CASE LAW

Cops and Cameras

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91 S.Ct. 1780
Supreme Court of the United States

Paul Robert COHEN, Appellant,
v.
State of CALIFORNIA.

No. 299.
|
Argued Feb. 22, 1971.
|
Decided June 7, 1971.

Synopsis

The defendant was convicted before the Superior Court of Los Angeles County of the offense of disturbing the peace and he appealed. The Court of Appeal, Second District, 1 Cal.App.3d 94, 81 Cal.Rptr. 503, affirmed the conviction, and the defendant appealed. The Supreme Court, Mr. Justice Harlan, held, inter alia, that conviction of defendant who walked through courthouse corridor wearing jacket bearing the words 'Fuck the Draft' in a place where women and children were present of breach of the peace under California statute prohibiting disturbance of the peace by offensive conduct could not be justified either upon theory that the quoted words were inherently likely to cause violent reaction or upon more general assertion that the states, acting as guardians of public morality, may properly remove such offensive word from the public vocabulary since the state may not, consistently with the First and Fourteenth Amendments, make the simple public display involved of the single four-letter expletive a criminal offense.

Reversed.

Mr. Justice Blackmun, dissented and filed an opinion in which Mr. Chief Justice Burger, and Mr. Justice Black joined and in which Mr. Justice White joined in part.

****1783** Syllabus[*]

***15** Appellant was convicted of violating that part of Cal. Penal Code s 415 which prohibits 'maliciously and willfully disturb(ing) the peace or quiet of any neighborhood or person * * * by * * * offensive conduct,' for wearing a jacket bearing the words 'Fuck the Draft' in a corridor of the Los Angeles Courthouse. The Court of Appeal held that 'offensive conduct' means 'behavior which has a tendency to provoke others to acts of violence or to in turn disturb the peace,' and affirmed the conviction. Held: Absent a more particularized and compelling reason for its actions, the State may not, consistently with the First and Fourteenth Amendments, make the simple public display of this single four-letter expletive a criminal offense. Pp. 1787—1789.

1 Cal.App.3d 94, 81 Cal.Rptr. 503, reversed.

Attorneys and Law Firms

Melville B. Nimmer, Los Angeles, Cal., for appellant.

Michael T. Sauer, Los Angeles, Cal., for appellee.

Opinion

Mr. Justice HARLAN delivered the opinion of the Court.

This case may seem at first blush too inconsequential to find its way into our books, but the issue it presents is of no small constitutional significance.

***16** Appellant Paul Robert Cohen was convicted in the Los Angeles Municipal Court of violating that part of California Penal Code s 415 which prohibits 'maliciously and willfully disturb(ing) the peace or quiet of any neighborhood or person * * * by * * * offensive conduct * * *.'[1] He was given 30 days' imprisonment. The facts upon which his conviction rests are detailed in the opinion of the Court of Appeal of California, Second Appellate District, as follows:

'On April 26, 1968, the defendant was observed in the Los Angeles County ****1784** Courthouse in the corridor outside of division 20 of the municipal court wearing a jacket bearing the words 'Fuck the Draft' which were plainly visible. There were women and children present in the corridor. The defendant was arrested. The defendant testified that he wore the jacket knowing that the words were on the jacket as a means of informing the public of the depth of his feelings against the Vietnam War and the draft.

'The defendant did not engage in, nor threaten to engage in, nor did anyone as the result of his conduct ***17** in fact commit or threaten to commit any act of violence. The defendant did not make any loud or unusual noise, nor was there any evidence that he uttered any sound prior to his arrest.' 1 Cal.App.3d 94, 97—98, 81 Cal.Rptr. 503, 505 (1969).

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In affirming the conviction the Court of Appeal held that 'offensive conduct' means 'behavior which has a tendency to provoke others to acts of violence or to in turn disturb the peace,' and that the State had proved this element because, on the facts of this case, '(i)t was certainly reasonably foreseeable that such conduct might cause others to rise up to commit a violent act against the person of the defendant or attempt to forceably remove his jacket.' 1 Cal.App.3d, at 99—100, 81 Cal.Rptr., at 506. The California Supreme Court declined review by a divided vote.[2] We brought the case here, postponing the consideration of the question of our jurisdiction over this appeal to a hearing of the case on the merits. 399 U.S. 904, 90 S.Ct. 2211, 26 L.Ed.2d 558. We now reverse.

The question of our jurisdiction need not detain us long. Throughout the proceedings below, Cohen consistently ***18** claimed that, as construed to apply to the facts of this case, the statute infringed his rights to freedom of expression guaranteed by the First and Fourteenth Amendments of the Federal Constitution. That contention has been rejected by the highest California state court in which review could be had. Accordingly, we are fully satisfied that Cohen has properly invoked our jurisdiction by this appeal. 28 U.S.C. s 1257(2); Dahnke-Walker Milling Co. v. Bondurant, 257 U.S. 282, 42 S.Ct. 106, 66 L.Ed. 239 (1921).

I

In order to lay hands on the precise issue which this case involves, it is useful first to canvass various matters which this record does not present.

The conviction quite clearly rests upon the asserted offensiveness of the words Cohen used to convey his message to the public. The only 'conduct' which the State sought to punish is the fact of communication. Thus, we deal here with a conviction resting solely upon 'speech,' cf. Stromberg v. California, 283 U.S. 359, 51 S.Ct. 532, 75 L.Ed. 1117 (1931), not upon any separately identifiable conduct which allegedly was intended by Cohen to be perceived by others as expressive of particular views but which, on its face, does not necessarily convey any message and hence arguably could be regulated without effectively repressing Cohen's ability to express himself. Cf. ****1785** United States v. O'Brien, 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968). Further, the State certainly lacks power to punish Cohen for the underlying content of the message the inscription conveyed. At least so long as there is no showing of an intent to incite disobedience to or disruption of the draft, Cohen could not, consistently with the First and Fourteenth Amendments, be punished for asserting the evident position on the inutility or immorality of the draft his jacket reflected. Yates v. United States, 354 U.S. 298, 77 S.Ct. 1064, 1 L.Ed.2d 1356 (1957).

***19** Appellant's conviction, then, rests squarely upon his exercise of the 'freedom of speech' protected from arbitrary governmental interference by the Constitution and can be justified, if at all, only as a valid regulation of the manner in which he exercised that freedom, not as a permissible prohibition on the substantive message it conveys. This does not end the inquiry, of course, for the First and Fourteenth Amendments have never been thought to give absolute protection to every individual to speak whenever or wherever he pleases or to use any form of address in any circumstances that he chooses. In this vein, too, however, we think it important to note that several issues typically associated with such problems are not presented here.

In the first place, Cohen was tried under a statute applicable throughout the entire State. Any attempt to support this conviction on the ground that the statute seeks to preserve an appropriately decorous atmosphere in the courthouse where Cohen was arrested must fail in the absence of any language in the statute that would have put appellant on notice that certain kinds of otherwise permissible speech or conduct would nevertheless, under California law, not be tolerated in certain places. See Edwards v. South Carolina, 372 U.S. 229, 236—237, 83 S.Ct. 680, 683—684, 9 L.Ed.2d 697, and n. 11 (1963). Cf. Adderley v. Florida, 385 U.S. 39, 87 S.Ct. 242, 17 L.Ed.2d 149 (1966). No fair reading of the phrase 'offensive conduct' can be said sufficiently to inform the ordinary person that distinctions between certain locations are thereby created.[3]

In the second place, as it comes to us, this case cannot be said to fall within those relatively few categories of ***20** instances where prior decisions have established the power of government to deal more comprehensively with certain forms of individual expression simply upon a showing that such a form was employed. This is not, for example, an obscenity case. Whatever else may be necessary to give rise to the States' broader power to prohibit obscene expression, such expression must be, in some significant way, erotic. Roth v. United States, 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed.2d 1498 (1957). It cannot plausibly be maintained that this vulgar allusion to the Selective Service System would conjure up

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such psychic stimulation in anyone likely to be confronted with Cohen's crudely defaced jacket.

This Court has also held that the States are free to ban the simple use, without a demonstration of additional justifying circumstances, of so-called 'fighting words,' those personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction. Chaplinsky v. New Hampshire, 315 U.S. 568, 62 S.Ct. 766, 86 L.Ed. 1031 (1942). While the four-letter word displayed by Cohen in relation to the draft is not uncommonly employed in a personally provocative fashion, in this instance it was clearly not 'directed to the person of the hearer.' ****1786** Cantwell v. Connecticut, 310 U.S. 296, 309, 60 S.Ct. 900, 906, 84 L.Ed. 1213 (1940). No individual actually or likely to be present could reasonably have regarded the words on appellant's jacket as a direct personal insult. Nor do we have here an instance of the exercise of the State's police power to prevent a speaker from intentionally provoking a given group to hostile reaction. Cf. Feiner v. New York, 340 U.S. 315, 71 S.Ct. 303, 95 L.Ed. 295 (1951); Terminiello v. Chicago, 337 U.S. 1, 69 S.Ct. 894, 93 L.Ed. 1131 (1949). There is, as noted above, no showing that anyone who saw Cohen was in fact violently aroused or that appellant intended such a result.

***21** Finally, in arguments before this Court much has been made of the claim that Cohen's distasteful mode of expression was thrust upon unwilling or unsuspecting viewers, and that the State might therefore legitimately act as it did in order to protect the sensitive from otherwise unavoidable exposure to appellant's crude form of protest. Of course, the mere presumed presence of unwitting listeners or viewers does not serve automatically to justify curtailing all speech capable of giving offense. See, e.g., Organization for a Better Austin v. Keefe, 402 U.S. 415, 91 S.Ct. 1575, 29 L.Ed.2d 1 (1971). While this Court has recognized that government may properly act in many situations to prohibit intrusion into the privacy of the home of unwelcome views and ideas which cannot be totally banned from the public dialogue, e.g., Rowan v. United States Post Office Dept., 397 U.S. 728, 90 S.Ct. 1484, 25 L.Ed.2d 736 (1970), we have at the same time consistently stressed that 'we are often 'captives' outside the sanctuary of the home and subject to objectionable speech.' Id., at 738, 90 S.Ct., at 1491. The ability of government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it is, in other words, dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner. Any broader view of this authority would effectively empower a majority to silence dissidents simply as a matter of personal predilections.

In this regard, persons confronted with Cohen's jacket were in a quite different posture than, say, those subjected to the raucous emissions of sound trucks blaring outside their residences. Those in the Los Angeles courthouse could effectively avoid further bombardment of their sensibilities simply by averting their eyes. And, while it may be that one has a more substantial claim to a recognizable privacy interest when walking through a courthouse corridor than, for example, strolling through Central Park, surely it is nothing like the interest in ***22** being free from unwanted expression in the confines of one's own home. Cf. Keefe, supra. Given the subtlety and complexity of the factors involved, if Cohen's 'speech' was otherwise entitled to constitutional protection, we do not think the fact that some unwilling 'listeners' in a public building may have been briefly exposed to it can serve to justify this breach of the peace conviction where, as here, there was no evidence that persons powerless to avoid appellant's conduct did in fact object to it, and where that portion of the statute upon which Cohen's conviction rests evinces no concern, either on its face or as construed by the California courts, with the special plight of the captive auditor, but, instead, indiscriminately sweeps within its prohibitions all 'offensive conduct' that disturbs 'any neighborhood or person.' Cf. Edwards v. South Carolina, supra.[4]

****1787** II

Against this background, the issue flushed by this case stands out in bold relief. It is whether California can excise, as 'offensive conduct,' one particular scurrilous epithet from the public discourse, either upon the theory of the court below that its use is inherently likely to cause violent reaction or upon a more general assertion that the States, acting as guardians of public morality, ***23** may properly remove this offensive word from the public vocabulary.

The rationale of the California court is plainly untenable. At most it reflects an 'undifferentiated fear or apprehension of disturbance (which) is not enough to overcome the right to freedom of expression.' Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503, 508, 89 S.Ct. 733, 737, 21 L.Ed.2d 731 (1969). We have been shown no evidence that substantial numbers of citizens are standing ready to strike out physically at whoever may

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assault their sensibilities with execrations like that uttered by Cohen. There may be some persons about with such lawless and violent proclivities, but that is an insufficient base upon which to erect, consistently with constitutional values, a governmental power to force persons who wish to ventilate their dissident views into avoiding particular forms of expression. The argument amounts to little more than the self-defeating proposition that to avoid physical censorship of one who has not sought to provoke such a response by a hypothetical coterie of the violent and lawless, the States may more appropriately effectuate that censorship themselves. Cf. Ashton v. Kentucky, 384 U.S. 195, 200, 86 S.Ct. 1407, 1410, 16 L.Ed.2d 469 (1966); Cox v. Louisiana, 379 U.S. 536, 550—551, 85 S.Ct. 453, 462—463, 13 L.Ed.2d 471 (1965).

