The Wisconsin Court of Appeals District IV

2020 AP 952-CR

State of Wisconsin,
Plaintiff-Respondent

v.

Aaron Oleston
Defendant-Appellant

Appeal from The Circuit Court of Rock County
The Honorable John M. Wood, presiding

Brief of Appellant Aaron Oleston

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Statement of the Issues

Does the First Amendment protect the rights of citizens to crudely criticize police officers?

Statement on Oral Argument and Publication

Oral argument is requested. This court may only direct the appeal be submitted on the briefs when the arguments of the appellant are plainly contrary to sound relevant legal authority, are meritless, involve solely questions of fact clearly supported by sufficient evidence, or the briefs fully present and develop the issues. Mr. Oleston's arguments are not contrary to sound legal theory, they are not meritless, and they are not factual arguments. Mr. Oleston's arguments involve a substantial breadth of First Amendment law, and touch on areas previously unaddressed by the Wisconsin Courts. Given the nature and circumstances of this case, and the continued discourse in the State and National community on policing, this Court should expend the additional judicial resources to ensure this case is decided properly.

Publication is also requested. Wisconsin Courts have yet to determine the standards expected of police and citizens when debating police actions. This is a matter of ongoing and substantial public interest. The Wisconsin Courts have long been silent on this issue, and the State has been experiencing a substantial growth in calls for police reform and demonstrations against the police. It is critical for all members of the State to understand what is expected and what will result in criminal punishment. This case will also likely contribute to the existing

First Amendment Jurisprudence with its substantial collection of prior decisions.

Statement of Facts and the Case

The facts giving rise to this case are straightforward and were all captured on Mr. Oleston's cameras. (See Exhibits 2,4). Mr. Oleston disagrees with many police actions including their harassment of the homeless, failure to identify themselves, and wasting taxpayer funds. (R.65:208). On August 13, 2018, Mr. Oleston went to the Janesville police department, positioned himself on the sidewalk near the rear entrance, and began to record what he saw. (R.65:204-205). Counts 1-4 of the criminal complaint occurred on this date.

Count 1

Officer Jeremy Wiley was walking into the building to begin his shift when he saw Mr. Oleston and said "Hi". (R.65:163). Mr. Oleston responded by saying "I don't talk to terrorists, so fuck you…suck a dick…you fucking thug". (R.65:163; Exhibit 2).

Count 2

Officer Daniel Schoonover was walking into the building to begin his shift. (R.65:98) Like Officer Wiley, Officer Schoonover said "Hi" to Mr. Oleston. (R.65:99). Mr. Oleston replied, "you work for this piece of shit organization, you Nazi ISIS organization." (R.65:99; Exhibit 2).

Count 3

Officers Robert Gruenwald and Ryan Nabler were leaving the police department at the end of their shift. (R.65:106,110).

Mr. Oleston asked them if they were janitors. (R.65:106,110). When Officer Nabler responded they were officers, Mr. Oleston remarked, "Oh, off duty". (R.65:106,110). He then asked the officers if they were going home to beat their wives, and called them assholes.

Count 4

Officers Pearson, Smith, and Rau were leaving the station. (R.65:116,123,145-146). As they were walking towards their vehicles, Mr. Oleston asked them if they were "having fun fucking with peoples' lives", and noted "citizens are forced to talk, we ask questions and you don't talk." (R.65:116,123,145-146).

Count 5

On August 15, 2018, Mr. Oleston resumed his position on the sidewalk. (R.65:215-216). Officer Bentley noticed Mr. Oleston grumbling. (R.65:153). Mr. Oleston noticed Officer Vitaioli's vehicle did not have a front license plate. (R.65:150). Another officer tested the siren on their patrol car. (R.65:153). After the siren stopped, Mr. Oleston could be heard pointing out the missing license plate in a raised voice. (R.153). Officer Wiley was present, and arrested Mr. Oleston for harassing off-duty place officers. (R.65:165).

