No. 43926-3-II

COURT OF APPEALS OF
THE STATE OF WASHINGTON
DIVISION TWO

KAREN THIEL,

Respondent,

v.

BRIAN MASSINGHAM,

Appellant.

ON APPEAL FROM
LEWIS COUNTY SUPERIOR COURT
(Commissioner Tracy Loiacono Mitchell
Judge James W. Lawler)

BRIAN MASSINGHAM'S OPENING BRIEF

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B. The lower court erred when it entered an anti-harassment order that was not narrowly tailored to serve a compelling state interest.

C. The lower court erred when it denied Mr. Massingham's Motion for Revision.

II. ISSUES

A. Whether Brian Massingham's pure speech is a constitutionally protected activity that cannot form the basis for an anti-harassment order when his speech was not a "true threat" and he made it in a public forum.

B. Whether the anti-harassment order was not narrowly tailored to achieve a compelling government interest.

III. INTRODUCTION

According to the trial court Brian Massingham uttered the name "Ken Gray" or "Kenny Gray" at two softball games in public parks, within his former wife's hearing range. The Lewis County Superior Court concluded Mr. Massingham's speech was unlawful harassment, and it issued an anti-harassment protection order restraining Mr. Massingham

from coming within 500 feet of his former wife's residence, restraining him from making any attempt to contact her except in regards to the children by text or e-mail, and requiring the parties to exchange their children at a mutually agreeable neutral location. The order does not restrain Massingham from continuing to say "Kenny Gray" in public places, even though this was the pure speech that the court deemed to be harassing.

IV. STATEMENT OF FACTS

Background. The parties' marital dissolution became final on May 9, 2012; on that date, among the orders the Lewis County Superior Court entered were an Agreed Parenting Plan[1] and a Final Order of Child Support.[2] The parties' two children were then aged 13 and 11.[3]

The Case. On June 21, 2012, Karen Thiel (formerly Karen Massingham) filed a Notice of Intended Relocation of Children.[4] On the same date, she also filed a Petition and Declaration for an Order for Protection.[5] Her declaration alleged a series of events that supposedly took place in May and June 2012, after the dissolution was final.[6]

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[1] CP 31-42.
[2] CP 152-62.
[3] CP 153.
[4] CP 44-47.
[5] CP 20-22.
[6] CP 22.

The District Court entered a temporary protection order on June 21, 2012.[7] The case was transferred from Lewis County District Court to Superior Court on July 12, 2012.[8]

A hearing was held in the Lewis County Superior Court on July 30, 2012, before Commissioner Tracy Loiacono Mitchell, at which Ms. Thiel testified that on May 13, 2012, at a baseball tournament for the parties' daughter in Kent, Washington, where Ms. Thiel was "working [sic] by the dugout... and Brian yells out, 'Kenny Gray'... loud enough for us to hear as we were walking by."[9] She also testified as follows regarding a fast pitch tournament, this one in April, 2012, in Kelso, Washington: "I was putting my chair up behind the backstop to watch my daughter warm up for pitching. And [Mr. Massingham] comes over and stands in front of me and he just keeps turning around, saying things about Kenny Gray."[10] Ms. Thiel also testified to the other events in her Petition.

After hearing testimony, the Commissioner entered an Order for Protection—Harassment (the "Order") on July 30, 2012, pursuant to chapter 10.14 RCW. [11] The Order was to be in effect for six months.[12] At

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[7] CP 12-14.
[8] CP 1-2.
[9] RP 18:18-21:11 (July 30, 2012).
[10] RP 26:15-18 (July 30, 2012).
[11] CP 220-21.

the hearing, the Commissioner did not find enough evidence to support any of Ms. Thiel's numerous allegations other than the two instances where Mr. Massingham either said "Kenny Gray" or said something about Kenny Gray:

> I'm going to grant the order for three incidences—or two—I'm sorry, two incidences. I don't find that the evidence has been proven on the glass. While there's suspicion of peeling out, I don't have enough evidence for that. But the main reason why I'm granting this, and I'm going to do it for six months, with the expectation that it—hopefully, it will kind of settle things down. I find the testimony regarding him telling her "Kenny Gray, Kenny Gray," and standing in front of her and turning around and saying "Kenny Gray," is very credible. The rest of it, when you look at each one, I have a difficult time.[13]

