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Freedom of Speech and the Press

CRIMINAL COURT

NEW YORK COUNTY

People v. Little[529]
(published July 9, 1991)

A criminal defendant moved to dismiss his indictment for disorderly conduct[530] contending that his insulting comments and accompanying conduct directed at a police officer were constitutionally[531] protected speech.[532] The court held that because the defendant's gestures were nothing more than an accompaniment to the words spoken and did not rise to the level of violent and threatening behavior, the language uttered by the defendant remained protected speech.[533]

The defendant was charged with disorderly conduct for yelling abusive profanities while waiving his arms and pointing his fingers toward a police officer on a public street.[534] The defendant's conduct caused pedestrians to stop and take notice.[535]

The court noted that if the defendant had been charged solely

529. N.Y. L.J., July 9, 1991, at 23 (Crim. Ct. New York County 1991).

530. Defendant was indicted for disorderly conduct pursuant to section 240.20(1) of the New York Penal Law which 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 or threatening behavior . . . ." N.Y. PENAL LAW § 240.20(1) (McKinney 1980).

531. The court did not state whether defendant's action was brought under the state or federal constitution. The court's decision, however, was based on People v. Dietze, 75 N.Y.2d 47, 549 N.E.2d 1166, 550 N.Y.S.2d 595 (1989), in which the court of appeals found that the New York State Constitution provided an independent basis for its holding. *Id.* at 50 n.1, 549 N.E.2d at 1167 n.1, 550 N.Y.S.2d at 596 n.1.

532. "Every citizen may freely speak, write and publish his 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 of the press." N.Y. CONST. art. I, § 8.

533. *Little*, N.Y. L.J., July 9, 1991, at 23.

534. *Id.*

535. *Id.*

on the basis of the profanities he uttered, rather than on the basis of a statute regulating behavior, the court would clearly have found defendant's speech constitutionally protected by following the holding of *People v. Dietze*.[536] In *Dietze*, the court of appeals held that Penal Law section 240.25(2), the harassment statute, was constitutionally invalid because it prohibited otherwise protected speech.[537] The court in *Dietze* stated that "[s]peech is often '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."[538] To forbid or penalize speech, the court of appeals requires that the speech rise to the level of presenting "a clear and present danger of some serious substantive evil . . . ."[539] In finding the statute invalid, the court in *Dietze* reasoned that "[a]t the least, any proscription of pure speech must be sharply limited to words which, by their utterance alone, inflict injury or tend naturally to evoke immediate violence or other breach of the peace."[540] Because the court in *Dietze* recognized that Penal Law section 240.25(2) was held not constitutionally limited in scope, it determined the statute extended to any "abusive language intended to annoy."[541] The court voided the statute for overbreadth because it prohibited a substantial amount of constitutionally protected expression and its continued existence posed a significant threat of prosecution for the mere exercise of

536. 75 N.Y.2d 47, 549 N.E.2d 1166, 550 N.Y.S.2d 595 (1989).

537. *Id.* at 53, 549 N.E.2d at 1169, 550 N.Y.S.2d at 598.

538. *Id.* at 51, 549 N.E.2d at 1168, 550 N.Y.S.2d at 597.

539. *Id.*

540. *Id.* at 52, 549 N.E.2d at 1168, 550 N.Y.S.2d at 597 (citing Lewis v. City of New Orleans, 415 U.S. 130, 132 (1974); Gooding v. Wilson, 405 U.S. 518, 522 (1972); People v. Feiner, 300 N.Y. 391, 401, 91 N.E.2d 316, 320 (1950), *aff'd*, 340 U.S. 315 (1951); People v. Tylkoff, 212 N.Y. 197, 202, 105 N.E. 835, 837 (1914)).

541. *Id.* The court refused to judicially construct such limitations to render the statute constitutional. *Id.* at 52, 549 N.E.2d at 1169, 550 N.Y.S.2d at 598. The court reasoned that interpreting the statute as limited to specific proscribable speech would result in an impermissibly vague statute as opposed to an overly broad one, thereby causing a chilling effect. *Id.* at 53, 549 N.E.2d at 1169, 550 N.Y.S.2d at 598.

free speech.[542]

Subsequent case law that has scrutinized subsection three of the disorderly conduct statute[543] extended the holding in *Dietze, finding* this statute unconstitutional in that it impinged upon constitutionally protected expression.[544] In *People v. Perkins*,[545] a defendant was charged with shouting profanities and making an obscene gesture directed at a police officer in the presence of a crowd of onlookers.[546] The court favored the "jurisdictional approach" utilized by the concurring opinion in *Dietze*.[547] This approach prescribes that when a statute is challenged on constitutional grounds there is a strong presumption of constitutionality.[548] The court noted that statutes should be construed in a manner that saves them from constitutional imperfections and interpreted in a way that "trims them to their constitutional limits."[549]

In determining whether to extend the holding in *Dietze*, the court in *Little* distinguished *Dietze* and its progeny by noting that the subdivision of the disorderly conduct statute, under which the defendant was charged, regulated behavior as opposed to language.[550] Hence, on its face, subdivision one of the disorderly conduct statute does not raise the same constitutional

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542. *Id.*

543. N.Y. PENAL LAW § 240.20(3) (McKinney 1980); *see Little*, N.Y. L.J., July 9, 1991, at 23; People v. Perkins, 147 Misc. 2d 325, 558 N.Y.S.2d 459 (Dist. Ct. Nassau County 1990).

