2013 PA Super 127

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
Appellee	:	
v.	:	
COLLETTE CHAMPAGNE MCCOY,	:	
Appellant	:	No. 751 MDA 2012

Appeal from the Judgment of Sentence entered March 9, 2012,
in the Court of Common Pleas of Berks County,
Criminal Division, at No. CP-06-CR-0002849-2011.

BEFORE: PANELLA, OTT, and STRASSBURGER,* JJ. **FILED MAY 23, 2013**

CONCURRING AND DISSENTING OPINION BY STRASSBURGER, J.:

I agree with the Majority that McCoy's disorderly conduct conviction must be set aside. However, because her disrupting meetings and processions conviction is not supported by sufficient evidence, and because the statute is unconstitutional both as applied and on its face, I dissent.

First, an examination of the record reveals that, contrary to the Majority's holding, the Commonwealth failed to offer sufficient evidence that Appellant disrupted a meeting or procession in violation of 18 Pa.C.S. § 5508.[1]

[1] Actually, the Majority's first error was to address McCoy's constitutional questions before determining whether the case could be decided on non-constitutional grounds. ***See, e.g., Commonwealth v. Hull***, 705 A.2d 911, 915 (Pa. Super. 1998) (quoting ***Commonwealth v. Samuels***, 511 A.2d 221, 230 (Pa. Super. 1986)) ("[A] court is not to rule on the constitutionality of a statute unless it is absolutely necessary to do so in order to decide the issue before it.").

*Retired Senior Judge assigned to the Superior Court.

The Majority concludes that the evidence was sufficient because McCoy's conduct was "more than a transitory annoyance to either the participant in the procession, which happened to include police, and the observers, whose attention was diverted from the funeral procession[2] and which caused observers to react in disgust." Majority Opinion at 9 (footnote added). The Majority determines that McCoy's conduct "implicated disorderly conduct," ***id.*** at 9-10, rendering her culpable for the officers' decisions to leave the procession to arrest her.

The record does not support the conclusion of the Majority. There is no evidence that there was any threat of violence, tumult, or disorder caused by McCoy's conduct. There is no evidence that McCoy directly interfered with the procession. The only disruption of the procession that occurred was caused by the decision of detective John Lackner (Lackner) to arrest McCoy because he was unhappy that she said "fuck" in front of children. ***See*** N.T., 2/13/2012, at 62-63 ("They could have been saying fuck the president[. They were not arrested] because it was fuck the police. I didn't take personal offense. It was disorderly in the sense they were saying fuck."). Contrary to the Majority's finding, because the officer arrested her without any indication of imminent public tumult, Lackner did not have

[2] Contrary to the Majority's representation, the motorcade at issue here was not a funeral procession. Rather, the vehicles were escorting the body of Deputy Pagerly from the hospital where an autopsy had been conducted to the funeral home. The legal constructs are no different regardless of the type of procession.

probable cause to arrest McCoy for disorderly conduct. ***See, e.g., Commonwealth v. Fedorek***, 946 A.2d 93, 100 (Pa. 2008) (quoting ***Commonwealth v. Hock***, 728 A.2d 943, 946 (Pa. 1999)) "[W]hether a defendant's words or acts rise to the level of disorderly conduct hinges upon whether they cause or unjustifiably risk a public disturbance. The cardinal feature of the crime of disorderly conduct is public unruliness which can or does lead to tumult and disorder.").

That Lackner voluntarily exited the procession to quiet McCoy, and other officers chose to join him, does not make McCoy guilty of acting with the intent to interrupt a procession. The fact that the attention of members of the public present on the street was distracted by McCoy's conduct is not sufficient to establish that she interrupted the procession. ***See Commonwealth v. Weiss***, 490 A.2d 853, 856 (Pa. Super. 1985) ("Vulgar language, however distasteful or offensive to one's sensibilities, does not become a crime because people standing nearby stop, look, and listen.").

