COURT OF APPEALS DECISION DATED AND FILED

December 14, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

No. 99-1767-FT

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

IN THE INTEREST OF DOUGLAS D., A PERSON UNDER THE AGE OF 17:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

DOUGLAS D.,

RESPONDENT-APPELLANT.

APPEAL from a judgment of the circuit court for Oconto County: RICHARD D. DELFORGE, Judge. *Affirmed.*

¶1 HOOVER, P.J. Douglas D. appeals a judgment adjudicating him delinquent for violating the disorderly conduct statute, § 947.01, STATS., based upon the content of a creative writing assignment he submitted to his English

teacher.[1] Douglas contends that his assignment constitutes pure speech protected by the First Amendment and that punishing him for his speech is therefore unconstitutional. This court concludes that the content of Douglas's writing assignment constitutes a true threat that is not protected by the First Amendment and that unprotected speech may be proscribed under the disorderly conduct statute. Accordingly, the judgment is affirmed.

¶2 The relevant facts are not in dispute. Douglas's English teacher gave him a creative writing assignment that called for Douglas to start a story that would be passed on to other students to finish. The assignment's title was "Top Secret," but no particular topic was assigned or prohibited. The assignment was to be completed during class.

¶3 Douglas did not immediately start his assignment, but instead talked and visited with friends. This, according to his teacher, disrupted the class. She sent Douglas into the hallway to start his story. At the end of the period, Douglas handed in his assignment and went to another class.

¶4 Douglas wrote the following:

> There one lived an old ugly woman her name was Mrs. C.[2] that stood for crab. She was a mean old woman that would beat children sencless. I guess that's why she became a teacher.
>
> Well one day she kick a student out of her class & he din't like it. That student was naned Dick.

[1] This is an expedited appeal under RULE 809.17, STATS.

[2] Douglas's teacher's last name began with the letter "C." The circuit court heard evidence that Douglas refers to his teacher as "Mrs. C."

> The next morning Dick came to class & in his coat he conseled a machedy. When the teacher told him to shut up he whiped it out & cut her head off.
>
> When the sub came 2 days later she needed a paperclipp so she opened the droor. Ahh she screamed as she found Mrs. C's head in the droor.

¶5 After reading Douglas's assignment, his teacher became upset and called the assistant principal. The assistant principal interpreted Douglas's paper as a threat to a staff member. He called Douglas to his office where Douglas apologized, saying that he did not intend any harm and that his story was not meant to be a threat to his teacher.

¶6 The State filed a delinquency petition alleging that Douglas had engaged in abusive conduct that tended to cause a disturbance in violation of § 947.01, STATS. Douglas's creative writing assignment provided the basis for the charge. After a fact-finding hearing, the court found Douglas delinquent. The court, considering the story's content and the circumstances in response to which it was written, rejected Douglas's claim that his contribution to the class assignment was protected by the First Amendment. It found that "[t]here is no question" Douglas's paper constituted a "direct threat" to Douglas's teacher. The circuit court further found that the story not only tended to, but did provoke a disturbance.[3] Finally, it determined that the story's content unreasonably offended

[3] Douglas attempts to characterize his story as "a third-person story describing a violent act [written] as a creative writing assignment." He does not, however, advance an argument that the circuit court's finding was clearly erroneous. Nor could he. The writing was composed after Douglas had been disciplined in front of his classmates for disruptive behavior and conveys the message that if "Mrs. C" were to admonish him again, she should be prepared to defend herself from harm. ("The next morning Dick came to class & in his coat he conseled a machedy. When the teacher told him to shut up he whiped it out & cut her head off.") Similarly, Douglas does not condemn as clearly erroneous the trial court's implicit finding that the threat was of a nature that would tend to cause a disturbance.

the senses or sensibilities of others in the community and was devoid of social value.[4]

¶7 Douglas contends that he is being unconstitutionally punished for exercising his right to free speech. This case involves the application of constitutional principles and a statute to a set of undisputed facts. An appellate court is not bound by the trial court's conclusions of law and must decide the matter de novo. *See* ***In re Smith***, 229 Wis.2d 720, 600 N.W.2d 258, 260 (Ct. App. 1999); *see also* ***Bose Corp. v. Consumers Union of United States, Inc.***, 466 U.S. 485, 499 (1984) ("[I]n cases raising First Amendment issues ... an appellate court has an obligation to 'make an independent examination of the whole record' in order to make sure that the 'judgment does not constitute a forbidden intrusion on the field of free expression.'") (quoted source omitted).

