



POLICE / PROSECUTOR UPDATE

Issue No. 108

November 2000

A recent Court of Appeals opinion dealt with the offense of resisting law enforcement, specifically the right to resist an unlawful arrest.

The facts of the case reveal that early one morning a police officer observed a motorcyclist make what the officer believed to be an unsafe start. The officer followed the motorcyclist to the property of a motorcycle club. After the officer entered the front yard of the property to question the motorcyclist, the defendant came out of the clubhouse and began yelling and swearing at the officer, demanding to know what he was doing on the property, why he was hassling the motorcyclist, and whether he had a warrant to be on the property. The officer ordered the defendant to be quiet and go back into the clubhouse. When the defendant did neither, the officer decided to arrest the defendant on the belief his yelling constituted resisting because it interfered with the officer's investigation of the unsafe start. He ordered the defendant to put his hands on the wall of the clubhouse. He refused and asked what he had done wrong and why he had to put his hands on the wall. The officer said that if the defendant did not keep his hands on the wall, he would be sprayed with pepper spray. He then sprayed the defendant in the eye, which made him more angry and vocal. The officer warned that if the defendant didn't cooperate, he would hit him with his large metal flashlight. When the defendant still wouldn't cooperate, the officer hit him twice, once on the leg and once on the head, knocking him to the ground.

The Court first analyzed whether the defendant's arrest for resisting law enforcement was lawful. The relevant portion of the statute provides that a person commits the offense who "forcibly resists, obstructs, or interferes with a law enforcement officer . . . while the officer is lawfully engaged in the execution of his duties . . ." The word "forcibly" modifies "resists," "obstructs," and "interferes." It does not modify only "resists." Thus, the *forcible nature* of the resistance, obstruction, or interference is an essential element of the offense which the State must prove. "A person 'forcibly resists' law enforcement when he or she uses strong,

powerful, violent means to evade a law enforcement official's rightful exercise of his or her duties; such means include the making of threatening gestures toward the official." In this case the defendant's conduct did not constitute resisting law enforcement. Although his tirade was loud and profane, he did not verbally threaten the officer in any way. The officer testified that although he felt the defendant was badgering him, he did not threaten the officer with force or violence and "wasn't physical whatsoever."

This did not end the Court's analysis. It has long been the general rule in Indiana that a private citizen may not use force in resisting a *peaceful* arrest by an individual who he knows, or has reason to know, is a police officer performing his duties regardless of whether the arrest in question is lawful or unlawful. However, this court-created rule that a citizen may not resist a peaceful, though illegal, arrest is not a blanket prohibition that criminalizes any conduct demonstrating resistance where the *means used* to effect the arrest are unlawful. That is, the officer may not use *unconstitutionally excessive* force in effecting the arrest, in the absence of evidence that the force used to resist the officer's excessive force was not itself disproportionate to the situation. Here the officer used excessive force. The defendant never threatened the officer with force or violence. There was no evidence that anyone touched the officer before he used pepper spray and the flashlight to subdue the defendant. The officer neither informed the defendant that he was under arrest nor attempted to handcuff him before using force. Finally, the purported crime for which the defendant was being arrested was a misdemeanor.

Shoultz v. State, 735 N.E.2d 818 (Ind. Ct. App. 2000).

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