CITY OF CLEVELAND, Plaintiff-appellee v. GERALDINE SMITH, Defendant-appellant

NO. 62560

COURT OF APPEALS OF OHIO, EIGHTH APPELLATE DISTRICT, CUYAHOGA COUNTY

October 28, 1993, Decided

PRIOR HISTORY: [*1]

CHARACTER OF PROCEEDING: Criminal appeal from Cleveland Municipal Court. Case No. 91-CRB-16255

DISPOSITION:

JUDGMENT: Affirmed.

COUNSEL:

For Plaintiff-Appellee: BARBARA J. DANFORTH, ESQ., CHIEF PROSECUTING ATTORNEY, CITY OF CLEVELAND, BY: TRACI HIXSON, ESQ., ASSISTANT PROSECUTOR, Justice Center - Eighth Floor, 1200 Ontario Street, Cleveland, Ohio 44113.

For Defendant-Appellant: JEFFERY F. SLAVIN, ESQ., 75 Public Square, Suite 512, Cleveland, Ohio 44113.

JUDGES: DYKE, CORRIGAN, HARPER

OPINION BY: ANN DYKE

OPINION:

JOURNAL ENTRY AND OPINION

DYKE, C.J.:

Defendant-Appellant Geraldine Smith was charged with disorderly conduct proscribed by Section 605.03 of the Codified Ordinances of Cleveland. As a minor misdemeanor, the case was tried to the bench in the Cleveland Municipal Court. Appellant was found guilty and sentenced to pay a fine of $ 50 plus court costs. The lower court granted appellant's motion to stay the sentence pending appeal. For the reasons that follow, we affirm the trial court's judgment, convicting appellant of disorderly conduct.

On June 29, 1991, investigators Johnson, Cumberlander and Roberts, all of the Ohio Department of Liquor Control, were in the area of 547 East 99th Street. [*2] At approximately 4:30 a.m. they were drawn to the area of appellant's tavern by the number of cars present. They had reason to believe that after-hour sales were taking place at the Track Inn, a bar owned by appellant. This tavern has a permit which allows it to operate until 2:30 a.m. after which time alcoholic beverages may not be furnished or consumed. (T. 6, 7) Johnson looked into the window of the tavern and observed what appeared to be patrons sitting at the bar consuming alcoholic beverages. The agents then entered the premises, identified themselves and informed everyone present to be calm and quiet while an inspection for weapons or contraband was being conducted. (T. 7)

As Johnson started his inspection behind the bar for contraband, he testified that appellant, who was sitting at the bar, became "outrageous" and what he considered "offensive". (T. 7) He further testified that appellant tried to reach for him, but never touched him. Throughout the incident she kept cursing him using profanities. After repeated warnings he placed appellant in protective custody. (T. 8) Johnson also testified that he had no confrontations with the approximately six other individuals present [*3] in the tavern while the inspection was in progress.

Cumberlander testified that appellant was "maybe cursing, just saying that we had no right to be in the premises." They told her to be cooperative because they had a reason to be there and were taking enforcement action. (T. 34) He also testified that no one else behaved like the appellant. She had no effect on the investigation. They did their job which was to control the situation with a minimum amount of force. (T. 35)

Dolores Braxton managed the bar. She testified that the last drink was served at 2:00 a.m. and then they cleaned up. When the investigators arrived, she and the rest of the individuals in the bar were getting ready to leave. (T. 54, 55) Johnson said that the investigators had received a call. (T. 58) Johnson then told Dolores to open the cash register. He said that it was their routine. (T. 59) Dolores complied and when appellant heard the bell ring, she said, "Dee Dee, he ain't got no business in my cash register." Johnson told her to shut up, but appellant did not comply. Appellant responded: "No, you ain't got no business in my fucking cash register." Johnson told her

that if she did not shut up, he would handcuff [*4] her. (T. 59, 60) Appellant continued to curse Johnson saying that he did not "have no business in my fucking register." Johnson, who was on the other side of the bar initially ordered an investigator who was next to the appellant to handcuff her, but proceeded to handcuff the appellant himself soon after. (T. 60) Johnson was visibly upset when a junior officer did not properly assist him in restraining the appellant. (T. 39) Dolores testified that appellant was doing nothing besides "talking". (T. 61) A few minutes later Johnson verbally expressed his indignation when a junior investigator took the appellant outside the door of the bar when she complained that she had breathing problems. (T. 61, 62) Finally, Dolores described Johnson as acting "weird." "He acted wild like something was wrong . . . . as if he was highly upset . . . he came in a rage . . . He came in all rowdy and like nasty . . ." (T. 66)

