**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**June 11, 2002**

**Cornelia G. Clark**
**Clerk of Court of Appeals**



**Appeal No. 01-2150-CR** **Cir. Ct. No. 01 CF 554**

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

---

**STATE OF WISCONSIN,**

**PLAINTIFF-APPELLANT,**

**V.**

**JAMES G. LUCK,**

**DEFENDANT-RESPONDENT.**

---

APPEAL from an order of the circuit court for Milwaukee County: ROBERT C. CRAWFORD, Judge. *Reversed and cause remanded.*

Before Wedemeyer, P.J., Fine and Schudson, JJ.

¶1 PER CURIAM. The State of Wisconsin appeals from an order declaring WIS. STAT. § 946.415 (1999-2000)[1] unconstitutional and dismissing the

[1] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

complaint charging James G. Luck with one count of violating § 946.415(2). The State claims the trial court erred when it concluded that the statute was unconstitutional. Because § 946.415 is constitutional, we reverse the order and remand this case for further proceedings.

## I. BACKGROUND

¶2 On January 23, 2001, the police were summoned to a home in the 1900 block of South 56th Street in the City of West Allis. Luck's wife, Catherine A. Luck, reported that her husband had threatened her with a large kitchen knife. Catherine locked herself in the bathroom to prevent injury to herself.

¶3 When the police arrived, Luck came out of the home and confronted them. The police ordered Luck, at gunpoint, to place his hands over his head and lie on the ground. He refused and told the officers to "fucking shoot me." Luck then retreated into the home. Catherine was able to escape from the home, but advised police that Luck had a gun and indicated that he planned on using it. A police negotiator, who spoke with Luck by phone, confirmed that Luck possessed a 9 mm semi-automatic handgun and that he threatened to use it to kill himself or anyone else who tried to stop him.

¶4 After a five-hour standoff, Luck surrendered to police. He was charged with one count of failure to comply with an officer's attempt to take a person into custody, in violation of WIS. STAT. § 946.415(2). Luck filed a pre-trial motion asking the court to find § 946.415 unconstitutional on its face. After receiving briefs from both sides, the trial court ruled that the statute was unconstitutional. An order to that effect was entered. The State now appeals.

## II. DISCUSSION

¶5 The issue in this case is whether WIS. STAT. § 946.415 is unconstitutional on its face. Whether a statute is constitutional presents a question of law, which we review independently. ***State v. Johnson***, 2001 WI 52 ¶10, 243 Wis. 2d 365, 627 N.W.2d 455. "Statutes are presumed to be constitutional." ***Id.*** The party challenging the statute must show that it is unconstitutional beyond a reasonable doubt. ***Id.***

¶6 WISCONSIN STAT. § 946.415 provides:

> **Failure to comply with officer's attempt to take person into custody.** **(1)** In this section, "officer" has the meaning given in s. 946.41 (2) (b).
>
> **(2)** Whoever intentionally does all of the following is guilty of a Class E felony:
>
> (a) Refuses to comply with an officer's lawful attempt to take him or her into custody.
>
> (b) Retreats or remains in a building or place and, through action or threat, attempts to prevent the officer from taking him or her into custody.
>
> (c) While acting under pars. (a) and (b), remains or becomes armed with a dangerous weapon or threatens to use a dangerous weapon regardless of whether he or she has a dangerous weapon.

In order to determine whether the statute is unconstitutional, we must first decide which standard to apply: the strict scrutiny or the rational basis test. The strict scrutiny test applies if the statute infringes upon a fundamental right or makes distinctions based upon a suspect classification. ***Williams v. Pryor***, 240 F.3d 944, 947 (11th Cir. 2001). If the strict scrutiny test does not apply, we evaluate the statute under the rational basis test. ***Id.*** at 948.

¶7 Here, the strict scrutiny test does not apply. There is no suggestion that the statute makes distinctions based upon a suspect classification. Moreover,

although the trial court did find that the statute infringed upon the right to remain secure in the home as guaranteed by the Fourth Amendment, we cannot agree. The first element of the statute requires that the defendant intentionally refuse to comply with an officer's *lawful* attempt to take the defendant into custody. The *lawful* requirement necessarily dictates that there is no Fourth Amendment violation. The officer must be acting constitutionally in attempting to take the person into custody.