Therefore, McCoy's conviction under 18 Pa.C.S. § 5508 should be vacated. Further, because the conduct of McCoy did not constitute violation of that statute, and the record does not support an inference that she conspired with Pruitt to do any additional acts that would constitute violation of Section 5508, McCoy's conspiracy conviction should also be vacated. ***See, e.g., Commonwealth v. Wayne***, 720 A.2d 456, 464 (Pa. 1998) ("It is

the existence of shared **criminal** intent that is the *sine qua non* of a conspiracy.") (emphasis added).

Even if the evidence were sufficient to establish that McCoy and Pruitt conspired to disrupt the procession, her conviction on the facts of this case would violate the First Amendment. Criminal statutes "may not be used to punish anyone exercising a protected First Amendment right." ***Commonwealth v. Mastrangelo***, 414 A.2d 54, 58 (Pa. 1980), *appeal dismissed* ***Mastrangelo v. Pennsylvania***, 449 U.S. 894 (1980).

> As a general rule, the First Amendment prohibits government interference with an individual's freedom of speech. Only very narrow exceptions, such as obscenity, defamation, and "fighting words," have been carved out of this general guarantee of freedom. **Any speech which does not fit into one of these narrow exceptions is constitutionally protected regardless of how vulgar or lacking in taste or social, political or artistic content**. … **The right to free speech encompasses the freedom to speak foolishly and without moderation**.

Commonwealth v. Zullinger, 676 A.2d 687, 689 (Pa. Super. 1996) (emphasis added; internal quotation and citations omitted).

The two exceptions relevant to this appeal are obscenity and fighting words. In overturning McCoy's disorderly conduct conviction, the Majority correctly concludes that her speech and conduct were not obscene. ***See*** Majority Opinion at 13. An examination of the relevant case law makes clear that McCoy's speech did not constitute "fighting words" either.

Fighting words are "those which by their very utterance inflict injury or tend to incite an immediate breach of the peace." ***Chaplinsky v. State of***

New Hampshire, 315 U.S. 568, 572 (1942). "[I]n determining whether words constitute fighting words, [t]he circumstances surrounding the words can be crucial, for only against the background of surrounding events can a judgment be made whether [the] words had a direct tendency to cause acts of violence by [others]." ***Hock***, 728 A.2d at 946 (quotation and citation omitted) (holding that statement "fuck you, asshole" made to police officer did not constitute fighting words).

For example, in ***Commonwealth v. Reynolds***, 835 A.2d 720, 731 (Pa. Super. 2003), this Court found that Reynolds uttered fighting words when he, brandishing a gun in a public place, said "I'll kill you motherfucker." ***Id.*** at 727. ***See also Commonwealth v. Lutes***, 793 A.2d 949, 963 (Pa. Super. 2002) (holding that Lutes uttered fighting words when he "twice called the victim a vulgar name and stated he was going to punch the victim in the mouth"); ***Commonwealth v. Pringle***, 450 A.2d 103 (Pa. Super. 1982) (holding that repeated shouting of "goddamn fucking pigs" while officers were making an arrest outside a tavern with a crowd of 50 onlookers constituted fighting words). All of these cases involved physical contact or the threat thereof.

By contrast, the Supreme Court held that the defendant did not communicate "fighting words" in ***Cohen v. California***, 403 U.S. 15 (1971). In that case, Cohen was charged with various offenses for wearing in a public building a jacket bearing the words "Fuck the Draft."

> This Court has … held that the States are free to ban the simple use, without a demonstration of additional justifying circumstances, of so-called "fighting words," those personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction. **While the four-letter word displayed by Cohen in relation to the draft is not uncommonly employed in a personally provocative fashion, in this instance it was clearly not directed to the person of the hearer**. No individual actually or likely to be present could reasonably have regarded the words on appellant's jacket as a direct personal insult. Nor do we have here an instance of the exercise of the State's police power to prevent a speaker from intentionally provoking a given group to hostile reaction. **There is, as noted above, no showing that anyone who saw Cohen was in fact violently aroused or that appellant intended such a result**.

Id. at 20-21 (internal quotations and citations omitted; emphasis added).

