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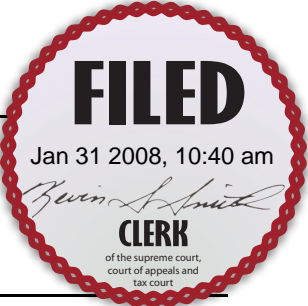
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IN THE  
COURT OF APPEALS OF INDIANA

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DAVID SPARKS, )  
)  
Appellant-Defendant, )  
)  
vs. ) No. 49A02-0707-CR-589  
)  
STATE OF INDIANA, )  
)  
Appellee-Plaintiff. )

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APPEAL FROM THE MARION SUPERIOR COURT  
The Honorable Barbara Collins, Judge  
Cause No. 49F08-0701-CM-1677

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January 31, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

## **Case Summary**

Appellant-Defendant David Sparks (“Sparks”) appeals his conviction for Resisting Law Enforcement, as a Class A misdemeanor.<sup>1</sup> We affirm.

### **Issue**

Sparks raises the single issue of whether there was sufficient evidence to support his conviction.

### **Facts and Procedural History**

On January 3, 2007, the Indianapolis Metropolitan Police Department received a report of a suspicious man in a green jacket in the 1000 block of North Irvington in Indianapolis. Upon their arrival, Officers Matthew Neuenschwander and Jeffrey Karwoski observed the suspect, later identified as Sparks, standing on the front porch of a home and peering in the window. He was wearing a green jacket. As the officers approached, Sparks had his back turned towards them. Officer Neuenschwander told Sparks to show his hands and turn around. Sparks responded by shoving his hands in the front pockets of his jacket and turning around.

For reasons of officer safety, Officer Neuenschwander pulled his service revolver and instructed Sparks several times to take his hands out of his pockets. Sparks failed to comply. Officer Neuenschwander then ordered Sparks to lie on the ground. Sparks complied, taking his hands out of his pockets and lying on the ground with his hands underneath him. Officer Neuenschwander put his firearm away, got on top of Sparks, pulled on Sparks’s right arm, and attempted to pull Sparks’s hand out from underneath his body. Officer Karwoski

assisted by pulling on the left arm of Sparks. Sparks aggressively struggled with the officers to prevent his hands from being pulled out from underneath his body. After ordering Sparks to release his hands several times without success and unable to place Sparks's hands behind his back, Officer Neuenschwander struck Sparks in the abdomen with his knee. At that point, the officers were able to handcuff Sparks.

That same day, the State charged Sparks with resisting law enforcement, as a Class A misdemeanor. After a bench trial, Sparks was convicted as charged. The trial court sentenced him to 365 days in jail with 10 days of credit and 355 days suspended.

Sparks now appeals.

### **Discussion and Decision**

Sparks contends that there was insufficient evidence to support his conviction for resisting law enforcement because Sparks did not use any powerful or violent force toward the officers. In addressing a claim of insufficient evidence, we consider only the probative evidence and reasonable inferences supporting the judgment to assess whether a reasonable trier of fact could have found the defendant guilty beyond a reasonable doubt. Brown v. State, 868 N.E.2d 464, 470 (Ind. 2007). It is the role of the fact-finder, not that of appellate courts, to assess witness credibility and weigh the evidence to determine whether it is sufficient to support a conviction. Drane v. State, 867 N.E.2d 144, 146 (Ind. 2007). We will affirm the conviction unless “no reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt.” Id. (quoting Jenkins v. State, 726 N.E.2d 268, 270 (Ind. 2000)).

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<sup>1</sup> Ind. Code § 35-44-3-3.

Indiana Code Section 35-44-3-3 provides in relevant part that “a person who knowingly or intentionally: (1) forcibly resists, obstructs, or interferes with a law enforcement officer or a person assisting the officer while the officer is lawfully engaged in the execution of the officer’s duties . . . commits resisting law enforcement, a Class A misdemeanor.” Our Supreme Court has concluded that “one ‘forcibly resists’ law enforcement when strong, powerful, violent means are used to evade a law enforcement official’s rightful exercise of his or her duties.” Spangler v. State, 607 N.E.2d 720, 723 (Ind. 1993).

