IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE,	)	
	)	
v.	)	I.D. No.: 0305008627
	)	
ALBERT MUTO	)	

Date Submitted: March 8, 2004
Date Decided: March 12, 2004

MEMORANDUM OPINION

Upon Consideration of Defendant's Motion to Dismiss Indictment.
DENIED.

Donald R. Roberts, Esquire, DEPARTMENT OF JUSTICE, Wilmington, Delaware. Attorney for the State of Delaware.

Jennifer-Kate Aaronson, Esquire, POTTER, CARMINE, LEONARD & AARONSON, P.A., Wilmington, Delaware. Attorney for Defendant.

SLIGHTS, J.

I.

Defendant, Albert Muto, has moved to dismiss the indictment returned against him by the grand jury which charges him with a single count of Threatening a Public Official in violation of Title 11, Section 1240 of the Delaware Code ("Section 1240").[1] He contends that the statute is constitutionally infirm because it is vague and overbroad.[2] As its title suggests, Section 1240 makes criminal any threat of death or serious physical injury against a public official made when the declarant has the "apparent ability to carry out [the] threat by any means."[3]

Because the speech proscribed by the statute does not qualify for protection under the First Amendment, Mr. Muto's argument that the statute is "overbroad" must fail. And because the statute adequately explains the proscribed conduct, it is neither vague as applied to Mr. Muto nor vague on its face. Consequently, Mr. Muto's motion to dismiss indictment must be **DENIED.**

II.

On or about November 18, 2002, Mr. Muto was charged by the grand jury with

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[1]DEL. CODE ANN. tit. 11, §1240 (2001).

[2]The Court notes that Section 1240 was amended effective May 15, 2003. *See* 74 Del. Laws, c. 31 (2003). The new version of the statute, *inter alia*, removed the language Mr. Muto contends is constitutionally offensive. Mr. Muto was charged under the old law because his offense conduct occurred in April, 2003.

[3]Section 1240(a).

two counts of assault second degree, one count of felony terroristic threatening and one count of misdemeanor terroristic threatening. He was assigned an attorney from the public defender's office who represented him during the pretrial proceedings and throughout the trial. Prior to trial, the State made a plea offer to Mr. Muto in which it indicated its intent to make a motion to have Mr. Muto declared a habitual offender under Delaware's habitual offender statute.[4] If sentenced as a habitual offender, Mr. Muto would have been subject to at least the statutory maximum penalties for the underlying felonies as minimum mandatory sentences, up to a maximum penalty of life imprisonment.[5] Mr. Muto rejected the plea agreement, went to trial and was convicted by the jury of one count of assault second degree, one count of felony terroristic threatening, one count of assault third degree, and one count of misdemeanor terroristic threatening. After a presentence investigation indicated that Mr. Muto was not a habitual offender, he was sentenced on June 13, 2003 to a total of 10 years at Level V followed by decreasing levels of probation.

On April 23, 2003, immediately following the announcement of the jury's verdict and while all parties were still in the courtroom, Mr. Muto allegedly made a threatening statement to the victim (his attorney) to the effect that: "I won't be in jail

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[4]DEL. CODE ANN. tit. 11, §4214(a) (2001).

[5]*Id.*

forever." He then allegedly handed the victim an envelope which contained a piece of paper listing names, addresses and phone numbers for the victim, his brother, his sister-in-law, and his ex-wife. Mr. Muto was indicted two months later and charged with Threatening a Public Official.

III.

Mr. Muto argues that Section 1240 is unconstitutionally vague and overbroad. According to Mr. Muto, the statute fails to provide notice of the prohibited conduct and does not provide minimum guidelines for law enforcement.[6] The focus of Mr. Muto's attack is the provision of the statute which requires the State to prove that, at the time the threat was made, the defendant had "the apparent ability to carry out [the] threat ... at some future date." Mr. Muto contends that this portion of the statute, in essence, turns law enforcement officers into carnival soothsayers because they are called upon to predict whether a defendant may, at some unspecified "future date," have the ability to make good on his threat to a public official. With life's

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[6]Section 1240 provides, in relevant part:

> "(a) Every person who intentionally threatens the life of or threatens serious physical injury to ... any ... public official, ... [or] public defender, ... with the specific intent that the statement is to be taken as a threat and the apparent ability to carry out that threat by any means is guilty of making a threat to a public official....
> (b) For purposes of this section, the following definitions shall apply:
> (1) 'Apparent ability to carry out that threat' includes the ability to fulfill the threat at some future date."

uncertainties always in play, Mr. Muto contends that it is simply impossible to enforce this element of the offense. It is also impossible, from the perspective of the putative defendant, to understand what conduct this element of the offense is meant to proscribe.

