COURT OF APPEALS
DECISION
DATED AND RELEASED

April 25, 1996

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

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No. 95-1492

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

CITY OF WATERTOWN,

Plaintiff-Respondent,

v.

JEFFREY BUSSHARDT,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Jefferson County: ARNOLD SCHUMANN, Judge. *Affirmed*.

Before Eich, C.J., Dykman and Vergeront, JJ.

EICH, C.J. Jeffrey Busshardt appeals from a judgment imposing a $145 forfeiture for resisting an officer in violation of a City of Watertown municipal ordinance. He argues: (1) that the circuit court had no jurisdiction to try his case because he never had a trial in municipal court; and (2) that the evidence was insufficient to support the circuit court's finding that he violated the ordinance. We reject both arguments and affirm the judgment.

The basic facts are not in dispute. Busshardt was arrested after repeatedly refusing to respond to an officer's request to stop and identify himself after being observed in an alley opposite the door to a church school late at night. He was issued two citations: one for obstructing an officer and one for resisting an officer. The municipal judge dismissed the obstructing charge, concluding that failure to respond to an officer's questions does not constitute obstruction as a matter of law. After receiving briefs on the resisting charge, the municipal judge dismissed that citation as well.

The City of Watertown appealed the dismissal of the resisting charge to circuit court where, over Busshardt's objections, he was tried on the charge. He was found to have violated the ordinance and ordered to pay a $145 forfeiture. Other facts will be discussed in the body of the opinion.

Busshardt first challenges the circuit court's authority to try him on the city's appeal from the dismissal of the resisting charge in municipal court. Section 800.14, STATS., governs appeals from municipal court decisions. Section 800.14(1) provides that "[a]ppeals from judgments of municipal courts may be taken by either party to the circuit court ...." Section 800.14(4) states:

> Upon the request of either party ... after notice of appeal under sub. (1), or on its own motion, the circuit court shall order that a new trial be held in circuit court. The new trial shall be conducted by the court without a jury unless the appellant requests a jury trial ....

Section 800.14(5), STATS., provides that "[i]f there is no request or motion under sub. (4), an appeal shall be based upon a review of a transcript of the proceedings [in municipal court]...."

There is no question that the city appealed the municipal court's dismissal of the resisting charge and asked for a de novo hearing under § 800.14(4), STATS. Busshardt argues, however, that because there had been no "trial" in municipal court--the resisting citation was dismissed as a matter of law--there can be no "new trial" in circuit court under the statute. He asks us to either reverse and dismiss the charge or reverse and direct that the case be remanded to the municipal court for another trial. In so arguing, he places

principal reliance on ***Village of Williams Bay v. Metzl***, 124 Wis.2d 356, 369 N.W.2d 186 (Ct. App. 1985), although he does not explain the application of the case other than to suggest that it stands for the proposition that in cases such as this the circuit court's review of the municipal court decision is limited to a review of the record--that "the circuit court should have been bound by the findings of fact made by the municipal judge and should have upheld them, unless they constituted an abuse of discretion and were `clearly erroneous.'" We think the case is inapposite.

The issue in ***Williams Bay*** was the appropriate standard of review to be applied in appeals taken under § 800.14(5), STATS., and we held that the proper standard "is similar to that which applies to appellate review of a trial to the court under sec. 805.17(2), Stats." ***Id***. at 357, 369 N.W.2d at 187. As may be seen, ***Williams Bay*** had nothing to do with the statute under which the appeal was taken in this case--the "new trial" provisions of § 800.14*(4)*.

Absent ***Williams Bay***, Busshardt's argument is limited to the proposition that because § 800.14(4), STATS., uses the term "new trial," it cannot apply to a situation, like that presented here, where the case was determined in municipal court on pretrial motions and no "trial" was ever held. Even if we were to accept that argument--which we do not--we fail to see how Busshardt can claim to have been prejudiced by the manner in which the circuit court proceeded. If, as he requests, the case were to be sent back to municipal court for trial, and he were to prevail, the city would again have the right to secure a "new trial" in circuit court under § 800.14(4). He has already had that trial, and even if we were to accept Busshardt's position, it would make little sense to open the door to a second--and possibly a *third*--trial of these limited factual issues. It would advance neither Busshardt's interests nor the public's interest in the efficient administration of justice for us to pave the way to such a succession of trials.

