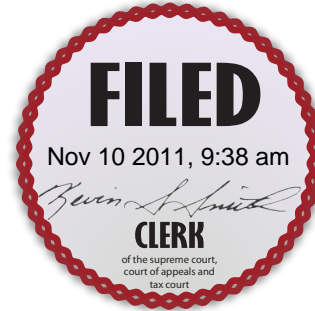


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE  
COURT OF APPEALS OF INDIANA**

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JOSEPH FAIRROW, )  
 )  
Appellant-Defendant, )  
 )  
vs. )  
 )  
STATE OF INDIANA, )  
 )  
Appellee-Plaintiff. )

No. 49A05-1012-CR-765

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APPEAL FROM THE MARION SUPERIOR COURT  
The Honorable Linda Brown, Judge  
Cause No. 49F10-1003-CM-16347

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**November 10, 2011**

**OPINION ON REHEARING - NOT FOR PUBLICATION**

**FRIEDLANDER, Judge**

In an unpublished memorandum decision, this court affirmed Joseph Fairrow's convictions of resisting law enforcement, a class A misdemeanor, and disorderly conduct, a class B misdemeanor. *See Fairrow v. State*, No. 49A05-1012-CR-765 (Ind. Ct. App. September 9, 2011). Fairrow has petitioned this court for rehearing, urging us to reconsider our decision and alleging as grounds for relief that our previous opinion contained a glaring omission, viz., we wholly neglected to consider an audiotape of the incident in addressing his challenge to the sufficiency of the evidence. We grant the petition for the limited purpose of clarifying that the tape was considered in rendering our decision.

The pertinent facts were set out in our original opinion and need only be briefly summarized here. Fairrow was driving a semi-tractor truck at approximately 11:30 p.m. in a residential neighborhood when Indianapolis Metropolitan Police Department Officer Tice observed that Fairrow failed to make a complete stop at a stop sign. The officer initiated a traffic stop. After obtaining Fairrow's license and registration, Officer Tice discovered that the vehicle's Texas plate was expired. Also, a search of the vehicle's VIN did not turn up any Indiana information. Officer Tice prepared three citations: (1) failure to register, (2) driving with expired plates, and (3) disregarding a stop sign. Officer Tice decided to tow the vehicle because the temporary plates had long since expired. Officer Stewart had arrived on the scene to assist when Officer Tice gave the citations to Fairrow. Fairrow's actions from that point on formed the basis for the criminal charges of which he was ultimately convicted and were the subject of the instant appeal. We need not repeat them here. It is enough to note for purposes of the rehearing petition that Fairrow made an audio recording of those events using his cell phone. He activated the recording device while Officer Tice was back

in his squad car running the vehicle documentation Fairrow had originally provided, and before the officer returned with the completed citations.

In appealing his convictions, Fairrow presented two issues for review, only one of which was impacted by the audio recording, and that issue is therefore the sole focus of Fairrow's rehearing petition. That issue, as originally framed by Fairrow, was: "Evidence is insufficient to support a conviction for disorderly conduct because Fairrow engaged in political speech and did not make unreasonable noise." *Appellant's Brief* at 6. Although the issue statement in his appellate brief did not even mention the audiotape, Fairrow's argument included the claim that the audio recording of the incident demonstrated that the conduct and statements upon which this charge was based were objectively political in nature (and thus constituted protected speech) and that they were not loud enough to constitute "unreasonable noise" within the meaning of the disorderly conduct statute. *See* Ind. Code Ann. § 35-45-1-3(a)(2) (West, Westlaw through end of 2011 1st Regular Sess.). Fairrow argued that the audio recording was "crucial" to the resolution of these issues. *Appellant's Brief* at 8. Fairrow contends upon rehearing that it was so crucial, in fact, that his "claim would never prevail if the officers' trial testimony was the only source of evidence against him." *Petition for Rehearing* at 4.

Indeed, Fairrow's contentions required a review of the evidence concerning what happened at the scene of his arrest. As the above statement implies, Fairrow argued that the testimony of the two arresting officers did not square with the audio-taped recording of the events in question. Further, he contended the audiotape demonstrated that he engaged in political speech and did not make unreasonable noise during the time after he was stopped

and before he was placed under arrest. In fact, he claims that he was “quite clear” about the importance of the audiotape vis-à-vis this issue. *Id.* As a result of the fact that our written decision did not mention the recording, Fairrow suggests, rather hyperbolically, that he was “effectively ... denied his constitutional right to appeal.” *Id.* at 1.

We did listen to the recording in reaching our decision.<sup>1</sup> We did not mention that we had, but it is not our practice to itemize all legal authority or every evidentiary matter considered when rendering our decision. In fact, we consider all materials submitted in the record, certainly including significant items of evidence, and especially including items upon which the parties’ arguments are explicitly premised – such as the audio recording in this case.

