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Freedom of Speech and Press

Thus, both the state and federal judiciary have the discretion to limit the free speech rights of attorneys when they appear in court before a jury where the court finds that their conduct or attire could impinge upon the criminal defendant's right to a fair trial, including the right to an impartial jury.

CRIMINAL COURT

NEW YORK COUNTY

People v. Stephen[604]
(decided February 10, 1992)

In a disorderly conduct prosecution for verbally taunting a police officer in public, defendant moved to dismiss the charge stating that Penal Law section 240.20(1)[605] violated his right to freedom of speech as guaranteed by the First Amendment[606] and article I, Section 8 of the New York State Constitution.[607] The court held section 240.20(1) unconstitutional as it pertains to the defendant, and dismissed the charge of disorderly conduct.[608]

A police officer observed the defendant engaging in offensive conduct and using profane language, while in public, in front of approximately 15-20 people.[609] The police officer witnessed defendant publicly "clutching his genital area with his hands and yelling at deponent, 'Fuck you,' 'If you were in jail, I'd fuck

604. 153 Misc. 2d 382, 581 N.Y.S.2d 981 (N.Y. Crim. Ct. 1992).

605. N.Y. PENAL LAW § 240.20(1) (McKinney 1989). The statute states in pertinent part that: "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 a violent, tumultuous or threatening behavior . . . ." *Id.*

606. U.S. CONST. amend. I.

607. N.Y. CONST. art. I, § 8.

608. *Stephen*, 153 Misc. 2d at 390, 581 N.Y.S.2d at 987.

609. *Id.* at 383, 581 N.Y.S.2d at 982-83.

you, you'd be my bitch.'"[610] The complaint further alleged that defendant also screamed to the police officer, "If you didn't have that gun and badge, I'd kick your ass, I'd kill you."[611] Following defendant's behavior, the crowd which had gathered joined the defendant in yelling, "Yeah, fuck the police."[612] Defendant was subsequently arrested and charged with a violation of Penal Law section 240.20(1).[613]

Relying on the holding in *People v. Dietze,*[614] defendant argued that section 240.20(1) was unconstitutional on its face.[615] Furthermore, defendant contended that the statute was overbroad and, as it applied to him, prohibited the constitutional right of freedom of expression.[616] Therefore, defendant asserted that, as the court of appeals did in *Dietze,* the court must find the statute unconstitutional.[617]

The court began its analysis of defendant's contention that the statute was overbroad and thus, unconstitutional, by first noting that there is a presumption that state statutes are constitutional.[618] Moreover, the court stated that "[w]henever possible, a court

610. *Id.* at 383, 581 N.Y.S.2d at 982.

611. *Id.*

612. *Id.* at 383, 581 N.Y.S.2d at 983.

613. *Id.*

614. 75 N.Y.2d 47, 549 N.E.2d 1166, 550 N.Y.S.2d 595 (1989).

615. *Stephen,* 153 Misc. 2d at 383-84, 581 N.Y.S.2d at 983. Defendant argued that although *Dietze* dealt with the constitutionality of subdivision 2 of section 240.20 (concerning harassment) the court in the present case found that the reasoning of the court of appeals in *Dietz* applied with "equal force" in this case. *Id.* at 384, 581 N.Y.S.2d at 983.

616. *Id.* at 384, 581 N.Y.S.2d at 984.

617. *Id.*

618. *Id.*; *see* Taylor v. Sise, 33 N.Y.2d 357, 364, 308 N.E.2d 442, 446, 352 N.Y.S.2d 924, 930 (1974). The court of appeals stated that "[t]here is generally a very strong presumption that 'the Legislature has investigated and found the existence of a situation showing or indicating the need for or desirability of the legislation.'" *Id.* (quoting Van Berkel v. Power, 16 N.Y.2d 37, 40, 209 N.E.2d 539, 540, 261 N.Y.S.2d 876, 878 (1965)); People v. Pagnotta, 25 N.Y.2d 333, 337, 253 N.E.2d 202, 205, 305 N.Y.S.2d 484, 488 (1969) (The court state that "[t]here is a strong presumption that a statute duly enacted by the Legislature is constitutional. Indeed, we have held that in order to declare a law unconstitutional, the invalidity of the law must be demonstrated beyond a reasonable doubt.").

must construe each statute in a manner which would avoid constitutional defects."[619] Thus, "[t]he court should strike down a statute as unconstitutional only as a last resort, and only when unconstitutionality is demonstrated beyond a reasonable doubt."[620] However, notwithstanding the above findings, the court held that defendant in this case had failed to establish beyond a reasonable doubt that the statute violated his constitutional right of free speech.[621] Therefore, the court rejected defendant's argument that the statute was facially overbroad.[622]

