2013 PA Super 127

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

Appeal from the Judgment of Sentence March 9, 2012
In the Court of Common Pleas of Berks County
Criminal Division at No(s): CP-06-CR-0002849-2011

BEFORE: PANELLA, J., OTT, J., and STRASSBURGER, J.*

OPINION BY OTT, J. **FILED MAY 23, 2013**

Collette Champagne McCoy appeals from the judgment of sentence entered against her in the Court of Common Pleas of Berks County following her conviction on charges of disorderly conduct, disrupting a procession, and conspiracy to disrupt a procession.[1] McCoy was sentenced to an aggregate term of 2 years' probation and 200 hours of community service. On appeal, McCoy claims 18 Pa.C.S. § 5508 is unconstitutionally vague, facially overbroad and unconstitutional as applied, there was insufficient evidence to support the convictions, and her sentence was manifestly excessive. After a thorough review of the submissions by the parties, relevant law, and the

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* Retired Senior Judge assigned to the Superior Court.

[1] 18 Pa.C.S. §§ 5503(a)(3), 5508 and 903(a)(1), respectively. The trial court acquitted McCoy of violating Section 5503(a)(4).

official record, we affirm in part, vacate in part, and remand for resentencing.

On June 30, 2011, a 40-50 car funeral procession for Sheriff's Deputy Kyle Pagerly, who had been killed in the line of duty, was slowly making its way through Reading. N.T. Trial, 2/13/12, at 19, 9. The procession consisted of fire, police, military and civilian vehicles. ***Id***. at 10. The emergency lights were activated on the official vehicles, but not the sirens. ***Id***. It took between five to ten minutes for the entire procession to pass. ***Id***. at 45. There were people lined up along the route. ***Id***. at 12. Some were crying, some had hands over their hearts, some bowed their heads. ***Id***. at 11. At approximately 3:45 p.m., as the procession passed along the 300 block of Penn Street, police officers in the procession saw McCoy and her co-defendant, Walter Javan Pruitt, walking along the street. Affidavit of Probable Cause, N.T. Trial at 12. McCoy crossed the street, walking through the procession. ***Id***. at 12-13. As the two walked in the street, feet away from the cars in the procession, they shouted, "Fuck the police," multiple times. ***Id***. at 13. First, one would shout it and then the other would respond. ***Id***. at 50. As McCoy walked down the street, shouting, she was also pumping her fist and laughing. ***Id***. at 50-51. As Pruitt walked down the street, he was swinging a red and white Sneaker Villa bag over his head.

Id. at 50.[2] As the procession passed, Pruitt also crossed the street between the cars. ***Id***. at 15-16.

As McCoy and Pruitt went down the street, next to the procession, waving the bag, pumping fists, and shouting, observers of the procession were reacting with disgust. ***Id***. at 37, 52. Because the police did not know what Pruitt, especially, was going to do next, ***id***. at 24, 32, 34, and due to the reactions of the observers, several police cars left the procession to respond to McCoy and Pruitt. ***Id***. at 16, 36-37, 52. One police officer had to push through an individual to approach Pruitt, ***id***. at 24, and observers cheered the police for stopping McCoy and Pruitt. ***Id.*** at 52. The police stopped McCoy and Pruitt and arrested them for interrupting a procession and disorderly conduct. ***Id***. at 17.

McCoy was convicted of violating 18 Pa.C.S. §§ 5505(a)(3)[3] and 5508. In relevant part, Section 5503 states:

> (a) Offense defined.--A person is guilty of disorderly conduct if, with intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof, he:
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> . . . .
>
> (3) uses obscene language, or makes an obscene gesture[.]

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[2] The bag contained clothes and a digital scale that had cocaine residue on it. Pruitt was also charged with possession of drug paraphernalia.

[3] The trial court acquitted McCoy of violating § 5503(a)(4) creating a hazardous or physically offensive condition by any act which serves no legitimate purpose of the actor.

18 Pa.C.S. § 5503(a)(3).

Section 5508 states, *in toto*:

> A person commits a misdemeanor of the third degree if, with intent to prevent or disrupt a lawful meeting, procession or gathering, he disturbs or interrupts it.

18 Pa.C.S. § 5508.

McCoy's first argument is that Section 5508 is unconstitutionally vague, facially overbroad, and unconstitutional as applied because the *mens rea* and *actus reus* are too ambiguous and subsequently criminalizes a substantial amount of constitutionally protected speech.

