

No. 43549-7-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Michael Horner,

Appellant.

Thurston County Superior Court Cause No. 11-1-01616-5

The Honorable Judge Thomas McPhee

Appellant's Reply Brief

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ARGUMENT

I. RCW 9A.08.020 VIOLATES THE FIRST AMENDMENT BECAUSE IT IS UNCONSTITUTIONALLY OVERBROAD.

A. The burden of justifying a restriction on speech rests with the government.

The government bears the burden of justifying any restriction on speech. *State v. Immelt*, 173 Wn.2d 1, 6, 267 P.3d 305 (2011).

Respondent's contrary contention is incorrect, and its reliance on *Ward* is misplaced. Brief of Respondent, p. 7 (citing *State v. Ward*, 123 Wn.2d 488, 869 P.2d 1062 (1994)). *Ward* states the general rule that "[a] statute is presumed constitutional and the party challenging it has the burden to prove it is unconstitutional beyond a reasonable doubt." *Ward*, 123 Wn.2d at 496 (analyzing *ex post facto* challenge to sex offender registration law).

However, this rule is inapplicable in the First Amendment context, where the burden rests with the government. *Immelt*, 173 Wn.2d at 6. *See also Resident Action Council v. Seattle Hous. Auth.*, 162 Wn.2d 773, 778, 174 P.3d 84 (2008) ("[T]he State bears the burden of justifying a restriction on speech"); *Voters Educ. Comm. v. Washington State Pub. Disclosure Comm'n*, 161 Wn.2d 470, 482, 166 P.3d 1174 (2007) (same); *Ino Ino, Inc. v. City of Bellevue*, 132 Wn.2d 103, 114, 937 P.2d 154 *as amended*, 943 P.2d 1358 (1997) (same); *Fine Arts Guild, Inc. v. City of*

Seattle, 74 Wn.2d 503, 506, 445 P.2d 602 (1968) (“[A]ny restraint imposed upon a constitutionally protected medium of expression comes into court bearing a heavy presumption against its constitutionality.”)

Having relied on an inapplicable standard, Respondent makes little effort to meet its burden of justifying the restrictions on speech imposed by RCW 9A.08.020. Brief of Respondent, pp. 7-12. Because Respondent has failed to overcome the presumption of invalidity, Mr. Horner’s conviction must be reversed.

B. RCW 9A.08.020 is overbroad on its face because (as currently interpreted) it prohibits a substantial amount of protected speech.

The federal constitution “gives significant protection from overbroad laws that chill speech within the First Amendment’s vast and privileged sphere.” *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 244, 122 S.Ct. 1389, 152 L.Ed.2d 403 (2002)). The overbreadth doctrine prohibits the government from criminalizing unprotected speech “if a substantial amount of protected speech is prohibited or chilled in the process.” *Id.*, at 255.

Overbreadth analysis starts with understanding how a statute has been construed: “it is impossible to determine whether a statute reaches too far without first knowing what the statute covers.” *United States v. Stevens*, 559 U.S. 460, ___, 130 S.Ct. 1577, 176 L.Ed.2d 435 (2010)

(quoting *United States v. Williams*, 553 U.S. 285, 293, 128 S.Ct. 1830, 170 L.Ed.2d 650 (2008)).

A criminal statute “may be invalidated as overbroad if ‘a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep.’” *Stevens*, 559 U.S. at ____ (quoting *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 449, n. 6, 128 S.Ct. 1184, 170 L.Ed.2d 151 (2008) (internal quotation marks omitted)). Put another way, a statute is substantially overbroad if there is “a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court.” *Members of City Council of City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 800-01, 104 S.Ct. 2118, 80 L.Ed.2d 772 (1984).¹

1. The accomplice liability statute is overbroad because it permits conviction for pure speech absent proof of (1) intent to further a crime and (2) a likelihood of imminent lawless action.