The State argues that the Court need not even reach Mr. Muto's argument that the statute is overbroad because such arguments are appropriate only when the statute at issue might curtail constitutionally protected conduct. As threats against public officials are not protected by the First Amendment, Section 1240 cannot be "overbroad," at least not in the constitutional sense of the word. According to the State, the statute is not vague because reasonable law enforcement officers can enforce it and reasonable people can understand what conduct it prohibits.

IV.

A statute may be deemed overbroad, for constitutional purposes, only "if in its reach it prohibits constitutionally protected conduct."[7] According to the United States Supreme Court, when considering an overbreadth challenge that is coupled with a vagueness challenge:

> The court's first task is to determine whether the enactment reaches a substantial amount of constitutionally protected conduct. If it does not,

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[7] *Grayned v. City of Rockford*, 408 U.S. 104, 114-15, 92 S. Ct. 2294, 2302, 33 L. Ed. 2d 222, 231 (1972).

> then the overbreadth challenge must fail. The Court should then examine the facial vagueness challenge and, assuming the enactment implicates no constitutionally protected conduct, should uphold the challenge only if the enactment is impermissibly vague in all of its applications. A plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others. A court should therefore examine the complainant's conduct before analyzing other hypothetical applications of the law.[8]

When addressing the constitutionality of a statute that prohibits a certain brand of speech, the court must first determine whether the statute offends the protection of free expression found in the First Amendment before the court can determine *vel non* the statute is overbroad.[9] If the statute as applied does not run afoul of the First Amendment, the overbreadth challenge must fail.[10]

At oral argument, counsel for Mr. Muto acknowledged that Section 1240 did not implicate constitutionally protected speech, at least not in this case. This concession was well-founded; threats to public officials - - assuming they are in fact threats as defined by the statute - - enjoy no protection under the First Amendment.[11]

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[8] *Village of Hoffman Estates v. Flipside, Hoffman Est.,* 455 U.S. 489, 494-95, 102 S. Ct. 1186, 1191, 71 L. Ed. 2d 362, 369 (1982), *rehr'g denied*, 456 U.S. 950, 102 S. Ct. 2023, 72 L. Ed. 2d 476 (1982). *See also Robinson v. State*, 600 A.2d 356, 362 (Del. 1991) (quoting *Village of Hoffman*).

[9] *Id.*

[10] *Grayned,* 408 U.S. at 114-15, 92 S. Ct. at 2302, 33 L. Ed. 2d at 231.

[11] *See Robinson,* 600 A.2d at 363 ("Although the First Amendment generally protects speech from content-based regulations, the First Amendment does not protect all speech."). There are, of course, instances where language perceived to be a threat still must be analyzed against the backdrop of the First Amendment, particularly in instances where political debate may otherwise be stifled.

And, to the extent there is no constitutionally protected conduct at stake, there can be no challenge on the ground that the statute is overbroad.

V.

Vagueness arguments find support in the due process paradigm embodied in the Fifth and Fourteenth Amendments.[12] Generally, a statute will be declared vague when it lacks clearly defined prohibitions.[13] In the context of criminal statutes specifically, the statute must define the criminal offense "with sufficient definiteness that ordinary people, or persons of reasonable, ordinary, average, or common intelligence, can understand what conduct is prohibited by the statute."[14] And the statutory language must be clear enough to discourage arbitrary, discriminatory or