Turning to the resisting charge, the Watertown ordinance, tracking § 946.41, STATS., states that no person may "knowingly resist[] ... an officer while such officer is doing any act in an official capacity and with lawful authority ...."

There is no question that an officer may stop and detain an individual for a reasonable period of time for purposes of investigating possible

criminal behavior under facts and circumstances that would fall short of probable cause to support an arrest. ***Terry v. Ohio***, 392 U.S. 1, 21-22 (1968). Under ***Terry***, such detention is constitutionally permissible if the officer may be said to have an "articulable suspicion that the person has committed or is about to commit a crime." ***State v. Goyer***, 157 Wis.2d 532, 536, 460 N.W.2d 424, 425-26 (Ct. App. 1990).[1] If such a suspicion may be said to exist, the person may be temporarily stopped and detained to allow the officer to "investigate the circumstances that provoke suspicion," as long as "`[t]he stop and inquiry [are] "reasonably related in scope to the justification for their initiation'"--which in this case was to verify or dispel the suspicion that Busshardt's presence in the alley under the circumstances may have been for a criminal purpose. ***Berkemer v. McCarty***, 468 U.S. 420, 439 (1984) (citing ***United States v. Brignoni-Ponce***, 422 U.S. 873, 881-82 (1975)) (internal quoted source omitted).

> The focus of a ***Terry*** stop is reasonableness.

It is a common sense question, which strikes a balance between the

> interests of society in solving crime and the members of that society to be free from unreasonable intrusions. The essential question is whether the action of the law enforcement officer was reasonable under all the facts and circumstances present.[2]

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[1] The ***Terry*** rule has been codified in Wisconsin in § 968.24, STATS., which provides:

After having identified himself or herself ... a law enforcement officer may

> stop a person in a public place for a reasonable period of time when the officer reasonably suspects that such person is committing, is about to commit or has committed a crime, and may demand the name and address of the person and an explanation of the person's conduct.

We resort to ***Terry*** and the cases following it in interpreting the scope of § 968.24, STATS. ***State v. Williamson***, 113 Wis.2d 389, 399-400, 335 N.W.2d 814, 819, *cert. denied*, 464 U.S. 1018 (1983).

[2] The Supreme Court elaborated on the ***Terry*** rationale in ***Adams v. Williams***, 407 U.S. 143, 145-6 (1972), stating:

The Fourth Amendment does not require a policeman who lacks the

State v. Jackson, 147 Wis.2d 824, 831, 434 N.W.2d 386, 389 (1989) (citation omitted). The ***Jackson*** court also noted that the same conduct may carry inferences of innocent, as well as illegal, activity.

> Doubtless, many innocent explanations for Jackson's conduct could be hypothesized, but suspicious activity by its very nature is ambiguous. Indeed, the principal function of the investigative stop is to quickly resolve the ambiguity and establish whether the suspect's activity is legal or illegal. In this regard, LaFave points out that the suspects in *Terry* `might have been casing the store for a robbery, or they might have been window-shopping or impatiently waiting for a friend in the store.' We conclude that if any reasonable suspicion of past, present, or future criminal conduct can be drawn from the circumstances, notwithstanding the existence of other inferences that can be drawn, officers have the right to temporarily freeze the situation in order to investigate further.

Id. at 835, 434 N.W.2d at 391 (quoted source omitted).[3]

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> precise level of information necessary for probable cause to arrest to simply shrug his shoulders and allow a crime to occur or a criminal to escape. On the contrary, ***Terry*** recognizes that it may be the essence of good police work to adopt an intermediate response. A brief stop of a suspicious individual, in order to determine his identity or to maintain the status quo momentarily while obtaining more information, may be most reasonable in light of the facts known to the officer at the time.

(Citations omitted.)

[3] In ***Jackson***, the police were responding to a possible stabbing and when they arrived on the scene, they observed the defendant fleeing the scene when he saw the police vehicle. He was stopped a short time later and the supreme court held that "[his] flight upon observing the squad car afforded [the] officer ... reasonable suspicion justifying the subsequent stop." ***State v. Jackson***, 147 Wis.2d 824, 834, 434 N.W.2d 386, 390-91 (1989).