Speech advocating criminal activity may only be punished if it “is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.” *Brandenburg v. Ohio*, 395 U.S. 444, 447,

¹ On the other hand, a statute will be upheld against an overbreadth challenge if its “legitimate reach dwarfs its arguably impermissible applications.” *New York v. Ferber*, 458 U.S. 747, 773, 102 S.Ct. 3348, 73 L.Ed.2d 1113 (1982). Thus a statute is not substantially

23 L.Ed.2d 430, 89 S.Ct. 1827 (1969). Thus, in order to be constitutional, a statute that criminalizes speech must require proof of *intent* (not mere knowledge) and a probability of *imminent* lawless action.² *Id.*

The government “cannot constitutionally sanction ‘advocacy of illegal action at some indefinite future time.’” *McCoy v. Stewart*, 282 F.3d 626, 631 (9th Cir. 2002) (quoting *Hess v. Indiana*, 414 U.S. 105, 108, 94 S.Ct. 326, 38 L.Ed.2d 303 (1973)). The *Brandenburg* test requires “temporal imminence.” *James v. Meow Media, Inc.*, 300 F.3d 683, 698-99 (6th Cir. 2002).

In *McCoy*, the defendant was a former gang member who “advised a street gang...on at least two separate occasions on how to operate their gang.” *McCoy*, 282 F.3d at 628. He suggested that the gang reduce the violence used to eject gang members, and advised them to “tag up the neighborhood [with graffiti] to let their presence be known.” *Id.*, at 632. He was charged under an Arizona statute making it unlawful to assist a criminal street gang. The statute required proof that he acted with intent to promote or further the gang’s criminal objectives and to promote, further,

overbroad if the “arguably impermissible applications of the statute amount to [no] more than a tiny fraction of the materials within the statute’s reach.” *Id.*

² Thus, “[t]he mere tendency of speech to encourage unlawful acts is not a sufficient reason for banning it absent some showing of a direct connection between the speech and imminent illegal conduct.” *Ashcroft*, 535 U.S. at 253.

or assist the gang in any criminal conduct. *Id.*, at 630 n. 3 (citing former A.R.S. § 13-2308 (1993)).

The Ninth Circuit found his advice “very general,” and noted the improbability that someone would act imminently on the advice. It reversed his conviction, finding that his speech “fit more closely the profile of mere abstract advocacy of lawlessness” rather than “demonstrating a specific intent to further illegal goals.” *Id.*, at 631.

Similarly, the government may not punish doctors who recommend marijuana to their patients. *Conant v. Walters*, 309 F.3d 629 (9th Cir. 2002). This is so even though a doctor’s recommendation “may encourage illegal conduct by the patient.” *Id.*, at 638. As the Fourth Circuit has pointed out:

in order to prevent the punishment or even the chilling of entirely innocent, lawfully useful speech, the First Amendment may in some contexts stand as a bar to the imposition of liability on the basis of mere foreseeability or knowledge that the information one imparts could be misused for an impermissible purpose.

Rice v. Paladin Enterprises, Inc., 128 F.3d 233, 247 (4th Cir. 1997)

(publisher stipulated that *Hit Man*, a manual for contract killers, was disseminated with knowledge and intent that it be immediately used in the planning and commission of murder; this stipulation removed the publication from First Amendment protection.)

By their plain terms, RCW 9A.08.020 and WPIC 10.51 permit conviction even in the absence of intent and a likelihood of imminent lawless action. In Washington, a jury may convict a person as an accomplice if s/he provides the principal with aid in the form of “words” or “encouragement,” even if the person acts with mere knowledge—not intent—that the words or encouragement will promote or facilitate the principal’s crime, and even if imminent lawless action is unlikely. RCW 9A.08.020; WPIC 10.51.

Under Washington law, the doctors in *Conant* would have no protection from accomplice liability if they gave medical advice they knew would promote illegal drug possession.³ *See Conant*, 309 F.3d at 638. The defendant in *McCoy* would be convicted for his advocacy, despite the improbability of imminent unlawful activity. *See McCoy*, 282 F.3d at 631. Under the statute, criminal liability would attach to an attorney who promised free representation to trespassing protesters.

