. This rule knows its limits. We will adhere to the waiver rule where it appears that the trial court argument of the party guilty of waiver was strategic or where the appellate argument requires additional fact-finding. *State v. Nicholson*, 220 Wis. 2d 214, 229-30, 582 N.W.2d 460 (Ct. App. 1998). Here, however, there is no suggestion that the State's failure to argue *Hobson* in the trial court was strategic; nor does the application of *Hobson* require any additional fact-finding. Instead, the *Hobson* issue raises a pure question of law.

¶9 We hold that Lazarewicz's motion to suppress was precluded by *Hobson*. We affirm the order denying the motion to suppress.

By the Court.—Judgment affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)4.