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See e.g. Watts v. United States, 394 U.S. 705, 707-08, 89 S. Ct. 1399, 1401, 22 L. Ed. 2d 664, 667 (1969)(reversing conviction for violation of statute prohibiting threats against the President upon concluding that the statement at issue, made at a political rally, was more of a "vehement[ly] sharp attack" against the President than a threat). *But see United States v. Kelner*, 534 F.2d 1020, 1024 (2d Cir. 1976), *cert. denied*, 429 U.S. 1022, 97 S. Ct. 639, 50 L. Ed. 2d 623 (1976)(finding threat to kill a member of a rival ethnic organization, even when made in the context of a political discussion on a nationally televised news broadcast, was sufficiently specific and unequivocal in purpose as to violate the applicable criminal statute). Clearly, the threat attributed to Mr. Muto was not made in the context of political debate or in any other context that would raise a legitimate question of whether First Amendment protections are implicated.

[12]*See* 16B AM. JUR. 2D *Constitutional Law* §920 (2003)("The void for vagueness doctrine is embodied in the Due Process Clauses of the Fifth and Fourteenth Amendments....").

[13]*Grayned*, 408 U.S. at 108, 92 S. Ct. at 2298, 33 L. Ed. 2d at 227.

[14]21 AM. JUR. 2D *Criminal Law* §15 (2003). *See also Sanders v. State*, 585 A.2d 117, 127 (Del. 1990)(statute vague "if it 'fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute....'")(citations omitted).

erratic enforcement.[15] In the interest of preserving due process, courts will hold criminal statutes to a higher standard of clarity than statutes that do not define criminal offenses.[16] Nevertheless, when considering a vagueness challenge to a criminal statute, courts must be mindful that "inartful drafting [alone] does not give rise to a constitutional claim."[17]

Generally, a defendant does not have standing to challenge a statute on the ground of vagueness if he is guilty of the conduct proscribed by the statute.[18] In this regard, it is well settled that:

> One cannot complain of the possible unequal operation of a statute on others less favorably situated than he or she is. And one who engages in some sort of conduct that is clearly proscribed by a statute cannot complain of the vagueness of the law as applied to the conduct of others. Thus, when the vice of a statute is vagueness, a litigant asserting the vagueness defense must demonstrate that the statute is vague as applied to the litigant's conduct without regard to its potentially vague

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[15] *Id.*

[16] *See State v. Baker*, 720 A.2d 1139, 1144 (Del. 1998).

[17] *Sanders*, 585 A.2d at 127.

[18] *See Village of Hoffman*, 455 U.S. at 495, 102 S. Ct. at 1191, 71 L. Ed. 2d at 369 ("A plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to others. A court should therefore examine the complainant's conduct before analyzing other hypothetical applications of the law.")(footnote omitted). *See also United States v. Mazurie*, 419 U.S. 544, 550, 955 S. Ct. 710, 714, 42 L. Ed. 2d 706, 713 (1975)("vagueness challenges to statutes which do not involve First Amendment freedoms must be examined in the light of the facts of the case at hand.")(citation omitted).

application to others.[19]

In this instance, although Mr. Muto has alleged that Section 1240 is vague as applied in all respects, he must first demonstrate that it is vague as applied to him before the Court will reach his broader argument.[20] He can make no such showing.

The facts regarding the circumstances surrounding the alleged threat, at least at this stage of the proceedings, are not in dispute. Mr. Muto was seated next to his attorney (the alleged victim) when he made a statement that a fact-finder could determine was a threat. As an accent to the verbal threat, he then allegedly handed a note to his attorney in which he arguably implied that the threat extended to members of his attorney's family. Mr. Muto argues that at the time this alleged offense conduct occurred, he was in the custody of the Department of Corrections and facing a potential life sentence under the habitual offender statute. Under these circumstances, Mr. Muto argues that is impossible to determine whether he had the "apparent ability to carry out [the] threat" either at the moment the threat was made or "at some future date." According to Mr. Muto, he would have no way of knowing

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[19] 16 AM. JUR. 2D *Criminal Law* §147 (2003)(citing *In re Complaint Against Harper*, 673 N.E.2d 1253 (Ohio 1996), *cert denied*, 520 U.S. 1274, 117 S. Ct. 2454, 138 L. Ed. 2d 212 (1997)). *Cf. State v. Cameron*, 498 A.2d 1217, 1221 (N.J. 1985)("A party may test a law for vagueness as applied only with respect to his or her particular conduct; if a statute is vague as applied to that conduct, it will not be enforced even though the law might be validly imposed against others not similarly situated.")(citation omitted).

