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Free Speech, Court of Appeals: People v. Tichenor

People v. Tichenor[51]
(decided May 8, 1997)

Defendant, Noel Tichenor, was convicted of disorderly conduct and resisting arrest.[52] On appeal, he challenged the constitutionality of the New York State disorderly conduct statute[53] under both the Federal[54] and New York State Constitutions.[55] Defendant claimed that the statute was vague, in violation of the due process requirements of the Fourteenth Amendment and that it was overly broad in violation of the First Amendment.[56] The New York Court of Appeals affirmed the conviction and held that: (1) the disorderly conduct statute was not overbroad on its face; (2) the statute in question was not

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[51] 89 N.Y.2d 769, 680 N.E.2d 606, 658 N.Y.S.2d 233 (1997).

[52] *Id.* at 772, 680 N.E.2d at 607, 658 N.Y.S.2d at 234.

[53] N.Y. PENAL LAW § 240.20 (McKinney 1997). Section 240.20 provides in pertinent part:

> A person is guilty of disorderly conduct when, with intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof: 1) He engages in fighting or in violent, tumultuous behavior or threatening behavior; or 2) He makes an unreasonable noise; or 3) In a public place, he uses abusive, or obscene language or makes an obscene gesture.

Id.

[54] U.S. CONST. amend. XIV. The Fourteenth Amendment provides in pertinent part: "No state shall deprive any person of life, liberty, or property without the due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." *Id.*; U.S. CONST. amend. I. The First Amendment provides in pertinent part that "Congress shall make no law abridging the freedom of speech." *Id.*

[55] *Tichenor*, 89 N.Y.2d 769, 680 N.E.2d 606, 658 N.Y.S.2d 233. *See* N.Y. CONST. art. I, § 6. The Freedom of Speech and Press Clause of the New York State Constitution provides: "Every citizen may freely speak, write and publish sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or the press." *Id.*

[56] *Tichenor*, 89 N.Y.2d at 775-77, 680 N.E.2d at 609-10, 658 N.Y.S.2d at 236-37.

unconstitutionally vague; and (3) the evidence supported a finding that defendant intended to create a public disturbance.[57]

Defendant, Noel Tichenor, was standing outside a bar shortly after midnight when a police officer walked by the bar and defendant uttered an obscenity at him.[58] The officer was about eight feet away from defendant when defendant spat on the ground in the direction of the policeman's feet.[59] Once the officer moved toward him, defendant then proceeded to shove the officer while uttering additional obscenities.[60] After this encounter, the officer attempted to arrest him, but defendant proceeded to reenter the bar.[61] The officer tried to handcuff defendant while a group of bar patrons congregated in the doorway of the establishment, with some of them screaming various lewd remarks directed at the officer.[62] While the officer called for assistance, the defendant escaped from the officer's grasp and walked back into the bar.[63] The officer followed defendant inside the bar and attempted to arrest him again.[64] An altercation began between the officer and defendant. Bar patrons joined in to assist the defendant.[65] When additional police arrived, they found defendant and several other individuals on top of the police officer.[66] Ultimately, the police restored order and placed the defendant under arrest.[67] Following a jury trial, defendant was convicted of disorderly conduct and resisting arrest but was acquitted of harassment charges.[68]

Relying on *People v. Dietze*,[69] defendant appealed asserting that the disorderly conduct statute was unconstitutional.[70] In *Dietze*,[71]

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[58] *Id.*
[58] *Id.*
[59] *Id.*
[60] *Id.*
[61] *Id.*
[62] *Id.*
[63] *Id.*
[64] *Id.*
[65] *Id.*
[66] *Id.*
[67] *Id.*
[68] *Id.*
[69] 75 N.Y.2d 47, 549 N.E.2d 1166, 550 N.Y.S.2d 595 (1989).

the New York Court of Appeals held a harassment statute unconstitutional.[72] Specifically, the statute in *Dietze* prohibited abusive language with intent to badger or alarm.[73] The *Dietze* court found that the statute, which encompassed constitutionally protected free speech, was overbroad.[74] The *Dietze* court reasoned that although the speech could be "abusive" or could "annoy"; nevertheless, the speech was constitutionally protected if it did not present "a clear and present danger of some serious substantive evil. . . ."[75] The *Tichenor* court distinguished the

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[70] *Tichenor*, 89 N.Y.2d at 773, 680 N.E.2d at 608, 658 N.Y.S.2d at 235. The court rejected defendant's claims stating that "[a] party seeking to nullify a statute as unconstitutional must overcome the presumption of constitutionality that favors legislative enactments." *Id.* *See also* People v. Dempiero, 86 N.Y.2d 549, 658 N.E.2d 718, 634 N.Y.S.2d 672 (1995); People v. Scalza, 76 N.Y.2d 604, 563 N.E.2d 705, 562 N.Y.S.2d 14 (1990); *In re* Van Berkel v. Power, 16 N.Y.2d 37, 209 N.E.2d 539, 261 N.Y.S.2d 876 (1965).

