State of Wisconsin

Court of Appeals

District IV

Appeal Nos. 2015AP122 CR & 2015AP123 CR

STATE of WISCONSIN,

Plaintiff-Respondent,

v.

ALINA CAMINITI and MATTHEW CAMINITI,

Defendants-Appellants.

REPLY BRIEF OF DEFENDANTS-APPELLANTS

Appeal from the Judgments of Conviction entered May 8, 2014,
In the Circuit Court for Dane County,
The Honorable Ellen K. Berz, Presiding,
In Circuit Court Case Nos. 11-CF-504 & 11-CF-505

THE JEFF SCOTT OLSON
LAW FIRM, S.C.
Jeff Scott Olson
131 W. Wilson St., Suite 1200
Madison, Wisconsin 53703
Phone: 608 283 6001
Fax: 608 283 0945
E-mail: jsolson@scofflaw.com

Attorneys for Defendants-Appellants

State of Wisconsin

Court of Appeals

District IV

Appeal Nos. 2015AP122 CR & 2015AP123 CR

STATE of WISCONSIN,

Plaintiff-Respondent,

v.

ALINA CAMINITI and MATTHEW CAMINITI,

Defendants-Appellants.

REPLY BRIEF OF DEFENDANTS-APPELLANTS

Appeal from the Judgments of Conviction entered May 8, 2014,
In the Circuit Court for Dane County,
The Honorable Ellen K. Berz, Presiding,
In Circuit Court Case Nos. 11-CF-504 & 11-CF-505

THE JEFF SCOTT OLSON LAW FIRM, S.C.
Jeff Scott Olson
131 W. Wilson St., Suite 1200
Madison, Wisconsin 53703
Phone: 608 283 6001
Fax: 608 283 0945
E-mail: jsolson@scofflaw.com

Attorneys for Defendants-Appellants

Table of Contents

Table of Authorities

Cases

Statutes

ARGUMENT

I. The State is Mistaken about the Standard of Review and the Burden of Proof in this case.

In its brief, the State does not state directly what test should be applied to the Caminitis' due process claim other than a "balancing test," but it asserts that the Caminitis are mistaken in asserting that the Court should use a strict scrutiny analysis. (Resp. Brief, 17-18). It also asserts that the challenged laws are presumed constitutional. Both assertions are erroneous.

A. Strict Scrutiny Must be Applied because Parents' Interest in Child-Rearing is a Fundamental Liberty Interest.

It is axiomatic that the strict scrutiny test is to be applied whenever "government action impinges upon a fundamental right protected by the Constitution." *Perry Educ. Ass'n v. Perry Local Educators' Ass'n,* 460 U.S. 37, 54 (1983). See also, *Doe v. Heck,* 327 F.3d 492, 519 (7th Cir. 2003) ("It is well established that when a fundamental constitutional right is at stake, courts are to employ the

exacting strict scrutiny test") and *State v. Olson*, 2006 WI App 32, ¶ 4, 290 Wis.2d 202, 712 N.W.2d 61 ("[W]here the statutory scheme impinges upon a fundamental liberty, [courts] will not invalidate it on substantive due process grounds [if] it is narrowly tailored to a compelling government interest.") Thus the question is whether or not parents' interest in rearing their children is a "fundamental interest." The Caminitis assert that it is.

The Seventh Circuit has held: "[T]he right of a man and woman to marry, and to bear and raise their children is the most fundamental of all rights—the foundation of not just this country, but of all civilization. *Brokaw v. Mercer County*, 235 F.3d 1000, 1018 (7th Cir.2000).

In *Yoder*, Chief Justice Burger stated:

> This case involves the fundamental interest of parents, as contrasted with that of the state, to guide the religious future and education of their children. The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring tradition.

Wisconsin v. Yoder, 406 U.S. 205, 232 (1972).

The right of parents to discipline their child is the "oldest of the fundamental liberty interests recognized by [the United States Supreme] Court." *Troxel v. Granville,* 530 U.S. 57, 65 (2000). Even cases cited by the State in its brief refer to a parent's right to make child-rearing decisions as a "fundamental right." See, e.g. *State v. Neumann*, 2013 WI 58, ¶ 39, 348 Wis. 2d 455, 832 N.W.2d 560 ([A] parent's fundamental right to make decisions concerning his or her child is not unlimited.")

B. The Burden of Proof is on the State to Justify its Impingement on Fundamental Parental Rights.

The State asserts "Wisconsin statutes are presumed constitutional," (Resp. Brief, 17) and in most cases, that is correct. However, where legislation or action taken under color of state law impinges upon a fundamental liberty interest, it is "presumptively unconstitutional." *Harris v. McRae*, 448 U.S. 297, 312 (1980). In such a case, the burden shifts to the government to justify such infringement by using the traditional strict scrutiny standard.

County of Sacramento v. Lewis, 523 U.S. 833, 846–47 (1998). The State has not met that burden here.