> [D]uly enacted legislation is presumed valid and unless it clearly and plainly violates the Constitution, it will not be declared unconstitutional. Accordingly, the party challenging the constitutionality of a statute bears a heavy burden of persuasion.

Commonwealth v. Davidson, 938 A.2d 198, 207 (Pa. 2007) (internal citations omitted).

> Under the void-for-vagueness standard, a statute will only be found unconstitutional if the statute is "so vague that persons of common intelligence must necessarily guess at its meaning and differ as to its application. However, a statute will pass a vagueness constitutional challenge if the statute "define[s] the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement."

Id. (internal citations omitted).

McCoy's argument is premised on the assertion that the statutory language barring the intent to "prevent or disrupt" a procession and a resulting "disturbance or interruption" of the procession does not sufficiently

inform a person what he or she may not do. McCoy claims that such broad language "encourages arbitrary and erratic arrests and convictions."[4]

McCoy, however, has not explained or given examples of, what behavior would lead to the arbitrary enforcement of the statute.[5] Given that it is McCoy's "heavy burden of persuasion", ***Davidson***, ***supra***, to demonstrate how the statute is impermissibly vague, we do not believe the unsupported allegations suffice. Moreover, we agree with the trial court's statement in its Pa.R.A.P. 1925(a) opinion, "A citizen is on notice that he or she may not disrupt a lawful meeting, procession or gathering by disturbing or interrupting it. An ordinary person would understand what conduct is prohibited and would have no reason to guess at the meaning of the word "disrupt."" ***See*** Trial Court Opinion at 11. The words used by the legislature are plain in their ordinary meaning and we do not believe they are unconstitutionally vague.

Next, McCoy claims the statute is facially overbroad. A statute is facially overbroad,

> only if it punishes lawful constitutionally protected activity as well as illegal activity. Thus, in determining whether a statute is

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[4] ***See Papachristou v. City of Jacksonville***, 405 U.S. 156, 162 (1972).

[5] We note Section 5508 was adopted in 1972. In the forty-plus years since, there are only two cases annotated. ***Commonwealth v. Siwert***, 4 Pa.D.&C.3d 589 (1977) and ***Lavendi v. Jenkins Tp.***, 49 Fed.Appx. 362 (C.A.3) (2002) (unreported). There does not appear to have been problems with encouraging arbitrary arrests or convictions under this Section.

> unconstitutional due to overbreadth, a "court's first task is to determine whether the enactment reaches a substantial amount of constitutionally protected conduct." The "overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep."

Commonwealth v. Davidson, 938 A.2d at 208 (internal citations omitted).

Additionally, "the United States Supreme Court has described application of the overbreadth doctrine as 'strong medicine' which is 'employed sparingly and only as a last resort.'" ***Id***. (citation omitted).

Initially, when determining whether a substantial amount of constitutionally protected activity is affected, we recognize "freedom of speech is subject to numerous constraints that render it a less-than absolute right in practice. The rights of others sometimes clash with and restrict one's freedom of speech. Just as one does not have the right to shout 'fire' in a crowded theater,"[6] so too, the Commonwealth has the authority to regulate those actions, which might include an element of speech, which disturb or interrupt a lawful procession.

Therefore, we reject McCoy's argument that because shouting "fuck the police" is not itself prosecutable, this statute is overbroad. Rather, we believe that facially, this statute requires a reasonable balance between protecting the First Amendment rights of those seeking to engage in a lawful

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[6] ***See Martin v. Capital Cities Media, Inc.***, 511 A.2d 830, 843 (Pa.Super. 1986).

procession, with the First Amendment rights of those who may be observing or are nearby.

McCoy's final constitutional argument is that the statute is unconstitutional as applied in that both the *actus reus* and *mens rea* are too ambiguous and criminalize a substantial amount of protected speech. This claim is based on the assertion that McCoy was "arrested and convicted of exercising pure speech." ***See*** Appellant's Brief at 29. However, our review of the official record does not support that assertion.

The evidence presented at trial was that the pair crossed the street through the funeral procession, swung a bag over head, conducted fist-pumping actions, shouted "fuck the police" numerous times, all while walking on the street and along the procession route, through the onlookers who were visibly disgusted, and within feet of the procession. These actions provided probable cause to stop McCoy and Pruitt and caused several police officers to leave the procession to respond. A reasonable person would be on notice that such actions would disturb the procession and thereby infringe on another's rights. McCoy, demonstrably, was not arrested and convicted for exercising pure speech. Rather, the evidence, viewed in totality, showed McCoy and Pruitt were engaging in a variety of actions, all of which

combined, disturbed the procession.[7] Therefore, the statue is not unconstitutionally vague as applied.

