COURT OF APPEALS
DECISION
DATED AND FILED

October 19, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2011AP124-CR **Cir. Ct. No. 2009CM239**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CHRISTOPHER A. ANDERSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Walworth County: ROBERT J. KENNEDY, Judge. *Affirmed*.

¶1 BROWN, C.J.[1] In this case, Christopher A. Anderson was arrested for disorderly conduct while at a hospital. He contends that because police had no probable cause to take him from his home and bring him to the hospital, his

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (2009-10).

seizure was illegal and, therefore, evidence of his loud, combative and boorish behavior afterward must be suppressed since it was tainted by the illegal seizure. His argument is plainly contrary to the law in this state, which holds that a combative or loutish response to a seizure, even if the seizure is unlawful, is a separate crime in and of itself. *See* ***State v. Annina***, 2006 WI App 202, ¶19, 296 Wis. 2d 599, 723 N.W.2d 708. We affirm.

¶2 The facts need not detain us long. According to Anderson,[2] police answered a complaint that an "unwanted person" was at an apartment in Elkorn. They found Anderson, in the apartment, alone and drinking. He told police that he lived there, but the landlord disputed that and said Anderson was not on the lease. The police told Anderson that he could not stay at the apartment and asked if anyone could take custody of him. Anderson suggested two acquaintances, but when contacted, the acquaintances refused to take him. So, the police took Anderson to the local hospital in "protective custody" and moved to cuff him. Anderson resisted the cuffing, but relented when one officer drew his taser and threatened to use it. Anderson was transported to the hospital without further incident. But, once at the hospital, he became loud and profane, kicked an officer in the knee and loudly refused admonitions to quit his conduct. He was then arrested for disorderly conduct.

¶3 On review, Anderson does not contest the events which unfolded at the hospital. Rather, he contends that the unlawful behavior by police in removing him from the apartment and placing him in protective custody justifiably provoked

[2] Because the trial court denied Anderson's motion to suppress without a hearing, the facts leading to Anderson's allegedly illegal detention are not laid out in the record. We use Anderson's rendition of those facts because even if his version is true, he is not entitled to relief.

him to act the way he did at the hospital. He also claims that suppression is required when the evidence is the product of illegal activity. As he pointedly asserts in the conclusion of his brief-in-chief, "[w]hen a man is peacefully drinking in his own residence and [is] unconstitutionally seized from it without probable cause, that is a provocation for which prosecution is barred."

¶4 Putting aside our uncertainty as to whether this was even his "own" residence, his argument fails because the law in Wisconsin is the exact opposite of what he contends.

¶5 Anderson spends much time telling us what ***Annina*** stands for. We know what the case stands for. We wrote it. In that case, we clearly and plainly (or at least we thought it was clear and plain until this appeal) explained that even if the police had no lawful authority to confront the defendant, the defendant's reflexive conduct in response, if it violates the law, is grounds for arrest. *See* ***Annina***, 296 Wis. 2d 599, ¶19. In that case, a police officer received a complaint regarding parked cars in front of the Annina residence. ***Id.***, ¶2. The officer went to the front door and attempted to speak with Annina about the complaint. ***Id.*** Annina was "defensive." ***Id.***, ¶¶2. No wonder. She appeared to be hosting a drinking party for juveniles. *See* ***id.***, ¶¶2-3. Police then obtained a search warrant and returned to her door. ***Id.***, ¶4. She opened it to talk to the officers, but after police stated that they had a search warrant and demanded entrance to the premises, she tried hard to shut the door on them. ***Id.*** Police were then able to force the door open enough to enter and place a handcuff on her left wrist. ***Id.*** But undeterred, Annina continued to carry the fight. ***Id.***, ¶5. When told she was being taken to the police station, she screamed at officers and went to her knees. ***Id.***, ¶6. When police tried to pick her up, she began kicking at them. ***Id.*** The officers eventually had to carry her from the residence. ***Id.***

¶6 Annina's argument was similar to Anderson's here in that she claimed the search warrant to be invalid and, by use of the "fruit of the poisonous tree" logic, she claimed that she could not be guilty of resisting an officer. ***Id.***, ¶15. We rejected the argument. We held that, even though the officers were acting without lawful authority when they forced their way into the residence, thus incurring Annina's wrath, her disorderly conduct and resistance to the arrest was a "new and distinct crime." ***Id.***, ¶18. We held that, although the police may have had no lawful authority to enter, they did have the lawful authority to arrest for this new conduct. ***Id.***

¶7 Subsequently, our supreme court engaged the same question in ***State v. Ferguson***, 2009 WI 50, 317 Wis. 2d 586, 767 N.W.2d 187. ***Ferguson***, like this case, concerned a dispute between people in different apartment units. ***Id.***, ¶2. There, police responded to a report of an attempted break-in. ***Id.*** But when they got to the residence, an apartment building, they found out that Ferguson had pounded on the door of another tenant threatening to evict him. ***Id.*** The tenant told police that Ferguson was not the landlord and had no authority to evict him. ***Id.*** The police then went to Ferguson's apartment and asked if she had been downstairs earlier. ***Id.***, ¶3. She responded by becoming belligerent, yelling and swearing at the officers. ***Id.*** When her nephew attempted to calm her down, she shoved her nephew, directed him to pick up his things and move out. ***Id.*** Police were outside the apartment at this time. ***Id.***, ¶4. After the shove, they entered the apartment and arrested her for disorderly conduct. ***Id.*** When they attempted to handcuff her, she resisted and continued yelling and screaming. ***Id.*** She pulled the same antics that Annina did, going limp and becoming a dead weight so that officers would have to carry her. ***Id.***, ¶5.