Admittedly, it is not so obvious that the First and Fourteenth Amendments must be taken to disable the States from punishing public utterance of this unseemly expletive in order to maintain what they regard as a suitable level of discourse within the body politic.[5] We ***24** think, however, that examination and reflection will reveal the shortcomings of a contrary viewpoint.

At the outset, we cannot overemphasize that, in our judgment, most situations where the State has a justifiable interest in regulating speech will fall within one or more of the various established exceptions, discussed above but not applicable here, to the usual rule that governmental bodies may not prescribe the form or content of individual expression. Equally important to our conclusion is the constitutional backdrop against which our decision must be made. The constitutional right of free expression is powerful medicine in a society ****1788** as diverse and populous as ours. It is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests. See Whitney v. California, 274 U.S. 357, 375—377, 47 S.Ct. 641, 648—649, 71 L.Ed. 1095 (1927) (Brandeis, J., concurring).

To many, the immediate consequence of this freedom may often appear to be only verbal tumult, discord, and ***25** even offensive utterance. These are, however, within established limits, in truth necessary side effects of the broader enduring values which the process of open debate permits us to achieve. That the air may at times seem filled with verbal cacophony is, in this sense not a sign of weakness but of strength. We cannot lose sight of the fact that, in what otherwise might seem a trifling and annoying instance of individual distasteful abuse of a privilege, these fundamental societal values are truly implicated. That is why '(w)holly neutral futilities * * * come under the protection of free speech as fully as do Keats' poems or Donne's sermons,' Winters v. New York, 333 U.S. 507, 528, 68 S.Ct. 665, 676, 92 L.Ed. 840 (1948) (Frankfurter, J., dissenting), and why 'so long as the means are peaceful, the communication need not meet standards of acceptability,' Organization for a Better Austin v. Keefe, 402 U.S. 415, 91 S.Ct. 1575, 29 L.Ed.2d 1 (1971).

Against this perception of the constitutional policies involved, we discern certain more particularized considerations that peculiarly call for reversal of this conviction. First, the principle contended for by the State seems inherently boundless. How is one to distinguish this from any other offensive word? Surely the State has no right to cleanse public debate to the point where it is grammatically palatable to the most squeamish among us. Yet no readily ascertainable general principle exists for stopping short of that result were we to affirm the judgment below. For, while the particular four-letter word being litigated here is perhaps more distasteful than most others of its genre, it is nevertheless often true that one man's vulgarity is another's lyric. Indeed, we think it is largely because governmental officials cannot make principled distinctions in this area that the Constitution leaves matters of taste and style so largely to the individual.

Additionally, we cannot overlook the fact, because it ***26** is well illustrated by the episode involved here, that much linguistic expression serves a dual communicative function: it conveys not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emotions as well. In fact, words are often chosen as much for their emotive as their cognitive force. We cannot sanction the view that the Constitution, while solicitous of the cognitive content of individual speech has little or no regard for that emotive function which practically speaking, may often be the more important element of the overall message sought to be communicated. Indeed, as Mr. Justice Frankfurter has said, '(o)ne of the prerogatives of American citizenship is the right to criticize public men and measures—and that means not only informed and responsible criticism but the freedom to speak foolishly and without moderation.' Baumgartner v. United States, 322 U.S. 665, 673—674, 64 S.Ct. 1240, 1245, 88 L.Ed. 1525 (1944).

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Finally, and in the same vein, we cannot indulge the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process. Indeed, governments might soon seize upon the censorship of particular words as a convenient guise for banning the expression of unpopular views. We have been able, as noted above, to discern little **1789 social benefit that might result from running the risk of opening the door to such grave results.

It is, in sum, our judgment that, absent a more particularized and compelling reason for its actions, the State may not, consistently with the First and Fourteenth Amendments, make the simple public display here involved of this single four-letter expletive a criminal offense. Because that is the only arguably sustainable rationale for the conviction here at issue, the judgment below must be reversed.

Reversed.

*27 Mr. Justice BLACKMUN, with whom THE CHIEF JUSTICE and Mr. Justice BLACK join.

I dissent, and I do so for two reasons:

1. Cohen's absurd and immature antic, in my view, was mainly conduct and little speech. See Street v. New York, 394 U.S. 576, 89 S.Ct. 1354, 22 L.Ed.2d 572 (1969); Cox v. Louisiana, 379 U.S. 536, 555, 85 S.Ct. 453, 464, 13 L.Ed.2d 471 (1965); Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 502, 69 S.Ct. 684, 690, 93 L.Ed. 834 (1949). The California Court of Appeal appears so to have described it, 1 Cal.App.3d 94, 100, 81 Cal.Rptr. 503, 507, and I cannot characterize it otherwise. Further, the case appears to me to be well within the sphere of Chaplinsky v. New Hampshire, 315 U.S. 568, 62 S.Ct. 766, 86 L.Ed. 1031 (1942), where Mr. Justice Murphy, a known champion of First Amendment freedoms, wrote for a unanimous bench. As a consequence, this Court's agonizing over First Amendment values seem misplaced and unnecessary.

2. I am not at all certain that the California Court of Appeal's construction of s 415 is now the authoritative California construction. The Court of Appeal filed its opinion on October 22, 1969. The Supreme Court of California declined review by a four-to-three vote on December 17. See 1 Cal.App.3d, at 104, 81 Cal.Rptr., at 503. A month later, on January 27, 1970, the State Supreme Court in another case construed s 415, evidently for the first time. In re Bushman, 1 Cal.3d 767, 83 Cal.Rptr. 375, 463 P.2d 727. Chief Justice Traynor, who was among the dissenters to his court's refusal to take Cohen's case, wrote the majority opinion. He held that s 415 'is not unconstitutionally vague and overbroad' and further said:

'(T)hat part of Penal Code section 415 in question here makes punishable only wilful and malicious conduct that is violent and endangers public safety and order or that creates a clear and present danger that others will engage in violence of that nature.

28 ' * * (It) does not make criminal any nonviolent act unless the act incites or threatens to incite others to violence * * *.' 1 Cal.3d, at 773—774, 83 Cal.Rptr., at 379, 463 P.2d, at 731.

Cohen was cited in Bushman, 1 Cal.3d, at 773, 83 Cal.Rptr., at 378, 463 P.2d, at 730, but I am not convinced that its description there and Cohen itself are completely consistent with the 'clear and present danger' standard enunciated in Bushman. Inasmuch as this Court does not dismiss this case, it ought to be remanded to the California Court of Appeal for reconsideration in the light of the subsequently rendered decision by the State's highest tribunal in Bushman.

Mr. Justice WHITE concurs in Paragraph 2 of Mr. Justice BLACKMUN'S dissenting opinion.

All Citations

403 U.S. 15, 91 S.Ct. 1780, 29 L.Ed.2d 284

Footnotes

* NOTE: The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See United States v. Detroit Timber & Lumber Co., 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

1 The statute provides in full:

'Every person who maliciously and willfully disturbs the peace or quiet of any neighborhood or person, by loud or unusual noise, or by tumultuous or offensive conduct, or threatening, traducing, quarreling, challenging to fight, or fighting, or

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who, on the public streets of any unincorporated town, or upon the public highways in such unincorporated town, run any horse race, either for a wager of for amusement, or fire any gun or pistol in such unincorporated town, or use any vulgar, profane, or indecent language within the presence or hearing of women or children, in a loud and boisterous manner, is guilty of a misdemeanor, and upon conviction by any Court of competent jurisdiction shall be punished by fine not exceeding two hundred dollars, or by imprisonment in the County Jail for not more than ninety days, or by both fine and imprisonment, or either, at the discretion of the Court.'

2 The suggestion has been made that, in light of the supervening opinion of the California Supreme Court in In re Bushman, 1 Cal.3d 767, 83 Cal.Rptr. 375, 463 P.2d 727 (1970), it is 'not at all certain that the California Court of Appeal's construction of s 415 is now the authoritative California construction.' Post, at 1789 (BLACKMUN, J., dissenting). In the course of the Bushman opinion, Chief Justice Traynor stated:

'(One may) * * * be guilty of disturbing the peace through 'offensive' conduct (within the meaning of s 415) if by his actions he wilfully and maliciously incites others to violence or engages in conduct likely to incite others to violence. (People v. Cohen (1969) 1 Cal.App.3d 94, 101, 81 Cal.Rptr. 503.)' 1 Cal.3d, at 773, 463 P.2d, at 730.

We perceive no difference of substance between the Bushman construction and that of the Court of Appeal, particularly in light of the Bushman court's approving citation of Cohen.

3 It is illuminating to note what transpired when Cohen entered a courtroom in the building. He removed his jacket and stood with it folder over his arm. Meanwhile, a policeman sent the presiding judge a note suggesting that Cohen be held in contempt of court. The judge declined to do so and Cohen was arrested by the officer only after he emerged from the courtroom. App. 18—19.

4 In fact, other portions of the same statute do make some such distinctions. For example, the statute also prohibits disturbing 'the peace or quiet * * * by loud or unusual noise' and using 'vulgar, profane, or indecent language within the presence or hearing of women or children, in a loud and boisterous manner.' See n. 1, supra. This secondquoted provision in particular serves to put the actor on much fairer notice as to what is prohibited. It also buttresses our view that the 'offensive conduct' portion, as construed and applied in this case, cannot legitimately be justified in this Court as designed or intended to make fine distinctions between differently situated recipients.

5 The amicus urges, with some force, that this issue is not properly before us since the statute, as construed, punishes only conduct that might cause others to react violently. However, because the opinion below appears to erect a virtually irrebuttable presumption that use of this word will produce such results, the statute as thus construed appears to impose, in effect, a flat ban on the public utterance of this word. With the case in this posture, it does not seem inappropriate to inquire whether any other rationale might properly support this result. While we think it clear, for the reasons expressed above, that no statute which merely proscribes 'offensive conduct' and has been construed as broadly as this one was below can subsequently be justified in this Court as discriminating between conduct that occurs in different places or that offends only certain persons, it is not so unreasonable to seek to justify its full broad sweep on an alternate rationale such as this. Because it is not so patently clear that acceptance of the justification presently under consideration would render the statute overbroad or unconstitutionally vague, and because the answer to appellee's argument seems quite clear, we do not pass on the contention that this claim is not presented on this record.

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207 Cal.App.4th 954
Court of Appeal, First District, Division 1, California.

The PEOPLE, Plaintiff and Respondent,
v.
Charles Byon NISHI, Defendant and Appellant.

No. A129724.
|
July 13, 2012.
|
Certified for Partial Publication.*
|
Review Denied Oct. 17, 2012.

Synopsis

Background: Defendant was convicted in the Superior Court, Marin County, No. SC169462A, Paul M. Haakenson, J., of attempting to deter or resist an executive officer in the performance of duty. Defendant appealed.

Holdings: The Court of Appeal, Dondero, J., held that:

defendant did not have a reasonable expectation of privacy in unauthorized campsite on public land;

defendant's statement in e-mail, that he was "armed and will now fire on all Sheriff and Fish & Game after this email," was a direct threat of violence that was not protected under the First Amendment; and

evidence of defendant's e-mail threat supported conviction.

Affirmed.

Attorneys and Law Firms

****886** Hilda Scheib, Esq., under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General Dane R. Gillette, Chief Assistant Attorney General Gerald A. Engler, Senior Assistant Attorney General Seth K. Schalit, Supervising Deputy Attorney General, Laurence K. Sullivan, Supervising Deputy Attorney General, for Plaintiff and Respondent.

DONDERO, J.

***957** Defendant Charles Nishi was convicted following a jury trial of one count of attempting to deter or resist an executive officer in the performance of duty in violation of Penal Code section 69.[1] In this appeal he challenges the denial of his pretrial motion to suppress evidence, and complains that he was denied the right to testify at trial. He also argues that the conviction is not supported by the evidence, and objects to the imposition of a probation condition that directs him to undergo a psychological evaluation and take medication as directed by a physician. In a supplemental brief, defendant claims instructional error and improper denial of his motion for ***958** self-representation. We conclude that defendant had no reasonable expectation of privacy in the area searched, and was not denied the right to testify at trial. The evidence supports the conviction and defendant's motion for self-representation was untimely. No instructional error occurred. The medication condition of probation is both reasonably related to deterring future criminality, and neither vague nor overbroad. We therefore affirm the judgment.

STATEMENT OF FACTS

The United States Air Force Freedom of Information and Privacy Act Office of ****887** the Department of Defense received an e-mail signed by Charles Nishi, who referred to himself as "The Shepherd," dated March 27, 2010, which was designated as an "EMERGENCY COMMUNICATION." In the e-mail Nishi stated he had been located after numerous California Highway Patrol helicopter flights, and complained that California's Department of Fish and Game had been repeatedly and unlawfully shooting at protected mountain lions in the "Open Space" to "PROVOKE AN ATTACK which endangers the public." Nishi petitioned for an immediate "shut down" of "Marin County Sheriffs and Fish & Games operations," and asked the United States Fish and Wildlife Service and the Department of Justice to "take control of all wild life activities" in the Marin County Indian Valley Open Space Preserve to prevent further slaughter of mountain lions. He also declared: "I am armed and will now fire on all Sheriff and Fish & Game after this email so either shut them down or put some boots on the ground to join the battle, remember that if they kill me what is going to happen to the human race by APOLLO or the same beings on Codex Dresden." Defendant further pointed out he had informed California's Department of Fish and Game that the United

States Air Force was “monitoring their activities” through air support.

