In the
Indiana Supreme Court

Charles R. Tyson,
Appellant(s),

v.

State Of Indiana,
Appellee(s).

Court of Appeals Case No.
19A-CR-01813

Trial Court Case No.
33C03-1707-CM-652

Order

This matter has come before the Indiana Supreme Court on a petition to transfer jurisdiction, filed pursuant to Indiana Appellate Rules 56(B) and 57, following the issuance of a decision by the Court of Appeals. The Court has reviewed the decision of the Court of Appeals, and the submitted record on appeal, all briefs filed in the Court of Appeals, and all materials filed in connection with the request to transfer jurisdiction have been made available to the Court for review. Each participating member has had the opportunity to voice that Justice's views on the case in conference with the other Justices, and each participating member of the Court has voted on the petition.

Being duly advised, the Court DENIES the petition to transfer.

Done at Indianapolis, Indiana, on 8/6/2020.

FOR THE COURT

Loretta H. Rush
Chief Justice of Indiana

David, J., Massa, J., and Goff, J., vote to deny transfer.
Rush, C.J., dissents from the denial of transfer with separate opinion in which Slaughter, J., joins.

Rush, Chief Justice, dissenting.

If Charles Tyson had been charged with resisting law enforcement by fleeing, there would be little question of his guilt. Ind. Code § 35-44.1-3-1(a)(3) (2017). But he wasn't. He was charged with **forcibly** resisting, obstructing, or interfering with an officer, *id.* § 1(a)(1), an offense he did not commit.

The record reveals that all Tyson did was fail to remove his hands from his pockets, which contained unknown objects, while walking away from an officer. That evidence is insufficient to satisfy the "force" element required to sustain Tyson's conviction. After confronting the murky, sparse law on this issue during oral argument, we should take this opportunity to reinforce that, when a resisting-law-enforcement conviction is based on the threat of force, the evidence must establish that (1) the threat was directed at the officer; and (2) the defendant's actions, viewed objectively, were threatening. Because neither requirement is present here, I respectfully dissent from the denial of transfer.

Charles Tyson was walking home around 3:00 a.m. when Officer Brandy Pierce stopped him. Officer Pierce suspected Tyson was intoxicated because, as she drove by, he twice turned away from her and "appeared to stumble or sway." After she exited her patrol vehicle and approached Tyson, Officer Pierce also smelled alcohol and marijuana. She told Tyson to stop several times, but he refused. Tyson said he had done nothing wrong and, pointing to a nearby residence, informed the officer that he was walking home.

Throughout the interaction, Tyson kept taking his hands in and out of his pockets, which contained items Officer Pierce could not identify. She repeatedly asked Tyson to keep his hands visible, but he continued backing away with his hands still in his pockets. When Tyson turned to walk up the stairs leading to his home, Officer Pierce tased him in the back, causing him to fall on his steps. Tyson refused to put his hands behind his back, so Officer Pierce tased him again. She then placed him under arrest, and a search of his person revealed he was unarmed.

Tyson was charged, in relevant part, with forcibly resisting law enforcement under Indiana Code section 35-44.1-3-1(a)(1). After a bench trial, he was found guilty. Our Court of Appeals affirmed, finding sufficient evidence supported Tyson's conviction. *Tyson v. State*, 140 N.E.3d 374, 378 (Ind. Ct. App. 2020). The panel reasoned that his "actions amounted to an active threat that impeded Officer Pierce's ability to lawfully execute her duties." *Id.* I disagree.

The evidence here does not show that Tyson's actions amount to forcible resistance—a required element of the offense—for two reasons. First, his actions were not directed at Officer Pierce. And second, there is no objective evidence that Tyson's actions were threatening. I address each requirement in turn.

