State of Wisconsin
Supreme Court

2020-AP-952-CR

State of Wisconsin,
Plaintiff-Respondent

v.

Aaron M. Oleston
Defendant-Appellant

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

Petition for Review

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Statement of Issues

On appeal, Mr. Oleston challenged his five convictions for disorderly conduct[1], arguing his comments to Janesville police officers were protected by the right to freedom of speech guaranteed by the First Amendment to the United States constitution as well as article I, Section 3 of the Wisconsin Constitution. The Court of Appeals agreed with Mr. Oleston with regards to counts one, two and three. The court of appeals determined *sua sponte* there was conduct in counts four and five which "involved penalizable non-speech elements" which were not within the realm of the First Amendment protection.

Thus, the issues presented are:

> Does the First Amendment protect the peoples right to approach police officers in a public space and crudely criticize police officers as a group?
>
> If this Court determines Mr. Oleston's speech and interwoven conduct are not protected forms of expression, when speech and non—speech elements are combined in the same course of conduct, what is the burden the State is required to meet to justify incidental limitations on the First Amendment

[1] Wisconsin's Disorderly conduct statute is contained at Wis. Stat. §947.01

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Reasons to Accept Review

Whether Mr. Oleston's speech is unprotected under the doctrine of "fighting words" or "profanity" is a question which which this court reviews *de novo*. *A.S. v. A.S.*, 2001 WI 48, ¶19, 243 WIs. 2d 173, 626 N.W.2d 712 (2001). This Court has not authored a controlling opinion in this issues.

In 1965, this Court speculated calling a police officer a "son-of-a-bitch" might constitute disorderly conduct, but conducted no constitutional analysis, as the case could be decided on more limited grounds. *Lane v. Collins*, 29 Wis. 2d 66, 138 N.W.2d 264 (1965). In *State v. Breitzman,* this court noted the question of whether profane conduct tending to provoke a disturbance is protected is a matter of unsettled law. This case provides a vehicle for this Court to settle this law.

Lane v. Collins also illustrates an important question of First Amendment law this court has yet to settle. Over the past fifty years, courts across the country have held law enforcement to a higher standard than the average person in cases involving "fighting words"[2]. This case also presents this Court with an opportunity to join the majority of jurisdictions in applying a narrower application first found in Justice Powell's concurrence in *Lewis v. New Orleans*, 415 U.S. 130, 134, 94 S. Ct. 970 (1974).

In concluding Mr. Oleston's conduct violated the disorderly conduct statute, the Court of Appeals relied exclusively on *State*

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[2] *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).

v. Becker, 51 Wis. 2d 659, 664, for the proposition conduct may be penalized when it causes substantial disorder or the invasion of the rights of others when the conduct goes beyond mere expression of ideas. The *Becker* court erroneously lowered the burden for the State in regulating expressive conduct. This dicta is clearly in conflict with the controlling opinions of the United States Supreme Court, as well as this Court's modern decisions. Unfortunately the court of appeals has relied on this decision to uphold a conviction of a man of expressing opinions local authorities found repugnant. Justice Douglas wrote:

> Since when have Americans been expected to bow submissively to authority and speak with awe and reverence...We...can speak softly or angrily. We can seek to challenge and annoy, as we need not stay docile and wait....[A]t the constitutional level speech need not be a sedative; it can be disruptive. *Colten v. Ky.*, 407 U.S. 104, 122, 92 S.Ct. 1953, 32 L.Ed. 2d 584 (1972)(Douglas, J., *dissenting*).

A decision by this can repudiate the erroneous dicta[3] of the *Becker* court and harmonize the law of expressive conduct. A decision will also allow this court to settle two areas of unsettled First Amendment law. This Court should accept this petition for review as the case presents an excellent opportunity for this Court to speak on timely issues present to one of our most cherished rights.

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[3] In *Becker* the defendant was yelling in a loud voice, began to yell at police officers, grabbed an officer's arm, and began to physically shove his way in-between two officers, causing an officer to lose their grip on a suspect. In comparison, Mr. Oleston loudly complained about police actions while videotaping the officers' reactions. Mr. Oleston did not initiate any physical contact with officers or interfere with their lawful authority.
Becker likely does not need to be overturned, as the physical conduct with officers and interference with their lawful duties is a highly different factual scenario.