Counsel for Mr. Massingham clarified with the court as follows:

> Mr. McGlothin: Now my question is, on fashioning the order... the ground that you found to be the harassing conduct, if you will... is him yelling out the name "Kenny Gray"
>
> The Court: Continuing to tell her "Kenny Gray" to her face, yes.[14]

The Order restrained Brian Massingham from 1. making any attempt to contact Karen Thiel except in regards to the children by text or e-mail; and 2. entering or being within 500 feet of Karen Thiel's

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[12] Id.
[13] RP 94:25-95:12 (July 30, 2012).
[14] RP 98:21-99:6.

residence, at the time in Chehalis, Washington.[15] The Order also 3. required the parties to exchange the children at Hillcrest service station "or other mutually agreeable neutral location."[16] The Order did not restrain Mr. Massingham from continuing to utter the name Kenny Gray in public places or at future sporting events.[17]

On August 9, 2012, Brian Massingham filed a Motion for Revision with the Superior Court, asking that the Order be vacated and Thiel's petition be dismissed because the Order punished Mr. Massingham for exercising his fundamental Constitutional right to free speech.[18] Mr. Massingham argued that his speech was constitutionally protected free speech and that the Order was not narrowly tailored to achieve a compelling state interest.[19] On September 7, 2012, the Lewis County Superior Court entered an order denying the Motion for Revision.[20] Massingham timely appealed both the Order for Protection and the Order Denying Motion for Revision.[21]

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[15] CP 221.
[16] Id.
[17] Id.
[18] CP 233-240.
[19] Id.
[20] CP 253-54.
[21] CP 255-62.

V. ARGUMENT

A. The Court Could Not Find Mr. Massingham's Speech was a Course of Conduct Constituting Unlawful Harassment Because It was Constitutionally Protected Free Speech.

1. Constitutionally Protected Speech May not Form the Basis for an Anti-Harassment Order.

The anti harassment statutes create a cause of action for unlawful harassment.[22] In order to receive an antiharassment order under those statutes a party must show by a preponderance of the evidence that the opposing party committed "unlawful harassment."[23] "Unlawful harassment" is defined to require "a knowing and willful *course of conduct*..."[24] "Course of conduct" is defined to exclude any constitutionally protected activity.[25] Moreover, the harassment chapter was not intended "to infringe upon any constitutionally protected rights including, ... freedom of speech."[26]

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[22] RCW 10.14.040.
[23] RCW 10.14.080(3).
[24] RCW 10.14.020(2).
[25] RCW 10.14.020(1). (Constitutionally protected activity is not included within the meaning of "course of conduct.")
[26] RCW 10.14.190; *In re Marriage of Suggs*, 152 Wn.2d 74, 80, 93 P.3d 161 (2004).

2. **Mr. Massingham's Speech was Constitutionally Protected Free Speech.**

a. Mr. Massingham's Speech did not Fall Into a Restricted Category.

Mr. Massingham's speech was constitutionally protected. From 1791 the First Amendment has protected speech from content restrictions except "in a few limited areas." These few limited areas where speech is not constitutionally protected are: obscenity, defamation, fraud, incitement, and speech integral to criminal conduct.[27] Mr. Massingham's saying "Kenny Gray" does not fall into any of these unprotected areas. It is, therefore, constitutionally protected and uttering those words is a constitutionally protected activity. As such, that conduct, standing alone, cannot constitute unlawful harassment and cannot give rise to a valid antiharassment order.

b. Mr. Massingham's Speech was not an Invasion of Ms. Thiel's Home But Instead was in a Public Park, and Parks Have a Special Place as Fora for Speech.

