FILED
AUG 26, 2015
Court of Appeals
Division III
State of Washington

NO. 32859-7-III

STATE OF WASHINGTON

COURT OF APPEALS - DIVISION III

STATE OF WASHINGTON,

Respondent,

vs.

NARIAH CORDOVA

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR

FRANKLIN COUNTY

BRIEF OF RESPONDENT

SHAWN P. SANT
Prosecuting Attorney

by: Kim Kremer, #40724
Deputy Prosecuting Attorney

1016 North Fourth Avenue
Pasco, WA 99301
Phone: (509) 545-3543

TABLE OF CONTENTS

A. COUNTERSTATEMENT OF THE CASE 1

B. ARGUMENT 2

1. **APPELLANT'S ADJUDICATION DID NOT INFRINGE UPON HER FIRST AMENDMENT RIGHTS** 2

2. **OFFICER PERRY'S TEMPORARY SEIZURE OF APPELLANT DID NOT VIOLATE THE FOURTH AMENDMENT** 6

C. CONCLUSION 8

TABLE OF AUTHORITIES

CASES

City of Kennewick v. Keller, 11 Wn.App. 777, 525 P.2d 267 (1974) 3, 5

City of Pasco v. Dixson, 81 Wn.2d 510, 515, 503 P.2d 76, 80 (1972) 4, 5

City of Seattle v. Eze, 111 Wn.2d 222, 759 P.2d 366 (1988) 5

Kovacs v. Cooper, 336 U.S. 77, 88, 69 S. Ct. 448, 454, 93 L. Ed. 513 (1949) 4

State v. A.A., 349 P.3d 909, 916, 2015 WL 1966306 (Wash. Ct. App. 2015) 7

State v. Montgomery, 31 Wn.App. 745, 760, 644 P.2d 747, 756 (1982) 3, 5

STATUTES

Pasco Municipal Code 9.06.010(1)(C) 2

RCW 13.32A.050(1) 6, 7

RCW 9A.84.030(1)(b) 2

A. COUNTERSTATEMENT OF THE CASE

On August 25, 2013, Officer Dean Perry of the Pasco Police Department was dispatched to the McDonald's Restaurant at 4810 North Road 68 in Pasco, Washington, on a report that a runaway was at that location. RP 40. While en route, dispatch advised the runaway's mother was at the location with the child. RP 40-41. Once at the restaurant, Officer Perry contacted Appellant Nariah Cordova and her mother, Jessica Mancilla. RP 41. The restaurant was open for business, and there were customers in the dining area. RP 41-42. Appellant and her mother were arguing; Officer Perry described Appellant's behavior as "belligerent and aggressive." RP 42. Officer Perry noted that Appellant's conduct was disrupting the business. RP 43. Ms. Mancilla suggested the parties go outside. *Id.* Appellant refused to go outside when her mother suggested it. *Id.* Officer Perry directed Appellant to go outside; when she refused, he took hold of her in an "escort position." *Id.* Appellant was still non-compliant, and based upon her body language, Officer Perry feared she would "fight or flee." RP 44, 46. Because of the volume of traffic on Road 68, Officer Perry was concerned for the safety of Appellant, himself, and the general public if Appellant ran out into the road. RP 44-45. Appellant was

actively physically resisting Officer Perry's attempt to control her. RP 45. He used a standard physical control tactic to gain control of Appellant and hold her against a nearby counter. RP 46.

Because this was Appellant's first criminal referral, the matter was referred to the Diversion Unit of the Benton – Franklin Juvenile Justice Center. Ms. Cordova's mother refused diversion on behalf of her daughter. CP 62. On December 16, 2013, the Franklin County Prosecutor's Office filed an Information in the Juvenile Division of the Superior Court, alleging one count of Obstructing a Law Enforcement Officer. CP 83-84. Prior to trial, Respondent, State of Washington, filed an Amended Information adding Disorderly Conduct, Pasco Municipal Code 9.06.010(1)(C) and, in the alternative, Disorderly Conduct, RCW 9A.84.030(1)(b). CP 49-50. Appellant was adjudicated guilty following a bench trial CP 99-100.