The police from the Sixth Precinct were then called and appellant was led away. Appellant was not charged by Johnson with assault or resisting arrest. Appellant did not deny using profanity when Johnson tried to get into the cash register in her tavern.

The Cleveland Municipal Court [*5] believed that the case came down to a question of credibility. The court held that the elements of disorderly conduct had been met and found appellant guilty of disorderly conduct in violation of the Municipal Code Section 605.03. Appellant appeals from her conviction and asserts a single assignment of error.

I

THE EVIDENCE PRESENTED AGAINST THE DEFENDANT-APPELLANT WAS NOT SUFFICIENT TO SUSTAIN A CONVICTION OF DISORDERLY CONDUCT BEYOND A REASONABLE DOUBT.

In her sole assignment of error appellant, Geraldine Smith, maintains that the evidence presented in her conviction of minor-misdemeanor disorderly conduct is insufficient to sustain the conviction. Within her sole assignment of error appellant asserts that although there is evidence that she used profanity, she did not threaten the officers or breach the peace and did not, therefore, use "fighting words" proscribed by Section 605.03 of the Codified Ordinances of Cleveland. Accordingly, appellant argues, her language is protected by the First Amendment and therefore not punishable.

In State *v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492 at paragraph two of the syllabus, the Court held that:

> An appellate court's [*6] function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. The relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. *(Jackson v. Virginia* (1974), 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560, followed.)

The basis of the complaint was disorderly conduct under Section 605.03 of the Codified Ordinances of Cleveland. The charge of disorderly conduct proscribed by R.C. 2917.11 mirrors the language of the Cleveland ordinance and provides in pertinent part:

> (A) No person shall recklessly cause inconvenience, annoyance, or alarm to another, by doing any of the following:
>
> (1) Engaging in fighting, in threatening harm to persons or property, or in violent or turbulent behavior;
>
> (2) Making unreasonable noise or offensively coarse utterance, gesture, or display, or communicating unwarranted and grossly abusive language [*7] to any person;
>
> (3) Insulting, taunting, or challenging another, under circumstances in which such conduct is likely to provoke a violent response[.]

Where the charge is premised upon the defendant's use of boisterous, rude or insulting words, a conviction may not stand unless the words reach a point where they become "fighting words" which are not constitutionally protected. See *Cincinnati v. Karlan* (1974), 39 Ohio St.2d 107, 109, 314 N.E.2d 162. That is, the words must, by their very utterance, inflict injury or be likely to provoke the average person to an immediate retaliatory breach of the peace. Id., at 110.

In ascertaining whether language directed at a police officer may properly support a conviction for disorderly conduct, it must be determined whether the defendant used "fighting words." See *Kent v. Kelley* (1975), 44 Ohio St.2d 43, 337 N.E.2d 788; *Cincinnati v. Karlan, supra; City of Garfield Hts. v. Simpson* (1992), 82 Ohio App.3d 286, 611 N.E.2d 892, *City of Cleveland v. Wronko* (May 14, 1987), Cuyahoga App. No. 52132, unreported; Toledo *v. Grince* (1989), 48 Ohio App.3d 126, 548 N.E.2d 999. In this connection, profane

