

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

SEPTEMBER 6, 1995

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.

NOTICE

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

No. 95-0752-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

**BRUCE VERDONE, a/k/a
BRUCE R. VERDONE,**

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Taylor County:
DOUGLAS T. FOX, Judge. *Affirmed.*

LaROCQUE, J. Bruce Verdone appeals a judgment of conviction for obstructing an officer in violation of § 946.41(1), STATS.¹ This court rejects his challenges and affirms the judgment.

¹ Section 946.41, STATS., provides:

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.

(2) In this section:

Verdone first maintains that the evidence was insufficient to support the conviction. Specifically, he argues that there was insufficient evidence that his refusal to give the arresting officer his driver's license, and then to refuse to give his date of birth, "obstructed" the officer. He suggests the State had the obligation to prove through testimony that his date of birth was not available through other sources.

This is the standard of review of a challenge to the sufficiency of the evidence:

The burden of proof is upon the state to prove every essential element of the crime charged beyond a reasonable doubt. The test is not whether this court ... is convinced of the guilt of the defendant beyond a reasonable doubt but whether this court can conclude that a trier of facts could, acting reasonably, be convinced to the required degree of certitude by the evidence which it had a right to believe and accept as true. On review we view the evidence in the light most favorable to sustaining the conviction. Reasonable inferences drawn from the evidence can be used to support a conviction; if more than one reasonable inference can be drawn from the evidence, the inference which supports the conviction is the one that the reviewing court must adopt.

State v. Hamilton, 120 Wis.2d 532, 540-41, 356 N.W.2d 169, 173-74 (1984).

(...continued)

- (a) "Obstructs" includes without limitation knowingly giving false information to the officer or knowingly placing physical evidence with intent to mislead the officer in the performance of his or her duty including the service of any summons or civil process.
- (b) "Officer" means a peace officer or other public officer or public employe having the authority by virtue of the officer's or employe's office or employment to take another into custody.

Verdone was convicted of obstructing a police officer. A person obstructs an officer in the course of his official duties if he prevents or makes more difficult the performance of the officer's duties. WIS J I—CIVIL 1766. It has been said that an officer is "obstructed" in the fulfillment of his duties when he is "hindered, delayed, impeded, frustrated or prevented" *Hamilton*, 120 Wis.2d at 544, 356 N.W.2d at 175.

Hamilton examined the defendant's refusal to identify himself to a police officer where the defendant was not suspected of having committed a crime, only of possibly having witnessed a crime. Here, the officer made a valid arrest for a speeding violation recorded by radar, and for operation of a vehicle without displaying state registration plates. In order for the officer to properly identify the defendant who was driving the vehicle, it was necessary to know more than his name. The officer made a prima facie showing of a statutory violation. First, he testified that Verdone would neither produce a valid driver's license nor provide his date of birth.

Verdone maintains that the *Hamilton* rationale is applicable here. In reversing the conviction in that case, the supreme court observed:

The only reasonable inference to be drawn from the record is not that the defendant's refusal to furnish identifying information obstructed the officer's investigation, but rather that the officer believed that refusal to furnish identifying information in and of itself constituted conduct that obstructed the officer and justified arrest of the person.

Id. at 542-43, 356 N.W.2d at 174.

The state's position similarly appears to be that a person's failure to furnish identifying information when requested by an officer in the lawful performance of an act constitutes a *per se* violation of sec. 946.41(1). The state appears to assert that obstruction of an officer can be presumed from the defendant's refusal to provide the identifying information upon the officer's request. In addition, the state's position

appears to be that to prove a violation of sec. 946.41(1), the state need not show that the defendant's conduct in any way affected the officer's ability to act.

Id. at 543, 356 N.W.2d at 174-75.

The State's position in this case is that it proved that Verdone's conduct affected the officer's ability to act. It relies upon the officer's testimony that he asked for either a driver's license or a date of birth numerous times over a five-minute period. Verdone refused to respond, giving various reasons: The officer did not have a warrant, Verdone was not driving, and he "wasn't hauling anything." The officer explained to the jury that he was unable to receive a valid teletype response from the motor vehicle department to verify Verdone's driving status and identity without a date of birth; that if a teletype inquiry is made containing only a name "it will come back no record found," even where the full name is provided. The teletype is necessary, according to the officer, to verify the physical description of the individual, as well as a correct address.

This court concludes that the jury was entitled to infer from the preceding evidence that Verdone's conduct "obstructed" the officer in the course of pursuing a valid stop for traffic violations. If the officer could not verify the identity of the driver, he could not properly issue the citation and file the appropriate charges without unreasonable delay entailed in other methods of identification. It may be noted that Verdone did not assert a refusal to identify himself on the constitutional grounds that it might tend to incriminate him.

Verdone also challenges the constitutionality of the obstructing statute on various grounds. The State maintains that the issue is waived because it was not raised at trial. This court concludes that the challenge must fail because there is no indication Verdone complied with the notice provisions of § 806.04(11), STATS. If a statute is alleged to be unconstitutional, the attorney general shall be served with a copy of the proceeding and is entitled to be heard. This service of notice is not only mandatory, but goes to the jurisdiction of the court to hear the action in the first instance. *Bollhoffer v. Wolke*, 66 Wis.2d 141, 144, 223 N.W.2d 902, 903 (1974). The judgment of conviction is therefore affirmed.

By the Court. – Judgment affirmed.

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