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Freedom of Speech and Press

CITY COURT

OSWEGO COUNTY

People v. O'Leary[649]
(decided February 28, 1992)

In a prosecution for disorderly conduct, defendant sought to have the court declare Penal Code section 240.20 subdivisions 3 and 7[650] unconstitutional as violative of the free speech guarantees[651] of both the First Amendment of the United States Constitution[652] and article I, section 8 of the New York State Constitution.[653] The court held that both subdivisions of the statute, which prohibit abusive or obscene language or gestures,[654] and the creation of a hazardous condition by an act which does not serve a legitimate purpose[655] did not violate defendant's freedom of speech or expression.[656]

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649. 153 Misc. 2d. 641, 583 N.Y.S.2d 881 (Sup. Ct., Oswego County 1992).

650. N.Y. PENAL LAW § 240.20(3) and (7) (McKinney 1989). The statute states in pertinent part that:

> [a] person is guilty of disorderly conduct when, with intent to cause inconvenience, annoyance or alarm, or recklessly creating a risk thereof; . . .
>
> 3. In a public place, he uses abusive or obscene language, or makes an obscene gesture . . .
>
> 7. He creates a hazardous or physically offensive condition by any act which serves no legitimate purpose.

Id.

651. *O'Leary*, 153 Misc. 2d at 642, 583 N.Y.S.2d at 882.

652. U.S. CONST. amend. 1.

653. N.Y. CONST. art. I, § 8.

654. N.Y. PENAL LAW § 240.20(3) (McKinney 1989).

655. N.Y. PENAL LAW § 240.20(7) (McKinney 1989).

656. *O'Leary*, 153 Misc. 2d at 655-56, 583 N.Y.S.2d at 891. The court found that both subdivisions of § 240.20 were not unconstitutional on their face. *Id.* As for subdivision 3, the court held that "[t]here is a limiting or saving construction that this Court finds implicit in the statute and therefore

The facts show that on September 19, 1991, defendant Dennis J. O'Leary was arrested for disorderly conduct, in violation of the above named statute.[657] The charges against defendant alleged that he stood on a public street and shouted "f— you" while kicking a police car.[658] Defendant was then arrested.[659] Subsequently, defendant filed a motion to dismiss the charge which alleged a violation of section 240.20(3) in the light of the New York Court of Appeals' ruling in *People v. Dietze.*[660] In support of defendant's contention that the statute violated his freedom of speech, defendant cited three "inferior" court cases.[661] While all three cases to which defendant cited involved

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the statute does pass constitutional muster." *Id.* Furthermore, citing People v. Cooke, 152 Misc. 2d at 311, 578 N.Y.S.2d 76 (1991), the court found that "Penal Law Section 240.20 subdivision 7 does not require proof that anyone was actually physically offended; it is enough that a condition of a kind that was physically offensive to the public was created." *O'Leary,* 153 Misc. 2d at 655-56, 583 N.Y.S.2d at 891.

657. *O'Leary,* 153 Misc. 2d at 642, 583 N.Y.S.2d at 882.

658. *Id.*

659. *Id.*

660. 75 N.Y.2d 47, 549 N.E.2d 1166, 550 N.Y.S.2d 595 (1989). Judge Hancock, writing for the majority, held that section 240.25(2), which is identical to section 240.20(3), "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 .... Section 240.25(2) [is] invalid for overbreadth, under both the State (art. I, § 8) and Federal (1st and 14th Amends.) Constitutions." *Id.* at 50, 549 N.E.2d at 1167, 550 N.Y.S.2d at 596.

661. People v. Perkins, 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 (N.Y. Sup. Ct. 1991). The court held that "in light of the recent Court of Appeals decision in *People v. Dietze* . . . this court is constrained to rule that Penal Law section 240.20(3) is unconstitutional. . . . " *Id.* at 326, 558 N.Y.S.2d at 460; People v. Blanchette, 147 Misc. 2d 50, 554 N.Y.S.2d 388 (City Ct. of Watertown, Jefferson County 1990). The court, also following the decision in *Dietze* stated that "[t]he balance between freedom of speech and freedom from abuse, then, becomes a chore for the Court when the constitutional promise of freedom of expression creates a situation where one's verbal spurs to the flanks of public sensibilities goes beyond a tolerable point." *Id.* at 53, 554 N.Y.S.2d at 390; People v. Cody, 147 Misc. 2d 588, 558 N.Y.S.2d 793 (City Ct. of Rochester, Monroe County 1990). The court stated that "[a] criminal statute must be informative on its face . . . and, in this respect must be sufficiently

a violation of section 240.20(3) and contained the same or similar words,[662] the court found that the non-binding authority was not controlling in the case at bar.[663]

