TOURO LAW
Touro College Jacob D. Fuchsberg Law Center

Touro Law Review

Volume 18
Number 2 *New York State Constitutional Decisions: 2001 Compilation*

Article 15

March 2016

Criminal Court of the City of New York, People v. Tiffany

Deborah A. Monastero

CRIMINAL COURT OF THE CITY OF NEW YORK

People v. Tiffany[1]
(decided January 30, 2001)

William Tiffany was charged with aggravated harassment in the second degree and harassment in the second degree in violation of New York Penal Law § 240.30 (1) and § 240.26 (3) respectively.[2] Although Tiffany moved for dismissal of both counts, he argued that Penal Law § 240.30(1)[3] was unconstitutionally overbroad and violated the First[4] and Fourteenth Amendments[5] of the United States Constitution and Article I, Section 8 of the New York State Constitution.[6] The court held that the aggravated harassment statute was not unconstitutional and therefore denied Tiffany's motion to dismiss.[7]

The complaint of aggravated harassment was based on numerous threatening phone calls Tiffany allegedly made to a woman with whom he previously shared a relationship.[8] Although Tiffany did not identify himself, the complainant told the authorities she recognized the caller's voice and identified him.[9] The caller threatened "to kill her and put a bullet in her head, to

---

[1] 186 Misc. 2d 917, 721 N.Y.S.2d 741 (N.Y. Crim. Ct. 2001).

[2] *Id.*

[3] N.Y. PENAL LAW § 240.30 (1) (McKinney 2000). The statute provides in pertinent part: "[C]ommunicates, or causes a communication to be initiated by mechanical or electronic means or otherwise, . . . by telephone . . . in a manner likely to cause annoyance or alarm."

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

[5] U.S. CONST. amend. XIV. The Fourteenth Amendment provides in pertinent part: "[N]or shall any State deprive any person of life, liberty or property, without due process of law . . . ."

[6] N.Y. CONST. art I, § 8. The New York Constitution provides in pertinent part: "Every citizen may freely speak . . . no law shall be passed to restrain or abridge the liberty of speech or the press."

[7] *Tiffany,* 186 Misc. 2d at 922, 721 N.Y.S.2d at 745.

[8] *Id.* at 918, 721 N.Y.S.2d at 742. (The defendant allegedly called the complainant at least once a day for a period of two months).

[9] *Id.*

make her life a living hell, and if she saw anyone else he would kill her."[10]

Tiffany argued that the court should follow *People v. Dietze,*[11] where N.Y. Penal Law § 240.25[12] was held unconstitutionally overbroad. In *Dietze*, the New York Court of Appeals reversed the defendant's conviction of harassment and held that the statute violated the First and Fourteenth Amendments of the Federal Constitution and Article I, Section 8 of the New York State Constitution.[13] The *Dietze* court found the statute, on its face, proscribed a significant amount of protected expression, and could subject an individual to prosecution for exercising their right to engage in free speech.[14]

In *Dietz,* the defendant approached the complainant and her son, who were both mentally retarded, and called the complainant a "bitch" and her son a "dog," and also stated that she would "beat the crap out of the [complainant] some day or night on the street."[15] The court found the defendant's conduct to be "abusive" and also found the defendant had the requisite intent to "harass" or "annoy," which was proscribed by the statute.[16] However, the court did find the defendant's speech to be protected by the Federal and New York State Constitutions.[17] The court stated that speech 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.[18] In order to constitutionally proscribe speech, it must put the complaining party in "clear and present danger of some substantive evil, and this statute failed to do so."[19]

---

[10] *Id.*

[11] 75 N.Y.2d 47, 549 N.E.2d 1166, 550 N.Y.S.2d 595 (1989).

[12] N.Y. PENAL LAW § 240.25 (McKinney 2000) provides in pertinent part: "A person is guilty of harassment when, with intent to harass, annoy or alarm another person . . . he uses abusive or obscene language . . . ."

[13] *Dietze*, 75 N.Y.2d at 50, 549 N.E.2d at 1167, 550 N.Y.S.2d at 596.

[14] *Id.*

[15] *Id.*

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

[17] *Id.*

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

[19] *Id.* (citing Terminiello v. Chicago, 337 U.S. 1 (1949)).

The *Tiffany* court began its constitutional analysis of the statute by discussing the long-standing judicial policy of presuming a state statute's constitutionality, and attempting to uphold its constitutionality whenever possible.[20] The court then distinguished the holding in *Dietze* by focusing on the fact that the statute at issue in this case, Penal Law § 240.30(1), merely proscribed abusive speech.[21] Conversely, in *Tiffany,* Penal Law § 240.25 proscribed speech that is likely to cause alarm or annoyance, and that type of speech is not afforded protection by either the Federal or the New York State Constitutions.[22] The court further distinguished *Dietze* by noting that the statute in *Dietze* was held unconstitutional after a full analysis during trial, whereas in this case the defendant was seeking to have the charges dismissed prior to trial.[23] Accordingly, the standard utilized when considering dismissal of charges prior to trial is less than beyond a reasonable doubt, which is the standard used at trial.[24] The court further held that "possession of a telephone does not constitute an open invitation to uninvited abuse."[25]

In *People v. Shack,*[26] the defendant, who was convicted of aggravated harassment in the second degree in violation of New York Penal Law § 240.30(2),[27] argued that the statute violated the First and Fourteenth Amendments of the United States Constitution and Article I, Section 8 of the New York Constitution because it was impermissibly overbroad.[28] Additionally, the defendant argued that even if the statute was found to be

---

[20] *Tiffany,* 186 Misc. 2d at 920, 721 N.Y.S.2d at 743.