Mr. Massingham uttering the words "Kenny Gray" at a public park, as opposed to sending the unwanted words into Ms. Thiel's home, is especially protected by the Constitutions. The U.S. Supreme Court long ago recognized that members of the public retain strong free speech

[27] Id.; *United States v. Alvarez*, 617 F.3d 1198, 1202 (9th Cir. 2010).

rights when they venture into public streets and parks, "which 'have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.' "[28]

In contrast, courts draw a special distinction regarding the home. The United States Supreme Court has made it clear that "[n]othing in the Constitution compels us to listen to or view any unwanted communication, whatever its merit."[29] The court "categorically" rejected the idea that a person has a right under the Constitution to send unwanted material into the home of another.[30] Commentators note that it is out of respect for the "intense privacy values associated with the home in American law," that the home is the principal exception to the general rule that the burden is on the viewer to avert his or her eyes from unwanted speech.[31]

Mr. Massingham's saying "Kenny Gray" was not an intrusion into Ms. Thiel's home. If it had been, it would not have had the same constitutional protection that it has because it occurred in a public

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[28] *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 469, 129 S. Ct. 1125, 1132, 172 L. Ed. 2d 853 (2009) (citations omitted).
[29] *Trummel v. Mitchell*, 156 Wn.2d 653, 667, 131 P.3d 305 (2006), quoting *Rowan v. U.S. Post Office Dep't*, 397 U.S. 728, 737, 90 S.Ct. 1484, 25 L.Ed.2d 736 (1970).
[30] *Id.*, quoting *Rowan*, 397 U.S. at 738.
[31] *Id.*, quoting Rodney A. Smolla, *Smolla and Nimmer on Freedom of Speech* § 5.5 (3d ed. 2003)

baseball park. Because Mr. Massingham's speech occurred instead in public baseball parks, he retains especially strong free speech rights. Because the speech was constitutionally protected, it cannot form the basis of a "course of conduct" constituting "unlawful harassment" for purposes of issuing an antiharassment order.

B. **RCW 10.14.020(2) is Unconstitutionally Vague and Overbroad As Applied Because a Similar Provision in RCW 9A.46.020(1)(a)(iv) Has Already Been So Found.**

RCW 9A.46.020(1)(a)(iv) states in relevant part that a person is guilty of unlawful harassment if, without lawful authority, the person knowingly threatens "Maliciously to do any other act which is intended to substantially harm the person threatened or another with respect to his or her physical *or mental* health or safety;[32] (Emphasis added).

The Washington Supreme Court struck down the mental health provision in RCW 9A.46.020(1)(a)(iv) because it was facially unconstitutionally overbroad as it restricted constitutionally protected speech:

> RCW 9A.46.020(1)(a)(iv) is unconstitutionally vague to the extent "mental health" is referenced...Moreover, use of the term is unconstitutionally overbroad insofar as *it restricts constitutionally protected speech*, subjecting it to a strict scrutiny test it fails to meet. We therefore find the term "mental health" in RCW 9A.46.020(1)(a)(iv) renders the statute both unconstitutionally vague and overbroad.[33]

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[32] RCW 9A.46.020(1)(a)(i)-(iv).
[33] *State v. Williams*, 144 Wn.2d 197, 212, 26 P.3d 890, 898 (2001).

Applying RCW ch. 10.14 in the way it was applied here suffers from the same constitutional infirmity, and it underscores that pure speech like Mr. Massingham's is constitutionally protected speech. RCW 10.14.020 defines unlawful harassment as

> a knowing and willful course of conduct directed at a specific person which seriously alarms, annoys, harasses, or is detrimental to such person, and which serves no legitimate or lawful purpose. The course of conduct shall be such as would cause a reasonable person to suffer substantial emotional distress, and shall actually cause substantial emotional distress to the petitioner...[34]

In RCW 10.14.020, use of the language "seriously alarms, annoys, harasses, or is detrimental to such person" and "substantial emotional distress" are as unconstitutionally vague and overbroad as the mental health language in RCW 9A.46.020(1)(a)(iv) because the public is left to speculate as to what speech or conduct is prohibited. Terms such as "substantial emotional distress" and "seriously alarms, annoys, harasses or is detrimental" are no more definite than was the term "mental health" in RCW 9A.46.020(1)(a)(iv). RCW 10.14.020 is, therefore, constitutionally vague. It is also constitutionally overbroad if this Court fails to give effect to the clause in RCW 10.14.020(2) that excludes constitutionally protected activity from the "course of conduct" definition.