In supporting its guilty verdict under Section 5508 in the instant case, the trial court relied upon its erroneous belief that McCoy's speech was unprotected as "fighting words."

> The case at bar involved shouting, fighting words and gestures that risked inciting violence among solemn members of the public lining the streets at the procession of a dead deputy killed in the line of duty just the day before. [McCoy] and [Pruitt] actually approached the procession when they left the sidewalks and went into the street while chanting loudly and making "fighting" gestures. [McCoy] came very close to the procession and then went between the vehicles while she was gesturing and shouting. The officers actually had to leave the procession to prevent an outbreak of violence.

Trial Court Opinion, 7/6/2012, at 13. The trial court's determination is in error.

The instant case is far more akin to ***Cohen*** than it is to ***Reynolds*** or ***Lutes***. McCoy did not threaten anyone. In fact, McCoy did not direct her speech to any of the officers or civilians present. The evidence shows that McCoy and Pruitt caused members of the public to feel silent disgust; however, there is absolutely no indication that anyone present reacted violently or that violence was imminent. Because McCoy's speech did not constitute "fighting words," her speech is protected by the First Amendment and her conviction for violating 18 Pa.C.S. § 5508 cannot stand.

Although the above shows that it is unnecessary to reach McCoy's facial challenge to the constitutionality of Section 5508, the Majority addresses the merits of her arguments that the statute is overbroad and void for vagueness. The Majority reaches an incorrect result on these questions too.

Lackner, among the final seven or eight cars in the procession of 40 to 50 vehicles, noticed McCoy on one side of the street pumping her fist into the air, and Pruitt on the other side swinging a bag above his head. As he got closer, Lackner was able to hear the two yell "fuck the police" five or six times. Lackner initially continued driving in the procession, but decided to turn around and exit the motorcade after he "observed the citizens that appeared to be in disgust." N.T., 2/13/2012, at 52. Lackner immediately took McCoy into custody for disorderly conduct based upon the fact that she repeatedly said the word "fuck" in front of families and children. ***Id.*** at 62-

63. In addition to witnessing the events Lackner related, Criminal Investigator Darren Smith (Smith) saw McCoy cross the street between vehicles in the motorcade. Smith offered no testimony that McCoy's crossing the street in any way disrupted the procession. Smith drove past McCoy and Pruitt, and only turned around after Lackner radioed "that he wanted to go arrest these individuals for interfering with the procession." ***Id.*** at 16.

Compare the facts of this case to those of the only published opinion interpreting Section 5508: ***Commonwealth v. Siwert***, 4 Pa.D.&C.3d 589, 591 (Northampton County 1977) (*en banc*). In ***Siwert***, the defendant was convicted under section 5508 for interrupting a church service for five minutes by asking the minister to address the congregation and arguing with him when he denied the request. ***Id.*** at 591. The Common Pleas court sitting *en banc* granted Siwert's motion for an arrest of judgment, holding that there was no showing that Siwert's conduct "was inherently disorderly, or presented a clear and present danger to anyone's safety." ***Id.*** at 595.

So we have one court determining that the interruption of a church service for 5 to 10 minutes by someone arguing with a minister does **not** constitute a punishable disruption, and this Court concluding that McCoy did disrupt a procession by standing on a public sidewalk laughing and shouting "fuck the police" a few times. No one reading the statute and these cases can have any definite idea of what conduct is prohibited. In fact, the trial

court itself stated, after reading Section 5508, "I don't understand the language but we yield to the infinite wisdom of the Legislature." N.T., 2/13/2012, at 116.

Further, the very fact that so many officers passed McCoy by and did nothing until Lackner decided that he needed to protect the tender ears of the children present demonstrates that the statutory language allows for "arbitrary and erratic arrests and convictions." Majority Opinion at 5 (quoting ***Papachristou v. City of Jacksonville***, 405 U.S. 156, 162 (1972)).[3] Section 5508 is simply a bad statute and should be held void for vagueness.