On September 13, 2018, a criminal complaint was filed charging Mr. Oleston with five counts of disorderly conduct, and one charge of obstructing a police officer. (R.1:1-4). On March 19, 2019, Counsel for Mr. Oleston filed a motion to dismiss all charges as Mr. Oleston's conduct and speech are protected by the First Amendment to the United States Constitution and Article 1

Section 3 of the Wisconsin Constitution. (R.16:1-3). The parties briefed the issues, and on April 30, 2019, the Circuit court held a hearing on the motion, and denied the motion to dismiss. (R.59:50). In its ruling, the circuit court placed significant emphasis on the right of officers to be let alone, (R.59:38,50); the lack of social value to Mr. Oleston's comments, (R.59:41,49); and Mr. Oleston's initiation of contact. (R.59:49).

Counsel for Mr. Oleston filed a petition for leave to appeal on June 27, 2019. The petition was denied, and Mr. Oleston proceeded to trial. At trial, Mr. Oleston was convicted on each count of disorderly conduct, but was found not guilty of obstructing a police officer. (R.65:282-285). On December 11, 2019, Mr. Oleston was placed on two years probation with sentences withheld. (R.66:18). Mr. Oleston filed a notice of intent to pursue post-conviction relief the next day. (R.54). A timely notice of appeal was filed on May 26, 2020. (R.55).

Argument

I. The First Amendment Protects Mr. Oleston's Speech

A. Legal Standards

The right to freedom of speech is guaranteed under Article I, Section 3 of the Wisconsin Constitution, as well as the First Amendment to the United States Constitution. Despite the differences in language between the two provisions, there is no difference in the freedoms they guarantee. *State v. Robert T.*, 2008 WI App 22 ¶6, 307 Wis. 2d 488, 746 N.W.2d 564 (2008). Whether Mr. Oleston's comments are protected by the First Amendment is a question which this court reviews *de novo*. *A.S. v. A.S.*, 2001 WI ¶19

Freedom of speech is not unlimited, but must be protected from censorship or punishment unless it is shown likely to produce a clear and present danger of a serious substantive evil rising beyond public inconvenience, annoyance, or unrest. *Terminiello v. Chicago*, 337 U.S. 1, 4, 69 S.Ct. 894 (1949). There are well defined and narrowly limited classes of speech, which the State may regulate without offending the First Amendment. *Chaplinsky v. N.H.*, 315 U.S. 568, 571-572, 62 S.Ct. 776 (1942). These categories include the lewd and obscene, the libelous, and "fighting words"; those which by their very utterance inflict injury or tend to incite an immediate breach of the peace, and the profane. *Id* at 572. *See, e.g.*, *Brandenburg v. Ohio*, 395 U.S. 444, 89 S. Ct. 1827 (1969)(Incitement to imminent lawless action); *Miller v. California*, 413 U.S. 15, 93 S. Ct. 2607 (1973) (Obscenity); *New York Times Co. v. Sullivan*, 376 U.S. 254, 84

S .Ct. 710 (1964)(Libel and defamation); *Watts v. United States*, 394 U.S. 705, 89 S. Ct. 710 (1969)(True Threats).

Wisconsin Courts have consistently held Wis. Stat. §947.01 (Disorderly conduct) is not overly broad, and cannot be applied to speech which is protected by the First Amendment. *State v. Douglas.*, 2001 WI 47 ¶21, 243 Wis.2d 204, 626 N.W.2d 725 (2001). Speech may only be prosecuted when it falls into one of the limited categories falling outside the protection of the First Amendment. *A.S. v. A.S.* 2001 WI 48 ¶16, 243 Wis. 2d 173, 626 N.W.2d 712 (2001). The disorderly conduct statute may be applied to speech alone when the speech is not an essential part of any exposition of ideas, when it is utterly devoid of social value, and when it can cause or provoke a disturbance. *A.S v. A.S*, 2001 WI 41 ¶17.

In determining if speech may serve as the basis for a conviction for disorderly conduct, courts must first determine if the speech falls into one of the narrow classes of unprotected speech. If the speech is not protected, then the court must determine the speech speech is not be an essential part of the exposition of ideas and is utterly devoid of social value. Only then may speech in and of itself satisfy the first element of disorderly conduct. *A.S. v. A.S.*, 2001 WI ¶17.