Sparks implicitly argues that his actions amount to only passive resistance. We disagree. Cases in which the reviewing court concluded that the defendant was passively resisting law enforcement as opposed to forcibly resisting law enforcement involved the defendant walking away from officers who were attempting to serve a protective order and the defendant slightly twisting and turning to prevent officers from taking his flag. See id.; Ajabu v. State, 704 N.E.2d 494, 495-496 (Ind. Ct. App. 1998). The facts in this case, however, are more akin to those in Guthrie v. State and Johnson v. State.

In Guthrie, Park Ranger Robert Turner was dispatched to Broad Ripple Park to investigate a person vending without a license. Guthrie v. State, 720 N.E.2d 7, 8 (Ind. Ct. App. 1999), trans. denied. Guthrie was found sitting on a blanket with his wares. Subsequent to determining that Guthrie did not have a vending permit, Park Ranger Turner instructed him to stop selling his merchandise but that he could remain in the park. Guthrie packed up his items and then requested a copy of the permit ordinance. Park Ranger Turner

summoned his supervisor for a copy of the ordinance. After some discussion, the supervisor instructed Park Ranger Turner to issue a citation to Guthrie. Park Ranger Turner asked Guthrie his name. When Guthrie refused to provide his name three times, he was arrested and transported to the Marion County lockup. Id.

Upon arrival at the lock up, Guthrie refused to get out of the vehicle, asserting that his arrest was illegal. Two officers physically removed him from the vehicle, placing him on the ground. Guthrie was then ordered to stand, but again he refused to comply. The officers lifted him to his feet but Guthrie refused to walk. When Guthrie then leaned back, keeping his legs straight, the officers had no choice but to carry him to the receiving area. Id.

The Guthrie Court differentiated the actions of Guthrie from those in Spangler, concluding that Guthrie did more than passively resist. Id. at 9. Rather, he applied some “force,” requiring the officers to exert force to counteract Guthrie’s acts of resistance. The court concluded that such resistance was sufficient evidence to uphold Guthrie’s conviction for resisting law enforcement. Id.

In Johnson v. State, relying on Guthrie, this Court affirmed the defendant’s resisting law enforcement conviction upon the facts that the defendant turned and pushed away from the officers and “stiffened up” when officers attempted to place him into a transport vehicle. Johnson v. State, 833 N.E.2d 516, 518-19 (Ind. Ct. App. 2005). The Johnson Court acknowledged that its “decision, and even that in Guthrie upon which [it] relied, may have moderated the definition of ‘forcibly resist’ as it was written in Spangler.” Id. at 519. The court interpreted Indiana Code Section 35-44-3-3 as not demanding the application of an

overly strict definition of “forcibly resist.” Id.

Similar to the defendants in Guthrie and Johnson, Sparks used physical means to resist Officers Neuenschwander and Karwoski such that the officers were required to exert force to counteract Taylor’s acts of resistance. Once on the ground, Sparks refused to release his hands from underneath his body. The officers, one pulling on each arm, attempted to place Sparks’s arms behind his back. Sparks responded by pulling back with his arms to keep them out of reach of the officers. This resulted in a struggle that lasted about ten seconds. Each time one of the officers successfully freed one of Sparks’s hands, Sparks aggressively shoved it back underneath his body. Sparks was only subdued when kned in the abdomen.

The evidence is sufficient to prove that Sparks acted with the requisite force in resisting the officers in the performance of their duties. Accordingly, there was probative evidence from which a reasonable trier of fact could have found Sparks guilty beyond a reasonable doubt of resisting law enforcement, as a Class A misdemeanor.

Affirmed.

NAJAM, J., and CRONE, J., concur.