

RECEIVED
SUPREME COURT
STATE OF WASHINGTON
Sep 29, 2015, 9:23 am
BY RONALD R. CARPENTER
CLERK

E ORJ
RECEIVED BY E-MAIL

No. 919844

SUPREME COURT OF WASHINGTON

STATE OF WASHINGTON,
Plaintiff/Respondent,

v.

DANIEL BRYON KINGMA,
Defendant/Appellant/Petitioner

PETITIONER'S REPLY TO RESPONDENT'S ANSWER

Daniel Bryon Kingma, Petitioner
P.O. Box 1754
Moses Lake, Washington 98837

 ORIGINAL

FILED AS
ATTACHMENT TO EMAIL

TABLE OF CONTENTS

Table of Contents.....i

Table of Authorities.....ii

 A.Identity of Party.....1

 B.New Issue Raised in Respondent’s Reply.....1

 C.Procedural History.....1

 D.Argument.....1

 E. Conclusion.....5

TABLE OF AUTHORITIES

Cases

Chaplinsky v. New Hampshire,

315 U.S. 568, 62 S.Ct. 766, 86 L.Ed. 1031 (1942).....4, 7

City of Kennewick v. Keller,

11 Wn. App. 777, 525 P.2d 267 (1974).....2, 5

City of Pasco v. Dixon,

81 Wn. 2d 510, 503 P.2d 76 (1972).....2, 3, 5

City of Seattle v. Camby,

104 Wn. 2d 49, 701 P.2d 499 (1985).....2, 3

Cohen v. California,

403 U.S. 15, 91 S.Ct. 1780, 29 L.Ed.2d 284 (1971).....3

Gooding v. Wilson,

405 U.S. 518, 92 S.Ct. 1103, 31 L.Ed.2d 408 (1972).....2, 5

Lewis v. New Orleans,

415 U.S. 130, 94 S.Ct. 970, 39 L.Ed.2d 214 (1974).....3

State v. Montgomery,

31 Wash.App. 745, 644 P.2d 747 (1982).....2

State v. Yoakum,

30 Wash.App. 874, 638 P.2d 1264 (1982).....2, 3, 5

A. IDENTITY OF PARTY

DANIEL BRYON KINGMA, petitioner, hereby answers

Respondent's Reply Brief filed in this matter on September 14, 2015.

B. NEW ISSUE RAISED IN RESPONDENT'S REPLY

1. Did Daniel Kingma use "fighting words" toward his father, Dale Kingma?

C. PROCEDURAL HISTORY

On September 14, 2015, the Respondent filed its Reply to Daniel Kingma's Petition for Review. In addition to addressing issues that had been raised by the Petitioner in the Petition for Review, the Respondent raised a new issue, namely, whether Daniel Kingma had used "fighting words" toward his father, thereby justifying his arrest. Reply Br. at 5-7.

D. ARGUMENT

Pursuant to RAP 13.4(d), "A reply to an answer should be limited to addressing only the new issues raised in the answer." The question of whether "fighting words" were used is a new issue which must be addressed herein.

While the State, in its Reply, argues that Daniel used fighting words towards Dale, there was no evidence introduced as to the actual words

spoken by Daniel; and in fact, the defendant raised this very issue at the trial court level. *See* 1/15/14 RP at 73.

In order for a reviewing court to conclude that the words used were in fact “fighting words, there must have been some evidence adduced at the trial court as to the words used. *See, e.g., City of Kennewick v. Keller*, 11 Wn. App. 777, 787, 525 P.2d 267, 273 (1974), *citing City of Pasco v. Dixon*, 81 Wn. 2d 510, 521, 503 P.2d 76, 83 (1972).

“[A]n objective test must be applied to evaluate the words spoken.” *City of Seattle v. Camby*, 104 Wn. 2d 49, 50, 701 P.2d 499, 500 (1985).