B. Mr. Oleston's Remarks Are Not Included in the Categories of Unprotected Speech

1. Obscenity

Obscenity is limited to works which, as a whole appeal to the prurient interest in sex. *Miller v. California*, 413 U.S. 24. While Mr. Oleston did tell one officer to perform a sexual act, the

phrase "suck a dick" is frequently used in a metaphorical sense, as it was here, and represents only a small portion of the statements. It would be entirely unreasonable to find this comment appealed to the prurient interest, thus exempting count one from First Amendment protections.

2. True Threat

Mr. Oleston's remarks cannot be construed as a true threat. A true threat is a statement that a speaker would reasonably foresee that a listener would reasonably interpret as a serious expression of a purpose to inflict harm. *State v. Perkins*, 2001 WI 46 ¶49, 243 Wis. 2d 141, 626 N.W.2d 762 (2001). None of Mr. Oleston's statements reflect a desire for harm to come to the officers involved.

3. Libel

Mr. Oleston's statements are not libelous. The First Amendment does not protect a false statement made with knowledge it was false, or reckless disregard for whether it was false. *New York Times Co. v. Sullivan*, 376 U.S. 280. In count one Mr. Oleston called an officer a terrorist and a thug. These are matters of opinion. Similarly, in count two, Mr. Oleston expressed opinions about the Janesville Police Department, calling it a piece of shit, Nazi, ISIS organization. In count three Mr. Oleston offered his opinion of two officers, deeming them "assholes" and asked if they were going to beat their wives. In count four Mr. Oleston again asked a question of police officers. A question is not a statement. In count five, Mr. Oleston pointed out Officer Viatioli's vehicle did not have a front license plate.

While Mr. Oleson was incorrect about the legality of this, it is indeed a true statement of fact.

4. Incitement to Lawlessness

Mr. Oleston's comments cannot reasonably be construed as an incitement to lawlessness. In *Brandenburg v. Ohio*, the Supreme Court held the mere teaching of moral propriety or necessity of violence is protected by the First Amendment. Notably, Mr. Oleston never mentions violence against officers. While his comments may be distasteful, they do not depict even a desire of harm to befall officers.

5. Fighting Words

Fighting words are those *personally* abusive epithets which, when addressed to the ordinary citizen are inherently likely to provoke violent reaction. *Cohen v. California,* 403 U.S. 15, 20, 91 S.Ct. 1780 (1971)(Emphasis added). The freedom of individuals to verbally oppose police action without thereby risking arrest is one of the principal characteristics by which we distinguish a free nation from a police state. *Houston v. Hill*, 482 U.S. 451, 463, 107 S.Ct. 2502 (1987). Words which express contempt or ridicule, or are annoying may only be criminalized when they have the characteristic of plainly tending to excite the addressee to a breach of the peace. *Gooding v. Wilson*, 405 U.S. 518, 523, 92 S. Ct. 1103 (1971). In cases involving a police officer , narrower application is warranted as a we expect trained officers to exercise a higher degree of restraint than the average citizen and be less likely to respond in a belligerent manner. *Houston v. Hill*, 482 U.S. 462; *see also, Glik v. Cunniffe*, 655 F.3d 78 (1st Cir. 2011); *Posr v. Court Officer Shield #207*, 180 F.3d 409

(2d Cir. 1999); *Mesa v. Prejean*, 543 F.3d 264 (5th Cir. 2008); *Kennedy v. Villa Hills*, 635 F.3d 210, 216 (6th Cir. 2011); *Braun v. Baldwin*, 346 F.3d 761 (7th Cir 2003); *Thurairajah v. City of Fort Smith*, 925 F.3d 979 (8th Cir. 2019); *Ford v. City of Yakima*, 706 F.3d 1188 (9th Cir. 2013); *Stearns v. Clarkson*, 615 F.3d 1278 (10th Cir. 2010); *Skop v. City of Atlanta*, 485 F.3d 1130 (11th Cir 2007).

