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ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 2014-2015

CR-13-0113

Phillip Allen Moore

v.

State of Alabama

Appeal from Tuscaloosa Circuit Court
(CC-12-2616)

PER CURIAM.

Phillip Allen Moore was convicted, following a jury trial, of menacing. See § 13A-6-23, Ala. Code 1975. The circuit court sentenced Moore to 90 days in the county jail

and placed him on supervised probation for 12 months. On the authority of Ex parte Pate, 145 So. 3d 733 (Ala. 2013), we reverse the conviction and render a judgment of acquittal in favor of Moore.

I. Factual Background and Procedural History

On June 23, 2012, Jeffrey West and his wife Kimberly were at a classic car show at Bama Trim on Highway 11 in Tuscaloosa. Moore, his brother Melvin, and Melvin's girlfriend Beth Dove were drinking alcoholic beverages and listening to music on a lot at an RV park adjacent to the Bama Trim property.

At some point after the car show had begun, the Wests left the car show in a black Trans Am automobile, one of two cars the Wests had brought to the show. The Wests were going to their house to get their teenage daughter Rachel. As they were leaving, Dove and the Moores yelled at Kimberly, who was driving, to "spin the tires." Kimberly, however, did not know how to "spin the tires," so she did not.

After going to his house, West returned alone in the Trans Am to the car show. He parked the car at the show, got out of the vehicle, and began wiping dust off the car to make

it presentable for the car show. The Moores and Dove, who were still listening to music in the RV park, turned the music up to the point that it could be heard at the car show. West testified that he recognized the song that was playing--which he identified as "You Can Suck My Dick" by the musical rap artist Eminem. West testified that the lyrics of the song were obscene and, in his opinion, inappropriate for women or children to hear. West also saw the Moores and Dove making lewd hand gestures during the song; specifically, they were pointing to their respective genital areas.

West, who had difficulty walking because of a recent back surgery, put down his dusting cloth and started walking toward the RV park. He walked to the road separating Bama Trim and the lot Moore's camper was on. Moore moved to the door of his camper and picked up a metal pipe that was about three feet long. Moore began walking toward West, and West stopped in the middle of the road. West put his hands up and said, "Look, all I wanted to do is ask you if you would mind turning your music down." In response, Moore said, "Yes, I do fucking mind." Moore then "raised [the metal pipe] above his shoulders kind of like a batter." Moore, however, did not

leave the RV lot, and he remained about 15-20 feet away from West.

West testified that he turned around to walk away because he was afraid of being hit with the pipe. In the meantime, Melvin had gone to get his car, with which he struck West.[1] West was thrown onto the hood and windshield of the car. Kimberly and Rachel had by this time arrived at the car show. Kimberly and Rachel both saw Moore raise the pipe, and they witnessed Melvin strike West with Melvin's car.

Moore was charged with menacing. After he was found guilty in the Tuscaloosa County District Court, Moore appealed to the Tuscaloosa Circuit Court, and his case was tried before a jury. As noted above, the jury returned a verdict of guilty, and Moore was sentenced to 90 days in the county jail and placed on supervised probation for 12 months.

II. Analysis

Moore challenges, as he did in the circuit court, the sufficiency of the State's evidence to support his conviction for menacing. Among other things, he argues that the State

[1]In a motion in limine filed in the circuit court, Moore asserted that Melvin was "charged with attempted murder" as a result of striking West with his car. That same motion asserts that Dove was charged with second-degree assault.

presented insufficient evidence to indicate that Moore's actions constituted "physical action" as that phrase in § 13A-6-23, Ala. Code 1975,[2] was construed by the Alabama Supreme Court in its opinion in Ex parte Pate, supra. Constrained by the court's decision in Pate, we agree.

In Pate, the defendant, Luther Stancel Pate IV, owned property on which was operated a restaurant leased by the Santa Fe Cattle Company ("Santa Fe"). The lease was terminated for nonpayment of rent, and when Pate discovered that Santa Fe employees were trespassing on the property one day after they were supposed to have vacated the property, the police were notified. Pate arrived at the property after the police had arrived, and, once "the police determined that it was a civil matter and they were not going to get involved," Pate "ordered everyone to leave the premises." Pate told the police "that if they were unable to prevent these people from trespassing on his property, he had a shotgun in his truck and he could get rid of the trespassers himself." 145 So. 3d at 734-35.

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[2]Section 13A-6-23, Ala. Code 1975, provides: "A person commits the crime of menacing if, by physical action, he intentionally places or attempts to place another person in fear of imminent serious physical injury."

The Santa Fe employees left the building, but one employee--Walter Bryan Hart--reentered the premises to get his laptop computer. When Pate realized that Hart had reentered the premises, he "yelled at [Hart] and told him to get out of the building or he was going to 'stomp [Hart's] a**.'"

> "Hart said that Pate continued yelling at him as he walked outside. Hart testified that he went straight to his car, got in, and looked up to see Pate standing in front of his car pointing a shotgun at him and telling him to get off his property. Hart indicated that he left as quickly as possible because he was afraid Pate was going to hurt him physically."