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[34] RCW 10.14.020(2).

C. A "True Threat" is Not Protected Speech, But The Lower Court Made No Finding of a "True Threat."

The reason *Williams* held the provision within RCW 9A.46.020(1)(a)(iv) criminalizing speech that threatens harm to a person's mental health as opposed to their physical health unconstitutional is because speech that affects or threatens a person's mental or emotional health is not a "true threat" and is, therefore, entitled to constitutional protection. A "true threat" is not protected speech under the First Amendment.[35] It can, therefore, serve as the basis for an antiharassment order. A "true threat" is a statement made "in a context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted ... as a serious expression of intention to inflict *bodily harm* upon or to take the life of [another individual]."[36] Our Washington Supreme Court has adopted an objective test of what constitutes a "true threat": A "true threat" is a statement made in a context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted as a serious expression of intention to inflict *bodily harm* upon or to take the life of another person.[37]

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[35] *State v. Kilburn*, 151 Wn.2d 36, 43, 84 P.3d 1215 (2004), citing *Watts v. U.S.*, 394 U.S. 705, 707, 89 S.Ct. 1399 (1969).
[36] *State v. Williams*, 144 Wn.2d 197, 207-08, 26 P.3d 890 (2001).
[37] *State v. Kilburn*, 151 Wn.2d 36, 43, 84 P.3d 1215 (2004).

Here, there was no finding of any "true threat" expressing an intent to inflict bodily harm upon, much less take the life of, Ms. Thiel. The court found simply that Mr. Massingham said the name "Kenny Gray" within hearing of Ms. Thiel on two occasions of ballgames in public baseball parks. Mr. Massingham's speech cannot qualify as constitutionally unprotected speech for having been a "true threat" when there was no finding of any threat of bodily harm.

D. The Trial Court Erred in Punishing Mr. Massingham For His Speech In A Manner That Bears No Relation To The Speech.

The trial court erred in proscribing a remedy that bears no relation whatsoever to Mr. Massingham's speech. "Although a trial court has broad authority in [the unlawful harassment] area, the authority is not limitless."[38] The relief granted "must be warranted by the facts."[39] It is not proper to grant relief to a person beyond the nexus of the relationship between the parties "*and the harm.*"[40] Here, the purported offending conduct was stating Ms. Thiel's paramour's name in a public forum (a park). The remedy, however, was to punish Mr. Massingham for uttering these words by prohibiting him from picking his children up and dropping them off at Ms. Thiel's home. It also prohibited him from going back to her home to allow their children from picking up their

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[38] *Trummel v. Mitchell*, 156 Wash. 2d 653, 668, 131 P.3d 305, 313 (2006).
[39] *Trummel*, 156 Wash.2d at 668
[40] *Trummel*, at 669

sports gear or other personal belongings that they may have forgotten when they were transitioning between households. Under these circumstances there is absolutely no nexus between Mr. Massingham's speech and the conduct proscribed by the trial court's order.

E. The Trial Court Cannot Use The Unlawful Harassment Statute To Impose Time, Manner Or Location Restrictions on Pure Speech.

Courts cannot use the unlawful harassment statutes to impose time, manner or place restrictions on pure speech. Washington's unlawful harassment statutes create a cause of action for "unlawful harassment." RCW 10.14.040. To prove unlawful harassment a party must show a knowing and willful "course of conduct." RCW 10.14.020(2). "Constitutionally protected activity" is excluded from the statutory definition for course of conduct. RCW 10.14.020(1). ("Constitutionally protected activity is not included within the meaning of 'course of conduct.'"). In other words, a court must find more than constitutionally protected activity such as pure speech or picketing in order to validly issue an anti-harassment order.[41]

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[41] RCW 10.14.090; and *State v. Noah*, 103 Wn. App. 29, 38-39, 9 P.3d 858, 865 (2000) ("Noah contends that the lawful exercise of his right of free speech and right to picket are excluded from the definition of "course of conduct," and cannot be the basis for an antiharassment order. He is absolutely correct.")