Statement of 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.65:153). 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).

An unpublished, one judge decision was issued on July 15, 2021 which affirmed the circuit court in part and reversed in part. Despite no party developing an argument Mr. Oleston's *conduct*[4] in counts four and five could suffice as the basis of his convictions, the court of appeals "conclude[d] that Oleston's conduct in courts four and five involved penalizable non-speech elements and is not within the realm of First Amendment protection[5].

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[4] During summation, the State argued "At least a couple of the officers testified it was common for members of the public to go by the police department either on foot or in a vehicle...they were focusing on the defendant because the defendant was calling them Nazis. He was calling them assholes. He was calling them to suck a dick. I apologize for the all the language. Obviously that's the key issue in this case, the language the defendant used as well as his conduct". (R. 65:268). The conduct the Court of Appeals classified as penalizable was walking towards officers as they left, and filming the interactions. During litigation, no party attempted to separate the conduct from the language used. The State never asserted members of the public cannot approach police officers, or record officers. *See e.g. A.C.L.U. of Ill. v. Alvarez*, 679 F.3d 583 (7th Cir.)(2012)("The act of *making* an audio or audiovisual recording is necessarily included within the First Amendment's guarantee of speech and press rights as a corollary of the right to disseminate the resulting recording...Criminalizing all nonconsensual audio recording necessarily limits the information that might later be published or broadcast - whether to the general public or to a single family member or friend - - and thus burdens First Amendment rights.").

[5] *But see, State v. Pettit*, 171 Wis. 2d 627, 647, 492 N.W. 2d 633 (Ct. App. 1992) ("We [the Court of Appeals] cannot serve as both advocate and judge)

Argument

A Decision by the Supreme Court Will Clarify The Expectations for Law Enforcement and Civilians When Civilians Exercise Their First Amendment Rights Regarding the State of Policing

It is no secret, the current state of policing, and calls for police reform is a current hot topic political issue. There are groups which fervently support officers, those who wish to see significant reform, those who would outright abolish the police, and myriad of options in between. While addressing individual officers, or small groups of officers is unlikely to be the most effective method of generating large scale change, addressing individuals and small groups of officers is still an important function of our freedom of speech. 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. Unfortunately, the fine line is less than clear in Wisconsin. A decision by this Court in this case will better help law enforcement, political advocates, and the general public understand where the fine line of protected speech and punishable conduct is drawn. This clarity will only serve to better the civil discourse needed in the charged debates on law enforcement.

This Case Presents an Opportunity to Correct and Harmonize an Important Area of Constitutional Law

The United States Supreme Court has long recognized actions may constitute symbolic speech, and that conduct can be inextricably tied to speech which accompanies it. *See, United States v. O'Brien*, 391 U.S. 367, 88 S.Ct. 1673 (1968)(When speech and non speech elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the non speech element can justify incidental limitations of First Amendment Freedoms); *Texas v. Johnson*, 491 U.S. 397, 109 S. Ct. 2533 (1989)(In deciding whenever particular conduct possesses sufficient communicative elements to bring the First Amendment into play, we have asked whether an intent to convey a particularized message[6] was present, and whether the likelihood was great that the message would be understood by those who viewed it.); *Holder v. Humanitarian Law Project*, 561 U.S. 1, 130 S.Ct. 2705 (2010)(content-neutral regulation will be sustained under the First Amendment if it advances important governmental interest unrelated to the suppression of free speech and does not burden substantially more speech than necessary to further those interests.).