Counts two, four, and five cannot be classified as fighting words. In count two, Mr. Oleston only referenced the Janesville Police Department; this was not a personal epithet. In count four Mr. Oleston referenced the efforts of police organizations to make citizens talk, while frequently failing to answer similar questions. This is not a personal epithet. Count Five relates to Mr. Oleston pointing out an officer's car was missing a license plate. This, again, is not a personal epithet.

In count one, Mr. Oleston implies Officer Wiley is a terrorist and a thug for working as an officer. In count three, Mr. Oleston calls two officers assholes. These are personal epithets. However, they are not likely to even provide an average individual to violence, much less the high standard officers are held to. *Buffkins v. Omaha*, 922 F.2d 465, 472 (8th Cir. 1990) ("'asshole' could not reasonably have prompted a violent response for arresting officers"). If this court allowed such common place indignities to justify convictions, the disorderly conduct statute would become a dangerous dragnet providing police with unfettered discretion to arrest individuals for words which offend or annoy them. *Houston v. Hill*, 482 U.S. 462. As the Supreme

Court noted this would be particularly problematic in the many one-on-one arrests where all that would be required for a conviction is the testimony of the officer the defendant called them a thug or asshole. *Id.* at 466.

6. Profanity

In *Chaplinsky*, the Supreme Court did include profanity in its exemptions from First Amendment Protections. *Chaplinsky*, 315 U.S. 572. Whether profane conduct tending to provoke a disturbance is protected is a matter of unsettled law. *State v. Breitzman*, 2017 WI 100 ¶48, 378 Wis. 2d 431, 904 N.W.2d 93 (2017). Wisconsin Case law does not indicate whether a charge of disorderly conduct under Wis. Stat. §947.01 based on profanity violates the right to free speech. *Id.* Decisions post-*Chaplinsky* have shied from the idea profanity can for the basis for a criminal conviction.

a) Courts Have Retreated From Considering Profanity To Be Unprotected Speech

In 1972, the Supreme Court struck down a Georgia law criminalizing opprobrious words or abusive language tending to cause a breach of the peace. *Gooding v. Wilson*, 405 U.S. 518, 92 S.Ct. 1103 (1972). The Court stated the statute could only be upheld as constitutional if could not be applied to vulgar or offensive speech protected by the First Amendment. *Id.* at 520. Georgia courts had sustained convictions for saying "Get the G— D__ bed rolls out...let's see how close we can come to the G— D__ tents" and "God Damn you, why don't you get out of the road." *Id.* at 525. The Court held these were not fighting words, and thus the statute was overbroad. *Id.* At 525, 528. The Court

notably omits *Chaplinsky's* inclusion of profanity as an unprotected class of speech.

Shortly thereafter, the Court issued a *Per Curiam* decision reversing the Ohio Supreme Court's holding a statute criminalizing the abuse of another by menacing, insulting, slanderous, or profane language. *Plummer v. Columbus*, 414 U.S. 2 (1973). Slander, and menacing or threating language have long been outside the protecting of the First Amendment. A reasonable conclusion is the Supreme Court was narrowing the *Chaplinsky* categories; insults and profanity are only outside the scope of the First Amendment when they reach the level of fighting words. This interpretation is supported by a *Per Curiam* option issued the next year, in which a conviction of criminal contempt for using the phrase "chicken-shit" in a court room was overturned. *Eaton v. Tulsa*, 415 U.S. 697 (1974). In *Lewis v. New Orleans*, the Court cast further doubt on the exemption of profanity from First Amendment protection. The Court held a statute which made it a crime for any individual to curse, revile, or to use obscene or opprobrious language had a broader sweep than the definition of fighting words. *Lewis v. New Orleans*, 415 U.S. 130, 132, 94 S. Ct. 970 (1974). *Chaplinsky*'s language excluding profanity from the protections of the First Amendment was absent.