The Department of Defense forwarded the e-mail to the Marin County Sheriff's Department on March 29, 2010. Deputy Sheriff Christopher Henderson, an officer who had often investigated cases of “criminal threats” to law enforcement, was given the e-mail with directions to “take care of it.” Deputy Henderson reviewed the e-mail and was alarmed by its nature, detail, length and content. He decided the message represented a “credible threat” and “safety issue,” so he issued a computer-generated “Officer Safety/Welfare Check” bulletin, which he sent to regional law enforcement agencies, including the Department of Fish and Game. In the bulletin the deputy identified defendant Charles Nishi of Novato as the author of an angry, confrontational e-mail sent to military officials, and included a description and photograph of him. The bulletin also mentioned a warning from defendant in the e-mail that he “is armed and will ‘fire on’ Sheriff and Fish and Game personnel if confronted.” Deputy Henderson's primary objective in issuing the bulletin was to effectuate a medical evaluation of defendant.

***959** Brian Sanford, superintendant in charge of operations for the Indian Valley Open Space Preserve, received the e-mail and Deputy Henderson's bulletin. As a result, he posted the e-mail and directed his staff “not to go into that preserve” until contact was made with defendant. Charles Armor, regional manager for the Bay Delta region of California's Department of Fish and Game, became concerned for the safety of his staff after learning of the contents of defendant's e-mail. He advised his staff “not to wear their uniforms,” and be “a little more vigilant” while working in the field.

Marin County Deputy Sheriff Brenndon Bosse, who has patrol responsibilities in the Indian Valley Open Space Preserve, also received defendant's e-mail and the associated bulletin from Deputy Henderson. He was delegated the duty to proceed to the Indian Valley Open Space Preserve to contact defendant. Deputy Bosse was acquainted with defendant due to prior contacts: his prior infractions in 2009 for camping in the preserve without a permit, and unsubstantiated reports made by defendant of the shooting of mountain lions. Defendant had been cooperative and nonthreatening with Deputy Bosse in the past. Nevertheless, “because of the threatening statement” in the e-mail that he “would ****888** fire upon Sheriff's deputies or Fish and Game officers,” Bosse stayed near cover as he hiked in the preserve searching for defendant.

About 6:00 p.m. on March 31, 2010, Deputy Bosse located defendant at a fire road in the Indian Valley Open Space Preserve. Defendant affirmed he sent the e-mail, but did not acknowledge he wrote the paragraph that threatened to “fire upon Sheriff's deputies or Fish and Game officers.” Defendant consented to a search for weapons, and exclaimed that the e-mail “worked” by keeping the officers “off the preserve.” He was then arrested and transported to the psychiatric facility at Marin General Hospital. During a subsequent search of defendant's campsite Bosse discovered boxes of new shotgun shells under a tarp next to a tent, although no firearm was found.

DISCUSSION

I. The Denial of the Motion to Suppress Evidence.

Defendant complains of the warrantless search of his campsite, and specifically the seizure of the boxes of shotgun shells from a tarp “immediately surrounding” his tent. Defendant argues that his “expectation of privacy in the campsite was subjectively as well as objectively reasonable, given his homeless status and the presumed willingness of society to recognize an expectation of privacy for a homeless camper on secluded public land.” Defendant's position is that the tarp was within the “curtilage” of his campsite, and thus “entitled to Fourth Amendment protections.” The Attorney ***960** General responds that defendant “had no reasonable expectation of privacy in the location where the ammunition was found,” so no Fourth Amendment violation occurred as a result of the warrantless search.

In reviewing the trial court's denial of a motion to suppress evidence, we view the record in the light most favorable to the trial court's ruling, deferring to those express or implied findings of fact supported by substantial evidence. (*People v. Alvarez* (1996) 14 Cal.4th 155, 182, 58 Cal.Rptr.2d 385, 926 P.2d 365; *People v. Miranda* (1993) 17 Cal.App.4th 917, 922, 21 Cal.Rptr.2d 785.) We independently review the trial court's application of the law to the facts. (*People v. Alvarez, supra,* at p. 182, 58 Cal.Rptr.2d 385, 926 P.2d 365.)

The threshold issue before us is “ ‘whether the challenged action by the officer “has infringed an interest of the defendant which the Fourth Amendment was designed to protect.” [Citations.] ...’ [Citations.]” (*People v. Shepherd* (1994) 23 Cal.App.4th 825, 828, 28 Cal.Rptr.2d 458.) “ ‘An illegal search or seizure violates the federal constitutional

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rights only of those who have a legitimate expectation of privacy in the invaded place or seized thing. [Citation.] The legitimate expectation of privacy must exist in the particular area searched or thing seized in order to bring a Fourth Amendment challenge.' [Citation.]" (*People v. McPeters* (1992) 2 Cal.4th 1148, 1171, 9 Cal.Rptr.2d 834, 832 P.2d 146, italics omitted; see also *People v. Jenkins* (2000) 22 Cal.4th 900, 971, 95 Cal.Rptr.2d 377, 997 P.2d 1044; *People v. Roybal* (1998) 19 Cal.4th 481, 507, 79 Cal.Rptr.2d 487, 966 P.2d 521.)

"A defendant has the burden at trial of establishing a legitimate expectation of privacy in the place searched or the thing seized." (*People v. Jenkins, supra,* 22 Cal.4th 900, 972, 95 Cal.Rptr.2d 377, 997 P.2d 1044.) "A person seeking to invoke the protection of the Fourth Amendment must demonstrate both that he harbored a subjective expectation of privacy and that the expectation was objectively ****889** reasonable. [Citation.] An objectively reasonable expectation of privacy is 'one society is willing to recognize as reasonable.' [Citation.] Stated differently, it is an expectation that has ' " 'a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society.' " ' [Citation.]" (*People v. Hughston* (2008) 168 Cal.App.4th 1062, 1068, 85 Cal.Rptr.3d 890 (*Hughston*); see also *Smith v. Maryland* (1979) 442 U.S. 735, 740, 99 S.Ct. 2577, 61 L.Ed.2d 220; *United States v. Dodds* (10th Cir.1991) 946 F.2d 726, 728 (*Dodds*).)

" 'A "reasonable" expectation of privacy is an objective entitlement founded on broadly based and widely accepted community norms. [Citation.]' [Citation.]" (*Rains v. Belshé* (1995) 32 Cal.App.4th 157, 173, 38 Cal.Rptr.2d 185.) "There is no set formula for determining whether a person has a reasonable expectation of privacy in the place searched, but the totality of the ***961** circumstances are considered. [Citation.] Among the factors sometimes considered in making the determination are whether the defendant has a possessory interest in the thing seized or place searched [citation], 'whether he has the right to exclude others from that place; whether he has exhibited a subjective expectation that it would remain free from governmental invasion; whether he took normal precautions to maintain his privacy and whether he was legitimately on the premises.' [Citation.]" (*In re Rudy F.* (2004) 117 Cal.App.4th 1124, 1132, 12 Cal.Rptr.3d 483.)

The most significant, and ultimately controlling, factor in the case before us is that defendant was not lawfully or legitimately on the premises where the search was conducted. The uncontradicted evidence reveals that camping on the Indian Valley Open Space Preserve was prohibited without a permit. Defendant had no authorization to camp within or otherwise occupy the public land. On at least four or five recent occasions he had been cited by officers for "illegal camping" and evicted from other campsites in the preserve.

Thus, both the illegality, and defendant's awareness that he was illicitly occupying the premises without consent or permission, are undisputed. "Legitimation of expectations of privacy by law must have a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society." (*Rakas v. Illinois* (1978) 439 U.S. 128, 143, fn. 12, 99 S.Ct. 421, 58 L.Ed.2d 387.) Defendant was not in a position to legitimately consider the campsite—or the belongings kept there—as a place society recognized as private to him. (*Dodds, supra,* 946 F.2d 726, 728–729.) Nor did he have the right to exclude others from that place. He had no ownership, lawful possession, or lawful control of the premises searched. (See *United States v. Gale* (D.C.Cir.1998) 136 F.3d 192, 195–196; *United States v. Carr* (10th Cir.1991) 939 F.2d 1442, 1446.) A "person can have no reasonable expectation of privacy in premises on which they are wrongfully present... ." (*United States v. Gutierrez–Casada* (D.Kan.2008) 553 F.Supp.2d 1259, 1270; see also *United States v. McRae* (6th Cir.1998) 156 F.3d 708, 711; *Dodds, supra,* at pp. 728–729.)

Defendant's unlawful, temporary occupation of the campsite distinguishes the present case from *United States v. Gooch* (9th Cir.1993) 6 F.3d 673, 676–677, in which the court concluded that the defendant had an objectively reasonable expectation of privacy in a tent pitched for several days in a public campground where he was "legally permitted to camp." (*Id.* at p. 677; see also *United States v. Basher* (9th Cir.2011) 629 F.3d 1161, 1167–1168.) In ****890** *United States v. Sandoval* (9th Cir.2000) 200 F.3d 659, 660–661 (*Sandoval*), the court extended the holding in *Gooch* to find a legitimate expectation of privacy associated with the seizure of a medicine bottle discovered during a search of a "makeshift ***962** tent" "located on Bureau of Land Management" property, (*id.* at p. 660), where it was "unclear whether Sandoval had permission to be there." (*Id.* at p. 661.) The defendant's tent in *Sandoval* was located in an area that was heavily covered by vegetation and virtually impenetrable. In addition, the tent was closed on all four sides, and the medicine bottle was not visible from outside. (*Id.* at p. 660.)

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The court in *Sandoval* concluded: "[W]e do not believe the reasonableness of Sandoval's expectation of privacy turns on whether he had permission to camp on public land. Such a distinction would mean that a camper who overstayed his permit in a public campground would lose his Fourth Amendment rights, while his neighbor, whose permit had not expired, would retain those rights." (*Id.* at p. 661, fn. omitted.)

Similarly, in *Hughston, supra,* 168 Cal.App.4th 1062, 1068–1069, 1071, 85 Cal.Rptr.3d 890, the defendant was found to have "a reasonable expectation of privacy" for Fourth Amendment purposes in an aluminum frame covered with tarps that was erected within a designated site on land specifically set aside for camping during a music festival. The court in *Hughston* declared: " 'One should be free to depart the campsite for the day's adventure without fear of this expectation of privacy being violated.' " (*Id.* at p. 1070, 85 Cal.Rptr.3d 890, quoting *People v. Schafer* (Colo.1997) 946 P.2d 938, 944.)

Here, in contrast to *Sandoval* and *Hughston,* not only was defendant clearly camped in a prohibited location, the shotgun shells were seized from *outside* his tent, in a pile of debris under a loose tarp. While a tent located in a public campground may be considered a private area where people sleep and keep valuables, functionally somewhat comparable to a house, apartment, or hotel room, the remainder of defendant's unauthorized, undeveloped campsite was a dispersed, ill-defined site, exposed and open to public view. The area around the tent was not within a defined residential curtilage in which defendant had a reasonable expectation of privacy. (*United States v. Basher, supra,* 629 F.3d 1161, 1169.) Also, after his repeated removal by officers from campsites he had occupied in the same preserve in the recent past, defendant was conscious of the illegality, which further tends to negate his legitimate expectation of privacy in that location. (*People v. Thomas* (1995) 38 Cal.App.4th 1331, 1333–1334, 45 Cal.Rptr.2d 610 (*Thomas*).)

We find the decision in *United States v. Ruckman* (10th Cir.1986) 806 F.2d 1471, persuasive in the present case. In *Ruckman,* the defendant lived in a natural cave located in a remote area of southern Utah on land owned by the United States and controlled by the Bureau of Land Management. He attempted to enclose the cave by "fashioning a crude entrance wall from boards and other materials which surrounded a so-called 'door.' " (*Id.* at p. 1472.) A warrantless search of the cave resulted in seizure of firearms and "anti-personnel booby traps." (*Ibid.*) As in the case before us, the evidence established that ***963** "Ruckman was admittedly a trespasser on federal lands and subject to immediate ejectment" (*ibid.*) by authorities "at any time." (*Id.* at p. 1473.) The court pointed out that " 'whether the occupancy and construction were in bad faith,' " and the " 'legal right to occupy the land and build structures on it,' " were factors " 'highly relevant' " to the issue of the defendant's expectation of privacy. (*Id.* at p. 1474, quoting *Amezquita v. Hernandez–Colon* (1st Cir.1975) 518 F.2d 8, 12.) The court determined "that Ruckman's cave is ****891** not subject to the protection of the Fourth Amendment." (*Ruckman, supra,* at p. 1472.)

