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District Court, Nassau County, People v. Zedner

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FREE SPEECH

United States Constitution Amendment I:

Congress shall make no law . . . respecting the freedom of speech. . . .

New York Constitution Article I Section 8:

[N]o law shall be passed to restrain or abridge the liberty of speech . . . .

NASSAU COUNTY DISTRICT COURT

People v. Zedner[1]
(Published August 13, 2002)

Jacob Zedner was arrested and charged with two counts of aggravated harassment in the second degree, pursuant to New York Penal Law Section 240.30(1).[2] Zedner had made a series of fax transmissions to the Nassau County Treasurer's office that involved alleged threats with special reference to the tragic events September 11, 2001.[3]

The basis for the prosecution of this case was a four-page fax[4] sent to John Dominsky, who is the Treasurer and Clerk of the

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[1] N.Y.L.J., Aug. 13, 2002, at 25, col. 4 (Nass. County Dist. Ct.).

[2] N.Y. PENAL LAW § 240.30 (McKinney 1992) provides in pertinent part:

> A person is guilty of aggravated harassment in the second degree when, with intent to harass, annoy, threaten or alarm another person, he or she: 1. Either (a) communicates with a person, anonymously or otherwise, by telephone, or by telegraph, mail or any other form of written communication, in a manner likely to cause annoyance or alarm; or (b) causes a communication to be initiated by mechanical or electronic means or otherwise with a person, anonymously or otherwise, by telephone, or by telegraph, mail or any other form of written communication, in a manner likely to cause alarm.

[3] *Zedner*, *supra* note 1.

[4] The fax stated in pertinent parts: "If you and the board of trustee will not obey, I.T.N.O.T.G.A.O.T.U. chaos will be upon you . . ."; "I guess New York did not

Village of Great Neck.[5] Mr. Dominsky's supporting deposition stated that he sent a notice of overdue taxes to Mr. Zedner in August of 2001 and as a result of that notice, Zedner phoned the village office and spoke with Dominsky on October 19, 2001.[6] The deposition further stated that in Dominsky's opinion Zedner was "angry, excited and . . . in need of [mental] medical attention."[7] After the conversation, Dominsky's office received the fax from Zedner.[8] In his deposition, Dominsky stated he felt the fax made references to September 11th and the communication was threatening.[9] Dominsky also feared that Zedner would act on his threats.[10] As a result of this deposition, Zedner was arrested.[11]

The court was presented with two questions: whether the evidence established a prima facie case for aggravated harassment in the second degree;[12] and whether Zedner's statements were merely expressions of free speech protected under the First[13] and Fourteenth[14] Amendments of the United States Constitution and Article 1, Section 8[15] of the New York State Constitution?[16]

Zedner made a motion, pursuant to New York Criminal Procedure Law Sections 170.30,[17] 170.35,[18] 100.40[19] and 100.15[20]

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learn yet, and did not obey the instructions which, I gave them I.T.N.O.T.G.A.O.T.U. before"; "if you will not obey I.T.N.O.T.G.A.O.T.U. you continue to see the punishment of G-D. Pharaoh got 10 punishments and he didn't listen. I, hope you have greater wisdom."

[5] *Zedner, supra* note 1.

[6] *Zedner, supra* note 1, at col. 5.

[7] *Zedner, supra* note 1, at col. 5.

[8] *Zedner, supra* note 1, at col. 5.

[9] *Zedner, supra* note 1, at col. 5.

[10] *Zedner, supra* note 1, at col. 5.

[11] *Zedner, supra* note 1, at col. 4.

[12] *Zedner, supra* note 1, at col. 5.

[13] U.S. CONST. amend. I provides in pertinent part: "Congress shall make no law . . . abridging the freedom of speech . . . ."

[14] U.S. CONST. amend. XIV, § 1 provides in pertinent part: "[N]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law. . . ."

[15] N.Y. CONST. art. I, § 8 provides in pertinent part: "[N]o law shall be passed to restrain or abridge the liberty of speech . . . ."

[16] *Zedner, supra* note 1, at col. 5.

[17] N.Y. CRIM. PROC. LAW § 170.30(1) (McKinney 1993) provides in pertinent part:

> After arraignment upon an information, a simplified information, a prosecutor's information or a misdemeanor complaint, the local criminal court may, upon notice of the defendant, dismiss such instrument or any count thereof upon the ground that: (a) It is defective, within the meaning of 170.35.

