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COURT OF APPEALS

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

Reply Brief of Appellant Aaron Oleston

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Table of Contents

Argument....3
I. Whether Profanity Can Serve as the Basis for a Criminal Conviction Is a Matter of Unsettled Law....3
II. The State's Assertion Mr. Oleston's Speech Falls Into Unprotected Categories Is Undeveloped....5
III. The State's "Conduct" Argument Is Unpersuasive....6
IV. The Purported Right To Be Let Alone Is Factually Inapplicable....7
Conclusion....9
Certifications....10

Table of Authorities

United States Supreme Court

American Steel Foundries v. Tri-City Central Trades Council...7,8
257 U.S. 184, 42 S. Ct. 72 (1921)

Hill v. Colorado.....7
530 U.S. 703, 120 S. Ct. 2480 (2000)

Wisconsin Supreme Court

Lane v. Collins.....3,4
29 Wis. 2d 66, 138 N.W.2d 264 (1965)

State v. Breitzman.....3,4,5
2017 WI 100, 378 Wis. 2d 431, 904 N.W.2d 93 (2017)

Wisconsin Court of Appeals

Gaethke v. Pozder.....5,6,8
2017 WI App 38, 376 Wis. 2d 488, 899 N.W.2d 381

State v. Donner.....5
192 Wis.2d 305, 531 N.W.2d 369 (1995).

Constitutional Provisions

U.S. Const. amend. I.....4,7,9

Statutes

Wis. Stat. §940.32.....7

Argument

I. Whether Profanity Can Serve as the Basis for a Criminal Conviction Is a Matter of Unsettled Law.

The State contends the use of profanity as a predicate for a disorderly conduct is a matter of established law which this court may not overturn. (Brief of Respondent p.14). The State repeatedly cites to *State v. Brietzman* and *Lane v. Collins,* to support this position. This is an unreasonable interpretation of the two cases, and the State is contradicted by the plain language of the cases.

The State summarizes *Lane v. Collins* as standing for the principle that "referring to a police officer as a 'son-of-a-bitch' constituted abusive language which could provoke retaliatory conduct.". (Brief of Respondent p.11). This is an inaccurate interpretation of dicta.

In *Lane v. Collins*, the defendant police officer (Collins) pulled the plaintiff (Lane) over, ostensibly for making an illegal U-turn and having a broken taillight. *Lane v. Collins*, 29 Wis. 2d 66, 70, 138 N.W.2d 264 (1965). Collins had been "calling upon" Lane's ex-wife. *Id.* Collins, rather than inquiring about the U-turn or broken taillight, asked Lane to not call his home again. While Lane and Collins were talking, Mr. Lane's now ex-wife, and Collins paramour, arrived on the scene. *Id.* When Mr. Lane crossed the street to speak with his ex-wife, Collins asked Lane if he was on probation. This provoked Lane, who then called Collins a son-of-a-bitch. *Id.* 70-71. Collins then arrested Lane. *Id.* 71.

The issue presented to the court was whether the arrest by Collins was lawful as a matter of law. *Id.* 69. The Court held a police officer cannot provoke a person into a breach of the police, and there was sufficient evidence to present the case to a jury as to provocation. *Id.* 72-73. The Court stated:

> Calling another person a "son-of-a-bitch" *under charged circumstances might* well constitute abusive language which is likely to have that result. [provoking retaliation] *Id.* 72 (Emphasis added).

The Court did not conclude the use of a personal epithet was sufficient to support a conviction of disorderly conduct, and left the question opened.[1] There was no need for the Court to engage in a significant discussion over whether the speech was protected by the First Amendment, as that issue was not properly before the Court.

This interpretation is supported by the Supreme Court of Wisconsin's decision in *Breitzman.* On petition to the Court, Brietzman only asked the Court to review the denial of her ineffective assistance of counsel claim. *State v. Breitzman*, 2017 WI 100 ¶5, 378 Wis. 2d 431, 904 N.W.2d 93 (2017). The Court was explicit in noting Brietzman did not raise a facial or as-applied challenge to the disorderly conduct statute. *Id.*

Two paragraphs later, the court stated counsel was not ineffective because "whether profane conduct that tends to cause or provoke a disturbance is protected as free speech is *unsettled*

[1] The Court's language suggests the use of a personal epithet could only sustain a conviction for disorderly conduct if the surrounding circumstances were such that the epithet would rise to the level of fighting words, which is in line with the modern case law surrounding profanity and the First Amendment

law". *Id.* ¶7 (Emphasis added). As the State noted, this Court is principally an error-correcting court and bound to follow the case law of the United States and Wisconsin Supreme Courts. *State v. Donner*, 192 Wis.2d 305, 316, 531 N.W.2d 369 (1995). The Wisconsin Supreme Court has plainly stated this is a matter of unsettled law. *Breitzman*, ¶7. In an area of unsettled law, this Court can and should look to what courts have held in other jurisdictions. As argued in Mr. Oleston's initial brief, the United Starts Supreme Court has retreated from allowing the criminalization of profanity in its decisions over the last seventy years, and the federal circuits have followed suit. The State has failed to present any persuasive reason why this Court should deviate from modern jurisprudence.