[21] *Id.*

[22] *Id.*

[23] *Id.* at 921, 721 N.Y.S.2d at 744.

[24] *Id.*

[25] *Tiffany,* 186 Misc. 2d at 920, 721 N.Y.S.2d at 744 (citing People v. Minguez, 147 Misc. 2d 482, 556 N.Y.S.2d 231 (Crim. Ct. New York County 1990)).

[26] 86 N.Y.2d 529, 658 N.E.2d 706, 634 N.Y.S.2d 660 (1995).

[27] N.Y. PENAL LAW § 240.30(2) (McKinney 2000). The statute states in pertinent part: "A person is guilty of . . . when, with intent to harass, annoy, threaten or alarm another person, . . . makes a telephone call, whether or not a conversation ensues, with no purpose of legitimate communication."

[28] *Shack,* 86 N.Y.2d at 535, 658 N.E.2d at 710, 634 N.Y.S.2d at 664.

constitutional, it was unconstitutional as applied to him.[29] The defendant specifically argued that the statute proscribed communication rather than conduct, and therefore wrongly criminalized expressions that are constitutionally protected.[30]

In *Shack,* the defendant suffered from a mental illness, and communicated by telephone with his cousin, a psychologist, who resided out of state.[31] Initially, the telephone communication was acceptable, so long as the defendant continued his treatment with a psychiatrist and took his medications.[32] A few months later, however, the defendant informed his cousin that he was no longer taking his medication.[33] Pursuant to their arrangement, the cousin informed the defendant that his phone calls were no longer welcome.[34] The defendant thereafter called her continuously and left threatening messages on her answering machine.[35]

The court noted the statute did not criminalize speech or expression, but rather conduct.[36] Additionally, the statute had a "limiting clause," which proscribed the conduct of making telephone calls "without any purpose of legitimate communication."[37] The court held the "limiting clause" distinguishes this statute from those that proscribe "pure speech," and as such, the statute is not constitutionally overbroad.[38] The court further noted that even if the statute did proscribe speech, it would not necessarily be determinative of its overbreadth.[39] The court stated that a person's right to free speech is at times limited

---

[29] *Id.*

[30] *Id.* at 537, 658 N.E.2d at 711, 634 N.Y.S.2d at 665.

[31] *Id.* at 533, 658 N.E.2d at 709, 634 N.Y.S.2d at 664.

[32] *Id.* (From the period of June through October, they had approximately two telephone conversations each week).

[33] *Shack*, 86 N.Y.2d at 533, 658 N.E.2d at 709, 634 N.Y.S.2d at 664.

[34] *Id.* at 534, 658 N.E.2d at 709, 634 N.Y.S.2d at 663.

[35] *Id.* (From December 12 through May 20, defendant made 185 calls to his cousin).

[36] *Id.* at 535, 658 N.E.2d at 710, 634 N.Y.S.2d at 664. (The statute criminalized harassing telephone calls).

[37] *Id.*

[38] *Shack*, 86 N.Y.2d at 535, 658 N.E.2d at 710, 634 N.Y.S.2d at 664.

[39] *Id.*

and has never encompassed "absolute protection."[40] Furthermore, the court found that the statute was constitutional as applied to the defendant because his criminal liability arose from his harassing conduct rather than from any expression of constitutionally protected speech.[41] The defendant further argued that the statute was overbroad because it may "chill" people from engaging in constitutionally protected speech.[42] In order to find a statute unconstitutional because it has a "chilling" effect, the statute must be "substantially overbroad."[43] Again, the court looked to the statute's limiting clause and distinguished this statute from others that have been held unconstitutionally overbroad.[44] The court added that even if there may be a rare instance where the statute may reach protected expression, it cannot find the statute overbroad in theory, unless it is "substantially overbroad."[45] For the aforementioned reasons, the court found the defendant's arguments unpersuasive.[46]

Similarly, in *Cohen v. California*,[47] the United States Supreme Court addressed the issue of whether offensive words imprinted on one's jacket are constitutionally protected. The defendant was arrested and convicted of disturbing the peace in violation of California Penal Code § 415,[48] for wearing a jacket in a Los Angeles courthouse with the words "[-]uck the Draft" plainly visible.[49] The defendant's purpose in having these words

---

[40] *Id.* (noting that a person's right to free speech may be "curtailed" when substantial privacy interests of others are invaded.)

[41] *Id.* at 536, 658 N.E.2d at 711, 634 N.Y.S.2d at 665.