II. The State has Failed to Address Defendants' Facial Challenge by Demonstrating that the Child Abuse and Parental Privilege Statutes are Drafted as Narrowly as Possible to Achieve a Compelling State Interest.

Contrary to the State's assertion that only facial unconstitutionality has been raised, (Rep. Brief p 20), the Defendants' motions to dismiss asserted that Wisconsin's child abuse statute and parental privilege statute, taken together, are unconstitutional, both facially and as applied. (R-50). The State makes frequent references to the evidence it produced at trial, but glosses over the fact that it presented absolutely no evidence in opposing the Defendants' pretrial motion to dismiss based on unconstitutional impingement on parental rights, thus failing to meet its burden under the strict scrutiny test to show that the statue was drafted as narrowly as possible to achieve a compelling state

interest. Consideration of the facial challenge to the statute must be separated from the facts adduced at trial – those facts are only relevant to the as-applied challenge.

The Caminitis do not for a moment suggest that the State does not have a compelling interest in protecting children from actual injury, or that it cannot do so by use of a well-drafted child abuse prohibition. But in this case the State has never identified in what way a more narrowly drafted statute would interfere with the providing the protection(s) children need.

The statute burdens the rights of all parents (not just the Caminitis) in at least two ways: by its broad language, it penalizes the infliction of even momentary pain (as opposed to being more narrowly drafted to penalize only the infliction of actual injury to a child), and it requires parents to use corporal discipline only when "necessary" (as opposed to when a parent finds it to be a useful, albeit perhaps not "necessary," parenting tool).

That parents' rights to raise children as they think best is burdened by the language of the child abuse statute is obvious. Whether or not that burden is justified might be open to argument, but it cannot be denied that the child abuse statute, § 948.03(2)(b), and parental privilege, § 939.45(5)(b), taken together, impose a burden on childrearing options.

According to § 948.03(2)(b), child abuse occurs when one who is responsible for a child who is not yet 18 years old intentionally causes bodily harm to that child. Bodily harm is defined as "physical pain or injury, illness, or any impairment of physical condition." Because the statute is drafted so broadly as to include pain as bodily harm, if a parent determines a child's behavior warrants a spanking, that spanking will cause at least mild pain, subjecting the parent to prosecution under the child abuse statute. It is no solution to say that the parent has the affirmative defense of reasonable discipline available, because it is unquestionably a burden to be hauled into court, put to the humiliation and expense of a trial for administering a non-injurious spanking to a child. And

it is no less burdensome to require that the act be intentional – presumably most spankings are administered intentionally rather than accidentally.

The parental privilege provides that reasonable discipline involves only such force as a reasonable person believes is necessary. This means that in defense, parents cannot assert they thought the spanking would be a helpful way to teach their wayward child or even that it seemed the best way. To be acquitted, the parent must demonstrate the spanking was "necessary." *State v. Kimberly B.*, 2005 WI App 115, 283 Wis. 2d 731, 699 N.W.2d 641.

Thus the statute of the child abuse statute coupled with the parental privilege statute limit a parent's freedom to make decisions about (1) the reason for the spanking, and (2) the force of the spanking, These impingements are not stated so plainly in the statutes, but they are there nonetheless.

The Caminitis assert that while the State admittedly has a compelling interest in the second category, the amount of force, it

has no legitimate interest whatsoever in the first. By requiring that use of corporal punishment must be necessary, say perhaps to discipline a child who has almost done something life threatening, like putting her hand in light socket, the State supplants the parent's decision-making. If the child skips school, is a spanking warranted? If she ruins her old sister's favorite sweater? If she refuses to eat her vegetables? The State has not even attempted to defend its interference in determining *when* a spanking can legally be administered or explained in what way children would be unprotected if the child abuse statute were narrowed to define bodily harm as significant pain rather than any bodily pain. And it has not shown that its compelling interest (the actual safety of children) would be less well served if the parental privilege statute eliminated having to prove that corporal punishment was "necessary."

The State asserts that it can imagine no alternative statute that would be less restrictive for religiously minded parents such as the Caminitis and still be fair to others (Resp. Brief p. 39). This misses the point of a facial challenge. A statute that prohibits only *excessive* use of force protects all children but leaves parents free to determine when and where a child's behavior warrants a spanking without State interference. The State does not explain why the many examples of such legislation offered in the Defendants' brief, including the Model Penal Code, that do exactly that, would leave children unprotected.

III. The State Has Failed to Address the As-Applied Challenge

The analysis that is employed for an as-applied challenge contains no presumption in regard to whether the statute was applied in a constitutional manner. *In re Gwenevere T.*, 2011 WI 30, ¶ 49, 333 Wis. 2d 273, 300, 797 N.W.2d 854, 868. The State asserts that the Caminitis' ability to make their arguments is circumscribed by

the fact that their children were bruised from the spankings. If the State had prosecuted them on that issue alone, a jury might have found the conduct was not reasonable discipline. But we will never know which factor influenced the Caminitis' jury because the prosecution availed itself of the full panoply of theories of prosecution available under the Wisconsin statute. It argued that minimal pain, something that would cause a child to say "ouch" or "owie" was sufficient to find child abuse. (R. 134, p. 77.) And it mocked and belittled the *reasons* for the spankings as not having made them necessary. Thus it cannot now separate the constitutional grounds on which the Defendants *migh*t have been convicted from the unconstitutional grounds, having urged both upon the jury in this prosecution.