In her next issue, McCoy argues her convictions are invalid due to an insufficiency of evidence. Her argument regarding Section 5508 is based, at least partially on a standard of evidence used by the trial court of Northampton County in ***Commonwealth v. Siwert***, ***supra***. This standard was based on comments to tentative draft 13 of the Model Penal Code. While this is historically informative, there is no authority for the proposition that comments to a tentative draft[8] or a trial court decision are binding upon our Court. Currently, Section 5508 Comments refer generally to Section 250.8 of the Model Penal Code. Section 205.8, in turn, refers to the "Explanatory Note for Sections 250.1-250.12" which appears "before Section 250.1." ***See*** Section 205.8 Explanatory Note.

The current Explanatory Note states, in relevant part, "Section 205.8 covers disrupting meetings and processions. This offense is distinct from the general provision against disorderly conduct in that it reaches some

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[7] Under McCoy's argument, a person who burned a flag in the Pennsylvania Senate Chamber during a session would not be disturbing a meeting because burning a flag is exercising pure speech and cannot serve as the basis for a conviction under this section. We believe this interpretation produces an absurd result, and is not a supportable interpretation of the law.

[8] ***Siwert*** was decided in 1977 and there is no explanation why the trial court relied on commentary to a tentative draft.

instances of behavior not in itself disorderly but calculated to outrage the sensibilities of the group involved."

Looking at the language of the statute together with the current explanatory note and knowledge that the statute is balancing competing First Amendment rights, we do not believe that the Commonwealth is required to prove a situation fraught with possibilities of imminent violence. Instead, we believe that given the narrow focus of the law, and the fact that the explanatory note refers to actions not in itself disorderly conduct, we may consider a lesser degree of action as violating the statute and supporting a conviction.

Viewing the evidence, as cited above, in the light most favorable to the Commonwealth as verdict winner, there is sufficient evidence to support a conviction for disrupting a procession. As noted, McCoy's and Pruitt's actions rose to the level of probable cause to arrest for disorderly conduct. The explanatory note indicates that Section 5508 is designed to prohibit actions that do not necessarily rise to the level of disorderly conduct. McCoy had engaged in conduct that was more than a transitory annoyance to either the participant in the procession, which happened to include the police, and the observers, whose attention was diverted from the funeral procession and which caused observers to react in disgust. Contrary to McCoy's characterization that the police officers left the procession of their own volition, the police officers were legitimately responding to a situation that

implicated disorderly conduct. We believe there is sufficient evidence to support the conviction of Section 5508.

Conspiracy is established when the Commonwealth proves the defendant entered into an agreement to commit or aid in the commission of an unlawful act, there was a shared criminal intent, and an overt act was taken in furtherance of the conspiracy. ***See*** 18 Pa.C.S. § 903(a)(1); and ***generally***, ***Commonwealth v. Murphy***, 795 A.2d 1025 (Pa. Super. 2002).

Further,

> 'The essence of a criminal conspiracy is a common understanding, no matter how it came into being, that a particular criminal objective be accomplished.' ***Commonwealth v. Keefer***, 338 Pa.Super. 184, 190, 487 A.2d 915, 918 (1985). 'Therefore, a conviction for conspiracy requires proof of the existence of a shared criminal intent.' ***Commonwealth v. Sattazahn***, 428 Pa.Super. 413, 422, 631 A.2d 597, 602 (1993) [*appeal denied*, 539 Pa. 270, 652 A.2d 293 (1994)].].
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> ' "An explicit or formal agreement to commit crimes can seldom, if ever, be proved and it need not be, for proof of a criminal partnership is almost invariably extracted from the circumstances that attend its activities." ' ***Commonwealth v. Kennedy***, 499 Pa. 389, 395, 453 A.2d 927, 929-930 (1982), *quoting* ***Commonwealth v. Strantz***, 328 Pa. 33, 43, 195 A. 75, 80 (1937). 'Thus, a conspiracy may be inferred where it is demonstrated that the relation, conduct, or circumstances of the parties, and the overt acts of the co-conspirators sufficiently prove the formation of a criminal confederation.' ***Commonwealth v. Woodward***, 418 Pa.Super. 218, 226, 614 A.2d 239, 243 (1992).