The court began its analysis of defendant's claim that the statute in question was overbroad and therefore violative of defendant's freedom of speech by first restating former Chief Judge Wachtler's concurring opinion in *Dietze*.[664] Judge Wachtler stated that "the Supreme Court has reaffirmed both that states may constitutionally punish fighting words under narrowly drawn statutes and that the narrowing terms can be supplied by a judicial construction . . . ."[665] Thus, the a statute which deprives

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definite, clear and positive to give unequivocal warning of the rule which is to be obeyed." *Id.* at 590-91, 558 N.Y.S.2d at 794. The Court went on to hold that "[a]s written, Penal Law § 240.20(3) is so ambiguous that it could not have advised this defendant that his statement might be prosecuted as disorderly conduct." *Id.* at 591, 558 N.Y.S.2d at 795.

662. *Perkins*, 147 Misc. 2d at 326, 558 N.Y.S.2d at 460 ("the defendant shouted f--- you and grabbed his genitals while shouting 'eat this'" in front of approximately 100 people); *Blanchette*, 147 Misc. 2d at 51, 554 N.Y.S.2d at 389 (defendant in public restaurant refused to quiet down and stop using the word "f---"); *Cody*, 147 Misc. 2d at 589, 558 N.Y.S.2d at 793 (defendant, a striking Greyhound Bus Company employee, said f--- you to police officer who was attempting to disperse the picketers).

663. *O'Leary*, 153 Misc. 2d at 642, 583 N.Y.S.2d at 882. The court stated that defendant cited to three "cases of inferior courts which resulted as an offshoot of the *Dietze* decision." *Id.*

664. *People v. Dietze*, 75 N.Y.2d 47, 54, 549 N.E.2d 1166, 1170, 550 N.Y.S.2d 595, 599 (1989) (Wachtler, C.J., concurring).

665. *Id.* at 59, 549 N.E.2d at 1173, 550 N.Y.S.2d at 602 (Wachtler, C.J., concurring) (citing Gooding v. Wilson, 405 U.S. 518, 523 (1972)). The court "continue[s] to recognize state power constitutionally to punish 'fighting' words under carefully drawn statutes not also susceptible of application to protected expression." *Id. See also* Chaplinsky v. New Hampshire, 315 U.S. 568 (1942). The Court held as follows:

> 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. These include 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. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be

an individual of his freedom of speech or expression may pass constitutional muster if "the State Court's interpretations of the statute narrow it to 'fighting words.'"[666]

In this case, the court stated that the constitutionality of section 240.20(3) revolved around a two step analysis:[667] "(1) Whether the Federal Constitutional guidelines will sustain a narrowly drawn and narrowly interpreted statute proscribing only 'fighting words,' and (2) Whether in fact the Courts of the State of New York have previously interpreted Penal Law 240.20 subdivision 3 . . . to apply only to 'fighting words.'"[668] In taking task to this analysis, the court reviewed the federal and state evolvement of the "fighting words" doctrine.

The federal analysis started with *Chaplinsky v. New Hampshire*.[669] In *Chaplinsky*, the statute at issue prohibited use of "any offensive or derisive name" or similar outbursts for offensive or annoying purposes.[670] Chaplinsky violated this statute by calling the city marshal "a god damn racketeer and a damn fascist"[671] and added that "the whole government of Rochester are fascists or agents of fascists . . . . " Holding the statute to be constitutional, the Supreme Court stated that it was "narrowly drawn and limited to define and punish specific conduct lying within the domain of state power, the use in a

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derived from them is clearly outweighed by the social interest in order and morality.

Id. at 571-72. The Court went on to say that "[r]esort to epithets . . . or opinion safeguarded by the Constitution, and its punishment as a criminal act would raise no question under that instrument." *Id.* at 572 (quoting Cantwell v. Connecticut, 310 U.S. 296, 309-10 (1940)).

666. *O'Leary*, 153 Misc. 2d at 645, 583 N.Y.S.2d at 884.