The Philip Caminiti, case cited by Respondent is not helpful because it addressed the issues raised by these Defendants only tangentially. To the extent that decision addressed whether the parental right to discipline is constitutionally protected, it centered on Philip Caminiti's assertion that the prosecution in his case had

argued that all corporal punishment of toddlers was *per se* unlawful (P-R App 13-18); no such argument has been raised in this case.

IV. The State has Failed to Meet its Burden to Justify its Burden on Religious Freedom.

The Caminitis' argument that the statutes impermissibly impinge upon their religious freedom points to the same deficits noted above – the statutes as presently configured give the State the right to pass judgment on the reason that parents choose to spank. If the spanking of toddlers with wooden spoons is unreasonable force, capable of causing actual injury, that is one thing. But the arguments that spanking at such a young age is likely to be ineffective, and that spanking for conduct exhibiting selfishness is inappropriate (arguments that the State hammered home at trial), impinge upon the religious freedom of the Caminitis and other Evangelicals.

The Free Exercise Clause "forbids subtle departures from neutrality," *Gillette v. United States,* 401 U.S. 437, 452 (1971), and allowing the government to delve into the reasons a parent

administers a spanking permits prosecutors and jurors to exercise viewpoint discrimination in determining whether a spanking was necessary. "In the realm of religious faith, … sharp differences arise. [T]he tenets of one man may seem the rankest error to his neighbor…. The essential characteristic of these [religious] liberties is, that under their shield many types of life, character, opinion and belief can develop unmolested and unobstructed" *Cantwell v. Connecticut*, 310 U.S. 296, 310 (1940).

The State has given no justification for its intrusion, through the child abuse and parental privilege statutes, into the motivations and thought processes of the parent who chooses to spank a child rather than focusing solely on the result of the spanking. The child abuse law, coupled with the narrowly delimited affirmative defense of the parental discipline privilege (1) burden the religious beliefs of those to whom corporal punishment is an essential element of child raising, (2) do not serve a compelling state interest to the extent that they regulate the infliction of discipline that is painful but not

injurious, and (3) are not the least restrictive means of achieving a compelling state interest because they discriminate against religious-based rationale for discipline which others may not regard as "necessary."

A limiting construction could possibly save the statutes, but the State has suggested none. The burden is on the State to prove that a limiting construction is available by which the court can preserve the statutes in a constitutional form. *State v. Janssen*, 219 Wis. 2d 362, 580 N.W.2d 260, 271 (1998). Even if this Court were to now craft a limiting construction, it would not salvage the outcome of the present case where, as explained above, the Defendants were prosecuted zealously not just based on the force of their spankings but also for the religious reasons that motivated the spankings.

CONCLUSION

The convictions must be overturned and the challenged statutes found unconstitutional in their present form because the State has not met its burden to justify its restriction of freedom of religion/exercise of conscience or its burden on the parents' right to raise children as they think best. The State has not shown that more narrowly drafted statutes could not protect the compelling interest in keeping children safe from actual harm (as opposed to transient, minor pain), especially in light of the fact that such statutes exist elsewhere.

Dated this Wednesday, September 02, 2015

Respectfully Submitted,

Alina and Matthew Caminiti,

Defendants-Appellants, By

THE JEFF SCOTT OLSON
LAW FIRM, S.C.
Jeff Scott Olson
State Bar No. 1016284

131 W. Wilson St., Suite 1200
Madison, Wisconsin 53703
Phone 608 283 6001
Fax 608 283 0945
E-mail jsolson@scofflaw.com

_____
Jeff Scott Olson
Attorney for Defendants-Appellants

§ 809.19(8) CERTIFICATION

I hereby certify, as required by Wis. Stat. § 809.19(8)(d), that this reply brief meets the requirements in Wis. Stat. 809.19(8)(c)(2). Specifically, the brief is prepared with proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points, maximum of 60 characters per full line of body text.

The length of this reply brief does not exceed 3000 words. The length of the brief is 2,272 words.

THE JEFF SCOTT OLSON LAW FIRM, S.C.

By:

_____
Jeff Scott Olson
Attorney for Defendants-Appellants

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that: I have submitted an electronic copy of this brief which complies with the requirements of s. 809.19(12). I further certify that: This electronic brief is identical in content and format to the printed form of the brief filed as of this date. A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

THE JEFF SCOTT OLSON LAW FIRM, S.C.

By:

_____

Jeff Scott Olson
Attorney for Defendants-Appellants