

795 LAW NOTE: PRIVILEGE: RESISTING AN UNLAWFUL ARREST

This Law Note discusses the common law privilege recognizing a right to resist an unlawful arrest.

The Privilege Was Recognized But Has Been Abrogated

In State v. Hobson, 218 Wis.2d 550, 577 N.W.2d 825 (1998), the Wisconsin Supreme Court addressed the question whether a defendant charged with battery to a law enforcement officer could claim a privilege to resist an unlawful arrest. The court's holding was as follows:

We conclude, based on the common law in this state, that Wisconsin has recognized a privilege to forcibly resist an unlawful arrest in the absence of unreasonable force. However, based upon public policy, we now decide to abrogate¹ that common law affirmative defense. Our decision to abrogate has prospective application only.
218 Wis.2d 350, 353.

The Abrogation Is Prospective

The Hobson decision was filed on May 27, 1998, and thus bars the invocation of the privilege to resist an unlawful arrest in any prosecution based on acts occurring after that date.²

Resisting An Arrest Where Unreasonable Force Is Used

Hobson was concerned with a situation where the arrest was unlawful because probable cause was lacking. The privilege the court recognized and then abrogated was a privilege "to forcibly resist unlawful arrest in the absence of unreasonable force." Not addressed is the privilege to resist an arrest where unreasonable force is used by the arresting officer. It seems clear that the general privilege of self defense defined in § 939.48 could apply to the unreasonable force situation: the unreasonable force would be the "unlawful interference" that is the predicate for invoking self defense. The majority opinion in Hobson appears to hold that self defense is the proper way to address this issue. 218 Wis. 2d 350, 368, note 17. A concurring opinion suggests that there is an additional common law privilege to resist an unreasonable force arrest that is separate from self defense. 218 Wis.2d 350, 387-88.

Lawfulness Of Arrest Can Be Relevant To An Element Of A Crime

Hobson was concerned with a privilege that was a true "affirmative defense" in the sense that it provided a defense that prevented conviction even though all the elements of the crime charged were present. That is, Hobson did commit a battery against a law enforcement officer, but claimed a defense to that crime based on facts that were not inconsistent with the presence of any of the elements of the crime. Notwithstanding the Hobson decision, the fact that a police officer was acting unlawfully in making an arrest would prevent a conviction for certain offenses because it may be inconsistent with the proof of an element of the crime. For example, if the charge is resisting or obstructing an officer, an element of the crime is that the officer was acting "with lawful authority." See § 946.41. An officer making an unlawful arrest would not be acting with lawful authority, thus negating an element of the crime. Battery to a law enforcement officer, the offense charged in Hobson, does not have a "with lawful authority" element.

COMMENT

Wis JI-Criminal 795 was approved by the Committee August 2002.

1. A definition of "abrogate" was noted by the court: "To annul, cancel, revoke, repeal, or destroy." State v. Hobson, 218 Wis.2d 350, 353, footnote 1.
2. Principles based on the Ex Post Facto clauses of the United States and Wisconsin Constitutions require prospective application of a "new rule of law [that] deprives a defendant of a previously available defense." 218 Wis.2d 350, 381.