667. *Id.*

668. *Id.*

669. 315 U.S. 568 (1942).

670. The New Hampshire statute provides in pertinent part:

No person shall address any offensive, derisive or annoying word to any street or other public place, nor call him any offensive or derisive name, nor make any noise or exclamation in his presence and hearing with intent to deride, offend or annoy him, or to prevent him from pursuing his lawful business or occupation.

Id. at 568.

671. *Id.* at 569.

public place of words likely to cause a breach of the peace."[672] The test to determine the constitutionality of ordinances regarding the prohibitions of "words" alone is "what men of common intelligence would understand would be words likely to cause an average addressee to fight."[673]

This test was narrowed in *Gooding v. Wilson.*[674] In *Gooding*, the disorderly conduct statute prohibited "opprobrious words or abusive language, tending to cause a breach of the peace . . . ."[675] The Court found that "allowing juries to determine guilt 'measured by common understanding and practice' does not limit the application of [disorderly conduct statutes] to 'fighting' words defined by *Chaplinsky.*"[676] The Court reasoned that the dictionary definitions of the words

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672. *Id.* at 573. The Court went on to say that its "conclusion necessarily disposes of appellant's contention that the statute is so vague and indefinite as to render a conviction thereunder a violation of due process. A statute punishing verbal acts, carefully drawn so as not unduly to impair liberty of expression, is not too vague for criminal law." *Id.* at 574.

673. *Id.* at 573. The Supreme Court agreed with the state court's statement that:

> The English language has a number of words and expressions which by general consent are 'fighting words' when said without a disarming smile . . . Such words, as ordinary men know, are likely to cause a fight. So are threatening, profane or obscene revilings. Derisive and annoying words can be taken as coming within the purview of the statute as heretofore interpreted only when they have this characteristic of plainly tending to excite the addressee to a breach of the peace . . . . The statute, as construed, does no more than prohibit the face-to-face words plainly likely to cause a breach of the peace by the addressee, words whose speaking constitutes a breach of the peace by the speaker — including 'classical fighting words,' words in current use less 'classical' but equally likely to cause violence, and other disorderly words, including profanity, obscenity and threats.

Id.

674. 405 U.S. 518 (1972)

675. *Id.*

676. *Id.* at 528 (citing and quoting in part Wilson v. State, 156 S.E.2d 446, 448-49 (Ga. 1967)). The *Gooding* Court further agreed with the trial court that "'the fault of the statute is that it leaves wide open the standard of responsibility, so that it is easily susceptible to improper application.'" *Id.* (quoting Wilson v. Gooding, 303 F. Supp. 952, 955-56 (N.D. Ga. 1969)).

"opprobrious" and "abusive," are given "greater reach than 'fighting' words."[677]

This tapering of the "fighting words" test was reaffirmed in *Lewis v. City of New Orleans*.[678] Once again, the statute at issue involved the use of offensive language in public places, however, this one dealt exclusively with language directed at police officers. The Court, in holding the statute as violative of the First and Fourteenth Amendments,[679] stated that it was "overbroad . . . and is therefore facially invalid."[680] Just as in *Gooding*, the Court found the word "opprobrious" to be too broad a term and hence unconstitutional.[681]

Based on these United States Supreme Court cases, the *O'Leary* court found that a disorderly conduct statute which is narrowly drawn to encompass only those words or gestures which will incite a breach of the peace, or would tend to incite a breach of the peace, and is not applied to constitutionally protected speech, will pass constitutional muster.[682]

The court then commenced an analysis of the history of disorderly conduct in New York[683] under section 240.20(3) and its antecedent, section 722(1).[684] The court found that section

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677. *Id.* at 525. "Webster's Third New International Dictionary (1961) defined 'opprobrious' as 'conveying or intended to convey disgrace,' and 'abusive' as including 'harsh insulting language.' Georgia appellate decisions have construed [§] 26–6303 to apply to utterances that, although within these definitions, are not 'fighting' words as *Chaplinsky* defines them." *Id.*

678. 415 U.S. 130 (1974).

679. *Id.* at 131-32. The police officer's testimony regarding the contradicted language at issue in the case stated that "appellant left the truck and 'started yelling and screaming that I had her son or did something to her son and she wanted the know where he was . . . . She said, 'you god damn m.f. police — I am going to [the Superintendent of Police] about this.'" *Id.* at 131 n.1.