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619. *Stephen*, 153 Misc. 2d at 384, 581 N.Y.S.2d at 983; *see* People v. Santorelli, 80 N.Y.2d 875, 876, 600 N.E.2d 232, 233, 587 N.Y.S.2d 601, 602 (1992). The New York Court of Appeals held that it "must construe a statute, which enjoys a presumption of constitutionality, to uphold its constitutionality if a rational basis can be found to do so." *Id. Accord People v. Dietze*, 75 N.Y.2d 49, 55, 549 N.E.2d 1166, 1171, 550 N.Y.S.2d 595, 599 (1989) (Wachtler, C.J., concurring) (stating that it was the court's "obligation to construe a statute, if possible, to save it from constitutional infirmities"); People v. Liberta, 64 N.Y.2d 152, 171, 474 N.E.2d 567, 578, 485 N.Y.S.2d 207, 218 (1985) ("In any case where a court must decide whether to sever an exemption or instead declare an entire statute a nullity it must look at the importance of the statute, the significance of the exemption within the over-all statutory scheme, and the effects of striking down the statute."); Brown-Forman Distillers Corp. v. State Liquor Auth., 64 N.Y.2d 479, 500, 479 N.E.2d 764, 777, 490 N.Y.S.2d 128, 141 (1985) ("Indeed, this court has not hesitated to so construe a statute when deemed necessary to save it from constitutional challenge and, thereby, to give an interpretation in harmony with the fundamental laws of both the Nation and this State."); People v. Keller, 158 N.Y. 187, 198, 52 N.E. 1107, 1111 (1899) ("The courts should always construe a statute as an exercise of legislative power within the restrictions of the constitution, and not as an exercise of some other power which the legislature does not possess.").

620. *Stephen*, 153 Misc. 2d at 384, 581 N.Y.S.2d at 983; *see, e.g.*, Defiance Milk Prods. Co. v. DuMond, 309 N.Y. 537, 540-41, 132 N.E.2d 829, 830 (1956) ("Every legislative enactment carries a strong presumption of constitutionality including a rebuttable presumption of the existence of necessary factual support for its provisions.").

621. *Stephen*, 153 Misc. 2d at 384, 581 N.Y.S.2d at 983 ("Although expression may accompany such behavior, there is no reasonable possibility that this statute presents 'a significant risk of prosecution for the mere exercise of free speech."); *see, e.g., Dietze*, 75 N.Y.2d at 50, 549 N.E.2d at 1167, 550 N.Y.S.2d at 596. Although the *Dietze* court held that section 240.20(2) was unconstitutional, the court found the defendant's constitutional claim

Next the court addressed defendant's argument that the statute, "even if not invalid on its face, as applied to him in this case, . . . penalizes constitutionally protected expression."[623] In answering this claim, the court inquired as to whether defendant's actions constituted "violent" or "tumultuous" behavior.[624] The court found, however, that "[w]hile defendant's alleged behavior can be described as provocative, offensive and verbally abusive, . . . it simply was neither 'violent' nor 'tumultuous.'"[625] Therefore, the court stated that the in order for the State to prevail at trial, it would have to prove that "defendant engaged in 'threatening behavior.'"[626] Thus, in interpreting *Dietze*, the court

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validly maintained under *Dietze*. The court agreed with the reasoning in *Dietze* which stated that "[b]ecause the statute, on its face, prohibits a substantial amount of constitutionally protected expression, and because its continued existence presents a significant risk of prosecution for the mere exercise of free speech . . .," the statute is unconstitutional. *Stephen*, 153 Misc. 2d at 384, 581 N.Y.S.2d at 983.

622. *Stephen*, 153 Misc. 2d at 385, 581 N.Y.S.2d at 984.

623. *Id.* In resolving this question, the court stated:

> [The] issue becomes whether defendant's actions in repeatedly clutching his genitals and yelling offensive epithets at the police officer constituted impermissible violent, tumultuous or threatening behavior, where a crowd gathered and joined the defendant's chants on a City street at 4:00 a.m., or whether such activities amounted to speech protected by the First and Fourteenth Amendments of the U.S. Constitution, and by Article I, section 8 of the New York State Constitution.

Id.