It is well settled that to constitute "force," an action must be "made in the direction of the official." *Spangler v. State*, 607 N.E.2d 720, 724 (Ind. 1993). This requirement applies whether force is based on physical contact or a threat of strength, power, or violence. *See Walker v. State*, 998 N.E.2d 724, 727 (Ind. 2013); *Pogue v. State*, 937 N.E.2d 1253, 1258–59 (Ind. Ct. App. 2010), *trans. denied*. When force is based on a threat, we have found the requirement satisfied when, with fists clenched, a defendant "advanced to near striking distance" of an officer. *Walker*, 998 N.E.2d at 728. The requirement was also established when a defendant faced an officer with a weapon that he refused to drop. *Pogue*, 937 N.E.2d at 1258. But the requirement was not met when a person simply walked away from an officer, *see Spangler*, 607 N.E.2d at 724–25, or refused to comply with an officer's commands, *see Macy v. State*, 9 N.E.3d 249, 253 (Ind. Ct. App. 2014); *Colvin v. State*, 916 N.E.2d 306, 309 (Ind. Ct. App. 2009), *trans. denied*. Yet, that's precisely what happened here.

The State asserts that Tyson's actions—refusing to stop and keeping his hands in his pockets—constituted a threat of violence that impeded Officer Pierce from executing her duties. But those actions were not directed at her. Indeed, Tyson was walking away from Officer Pierce—up the steps to his own home—when she tased him twice in the back. So, even if the unknown objects within Tyson's pockets constituted a threat, the State still failed to prove that Tyson's actions were "directed towards the law

enforcement official." *Spangler*, 607 N.E.2d at 724. Though Tyson's conviction should be vacated on this basis alone, there is a second reason why the State failed to satisfy the "force" element.

When the "force" element of a resisting-law-enforcement conviction is based on a threat directed at a law-enforcement officer, there must also be objective evidence that the defendant's actions were threatening. *See Walker*, 998 N.E.2d at 727–28. Relevant to this "threatening" requirement is a defendant's aggressive state of mind. *See Snow v. State*, 77 N.E.3d 173, 178 (Ind. 2017). For example, in *Walker*, we explained that a "gesture or movement" that "presents an imminent danger of bodily injury" would be evidence demonstrating an action's "threatening" nature. 998 N.E.2d at 727. There, we found that walking toward an officer with clenched fists was "purposefully aggressive behavior." *Id.* at 729. Conversely, we have found that both walking away from an officer and refusing to present one's arms to be handcuffed are not "threatening" actions. *See Spangler*, 607 N.E.2d at 724–25; *Graham v. State*, 903 N.E.2d 963, 966 (Ind. 2009). Similarly here, there is no objective evidence that Tyson's actions were threatening. He did not show a weapon, and he never approached Officer Pierce. Rather, Tyson simply refused to follow her commands and walked away.

We acknowledge Officer Pierce's concern that Tyson had unknown objects in his pockets and her explanation that a "welfare check," like the one she performed with Tyson, can become dangerous. But this is not objective evidence of "threatening" actions. If there were evidence that the objects in Tyson's pockets resembled weapons, the State's case would be on better footing. But Officer Pierce, who is trained in recognizing weapons, "didn't know" what Tyson had on him and simply stated, "I could see that there were items in his pockets." In short, because there was no objective evidence that Tyson's actions were threatening, the State—for a second reason—cannot satisfy the "force" element required to sustain Tyson's conviction.

We have acknowledged that application of the "seemingly simple" resisting-law-enforcement statute has resulted in "a degree of unpredictability in outcome." *Walker*, 998 N.E.2d at 726–28. Despite that

recognition, today we pass up a valuable opportunity to provide much-needed direction. Currently, we have a meager patchwork of precedent that has not explicitly set forth what is required to prove "force" when the offense is based on a threat. In fact, in the twenty-seven years since *Spangler*, we've analyzed the "force" element in only three decisions. *Walker*, 998 N.E.2d 724; *K.W. v. State*, 984 N.E.2d 610, 612–13 (Ind. 2013); *Graham*, 903 N.E.2d 963. By denying transfer, we relinquish a rare chance to distill the common themes found in past cases into clear guidance moving forward.

Thus, I would grant transfer and clarify that, when the "force" element of a resisting-law-enforcement conviction is based on a threat, the evidence must establish that (1) the threat was directed at the officer; and (2) the defendant's actions, viewed objectively, were threatening. Enforcing these requirements is the only way to distinguish between what is and isn't a threat of force. Because Tyson's actions do not satisfy these requirements, I would reverse his conviction.

Slaughter, J., joins.