680. *Id.* at 131-32.

681. *Id.*

682. *O'Leary*, 153 Misc. 2d at 648, 583 N.Y.S.2d at 886.

683. *Id.* at 648, 583 N.Y.S.2d at 886.

684. N.Y. PENAL LAW § 722(1) (McKinney 1989). The statute provides in pertinent part:

> Any person who with intent to provoke a breach of the peace, or where a breach of the peace may be occasioned, commits any of the following

722 anticipated disorderly conduct to be "the type which the defendant intended to provoke a breach of the peace or whereby a breach of the peace may have been occasioned."[685] The interpretation of this statute has evolved from requiring intent to provoke breach of peace[686] to requiring actual threat of the peace,[687] and finally, to requiring intent and acts that "annoy disturb or interfere with obstruct or be offensive to others"[688] and that cause alarm to the community.[689]

The line of cases that developed this definition of disorderly conduct interpreted the former section 722. The court, however, found that the present section 240.20 had been interpreted to require "a limiting and saving construction that a breach of the peace be intended or likely to occur by the actions of the defendant."[690] Section 240.20 implicitly states that:

> [A]s far as disorderly conduct is concerned, a limiting construction that a breach of the peace must be intended to occur or likely to occur as a result of the actions of the defendant and

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> acts shall be deemed to have committed the offense of Disorderly Conduct:
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> 1. Uses offensive, disorderly, threatening, abusive, or insulting language, conduct or behavior; . . .

Id.

685. *O'Leary*, 153 Misc. 2d at 649, 583 N.Y.S.2d at 887. The court found that "[t]he Legislature, by its specific wording determined that a breach of the peace must be the primary element of section 722 and that element must be established by the conduct envisioned in the confines of the statute." *Id.*

686. *Id.* (discussing People v. Pieri, 269 N.Y. 315, 199 N.E. 495 (1936)).

687. *Id.* (discussing People v. Chesnick, 302 N.Y. 58, 96 N.E.2d 87 (1950). "The key phrase of the statute is 'breach of the peace' and, traditionally, that language means a violation of public order and tranquillity." *Id.* at 60, 96 N.E.2d at 88.

688. 25 Misc. 2d 239, 203 N.Y.S.2d 306 (Steuben County Ct. 1960).

689. *Id.* The court further stated that:

> To constitute the offense of disorderly conduct there must be more than the occurrence of the forbidden acts in a public place. In addition to the occurrence in a public place, it must appear that there is a disturbance of the public order, or a causing of consternation or alarm among a substantial segment of the community, or that such disturbance of the public peace is imminent.

Id.

690. *Id.* at 653, 583 N.Y.S.2d at 889.

> this comports with constitutional guidelines and logically only applies to 'fighting words' or words that would evoke a 'breach of the peace.[691]

The court utilized the holding in *People v. Pritchard*[692] which held that "the proscription of the statute, (240.20) unlike the former statute (Section 722), is limited to that type of conduct which involves a genuine intent or tendency to provoke a 'breach of the peace' or, to use the revisions or modern phraseology, 'to cause public inconvenience, annoyance or alarm.'"[693] The court construed section 240.20(3) as requiring a determination of whether a breach of the peace was intended or was likely to occur by the language or conduct used.[694] This limiting construction was construed to "logically only [to] appl[y] to 'fighting words' or words that would evoke a 'breach of the peace.'"[695]

The court then determined that the proper standard for analyzing defendant's constitutional claim was to be found in

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691. *O'Leary*, 153 Misc. 2d at 654, 583 N.Y.S.2d at 890.

692. 27 N.Y.2d 246, 265 N.E.2d 532, 317 N.Y.S.2d 4 (1970).

693. *Id.* at 248, 265 N.E.2d at 533, 317 N.Y.S.2d at 6. The court in *O'Leary* went on to say that:

> Even though the State Legislature had taken out the words in Section 722 regarding "breach of the peace" they are implied by the construction of the Courts of New York to Section 240.20, i.e. that the statute to be effective against a named defendant, must have a limiting and saving construction that a breach of the peace be intended or likely to accrue by the actions of the defendant.