B. ARGUMENT

1. APPELLANT'S ADJUDICATION DID NOT INFRINGE UPON HER FIRST AMENDMENT RIGHTS

While Appellant bases this appeal in the First Amendment, nothing in the record suggests the trial court considered constitutionally-protected speech in reaching its findings. The trial

court's findings specifically state the Appellant's "*conduct* within the restaurant ... created public inconvenience, annoyance, or alarm." CP 100 (emphasis added). Although Officer Perry referred to Appellant's "belligerent and aggressive" language toward him and her mother, he testified that he believed Appellant committed the crime of Disorderly Conduct by engaging in "tumultuous behavior likely to cause public alarm" and that "demeanor and her volume and the words she was using" were disrupting the business. RP 63. There was no testimony as to any specific things Appellant said other than that she was stating she would not do what her mother told her to do. RP 68. Appellant was not arrested because of her speech, nor was she adjudicated guilty because of her speech; her conduct in a private business is what led to her arrest.

It is worth noting that the cases cited in Appellant's brief involve arrests of people engaged in speech in a traditionally public forum. In Montgomery, that appellant was standing on a downtown street when he expressed his dislike of the Seattle Police Department using "crude language." State v. Montgomery, 31 Wn.App. 745, 760, 644 P.2d 747, 756 (1982). The same is true in City of Kennewick v. Keller, 11 Wn.App. 777, 525 P.2d 267 (1974). In Dixon, that appellant was in a public park during hours the park

is normally open to the public. City of Pasco v. Dixson, 81 Wn.2d 510, 515, 503 P.2d 76, 80 (1972). He was arrested and charged with "creating a disturbance ... by using abusive, lewd, vulgar or obscene language[.]" 81 Wn.2d at 518, 503 P.2d at 82.

In contrast, Appellant was in a privately-owned business while that business was open to the public. RP 41-42. Her actions appeared to disturb customers and interrupt business. RP 63. Even if Appellant's conduct was protected by the First Amendment, the First Amendment would not grant her the right to disrupt McDonald's ability to conduct its business. Kovacs v. Cooper, 336 U.S. 77, 88, 69 S. Ct. 448, 454, 93 L. Ed. 513 (1949) ("To enforce freedom of speech in disregard of the rights of others would be harsh and arbitrary in itself.")

It is worth noting that Appellant was charged with a very different crime than the appellants in the cases she cites. Appellant was not charged with using foul, abusive, vulgar, or obscene language; she was charged with, and adjudicated guilty of, "creat[ing] a risk of public inconvenience, annoyance or alarm ... by engag[ing] in ... tumultuous behavior[:] to wit, was intentionally loud and belligerent during contact with a law enforcement officer inside a business that was open to the public at the time[.]" CP 49-50, 99-

100. While Appellant states "disorderly conduct ordinances have been limited to the use of fighting words," App. Br. 6, the ordinances to which the case cited refers to are those that ban specific types of words. See Montgomery, 31 Wn.App. at 760, 644 P.2d at 756; Keller, 11 Wn.App. at 778, 525 P.2d at 267; Dixson, 81 Wn.2d at 518, 503 P.2d at 82. Because the crime with which she was charged does not require words, there is no reason to think this Court should limit the ordinance's ambit to "fighting words."

As stated above, Appellant's *conduct* is what the trial court sanctioned, not her speech. Officer Perry described Appellant's volume as disturbing the business. RP 43. He testified that in his understanding of Pasco's Disorderly Conduct code, a person could commit the crime of Disorderly Conduct by "screaming inarticulable gibberish." RP 69. Although Appellant does not address this issue, this Court may wish to address whether Respondent's *volume* is protected by the First Amendment. Given the facts of this case, it is not. City of Seattle v. Eze, 111 Wn.2d 222, 759 P.2d 366 (1988).