Here, as in *Ruckman,* defendant was a trespasser on public land, and occupied the campsite without authority in bad faith. "Where, as here, an individual 'resides' in a temporary shelter on public property without a permit or permission and in violation of a law which expressly prohibits what he is doing, he does *not* have an objectively reasonable expectation of privacy. (*United States v. Ruckman* (10th Cir.1986) 806 F.2d 1471, 1474 [rejecting a claim of privacy in a cave on federal property because the determination whether a place constitutes a person's 'home' must take into account the means by which it was acquired and whether it is occupied without any legal right]; *Amezquita v. Hernandez–Colon* (1st Cir.1975) 518 F.2d 8, 11–12 [no privacy right in a squatter's community on public property]; *State v. Cleator* (1993) 71 Wash.App. 217 [857 P.2d 306, 308–309] [no privacy right in a tent on public property]; *State v. Mooney* (1991) 218 Conn. 85 [588 A.2d 145, 152, 154] [no privacy right in a squatter's 'home' under a bridge abutment].)" (*Thomas, supra,* 38 Cal.App.4th 1331, 1334–1335, 45 Cal.Rptr.2d 610.)[2] We therefore conclude that the warrantless search of defendant's campsite did not violate the Fourth Amendment.

II. The Failure of the Trial Court to Advise Defendant of his Right to Testify.[**]

III. The Evidence to Support the Conviction of a Violation of Section 69.

Next, defendant maintains that his conviction of a violation of section 69 is not supported by the evidence. Defendant contends that his e-mail neither "directly threatened the sheriff or Fish & Game department," nor "showed any intent that the federal government convey" his threat to those officers. He also argues that his "threat did not have as its requisite purpose the deterrence of local officials from performing their duties," but rather was "intended to ***964** convince the federal agencies" to intervene to halt actions

defendant considered unlawful—that is, the unauthorized shooting of mountain lions.

A. The Standard of Review.

We first consider the nature of our review of the evidence. Defendant requests that we "employ [an] independent review standard," due to the "plausible First Amendment defense to [the] charge."

"In *Bose Corp. v. Consumers Union of U.S., Inc.* (1984) 466 U.S. 485, 499 [104 S.Ct. 1949, 80 L.Ed.2d 502], the United States Supreme Court explained that 'in 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." ' [Citation.]" (*People v. Lindberg* (2008) 45 Cal.4th 1, 36, 82 Cal.Rptr.3d 323, 190 P.3d 664.) "[W]hen the appellate issue is whether a particular communication falls outside the protection of the First Amendment, independent review is called for, 'both to be sure that the speech in question actually falls within the unprotected category and to confine the ****892** perimeters of any unprotected category within acceptably narrow limits in an effort to ensure that protected expression will not be inhibited.' [Citation.]" (*Krinsky v. Doe 6* (2008) 159 Cal.App.4th 1154, 1161–1162, 72 Cal.Rptr.3d 231 (*Krinsky*).) "Relying on *Bose,*" the California Supreme Court "held in *In re George T.* [(2004) 33 Cal.4th 620, [16 Cal.Rptr.3d 61, 93 P.3d 1007]], that when a plausible First Amendment defense is raised, a reviewing court should independently review the entire record in determining the sufficiency of evidence supporting a juvenile court's finding that the minor made a criminal threat within the meaning of section 422." (*Lindberg, supra,* at p. 37, 82 Cal.Rptr.3d 323, 190 P.3d 664.) The court "explained that independent review of the constitutionally relevant facts is necessary in cases involving First Amendment issues 'to ensure that a speaker's free speech rights have not been infringed by a trier of fact's determination that the communication at issue constitutes a criminal threat.' ([*In re George T., supra,*] at p. 632 [16 Cal.Rptr.3d 61, 93 P.3d 1007].) Independent review is employed 'precisely to make certain that what the government characterizes as speech falling within an unprotected class actually does so.' [Citation.]" (*Ibid.*)

"Thus, when called upon to draw ' "the line between speech unconditionally guaranteed and speech [that] may legitimately be regulated," ' 'we "examine for ourselves the statements in issue and the circumstances under which they were made to see ... whether they are of a character which the principles of the First Amendment, as adopted by the Due Process Clause of the Fourteenth Amendment, protect." ' [Citations.]" (*Krinsky, supra,* 159 Cal.App.4th 1154, 1161–1162, 72 Cal.Rptr.3d 231.) " 'Independent review is not the equivalent of ***965** de novo review "in which a reviewing court makes an original appraisal of all the evidence to decide whether or not it believes" ' the outcome should have been different. [Citation.] Because the trier of fact is in a superior position to observe the demeanor of witnesses, credibility determinations are not subject to independent review, nor are findings of fact that are not relevant to the First Amendment issue... .' [Citation.]" (*People v. Lindberg, supra,* 45 Cal.4th 1, 36, 82 Cal.Rptr.3d 323, 190 P.3d 664.) "[T]o the limited extent that the court below resolved evidentiary disputes, made credibility determinations, or made findings of fact that are not relevant to the First Amendment issue, we uphold those rulings if they are supported by substantial evidence." (*Krinsky, supra,* at p. 1162, 72 Cal.Rptr.3d 231, citing *In re George T., supra,* 33 Cal.4th 620, 634, 16 Cal.Rptr.3d 61, 93 P.3d 1007.)

Here, the charge of a violation of section 69 focused on defendant's proclamation that he was "armed and will now fire on all Sheriff and Fish & Game after this email." The direct threat of violence to Fish and Game or sheriff's department officials who entered the Marin County Indian Valley Open Space Preserve was not protected speech under the First Amendment. (*People v. Monterroso* (2004) 34 Cal.4th 743, 776, 22 Cal.Rptr.3d 1, 101 P.3d 956.) "[T]rue threats are not constitutionally protected." (*People v. Dunkle* (2005) 36 Cal.4th 861, 919, 32 Cal.Rptr.3d 23, 116 P.3d 494.) As the California Supreme Court explained in *People v. Toledo* (2001) 26 Cal.4th 221, 233, 109 Cal.Rptr.2d 315, 26 P.3d 1051, "penalizing speech does not offend First Amendment principles as long as, ' "the relevant statute singles out for punishment threats falling outside the scope of First Amendment protection." ' [Citations.]" (*People v. Jackson* (2009) 178 Cal.App.4th 590, 598, 100 Cal.Rptr.3d 539.) " ' "[T]he state may penalize threats, even ****893** those consisting of pure speech, provided the relevant statute singles out for punishment threats falling outside the scope of First Amendment protection. [Citations.] In this context, the goal of the First Amendment is to protect expression that engages in some fashion in public dialogue, that is, ' "communication in which the participants seek to persuade, or are persuaded; communication which is about changing or maintaining beliefs, or taking or refusing to take action on the basis of one's beliefs... ." ' [Citations.]" ... A statute that

is otherwise valid, and is not aimed at protected expression, does not conflict with the First Amendment simply because the statute can be violated by the use of spoken words or other expressive activity. [Citation.]' [Citation.]" (*City of San Jose v. Garbett* (2010) 190 Cal.App.4th 526, 536–537, 118 Cal.Rptr.3d 420.)

" ' "When a reasonable person would foresee that the context and import of the words will cause the listener to believe he or she will be subjected to physical violence, the threat falls outside First Amendment protection." ' [Citations.]" (*People v. Wilson* (2010) 186 Cal.App.4th 789, 804, 112 Cal.Rptr.3d 542.) Further, " ' "As long as the threat reasonably appears to be a serious expression of intention to inflict bodily harm [citation] and its ***966** circumstances are such that there is a reasonable tendency to produce in the victim a fear that the threat will be carried out," a statute proscribing such threats "is not unconstitutional for lacking a requirement of immediacy or imminence." ' [Citations.]" (*People v. Monterroso, supra,* 34 Cal.4th 743, 776, 22 Cal.Rptr.3d 1, 101 P.3d 956.)

Therefore, "defendant has not raised any First Amendment arguments, and an independent standard of review is not applicable. When the First Amendment is not implicated, defendant's sufficiency of the evidence challenge is evaluated under the substantial evidence test. [Citations.] 'In assessing the sufficiency of the evidence, we review the entire record in the light most favorable to the judgment to determine whether it discloses evidence that is reasonable, credible, and of solid value such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.] Reversal on this ground is unwarranted unless it appears "that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction]." [Citation.]' [Citation.]" (*People v. Wilson, supra,* 186 Cal.App.4th 789, 805, 112 Cal.Rptr.3d 542.) The standard is " 'whether any rational trier of fact could find the legal elements [of section 69] satisfied beyond a reasonable doubt... .' [Citation.]" (*People v. Lindberg, supra,* 45 Cal.4th 1, 36–37, 82 Cal.Rptr.3d 323, 190 P.3d 664.)

B. The Evidence That Supports the Conviction of a Violation of Section 69.

Former section 69, under which defendant was charged and convicted, stated, "Every person who attempts, by means of any threat or violence, to deter or prevent an executive officer from performing any duty imposed upon such officer by law, or who knowingly resists, by the use of force or violence, such officer, in the performance of his duty, is punishable by a fine not exceeding ten thousand dollars ($10,000), or by imprisonment in the state prison, or in a county jail not exceeding one year, or by both such fine and imprisonment." (Stats.1983, ch. 1092, § 232, p. 4022.) "The statute sets forth two separate ways in which an offense can be committed. The first is attempting by threats or violence to deter or prevent an officer from performing a duty imposed by law; the ****894** second is resisting by force or violence an officer in the performance of his or her duty." (*In re Manuel G.* (1997) 16 Cal.4th 805, 814, 66 Cal.Rptr.2d 701, 941 P.2d 880.) The first form of a violation of section 69 "encompasses attempts to deter either an officer's immediate performance of a duty imposed by law or the officer's performance of such a duty at some time in the future." (*In re Manuel G., supra,* at p. 817, 66 Cal.Rptr.2d 701, 941 P.2d 880, italics omitted.) The second form of violating section 69 "assumes that the officer is engaged in such duty when resistance is offered," and "the officers must have been acting lawfully when the defendant resisted arrest." (*In re Manuel G., supra,* at p. 816, 66 Cal.Rptr.2d 701, 941 P.2d 880.)

***967** The case against defendant proceeded exclusively on the first form of a violation of section 69, which has "been called ' "attempting to deter," ' " (*People v. Carrasco* (2008) 163 Cal.App.4th 978, 984, 77 Cal.Rptr.3d 912) and is "established by ' "[a] threat, unaccompanied by any physical force" ' and may involve either an officer's immediate or future performance of his duty. [Citation.]" (*Id.* at p. 985, 77 Cal.Rptr.3d 912.) To avoid infringement on protected First Amendment speech, "the term 'threat' has been limited to mean a threat of unlawful violence used in an attempt to deter the officer. [Citations.] The central requirement of the first type of offense under section 69 is an attempt to deter an executive officer from performing his or her duties imposed by law; unlawful violence, or a threat of unlawful violence, is merely the means by which the attempt is made." (*In re Manuel G., supra,* 16 Cal.4th 805, 814–815, 66 Cal.Rptr.2d 701, 941 P.2d 880; see also *People v. Superior Court* (*Anderson*) (1984) 151 Cal.App.3d 893, 896–897, 199 Cal.Rptr. 150.) "[A] violation of section 69 requires a specific intent to interfere with the executive officer's performance of his duties... ." (*People v. Gutierrez* (2002) 28 Cal.4th 1083, 1153, 124 Cal.Rptr.2d 373, 52 P.3d 572; see *People v. Patino* (1979) 95 Cal.App.3d 11, 27, 156 Cal.Rptr. 815.)

We find substantial evidence in the record to support the conviction. While defendant submits that the purpose of his e-mail was merely to dissuade the Fish and Game and sheriff's

departments from continuing to proceed with a program of unlawfully eradicating mountain lions or "his cats," either directly or through the assistance of federal authorities, the evidence also convincingly demonstrates an intent to deter officials from patrolling or otherwise performing duties in the Indian Valley Open Space Preserve by threatening to "fire on" them if they appeared there. Attempts to deter either an officer's immediate performance of a duty or the performance of such a duty at some time in the future constitute a violation of the statute. (*In re Manuel G., supra,* 16 Cal.4th 805, 817, 66 Cal.Rptr.2d 701, 941 P.2d 880.) Defendant essentially acknowledged as much when he was encountered by Deputy Bosse, and remarked that the e-mail "worked" by keeping the officers "off the preserve." Moreover, the message had the contemplated effect. The superintendent in charge of operations for the Indian Valley Open Space Preserve directed his staff "not to go into that preserve" until contact was made with defendant. The regional manager for the Bay Delta region of the Department of Fish and Game advised his staff "not to wear their uniforms," and be "a little more vigilant when they're working in the fields." Deputy Bosse testified that in light of the e-mail, he patrolled with greater care during his search for defendant.

