IN THE COURT OF COMMON PLEAS FOR THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

State of Delaware,	:	Case No. 0406029389
	:	
Plaintiff,	:	
	:	
v.	:	
	:	
Clay S. Cooper,	:	
	:	
Defendant.	:	

Decision after trial

Date of Trial: **September 21, 2004**

Date Decided: **September 28, 2004**

Upon the Defendant's Motion for a Judgment of Acquittal

The Motion is granted.

Gregory Babowal, Deputy Attorney General, Department of Justice, 102 West Water Street, Dover, Delaware 19901, Attorney for the Plaintiff.

Kevin M. Howard, Esquire, Young & Malmberg, P.A. 502 South State Street, Dover, Delaware 19901, Attorney for Defendant.

Trader, J.

In this criminal case I hold there is insufficient evidence to support a jury verdict of guilty of disorderly conduct. The defendant's statements constitute protected speech under the First and Fourteenth amendments. Therefore, the jury verdict is set aside and the motion for a judgment of acquittal is granted.

The Status of the Proceedings

The defendant was initially charged with disorderly conduct in violation of 11 Del. C. Sec. 1301(1)(b) and harassment in violation of 11 Del. C. Sec. 1311(a)(1). On September 21, 2004, a jury trial was held on the above charges and at the close of the state's evidence, I granted defendant's motion for judgment of acquittal on the harassment charge. I held that the defendant's comment to Commissioner Blades constituted language protected by the First and Fourteenth amendments to the United States Constitution. The statute must be authoritatively construed to punish only unprotected speech – "fighting words." *Gooding v. Wilson*, 405 U.S. 518 (1972). Fighting words are words that have a direct tendency to incite violence from the person to whom the remark is individually addressed. *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942). Although the language the defendant used may be insulting, it would not cause an immediate violent response.

At the close of all the evidence, the defendant's motion for judgment of acquittal on the disorderly conduct charge was denied. The jury returned a verdict of guilty on the disorderly conduct charge and the defendant renewed his motion for a judgment of acquittal.

The Facts

Lester Blades, a commissioner of the Family Court, was eating dinner with his family in the Giacomo Restaurant at approximately 7:00 P.M. on June 18, 2004. While he was waiting in line to go into the bathroom, the defendant approached him and said, "I want to thank you for ruining my God damn kids' lives. Thanks to you, I have three eighth grade drop-outs." The defendant further stated to

the Commissioner that he was Clay Cooper. Commissioner Blades then went to the bathroom and the defendant requested his check from the waitress. He said to the waitress in a loud voice, "I did not know God damn state commissioners were here." He further stated, "That person is the biggest piece of shit you'll ever see in your life." Except for a sarcastic comment at one table, none of the customers reacted to these statements. Commissioner Blades did not hear any of the remarks to the waitress. The waitress said that the defendant was polite and courteous and she was not offended by these comments. When the defendant paid his bill, he said to another waitress, "I want you to kick the Commissioner's ass". These statements were not overheard by any customers or any other employees.

Case Law in States With Similar Statutes

The courts in other states have reached a similar conclusion in disorderly conduct cases. In *Commonwealth v. Hock*, 728 A.2d 943 (Pa. 1999), a woman was charged with disorderly conduct when she said "F___ you, a _____" to a police officer. In determining she was not guilty, the Pennsylvania Supreme Court stated that "[t]he cardinal feature of the crime of disorderly conduct is public unruliness which can or does lead to tumult or disorder." This case is applicable because the Pennsylvania disorderly conduct statute says, in relevant part, "A person is guilty of disorderly conduct if, with intent to cause public inconvenience, annoyance or alarm . . . he uses obscene language." 18 Pa. C.S.A. §5503(a). This part of the statute is almost identical to 11 Del. C. §1301(1)(b). Therefore, an interpretation of the statute by the Pennsylvania Courts should be persuasive for the Delaware courts.

New York also has a statute similar to the Delaware statute. N.Y. Crim. Law §240.20 (McKinney 2004) provides that a person is guilty of disorderly conduct when, with intent to cause public inconvenience, annoyance or alarm, he uses abusive or obscene language, or makes an obscene gesture. The primary difference between the New York and Delaware statutes is that the New York

statute requires that the disorderly conduct occur in a public place and the Delaware statute does not have such language.