There is little doubt courts can impose time, manner and location restrictions on purely constitutionally protected activity under the proper circumstances using avenues other than the unlawful harassment statutes. For instance, in *Bering v. SHARE*[42] the Washington Supreme Court affirmed a time, manner and location injunction sought by a physician against antiabortion protestors who were doing nothing more than exercising free speech and picketing in front of the medical building where petitioner worked.[43] In other words, the activists were engaging solely in constitutionally protected activity. The physician in *Bering*, however, did not use the anti harassment statutes to achieve the court imposed restrictions; rather, the physician sought an injunction. That may be the proper method to regulate Mr. Massingham's speech. Clearly, the unlawful harassment statutes are improper to achieve this end.

Here, Mr. Massingham engaged in nothing more than constitutionally protected activity, and the unlawful harassment statutes were not the proper vehicle to place any time, manner or location restrictions on Mr. Massingham's speech. If Ms. Thiel would have sought an injunction, the granting of which does not require a course of harassing conduct that does not include constitutionally protected activity, then the trial court

[42] 106 Wn.2d 212, 721 P.2d 918 (1986).
[43] *Bering*, 106 Wash.2d at 216.

may have issued an injunction placing restrictions on the time, place and manner on Mr. Massingham's conduct, but it would have had to comply with the strict scrutiny analysis mandated when a court infringes upon a fundamental constitutional right.[44]

Courts may also impose narrowly tailored, content-neutral time, manner and location restrictions on free speech in cases where a person engages in activity beyond constitutionally protected activity. For instance, in *Noah*, a psychotherapist successfully obtained an antiharassment order against Noah who not only picketed in front of the psychotherapist's office, but also contacted the psychotherapist's landlord, placed an unsolicited phone call into the psychotherapist's residence, and attempted to find out where the psychotherapist's ill father was hospitalized.[45] The appellate court agreed with Noah that his pure speech and picketing activities were constitutionally protected and could not form the basis for an antiharassment order.[46] His other activity was not constitutionally protected and allowed the trial court to conclude there was unlawful harassment. Once the trial court could properly make this finding, it could then issue a valid antiharassment order that incidentally

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[44] *Bering* at 222 ("Such restrictions are valid if they 'are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication'")
[45] *Noah*, 103 Wn. App. at 39.
[46] Id. at 38-39.

placed narrowly tailored content-neutral restrictions on Noah's constitutionally protected activity.[47]

Even if this Court were to view this case as a time, manner and location restriction case, the remedy the trial court fashioned is still unconstitutional. The restrictions are valid only if they "are content-neutral, are narrowly tailored to serve a compelling government interest, and leave open ample alternative channels of communication." [48] Here, even if we were to assume that this state has a compelling interest in keeping Mr. Massingham from uttering the words "Ken Gray" while Ms. Thiel was within ear shot, then the trial court's remedy has absolutely no nexus to the speech and was, therefore, not narrowly tailored to achieve the state's objective. The remedy does nothing to prevent Mr. Massingham from uttering the words "Ken Gray" at a ballpark, a public forum, or within ear shot of Ms. Thiel. All it does is prohibit Mr. Massingham from coming onto Ms. Thiel's residence. There was no allegation or evidence that Mr. Massingham ever mentioned Ken Gray while he was at Ms. Thiel's residence.

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[47] *Id* at 41-44.

[48] *Bering v. SHARE*, 106 Wash. 2d 212, 222, 721 P.2d 918, 925 (1986) (citations omitted); and *Noah*, at 41 (recognizing that "[u]nder the Washington Constitution, the standard is stricter: a 'compelling' not 'significant' government interest is required to uphold a statute regulating time, place or manner.")

CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned, a citizen of the United States, a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On the below written date, I caused delivery of a true copy of Brian Massingham's opening brief to the following individuals via U.S. Mail:

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