The evidence in this case establishes that Officer Ruder, who was aware of a rash of burglaries in Watertown in recent weeks--including the burglary of a church--was on patrol at 1:30 a.m. when, driving past an alley, he saw Busshardt, dressed in dark clothing, standing in a dimly lit area in a church compound comprised of a church, school and two clerical residences. According to Ruder, Busshardt was facing the school's rear door. Ruder stopped his car and approached Busshardt, who had by then moved into a parking lot in the midst of the church properties. When he was about seventy-five feet away, Ruder, in a loud voice, identified himself as a police officer and asked Busshardt to stop. According to Ruder, Busshardt did not respond, but kept walking away, "increas[ing] his speed" as he did so.

Ruder ran up to Busshardt, placed his hand on his shoulder and again identified himself as an officer and asked him what he was doing in the area. Busshardt said "fuck you" and, according to Ruder, "jerked away" and continued walking. Ruder caught up to him and when he grabbed him a second time (and again asked for a response) Busshardt again "jerked free" of Ruder's grasp and, saying "Fuck you. I don't have to tell you anything," continued to walk away. When Ruder attempted to restrain him a third time he again broke free of his grasp, this time assuming what Ruder described as a "fighting stance," balanced on the balls of his feet with his fists clenched in front of him. At this point Ruder noticed a leather knife sheath on Busshardt's belt and told him he was under arrest.

Making still another "fuck you" reply, Busshardt "went down to the ground" when Ruder attempted to handcuff him. According to Ruder, Busshardt was "struggl[ing] quite aggressively, kicking his legs, swinging his arms [and] attempting to break free of my grasp ...." Another officer arrived and assisted Ruder in subduing Busshardt and he was taken to the Watertown Police Station.

Applying the cases we have discussed above to these facts, we are satisfied first that Ruder could have drawn a reasonable suspicion of possible

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Holding that "flight from the police can, dependent on the totality of circumstances present, justify a warrantless investigative stop," ***id***. at 833, 434 N.W.2d at 390, the supreme court rejected the defendant's argument that his actions did not necessarily imply wrongful conduct because "the record allows other equally reasonable inferences of an innocent nature." ***Id***. at 835, 434 N.W.2d at 391.

criminal activity from Busshardt's presence behind the school that morning--a suspicion that would be sufficient to justify stopping Busshardt to "temporarily freeze the situation in order to investigate further." ***Jackson***, 147 Wis.2d at 835, 434 N.W.2d at 391.

We are equally satisfied that, the "stop" being reasonable under the circumstances, Busshardt's actions in attempting to elude Ruder after Ruder had identified himself and explained the purpose of the attempted detention gave Ruder probable cause to arrest him for resisting an officer acting with lawful authority.

We considered a similar question in ***Goyer***. In that case police were investigating a one-car collision in which, according to their information, the defendant had been involved. When the officers located the defendant at the scene and asked him to identify himself, he became boisterous and challenged the officer's right to question him. Continuing to direct abusive language at the officers, the defendant eventually identified himself but refused to answer their questions and, after several verbal exchanges, told them he was going to get his attorney, turned away and started for a house across the street. He refused to stop when requested by the officers and they apprehended him several feet away from the accident, grabbing his arm and detaining him. We concluded that the officers had the right to physically restrain the defendant in order to continue their investigation, noting that "[t]he right to make a *Terry* stop would mean little if the officer could not restrain a suspect who attempts to walk away from the investigation." ***Goyer***, 157 Wis.2d at 538, 460 N.W.2d at 426. We think the facts of this case lead to a similar result.[4]

Finally, we are satisfied that the evidence of Busshardt's actions, which we have discussed in detail above, is sufficient to support the circuit court's determination of guilt on the resisting charge.[5] The ordinance Busshardt

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[4] While Busshardt testified at one point that he was unaware Ruder was a police officer until he had subdued and arrested him, he does not so argue on this appeal--understandably in light of the fact that he also testified that he heard Ruder identify himself as a police officer during their encounter and "assume[d] he was a police officer." According to Busshardt, he refused to comply with Ruder's requests, broke away from his grasp and heaped obscenities on him because, in his words: "I didn't want to be hassled by him."