That the e-mail was not separately or directly sent to the intended victims fails to negate proof of either an attempt to deter or prevent an officer from ****895** performing a duty or the requisite specific intent to interfere with the executive officer's performance of duties. The statute does not require that a threat be personally communicated to the victim by the person who makes ***968** the threat. (*In re Ryan D.* (2002) 100 Cal.App.4th 854, 861, 123 Cal.Rptr.2d 193; *In re David L.* (1991) 234 Cal.App.3d 1655, 1659, 286 Cal.Rptr. 398.) The inference may be drawn from the evidence that defendant intended, and expected or at least foresaw, a message with an unequivocal threat to shoot Fish and Game and sheriff's department officers would be conveyed from the Department of Defense to the intended law enforcement targets of the threat. (*People v. Hamilton* (2009) 45 Cal.4th 863, 936, 89 Cal.Rptr.3d 286, 200 P.3d 898.) Section 69 also does not require a showing that defendant had the present ability to carry out the threats; evidence that the letter contained the threats was sufficient to support a finding that defendant violated section 69. (*Hamilton, supra,* at p. 936, 89 Cal.Rptr.3d 286, 200 P.3d 898; *People v. Hines* (1997) 15 Cal.4th 997, 1060, 64 Cal.Rptr.2d 594, 938 P.2d 388.) We conclude that the elements of a violation of section 69 are established by substantial evidence.

IV.–VI.[***]

DISPOSITION

Accordingly, the judgment is affirmed.

We concur: MARCHIANO, P.J., and MARGULIES, J.

All Citations

207 Cal.App.4th 954, 143 Cal.Rptr.3d 882, 12 Cal. Daily Op. Serv. 8017, 2012 Daily Journal D.A.R. 9687

Footnotes

* Pursuant to California Rules of Court, rules 8.1105(b) and 8.1110, this opinion is certified for publication with the exception of parts II., IV., V., and VI.

1 All further statutory references are to the Penal Code unless otherwise indicated. Defendant was acquitted by the jury of additional counts of making criminal threats. (§ 422.)

2 *Thomas* held that a homeless man living in a cardboard box on a public sidewalk, in violation of a law expressly prohibiting him from doing so, did not have a reasonable expectation of privacy in the box. (*Thomas, supra,* 38 Cal.App.4th 1331, 1333–1335, 45 Cal.Rptr.2d 610.)

** See footnote *, *ante*.

*** See footnote *, *ante*.

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138 S.Ct. 2561
Supreme Court of the United States

Mary Anne SAUSE
v.
Timothy J. BAUER, et al.

No. 17–742
|
June 28, 2018.

Synopsis
Background: Resident brought pro se § 1983 action against current and former members of town police department and current and former mayors, alleging violation of her First Amendment free exercise rights during investigation of noise complaint at her residence. The United States District Court for the District of Kansas, Julie A. Robinson, J., 2:15–CV–09633–JAR–TJJ, 2016 WL 3387469, dismissed action on qualified immunity grounds, and resident appealed. The United States Court of Appeals for the Tenth Circuit, Moritz, Circuit Judge, 859 F.3d 1270, affirmed.

Upon granting certiorari, the Supreme Court held that whether the officers interfered with resident's First Amendment free exercise rights when they allegedly told her to stop praying, and whether they were entitled to qualified immunity, could not be determined on a motion to dismiss resident's pro se complaint.

Certiorari granted; reversed and remanded.

Opinion

***2562** PER CURIAM.

Petitioner Mary Ann Sause, proceeding *pro se,* filed this action under Rev. Stat. 1979, 42 U.S.C. § 1983, and named as defendants past and present members of the Louisburg, Kansas, police department, as well as the current mayor and a former mayor of the town. The centerpiece of her complaint was the allegation that two of the town's police officers visited her apartment in response to a noise complaint, gained admittance to her apartment, and then proceeded to engage in a course of strange and abusive conduct, before citing her for disorderly conduct and interfering with law enforcement. Among other things, she alleged that at one point she knelt and began to pray but one of the officers ordered her to stop. She claimed that a third officer refused to investigate her complaint that she had been assaulted by residents of her apartment complex and had threatened to issue a citation if she reported this to another police department. In addition, she alleged that the police chief failed to follow up on a promise to investigate the officers' conduct and that the present and former mayors were aware of unlawful conduct by the town's police officers.

Petitioner's complaint asserted a violation of her First Amendment right to the free exercise of religion and her Fourth Amendment right to be free of any unreasonable search or seizure. The defendants moved to dismiss the complaint for failure to state a claim on which relief may be granted, arguing that the defendants were entitled to qualified immunity. Petitioner then moved to amend her complaint, but the District Court denied that motion and granted the motion to dismiss.

On appeal, petitioner, now represented by counsel, argued only that her free exercise rights were violated by the two officers who entered her home. The Court of Appeals for the Tenth Circuit affirmed the decision of the District Court, concluding that the officers were entitled to qualified immunity. 859 F.3d 1270 (2017). Chief Judge Tymkovich filed a concurring opinion. While agreeing with the majority regarding petitioner's First Amendment claim, he noted that petitioner's "allegations fit more neatly in the Fourth Amendment context." *Id.,* at 1279. He also observed that if the allegations in the complaint are true, the conduct of the officers "should be condemned," and that if the allegations are untrue, petitioner had "done the officers a grave injustice." *Ibid.*

The petition filed in this Court contends that the Court of Appeals erred in holding that the officers who visited petitioner's home are entitled to qualified immunity. The petition argues that it was clearly established that law enforcement agents violate a person's right to the free exercise of religion if they interfere, without any legitimate law enforcement justification, when a person is at prayer. The petition further maintains that the absence of a prior case involving the unusual situation alleged to have occurred here does not justify qualified immunity.

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There can be no doubt that the First Amendment protects the right to pray. Prayer unquestionably constitutes the "exercise" of religion. At the same time, there are clearly circumstances in which a police officer may lawfully prevent a person from praying at a particular time and place. For example, if an officer places a suspect under arrest and orders the suspect to enter a police vehicle for transportation to jail, the suspect does not have a right to delay that trip by insisting on first engaging in conduct that, at another ***2563** time, would be protected by the First Amendment. When an officer's order to stop praying is alleged to have occurred during the course of investigative conduct that implicates Fourth Amendment rights, the First and Fourth Amendment issues may be inextricable.

That is the situation here. As the case comes before us, it is unclear whether the police officers were in petitioner's apartment at the time in question based on her consent, whether they had some other ground consistent with the Fourth Amendment for entering and remaining there, or whether their entry or continued presence was unlawful. Petitioner's complaint contains no express allegations on these matters. Nor does her complaint state what, if anything, the officers wanted her to do at the time when she was allegedly told to stop praying. Without knowing the answers to these questions, it is impossible to analyze petitioner's free exercise claim.

In considering the defendants' motion to dismiss, the District Court was required to interpret the *pro se* complaint liberally, and when the complaint is read that way, it may be understood to state Fourth Amendment claims that could not properly be dismissed for failure to state a claim. We appreciate that petitioner elected on appeal to raise only a First Amendment argument and not to pursue an independent Fourth Amendment claim, but under the circumstances, the First Amendment claim demanded consideration of the ground on which the officers were present in the apartment and the nature of any legitimate law enforcement interests that might have justified an order to stop praying at the specific time in question. Without considering these matters, neither the free exercise issue nor the officers' entitlement to qualified immunity can be resolved. Thus, petitioner's choice to abandon her Fourth Amendment claim on appeal did not obviate the need to address these matters.

For these reasons, we grant the petition for a writ of certiorari; we reverse the judgment of the Tenth Circuit; and we remand the case for further proceedings consistent with this opinion.

It is so ordered.

All Citations

138 S.Ct. 2561, 201 L.Ed.2d 982, 86 USLW 3648, 86 USLW 4687, 18 Cal. Daily Op. Serv. 6529, 2018 Daily Journal D.A.R. 6371, 27 Fla. L. Weekly Fed. S 576

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25 F.4th 414
United States Court of Appeals, Sixth Circuit.

Michael Andrew WOOD, Plaintiff-Appellant,
v.
Chad EUBANKS, in his individual and official capacity as Sergeant of the Clark County Sheriff's Department; Mario Troutman, Jr., Cherish Steiger, Matthew Yates, Jacob Shaw, and Joseph Johnson, in their individual and official capacities as Deputies of the Clark County Sheriff's Office, Defendants-Appellees.

No. 20-3599
|
Argued: November 2, 2021
|
Decided and Filed: February 8, 2022

Synopsis

Background: County fair patron brought § 1983 action against sheriff's deputies and sergeant, alleging false arrest and First Amendment retaliation arising from his arrest for disorderly conduct for spewing profanities about the police and fairgrounds' executive director while being escorted off fairgrounds wearing a shirt stating "Fuck the Police." The United States District Court for the Southern District of Ohio, Thomas M. Rose, Senior District Judge, 459 F.Supp.3d 965, adopted in part a magistrate's report and recommendation, 2020 WL 635652, and granted summary judgment for deputies and sergeant. Patron appealed.

Holdings: The Court of Appeals, Gibbons, Circuit Judge, held that:

patron's profanities were protected speech;

patron's yelling at director and proximity to him did not provide probable cause to arrest;

sheriff and deputies did not have qualified immunity;

removal of patron from fairgrounds was an adverse action as element of First Amendment retaliation claim; and

factual issues precluded summary judgment on retaliation claim.

Reversed.

***418** Appeal from the United States District Court for the Southern District of Ohio at Dayton. No. 3:18-cv-00168—Thomas M. Rose, District Judge.

Attorneys and Law Firms

ARGUED: Sara Elizabeth Coulter, CASE WESTERN RESERVE UNIVERSITY, Cleveland, Ohio, for Appellant. Andrew N. Yosowitz, TEETOR WESTFALL, LLC, Columbus, Ohio, for Appellees. David J. Carey, AMERICAN CIVIL LIBERTIES UNION OF OHIO FOUNDATION, Columbus, Ohio, for Amicus Curiae. ON BRIEF: Lynnette Dinkler, DINKLER LAW OFFICE, LLC, Dayton, Ohio, for Appellant. Andrew N. Yosowitz, TEETOR WESTFALL, LLC, Columbus, Ohio, for Appellees. David J. Carey, AMERICAN CIVIL LIBERTIES UNION OF OHIO FOUNDATION, Columbus, Ohio, Elizabeth Bonham, Freda J. Levenson, AMERICAN CIVIL LIBERTIES UNION OF OHIO FOUNDATION, Cleveland, Ohio, for Amicus Curiae.

Before: GUY, GIBBONS, and GRIFFIN, Circuit Judges.

OPINION

JULIA SMITH GIBBONS, Circuit Judge.

Michael Wood wore a shirt bearing the words "Fuck the Police" to the county fair. According to Wood, the defendant police officers ordered him to leave and escorted him from the fairgrounds because of his shirt. While leaving, Wood made his displeasure known through numerous coarse insults levied at the police and the fairground's administrator. The defendants then arrested Wood for disorderly conduct. After the charges were dismissed, Wood filed this § 1983 action against the officers, alleging false arrest and retaliation. The district court granted summary judgment to the defendants. We reverse because Wood's speech was protected by the First Amendment.

I.

On July 29, 2016, Michael Wood went to the Clark County Fair wearing a shirt that said "Fuck the Police." Wood explained that he "wore the shirt because [he] ha[s] the constitutional right to do so." DE 55-2, Wood Dep., Page ID 465. While Wood had "no ill will or ill intent against law enforcement in general," he took issue with how some of the county's officers had treated him in the past. *Id*. Specifically, he said that Sergeant Chad Eubanks had previously stopped him for a traffic infraction and said "something along the lines of, 'I'll mess you up.' " *Id*. He also stated that he believed the Clark County Sheriff's Office was "a cesspool" because so many officers who "were not honorable servants" had been fired and "more exist[ed]" in the department. *Id*. at 466. Wood also filed a Freedom of Information Act request regarding "a big fiasco about an affair, interoffice affair" in the department. *Id*. at 470.

Wood said that he received a few comments about his shirt at the fair, including a woman who made a profane gesture at him. Wood also claimed that a sheriff's deputy yelled to him as he passed, "Hey, Wood, I like your shirt." *Id*. at 466. Wood "gave him a thumbs up" and said, "Yeah, I thought you might." *Id*.

***419** A few hours after Wood arrived at the fair, the sheriff's department received a call complaining about Wood's shirt. Deputies Jacob Shaw, Mario Troutman, and Matthew Yates approached Wood and asked him to identify himself, but Wood declined to do so. Yates allegedly responded that the officers "know who you are." *Id*. at 468. Wood attempted to record the interaction but stopped when "Troutman started laughing and pointing and said, 'Huh, your light went out. You're not recording anymore.' " *Id*. At that point, Wood walked away.

Several hours later, the officers were called to one of the buildings on the fairgrounds. Shaw, Troutman, and Yates were joined by Eubanks and deputies Joseph Johnson and Cherish Steiger. Dean Blair, the Executive Director of the Clark County Fairgrounds, allegedly approached Wood first, saying, "Where's this shirt? I want to see this shirt." *Id*.