O'Leary, 153 Misc. 2d at 653, 583 N.Y.S. 2d at 889; *see also* People v. Munafo, 50 N.Y.2d 326, 406 N.E.2d 780, 428 N.Y.S.2d 924 (1980). Judge Fuchsberg, writing for the majority, stated that:

> however wide ranging its application, a common thread that ran through almost all this legislation (Disorderly Conduct) was a desire to deter breaches of the peace or, more specifically of the community's safety, health or morals . . . and, although it has always been difficult to essay any precise definition of 'breach of the peace' . . . this court has equated that term with public inconvenience, annoyance or alarm, the governing phrase of our current disorderly conduct statute.

Id. at 331, 406 N.E.2d at 782-83, 428 N.Y.S.2d at 926.

694. *O'Leary*, 153 Misc. 2d at 654, 583 N.Y.S.2d at 890.

695. *Id.*

People v. Bakolas.[696] The New York Court of Appeals in *Bakolas* held that unreasonable noise, which the *O'Leary* court determined to be similar to the abusive language in the case at bar,[697] is to be construed by the reasonable person standard.[698] The *Bakolas* court further stated that "[a]lthough the facts recited in the information involve speech, protected speech may be restricted as to time, place and manner."[699]

As for defendant's claim that subsection 7 of section 240.20 was unconstitutional, the court stated that the statute itself "does not require proof that anyone was actually physically offended; it is enough that a condition of a kind that was physically offensive to the public was created."[700] Thus, applying the same objective, reasonable person standard, the court held that subdivision 7 was constitutional.[701]

The court in the present case justified its analogy to the *Bakolas* decision, dealing with unreasonable noise, by stating "that the interpretation that must be applied to the statute of disorderly conduct is not merely the words used but the context in which

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696. 59 N.Y.2d 51, 449 N.E.2d 738, 462 N.Y.S.2d 844 (1983). Although *Bakolas* dealt with a constitutional challenge to subdivision 2 of section 240.20 (unreasonable noise), the *O'Leary* court found that unreasonable noise was similar to "the abusive or obscene words in this case which may be 'fighting words.'" *O'Leary*, 153 Misc. 2d at 654, 583 N.Y.S.2d at 890.

697. *O'Leary*, 153 Misc. 2d at 654, 583 N.Y.S.2d at 890.

698. *Bakolas*, 59 N.Y.2d at 53, 449 N.E.2d at 740, 462 N.Y.S.2d at 846. "The term 'unreasonable noise' is not incapable of definition. Rather, it describes a noise of a type or volume that a reasonable person, under the circumstances, would not tolerate." *Id.*

699. *Id.* at 55, 449 N.E.2d at 741, 462 N.Y.S.2d at 847; *See also* Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council, 425 U.S. 748, 771 (1976). Regarding the restriction on certain speech, the Supreme Court of the United States stated that "[w]e have often approved restrictions of that kind provided that they are justified without reference to the content of the regulated speech, that they serve a significant governmental interest, and that in doing so they leave open ample alternative channels for communication of the information." *Virginia Pharmacy Bd.*, 425 U.S. at 771.

700. *O'Leary*, 153 Misc. 2d at 656, 583 N.Y.S.2d at 891 (citing People v. Cooke, 152 Misc. 2d 311, 316, 578 N.Y.S.2d 76, 79 (1991)).

701. *Id.*

they are said."[702] It is the context in which the word is used which is to be examined when a court is deciding the word's meaning.[703] Thus, the court concludes that the statute, as applied to the facts of this particular case, is constitutionally valid.[704]

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702. *Id.* at 655, 583 N.Y.S.2d at 890. The court further explained by stating that "as a constitutionally protected word such as 'fire' may be used in a valid fashion, it may also become a breach of the peace when used in a context which clearly shows either an intent on the defendant's part to cause a breach of the peace or could tend to cause a breach of the peace." *Id.* at 655, 583 N.Y.S.2d at 890-91.

703. *Id.* at 655, 583 N.Y.S.2d at 891. "The standard would be that of a 'reasonable man' in the same position as the complainant and defendant to determine what intent was used or meant and what effect the use of the words would have in that particular factual context and at that moment." *Id.*

704. *Id.* The court noted that:

> [I]mplicit in the statute of disorderly conduct is the construction that it only be applied to words that cause a breach of the peace, or are intended to cause a breach of the peace or, [are] likely to cause a breach of the peace and not to any others. If this first element is not found, on a proper motion to dismiss or on trial, the charge must be dismissed.

Id.