¶8 This court first examines whether Douglas's speech was protected by the First Amendment. The right to free speech is not absolute. For example, speech may be punished if it presents a clear and present danger of a serious substantive evil that rises far above inconvenience, annoyance or unrest. *See* ***Terminiello v. City of Chicago***, 337 U.S. 1, 4 (1949). In addition to speech that creates a clear and present danger, there are other classes of speech that receive

[4] Douglas contends that ***State v. Janssen***, 219 Wis.2d 362, 389, 580 N.W.2d 260, 271 (1998), "rejected a weighing of offensiveness against social value." Janssen was prosecuted for flag desecration after he defecated on an American flag. In a decision authored by Justice John P. Wilcox, the supreme court struck down the flag desecration statute as facially overbroad. At the end of the opinion, while expressing the court's sense of repugnance Janssen's conduct provoked, Justice Wilcox observed that defecating on the American flag was an act without social value. This court is not prepared to accord precedential value to a comment the supreme court made as part of a gratuitous expression of distaste for the conclusion the constitution compelled in the case before the court. In any event, in light of the circuit court's "direct threat" finding, its comment regarding social value is immaterial. This court observes, without deciding, that "true threats" may constitute a subspecies of proscribable "clear and present danger" expression.

limited or no First Amendment protection. They include: (1) obscenity, ***Miller v. California***, 413 U.S. 15, 24 (1973); (2) fighting words, ***Chaplinsky v. New Hampshire***, 315 U.S. 568, 572 (1942); (3) libel, ***New York Times Co. v. Sullivan***, 376 U.S. 254, 267 (1964); (4) commercial speech, ***Ohralik v. Ohio State Bar Assn.***, 436 U.S. 447, 456 (1978) and; (5) words likely to incite imminent lawless action, ***Brandenburg v. Ohio***, 395 U.S. 444 (1969).

¶9 Douglas argues that the State failed to show a clear and present danger of a serious substantive evil justifying punishment and that his creative writing does not fall within any of the other five categories. As the trial court determined, however, Douglas's writing does fall within another category of speech that is not protected by the First Amendment, namely, true threats.[5] Threats of violence are outside the First amendment and thus proscribable because of the government's interest in "protecting individuals from the fear of violence, from the disruption that fear engenders and from the possibility that the threatened violence will occur." ***R.A.V. v. St. Paul, Minn.***, 505 U.S. 377, 388 (1992). "When the basis for the content discrimination consists entirely of the very reason the entire class of speech at issue is proscribable, no significant danger of idea or viewpoint discrimination exists." ***Id***.; *see also* **State v. Zwicker**, 41 Wis.2d 497, 509, 164 N.W.2d 512, 518 (1969) (disorderly conduct statute proscribes acts that

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[5] *See, e.g.,* ***Watts v. United*** **States**, 394 U.S. 705 (1969) (per curiam) ("True threats" are not protected by the first amendment.) A threat is a "true threat" when "a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of intent to harm or assault." ***United States v. Orozco-Santillan***, 903 F.2d 1262, 1265 (9th Cir. 1990). "[T]hreats should be considered in light of their entire factual context, including the surrounding events and the reaction of the listeners." ***Id***., (citing ***United States v. Gilbert***, 884 F.2d 454, 457 (9th Cir. 1989)). Whether the circumstances demonstrate a "true threat" is a question of fact. *See* ***United States v. Khorrami***, 895 F.2d 1186, 1192 (7th Cir. 1990). As indicated, Douglas does not argue that the circuit court's finding of a direct threat was clearly erroneous. This court discerns no material difference in connotation between the phrase "true threat" and "direct threat."

would menace); ***State v. Dronso***, 90 Wis.2d 110, 115, 279 N.W.2d 710, 713 (Ct. App. 1979) (distinguishing nonproscribable "intent to annoy" from threats to injure). This court concludes that Douglas's composition's expression of a true threat is not protected by the First Amendment.

¶10 Douglas further contends that the disorderly conduct statute does not criminalize protected speech unless that speech is intertwined with conduct that is both disorderly and likely to cause a disturbance. He claims that his writing was pure speech, not intertwined with conduct other than putting paper to pen, and was therefore entitled to First Amendment protection.

¶11 This court rejects Douglas's pure-protected-speech contention for two reasons. First, as indicated, true threats are not protected. Second, Douglas's assertions that the disorderly conduct statute may not be applied to pure speech is incorrect. Douglas relies on the following passage in ***Zwicker***, 41 Wis.2d at 509, 164 N.W.2d at 518, as support for his position:

> The language of the disorderly conduct statute is not so broad that its sanctions may apply to conduct protected by the constitution. The mere propounding of unpopular views will not qualify for conviction. The statute does not proscribe activities intertwined with protected freedoms unless carried out in a manner which is violent, abusive, indecent, profane, boisterous or unreasonably loud, or conduct similar thereto, *and* under circumstances in which such conduct tends to cause or provoke a disturbance. Prohibition of conduct which has this effect does not abridge constitutional liberty.

¶12 The ***Zwicker*** court's use of the term "conduct" is not, however, confined to describing only physically disorderly acts. Our supreme court long ago used the word to describe both acts *and* (unprotected) words. *See* ***Teske v. State***, 256 Wis. 440, 444, 41 N.W.2d 642, 644 (1950), cited in ***State v. Givens***, 28

Wis.2d 109, 116, 135 N.W.2d 780, 784 (1965), and most recently in ***City of Oak Creek v. King***, 148 Wis.2d 532, 541, 436 N.W.2d 285, 288 (1989); *see also,* ***R.A.V.***, 505 U.S. at 389 (words can in some circumstances violate laws directed not against speech but against conduct). Thus, Douglas was subject to a delinquency prosecution based solely on the threat his writing conveyed.

¶13 Upon this court's conclusion that the content of Douglas's writing assignment is not constitutionally protected and that unprotected speech may be punished under the disorderly conduct statute, the judgment is affirmed.

By the Court.—Judgment affirmed.

This opinion will not be published. RULE 809.23(1)(b)4, STATS.