624. *Id.* The court agreed that: "[t]he phrase 'tumultuous and violent conduct,' . . . in itself clearly means much more than mere loud noise or ordinary disturbance. It is designed to connote frightening mob behavior involving ominous threats of injury, stone throwing or other such terrorizing acts." *Id.* (quoting Donnino, Practice Commentary to N.Y. PENAL LAW § 240.05 (McKinney 1967)). The court also applied the definition found in Webster's Third New International Dictionary (1986) for the word "tumult" as "disorderly and violent movement, agitation or milling about, of a crowd accompanied usually with great uproar and confusion of voices . . . ." *Id.*

625. *Stephen*, 153 Misc. 2d at 386, 581 N.Y.S.2d at 984. The court reasoned that "defendant merely made loud, derisive, taunting comments and vulgar and demeaning gestures, and some of his comments were repeated by members of a crowd which formed at the scene." *Id.*

626. *Id.*

stated that "where threats are sought to be penalized, they must either be serious, or should reasonably be taken serious."[627] The court found that the sort of conduct for which defendant was charged amounted to a "'crude outburst,' but nothing more."[628] Furthermore, "even a minimally streetwise New Yorker could not reasonably have taken defendant's 'threats' against the officer seriously."[629] For the above reason, defendant's freedom of speech rights under article I, section 8 of the New York State Constitution was infringed upon and his's state constitutional claim succeeded.[630]

The court, recognizing the fact that the guarantees of protected speech under the First Amendment are not absolute,[631] stated:

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627. *Id.* at 389, 581 N.Y.S.2d at 986. The court in *Dietze* found "that defendant's statement that she would 'beat the crap out of [complainant] some day or night in the street' 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." *Dietze*, 75 N.Y.2d 49, 53-54, 549 N.E.2d 1166, 1169-70, 550 N.Y.S.2d 595, 598-99 (1989).

628. *Dietz*, 75 N.Y.2d at 54, 549 N.E.2d at 1170, 550 N.Y.S.2d at 599.

629. *Stephen*, 153 Misc. 2d at 389, 581 N.Y.S.2d at 986. The court did find, however, that in People v. Perkins, 150 Misc. 2d 543, 576 N.Y.S.2d 750 (App. Term 2d Dep't 1991), the court did not find a constitutional violation for similar conduct on part of defendant. *Perkins*, 150 Misc. 2d at 545, 576 N.Y.S.2d at 752. However, the *Stephen* court stated that *Perkins* was not controlling and therefore could not be relied on by the State in the present case. *Stephen*, 153 Misc. 2d at 389, 581 N.Y.S.2d at 986.

630. *Stephen*, 153 Misc. 2d at 389, 581 N.Y.S.2d at 986.

631. *Id.* at 386, 581 N.Y.S.2d at 984; *see* Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 570 (1976). The Court "reaffirm[ed] that the guarantees of freedom of expression are not an absolute prohibition under all circumstances." *Id.* Terminiello v. City of Chicago, 337 U.S. 1, 4 (1949). In *Terminello* the Court explained:

> Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech, though not absolute, . . . is protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above inconvenience, annoyance, or unrest.

Id.; Pennekamp v. Florida, 328 U.S. 331, 351 (1946) ("[T]his Court ha[s] held that the Constitution did not allow absolute freedom of expression — a freedom unrestricted by the duty to respect other needs fulfillment of which

"where words present a clear and present danger of inciting those listening to lawless action, they are not entitled to constitutional protections and may be punished."[632] However, the court clarified the above statement by stating that "[w]here no listeners are being incited, or the remarks are not likely to produce imminent disorder, the speaker's comments remain subject to constitutional protections."[633] Furthermore, not all "provocative idea[s] will produce a riot."[634] Thus, the court remarked that it is up to the judiciary to determine whether, under the circumstances surrounding the event, the utterance or expression was for the purpose of "inciting or producing imminent lawless action and was likely to do so."[635] In applying this standard, the court found that defendant's conduct toward the police officer was "clearly protected speech."[636] Thus, "defendant's statements [were] pro-

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make for the dignity and security of man."). Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942) ("There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problem."). The *Chaplinsky* Court went on to state that this speech "include[s] the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words — those which by their very utterance inflict injury or tend to incite an immediate breach of the peace." *Id.*

632. *Stephen*, 153 Misc. 2d at 386, 581 N.Y.S.2d at 984-85. *See also* Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (reaffirming that the constitutional guarantee of protected speech "do[es] not permit a State to forbid or proscribe advocacy of the use of force or law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action").

633. *Stephen*, 153 Misc. 2d at 386, 581 N.Y.S.2d at 985; *see also* Gooding v. Wilson, 405 U.S. 518, 521-22 (1971) ("The constitutional guarantees of freedom of speech forbid the States to punish the use of words or language not within narrowly limited classes of speech.").