[18] N.Y. CRIM PROC. LAW § 170.35(1) (McKinney 1993) provides in pertinent part:

> An information, a simplified information, a prosecutor's information or a misdemeanor complaint, or a count thereof, is defective within the meaning of paragraph (a) of subdivision one of section 170.30 when: (a) It is not sufficient on its face pursuant to the requirements of section 100.40; provided that such an instrument or count may not be dismissed as defective, but must instead be amended, where the defect or irregularity is of a kind that may be cured by amendment and where the people move to so amend; or . . . (c)The statute defining the offense charged is unconstitutional or otherwise invalid.

[19] N.Y. CRIM. PROC. LAW § 100.40(1) (McKinney 1992) provides in pertinent part:

> An information, or a count thereof, is sufficient on its face when: (a) It substantially conforms to the requirements prescribed in section 100.15; and (b) The allegations of the factual part of the information, together with those of any supporting depositions which may accompany it, provide reasonable cause to believe that defendant committed the offense charged in the accusatory part of the information; and (c) Non-hearsay allegations of the factual part of the information and/or of any supporting depositions establish, if true, every element of the offense charged and the defendant's commission thereof.

[20] N.Y. CRIM. PROC. LAW § 100.15(3) (McKinney 1992) provides in pertinent part:

> The factual part of such instrument must contain a statement of the complainant alleging facts of an evidentiary character supporting or tending to support the charges. Where more than one offense is charged, the factual part should consist of a single factual account applicable to all the counts of the accusatory part. The factual allegations may be based either upon personal knowledge of the complainant or upon information and belief. Nothing in this section, however, limits or affects the requirement, prescribed in subdivision one of section 100.40, that in order for an information or a count thereof to be sufficient on its face, every element of the offense charged and the defendant's commission thereof must

to dismiss two district court informations,[21] claiming that the informations were facially insufficient and defective.[22] The court stated that the language used by Zedner was "inappropriate, and in poor judgment" but noted that this alone does not make the language criminally actionable.[23] The *Zedner* court dismissed all the criminal charges filed against Zedner.[24] The court ruled that the conclusion that Zedner's statements referred to September 11th was "a stretch and nothing but an educated guess to turn some stupid comment into a criminal event."[25] The court further explained, "even if this Court were to agree that the comment made reference to September 11, 2001, this does not constitute a criminal statement showing that clear and present danger was imminent to any individual or that exigent circumstances existed."[26] The court ruled the statements were protected expressions of free speech and expression under both the New York Constitution and Federal Constitution.[27]

Zedner argued that the alleged statements in the informations did not constitute an immediate threat and that the

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be supported by non-hearsay allegations of such information and/or any supporting depositions.

[21] The first information stated:

> TO WIT: At the time and place aforesaid Arrested Jacob Zedner did send a harassing fax to the Nassau County Tax Office promising "Chaos upon them . . . 'and stating "I guess New York did not learn yet and did not obey the instructions which I gave them.' Following the fax was a phone call from the defendant confirming the fax. These actions have put Comp. Mari Lonino in fear for her safety.

The second information stated:

> TO WIT: At the time and place aforesaid Arrestee Jacob Zedner did send a four page harassing fax to the Treasurer of the Village of Great Neck personally naming Comp. John Dominsky by name and stating "I guess New York did not learn yet and did not obey the instructions which I gave them.' This has put Comp. John Dominsky in fear for his safety.

[22] *Zedner, supra* note 1, at col. 4.

[23] *Zedner, supra* note 1, at col. 1.

[24] *Zedner, supra* note 1, at col. 1.

[25] *Zedner, supra* note 1, at col. 1.

[26] *Zedner, supra* note 1, at col. 1.

[27] *Zedner, supra* note 1, at col. 1.

speech was protected under the United States Constitution.[28] The prosecution believed specific areas of the fax were criminal.[29] The district court agreed with Zedner and dismissed the criminal charges.[30] The court relied on three cases to come to this conclusion.

The court relied on *People v. Dietze*,[31] which stated that speech may often be "abusive—even vulgar, derisive, and provocative—and yet it is still protected under the State and Federal constitutional guarantees of free expression unless it is much more than that."[32] The *Dietze* court further stated, "unless speech presents a clear and present danger of some serious substantive evil, it may neither be forbidden nor penalized."[33] In *Dietze*, the defendant made statements that she would "beat the crap out of [complainant] some day or night in the street."[34] The *Dietze* court found that there was nothing in the record that proved that defendant's statement "was either serious, should reasonably have been taken to be serious, or was confirmed by other words or acts showing that it was anything more than a crude outburst. While genuine threats of physical harm fall within the scope of the statute, such an outburst, without more, does not."[35]

The *Zedner* court also relied on *People v. Yablov*,[36] in which the defendant was charged with violating New York Penal Law Section 240.30(1).[37] The defendant in *Yablov* had left a series of allegedly threatening messages on his former lover's answering