RCW 9A.08.020 could be construed to reach only unprotected speech. *See, e.g., State v. Johnston*, 156 Wn.2d 355, 364, 127 P.3d 707 (2006) (Bomb threat statute “must be limited to apply to only true threats”); *State v. Schaler*, 169 Wn.2d 274, 284, 236 P.3d 858 (2010)

³ Of course, both medical and recreational use of marijuana are legal in Washington at this point. RCW 69.50.101.

(construing the crime of harassment to reach only true threats). The *Brandenburg* court provided the appropriate standard: were RCW 9A.08.020 construed to reach speech made with intent to incite and likely to produce imminent lawless action, it would not be overbroad. With such a construction, trial courts could instruct juries in conformity with *Brandenburg*. See, e.g., *United States v. Freeman*, 761 F.2d 549, 552 (9th Cir. 1985) (“[T]he jury should have been charged that the expression was protected unless both the intent of the speaker and the tendency of his words was to produce or incite an imminent lawless act, one likely to occur”) (citing *Brandenburg*.)

Under the current prevailing construction, RCW 9A.08.020 is unconstitutionally overbroad. *Brandenburg*, 395 U.S. at 447; see *Immelt*, 173 Wn.2d at 6. Because Mr. Horner was tried as an accomplice, his conviction must be reversed. *Immelt*, 173 Wn.2d at 6. He may not be retried on an accomplice theory. *Id.*

2. Respondent has failed to meet its burden of justifying the restrictions on speech imposed under the current interpretation of RCW 9A.08.020.

Respondent’s main point appears to be that accomplice liability only attaches to speech that promotes or facilitates a particular crime. Brief of Respondent, pp. 11-12. Without citation to authority, Respondent contends that “[i]t is not reasonable to contemplate that the defendant is

assisting in some general or hypothetical crime, but rather a specific, concrete crime occurring at the time or planned in the near future.” Brief of Respondent, p. 11.

Even if true, Respondent’s argument does not solve the overbreadth problem because it addresses only one piece of the *Brandenburg* standard. RCW 9A.08.020 punishes any statement made *with knowledge* that it will promote or facilitate a particular, specific crime. *See* WPIC 10.51. *Brandenburg* requires proof that the speaker *intended* to promote or facilitate crime. *Brandenburg*, 395 U.S. at 447.⁴

Washington’s accomplice liability statute reaches the doctor who suggests that a patient would benefit from an illegal drug,⁵ the lawyer who promises to provide free legal services to trespassing protesters, and the former gang member who advises others to “tag up the neighborhood [with graffiti] to let their presence be known.” *McCoy*, 282 F.3d at 632. In each case, the speaker’s words would promote or facilitate a particular crime (drug possession, trespass, graffiti) and incur criminal liability even absent the proof of intent required under *Brandenburg*.

As these examples show, the overbreadth is not purely theoretical; instead, there is “a realistic danger” that the statute will prohibit or chill

⁴ Furthermore, Respondent’s unsupported claim regarding crimes “planned in the near future” does not necessarily satisfy *Brandenburg*’s imminence requirement. *Id.*

protected speech. *Vincent*, 466 U.S. at 800-01; *Ashcroft*, 535 U.S. at 255. RCW 9A.08.020 is unconstitutional. *Brandenburg*, 395 U.S. at 447. Accordingly, Mr. Horner's conviction must be reversed and his case remanded for a new trial. *Id.* He may not be retried under an accomplice theory. *Id.*

II. MR. HORNER'S CONVICTION FOR TRAFFICKING VIOLATED HIS RIGHT TO ADEQUATE NOTICE UNDER THE SIXTH AND FOURTEENTH AMENDMENTS AND WASH. CONST. ART. I, §22.

Mr. Horner rests on the argument set forth in Appellant's Opening Brief.

⁵ See *Conant* 309 F.3d at 638.

CONCLUSION

Mr. Horner's trafficking conviction must be dismissed without prejudice, and the remaining charges remanded for a new trial.

Respectfully submitted on April 24, 2013,

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CERTIFICATE OF SERVICE

I certify that on today's date:

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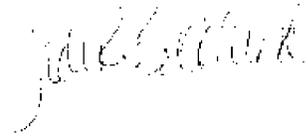
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I filed the Appellant's Reply Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on April 24, 2013.



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