634. *Stephen*, 153 Misc. 2d at 386, 581 N.Y.S.2d at 985.

635. *Id.*; *see also* Texas v. Johnson, 491 U.S. 397, 409 (1989). The Court stated that it has "not permitted the government to assume that every expression of a provocative idea will incite a riot, but ha[s] instead required careful consideration of the actual circumstances surrounding such expression, asking whether the expression 'is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.'" *Id.* (quoting *Brandenburg*, 395 U.S. at 447).

636. *Stephen*, 153 Misc. 2d at 387, 581 N.Y.S.2d at 985. The court further stated that "[u]tilizing common, contemporary understanding, there was no

tected speech and [did] not fall within the incitement exception to the First Amendment."[637]

Once the court rejected the State's "clear and present danger" argument,[638] it turned its analysis to the "fighting words" doctrine.[639] In utilizing the standard set forth in *Chaplinsky v. New Hampshire*,[640] the court stated that "whether particular speech constitutes 'fighting words' cannot be determined outside of the context in which the speech occurs."[641] Thus, the court determined that the words and gestures which defendant used toward the police officer in the present case did not amount to those which would create a breach of the peace or incite violence.[642]

The court stated further that "the Supreme Court has held that the 'fighting words' doctrine applies more narrowly to police officers, as police officers are trained and expected to exercise more restraint in response to provocation than do other citizens."[643] The court noted that while ordinary citizens may be provoked to retaliate in response to defendant's conduct, a police officer is expected to remain calm.[644] Thus, the court rejected the State's assertion that the "fighting words" exception should be applied in sustaining defendant's conviction, and agreed with defendant's contention that section 240.20(1) was unconstitutional

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likelihood that defendant's remarks . . . would produce an immediate violent response by the persons hearing them." *Id.*

637. *Id.*

638. *Id.*

639. *Id.* The "fighting words" doctrine holds that words and expressions "which by their very utterance inflict injury or tend to incite an immediate breach of the peace," or which would provoke a reasonable and prudent person to retaliate, are not protected forms of speech. *Id.* (citing Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942)).

640. 315 U.S. at 568.

641. *Stephen*, 153 Misc. 2d at 387, 581 N.Y.S.2d at 985.

642. *Id.* at 388, 581 N.Y.S.2d at 985 ("No reasonable person witnessing the situation would have thought it likely that the police officer would have been driven to attack defendant as a direct consequence of his comments.").

643. *Id.*; *see also* City of Houston v. Hill, 482 U.S. 451, 462-63 (1987) ("The freedom of individuals verbally to oppose or challenge police action without thereby risking arrest is one of the principal characteristics by which we distinguish a free nation from a police state.").

644. *Stephen*, 153 Misc. 2d. at 388, 581 N.Y.S.2d at 986.

as applied to him. Therefore the court granted defendant's motion to dismiss the charge against him.[645]

In conclusion, it is well understood that states may provide greater protection to the guarantees of freedom of speech and expression than provided under the Federal Constitution.[646] In *Stephen*, however, the court found that defendant's constitutionally protected right of free speech was violated, under both the First Amendment and article I, section 8.[647] Thus, the court maintained that both the "clear and present danger" and the "fighting words" exceptions to constitutionally protected expression were not present in this case.[648]

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645. *Id.*

646. *See* People *ex rel* Arcara v. Cloud Books Inc., 68 N.Y.2d 553, 557, 503 N.E.2d 492, 494, 510 N.Y.S.2d 844, 846, *on remand from* 478 U.S. 697 (1986). The New York Court of Appeals stated that:

> The Supreme Court's role in construing the Federal Bill of Rights is to establish minimal standards for individual rights applicable throughout the Nation. The function of the comparable provisions of the State Constitution, if they are not to be considered purely redundant, is to supplement those rights to meet the needs and expectations of the particular State.

Id.; People v. Barber, 289 N.Y. 378, 384, 46 N.E.2d 329, 331 (1943).

647. *Stephen*, 153 Misc. 2d at 388, 390, 581 N.Y.S.2d at 986-87. As to the First Amendment claim, the court found that defendant's speech did not present a "clear and present danger," thus preserving defendant's Federal Constitutional right of free speech. *Id.* at 389, 581 N.Y.S.2d at 986. With regard to defendant's article I, section 8 claim, the court found that defendant's speech did not fall under the "fighting words" exception and thus sustained defendant's state constitutional right of freedom of expression. *Id.* at 390, 581 N.Y.S.2d at 987.

648. *Id.*