1766 OBSTRUCTING AN OFFICER — § 946.41(1)

Statutory Definition of the Crime

Obstructing an officer, as defined in § 946.41 of the Criminal Code of Wisconsin, is committed by one who knowingly obstructs an officer while the officer is doing any act in an official capacity and with lawful authority.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present.

Elements of the Crime That the State Must Prove

1. The defendant obstructed an officer.

   A (title – e.g., sheriff) is an officer.[1]

   To obstruct an officer means that the conduct of the defendant prevents or makes more difficult the performance of the officer's duties.[2]

   (The refusal to answer an officer's questions, by itself, is not obstructing an officer.)[3]

2. The officer was doing an act in an official capacity.[4]

   _____[5] act in an official capacity when they perform duties that they are employed to perform.[6] [The duties of a _____ include: _____.][7]

3. The officer was acting with lawful authority.

   _____[8] act with lawful authority if their acts are conducted in accordance with the law. In this case, it is alleged that the officer was _____.[9]

4. The defendant knew that (officer) was an officer acting in an official capacity and with lawful authority and that the defendant knew (his) (her) conduct would obstruct the officer.[10]

Deciding About Knowledge

You cannot look into a person's mind to find knowledge. Knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all four elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 1766 was originally published in 1990 and revised in 1992, 1999, 2003, 2005, and 2008, and 2010. The 2010 revision added to the Comment and to footnote 9. This revision was approved by the Committee in July 2024; it amended formatting errors in the instruction.

The 1990 revision split former Wis JI Criminal 1765 into three instructions. Wis JI Criminal 1765 is limited to offenses involving "resisting" an officer, which is interpreted to require physical interference. Wis JI Criminal 1766 is limited to offenses involving "obstructing," interpreted to involve nonphysical

interference. Wis JI Criminal 1766A is limited to offenses involving the giving of false information.

In State v. Ferguson, 2009 WI 50, 317 Wis.2d 587, 767 N.W.2d 187, the court concluded that a jury instruction for a charge of obstructing an officer should include a definition of "lawful authority" and that the definition should include a description of "exigent circumstances" when the obstructing occurs directly after a warrantless entry of a dwelling. However, the failure to so instruct in this case was not error, or, if error, was harmless, because the evidence supported conviction for obstructing after the defendant was arrested and had been removed from the dwelling.

Four justices also concluded that the decision of the court of appeals in State v. Mikkelson, 2002 WI App 152, 256 Wis.2d 132, 647 N.W.2d 421, is overruled. Mikkelson was characterized as holding that exigent circumstances could not justify a warrantless entry to arrest for a misdemeanor. Ferguson holds that a warrantless entry, based on probable cause and exigent circumstances, may be made for any jailable offense.

The general definition of "lawful authority" provided in Wis JI Criminal 1766 was used in the Ferguson case, though the standard instruction was not cited. A model description of what "lawful authority" involves where there is an "exigent circumstances" entry has been added to footnote 9.

1. The Committee believes that it is clearer to the members of the jury if they are simply instructed that, for example, a sheriff is an officer. "Officer" is defined as follows in sec. 946.41(2)(b):

> "Officer" means a peace officer or other public officer or public employee having the authority by nature of his office or employment to take another into custody.

2. This part of the definition of "obstruct" was adapted from the one found in the 1966 version of Wis JI Criminal 1765, which referred to "hinder, delay, impede, frustrate or prevent" an officer from performing his duties. No change of meaning is intended.

"Obstructing" was added to the statute in the 1955 version of the Criminal Code. Earlier definitions of this offense had prohibited only "resisting." See discussion in State v. Welch, 37 Wis. 196 (1875). The addition of "obstructing" was intended to cover the type of conduct (e.g., "impeding," "hindering," "frustrating") that Welch said was not covered by "resisting" standing alone.

The instruction's definition of "obstruct" was referred to with apparent approval [but without citing the instruction] in State v. Grobstick, 200 Wis.2d 242, 249, 546 N.W.2d 187 (Ct. App. 1996), where the court found that the defendant's jumping out a window and then returning to hide in a closet "made more difficult" the execution of a bench warrant.

3. An important question that has not been completely answered is whether failure to cooperate with police can be "obstructing" if no physical resistance is offered. For example, is it "obstructing an officer" for a person to refuse to identify himself and answer questions during a lawful "stop and question" situation? The Wisconsin Supreme Court recognized this question but found it unnecessary to answer definitively in State v. Hamilton, 120 Wis.2d 532, 356 N.W.2d 169 (1984). In Hamilton, the court assumed for the purposes of the case that the definition of "obstruct" in Wis JI Criminal 1765 (1966) was correct and found that the facts of the case did not show a hindering, delaying, impeding, etc. Hamilton involved a person suspected of knowing about or being involved in the breaking of windows with a pellet gun. When

confronted in a friend's house, Hamilton refused to identify himself or answer questions. The court held this refusal could not constitute "obstructing," primarily because the officers could easily have identified Hamilton by asking the other person who was present.

Some states have tried to address this problem by enacting statutes, making it a crime to refuse to answer questions posed by police during a lawful stop. The constitutionality of such statutes has been raised in at least three cases before the United States Supreme Court. On each occasion, the Court has avoided giving a complete answer to the constitutional questions. (See Michigan v. DeFillipo, 443 U.S. 31 (1979); Texas v. Brown, 443 U.S. 47 (1979); and Kolender v. Lawson, 461 U.S. 352 (1983).)