Camby defined what constitutes “fighting words” as follows:

“Fighting words”, excluded from First Amendment protection, are defined as “words ... which by their very utterance inflict injury or tend to incite an immediate breach of the peace.” (Footnote omitted.) *Chaplinsky*, at 572, 62 S.Ct. at 769. *See also Gooding v. Wilson*, 405 U.S. 518, 522, 92 S.Ct. 1103, 1106, 31 L.Ed.2d 408 (1972); *Pasco v. Dixon*, 81 Wash.2d 510, 520, 503 P.2d 76 (1972); *Kennewick v. Keller*, 11 Wash.App. 777, 785, 525 P.2d 267 (1974); *Yoakum*, at 876, 638 P.2d 1264; *State v. Montgomery*, 31 Wash.App. 745, 754, 644 P.2d 747 (1982); *Camby*, 38 Wash.App. at 465, 685 P.2d 665. “Fighting words “have a direct tendency to cause acts of violence by the persons to whom, individually, the remark is addressed.... The test is what men of common intelligence would understand would be words likely to cause an average addressee to fight.... 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. *Chaplinsky*, 315 U.S. at 573, 62 S.Ct. at 770. *See also Gooding*, 405 U.S. at 523, 92 S.Ct. at 1106; *Montgomery*, 31

Wash.App. at 754, 644 P.2d 747; *Yoakum*, 30 Wash.App. at 877, 638 P.2d 1264; *Camby*, 38 Wash.App. at 465–66, 685 P.2d 665. The “fighting words” analysis involves three steps. First, the words must be directed at a particular person or group of persons. *Cohen v. California*, 403 U.S. 15, 20, 91 S.Ct. 1780, 1785, 29 L.Ed.2d 284 (1971). There must be an addressee. Second, the words themselves must be “those personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction.” (Citation omitted.) *Cohen*, at 20, 91 S.Ct. at 1785. This protects against supersensitive addressees. The addressee's personal disagreement with or anger over words said to him does not, by itself, mean that the words can be punished as fighting words. Presuming the first two steps are present, which in this case they are, the third step looks at the words in the context or situation in which they were made. As noted by Justice Powell, concurring in *Lewis v. New Orleans*, 415 U.S. 130, 135, 94 S.Ct. 970, 973, 39 L.Ed.2d 214 (1974): “[W]ords may or may not be ‘fighting words,’ depending upon the circumstances of their utterance.” See also *Yoakum*, 30 Wash.App. at 877, 638 P.2d 1264; *Camby*, 38 Wash.App. at 466, 685 P.2d 665. Similarly, this court has stated: “To show a public disorder, actual or threatened, existing or impending, the uttered words must ... be related to the circumstances in which they were uttered.” *Pasco v. Dixon*, *supra* 81 Wash.2d at 520, 503 P.2d 76.

City of Seattle v. Camby, 104 Wn. 2d at 52-53.

It is not the case that the First Amendment only applies to government actors, and not to civilians, as argued by the Respondent at page 5. The First Amendment protects the speaker even when the addressee is a civilian. *Camby*, 104 Wn. 2d at 50. The critical issue here is whether Daniel’s words toward his father, consisting of “miscellaneous profanity,”

constituted evidence that he had engaged in behavior for which he could be arrested by Deputy Corporal Mansford.

As stated above, the Defendant/Petitioner argued at the trial court level that Dale's statement to Corporal Mansford merely alleged that Daniel had come onto the property yelling miscellaneous profanity and wanting to fight. 1/15/14 at 73. There was no evidence offered by the State as to the specific words that were used. There is thus insufficient evidence proving fighting words were used.

At the suppression hearing, the State did not attempt to justify Kingma's arrest on the basis of alleged "fighting words," but rather, on the basis that Daniel had trespassed on his father's property. 1/15/14 RP at 64-67 and at 85-89. A general description of Daniel's speech as including the use of "miscellaneous profanity" is insufficient to establish that Daniel's presence on the property was unlawful.

The Court should therefore disregard the Respondent's argument that Daniel used "fighting words." Speech is presumed to be constitutionally protected *unless* the State can prove that an exception such as "fighting words" exists. "Speech, although vulgar and offensive, is protected by the first amendment to the United States Constitution, *unless* the speaker's utterances are 'fighting words', i.e., words which by their very utterance inflict injury or tend to incite an immediate breach of the peace."