[71] *Dietze*, 75 N.Y.2d at 50, 549 N.E.2d at 1167, 550 N.Y.S.2d at 596. The complainant and her son who were both mentally retarded, were walking down a street when they were approached by the defendant and his friend. *Id.* Although defendant was aware of the complainant's mental retardation, he still called her a "bitch" and her son a "dog." *Id.* Defendant further added that he would "beat the crap out of the [complainant] some day or night on the street." *Id.* Complainant ran away in tears and told the authorities of the occurrence. *Id.* A similar incident had previously occurred between the defendant and the complainant. *Id.* The court concluded that the speech in this case was abusive but "defendant's words [did] not, however, fall within the scope of constitutionally proscribable expression, which is considerably narrower than that of the statute." *Id.* at 51, 549 N.E.2d at 1168, 550 N.Y.S.2d at 597.

[72] *Id.* at 50, 549 N.E.2d at 1167, 550 N.Y.S.2d at 596.

[73] N.Y. PENAL LAW § 240.25 (McKinney 1989). Section 240.25, before it was amended, provided in pertinent part:

> A person is guilty of harassment when, with intent to harass, annoy or alarm another person: 1. He strikes, shoves, kicks or otherwise subjects him to physical contact, or attempts or threatens to do the same; or 2. In a public place, he uses abusive or obscene language, or makes an obscene gesture.

Id.

[74] *Dietze*, 75 N.Y.2d at 51, 549 N.E.2d at 1168, 550 N.Y.S.2d at 597.

[75] *Id.* (citing Terminello v. Chicago, 337 U.S. 1 (1948)). The *Dietze* court further noted that "[s]peech is often 'abusive'-even vulgar, derisive, and provocative-and yet it is still protected under the State and Federal

harassment statute in *Dietze* from the disorderly conduct statute at bar and explained that the latter was "directed at words and utterances coupled with an intent to create a risk of public disorder, which the State has the authority and responsibility to prohibit, prevent and punish."[76] In other words, the harassment statute on its face would make constitutionally protected speech illegal in contrast to the disorderly conduct statute which addressed speech that creates a clear and present danger of a substantive evil.[77]

The court emphasized that, at common law, misconduct could be prosecuted as a public nuisance and that a common factor in such legislation was to attempt to deter breaches of the peace adversely affecting the community's safety, health and morals.[78] The *Tichenor* court also emphasized that the New York State Court of Appeals had upheld the constitutionality of predecessor statutes which were similarly worded[79] and that the United States Supreme Court had affirmed those conclusions.[80] Specifically,

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Constitutional guarantees of free expression" *Id.* *See* Lewis v. City of New Orleans, 415 U.S. 130 (1974) (holding a Louisiana ordinance which prohibited the use of obscene language directed at a police officer to be overbroad in violation of the First and Fourteenth Amendments).

[76] People v. Tichenor, 89 N.Y.2d 769, 775, 680 N.E.2d 606, 609, 658 N.Y.S.2d 233, 236 (1997). *See also* People v. Feiner, 300 N.Y. 391, 91 N.E.2d 316 (1950).

[77] *Dietze,* 75 N.Y.2d at 51, 549 N.E.2d at 1168, 550 N.Y.S.2d at 597.

[78] *Tichenor,* 89 N.Y.2d at 773-74, 680 N.E.2d at 608, 658 N.Y.S.2d at 235 (citing People v. Munafo, 50 N.Y.2d 326, 406 N.E.2d 780, 428 N.Y.S. 924 (1980)).

[79] People v. Feiner, 300 N.Y. 391, 91 N.E.2d 316 (1950).