In the Committee's judgment, a refusal to answer questions by itself should not be considered "obstructing an officer" in violation of § 946.41. The history of Wisconsin's statute shows that the type of conduct covered has been broadened substantially over the years to extend well beyond the "direct, forcible resistance" required by previous versions of the statute. (See note 2, supra.) Further expansion to cover simple refusal to answer questions should be done, if done at all, only by direct and carefully focused legislative action. (See, for example, sec. 946.40, Refusing To Aid Officer, which identifies a situation where persons do have an affirmative duty to assist a peace officer.)

The conclusion of the Committee in the paragraph above was approved in Henes v. Morrissey, 194 Wis.2d 339, 533 N.W.2d 802 (1995). Henes was a civil case against police officers who arrested Henes when he refused to identify himself during a Terry stop. The court held that:

> Mere silence, standing alone, is insufficient to constitute obstruction under the statute. Here, all Henes did was remain silent. He did not affirmatively act to obstruct the deputies' investigation: he did not give them false information, he did not flee from the deputies, nor did he act in any violent manner towards them. Without more than mere silence, there is no obstruction.
>
> Further, the deputies have not shown how Henes' refusal to identify himself "obstructed" their investigation. . . .

194 Wis.2d 339, 355.

In State v. Espinosa, 2002 WI App 51, 250 Wis.2d 804, 641 N.W.2d 484, the court of appeals recognized an "exculpatory denial" exception to § 946.41(2)(a). This was overruled by State v. Reed, 2005 WI 53, ¶48, 280 Wis.2d 68, 695 N.W.2d 315:

> In sum, we conclude that there is no exculpatory denial exception in the obstructing statute. The statute criminalizes all false statements knowingly made and with intent to mislead the police. Although the State should have sound reasons for believing that a defendant knowingly made false statements with intent to mislead the police and were not made out of a good-faith attempt to defend against accusations of a crime, we conclude that the latter can never include the former; knowingly providing false information with intent to mislead the police is the antithesis of a good-faith attempt to defend against accusations of criminal wrongdoing. Accordingly, we overrule Espinoza.

4. Acting "in an official capacity" and acting "with lawful authority" are two separate questions. State v. Barrett, 96 Wis.2d 174, 180 81, 291 N.W.2d 498 (1980). For the purposes of sec. 940.20(2), Battery To A Law Enforcement Officer, the court in Barrett adopted the following test for "in his official capacity":

"whether the official is acting in the scope of his employment as opposed to being engaged in a personal act of his own." Barrett, supra. "Lawful authority" goes to whether the officer's actions "are conducted in accordance with the law." Barrett, 96 Wis.2d at 181. See note 9, below.

5. Use the plural form in the blank, e.g., "sheriffs," "police officers," etc.

6. The definition of "official capacity" is taken from Wis JI Criminal 915. See the Comment to that instruction for further discussion.

7. The duties, powers, or responsibilities of some peace officers are set forth in the Wisconsin Statutes. When that is the case, the Committee suggests using the sentence in brackets and describing the duties in the blank. The Committee has concluded that the jury may be informed of the law that declares what a person's official duties are without running the risk of directing a verdict on an element of the crime. It is still for the jury to determine whether the person was performing the duty in the particular case. But see State v. Jensen, 2007 WI App 256, 306 Wis.2d 572, 743 N.W.2d 468; and State v. Schultz, 2007 WI App 257, 306 Wis.2d 598, 743 N.W.2d 823.

8. Use the plural form in the blank, e.g., "sheriffs," "police officers," etc.

9. The Committee suggests specifying the lawful function being performed and, if raised by the evidence, instructing the jury on the applicable legal standard. For example, if a "stop and question" situation is involved, something like the following may be helpful:

> In this case, it is alleged that the officer was conducting a lawful stop to investigate a suspected crime. A stop is lawful when the officer has reasonable suspicion that a person is committing, has committed, or is about to commit a crime. A stop may continue for a reasonable period of time required to inquire into the person's identity and to ask for an explanation of the person's conduct. An officer conducting a stop may use only the amount of force reasonably necessary to detain the person while the inquiry into identity and conduct is made.

Or, if the evidence raises a question about the legality of an arrest, something like the following may be helpful:

> In this case, it is alleged that the officer was making a lawful arrest. An arrest is lawful when the officer has reasonable grounds to believe that the person has committed a crime. An officer making an arrest may use only the amount of force reasonably necessary to take the person into custody.

If the evidence raises a question about the "lawful authority" for an "exigent circumstances" entry, something like the following may be helpful:

> In this case, it is alleged that the officer was making a lawful entry under the "exigent circumstances" rule. That rule allows an officer to enter a dwelling without a warrant when the entry is necessary [to prevent the imminent destruction of evidence] [in hot pursuit of a criminal suspect] [to prevent injury to the suspect or another person] [to prevent the likelihood that the suspect will escape.]

The four bracketed examples of exigent circumstances are based on those set forth in the Ferguson decision,

2009 WI 50, ¶20, citing State v. Richter, 2000 WI 58, 235 Wis.2d 524, ¶29, 612 N.W.2d 29 and State v. Smith, 131 Wis.2d 220, 229, 388 N.W.2d 601 (1986).

10. That the interpretation of the knowledge element reflected in Wis JI Criminal 1765 and 1766 is correct was confirmed in State v. Lossman, 118 Wis.2d 526, 536, 348 N.W.2d 159 (1984):

> The accused must believe or know he (1) resisted the officer, while the officer was (2) acting in an official capacity and (3) with lawful authority.

Also see State v. Elbaum, 54 Wis.2d 213, 194 N.W.2d 1660 (1972), and State v. Zdiarstek, 53 Wis.2d 776, 193 N.W.2d 833 (1972).