¶8 The issue was whether police had lawful authority to arrest for the resisting that took place outside the home. ***Id.***, ¶35, 39-40. As did our court in ***Annina***, the supreme court held that earlier unlawful entry in the home did not mean that police lacked lawful authority to arrest her for disorderly conduct. *See* ***Ferguson***, 317 Wis. 2d 586, ¶39. The court explained:

> [A defendant] cannot claim immunity from prosecution simply because his appearance in court was precipitated by an unlawful arrest. An illegal arrest, without more, has never been viewed as a bar to a subsequent prosecution, nor as a defense to a valid conviction.

Id., ¶22 (quoting ***U.S. v. Crews***, 445 U.S. 463, 474 (1980)).

¶9 Incredibly, Anderson contends that these two cases support him. He claims that both these cases stand for the proposition that there must have been probable cause to justify the initial seizure before an arrest based on a defendant's subsequent disorderly or resistive conduct may be considered valid. But that is exactly what the two cases rejected. We do not know how to more plainly say it without risk of becoming repetitive.

¶10 Anderson alternatively complains that citizens have a right to resist an illegal arrest because the illegality acts to "provoke" the citizen's behavior. He asserts that this is the law in Wisconsin and cites ***State v. Brown***, 107 Wis. 2d 44, 55, 318 N.W. 2d 370 (1982), to validate his contention. That case was about a sixteen-year-old driver who claimed that he was going the fifty-five mile per hour speed limit when a car came up behind him at a high rate of speed, swerving in a "rather violent manner" and tailgated the boy. ***Id.*** at 46. The vehicle then passed the boy and immediately slowed down in front of him to "15 to 25 miles per hour." ***Id.*** This caused the boy to try to pass the other car, but the other car would not let him pass. ***Id.*** So, the boy had to speed up in order to complete the pass.

Id. at 46-47. The other car was a state patrol officer who then stopped the boy for speeding. ***Id.*** At trial, the boy's attorney sought jury instructions on the affirmative defenses of self-defense, coercion or necessity and entrapment. ***Id.*** at 48. The trial court refused to give the requested instructions and the boy was found guilty. ***Id.*** at 48-49. On review by the supreme court, the court reasoned that "where a violation of [speeding] occurs, the actor may claim the defense of legal justification if the conduct of a law enforcement officer causes the actor reasonably to believe that violating the law *is the only means of preventing bodily harm to the actor or another and causes the actor to violate the law*." ***Id.*** at 55-56 (emphasis added). In other words, it is when the actions of the law enforcement officer cause the citizen to believe that his or her safety is endangered, then an affirmative defense is available in what otherwise would be a strict liability speeding case.

¶11 Anderson points to language in ***Brown*** to claim that it stands for much more than it actually does. At one point in the opinion, the court wrote: "we do not believe that the legislature intended to condone official misconduct by allowing the state to prosecute successfully speeding offenses that are caused by the state's agents." ***Id.*** at 55. At another point, the court wrote: "[w]here the violation of the speeding law is caused by the state itself through the actions of a law enforcement officer, we conclude that the public interest in allowing the violator to claim a defense outweighs the public interest in case of prosecution." ***Id.***

¶12 But what Anderson is doing is quoting out of context. The court did not hold that any illegal act, arrest or search by police thereafter immunizes a defendant from arrest for new crimes. It did not hold that defendants have carte blanche freedom to react to police conduct in any way whatsoever. No. What the

court held was that where the officer's conduct *causes* a citizen to do something to prevent harm to physical safety, that conduct is an affirmative defense. ***Id.*** at 56. Here, Anderson did not act out of concern for his safety. He acted in outrage because he was removed from "his" residence and brought to the hospital against his will. This is nowhere near being a ***Brown*** case.

¶13 Finally, Anderson cites a concurring opinion by Chief Justice Shirley Abrahamson in ***State v. Hobson***, 218 Wis. 2d 350, 577 N.W. 2d 825 (1998), where she posited that there is a common law right to resist an unlawful arrest. ***Id.*** at 386 (Abrahamson, C.J., *concurring*). Chief Justice Abrahamson discussed how an illegal arrest "provoke[s]" resistance. ***Id.*** First of all, we need hardly mention that concurring opinions are not the law that this court is required to follow. But more to the point, Chief Justice Abrahamson's concurrence is an observation as to how it is in the real world; it is not a compendium of the existing law in this state.

By the Court.—Judgment and order affirmed.

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