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[28] *Zedner, supra* note 1, at col. 1.
[29] *Zedner, supra* note 1, at col. 1.
[30] *Zedner, supra* note 1, at col. 1.
[31] 75 N.Y.2d 47, 549 N.E.2d 1166, 550 N.Y.S.2d 595 (1989).
[32] *Id.* at 51, 549 N.E.2d at 1168, 550 N.Y.S.2d at 597. The court referenced *Lewis v. City of New Orleans*, 415 U.S. 130, 133-34 (1974) and *Steinhilber v. Alphonse*, 68 N.Y.2d 283, 501 N.E.2d 550, 508 N.Y.S.2d 901 (1986). *Id.*
[33] *Id. see also* Terminiello v. Chicago, 337 U.S. 1, 4-5 (1949); City of Houston v. Hill, 482 U.S. 451, 461-62 (1987); People v. Feiner, 300 N.Y. 391, 402, 91 N.E.2d 316, 320 (1950), *aff'd* 340 U.S. 315 (1951).
[34] *Dietze*, 75 N.Y.2d at 50, 549 N.E.2d at 1167, 550 N.Y.S.2d at 596.
[35] *Id.* at 53-54, 549 N.E.2d at 1169-70, 550 N.Y.S.2d at 598-99; *see also* Watts v. United States, 394 U.S. 705, 708 (1969); People v. Todaro, 26 N.Y.2d 325, 258 N.E.2d 711, 310 N.Y.S.2d 303 (1970).
[36] 183 Misc.2d 880, 706 N.Y.S.2d 591 (N.Y. Crim. Ct. 2000).
[37] *Id.* at 881, 706 N.Y.S.2d at 592; *see supra* note 2.

machine over a period of seventeen months.[38] Three specific messages were used as the basis of the prosecution.[39] The *Yablov* court determined that although annoying, the alleged threats were protected free speech because in all of the calls no specific threat of harm was made.[40]

The *Zedner* court felt it necessary to distinguish *People v. Price*[41] on its facts.[42] In *Price*, the defendant was charged with violating three counts of New York Penal Law Section 240.30(1),[43] aggravated harassment in the second degree.[44] The defendant had sent a letter to his attorney, left a message with his attorney, and stated "I'll get you" while shaking his hand at her during a court appearance.[45] The *Price* court held that the communication through the mail and the phone message were not constitutionally protected because they specifically targeted the attorney and invaded her privacy interest.[46]

The Federal Constitution provides virtually the same free speech protection as the New York State Constitution. *Brandenburg v. Ohio* exemplifies the federal constitutional protections afforded free speech.[47] In *Brandenburg,* a Ku Klux Klan leader was convicted under an Ohio statute for

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[38] *Yablov,* 183 Misc.2d at 881, 706 N.Y.S.2d at 592.

[39] *Id.* at 881-83; 706 N.Y.S.2d at 592-93. The three messages were as follows: If I don't get the money you make tomorrow, I'll go to the next step. I have so many irons in the fire, you don't know what the fuck is going on! You'll be vulnerable we'll get you David, we'll get you!"; "Pay me or see me! I laid it right on the line for you." and "David-David-David-Fuck you David! Are you there? It's 9 pm Saturday night. Are you out drinking, dancing, carousing? Fuck you! Fuck you!"
Id.

[40] *Id.* at 886-87, 706 N.Y.S.2d at 595.

[41] 178 Misc.2d 778, 683 N.Y.S.2d 417 (N.Y. Crim. Ct. 1998).

[42] *Zedner, supra* note 1.

[43] N.Y. PENAL LAW § 240.30 (McKinney 1992); *see supra* note 2.

[44] *Price*, 183 Misc.2d at 779, 683 N.Y.S.2d at 418.

[45] *Id.* The letter stated "I'm going through all this shit with you, you better be careful, I won't be responsible if you speak to me like that again."; the phone message stated "You will be fucking sorry, you're playing with fire, you better get me my apartment free and clear with no rent for five years, that's the only way it will be balanced, I' [sic] be at [Ms. Berman's address], no doors will keep me out, you better perform magic on Thursday."

[46] *Id.* at 781, 683 N.Y.S.2d at 419.

[47] 395 U.S. 444 (1969).

