

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 4, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

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

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.

No. 98-3078-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

TERRY PATTERSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Jackson County: ROBERT W. RADCLIFFE, Judge. *Affirmed.*

ROGGENSACK, J.¹ Terry Patterson appeals from a judgment of the circuit court convicting him of resisting an officer in violation of § 946.41(1), STATS., and from the circuit court's order denying his postconviction motion seeking to vacate the conviction on the ground that a correctional officer is not an

¹ This appeal is decided by one judge pursuant to § 752.31(2)(f), STATS.

“officer” within the meaning of § 946.41. We conclude, as the circuit court did, that a correctional officer is an “officer” within the plain meaning of § 946.41 because a correctional officer has authority to “take another into custody” by physically restricting a prisoner’s freedom of movement. Accordingly, we affirm.

BACKGROUND

In September 1996, Patterson was an inmate in the segregation unit at the Jackson Correctional Institution (JCI). As such, Patterson did not receive his meals in the communal area of the prison, rather he ate his meals in his cell. On September 21, 1996 after his meal, Patterson refused to return his food tray to the correctional officer who was acting as a prison guard. When several attempts failed to get Patterson to comply with the order to return his food tray, the guard ordered Patterson to put his hands through the trap door so the guard could handcuff Patterson and remove him from the cell. When Patterson refused, the guards performed a “cell extraction,” whereby four guards entered the cell wearing helmets, face shields and body pads to remove Patterson. However, when the guards entered the cell, Patterson charged them and flipped up the face shield of one of the guards, cutting the skin near his eye. Patterson also struggled with the guards and then stiffened his body, making it difficult for the guards to handcuff him.

The State charged Patterson with battery by an inmate while in possession of a dangerous weapon, as a repeater, in violation of § 940.20(1) and § 939.63(1), STATS., and with resisting an officer while in possession of a dangerous weapon, as a repeater, in violation of § 946.41(1), STATS., and § 939.63(1). On July 24, 1997, a jury convicted Patterson of all counts. The court sentenced him to ten years in prison for the battery conviction, consecutive to the

sentence he was serving, and three years for the resisting offense, consecutive to the sentence he was serving, but concurrent to the sentence on Count I.

Patterson filed a postconviction motion seeking to vacate the resisting an officer conviction on the ground that a correctional officer is not an “officer” within the meaning of § 946.41, STATS. After a hearing, the court denied Patterson’s motion. This appeal followed.

DISCUSSION

Standard of Review.

Patterson’s appeal requires us to construe § 946.41, STATS. We review questions of statutory interpretation *de novo*. *Truttschel v. Martin*, 208 Wis.2d 361, 364-65, 560 N.W.2d 315, 317 (Ct. App. 1997).

Section 946.41, STATS.

Section 946.41(1), STATS., addresses the crime of resisting or obstructing an officer and provides as follows:

- (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.

§ 946.41(1), STATS. The offense of resisting an officer has three elements: (1) the defendant resisted an officer; (2) the officer was doing an act in his or her official capacity and with lawful authority; and (3) the defendant knew or believed that he or she was resisting the officer while the officer was acting in his or her official capacity and with lawful authority. *See Henes v. Morrissey*, 194 Wis.2d 338, 353, 533 N.W.2d 802, 808 (1995). Patterson argues that he could not be convicted of

resisting an officer because a correctional officer is not an “officer” within the meaning of § 946.41.

The threshold question when construing a statute is whether the statutory language is ambiguous. *State v. Williquette*, 129 Wis.2d 239, 248, 385 N.W.2d 145, 149 (1986). Statutory language is deemed ambiguous if reasonable persons could disagree about its meaning. *Id.* When a statute is clear on its face, however, we will not look beyond the statutory language in applying it. *State v. Hoffman*, 163 Wis.2d 752, 760, 472 N.W.2d 558, 561 (Ct. App. 1991). Our consideration of the statutory language may properly include references to related statutes. *Racine Family Court Comm'r v. M.E.*, 165 Wis.2d 530, 537, 478 N.W.2d 21, 24 (Ct. App. 1991).