¶8 Further, in reaching its determination that the statute infringed upon the right to remain secure in the home, the trial court ignored the language of the statute. The statute does not infringe on a person's right to remain secure in his or her home or to assert rights under the Fourth Amendment. Rather, the statute applies only if three elements are satisfied: (1) the defendant intentionally refuses to comply with an officer's lawful attempt to take the defendant into custody; (2) the defendant intentionally retreats or remains in a building or place and, through action or threat, attempts to prevent the officer from taking the defendant into custody; and (3) the defendant intentionally arms himself or herself with a dangerous weapon. WIS. STAT. § 946.415; WIS JI—CRIMINAL 1768. Thus, by simply remaining in one's home, a person would not be guilty of any of the three elements. If the police could not lawfully order the person out of the house, the person would not be violating the statute by remaining in the house. Accordingly, we conclude that the statute does not infringe on the rights protected by the Fourth Amendment. Therefore, we evaluate the statute under the rational basis test.

¶9 Under the rational basis test, we will uphold the statute as constitutional as long as it bears a rational relation to some legitimate end. ***Williams***, 240 F.3d at 948. In ***State v. Koeppen***, 2000 WI App 121, 237 Wis. 2d

418, 614 N.W.2d 530, we explored the legislative history underlying WIS. STAT. § 946.415, which identified the reason for its enactment. We noted:

> WISCONSIN STAT. § 946.415 was drafted in response to a deputy district attorney's letter to a legislator. *See* Letter from Thomas J. Gritton, Deputy District Attorney for Winnebago County, to Rep. Carol Owens, Wisconsin State Assembly 1 (Feb. 10, 1995) (Legislative Reference Bureau drafting file for 1995 Wis. Act 93, 1995 A.B. 276 (LRB-3065/2)). In the letter, the deputy district attorney informed the legislator that legislation needed to be created to deter a reoccurring problem where suspected criminals would barricade themselves in their residences while armed and then refuse to exit and allow police to take them into custody. He noted that these situations were very costly because they often necessitated an emergency response team to negotiate with the suspect, they jeopardized officers' safety and they often compelled officers to use deadly force. *See* ***id.*** Because of these reasons, he requested legislation with stiffer penalties than the existing related crime of disorderly conduct and that would create a greater deterrence to such conduct. The legislative analysis accompanying the resulting assembly bill, 1995 A.B. 276, indicates that § 946.415 increased the potential prison time for this conduct from nine months to two years.
>
> Considering the above legislative history and other relevant criteria, we hold that WIS. STAT. § 946.415 delineates one crime that can be committed in several ways. The history indicates that the statute is directed at a single result—criminalizing suspects' armed, physical refusals to comply with police officers' efforts to take them into custody.

***Id.*** at ¶¶20-21. The foregoing explains that the purpose of § 946.415 is to punish people who prevent the police from lawfully taking them into custody and to deter people from preventing the custody. Punishing people for interfering with the police who are attempting to exercise lawful authority and deterring people from engaging in that interference provide a sufficient "rational basis" for the enactment

of the statute. Because a rational basis exists, we cannot conclude that the statute is unconstitutional.

¶10 Luck also argues that the statute is unconstitutional because it is overbroad and vague. We reject these contentions. First, an overbreadth challenge can only be maintained in the context of the First Amendment. ***State v. Konrath***, 218 Wis. 2d 290, 305-06, 577 N.W.2d 601 (1998). Here, the statute does not implicate constitutionally protected speech. Although Luck suggests that a person may be "expressing" himself when he refuses to allow a police officer to arrest him by arming himself and retreating into his home, his suggestion lacks any validity. Even if such conduct could be labeled as an "expression," it certainly is not constitutionally protected speech. *See* ***State v. Johnson***, 108 Wis. 2d 703, 709, 324 N.W.2d 447 (Ct. App. 1982) ("Not all speech is constitutionally protected.").

¶11 Second, we are not persuaded by Luck's claim that the statute is vague because an ordinary person may not understand the concept of "lawful arrest." He argues that the term would require the occupant of a home to know the probable cause and exigent circumstances that the police are relying on when they make a warrantless arrest. In order to succeed on his vagueness challenge, Luck must show that the statute is "impermissibly vague in all of its applications." ***Id.*** at 709-10. Here is where Luck's challenge fails.

¶12 The State points out several situations in which "lawful arrest" would not be vague. If a police officer comes to a home with an arrest warrant, it would be clear to the occupant that the arrest is lawful. Likewise, if a suspect committed a crime in the presence of an officer, then retreated into his or her home, and observed a fellow occupant consent to the officer's entry into the home,

the "lawfulness" of the arrest could not be questioned. Because examples can be proffered where the challenged term is not vague, Luck's facial challenge to WIS. STAT. § 946.415 as vague must fail.

¶13 We conclude that the trial court erred when it found WIS. STAT. § 946.415 to be unconstitutional. Luck has failed to satisfy this court that the challenged statute is unconstitutional beyond a reasonable doubt. Accordingly, the trial court's order is reversed. We hold that the statute is constitutional, and we remand the matter for further proceedings.

*By the Court.*—Order reversed and cause remanded.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.