COURT OF APPEALS
DECISION
DATED AND FILED

May 17, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2011AP386-CR **Cir. Ct. No. 2010CM691**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

WILLIAM J. ZARDA,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Marathon County: GREGORY E. GRAU, Judge. *Affirmed*.

¶1 PETERSON, J.[1] William Zarda appeals an order denying his motion to dismiss based on his allegations that the disorderly conduct statute is

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

unconstitutionally overbroad and vague, and unconstitutional as applied. We affirm.

BACKGROUND

¶2 The criminal complaint alleged that Zarda encountered a former girlfriend at a Target store and yelled "fuck you bitch" as she walked down the store's main aisle. Zarda then followed her to another store's parking lot, where he confronted her husband and "got in [her husband's] face." The former girlfriend's children were present and became "hysterical."

¶3 The State charged Zarda with disorderly conduct. Zarda brought a pretrial motion, alleging the disorderly conduct statute was unconstitutionally overbroad and vague. He also asserted the statute was unconstitutional as applied because it infringed on his First Amendment right to use profanities.

¶4 The circuit court rejected Zarda's motion. Zarda subsequently pled no contest, and the court found him guilty.

DISCUSSION

¶5 Zarda first argues the disorderly conduct statute is unconstitutionally overbroad. "A statute is overbroad when its language, given its normal meaning, is so sweeping that its sanctions may be applied to constitutionally protected conduct which the state is not permitted to regulate." ***Bachowski v. Salamone***, 139 Wis. 2d 397, 411, 407 N.W.2d 533 (1987). Although Zarda concedes our supreme court in ***State v. Zwicker***, 41 Wis. 2d 497, 510-11, 164 N.W.2d 512 (1969), held the disorderly conduct statute is not overbroad, he asserts that in ***State v. Douglas D.***, 2001 WI 47, 243 Wis. 2d 204, 626 N.W.2d 725, our supreme court tacitly determined the disorderly conduct statute is overbroad. We disagree. The

court in ***Douglas D.*** concluded "[the disorderly conduct statute] is not overbroad. As this court repeatedly has held, 'the language of the disorderly conduct statute is not so broad that its sanctions may apply to conduct protected by the constitution.'" ***Id.***, ¶21 (citations omitted). Zarda seems to suggest on this point and others that we can reach a conclusion contrary to a direct holding of our supreme court. He is wrong. *See* ***Cook v. Cook***, 208 Wis. 2d 166, 189, 560 N.W.2d 246 (1997).

¶6 Zarda also asserts the disorderly conduct statute is unconstitutionally vague. A statute is vague if it fails to give reasonable notice of what conduct is prohibited. ***Zwicker***, 41 Wis. 2d at 507. However, our supreme court has held the disorderly conduct statute is not unconstitutionally vague. ***Id.*** at 507-08.

¶7 Zarda next argues the disorderly conduct statute is unconstitutional as applied because it criminalizes his First Amendment right to say "fuck you bitch." Zarda improperly frames the issue. The disorderly conduct charge was not based solely on his profane language; rather, it was based on all of his conduct. As the State points out in its brief, the criminal complaint alleged Zarda yelled "fuck you bitch" at his former girlfriend in the main aisle of a Target store, followed her to a nearby parking lot, confronted her husband, "got in [her husband's] face," and her children became "hysterical." The court found him guilty based on all these facts.[2] The statute is not unconstitutional as applied.

[2] Zarda instructs us in his reply brief that he wants to "make the Court aware that the purpose of this appeal at this time is a challenge on fighting words …." However, he offers no legal authority as to why we should only consider a portion of the factual basis the circuit court used to find him guilty.

¶8 Finally, Zarda contends the disorderly conduct statute is "quite possibly underbroad." In the context of the First Amendment, a statute is underbroad if it criminalizes "only particular viewpoints within a larger proscribable category of speech." ***Douglas D.***, 243 Wis. 2d 204, ¶20. At the motion hearing, Zarda made a passing reference to underbreadth, almost as an aside, and the court never ruled on the issue. Normally, a party must raise and argue an issue with enough prominence to allow the circuit court to address the issue and make a ruling. *See* ***Lenz Sales & Serv. v. Wilson Mut. Ins. Co.***, 175 Wis. 2d 249, 257, 499 N.W.2d 229 (Ct. App. 1993); *see also* ***Wirth v. Ehly***, 93 Wis. 2d 433, 443-44, 287 N.W.2d 140 (1980). "[I]ssues not raised or considered in the trial court will not be considered for the first time on appeal." ***Wirth***, 93 Wis. 2d at 443. Nevertheless, our supreme court has determined the disorderly conduct statute "is not underbroad. … It does not proscribe certain viewpoints within a category of unprotected conduct while leaving related viewpoints within the same category of speech outside its scope." ***Douglas D.***, 243 Wis. 2d 204, ¶21.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.