This court was initially slow to accept the rulings of the Supreme Court. In *State v. Zwicker*, this court upheld a conviction of disorderly conduct founded factually on Zwicker refusing to surrender his protest sign, and going limp when officers tried to arrest him. *State v. Zwicker*, 41 Wis. 2d 497, 503, 164 N.W.2d 512 (1969). The *Zwicker* court stated that the

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[6] *But see, Masterpiece Cakeshop, LTD. v. Cool. Civil Rights Comm'n*, 138 S.Ct. 1719, 1742 (2018)("But a particularized message is not required or else the freedom of speech would never reach the unquestionably shielded painting of Jackson Pollock, music of Arnold Schoenberg, or Jabberwocky verse of Lewis Carrol")

"freedom of speech and peaceable assembly, are not the be all and end all...general regulatory statutes not intended to control the content of speech but incidentally limiting its unfettered exercise are permissible when they have been found justified by subordinating valid governmental interests". *Id.* at 509-510 (Internal citations omitted). While the *Zwicker* court correctly quoted the standard enunciated in *Konigsberg v. State Bar of California*, 366 U.S. 36, 50, 81 S. Ct. 997 (1961), the rational basis review of *Konigsberg* had clearly been overridden by the intermediate scrutiny required in *O'Brien*.

In *State v. Becker*, this court continued to rely upon prior formulations, and inapt citations stating "The legislature has the right to reasonably regulate the conduct of its citizens for the protection of society as a whole, even when that conduct is intertwined with expression and association." *State v. Becker*, 51 Wis. 2d 659, 664 (1971). In support of this, the Court cited to *Cameron v. Johnson*, 390 U.S. 611, 617, 88 S. Ct. 1355 (1968). This case is inapposite. The petitioners in *Cameron v. Johnson* were seeking a judgement an "anti-picketing" law was overly broad and vague, as well as a permanent injunction preventing Mississippi officials from enforcing the statute in criminal prosecutions. *Id.* at 612-613. The statute prohibited "obstruction of or unreasonable interference with ingress and egress to and from public buildings, including courthouses, and with traffic on the streets or sidewalks adjacent to those buildings. *Id.* at 622. Concluding federal district courts should be slow to act where its powered are invoked to interfere by injunction with threatened criminal prosecutions, and the record did not support any bad faith on the part of the state, this was not a case in which a federal court of equity could rightly afford the appellants any

protection by withdrawing the determination of guilt from the state courts.

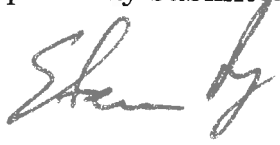
The United States Supreme Court has long recognized conduct may be sufficiently imbued with elements of communication to fall within the scope of the First Amendment. This Court has recognized expressive conduct as being protected by the First Amendment, and when a statute implicates First Amendment Rights, the State has the burden to prove the statute is constitutional beyond a reasonable doubt. *See*, *State v. Baron*, 2009 WI 58, ¶¶10, 14 (2009).

In *Becker* this Court stated "[t]he legislature has the right to reasonably regulate the conduct of its citizens for the protection of society as a whole, even when that conduct is intertwined with expression and association." The *Becker* court was incorrect when it stated the legislature had the right to reasonably regulate expressive conduct, as the United States Supreme Court had expressed far more stringent requirements than "reasonableness" just three years prior in *United States v. O'Brien*. *United States v. O'Brien*, 391 U.S. 367, 376-377 (1968). Mr. Oleston calls upon this court to explicitly reject the erroneous dicta in in *Becker*, and to reverse the court of appeals conclusory decision where the court both made the argument for the State, and failed to apply the correct constitutional tests for regulating expressive conduct.

While This Court Primarily Serves as a Law Building Court, Error Correction Is Necessary in This Case

This Court primarily serves as a law-making, and does not generally grant petition based in error correction. Error correction is necessary in this case. In upholding counts four and five, the court of appeals acted as both advocate and judge. When an appellate court oversteps its bounds and acts an advocate for an unarmed position, the neutrality of the court is necessary called into question. Mr. Oleston was deprived of the opportunity to argue the conduct of walking around the outside of a public building, and recording the officers was protected by the First Amendment. U.S. Const. amend. I ("Congress shall make no law...abridging the freedom of...the right of the people to peaceably assemble"); *A.C.L.U. of Ill. v. Alvarez*, 679 F.3d 583 (7th Cir.)(2012)("The act of *making* an audio or audiovisual recording is necessarily included within the First Amendment's guarantee"). Should the *State* raise these "extreme position[s]" Mr. Oleston welcomes the chance to rebut them; a chance he was denied when the Court of Appeals acted as both advocate and judge.

Dated: Monday, August 16, 2021
Respectfully submitted,



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