The term “officer,” as it is used in § 946.41(1), STATS., is defined as follows:

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*.

§ 946.41(2)(b) (emphasis added). Patterson argues that a correctional officer is not an officer within the meaning of § 946.41 because a corrections officer does not have authority to “take another into custody.”

The term “custody” is not defined in § 946.41, STATS.; however, it is defined elsewhere in the statutes. See § 946.42(1)(a), STATS., *State v. Cobb*, 135 Wis.2d 181, 184, 400 N.W.2d 9, 11 (Ct. App. 1986) (noting that definition of the term “custody” for the purpose of calculating sentence credit can be determined by reference to the escape statute). Wisconsin’s escape statute defines “custody” as follows:

‘Custody’ includes without limitation *actual custody* of an institution ... or of a peace officer or institution guard and *constructive custody* of prisoners ... temporarily outside the institution

Section 946.42(1)(a) (emphasis added). Within the framework of this definition, a distinction is drawn between “actual custody” and “constructive custody.” *State v. Schaller*, 70 Wis.2d 107, 110-11, 233 N.W.2d 416, 418 (1975). Actual custody refers to actual imprisonment or physical detention, while constructive custody is the mere power, legal or physical, of imprisoning. *Id.* at 111, 233 N.W.2d at 418. Each is a subset of the term “custody” and does not define the entire scope of the word. *Hoffman*, 163 Wis.2d at 760, 472 N.W.2d at 561.

Actual custody depends upon physical detention by an institution, institution guard, or peace officer. *Cobb*, 135 Wis.2d at 185, 400 N.W.2d at 11. Generally, custody requires a restriction of ability or freedom of movement, *State v. Adams*, 152 Wis.2d 68, 75, 447 N.W.2d 90, 93 (Ct. App. 1989); however, it can be established without physical control if the individual submits to the authority of the custodian. *Hoffman*, 163 Wis.2d at 761-63, 472 N.W.2d at 562-63.

Constructive custody is the power to take another into custody. *See Schaller*, 70 Wis.2d at 111, 233 N.W.2d at 418; *State v. Scott*, 191 Wis.2d 146, 153, 528 N.W.2d 46, 48 (Ct. App. 1995). For example, a sheriff has constructive custody of a prisoner temporarily outside of the prison on work release because the sheriff has the power to impose confinement rather than allow release. However, the sheriff does not have the same power over probationers because probationers are under the continuing custody of the probation system and are not under sentence, therefore the sheriff has no power to revoke their probation and enforce imprisonment. *Schaller*, 70 Wis.2d at 112-14, 233 N.W.2d at 419.

While the definition of custody is consistent with the level of restraint required to constitute an arrest, the terms are not synonymous. *Adams*, 152 Wis.2d at 75, 447 N.W.2d at 93. Instead, being in custody is an element of arrest; therefore, a person can be in custody without being under arrest, but a person cannot be under arrest without being in custody. *Hoffman*, 163 Wis.2d at 762, 472 N.W.2d at 562. Arrest is merely one manner in which a person can be placed in custody but it is not the only manner. *Scott*, 191 Wis.2d at 150, 528 N.W.2d at 48. Neither actual custody, *i.e.* physical detention, nor constructive custody, *i.e.* the power to detain, requires arrest or the power to arrest.

There is no question that Patterson was in custody of the Department of Corrections by virtue of his incarceration in JCI; however, Patterson's confinement in prison is only relevant insofar as his prisoner status confers authority upon the prison correctional officers to supervise him. *See* § 301.28(1), STATS. The supervisory duty of a correctional officer includes, among other things, the authority to physically restrain a prisoner and transport him to another cell. Because a correctional officer can physically detain a prisoner by restricting his freedom of movement, the correctional officer has authority to "take another into custody." Therefore, a correctional officer is an "officer" within the plain meaning of § 946.41, STATS.

CONCLUSION

A correctional officer is an "officer" within the plain meaning of § 946.41, STATS., because a correctional officer has authority to "take another into custody" by physically restricting a prisoner's freedom of movement. Accordingly, we affirm Patterson's conviction for resisting an officer.

By the Court.—Judgment and order affirmed.

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