[42] *Id.* at 537, 658 N.E.2d at 711, 634 N.Y.S.2d at 664 (arguing that patients may fear criminal liability should they argue with their mental health provider during a phone conversation).

[43] *Shack*, 86 N.Y.2d at 537, 658 N.E.2d at 711, 634 N.Y.S.2d at 665 (noting that in order to find a statute unconstitutionally overbroad, the statute must be so broadly worded that it has the potential of reaching a substantial amount of protected expression).

[44] *Id.*

[45] *Id.*

[46] *Id.* at 542, 658 N.E.2d at 714, 634 N.Y.S.2d at 668.

[47] 403 U.S. 15, 16 (1971).

[48] CAL. PENAL CODE § 415. The statute provides in pertinent part, "[M]aliciously and willfully disturbing the peace or quiet of any neighborhood or person . . . by . . . offensive conduct."

[49] *Cohen*, 403 U.S. at 16.

imprinted on his jacket was "a means of informing the public of the depth of his feelings against the Vietnam War and the draft."[50] The defendant argued that the statue, as applied to the facts of his case, denied him the right of freedom of expression inherent under both the First[51] and Fourteenth[52] Amendments of the Federal Constitution.[53] The United States Supreme Court found that Cohen's conviction was based on the "offensiveness" of the words that his message conveyed to the public, and not his conduct.[54] Therefore, his conviction was a result of his exercising his right to engage in free speech.[55]

The Court explained that "freedom of speech [is] protected from arbitrary governmental interference by the Constitution and [proscription of such speech] can be justified, if at all, only as a valid regulation of the manner in which he exercised that freedom, not as a permissible prohibition on the substantive message it conveys."[56] Furthermore, the Court noted that the Constitution has never afforded "absolute protection to every individual to speak whenever or wherever he pleases, or to use any form of address in any circumstances that he chooses."[57] Although the Court found Cohen's jacket "distasteful," the message it conveyed was constitutionally protected.[58] "The constitutional right of free expression is powerful medicine in a society as diverse and populous as ours."[59]

The Federal Constitution affords broad protection to freedom of speech, and the New York State Constitution confers

---

[50] *Id.*

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

[52] U.S. CONST. amend. XIV. The Fourteenth Amendment provides in pertinent part: "[N]or shall any State deprive any person of life, liberty or property, without due process of law . . . "

[53] *Cohen*, 403 U.S. at 18.

[54] *Id.* at 18.

[55] *Id.*

[56] *Id.* at 19

[57] *Id.*

[58] *Cohen*, 403 U.S at 26.

[59] *Id.* at 24.

an even more expansive view.[60] However, both the Federal and New York State Constitutions have never afforded "absolute protection" to free speech.[61] When determining whether or not speech is constitutionally protected, the New York courts look for guidance from the federal system.[62] The Federal Constitution allows for the proscription of speech that constitutes "fighting words,"[63] presents a "clear and present danger,"[64] and "true threats."[65] Freedom of speech has always been invaluable in an open society, and is only restricted in the narrowest of circumstances, as it should be.

Deborah A. Monastero

---

[60] State v. Prisinzano, 170 Misc. 2d 525, 528, 648 N.Y.S.2d 267, 272 (N.Y. Crim. Ct. 1996) (denying defendant's motion to dismiss for threatening replacement employees by stating "[W]hen the cops leave, the blood is going to run off your bald [-]ucking head"; "Once the police leave, I'm going to get you"; and "[O]nce the police leave you'll get yours.")

[61] *Id.*

[62] *See Prisinzano*, 170 Misc. 2d at 525, 648 N.Y.S.2d at 267; *Shack*, 86 N.Y.2d at 529, 658 N.E.2d at 706, 634 N.Y.S.2d at 660; *Dietze*, 75 N.Y.2d at 47, 549 N.E.2d at 1166, 550 N.Y.S.2d at 595; People v. Pagnotta, 25 N.Y.2d 333, 253 N.E.2d 202, 305 N.Y.S.2d 484 (1969).

[63] Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) (noting that in order to constitute fighting words, it must be established that; 1) the speaker must address his words directly to a specific individual; 2) the encounter must be face to face; 3) the words must be likely to provoke the average addressee to violence under the circumstances; and 4) the threat of such violent response must be imminent.); *Prisinzano*, 170 Misc.2d at 529, 648 N.Y.S.2d at 272.

[64] *Prisinzano*, 170 Misc.2d at 533, 648 N.Y.S.2d at 275 (noting that *Brandenburg v. Ohio*, 395 U.S. 444 (1969), established the modern "clear and present danger" test as: "1) the content of the speech advocates the use of force or violation of law; 2) the speaker intends to incite or produce a violation of law; 3) there exists a likelihood that lawless response will occur and 4) such a lawless response is imminent").

[65] Watts v. U.S., 394 U.S. 705 (1969) (noting that to constitute a "true threat" the speaker must utter the words and have the intent of threatening physical injury, not necessarily carrying out the threat); *Prisinzano*, 170 Misc.2d at 536, 648 N.Y.S.2d at 276.

[This page intentionally left blank]