[80] Feiner v. New York, 340 U.S. 315 (1951) (holding that the state has the authority to prohibit or penalize when clear and present danger threatens public safety). In *Feiner,* both black and white gathered in the streets to listen to defendant speak. *Id* at 316. Defendant made a speech to listeners in which he made derogatory statements about government officials, and advocated that black persons should rise up in arms and fight for equal rights. *Id.* at 317. Police were present at this event and simply observed the speech without interrupting for some time without interrupting defendant's speech. *Id.* However, once they perceived a threat of violence ensuing, the defendant was told to end his speech. Defendant refused and was subsequently arrested. *Id.* at 317-18

the New York Court of Appeals has "steadfastly upheld the constitutionality of New York's disorderly conduct statutes."[81] Thus, the Court of Appeals asserted the doctrine of stare decisis in support of its conclusion.[82]

The *Tichenor* court rejected defendant's argument that the disorderly conduct statute was vague.[83] Again, the court noted that the vagueness challenge had been previously rejected.[84] The court determined that the statute provides sufficient notice of what conduct is prohibited and that the statute is not written in such a manner as to permit or encourage arbitrary and discriminatory enforcement.[85] "The statutory requirement that the defendant possess an intent to 'cause, or recklessly create a risk of, public inconvenience, annoyance or alarm, narrows the definition, so that no inadvertent act may be punished."[86]

Defendant, again relying on *Dietze,* argued that the disorderly conduct statute was unconstitutional as applied to the facts of his case, asserting that his altercation with the police officer was a private encounter.[87] However, the New York Court of Appeals stated that a reasonable jury could infer that defendant intended to create a public disturbance and that the defendant's disruptive

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[81] *Tichenor*, 89 N.Y.2d at 774, 680 N.E.2d at 609, 658 N.Y.S.2d at 236 (citing People v. Todaro, 26 N.Y.2d 325, 329, 258 N.E.2d 711, 310 N.Y.S.2d 303 (1970); People v. Thomas, 23 N.Y.2d 659, 242 N.E.2d 490, 295 N.Y.S.2d 340 (1968); People v. Turner, 17 N.Y.2d 829, 218 N.E.2d 316, 271 N.Y.S.2d 274 (1966)).

[82] *Id.* The court stated: "Appellant would have us ignore or overrule the potent stare decisis effect of these . . . precedents." *Id.*

[83] *Id.* at 775, 680 N.E.2d at 609-10, 658 N.Y.S.2d at 236-37.

[84] *Id.* (citing People v. Hardy, 47 N.Y.2d 500, 392 N.E.2d 1233, 419 N.Y.S.2d 49 (1979); People v. Todaro, 26 N.Y.2d 325, 258 N.E.2d 711, 310 N.Y.S.2d 303 (1970); People v. Thomas, 23 N.Y.2d 659, 242 N.E.2d 490, 295 N.Y.S.2d 340 (1968); People v. Turner, 17 N.Y.2d 829, 218 N.E.2d 316, 271 N.Y.S.2d 274 (1966); People v. Feiner, 300 N.Y. 391, 91 N.E.2d 316 (1950)).

[85] *Tichenor,* 89 N.Y.2d at 775-76, 680 N.E.2d at 610, 658 N.Y.S.2d at 237 (citing People v. Bright, 71 N.Y.2d 376, 520 N.E.2d 1355, 526 N.Y.S.2d 66 (1988)).

[86] *Id.* (citing People v. Bakolas, 59 N.Y.2d 51, 449 N.E.2d 738, 462 N.Y.S.2d 844 (1983)).

[87] *Tichenor*, 89 N.Y.2d at 776, 680 N.E.2d at 610, 658 N.Y.S.2d at 237.

behavior at the doorstep of a bar was an encounter of a public nature rather than a private altercation.[88] Since the altercation was likely to escalate into a public inconvenience, it falls within the statute's definition of discriminatory conduct.[89] Furthermore, the court explained that the evidence of the defendant eluding the officer when slipping into the bar can support an inference that defendant intended to cause public disorder.[90]

Relying on established New York law, the *Tichenor* court held that the disorderly conduct statute was not unconstitutionally vague and that defendant intended to create a public disturbance.[91] New York State courts, when faced with similar statutes like the one challenged in *Tichenor*, have held that those statutes may limit free speech when it is of a clear and present danger of a substantive evil.[92] It is clear that states may afford greater protection to the guarantees of freedom of speech and press than provided under the Federal Constitution. However, in the instant case, the New York Court of Appeals concluded that the disorderly conduct statute was constitutionally valid because the defendant's conduct may be described as the type of conduct that a state has the right and responsibility to punish. [93]

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[88] *Id.* at 776-77, 680 N.E.2d at 610, 658 N.Y.S.2d at 237.

[89] *Id.* at 777, 680 N.E.2d at 610, 658 N.Y.S.2d at 237.

[90] *Id.*

[91] *Id.*

[92] *See* People v. Dietze, 75 N.Y.2d 47, 51, 549 N.E.2d 1166, 1168, 550 N.Y.S.2d 595, 597 (1989).

[93] *Tichenor*, 89 N.Y.2d at 777, 680 N.E.2d at 610, 658 N.Y.S.2d at 237.