Likewise, the statute is unconstitutionally overbroad, as its language encompasses a substantial amount of protected speech. The Majority disagrees, holding that "facially, this statute requires a reasonable balance between protecting the First Amendment rights of those seeking to engage in lawful procession, with the First Amendment rights of those who may be observing or are nearby." Majority Opinion at 6-7.

Section 5508 provides, in its entirety, "[a] person commits a misdemeanor of the third degree if, with intent to prevent or disrupt a lawful

[3] The Majority cites the fact that there are only two cases annotated to Section 5508 since its enactment in 1972 as evidence that there have been no "problems with encouraging arbitrary arrests or convictions." Majority Opinion at 5 n. 5. I do not find the dearth of case law instructive, as minimal penalties attach to violation of the statute, and therefore we have no idea how many pleas there have been or convictions without appeal.

meeting, procession or gathering, he disturbs or interrupts it." 18 Pa.C.S. § 5508. There is absolutely nothing on the face of this statute that remotely suggests a balancing of First Amendment rights.

The ***Siwert*** court chose to interpret the statute to prohibit only disruptions that are "inherently disorderly, or present[] a clear and present danger to anyone's safety," ***Siwert, supra*** at 595. The Majority expressly rejected this limitation of its scope to speech outside of the protection of the First Amendment. ***See*** Majority Opinion at 8-9. Instead, relying upon an explanatory note from the Model Penal Code, the Majority holds that Section 5508 has a "narrow focus" on conduct that would be insufficient to sustain a disorderly conduct conviction, but is "'calculated to outrage the sensibilities of the group involved.'" ***Id.*** at 9 (quoting Model Penal Code Explanatory Note for Sections 250.1-250.12).

First, Section 5508 contains different language than that of the Model Penal Code. "Under the Model Penal Code approach, 'offensive utterance,' utterances, gestures or displays 'designed to outrage the sensibilities' of the participants at the disrupted gathering are also criminalized. Such an approach creates obvious questions of constitutionality under the First Amendment, and was not adopted in the Pennsylvania Crimes Code." 14 West's Pa. Practice, Criminal Offenses and Defenses § 1:471 (6th ed. 2010).

Although our Legislature attempted to use less obviously-unconstitutional language than that of the Model Penal Code, it did not go

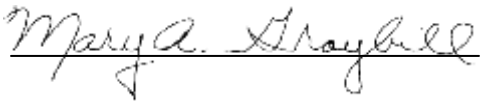
far enough to tailor the statute to exclude protected speech. If, as the Majority holds, the Commonwealth can punish someone under Section 5508 because people at a meeting or procession may suffer outraged sensibilities, the statute enacts an impermissible heckler's veto. "'[C]onstitutional rights may not be denied simply because of hostility to their assertion or exercise.'" ***Cox v. Louisiana***, 379 U.S. 536, 551 (1965) (quoting ***Watson v. City of Memphis***, 373 U.S. 526, 535 (1963)) ***See also Zamecnik v. Indian Prairie School Dist. No. 204***, 636 F.3d 874, 879 (7th Cir. 2011) ("Statements that while not fighting words are met by violence or threats or other unprivileged retaliatory conduct by persons offended by them cannot lawfully be suppressed because of that conduct.").

> [A] function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech … is … protected against censorship or punishment…. There is no room under our Constitution for a more restrictive view.

Cox, 379 U.S. at 552 (internal quotation omitted) (holding unconstitutionally vague and overbroad a statute that punished a breach of the peace, which was defined as "to agitate, to arouse from a state of repose, to molest, to interrupt, to hinder, to disquiet"). Section 5508 is unconstitutionally overbroad.

In sum, McCoy is guilty of engaging in conduct that was "vulgar [and] lacking in taste," and choosing "to speak foolishly and without moderation." ***Zullinger***, 676 A.2d at 689. However, McCoy is not guilty of violating any constitutionally-valid criminal statute. Therefore, I most vigorously dissent.

Judgment Entered.



Deputy Prothonotary

Date: 5/23/2013