Commonwealth v. Swerdlow, 431 Pa.Super. 453, 458, 636 A.2d 1173, 1176-1177 (1994) (internal quotations and additional

> citations omitted). "The conduct of the parties and the circumstances surrounding their conduct may create 'a web of evidence' linking the accused to the alleged conspiracy beyond a reasonable doubt." ***Commonwealth v. McKeever***, 455 Pa.Super. 604, 609, 689 A.2d 272, 274 (1997) (citation omitted.) Even if the conspirator did not act as a principal in committing the underlying crime, he is still criminally liable for the actions of his co-conspirators taken in furtherance of the conspiracy. ***Commonwealth v. Soto***, 693 A.2d 226, 229-230 (Pa. Super. 1997), ***appeal denied***, 550 Pa. 704, 705 A.2d 1308 (1997).

Commonwealth v. Johnson, 719 A.2d 778, 784-85 (Pa. Super. 1998) (*en banc*).

The concerted actions of McCoy and Pruitt, as related above, are sufficient to prove the conspiracy to disrupt the procession. Although Pruitt testified he was only repeating words from a movie he had recently seen and which he found funny, the trial court was under no obligation to accept the explanation. Rather, the trial court believed the actions undertaken by McCoy and Pruitt on the afternoon of June 30, 2011 demonstrated beyond a reasonable doubt the intent of the two to act together to disrupt the procession. McCoy is not entitled to relief on this claim.

We do agree with McCoy that there was insufficient evidence to support the conviction of disorderly conduct.[9] In relevant part, Section 5503 states,

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[9] McCoy was charged with violating two subsections of Section 5503; Sections 5503(a)(3) and (a)(4). McCoy was acquitted of Section 5503(a)(4), regarding the creation of "a hazardous or physically offensive condition by any act which serves no legitimate purpose of the actor."

> (a) A person is guilty of disorderly conduct if, with intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof, he:
>
> (3) uses obscene language, or makes an obscene gesture

18 Pa.C.S. § 5503(a)(3).

> The first inquiry is what is the definition of "obscene" for purposes of 18 Pa.C.S. § 5503(a)(3). This Court has held that, for purposes of a disorderly conduct statute prohibiting the use of obscene language, language is obscene if it meets the test set forth in ***Miller v. California***, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973):
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> > (a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest, (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law, and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.
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> ***Commonwealth v. Byner***, 438 Pa.Super. 473, 652 A.2d 909, 912 (1995).

Commonwealth v. Kelly, 758 A.2d 1284, 1286 (Pa. Super. 2000).

> Moreover, the offense of disorderly conduct is not intended as a catchall for every act which annoys or disturbs people; it is not to be used as a dragnet for all the irritations which breed in the ferment of a community. It has a specific purpose; it has a definite objective, it is intended to preserve the public peace; it has thus a limited periphery beyond which the prosecuting authorities have no right to transgress any more that the alleged criminal has the right to operate within its clearly outlined circumference.

Id. at 1287.

The trial court stated the conviction of disorderly conduct was based not upon the obscene character of the words, but that McCoy's words and

actions were fighting words, which are not a class of constitutionally protected speech. ***See Commonwealth v. Byner***, 652 A.2d 909, 912 n.4 (Pa. Super. 1995). The trial court's explanation in support of conviction appears more relevant to Section 5503(a)(4) than (a)(3). Section (a)(3), under which McCoy was convicted, addresses only obscene language or gestures and conviction under this section must be the result of such obscene behavior. We have reviewed to official record and must conclude there is no evidence that the chant was intended to appeal to anyone's prurient interest nor did it describe, in a patently offensive way sexual conduct. There was no evidence of obscene language or gestures and therefore we agree with McCoy that her conviction of disorderly conduct must be set aside.

McCoy's final claim is a challenge to the discretionary aspect of her sentence. Because we have vacated a conviction that provided an integral base for her total sentence, we will remand for imposition of a new sentence. Therefore, McCoy's sentencing claim is moot.

Judgment of sentence affirmed in part and vacated in part. This matter is remanded for imposition of new sentence. Sentencing hearing is to be held within 45 days of the return of the official record. Jurisdiction relinquished.

Strassburger, J., files a concurring and dissenting opinion.

Judgment Entered.

Mary A. Stroyboll

Deputy Prothonotary

Date: 5/23/2013