544. *See Little*, N.Y. L.J., July 9, 1991, at 23.

545. 147 Misc. 2d 325, 558 N.Y.S.2d 459 (Dist. Ct. Nassau County 1990), *rev'd*, 150 Misc. 2d 543, 576 N.Y.S.2d 750 (Sup. Ct. New York County), *appeal denied*, 78 N.Y.2d 1129, 586 N.E.2d 70, 578 N.Y.S.2d 887 (1991).

546. *Id.* at 326, 558 N.Y.S.2d at 460.

547. *Id.* at 327-28, 558 N.Y.S.2d at 461 (citing *Dietze*, 75 N.Y.2d at 54, 549 N.E.2d at 1170, 550 N.Y.S.2d at 599 (Wachtler, C.J., concurring)).

548. *Id.*

549. *Id.* The court in *Little* utilized the same approach. *See Little*, N.Y. L.J., July 9, 1991, at 23.

550. *Little*, N.Y. L.J., July 9, 1991, at 23. The court stated that "while in certain circumstances the behavior regulated under subdivision one may be accompanied by language, the statute itself is not a proscription of pure speech." *Id.*

concerns.[551] The defendant's constitutional claim undoubtedly would have failed if the court ended its analysis here.[552] However, the court "trim[ed] the statute to its constitutional limits"[553] by applying the holding in *Dietze*.[554] As a result, the court found the insulting comments made by defendant to be constitutionally protected.[555]

In determining whether the defendant's conduct, i.e., pointing his fingers and raising his arms, was also constitutionally protected speech, the court analyzed whether it rose to the level of tumultuous, violent or threatening behavior.[556] The court concluded that the defendant's conduct was not threatening.[557] The court also determined that the defendant's behavior was not tumultuous and violent by reasoning that this phrase connotes more than "mere noise or ordinary disturbance,"[558] but rather, refers to frightening mob-like behavior.[559] The court ruled that "defendant's gestures were nothing more than an accompaniment to words spoken which, in this context, [did] not remove the language uttered by defendant from the protection of the holding of *Dietze*."[560]

Alternatively, if the defendant behaved more violently, to the extent that his conduct could be segregated from his utterances, it appears that his conduct would have been proscribed by the statute and not constitutionally protected. Unlike *Dietze* and its

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551. *Id.*

552. *Id.*

553. *Id.* (citing *People v. Dietze*, 75 N.Y.2d 47, 60, 549 N.E.2d 1166, 1174, 550 N.Y.S.2d 595, 603 (1989) (Wachtler, C.J., concurring)).

554. *Id.*

555. *Id.*

556. *Id.*

557. *Id.* (stating that "'[w]hile genuine threats or physical harm fall within the scope of the statute, such an outburst, without more does not'") (quoting *Dietze*, 75 N.Y.2d at 54, 549 N.E.2d at 1170, 550 N.Y.S.2d at 599).

558. *Id.*; *see also* People v. Mighty, 142 Misc. 2d 37, 40, 535 N.Y.S.2d 944, 946-47 (City Ct. Rochester 1988) (finding that the defendant's abusive language and name calling directed at police officers did not constitute violent and tumultuous conduct).

559. *Little*, N.Y. L.J., July 9, 1991, at 23.

560. *Id.*

progeny, the court in *Little* did not hold the subsection of the statute constitutionally invalid, but rather construed the statute as limited to certain constitutionally proscribed speech, a result the *Dietze* court refused to create.[561]

561. *See Dietze*, 75 N.Y.2d at 52-53, 549 N.E.2d at 1169, 550 N.Y.S.2d at 598. The court refused "to incorporate limitations into the statute by judicial construction." *Id.* at 52, 549 N.E.2d 1169, 550 N.Y.S.2d 598. "While it is argued that the statute's unconstitutional overbreadth might be cured by restricting its reach to 'fighting words' or other words . . . such a 'cure' would, indeed, be fraught with significant problems of its own." *Id.* "[C]onstruing the statute as limited to certain constitutionally proscribable speech would likely result in transforming an otherwise overbroad statute into an impermissibly vague one . . . ." *Id.* at 53, 549 N.E.2d at 1169, 550 N.Y.S.2d at 598.