Contrary to what one might reasonably infer from Fairrow’s rehearing petition, the audio recording does not create a picture of the events of that night that differs greatly from the description provided thereof by Officers Tice and Stewart in their trial testimony. Perhaps the only discordant note is sounded in the officers’ consistent claim that Fairrow was

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<sup>1</sup> We note with interest the trial court’s comments after listening to the audiotape, *viz.*,

Let me say, sir, that I listened to that audio tape a couple of times. And I think it was pretty clear, at least to me, that I think a portion of this was orchestrated. I think you intentionally turned the telephone on, and I think that you intentionally behaved to, for the officers to arrest you for Resisting Law Enforcement. I think your behavior was more than intentional. I think that once the officer stopped you, then it became a I’ll get them, and I’ll tape it, and I’ll be just as bad as I can be along this process which and it just seemed pretty clear to me when I was listening to the tape, that the only person that was really doing a lot of the talking was the defendant. And it kept escalating because of what the defendant was saying. And then I think the defendant turned his telephone on in an effort to the Court[,] why I have no idea. I don’t know if it was his intent to file a lawsuit, or what? I have no idea. But that started out being just a simple traffic stop. That’s all it was, a simple traffic stop that you made far worse than it ever had to be. And I think you did it deliberately, that’s what I think.

*Transcript* at 90-91. These observations are not without merit.

“yelling” throughout the encounter. *See, e.g., Transcript* at 35. This perhaps creates an impression that the volume of Fairrow’s verbal protests was consistently somewhat louder than it actually was. Nevertheless, we observe that Fairrow’s volume was often louder than conversational and certainly loud enough to render plausible Officer Tice’s claim that people living in nearby houses were beginning to respond to the sounds of the incident. This was sufficient to prove that Fairrow “made unreasonable noise and continued to do so after being asked to stop.” *See* I.C. § 35-45-1-3(a)(2).

We turn now to Fairrow’s claim that the audio recording demonstrates that his verbal utterances that night constituted protected political speech. We resolved this question in the original opinion by analogizing this case to *J.D. v. State*, 859 N.E.2d 341 (Ind. 2007), and concluding that “Fairrow’s loud over-talking of the officer was not constitutionally-protected speech.” *Slip op.* at 5. Perhaps our conclusion in this regard bears some elaboration.

As we indicated in our original opinion, in *J.D.*, a law enforcement officer attempted to diffuse a dispute between J.D., a juvenile resident of a guardian home, and the facility’s house parent. While the officer attempted to discuss the matter with J.D., J.D. loudly interrupted the officer’s attempts to speak and did not heed requests to stop yelling. When this behavior persisted, the officer arrested J.D. and she was later adjudicated to be a delinquent in connection with the incident. J.D. appealed the adjudication, contending that her conduct constituted protected political speech. Our Supreme Court affirmed, concluding that J.D.’s alleged political speech consisted of persistent yelling over and obscuring of the officer’s attempts to speak and function as a law enforcement officer and amounted to an abuse of the right to free speech. As such, J.D.’s speech subjected her to accountability

under article 1, section 9, of the Indiana Constitution.

Our Supreme Court recently addressed the subject of political speech in the context of a disorderly conduct conviction and invoked *J.D.* in doing so. See *Barnes v. State*, 946 N.E.2d 572, *adhered to on reh'g*, 953 N.E.2d 473 (Ind. 2011). In *Barnes*, the court contrasted the situation in *J.D.* with that present in *Price v. State*, 622 N.E.2d 954 (Ind. 1993), where the court ruled that the defendant's conduct was protected political speech and thus that a conviction for disorderly conduct could not stand. The court noted that in *Price*, "the defendant loudly objected to the arrest of another person and the officers' threats to arrest her for her protest." *Barnes v. State*, 946 N.E.2d at 578. The court reversed upon its conclusion that "in *Price*, 'the defendant's speech did not obstruct or interfere with the police,' whereas the juvenile's alleged political speech in *J.D.* hampered the officer's ability to perform his law enforcement duties." *Id.* (quoting *J.D. v. State*, 622 N.E.2d at 344). Most significantly, the court characterized *J.D.*'s speech, which was not constitutionally protected, "as that of a person of interest refusing to cooperate with a police investigation" and therefore "not within the contours of political speech contemplated by *Price*." *Id.*

The audiotape in the instant case corroborates the testimonies of Officers Tice and Stewart that Fairrow persisted throughout the taped portion of the encounter in interrupting them as they sought his cooperation or attempted to explain what they were doing or what was happening.<sup>2</sup> He also called them liars on at least two occasions and shouted to his girlfriend as she drove up during the incident that they had beaten him. The audiotape

certainly does not contradict the State’s allegation that Fairrow’s conduct hampered the officers on the scene in the performance of their duty. In fact, it, along with the officers’ testimony, helped demonstrate that the allegation was true. Thus, as indicated in *J.D.*, and as set out in our original opinion, this case is analogous to *J.D.* in this important respect, and the same result obtains.

Farrow’s petition for rehearing is granted and our original opinion stands, augmented by these elaborations.

DARDEN, J., and VAIDIK, J., concur.

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<sup>2</sup> Fairrow did this by repeating, sometimes in staccato fashion, certain phrases or questions, such as “I didn’t do anything”, “What are you doing?”, “Oh my God”, “What did I do?”, and “What is wrong” or “What is wrong with you?”