The federal circuits and state courts have heeded this notable absence. In *Sandul v. Larion*, the Sixth Circuit famously held a citizen raising their middle finger engages in speech protected by the First Amendment. *Sandul v. Larion*, 119 F.3d

1250, 1255 (6th. Cir 1997). In *Duran v. Douglas*, Duran made offensive gestures and yelled profanities in Spanish towards law enforcement. *Duran v. Douglas*, 904 F.2d 1372, 1378 (9th Cir. 1990). The Ninth Circuit, while criticizing Duran's behavior, noted "it was not illegal; criticism of the police is not a crime". *Id.* Illinois has long recognized arguing with a police officer, even if done loudly or with profane or offensive language, will not in and of itself constitute disorderly conduct. *See*, *Payne v. Pauley*, 337 F.3d 767, 777 (7th. Cir. 2003).

b) Wisconsin Should Follow the Modern Trend and Refrain From Criminalizing Profanity

Freedom of speech is undeniably at the heart of democracy. Only through free debate and free exchange of ideas can the government remain responsive to the will of the people, and change may occur peacefully. *De Jong v. Oregon*, 299 U.S. 353, 365, 57 S.Ct. 255 (1937). Speech serves its highest purpose when it creates dissatisfaction with the status quo. *Terminiello v. Chicago*, 337 U.S. 4. Speech must be protected a the instrument of peaceful change unless it is likely to produce a clear and present danger of serious evil. *Id.* The line between speech which is unconditionally guaranteed and speech which may be regulated and punished is finely drawn. *Gooding v. Wilson*, 405 U.S 522.

Linguistic expression conveys not only ideas, but emotions. *Cohen v. California*, 403 U.S. 26. Words are often chosen for the emotions they elicit as well as the cognitive views they present. *Id.* Allowing the criminalization of words deemed profane begins a slippery slope. Who is to determine what is and is not profane?

Governments may seize the opportunity of censoring particular words as a convenient guise for banning the expression of unpopular views. *Id.*

The First Amendment protects a significant amount of verbal criticism and challenges which are directed at law enforcement. *Houston v. Hill*, 482 U.S. 461. Encounters with law enforcement are frequently emotional encounters. The people must be free to choose the words the use to criticize government actors without risking arrest. *Id.* at 463. Allowing police to arrest members of the public for using words deemed by the government to be profane is a marked step away from our republic towards a police state. This Court should not break from the modern interpretation that profane speech not reaching the level of fighting words can form the basis for a criminal conviction.

II. Even if Unprotected, Mr. Oleston's Speech Cannot Support a Conviction for Disorderly Conduct

If this court were to erroneously conclude Mr. Oleston's speech was not protected, it still cannot form the basis for a charge of disorderly conduct as it was an essential part of the exposition of ideas and not devoid of social value. *A.S. v. A.S.*, 2001 WI ¶17. Count one expresses the view police use violence to intimidate society, and Mr. Oleston wished to exercise his right to not talk with them. In count two Mr. Oleston expresses his dissatisfaction with the Janesville Police Department and compares them to Nazis and ISIS. Count three expresses Mr. Oleston's frustration with police using violence in their own homes. Count four again references his dissatisfaction with

police policy, and double standards police may be applying in their interactions with the public. In count five, Mr. Oleston tries to report what he believes to be a crime, and expresses his distastes for what he believes are double standards between the police and the public.

Mr. Oleston's speech in the above incidents will never be confused with those of America's great orators. His rhetoric is certainly not without flaw, and fails to carry great persuasive force. But the First Amendment does not only protect speech of the highest form. Freedom of Speech is the first of the safeguards to our free society. *Terminiello*, at 4. Speech, even that which creases public inconvenience, annoyance, or unrest must be protected from censorship. *Id.* A more restrictive view of our Constitutions would lead to the standardization of ideas by legislatures, courts, political or community groups. *Id.* The right to speak freely and to promote a diversity of idea, particularly ideas outside the mainstream, is one of the chief distinctions setting our Country apart from totalitarian regimes. *Id.*

III. The Right To Be Let Alone Is Constitutionally Questionable, and Factually Inapplicable

At the motion hearing, the circuit court placed emphasis on officers not forfeiting the rights to enjoy the privilege of being left alone on their way to and from work. (R.59:50). In *Hill v. Colorado*, the Supreme Court created an interest in being left alone while going to and from work. *Hill v. Colorado*, 530 U.S. 703, 716-717 (2000). In doing so, the Court referenced Justice Brandeis' dissent in *Olmstead v. United States*, and *American*

Steel Foundries v. Tri-City Central Trades Council. Hill v. Colorado, 530 U.S. 716-717.