Troutman, Yates, and Johnson wore body cameras and filmed the subsequent events. As Yates walked closer to Wood and Blair, two other officers entered the building from the opposite side. Wood was no longer wearing the profane shirt, and Blair asked Wood whether he had changed. Wood did not answer but asked Blair and the officers if he had committed a crime or was being detained. Blair replied that he wanted Wood to leave, that Wood was "not welcome," and that Wood needed to get off the fairgrounds. Yates Cam #1, 00:40–45; Johnson Cam, 00:13–00:25. Wood agreed to leave if the three-dollar entrance fee was refunded. Blair gave Wood five dollars and told him to "keep the change" and never come back. Yates Cam #1, 00:55–45. Wood replied, "I have change for you, sir," but Blair refused to accept the money, telling Wood that he "wouldn't take [Wood's] money" and didn't "want [Wood] around." *Id*. at 00:58–1:14.

Wood asked Blair whether he "realized what [Wood was] doing [wa]s a constitutionally protected activity." *Id*. at 1:13–1:21. Blair replied, "Not in my home." *Id*. Wood responded, "Not in your home? This isn't your home. This is public property." *Id*. Eventually, Blair asked the officers, "What [do] I have to say to him?" and reiterated to Wood, "Get off my grounds." *Id*. at 1:24–30. Wood responded, "Very well. I'll be talking to my attorney about this." *Id*. at 1:27–31.

Troutman then allegedly pushed Wood's shoulder, and Wood said, "You ain't pushing me nowhere. I'll leave." DE 55-2, Wood Dep., Page ID 469; Yates Cam #1, 1:35–42; Johnson Cam, 1:17–22. Wood turned and began walking toward the open door, flanked by Blair and several officers. While walking, Wood turned to face the officers and repeatedly asked whether they had taken an oath to uphold the Constitution. Blair continued to repeat that Wood was "not welcome in [his] house." Yates Cam #1, 2:00–2:05. At this point, Wood told the officers not to put their hands on him and that Troutman had committed battery.

As the officers escorted Wood outside, one of them told Wood that he had "been given an order to vacate the property. So you're leaving." Troutman Cam #1, 00:32–35. Wood asked whether that was "a lawful order." Yates Cam #1, 2:10–18; Troutman Cam #1, 00:30–35. Blair and Wood exited the building and continued arguing, with Wood repeatedly stating that the fairgrounds were public property and Blair insisting that Wood leave. When Blair told Wood that he needed to leave because he had gotten his money back, Wood replied, "Five dollars ain't shit to me, bro ... Who the fuck do you think you are?" Yates Cam #1, 2:40–56; Troutman Cam #1, 1:10–1:15. ***420** One of the officers spoke into his radio that they were "escorting ... [Wood] to the front gate." Johnson Cam 2:29–35.

While walking, Wood pointed behind him and said, "Look at these thugs with badges behind me. How many is there?" Yates Cam #1, 2:57–3:00. Spinning around, Wood counted

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"1, 2, 3, 4, 5, 6 motherfuckers. Six bitch ass fucking pigs." *Id*. at 3:00. Wood appeared to stop, prompting one officer to tell him to "keep walking." *Id*. at 3:01–05. Wood complied but continued speaking. "Fucking thugs with guns that don't uphold the United States Constitution. Fuck all you. You dirty rat bastards." *Id*. at 3:05–14; Troutman Cam #1, 3:00–31. Wood then turned to Steiger and said, "And you, you're a fucking thief, I've heard about you." Yates Cam #1, 3:13–17; Johnson Cam, 2:53–56.

Wood stopped at a tent to pick up his belongings, and an officer said, "this way, sir, sir." Yates Cam #1, 3:26–30; Troutman Cam #1, 1:44–48. Wood replied, "Fucking thugs with badges ... thugs with badges." Yates Cam #1, 3:32–38; Troutman Cam #1, 1:50–2:00. As the officers directed him forward, Wood exclaimed that "the United States Constitution doesn't apply at the Clark County fairgrounds, people." Yates Cam #1, 3:40–46; Troutman Cam #1, 2:00–05.

Wood and the officers disagreed about where Wood should exit. Wood stated that he was "going out the back gate" because he had come in that way. Yates Cam #1, 3:49–59; Troutman Cam #1, 2:07–13. The officers insisted on the front gate, and one officer told Wood that they were "not going to walk all the way to the back gate." Yates Cam #1, 3:55–57. Wood replied, "Then that's your fucking fat-ass problems, motherfucker, I'm leaving." *Id*. at 3:57–4:02; Johnson Cam, 3:35–40. Wood turned and walked toward the back gate, with Blair and all six deputies following.

The officers began discussing whether they could arrest Wood for disorderly conduct and disturbing the peace. One officer asked another "how long [they] [were] going to allow" Wood to keep talking. Johnson Cam, 4:00–03. That officer replied that "we could do disorderly conduct." *Id*. at 4:02–06. Blair, catching up with Wood, turned and said to the officers that Wood was "disturbing my peace" and shouted, "Charge him!" Yates Cam #1, 4:20–22; Troutman Cam #1, 2:37–43. One officer asked the others what they should do, commenting that Wood was "talking the whole way out the door, he's still talking." Yates Cam #1, 4:40–50; Troutman Cam #1, 3:00–05. Another officer said, "Well, make an arrest," to which another asked, "Make an arrest?" Yates Cam #1, 4:49–52.

Blair and Wood walked in front of the officers, continuing to argue. Troutman Cam #1, 3:15–30. Although difficult to discern from the audio, Wood asked Blair, "Have you ever fucking served this country?," to which Blair replied, "Yes, asshole." *Id.* at 3:13–24. Wood retorted, "Bullshit. In what? The Air Force? Fucking flyboy." *Id*. Wood then turned around and said to Troutman, "Look at this bullshit. You're one big man ain't you, motherfucker. You got eight pussies with badges behind you." *Id.* at 3:40–47. Blair commented, "You got a lot of mouth." *Id*. at 3:49–50. Wood replied that Troutman "wants to fucking batter [him]," and Wood planned to press charges. *Id*. at 3:50–53. Blair turned to Troutman and said, "I'm your witness. That's bullshit." *Id*. at 3:53–58. Wood continued to insist that Troutman had "touched [him]" and asked whether they knew "what the legal definition of battery is." *Id*. at 3:57–4:00. Blair repeated, "You got a lot of mouth, boy." *Id*. at 4:00–03. Wood retorted, shouting "Do you know what the legal definition of battery ***421** is, motherfucker? Then try to find out." *Id*. at 4:03–08.

At that point, the officers arrested Wood for disorderly conduct. On the way to the jail, an officer said to Wood, "How's that work? You got a shirt that said, 'f the police,' but you want us to uphold the Constitution?" Troutman Cam #2, 17:15–21. He was charged with disorderly conduct, Ohio Rev. Code Ann. § 2917.11(A)(2), and obstructing official business, § 2921.31. The prosecutor later dismissed both charges, apparently because the "State [was] unable to locate necessary lay witnesses to [the] incident in time for trial" to show that Wood's "words and conduct amounted to 'fighting words' " under the First Amendment. DE 6-6, Pretrial Rev. Form, Page ID 84; DE 35, Prosecutor Email, Page ID 262.

Wood filed this 42 U.S.C. § 1983 action against all six officers involved in his arrest (Eubanks, Shaw, Troutman, Yates, Johnson, and Steiger), alleging numerous constitutional violations. The defendants moved for summary judgment, and the magistrate judge recommended granting the motion as to all but two of Wood's claims—unlawful arrest and First Amendment retaliation. *Wood v. Eubanks*, R. & R., No. 3:18-CV-168, 2020 WL 635652, at *16 (S.D. Ohio Feb. 11, 2020). The district court disagreed in part, concluding that the officers were protected by qualified immunity on the false arrest claim and that there was insufficient evidence of retaliation, so the court granted summary judgment to the defendants on all claims. *Wood v. Eubanks*, 459 F. Supp. 3d 965, 980 (S.D. Ohio 2020). Wood timely appealed the dismissal of his false arrest and retaliation claims.

II.

We review a grant of summary judgment de novo. *Randolph v. Ohio Dep't of Youth Servs.*, 453 F.3d 724, 731 (6th Cir. 2006).

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Summary judgment is proper if "there is no genuine dispute as to any material fact" and "the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). We view the evidence and draw all reasonable inferences in favor of the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986).

III.

Wood's first claim is for false arrest. "To prevail on a false arrest claim under § 1983, 'a plaintiff must prove that the arresting officer lacked probable cause to arrest the plaintiff.' " *Tlapanco v. Elges*, 969 F.3d 638, 652 (6th Cir. 2020) (brackets and internal quotation marks omitted). Therefore, "[a] showing of 'probable cause provides a complete defense to a claim of false arrest.' " *Id.* (internal quotation marks omitted). An officer is entitled to qualified immunity if he reasonably believed that the arrest was lawful, even if that belief was erroneous. *Barton v. Martin*, 949 F.3d 938, 950 (6th Cir. 2020). "[S]tate law defines the offense for which an officer may arrest a person, while federal law dictates whether probable cause existed for an arrest." *Kennedy v. City of Villa Hills*, 635 F.3d 210, 215 (6th Cir. 2011). Because there was no probable cause to arrest Wood for his conduct, and because Wood's right to be free from arrest was clearly established, the officers are not entitled to qualified immunity.

A.

Wood was arrested for disorderly conduct, Ohio Rev. Code Ann. § 2917.11(A)(2), and obstructing official business, § 2921.31. The only issue is whether the officers had probable cause to arrest Wood for disorderly ***422** conduct.[1] Ohio's statute "requires two elements to commit disorderly conduct." *Osberry v. Slusher*, 750 F. App'x 385, 394 (6th Cir. 2018) (internal citations omitted). "First, a person must 'recklessly cause inconvenience, annoyance, or alarm to another,' " and "[s]econd, the person must cause this disturbance by engaging in specific enumerated conduct." *Id.* Here, the alleged specific enumerated conduct is "[m]aking unreasonable noise or an offensively coarse utterance, gesture, or display or communicating unwarranted and grossly abusive language to any person." Ohio Rev. Code Ann. § 2917.11(A)(2).

Ohio's statute "requires two elements to commit disorderly conduct." *Osberry v. Slusher*, 750 F. App'x 385, 394 (6th Cir. 2018) (internal citations omitted). "First, a person must 'recklessly cause inconvenience, annoyance, or alarm to another,' " and "[s]econd, the person must cause this disturbance by engaging in specific enumerated conduct." *Id.* Here, the alleged specific enumerated conduct is "[m]aking unreasonable noise or an offensively coarse utterance, gesture, or display or communicating unwarranted and grossly abusive language to any person." Ohio Rev. Code Ann. § 2917.11(A)(2).

The Ohio Supreme Court has clearly established that a person may not be punished for disorderly conduct "unless the words spoken are likely, by their very utterance, to inflict injury or provoke the average person to an immediate retaliatory breach of the peace." *State v. Hoffman*, 57 Ohio St.2d 129, 387 N.E.2d 239, 242 (1979). In other words, the statute "require[s] that the speech in question constitute 'fighting words.' " *D.D. v. Scheeler*, 645 F. App'x 418, 425 (6th Cir. 2016) (citing *City of Cincinnati v. Karlan*, 39 Ohio St.2d 107, 314 N.E.2d 162, 164 (1974)). Fighting words —as defined by the Supreme Court in *Chaplinsky v. New Hampshire*—are words that "by their very utterance inflict injury or tend to incite an immediate breach of the peace." 315 U.S. 568, 572, 62 S.Ct. 766, 86 L.Ed. 1031 (1942). So Wood "could only act with the required mental state for this crime—recklessness—if 'with heedless indifference to the consequences,' [ ]he engaged in conduct or speech likely 'to inflict injury or provoke the average person to an immediate retaliatory breach of the peace.' " *Osberry*, 750 F. App'x at 394 (quoting *Goodwin*, 781 F.3d at 333). "The question is whether, under the circumstances, it is probable that a reasonable police officer would find [the] language and conduct annoying or alarming and would be provoked to want to respond violently." *Goodwin v. City of Painesville*, 781 F.3d 314, 333 (6th Cir. 2015) (quoting *Warren v. Patrone*, 75 Ohio App.3d 595, 600 N.E.2d 344, 345 (1991)).

We have explained that, since the *Chaplinsky* decision, its " 'fighting words' doctrine has become 'very limited.' " *Greene v. Barber*, 310 F.3d 889, 896 (6th Cir. 2002) (quoting *Sandul v. Larion*, 119 F.3d 1250, 1255 (6th Cir. 1997)). While calling a city marshal "a God damned racketeer" and "a damned Fascist" constituted fighting words in *Chaplinsky*, "[s]tandards of decorum have changed dramatically since 1942, ... and indelicacy no longer places speech beyond the protection of the First Amendment." *Id.* at 895–96 (citation omitted). "The fighting words exception is very limited because it is inconsistent with ***423** the general principle of free speech recognized in our First Amendment jurisprudence." *Baskin v. Smith*, 50 F. App'x 731, 736 (6th Cir.