145 So. 3d at 735. Other witnesses--including Pate--testified, however, that Pate did not point the gun at Hart.

In reversing Pate's conviction, the Alabama Supreme Court decided, as Pate had stated the issue, that Pate's "merely arming himself, without any accompanying action, [was] not a 'physical action' that could form the basis of a charge of menacing." 145 So. 3d at 737. The Court, however, did not provide any analysis to explain either its construction of the phrase "physical action" or why Pate's actions in "arming himself" did not qualify as "physical action."[3] Consequently,

[3]Justice Murdock, in his dissenting opinion, stated:

"The analysis of the main opinion consists mostly of

we are left with little guidance as to the meaning of the phrase "physical action" in § 13A-6-23 and whether Moore's actions in the present case qualify as "physical action" for purposes of the offense of menacing.

In his brief on appeal, Moore offers the following attempt to reconcile Pate with existing caselaw and apply it to the instant case:

> "[Pate] set the precedent that simply arming oneself with a gun, without more, does not establish the physical action necessary for the menacing statute.
>
> "Earlier Alabama cases illustrate what the 'more' is to which the Supreme Court alludes. [Justice Wise's] concurring ... opinion and [Justice Murdock's] dissenting opinion in Ex parte Pate discuss Hiler [v. State, 44 So. 3d 535 (Ala. Crim. App.), rev'd on other grounds, 44 So. 3d 543 (Ala. 2009),] extensively. In Hiler, officers were called out to a domestic dispute. Once they arrived, the officers encountered Hiler at an outbuilding behind the main home. As officers attempted to approach Hiler, Hiler held up a device and told the officers that it was a bomb. At one point during the interaction, Hiler laid the device down, but then sprinted back toward it when officers attempted to

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> a long quote concerning principles of statutory construction. Following this quote the main opinion simply states that, in light of these principles, the defendant's actions in this case cannot be considered menacing. There is no discussion of the quoted principles and specifically how they mandate such a conclusion."

Pate, 145 So. 3d at 741 n.5 (Murdock, J., dissenting).

tase him. The claim of a bomb, in addition to Hiler's physical movements, created a reasonable fear of imminent serious physical injury because a bomb, by its nature, can cause immediate harm from a distance. Hiler was convicted of menacing.

"A pipe, on the other hand, could not cause such immediate harm as a gun or a bomb. Many other cases involving an upheld conviction for menacing, involve defendants firing guns or pointing guns, getting within very close distance with the victim or rapidly closing the distance between the Defendant, the weapon, and the victim, and oral representations by the Defendant. This is the 'more' that the Supreme Court would require in order to find sufficient evidence for physical action. See Walker v. State, [137 So. 3d 943] (Ala. Crim. App. 2013) (defendant fired gun); ... Hiler v. State, 44 So. 3d 535, 537 (Ala. Crim. App. 2009) (defendant told officers the device was a bomb and ran toward the explosive device); Oliver v. City of Opelika, 950 So. 2d 1229, 1233 (Ala. Crim. App. 2006) (defendant pointed gun); Hoffman v. City of Montgomery, 863 So. 2d 127, 128 (Ala. Crim. App. 2003) (defendant pointed gun at victim with only a desk separating them); Johnson v. State, 651 So. 2d 1085, 1086 (Ala. Crim. App. 1994) (defendant pointed gun at victim and said 'I'll kill you' and defendant fired gun); Mosley v. City of Auburn, 428 So. 2d 165, 166 (Ala. Crim. App. 1982), superseded on other grounds, Mason v. City of Vestavia Hills, 518 So. 2d 221 (Ala. Crim. App. 1987) (defendant threatened to kill the victim along with slashing at the victim with a knife and pushing the victim).

"In the light most favorable to the State, [Moore's] getting a pipe, walking toward [West], and holding it like a batter while maintaining a distance of 15-20 feet, is not sufficient for the physical action element of the menacing statute. If simply getting a gun and walking toward someone, as Stan Pate did, is not enough for physical action,

> then surely picking up a pipe and walking toward the edge of one's property is not physical action for the purposes of the menacing statute. [Moore's] case is distinguishable from Hiler and other menacing cases because it does not provide the 'more' that is illustrated in those cases. [Moore] did not throw the pipe. [Moore] did not threaten to throw the pipe. [Moore] did not run or sprint at West with the pipe. [Moore] did not claim that the pipe could do more than it was designed to do. There was insufficient evidence of physical action."

Moore's brief, pp. 15-18.

In its brief, the State does not address Ex parte Pate. It does, however, state:

> "Moore chose to be poised in such a position so as to strike West. Moore argues that he did not intend to put West in imminent fear because the testimony was that he was 15-20 feet away. However, this argument is not credible. Moore and West were facing each other. In the same way a bullet from a gun can inflict lethal damage by the bullet traveling in a millisecond, Moore was in a position to inflict lethal damage because he was capable of striking West and crushing his skull in about 3 or 4 seconds. Moore, in the position in which he had the pipe also could have thrown this weapon at West."

State's brief, pp. 14-15.