A. The Right To Be Let Alone Does Not Accurately Reflect First Amendment Jurisprudence

Justice Scalia pointed out in his dissent, the creation of this interest is highly questionable. *Hill v. Colorado*, 530 U.S. 750-754 (Scalia, J., dissenting). Three years prior, the Court issued *Schenck v. Pro-Choice Network of W. N.Y.*. In the the majority opinion, Justices Rehnquist, Stevens, O'Connor, Souter, Ginsburg, and Breyer expressed doubts whether the right of the people to be left alone accurately reflected the Court's First Amendment jurisprudence. *Schenck v. Pro-Choice Network of W. N.Y.*, 519 U.S. 357, 383, 117 S. Ct. 855 (1997). Justice Scalia wrote separately to emphasize there is no right to be free of unwelcome speech on the public streets. *Schenck,* 519 U.S. 386 (Scalia, J., concurring in part). This opinion was joined by Justices Kennedy and Thomas. The Court was unanimous there was not a right to be free of unwelcome speech in public.

Further, the *Hill* courts citation to *Olmstead* is disingenuous. Justice Brandeis wrote the Constitution conferred the right of the public to be let alone *against the Government. Olmstead v. United States*, 277 U.S. 438, 478, 48 S. Ct. 564 (1928) (Brandeis, J., dissenting). The *Hill* court flipped this on its head, giving the government the right to interfere with private actors speech in a public place because out was unwelcome to others. As Justice Scalia noted, "in public debate our own citizens must tolerate insulting, and even outrageous, speech in order to

provide adequate creating space to the freedoms protected by the First Amendment". *Hill*, 530 U.S. 752 (Scalia, J., dissenting).

B. The Factually Scenarios in *Hill* and *American Steel Foundries*, Are Readily Distinguishable From the Present Case

Even if this interest was consistent with the First Amendment, it could not be applied to Mr. Oleston. In *Hill*, the petitioners engaged in demonstrations in front of abortion clinics which impeded access, and were often confrontational; it was common practice to provide escorts for people entering and leaving the clinics to protect them from aggressive "counselors". *Hill*, at 708-710. Similarly in *American Steel Foundries v. Tri-City Central Trades Council*, there were numerous picketers who impeded the replacement workers from eating the building, and assaults had occurred on multiple occasions. *American Steel Foundries v. Tri-City Central Trades Council*, 257 U.S. 184, 197-201. (1921). These near mobs are incredibly different than a single individual with a camera. Mr. Oleston did not interfere with officers ability to enter or leave the building, and never tried to harm officers. The only thing he did was talk to officers. One person talking cannot be said to actual infringe on any right to be left alone while entering or leaving the workplace.

Conclusion

Freedom of Speech is central preserving our republic and peacefully enacting change. Mr. Oleston respectfully requests this Court recognize his speech was protected, and overturn his convictions for peacefully voicing his displeasure with the Janesville Police. The First Amendment demands no less.

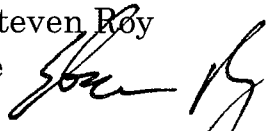
Dated: Wednesday, September 2, 2020
Respectfully submitted,

Steven Roy
Attorney for the Defendant
Wisconsin State Bar No. 1115155

CERTIFICATE OF COMPLIANCE WITH RULE 809.19 (8)

I hereby certify that this brief conforms to the rules contained in s. 809.19 (8) (b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 3,879 words.

Signed: Steven Roy

Signature 

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I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with s. 809.19 (2) (a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under s. 809.23 (3) (a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

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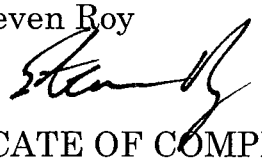
Signature 

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This electronic appendix is identical in content to the printed form of the appendix filed as of this date.
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Signed Steven Roy
Signature