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2002). Therefore, "profanity alone is insufficient to establish criminal behavior." *Wilson v. Martin*, 549 F. App'x 309, 311 (6th Cir. 2013); *see also* *D.D.*, 645 F. App'x at 425 ("Ohio's disorderly conduct statute and the First Amendment require more than the uttering, or even shouting, of distasteful words."); *United States v. Gustafson*, 30 F.3d 134 (Table), 1994 WL 276883, at *3 (6th Cir. 1994) ("The [Ohio] cases are clear that use of profanity alone or generalized derogatory statements are insufficient to support a conviction for disorderly conduct.").

Further, both the Supreme Court and this court have made clear that "police officers ... 'are expected to exercise greater restraint in their response than the average citizen.' " *Barnes v. Wright*, 449 F.3d 709, 718 (6th Cir. 2006) (quoting *Greene*, 310 F.3d at 896). "Police officers are held to a higher standard than average citizens, because the First Amendment requires that they 'tolerate coarse criticism.' " *D.D.*, 645 F. App'x at 425 (quoting *Kennedy*, 635 F.3d at 216); *see also* *City of Houston v. Hill*, 482 U.S. 451, 462–63, 107 S.Ct. 2502, 96 L.Ed.2d 398 (1987) ("The freedom of individuals verbally to oppose or to challenge police action without thereby risking arrest is one of the principal characteristics by which we distinguish a free nation from a police state.").

Against that backdrop, the defendants argue that they had probable cause to arrest Wood for disorderly conduct because "[h]is language consisted of personally abusive epithets" that "constitute fighting words." CA6 R. 26, Appellees' Br., at 26. Wood referred to all six officers as, variously, "thugs with badges," "fucking thugs with guns," and "fucking thugs with badges." Yates Cam #1, 2:57–3:10, 3:32–38; Troutman Cam #1, 3:00–31. Wood deployed "motherfuckers" more than once. Yates Cam #1, 3:00, 3:57–4:02; Johnson Cam, 3:35–40; Troutman Cam #1, 3:40–47, 4:03–08. Other insults included "six bitch ass fucking pigs," "fuck all you," "dirty rat bastards," and "eight pussies with badges." Yates Cam #1, 3:00, 3:05–14, 3:57–4:02; Troutman Cam #1, 3:00–31, 3:40–47; Johnson Cam, 3:35–40. In addition to his general commentary about the officers, Wood spoke to four people specifically. To Blair, Wood said, "Who the fuck do you think you are," called Blair a "fucking flyboy," and asked whether Blair knew what "the legal definition of battery is motherfucker." Troutman Cam #1, 1:10–1:15; 3:13–24; 4:03–08. Wood at one point called Steiger, "a fucking thief." Yates Cam #1, 3:13–17; Johnson Cam 2:53–56. Wood also said to one of the officers, "Then that's your fucking fat-ass problems, motherfucker." Yates Cam #1, at 3:57–4:02. And shortly before Wood was arrested, he turned to Troutman and said, "You're one big man ain't you, motherfucker." Troutman Cam #1, 3:40–47.

We have routinely protected the use of profanity when unaccompanied by other conduct that could be construed as disorderly. *See* *Sandul*, 119 F.3d at 1255 ("[T]he use of the 'f-word' in and of itself is not criminal conduct."). In *Greene v. Barber*, we explained that whether the plaintiff had "a constitutionally protected right" to call police officer Lt. Barber "an 'asshole' and castigate him as 'stupid' ... depend[ed] on the time, place, and manner in which Mr. Greene [the plaintiff] so expressed himself." 310 F.3d at 895. While "[i]t [wa]s clear that the Constitution gave Mr. Greene no license to interrupt the transaction of public business by loud animadversions on Lt. Barber's personality and mental capacity," we held that "standing alone, the fact that Mr. Greene's remarks ***424** were unflattering to Lt. Barber clearly gave Barber no license to abridge Greene's freedom to speak as he did." *Id.* We held that "Mr. Greene's characterization of Lt. Barber as an 'asshole' was not egregious enough to trigger application of the 'fighting words' doctrine" because "it is hard to imagine Mr. Greene's words inciting a breach of the peace by a police officer whose sworn duty it was to uphold the law." *Id.* at 896. Likewise, we held in *D.D. v. Scheeler* that saying "fuck the police" and referring to officers as "useless" and "idiots" "did not rise to the level of 'fighting words' " in part because the epithets were "no worse than the speech protected" in a previous case, were not "beyond 'coarse criticism,' " and were not "designed to provoke" the officer. 645 F. App'x at 420, 425–27. We have held that similar speech is protected by the First Amendment when unaccompanied by other conduct,[2] which is consistent with the rule that "[f]its of rudeness or lack of gratitude may violate the Golden Rule" but are not "illegal," "punishable[,] or for that matter grounds for a seizure." *Cruise-Gulyas v. Minard*, 918 F.3d 494, 495 (6th Cir. 2019) (extending middle finger to police officer provided no legal basis to stop plaintiff).

We have been equally clear that behavior involving more than mere epithets provides probable cause for a disorderly conduct arrest. In *Harris v. United States*, a man approached a Drug Enforcement Agency agent in an airport and said, "I don't appreciate you and your monkeys following me and if you keep it up I'll rip your head off." 422 F.3d 322, 325 (6th Cir. 2005). Another officer who overheard the comment approached the man and he pushed her. Speech aside, "by threatening the officers with physical violence and by making threatening gestures," the man "provided [the

officers] with the necessary probable cause to charge him with disorderly conduct." *Id.* at 330; *see also Gustafson*, 30 F.3d 134, at *3 (sufficient evidence to support judgment that defendant was guilty of disorderly conduct where he "waved his finger approximately one inch from the faces of [the officers] after being warned to stop"); *Hagedorn v. Cattani*, 715 F. App'x 499, 506 (6th Cir. 2017) (probable cause to arrest a woman because her tirade was "inappropriately loud" and disturbed neighbors, but not because she employed profanities). Similarly, we have repeatedly held that the state can punish an "individual whose act of speaking, by virtue of its time and manner, plainly obstructed ongoing police activity involving a ***425** third party." *King v. Ambs*, 519 F.3d 607, 614 (6th Cir. 2008); *see also Schliewe v. Toro*, 138 F. App'x 715, 721–23 (6th Cir. 2005) ("[I]n this case it is abundantly clear that Mr. Schliewe was arrested for bleeding on those around him and threatening Officer Toro, regardless of the fact that he used profanity.").

While Wood's speech was profane, the circumstances did not create a situation where violence was likely to result. None of the officers reacted with violence or appeared to view Wood's words as "an invitation to exchange fisticuffs." *Texas v. Johnson*, 491 U.S. 397, 409, 109 S.Ct. 2533, 105 L.Ed.2d 342 (1989); *see also Cohen v. California*, 403 U.S. 15, 20, 91 S.Ct. 1780, 29 L.Ed.2d 284 (1971) (speech not fighting words where there was "no showing that anyone who saw Cohen was in fact violently aroused or that appellant intended such a result"); *Bible Believers v. Wayne Cnty.*, 805 F.3d 228, 246 (6th Cir. 2015) (en banc) (concluding that derogatory speech about Islam did not qualify as fighting words, in part, because "the average individual attending the Festival did not react with violence, and of the group made up of mostly adolescents, only a certain percentage engaged in bottle throwing when they heard the proselytizing"). "And if violence had resulted, the officers would be facing more claims than they are now." *Wilson*, 549 F. App'x at 311.

We therefore conclude that the First Amendment protected Wood's speech and thus his disorderly conduct arrest lacked probable cause. This conclusion is consistent with those of other circuits to have considered similar issues. *See Payne v. Pauley*, 337 F.3d 767, 776 (7th Cir. 2003) ("[T]he First Amendment protects even profanity-laden speech directed at police officers. Police officers reasonably may be expected to exercise a higher degree of restraint than the average citizen and should be less likely to be provoked into misbehavior by such speech." (citing *City of Houston*, 482 U.S. at 461, 107 S.Ct. 2502)); *United States v. Poocha*, 259 F.3d 1077, 1082 (9th Cir. 2001) (holding that yelling "fuck you" at an officer was not likely to provoke a violent response and "[c]riticism of the police, profane or otherwise, is not a crime"); *Buffkins v. City of Omaha*, 922 F.2d 465, 472 (8th Cir. 1990) (plaintiff's "use of the word 'asshole' could not reasonably have prompted a violent response from the arresting officers").

Relying on Ohio state court decisions applying *Chaplinsky*, defendants contend (and the district court agreed) that swearing at a police officer, alone, constitutes disorderly conduct. *See, e.g.*, *State v. Wood*, 112 Ohio App.3d 621, 679 N.E.2d 735, 740 (1996) (telling a police officer " 'fuck you,' either verbally or via an extended digit," could "constitute fighting words"). Although Ohio's state law appears discordant with our own, *see, e.g.*, *Sandul*, 119 F.3d at 1255–56; *Wilson*, 549 F. App'x at 310; *Cruise-Gulyas v. Minard*, 918 F.3d 494, 496 (6th Cir. 2019), *cert. denied*, ––– U.S. ––––, 140 S. Ct. 116, 205 L.Ed.2d 32 (2019), our caselaw requires that—for the purposes of examining a claim of qualified immunity from a § 1983 cause of action —we turn only to federal court precedent for evaluating whether police officers have probable cause to effectuate an arrest, *see Kennedy*, 635 F.3d at 215 ("[S]tate law defines the offense for which an officer may arrest a person, while federal law dictates whether probable cause existed for an arrest."); *Sandul*, 119 F.3d at 1256 (holding that "protected speech cannot serve as the [sole] basis for a violation" of any statute).

The defendants also argue that "Wood committed disorderly conduct while continually yelling and cursing at Dean Blair, a civilian." CA6 R. 26, Appellees' Br., at 37. ***426** The defendants cite a portion of the exchange where Wood appeared to question Blair's military service, but the defendants do not argue that questioning a person's military credentials amounts to fighting words.[3] Rather, they focus on Wood's use of curse words, his proximity to Blair, and his "hostile and agitated" demeanor. *Id.* at 38.

As an initial matter, although the defendants refer to Blair as a civilian, they do not challenge the district court's determination that "Blair is a quasi-state official, acting as the Executive Director of the Clark County Fairgrounds." *Wood*, 459 F. Supp. 3d at 977 n.3. As for the profanity, Wood called Blair a "fucking flyboy" and, like the officers, a "motherfucker." Troutman Cam #1, 3:13–24; 4:03–08. These words alone do not provide probable cause to arrest Wood for disorderly conduct. As for Wood's proximity to Blair, it

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was Blair who followed Wood, matching his pace as Wood headed toward the fairgrounds exit. And when Wood asked Blair whether he knew "what the legal definition of battery is, motherfucker," Blair was walking ahead of Wood, with Troutman between them, and they were discussing whether Troutman had touched Wood. Troutman Cam #1, 4:03–08. Wood did not step closer to Blair or make any gesture that could be construed as threatening. Neither proximity nor Wood's demeanor provided probable cause for arrest.

Regarding the claim that the officers had probable cause to arrest Wood for "yelling" and "screaming" at Blair, the defendants provide no further argument or any case citations as to how that constituted disorderly conduct. Forfeiture aside, *see United States v. Johnson*, 440 F.3d 832, 846 (6th Cir. 2006), the claim is meritless. Even assuming, as the defendants argue, that the "level of noise [Wood] was making could itself violate Section (A)(2)," under the statute's clear language, "a disorderly conduct charge against h[im] can stand only if [ ]he 'recklessly caused inconvenience, annoyance, or alarm' by 'unreasonably' making the noise." *Goodwin*, 781 F.3d at 333–34 (quoting Ohio Rev. Code Ann. § 2917.11(A)(2)).

From Wood's telling, Blair ordered him removed from the fairgrounds based on his "Fuck the Police" shirt. Blair followed Wood to the exit and continued to argue with him. Blair then offered to serve as Troutman's "witness" if Wood pursued battery charges against Troutman. While Wood may have spoken at an elevated volume, nothing in this record indicates that anyone complained. *Cf. Hagedorn*, 715 F. App'x at 506 (finding sufficient basis for arrest where officer "provided evidence" of neighbor's complaint "which would allow a reasonable person to believe that [the plaintiff] was guilty of making unreasonable noise ... despite the protected nature of her speech"). Given these facts, Wood's conduct was not "sufficiently reckless and unreasonable to allow an officer to reasonably believe there was probable cause to arrest h[im]." *Goodwin*, 781 F.3d at 334.