Before Pate, we would have been inclined to recognize the inherent logic of the State's position as set forth above. We are, however, bound by the Pate decision, and we therefore must agree with Moore's position that there was insufficient

evidence of the physical-action element of menacing.

III. Conclusion

Moore's conviction is reversed, and a judgment of acquittal is rendered in his favor.

REVERSED AND JUDGMENT RENDERED.

Welch, Kellum, and Joiner, JJ., concur. Windom, P.J., dissents. Burke, J., dissents, with opinion.

BURKE, Judge, dissenting.

I respectfully dissent from the majority's decision to reverse Moore's conviction and to render a judgment of acquittal in favor of Moore. Specifically, I disagree with the main opinion's conclusion that Ex parte Pate, 145 So. 3d 733 (Ala. 2013), mandates that outcome. My reading of Pate indicates that the holding of the Supreme Court is based upon, and limited to, the very distinct facts of that case.

As the main opinion correctly states, in Pate, the Alabama Supreme Court provided little analysis concerning what satisfies the "physical-action" element of the menacing statute. However, the Supreme Court did not abrogate the crime of menacing; thus, it is the duty of this Court to provide guidance as to what now constitutes an offense under § 13A-6-23(a), Ala. Code 1975.

Section 13A-6-23(a), Ala. Code 1975, provides:

> "A person commits the crime of menacing if, by physical action, he intentionally places or attempts to place another person in fear of imminent serious physical injury."

"Although the question whether the offender's conduct evoked fear in the victim is relevant, the focus is on the offender's culpability, his conduct, and his purpose -- not

the subjective perception or reaction of the victim." Hoffman v. City of Montgomery, 863 So. 2d 127, 130 (Ala. Crim. App. 2003). Also, under the menacing statute, "'[l]anguage, whether abusive or obscene, is not "physical action."'" Lansdell v. State, 25 So. 3d 1169 (Ala. Crim. App. 2007) (quoting Ex parte N.W., 748 So. 2d 190, 193 (Ala. 1999)).

Reviewing some of this Court's prior cases involving menacing, I find that the physical-action element of the menacing statute is satisfied when the defendant shows a device to an officer, tells the officer that the device is a bomb, straps the device to his waist, indicates the device has a mercury switch, lays the device down, and then runs toward the device after the officer attempts to use a stun gun on him. Hiler v. State, 44 So. 3d 535 (Ala. Crim. App.), rev'd on other grounds, 44 So. 3d 543 (Ala. 2009). The physical-action element of the menacing statute is also satisfied when the defendant points a pistol at an officer's head and then hesitates when he is ordered to drop the weapon. Oliver v. City of Opelika, 950 So. 2d 1229, 1233 (Ala. Crim. App. 2006). Furthermore, the physical-action element of the menacing statute is satisfied when the defendant, who was wearing a

mask, fires a gunshot, knocks in a door of an occupied house, and then fires another gunshot. Hall v. State, 527 So. 2d 1333, 1336-37 (Ala. Crim. App. 1986). Additionally, the physical-action element of the menacing statute is satisfied when the defendant brandishes a pistol while threatening the lives of several juveniles. Henry v. State, 714 So. 2d 1002, 1006 (Ala. Crim. App. 1998). Further, the physical-action element of the menacing statute is satisfied when the defendant, while intoxicated, drives a vehicle at a high rate of speed and swerves and hits the victim's vehicle. Turner v. State, 542 So. 2d 1314, 1316 (Ala. Crim. App. 1989).

In Pate, the Supreme Court held only that lawfully arming oneself, or "getting the gun, without more, was not sufficient to establish the physical-action element of menacing." 145 So. 3d at 738. In Pate, the City of Tuscaloosa presented evidence indicating that, in addition to arming himself, Pate took other actions that were specifically directed at the victim. However, it appears that the Supreme Court believed that the trial court -- the finder of fact in Pate's nonjury trial -- did not make factual findings concerning that evidence. The Supreme Court believed that the trial court's finding

concerning the satisfaction of the physical-action element of the menacing statute was limited solely to the fact that Pate lawfully armed himself; thus, the Supreme Court limited its holding to that one action. The Supreme Court then appears to hold that that single action alone cannot satisfy the physical-action element of the menacing statute. Apparently, as a matter of law, merely lawfully arming oneself, without more, cannot place another person in fear of imminent serious physical injury.

In the present case, as set forth in the main opinion, there was evidence indicating that Moore committed acts in addition to merely arming himself with the metal pipe. In addition to arming himself, Moore walked toward West until he was only 15-20 feet away, made a statement to West in a threatening manner, and then raised the metal pipe above his shoulders "kind of like a batter." From that threatening posture, Moore could have easily thrown the pipe at West or otherwise hit him with the pipe in a matter of seconds. Considering the entirety of the circumstances in this particular case, I find that the jury could have found that the physical-action element of the menacing statute was

satisfied. Therefore, I would affirm Moore's conviction.

Based on the foregoing, I respectfully dissent, and I invite our Supreme Court to provide guidelines concerning the application of Pate.