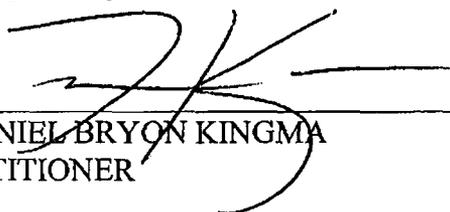
State v. Yoakum, 30 Wn. App. 874, 876-77, 638 P.2d 1264, 1266 (1982)(emphasis added), citing *Chaplinsky v. New Hampshire*, 315 U.S. 568, 62 S.Ct. 766, 86 L.Ed. 1031 (1942); *Gooding v. Wilson*, 405 U.S. 518, 92 S.Ct. 1103, 31 L.Ed.2d 408 (1972); *Kennewick v. Keller*, 11 Wash.App. 777, 785, 525 P.2d 267 (1974); *Pasco v. Dixon*, 81 Wash.2d 510, 520, 503 P.2d 76 (1972). There is no evidence in the record which would support a conclusion that Daniel used “fighting words.”

CONCLUSION

In conclusion, the Court should find that, in the absence of concrete evidence as to the words Daniel used, his speech, which included “miscellaneous profanity,” is presumed to be protected speech under the First Amendment.

DATED this 28th day of September, 2015

Respectfully submitted,



DANIEL BRYON KINGMA
PETITIONER

APPENDIX A

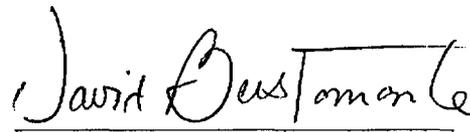
Declaration of Service

DECLARATION OF SERVICE

COMES NOW DAVID BUSTAMANTE, and declares under penalty of perjury, under the laws of the state of Washington, that the following is true and correct:

On the 29th day of September, 2015, I caused the subjoined Petitioner's Reply to Respondent's Answer, in the matter of *State of Washington, Respondent, v. Daniel Bryon Kingma, Petitioner*, Supreme Court Cause No. 919844, to be served on the Respondent, State of Washington, by personally hand-delivering a true and correct copy to the offices of the Grant County Prosecuting Attorney's Office located at 35 C Street N.W., Ephrata, Washington 98823.

Signed at Ephrata, Washington, this 29th day of September, 2015.



DAVID BUSTAMANTE
Declarant

OFFICE RECEPTIONIST, CLERK

To: David Bustamante
Cc: Kevin J. McCrae
Subject: RE: Electronic filing 919844

Received on 09-29-2015

Supreme Court Clerk's Office

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: David Bustamante [mailto:dbustamante@grantcountywa.gov]
Sent: Tuesday, September 29, 2015 9:01 AM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Cc: Kevin J. McCrae <kmccrae@grantcountywa.gov>
Subject: RE: Electronic filing 919844

Forgot the attachments.

From: David Bustamante
Sent: Tuesday, September 29, 2015 8:57 AM
To: 'Supreme@courts.wa.gov'
Cc: Kevin J. McCrae
Subject: Electronic filing 919844

RE: State of Washington, Plaintiff/Respondent, v. Daniel Bryon Kingma, Defendant/Appellant/Petitioner

Supreme Court Case No. 919844

Petitioner's Reply to Respondent's Answer to Petitioner for Review

To whom it may concern,

Attached with this transmission, please find Petitioner's Reply to Respondent's Answer to Petitioner for Review. A Declaration of Service is attached as Appendix A

PLEASE NOTE:

The person filing this document is:

Daniel Bryon Kingma, Petitioner
Pro Se (NO BAR NUMBER)
Tel. (509) 350) 9509
Email: danielbryonkingma@gmail.com

Respectfully submitted,

DAVID BUSTAMANTE
STAFF ATTORNEY
GRANT COUNTY DEPARTMENT OF PUBLIC DEFENSE
P.O. BOX 37
EPHRATA, WASHINGTON 98823
TEL. (509) 754-6027, EXT. 13
FAX (509) 754-6030