comments have been found not [*8] to be "fighting words," and have therefore been determined to be constitutionally protected language, where they were general remarks, not directed at the individual police officers present, which would not provoke the average person. See *Kent v. Kelley, supra* ("fighting words" not found and conviction reversed where the defendant shouted at a police officer, "stay away from the f--- door," "get the f--- out of here," and "what do you think you're doing?" as this language was not directed at any person in particular and would not provoke the average person); *City of Garfield Hts. v. Simpson, supra* ("fighting words" not found and conviction reversed where the defendant's alleged pre-arrest comments were "I want all these f---- police cars out of here and all you policemen out of the area," "get the f-- out of here," and "get the vehicles off the property" as this language does not constitute a rational basis for concluding that the defendant had engaged in disorderly conduct); *City of Cleveland v. Wronko, supra* (conviction reversed where a homeowner allegedly told police officers on his property, "You motherf--- think you can do whatever you want."); *Toledo v. Grince,* [*9] *supra* ("fighting words" not found and conviction reversed where the defendant said "the police are worthless, this is f------ bullshit" loud enough for a gathered crowd to hear, as this comment was determined to be a generalized derogatory remark, not directed at the individual officers, and was determined to be the type of insult an officer should be able to withstand without retaliating).

Conversely, constitutionally unprotected "fighting words" have been found where the defendant repeatedly directs to the police profane epithets which would provoke the average person to a breach of the peace. See *Cincinnati v. Karlan, supra* ("fighting words" found, and conviction affirmed where the defendant said to a police officer "I hate all of you f------ cops," "get out of my way you f------, prick-ass cops," and thereafter twice calls the officer a "prick-assed cop"); *City of Shaker Hts. v. Marcus* (February 4, 1993), Cuyahoga App. No. 61801, unreported ("fighting words" found and conviction affirmed where defendant's initiation of the confrontation and slamming his fist upon the desk extended the circumstances beyond mere language); *City of Broadview Hts. v. Harris* (November [*10] 25, 1992), Cuyahoga App. No. 61408, unreported ("fighting words" found and conviction affirmed where defendant repeatedly directed abusive profane epithets toward both officers as they attempted to arrest her son, and she did not desist after being repeatedly asked to do so.); State *v. Callahan* (1989), 48 Ohio App.3d 306, 549 N.E.2d 1230 ("fighting words" found and conviction affirmed where the defendant drove a speeding car near a crowd, screamed at a police officer, calling him a "pig," a "Nazi," and a "Gestapo," then approached the officer a second time and again began to scream at him); State *v. Semple* (1989), 58 Ohio App.3d 93, 568 N.E.2d 750 ("fighting words" found and conviction affirmed where the defendant repeatedly insulted a police officer and asserted that he was "probably on the take"); *Springdale v. Hubbard* (1977), 52 Ohio App.2d 255, 369 N.E.2d 808 ("fighting words" found and conviction affirmed where the defendant called two police officers "f------ pigs," indicated that he was subject to police brutality, and repeatedly, after being warned to desist, called the officers "f------ pigs").

Pursuant to *Karlan* and its progeny, in order for the instant appellant [*11] to be guilty of disorderly conduct, her utterance must constitute so-called "fighting words." We recognize that the instant complaint was drafted in a manner so as to attempt to comply with the current state of the case law concerning the offense *sub judice*. Contrary to the argument of the appellant, we hold that it could be found that appellant, by her conduct, recklessly created a risk of causing public inconvenience, annoyance or alarm within the meaning of the statute. Appellant engaged in a course of "unwarranted and grossly abusive language" under circumstances in which the conduct was likely to provoke a violent response. A police officer, although trained to preserve the peace, is also human, and under great stress of abuse may forget his official duty and retaliate in the face of such provocation. The testimony of the appellant and that of Dolores Braxton indicates that appellant was upset and repeatedly directed abusive profane epithets towards Johnson as he attempted to conduct an inspection for weapons or contraband. She did not desist after being repeatedly asked to do so. See *Cincinnati v.* Karlan, *supra; City of Broadview Hts. v. Harris, supra; State v. Callahan,* [*12] supra.

Appellant's assignment of error is overruled.

Judgment affirmed.

It is ordered that appellee recover of appellant its costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Cleveland Municipal Court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

CORRIGAN, J., AND

HARPER, J., CONCUR.

ANN DYKE

CHIEF JUSTICE

N.B. This entry is made pursuant to the third sentence of Rule 22(D), Ohio Rules of Appellate Procedure. This is an announcement of decision (see Rule 26). Ten (10) days from the date hereof, this document will be stamped to indicate journalization, at which time it will become the judgment and order of the court and time period for review will begin to run.