"advocat[ing] . . . the duty, necessity or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform" and for "voluntarily assembl[ing] with any society, group, or assemblage of persons formed to teach or advocate the doctrines of criminal syndicalism."[48] The conviction arose out of two speeches Brandenburg made at a Klan meeting that was closed to the public and attended only by Klan members, a reporter and his cameraman.[49] Portions of the speeches were aired on local and national television networks.[50] During his speeches, Brandenburg made derogatory statements about African-Americans and Jews, and also said "if our President, our Congress, our Supreme Court, continues to suppress the white, Caucasian race, it's possible that there might have to be some revengeance taken."[51]

The Supreme Court struck down the Ohio statute, stating "that the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."[52] The Court held that if a statute does not properly draw the distinction between generally advocating violence and advocating groups to imminently commit violent acts, it is in violation of the First and Fourteenth Amendments.[53]

Additionally, the United States Supreme Court case *Watts v. United States,* stressed that speech often is vulgar and nasty, but this does not make it criminal.[54] In that case, a young black man named Watts stated in public, "I am not going [to Vietnam].[55] If they ever make me carry a rifle the first man I want to get in my sights is L.B.J."[56] Watts was charged with knowingly and

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[48] *Id.* at 444-45.
[49] *Id.* at 445-47.
[50] *Id.* at 445.
[51] *Id.* at 446.
[52] *Brandenburg*, 395 U.S. at 447.
[53] *Id.* at 448.
[54] 394 U.S. 705, 705 (1969).
[55] *Id.*
[56] *Id.* at 706.

willfully threatening the President and was convicted.[57] The Court of Appeals for the District of Columbia upheld the guilty verdict.[58] The United States Supreme Court reversed the conviction and remanded to the district court, ordering it to enter a judgment of acquittal.[59] The Court believed that "what is a threat must be distinguished from what is constitutionally protected speech."[60] The Court ruled the government must prove that the speech was indeed a true threat and they had failed to do so.[61] The Court believed that Watt's speech was "political hyperbole," and contained no actual threat to the life of the President.[62]

In *Gooding v. Wilson,*[63] the United States Supreme Court decided another case involving the interpretation of abusive language. In *Wilson*, the defendant was tried and convicted of violating Georgia Code Section 26-6303, which criminalized the use of "opprobrious words" or "abusive language."[64] Wilson appealed to the Georgia Supreme Court, but his conviction was upheld.[65] Wilson sought and received habeas corpus relief from the District Court for the Northern District of Georgia.[66] The district court held that Section 26-6303 on its face was unconstitutionally overbroad and vague, in violation of the United States Constitution.[67] The district court overturned the conviction,

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[57] *Id.* Watts was convicted under 18 U.S.C. §871(a), a federal statute which provides in pertinent part: "(a) Whoever . . . knowingly and willfully otherwise makes any such threat against the President, President-elect, Vice President or other officer next in the order of succession to the office of President, or Vice President-elect, shall be fined under this title or imprisoned not more than five years, or both."

[58] *See* Watts v. United States, 402 F.2d 676 (D.C. Cir. 1968).

[59] *Watts,* 394 U.S. at 708.

[60] *Id.* at 707.

[61] *Id.* at 708.

[62] *Id.*

[63] 405 U.S. 518 (1972).

[64] *Id.*; Ga. Code Ann. § 26-6303 (n.d.) provided in pertinent part: "Any person who shall, without provocation, use to or of another, and in his presence . . . opprobrious words or abusive language, tending to cause a breach of the peace . . . shall be guilty of a misdemeanor."

[65] *Wilson*, 405 U.S. at 518.

[66] *Id.*

[67] *Id.* at 520.

the court of appeals affirmed, as did the United States Supreme Court.[68]

Wilson, who opposed the Vietnam War, picketed a building where the United States Army was located.[69] When the police arrived, Wilson assaulted the officers while yelling at them.[70] The Supreme Court held that Wilson was fairly convicted of assault and battery and dealt only with the constitutionality of Section 26-6303.[71] The Court stated that Section 26-6303 dealt only with spoken words, and therefore it must not run contrary to speech protected by the United States Constitution.[72] The Court ruled that a state law must be specifically and narrowly drawn as to only outlaw speech that contained specific threats or fighting words.[73] The Court determined that the terms "opprobrious" and "abusive" had a greater reach than "fighting" words, making the Georgia statute overbroad and vague, and as a result unconstitutional.[74]

In conclusion, the Federal Constitution and the New York State Constitution are quite similar with respect to the free speech protections afforded to citizens. New York holds that speech contains fighting words or specific threats are not constitutionally protected. Similarly, the United States Supreme Court holds the same, as demonstrated in *Wilson*, and continues to apply this principle to this day.

Jonathan Kirchner

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[68] *Id.*
[69] *Id.*
[70] *Wilson*, 405 U.S. at 520 n.2. Appellee said, "White son of a bitch, I'll kill you."; "You son of a bitch, I'll choke you to death."; "You son of a bitch, if you ever put your hands on me again, I'll cut you all to pieces." *Id.*
[71] *Id.* at 520 n.1.
[72] *Id.* at 520.
[73] *Id.* at 525.
[74] *Id.*

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