II. The State's Assertion Mr. Oleston's Speech Falls Into Unprotected Categories Is Undeveloped.

The State makes passing reference to unprotected categories of speech, and claims Mr. Oleston's words fall into these categories. (Brief of Respondent p.11). The entirety of the State argument is quoted below:

> The Defendant's alleged comments to them…fall within the legal definitions of fighting words, obscenity and defamatory speech and thus subjects the Defendant to prosecution under Section 947.01 of the Wisconsin Statutes. (Brief of Respondent p.11)(Defendants remarks removed for clarity).

The State fails to cite to any authority as to how these comments fall into the unprotected categories, and the argument is entirely undeveloped. This Court does not consider undeveloped arguments, and should not deviate from the standard practices in

this case. *Gaethke v. Pozder*, 2017 WI App 38, ¶44, 376 Wis. 2d 488, 899 N.W.2d 381 (generally, this court does not consider conclusory assertions and undeveloped arguments)

III. The State's "Conduct" Argument Is Unpersuasive

The State raises two arguments related to the "conduct" accompanying Mr. Oleston's words. Firstly, the State argues the offenses occurred during the day in a public place. (Brief of Respondent p.12) Secondly, the State describes Mr. Oleston as "stalking these officers". (Brief of Respondent p.13). The State fails to develop these arguments and cites no case law to support their proposition.

The State argues the time of Mr. Oleston speaking to police is a "significant fact which should be taken into consideration by the Court in its analysis". (Brief of Respondent p.12-13). The State's argument is based on the strong likelihood that other people who were not police officers....could have been present." (Brief of Respondent p.12). The State then goes on to make the point whether or not other people actually witnessed the interaction is irrelevant. (Brief of Respondent p. 13). In this, the State and Mr. Oleston agree; the time of day is irrelevant as the likelihood of observers plays no part in the analysis of disorderly conduct. Further, speaking in a raised voice during the day is less likely to cause a disturbance than doing so at night. Accepting the States argument leaves little to no time in which the defendant could actually speak with officers of the Janesville Police Department from the sidewalk.

The State then relies on the trial courts characterization of Mr. Oleston and stalking these officers in attempts to justify the convictions. This characterization is unsupported by any legal authority. Wis. Stat. §940.32(2) defines stalking as:

> (a) The actor intentionally engages in a course of conduct directed *at a specific person* that would cause a reasonable person under the same circumstances to suffer serious emotional distress or to fear bodily injury to or the death of himself or herself or a member of his or her family or household. *Wis. Stat.* §940.32(2)(a)(Emphasis added).

Mr. Oleston did not engage in a course of conduct which was directed at a specific person; his speech was aimed at the Janesville Police Department in general, and the State has never presented any evidence which even remotely suggests his speech were targeted to a specific person or persons.

IV. The Purported Right To Be Let Alone Is Factually Inapplicable

The State continues to assert there is a constitutional right to free passage in going to and from work. 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. The State of Colorado passed a statute which regulated the act of approaching people near the entrance to heath care facilities. *Hill*, 707.

Similarly in *American Steel Foundries v. Tri-City Central Trades Council*, there were numerous picketers who impeded the

replacement workers from entering 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). Here, the picketers violated a restraining order prohibiting them from interfering with any person employed by American Steel. *Id.* 193.

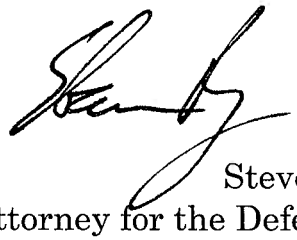
These near mobs violating prior restraints are incredibly different than a single individual with a camera, on a quintessential public forum with no prior restraints. Mr. Oleston did not interfere with officers ability to enter or leave the building, and never tried to harm officers. The only thing he did was talk to officers. One person talking cannot be said to actually infringing on any supposed right to be left alone while entering or leaving the workplace.

The State has refused to engage in meaningful analysis of the purported right to free passage to and from work. There are significant factual distinctions between the cases, and the State has failed to rebut any of Mr. Oleston's arguments. The State's response merely cites to *Hill*, and develops the argument no further. As such, this court should consider the State's argument waived. *Gaethke v. Pozder*, 2017 WI App 38, ¶44 (generally, this court does not consider conclusory assertions and undeveloped arguments).

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: Monday, October 19, 2020
Respectfully submitted,



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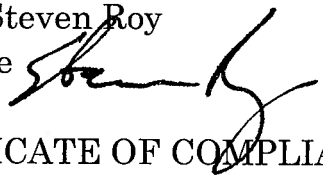
Signature 

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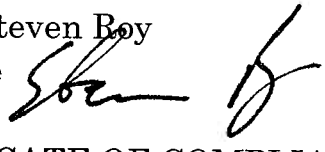
Signature 

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Signed Steven Roy
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