[5] Busshardt, who also testified at the motion hearing, stated that because of an injury to

was found guilty of violating restates § 946.41(1), STATS., which makes it a misdemeanor to "knowingly resist[] ... an officer while such officer is doing any act in an official capacity and with lawful authority ...." Definitions of the term "resist" or "resisting" in this usage are scarce in the legal literature. The pattern jury instruction, WIS J I—CRIMINAL 1765, states: "To resist, an officer means to oppose the officer by force or threat of force." The instruction is intended to express the concept stated in what the Criminal Jury Instructions Committee states is the only Wisconsin case discussing the term, ***State v. Welch***, 37 Wis. 196, 201 (1875), where the court said that "[t]o resist, is to oppose by direct, active and *quasi* forcible means."[6]

We think Busshardt's conduct meets that test. As we have held, under ***Terry v. Ohio*** and similar cases Ruder was lawfully entitled to stop Busshardt for investigatory purposes. He was thus plainly acting under lawful authority in attempting to do so--attempts which, under the undisputed evidence, Busshardt repeatedly resisted, not only verbally but physically breaking free from Ruder's grasp and attempting to leave the scene.

Busshardt disagrees. He suggests in his reply brief that ***Terry*** and the other "stop" cases are irrelevant because Ruder did not just stop him for investigative purposes, but actually took him into custody, handcuffing and arresting him, and he argues that Ruder lacked legal authority to do so. He bases the argument on the fact that the municipal court had dismissed the obstructing charge, ruling that Ruder had no basis to arrest him or take him into custody for obstructing an officer because, under ***State v. Hamilton***, 120 Wis.2d 532, 543, 356 N.W.2d 169, 175 (1984), a refusal to answer an officer's questions--even after a valid ***Terry*** stop--is, by itself, insufficient to support a charge of obstructing an officer. Thus, says Busshardt, Ruder was not acting with "lawful

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his leg suffered a few weeks earlier, he was incapable of running, or even "walk[ing] fast." He also disputed Ruder's account of the night's events on several other points. In considering the sufficiency of the evidence to support a trial court's findings in a case such as this, however, "`we examine the record, not for facts to support a finding the trial court did not make or could have made, but for facts to support the finding the trial court did make.'" ***Estate of Becker***, 76 Wis.2d 336, 347, 251 N.W.2d 431, 435 (1977) (quoted source omitted); *see* ***In re T.R.B.***, 160 Wis.2d 840, 842, 467 N.W.2d 553, 554 (Ct. App. 1991).

[6] In a much more recent case, ***State v. Christopher***, 44 Wis.2d 120, 124, 170 N.W.2d 803, 805 (1969), the court said that § 946.41, STATS., "means what it says. It renders unlawful any knowing resistance ... of a law officer ...."

authority" within the meaning of the ordinance when he arrested him and he cannot and should not be penalized for resisting an unlawful arrest.

The issue is not whether Ruder had grounds to arrest Busshardt for obstruction; that issue was decided in municipal court and the city never appealed the decision. The question before us, as framed by Busshardt, is whether, under the evidence taken in circuit court, Busshardt may be said to have resisted Ruder in the exercise of his (Ruder's) lawful authority.[7] The facts established at trial were that Busshardt physically (and repeatedly) thwarted Ruder's lawful attempts to detain him briefly for questioning; and the trial court could properly determine on that evidence that the elements of the resisting charge had been established.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.

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[7] Busshardt is correct in stating that Ruder testified that he placed him under arrest for "obstructing." There is no question, however, that Busshardt was charged with both obstructing *and* resisting, and that his circuit court trial was on the resisting charge. Nor is there any question that, on the evidence we have discussed at some length above, the trial court found him guilty on the resisting charge--that he not only resisted Ruder in the lawful discharge of his duties in attempting to effectuate a ***Terry*** stop, but also attempted to flee or evade him. The court's decision is quite plain in that regard.

In ***Scott v. United States***, 436 U.S. 128 (1978), the Supreme Court said that

> the fact that the officer does not have the state of mind which is hypothecated by the reasons which provide the legal justification for the officer's action does not invalidate the action taken as long as the circumstances, viewed objectively, justify that action.

Id. at 138 (quoted in ***State v. Woods***, 117 Wis.2d 701, 712, 345 N.W.2d 457, 463-64 (1984)).