The case presenting the most similar facts to this one is *Henry v. City of Flint*, 814 F. App'x 973 (6th Cir. 2020). There, a man and officer engaged in a heated argument stemming from the officer's investigation of a neighboring abandoned house. The man called the officer a number of profane names, including "asshole," "smart butt," "dumbass," "motherfucker," "punk motherfucker," and "bitch," in addition to telling the officer to "get the fuck on," ***427** "fuck you," and to "do your damn job." *Id.* at 975–77. The case involved a factual dispute as to whether the neighbor turned on a light during the kerfuffle because "[a]bsent the light being turned on as a possible sign of disturbance to others, there was no ground for believing there was a basis for arresting [the plaintiff]—other than his profanity and verbal abuse of the officers, which we have clearly held is not, standing alone, a basis for an arrest." *Id.* at 981 (citing *Greene*, 310 F.3d at 896–97; *Kennedy*, 635 F.3d at 215–16). We denied summary judgment to the officer because absent the light, "a reasonable jury could find that no reasonable officer could have thought there was such a disturbance, rather than simply a belligerent, profane, and uncooperative person." *Id.* at 982. In the absence of any evidence that Wood was unreasonably loud, there was no probable cause to arrest Wood for his profanities alone.

Finally, the defendants argue that there was probable cause to arrest Wood for disorderly conduct because Wood "defied the Deputies' orders" when he insisted on exiting through the back gate rather than the front. CA6 R. 26, Appellees' Br., at 26. But they provide no further argument or any case citations on this point, rendering it forfeited. *See Johnson*, 440 F.3d at 846. And, regardless, refusing to follow police instructions constitutes obstructing official business, Ohio Rev. Code Ann. § 2921.3, which the defendants did not pursue either in the district court or on appeal.

For these reasons, the officers lacked probable cause when they arrested Wood.

B.

The officers are not entitled to qualified immunity if the constitutional right they violated "was 'clearly established' at the time of the challenged conduct." *Ashcroft v. al-Kidd*, 563 U.S. 731, 735, 131 S.Ct. 2074, 179 L.Ed.2d 1149 (2011) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982)). Wood's right to be free from arrest under these circumstances was clearly established at the time.

In *Henry v. City of Flint*, we denied qualified immunity because "there was no ground for believing there was a basis for arresting [the plaintiff]—other than his profanity and verbal abuse of the officers, which we have clearly held is not, standing alone, a basis for an arrest." 814 F. App'x at 981. *Henry* was decided in 2020, so the defendants contend it cannot clearly establish Wood's right to be free from arrest in 2016. But *Henry* did not represent a change in the law. *Henry*

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relied on our decisions in *Greene v. Barber* and *Kennedy v. City of Villa Hills*, which we decided in 2002 and 2011, respectively. *Id.* at 982. In *Greene*, we held that the plaintiff's “right not to be arrested for insulting a police officer [was] ‘clearly established.’ ” 310 F.3d at 897. The same goes for *Kennedy*. Although the plaintiff in that case “used coarse language,” he “did not pose [a] risk of public alarm” because there were “no third parties ... whom an arrest would protect” or whom the plaintiff disturbed. 635 F.3d at 217. We said then that “the First Amendment requires ... police officers [to] tolerate coarse criticism,” and “[e]ven crass language used to insult police officers does not fall within the ‘very limited’ unprotected category of ‘fighting words.’ ” *Id.* at 214, 216, 218 n.5.

Beyond *Greene* and *Kennedy*, we had already made clear by 2016 that profanity alone is insufficient to constitute fighting words under Ohio's disorderly conduct statute. *See D.D.*, 645 F. App'x at 425, 427 (denying qualified immunity to officer on false arrest claim because “Ohio's disorderly conduct statute and the First ***428** Amendment require more than the uttering, or even shouting, of distasteful words,” and “no competent officer would have found probable cause to arrest [the plaintiff]”); *Leonard*, 477 F.3d at 359 (“The Supreme Court has held that a state may not make a ‘single four-letter expletive a criminal offense.’ ” (quoting *Cohen*, 403 U.S. at 26, 91 S.Ct. 1780)); *McCurdy v. Montgomery Cnty.*, 240 F.3d 512, 515, 520 (6th Cir. 2001) (finding that plaintiff's “right to challenge verbally” officer's conduct, including stating “what the fu*k do you want” and “what the fu*k is your job,” was “well-established”); *Sandul*, 119 F.3d at 1256 (denying qualified immunity because there should be “little doubt in the mind of a reasonable officer that the mere words and gesture ‘f—k you’ are constitutionally protected speech”); *City of Houston*, 482 U.S. at 462–63 & n.12, 107 S.Ct. 2502 (“The freedom of individuals verbally to oppose or challenge police action without thereby risking arrest is one of the principal characteristics by which we distinguish a free nation from a police state,” a “conclusion [that] finds a familiar echo in the common law.”). Given this backdrop, it was clearly established in 2016 that there was no probable cause to arrest Wood for disorderly conduct.

IV.

Wood also asserts a First Amendment retaliation claim. To prevail, Wood must demonstrate three elements: (1) “that he engaged in constitutionally protected speech,” (2) “that he suffered an adverse action likely to chill a person of ordinary firmness from continuing to engage in protected speech,” and (3) “that the protected speech was a substantial or motivating factor in the decision to take the adverse action.” *Westmoreland v. Sutherland*, 662 F.3d 714, 718 (6th Cir. 2011).[4] The district court granted summary judgment to the defendants after concluding that Wood had not suffered an adverse action and “there [wa]s no evidence of retaliatory animus from Defendants based on Plaintiff's t-shirt.” *Wood*, 459 F. Supp. 3d at 978.

As to the first element, the defendants do not contest that Wood's shirt was constitutionally protected speech, nor could they. Wood's “Fuck the Police” shirt was clearly protected speech. “It is well-established that ‘absent a more particularized and compelling reason for its actions, a State may not, consistently with the First and Fourteenth Amendments, make the simple public display of a four-letter expletive a criminal offense.’ ” *Sandul*, 119 F.3d at 1254–55 (alterations omitted) (quoting *Cohen*, 403 U.S. at 26, 91 S.Ct. 1780).

On the second element, Wood demonstrated that he suffered an adverse action because the police officers escorted him out of the fairgrounds. Although we have held that a Fourth Amendment seizure amounts to an adverse action, *Cruise-Gulyas*, 918 F.3d at 497, Wood does not challenge the magistrate's determination—which the district court adopted—that he was not seized until the moment of arrest. *See* R. & R., 2020 WL 635652, at *8; *Wood*, 459 F. Supp. 3d at 980. To determine whether removing Wood from the fairgrounds was an adverse action, we consider whether the action “would ‘deter a person of ordinary firmness’ from the exercise ***429** of the right at stake.” *Thaddeus-X v. Blatter*, 175 F.3d 378, 396 (6th Cir. 1999) (en banc) (citation omitted); *see also Bloch v. Ribar*, 156 F.3d 673, 678 (6th Cir. 1998) (applying same standard outside of prison context).

We have “emphasize[d] that while certain threats or deprivations are so de minimis that they do not rise to the level of being constitutional violations, this threshold is intended to weed out only inconsequential actions, and is not a means whereby solely egregious retaliatory acts are allowed to proceed past summary judgment.” *Thaddeus-X*, 175 F.3d at 398. While “[m]ere threats ... are generally not sufficient to satisfy the adverse action requirement,” *Mitchell v. Vanderbilt Univ.*, 389 F.3d 177, 182 (6th Cir. 2004), acts that are more than a “petty slight[ ] or minor annoyance[ ]” suffice, *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68,

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126 S.Ct. 2405, 165 L.Ed.2d 345 (2006). *See* *Benison v. Ross*, 765 F.3d 649, 660 (6th Cir. 2014) (withholding an educational transcript); *Paeth v. Worth Twp.*, 483 F. App'x 956, 963 (6th Cir. 2012) (issuing a stop work order); *Campbell v. Mack*, 777 F. App'x 122, 135 (6th Cir. 2019) (over-tightening a detainee's handcuffs); *see also* *Rutan v. Republican Party of Illinois*, 497 U.S. 62, 75 n.8, 110 S.Ct. 2729, 111 L.Ed.2d 52 (1990) (noting that the First Amendment "already protects state employees ... from even an act of retaliation as trivial as failing to hold a birthday party for a public employee ... when intended to punish her for exercising her free speech rights" (internal quotation marks and citation omitted)). Here, police officers removed Wood from a public event under armed escort. That act was neither " 'inconsequential' as a matter of law," *Wurzelbacher v. Jones-Kelley*, 675 F.3d 580, 585 (6th Cir. 2012), nor just a "petty slight[ ] or minor annoyance[ ]," *Burlington N. & Santa Fe Ry. Co.*, 548 U.S. at 68, 126 S.Ct. 2405. Wood satisfies the adverse action element.

Finally, the facts are in dispute as to whether Wood's shirt "was a substantial or motivating factor in the decision to take the adverse action." *Westmoreland*, 662 F.3d at 718. While the defendants argue that they removed Wood from the fairgrounds because he was filming people, Wood alleges that Blair walked up to him flanked by the defendants and yelled "Where's this shirt? I want to see this shirt." DE 55-2, Wood Dep., Page ID 468. As the officers surrounded Wood and escorted him from the building, one of them said to Wood, "You've been given an order to vacate the property. So you're leaving." Troutman Cam #1, 00:32–35. While walking Wood through the fairgrounds, with Wood repeatedly questioning whether the defendants had taken an oath to uphold the Constitution, one of the officers said they were "escorting ... [Wood] to the front gate." Johnson Cam 2:29–35. And while en route to jail, one officer said to Wood, "How's that work? You got a shirt that said, 'f the police,' but you want us to uphold the Constitution?" Troutman Cam #2, 17:15–21. A reasonable jury, considering these facts, could conclude the officers were motivated to surround Wood and require him to leave in part because he wore a shirt that said "Fuck the Police." We reverse the grant of summary judgment to the defendants on this claim.

V.

Wood used strong language to criticize the defendants. But "[o]ne of the prerogatives of American citizenship is the right to criticize public men and measures—and that means not only informed and responsible criticism but the freedom to speak foolishly and without moderation." *Cohen*, 403 U.S. at 26, 91 S.Ct. 1780 (quoting ***430** *Baumgartner v. United States*, 322 U.S. 665, 673–74, 64 S.Ct. 1240, 88 L.Ed. 1525 (1944)). "[T]he First Amendment recognizes, wisely we think, that a certain amount of expressive disorder not only is inevitable in a society committed to individual freedom, but must itself be protected if that freedom would survive." *City of Houston*, 482 U.S. at 472, 107 S.Ct. 2502. Wood's speech, while coarse, was constitutionally protected. We reverse the grant of summary judgment and remand the case for further proceedings consistent with this opinion.

All Citations

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Footnotes

1 Defendants did not raise the obstruction charge as a basis for summary judgment. And, although they argued probable cause existed to arrest Wood for disorderly conduct and littering, § 3767.32(A), because Wood "threw his refunded money on the ground," DE 31, Mot. for Summ. J., Page ID 205, 208, the district court did not address the littering argument and the defendants do not press it on appeal.

2 *See* *Cruise-Gulyas*, 918 F.3d at 496; *Hagedorn v. Cattani*, 715 F. App'x 499, 506 (6th Cir. 2017) (calling officer "asshole" and "idiot" were not fighting words); *Wilson*, 549 F. App'x at 311 (officers "patently without probable cause to arrest" an "11 year-old girl [who] raised her middle fingers toward an adult male police officer" because "[t]hose circumstances did not create a situation where violence was a likely result"); *Kennedy*, 635 F.3d at 211, 218 n.5 (calling officer a "son of a bitch" and a "fat slob" "seems to be the type [of speech] that the First Amendment protects" because "[e]ven crass language used to insult police officers does not fall within the 'very limited' unprotected category of 'fighting words' " (quoting *Greene*, 310 F.3d at 892–93, 896)); *Zulock v. Shures*, 441 F. App'x 294, 305–07 (6th Cir. 2010) (no probable cause to arrest man for disorderly conduct under Ohio law where man said " 'fuck you' four or five times" to police officer while holding knife); *Leonard v. Robinson*, 477 F.3d 347, 351, 359 (6th Cir. 2007) (telling elected officials "that's why you're in a God damn lawsuit" "was not, as a matter of law 'likely to cause a fight' " (citation omitted)); *Barnes*, 449 F.3d at 718 ("using [foul]

language, cussin', ranting and raving about [a] prior [dispute]" to police officer does not constitute fighting words because even such strong language "is accorded the full protection of the First Amendment"); *Sandul*, 119 F.3d at 1252, 1256 (shouting "fuck you" and extending middle finger to abortion protesters was protected by First Amendment).

3 Nor could they raise this argument now because they did not press it in the district court.

4 The Supreme Court recently announced an additional requirement, holding that "a plaintiff must plead and prove the absence of probable cause for the arrest" to sustain a First Amendment retaliation claim. *Nieves v. Bartlett*, ––– U.S. ––––, 139 S. Ct. 1715, 1724–25, 204 L.Ed.2d 1 (2019). As we have concluded, Wood satisfied this requirement because probable cause did not exist for Wood's arrest.

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