In Eze, that defendant was convicted of Disorderly Bus Conduct under Seattle's Municipal Code for behavior the trier of fact found to be "loud and unreasonable." 111 Wn.2d at 25, 759 P.2d at 367-68. He appealed, arguing the code was vague,

overbroad, and in conflict with state law. 111 Wn.2d at 26, 759 P.2d at 368. In addressing whether the code was overbroad, our supreme court noted "restrictions on the *volume* of speech do not necessarily violate the First Amendment, even when that speech occurs in an area traditionally set aside for public debate—the so-called "public forum"." 111 Wn.2d at 31, 759 P.2d at 371 (emphasis in original). Although that citation referred to the public forum, the code in question in Eze specifically addressed behavior in a non-public forum. *Id.* How much further removed from the public forum is Appellant's conduct in private-owned restaurant?

2. OFFICER PERRY'S TEMPORARY SEIZURE OF APPELLANT DID NOT VIOLATE THE FOURTH AMENDMENT

Officer Perry seized Appellant when he directed Appellant to leave the restaurant. However, this action was reasonable given his duty under the Family Reunification Act. RCW 13.32A.050(1). At the time of his contact, Appellant, a reported runaway, was with her mother in a restaurant open for business. RP 40, 41. Officer Perry had an affirmative duty to return Appellant to her mother. RCW 13.32A.050(1), RP 34. As soon as he contacted her, Officer Perry believed Appellant would not voluntarily return home with her mother. RP 43. Appellant's mother asked Officer Perry if they could

step outside the restaurant. Id. After refusing to obey her mother's request – thereby reinforcing Officer Perry's belief Appellant would not agree to return home with her mother – Officer Perry directed Appellant to go outside. Id. When she refused to obey this directive, Officer Perry took hold of her to escort her outside using a low-level control tactic. Id.

Appellant argues that this seizure was illegal because it is outside the community caretaking function. App.Br. 10. Assuming, *arguendo*, that Appellant had not already committed a crime, Officer Perry's actions were still squarely within his duties under the Family Reunification Act. RCW 13.32A.050(1). As this Court recently wrote, "[u]nder the [Family Reconciliation A]ct, a law enforcement officer is unquestionably fulfilling his or her role as a community caretaker when he or she encounters a child runaway or a child beyond the control of his parents." State v. A.A., 349 P.3d 909, 916, 2015 WL 1966306 (Wash. Ct. App. 2015). Appellant was refusing to follow reasonable directives of her parent. Using the weight of his authority as a law enforcement officer to obtain Appellant's compliance with her mother's desire to leave the restaurant is less intrusive than patting her down for weapons and placing her in the back of his patrol car to return her to her mother's

custody – both of which are reasonable intrusions onto a runaway's Fourth Amendment rights. *Id.* Because Officer Perry's actions were reasonable and appropriate, his seizure of Appellant was legal.

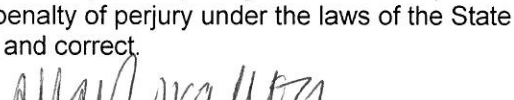
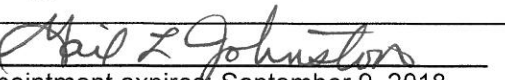
C. CONCLUSION

Appellant's seizure by law enforcement did not violate her civil liberties. Her subsequent adjudication was based upon her conduct, not protected speech. This Court should affirm the trial court's finding of guilt.

Dated this 25th day of August.

Respectfully submitted,
SHAWN P. SANT
Prosecuting Attorney

By:
Kim Kremer
WSBA #40724
Deputy Prosecuting Attorney

Affidavit of Service	Andrea Burkhart P.O. Box 946 Walla Walla WA 99362 *Andrea@BurkhartandBurkhart.com*	A Legal Secretary by the Prosecuting Attorney's Office in and for Franklin County and makes this affidavit in that capacity. I hereby certify that a copy of the foregoing was delivered to opposing counsel by email per agreement of the parties pursuant to GR30(b)(4). I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Dated August 25, 2015, Pasco WA  Original e-filed at the Court of Appeals; Copy to counsel listed at left
Signed and sworn to before me this 25th day of August, 2015  Notary Public and for the State of Washington residing at Pasco My appointment expires: September 9, 2018		