New York has interpreted its disorderly conduct statute in the commentary following the statute. McKinney's Penal Law §240.20 *Disorderly Conduct* (2004) explains that the statute was "designed to proscribe only that type of conduct which has a real tendency to provoke public disorder." The Court of Appeals for New York stated that "[t]he clear aim was to reserve the disorderly conduct statute for situations that carried beyond the concern of individual disputants to a point where they had become a potential or immediate public problem." *People v. Munafo*, 406 N.E.2d 780 (1980). In *Munafo*, the court also explained that courts need to consider the nature and number of those attracted, the surrounding circumstances and the time and place that the conduct occurred. *Id.*

The test in New York is whether the defendant's conduct led or was likely to lead to disorder or public disturbance. *People v. O'Neal*, 404 N.Y.S.2d 250 (1978). The gravamen of the offense of disorderly conduct is whether a breach of the peace has become imminent or might reasonably be expected or intended to flow from such conduct. *People v. Hill,* 303 N.Y.S.2d 265 (1969). For disorderly conduct to occur, there must be more than occurrence of forbidden acts in a public place, it must also appear that there was a disturbance of the public order, or a causing of disquiet and alarm among a substantial segment of the community, or that such a disturbance of the public peace was imminent. *People v. Szepansky,* 203 N.Y.S.2d 306 (1960). If the conduct does not cause violence, then it is necessary to inquire into whether or not the peace and quiet of a sizable segment of the community was disturbed or likely to be by such disorderly conduct. *People v. Lavoy,* 124 N.Y.S.2d 639 (1953). Finally, the conduct complained of must be more than bad manners; it must be substantial in order to amount to disorderly conduct. *People v. Reid,* 40 N.Y.S.2d 793 (1943).

The Decision from the Maryland Court of Appeals

In *Downs v. Maryland*, 366 A.2d 41 (Md. 1976), the court outlined the progression of "'fighting' words" cases resulting from *Chaplinsky, supra*. In *Cohen v. California*, 403 U.S. 15 (1970), the Supreme Court held that "'fighting' words" are "those personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction." *Downs, supra* qtg *Cohen, supra*. *Cohen* also held that the words must be directed to the hearer. In *Gooding v. Wilson, supra*, the Supreme Court further required that "the person addressed would make an immediate violent response." *Downs* held that the defendant's remarks were made to friends and not directed to anyone so that no one who heard the statements was offended by the statements. If someone was offended by them, he/she was not aroused to respond in a violent manner. Therefore, the statements were protected speech. Additionally, the court noted, "[t]hat his views might be offensive to someone who overheard him does not warrant a conviction for disorderly conduct."

The Applicable Law in Delaware

It is a proper function of the state court to construe a statute, if possible, so as to bring its application within constitutional limits. *Maxwell v. Vetter*, Del. Super., 311 A.2d 864 (1973). I therefore must construe "offensively coarse utterance" in 11 Del. C. Sec. 1301(1)(b) as to limit its application to fighting words which have a direct tendency to cause acts of violence by the person to whom the remark is individually addressed. The constitutional guarantee of freedom of speech forbids the state to punish the use of words or language not within narrowly limited classes of speech. *Chaplinsky, supra.* Sec. 1301(1)(b) does not continue Delaware's former condemnation of profanity as disorderly conduct in light of its widespread use and the tolerance of profane utterances.

Therefore, in the case before me I hold the state must prove beyond reasonable doubt the following elements of the offense: (1) the defendant caused public inconvenience or alarm to another person; (2) by making an offensively coarse utterance; (3) he acted intentionally or it was his conscious object to engage in conduct of this nature. In addition, the state must show beyond a reasonable doubt that the language had a direct tendency to cause immediate violence by the person to whom the language is directed.

Applying the above law to the facts of this case, I conclude that the defendant's statements are protected by the First and Fourteenth Amendments to the United States Constitution. The profane statements of the defendant were not heard at all by Commissioner Blades and the statements were not directed against anyone. The statements did not annoy or alarm or inconvenience the waitresses or any of the customers in the restaurant. The statements did not cause any violence or a breach of the peace. The comments essentially amounted to bad manners. Since I conclude Sec. 1301(1)(b) to apply to face-to-face words plainly likely to cause a breach of the peace, I must conclude that the defendant's language, although insulting, was constitutionally protected by the First and Fourteenth Amendments.

The Standard for Setting Aside a Jury Verdict

The standard for setting aside a jury verdict upon a motion for acquittal is established in *State v. Chapman,* Del. Super., Witham, J. (April 12, 2002) (ORDER). In *Chapman*, the court said that if the jury returns a guilty verdict, a motion for acquittal may be made and the court may set aside the verdict and enter a judgment of acquittal.

> 'The relevant question is whether, after reviewing the evidence [and legitimate inferences] in light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' However, the Court is not required to ask itself whether *it* believes that the evidence at trial established guilt beyond a reasonable doubt. It must merely inquire as to whether *any* rational trier of fact could have found that guilt was established.

Id. at *1 (emphasis in original).

Since I conclude as a matter of law that the defendant's language constituted protected speech, I must further conclude that a rational trier of fact would not find the defendant guilty beyond a reasonable doubt. The evidence in the light most favorable to the state was not sufficient to submit the charge of disorderly conduct to the jury.

Therefore, the jury's verdict is set aside and the defendant's motion for a judgment of acquittal is granted.

IT IS SO ORDERED.

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Merrill C. Trader
Judge