[20] *See Village of Hoffman*, 455 U.S. at 494-95, 102 S. Ct. at 1191, 71 L. Ed. 2d at 369.

whether he had violated the statute because he had no way of knowing what the "future" had in store for him and, more importantly, had no way of knowing whether he would ever have the ability to carry out the threat he had just made. Nor could law enforcement reasonably be expected to know whether Mr. Muto had the "apparent ability to carry out [the] threat" at some future date because they also had no idea what the future held for Mr. Muto.

The Court agrees that Section 1240 is not as precise as it could be. But the Court cannot agree with Mr. Muto's contention that it is void for vagueness as applied to him. At the time he made the threat, Mr. Muto was seated at counsel table with his alleged victim no more than arms length away. Section 1240 makes clear that it is not the fulfillment of the threat that is proscribed; the statute proscribes the making of the threat in the first instance. At the moment the communication of the alleged threat was completed, Mr. Muto arguably had the "apparent ability to carry out [the] threat" then and there. The statute's reference to a "future date" was not even implicated.

Moreover, even if the reference to "future date" was implicated here, it is clear, if the State prevails in its proofs, that a reasonable person in Mr. Muto's situation would have appreciated that the statute's reference to "ability to carry out [the] threat at some future date" meant precisely what it says. Indeed, according to the State's

proffer, the entirety of the alleged oral threat was Mr. Muto's statement that he "would not be in jail forever." This statement suggests his intention to make good on the threat "at some future date," i.e., his release from prison. Whether Mr. Muto's statement, coupled with the written note, constitutes a threat, and whether he, in fact, had the "apparent ability to carry out that threat," both are questions of fact for the jury to decide. In the context of the motion *sub judice*, the Court need only be satisfied that Section 1240 provides fair notice to a person of ordinary intelligence "that his contemplated behavior is forbidden by statute," and that the statute was not drafted in such a manner as to allow "arbitrary or erratic enforcement."[21] The Court is satisfied that Section 1240 adequately addresses both concerns as applied to Mr. Muto.[22]

Although not required to do so given the conclusion that Section 1240 is not vague as applied to Mr. Muto, for completeness sake, the Court will briefly address Mr. Muto's argument that the statute is vague on its face. In this regard, the Court first notes that Section 1240 "clearly delineates its reach in words of common

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[21] *See State v. Baker*, 700 A.2d at 1147-48.

[22] *See In re Hanks*, 553 A.2d 1171, 1176 (Del. 1989)(the requirement that a statute provide adequate notice of its proscribed conduct does not mandate "mathematical certainty" in the language of the statute).

understanding."[23] The allegedly offensive language is not legalese. A reasonable law enforcement officer contemplating whether to make an arrest under this statute, or a reasonable person contemplating whether to make a threat to a public official, both would understand that to be found guilty under Section 1240, the declarant must, *inter alia,* have the "apparent ability to carry out [the] threat," either at the time it is made or at some "future date." The provision that Mr. Muto has attacked simply notifies the reader that even though the declarant may not be able to carry out the threat at the time it is made, he can still commit the offense of Threatening a Public Official if he has the apparent ability to carry out the threat at a later date. And, again, whether the declarant, in fact, has the apparent ability to carry out the threat, either at present or in the future, is a matter for decision by law enforcement at the time of arrest and later by the fact-finder at trial. That the inquiry implicated by this element of the offense may involve some appreciation of the putative defendant's individual circumstances does not, in and of itself, render the statute vague on its face. Law enforcement officers and jurors are fully capable of making this determination without being "arbitrary or erratic" in their conclusions.[24]

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[23] *See State v. Robinson,* 600 A.2d at 366 (citation omitted).

[24] *See State v. Baker*, 700 A.2d at1147-48.

VI.

Based on the foregoing, the motion to dismiss indictment is **DENIED.**

IT IS SO ORDERED.

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Slights, J.