

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

November 20, 1997

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. 96-2740-CR**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT IV**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**DONNELL D. JOHNSON,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment of the circuit court for Dodge County:  
ANDREW P. BISSONNETTE, Judge. *Affirmed.*

Before Dykman, P.J., Vergeront and Roggensack, JJ.

PER CURIAM. Donnell Johnson appeals from a judgment convicting him on three counts of battery by a prisoner, contrary to § 940.20(1), STATS. Johnson fought with and injured four guards at Fox Lake Correctional Institution and was charged with battering three of them. The guards testified that Johnson attacked one of them without provocation and then viciously fought

subsequent attempts to restrain him. Johnson and his inmate eyewitnesses testified that a guard provoked the incident by assaulting Johnson. He asked for an acquittal on self-defense. The trial court, as the finder of fact in Johnson's bench trial, found that the State failed to prove beyond a reasonable doubt that Johnson attacked without provocation. The court also found, however, that regardless of the provocation, Johnson exceeded his self-defense privilege in the ensuing fight. We affirm.

#### THE STATE'S VERSION

Guards were escorting Johnson to temporary lock-up during the investigation of his alleged disciplinary infraction. Without warning or provocation, Johnson struck Officer Ruhland in the face, breaking his nose, and hurled him across the hallway against the opposite wall. In the ensuing struggle to subdue Johnson, he kicked, punched and/or bit three other officers. None of the officers struck or kicked Johnson in return, but only tried to wrestle him into submission. Johnson subsequently told Ruhland that he went after him because of a grudge against Ruhland's brother, who was a correctional officer on Johnson's unit. He also described himself as a "true soldier" and a "true gangster." All four guards testified that none of them said or did anything to provoke Johnson.

#### JOHNSON'S VERSION

Johnson was within 120 days of his mandatory release, after serving ten years, and had no motivation or desire to cause trouble. Nor was he particularly concerned about the disciplinary matter, which he believed to be a misunderstanding. While the guards were escorting him to temporary lock-up, one of them pushed him through a doorway. He objected to being pushed. Ruhland then shoved him against the wall, put an arm against his throat, and said,

“Don’t you ever talk to an officer like that.” Johnson responded by slamming Ruhland against the opposite wall of the building. In the ensuing struggle, the guards went far beyond restraint tactics and were actively trying to hurt Johnson. It was only for self-defense that he fought back with such severity that two guards had broken noses and all four were treated for injuries. Approximately thirty inmates witnessed the incident. Two, including Johnson’s cousin, appeared as defense witnesses and substantiated Johnson’s claim that Ruhland initiated the incident by shoving him against the wall.

### THE COURT’S VERDICT

The trial court found that the State did not prove the officers’ version of the incident beyond a reasonable doubt. The court therefore analyzed the incident as if Ruhland had initially pushed Johnson against the wall and threatened him. Under that scenario, the court first found that Johnson used excessive force in terminating Ruhland’s interference, and therefore lost his self-defense privilege. The court further found that Johnson excessively resisted the subsequent attempt to restrain him when he punched, bit and kicked the officers. The court expressly found that the officers were only trying to restrain Johnson after he struck and pushed Ruhland. The court also found that none of the officers tried to hit Johnson, thereby triggering Johnson’s privilege to fight back. The result was a guilty verdict on all three counts.

### DECISION

Johnson first argues that the trial court erroneously applied the law by recognizing Johnson’s privilege to defend against Ruhland’s assault, while not recognizing that he was also privileged to defend against the subsequent attempt to restrain him. According to Johnson:

It is ... appropriate to conclude that a guard who batters his prisoner forfeits his privilege to use force for the purpose of restraining that prisoner until order has been restored.... "Order," in this context, can only mean the presence of legitimate authority, that is, officers who neither participated in nor ratified the use of excessive force. Physical restraint contrary to this rule should be deemed a continuation of the original assault which may be resisted by force of such degree and character as may be necessary to repel the offending officer.

We disagree. A person may forcibly resist an arrest if the arresting officer uses excessive force. *State v. Reinwand*, 147 Wis.2d 192, 201, 433 N.W.2d 27, 31 (Ct. App. 1988). If excessive force is not used, then there is no privilege to resist, even if the arrest is illegal. *Id.* We conclude that the same rule should apply to restraints of prisoners in correctional institutions. Here, once the initial incident with Ruhland concluded, the trial court found that the officers engaged solely in appropriate efforts to restrain Johnson, without using excessive force. Credible evidence supports that finding. Johnson therefore had no privilege to defend against the efforts to restrain him after he had thrown Ruhland against the wall and onto the ground.

Johnson next argues that there was insufficient evidence to find that he used more force than he could have reasonably believed necessary to fend off Ruhland. Again, we disagree. Johnson testified that he weighed 255 pounds and bench-pressed 400 pounds at the time of the incident, which took place in front of some thirty witnesses. He conceded that he felt no fear. Additionally, there was no testimony, even from Johnson, that Ruhland would have done anything more to him. According to Johnson, Ruhland made no other verbal or physical threats after grabbing him and warning him about his comment. Under these circumstances, the trial court reasonably inferred that either Ruhland would have imminently ceased his assault or that Johnson could have terminated it himself

well short of pushing Ruhland ten feet across a hallway, into the opposite wall, and onto the ground. “If any possibility exists that the trier of fact could have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt, an appellate court may not overturn a verdict ....” *State v. Poellinger*, 153 Wis.2d 493, 507, 451 N.W.2d 752, 758 (1990). A person acting in self-defense may not use more force than is reasonably believed necessary under the circumstances to resist an unlawful interference. Section 939.48(1), STATS.

*By the Court.*—Judgment affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.

