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Court of Appeals  
Division III  
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

No. 32859-7-III

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STATE OF WASHINGTON, Respondent,

v.

NARIAH CORDOVA, Appellant.

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APPELLANT'S BRIEF

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## **I. INTRODUCTION**

Nariah Cordova, a juvenile with no criminal history, was eating French fries inside McDonalds with her mother when Officer Dean Perry approached them based on a report that Cordova had run away the night before. When Cordova argued with her mother, used foul language, and refused to go outside at Perry's request, Perry physically took Cordova's arm to force her outside. Cordova attempted to pull away and Perry forced her into the counter to forcibly handcuff her, injuring her face in the process. Following a bench trial, Cordova was convicted of disorderly conduct and obstructing a law enforcement officer. Cordova now appeals, contending that the arrest for disorderly conduct was based upon her lawful exercise of First Amendment speech and that Perry was not engaged in official duties when he unlawfully arrested her.

## **II. ASSIGNMENTS OF ERROR**

**ASSIGNMENT OF ERROR 1:** The disorderly conduct ordinance is unconstitutional as applied to Cordova's speech.

**ASSIGNMENT OF ERROR 2:** Insufficient evidence supports the convictions for obstructing a public official and disorderly conduct.

ASSIGNMENT OF ERROR 3: The trial court's findings of fact are insufficient to support its conclusions and the convictions.

### **III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

ISSUE 1: Does application of the disorderly conduct ordinance in the present case unlawfully infringe upon protected speech?

ISSUE 2: Is there sufficient evidence to uphold the disorderly conduct conviction when Cordova's constitutionally protected speech is not considered?

ISSUE 3: Did Perry have legal authority to take Cordova into custody under a community caretaking function?

ISSUE 4: Is there sufficient evidence that Cordova interfered with Perry's performance of an official duty?

### **IV. STATEMENT OF THE CASE**

The State charged Nariah Cordova with obstructing a law enforcement officer and disorderly conduct.<sup>1</sup> The matter proceeded to bench trial, in which the parties presented somewhat conflicting evidence.

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<sup>1</sup> The State charged Cordova alternatively under Pasco Municipal Code section 9.06.010(1)(C) and RCW 9A.84.030(1)(b). CP 49-50. Following a bench trial, the trial court dismissed count 3. RP 138.

The State's witness, Pasco Police Officer Dean Perry, testified that he was dispatched to McDonalds in response to a call reporting a runaway at that location. RP 33, 40. Although being a runaway is not a crime, Perry testified that his department's policy in dealing with runaway juveniles is to return them to their parents, by force if necessary. RP 34, 35.

While he was en route, dispatch advised that the juvenile's mother was at the scene. RP 40. On arrival, he contacted Cordova with her mother, Jessica Mancilla. RP 41-42. Cordova was arguing with her mother and using foul language. RP 42. Perry did not recall what was being said. RP 56. Cordova yelled at Perry when he spoke to her and Mancilla asked if they could take it outside because people were turning around to watch. RP 42-43. Perry told Cordova she had to go outside and she refused. Perry then grabbed her arm to physically escort her outside and Cordova resisted. RP 43, 45. Perry applied an arm bar and pinned Cordova against the counter where she was handcuffed, injuring her above the eye in the process. RP 45-46. Although Perry originally intended to detain Cordova for disorderly conduct, at her mother's request, he released Cordova to Mancilla. RP 47.

For the defense, Mancilla disputed Perry's version of events, testifying that she and Cordova were not arguing, Cordova was finishing

her food and then they were going to go home. RP 88. According to Mancilla, Perry approached them loudly asking questions, and she was embarrassed and asked if they could go outside. RP 89-90. Cordova pulled her arm away from Mancilla and at that point, Perry grabbed her, threw her over the counter and said she was under arrest. RP 92. Cordova then said something he did not like, and Perry grabbed her hair and struck her head against the counter. RP 94.

The trial court found Cordova committed the crimes of obstructing Perry and disorderly conduct under the Pasco Municipal Code. RP 138. It entered a disposition order imposing three months' community supervision and 24 hours of community service. RP 141. Several months later, the trial court entered findings of fact and conclusions of law including the following findings:

3. Upon receiving a report of a located runaway, law enforcement has a duty to ensure the child will voluntarily comply with the parents' wishes. This is part of the officer's community caretaking function.
5. Respondent willfully hindered Officer Perry in the execution of his duties.
6. Respondent's conduct within the restaurant was intentional, tumultuous, and created public inconvenience, annoyance, or alarm.

CP 99-100. Based on these findings, the trial court concluded that Officer Perry was lawfully executing his duties at the time of the incident. CP 100. Cordova now appeals.

## V. ARGUMENT

A. The disorderly conduct ordinance is unconstitutional as applied to this case because it infringes upon Cordova's constitutionally protected speech.

The State alleged in its first amended information that Cordova violated Pasco Municipal Code § 9.06.010(1)(C) because she:

[W]ith intent to cause to recklessly create a risk of public inconvenience, annoyance or alarm, did engage in fighting or in violent, tumultuous or threatening 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 of that contact with law enforcement.

CP 49-50. In its findings of fact and conclusions of law, the trial court found, "Respondent's conduct within the restaurant was intentional, tumultuous, and created public inconvenience, annoyance, or alarm." CP 100. The trial court further found specifically that Perry's testimony about what transpired in the restaurant was credible and Cordova's witnesses were not credible. CP 100. Accordingly, the question presented is whether, taking Perry's testimony about the events inside the restaurant in

the light most favorable to the state, sufficient evidence supports the conclusion that Cordova engaged in conduct that violated the ordinance. *State v. Locke*, 175 Wn. App. 779, 788, 307 P.3d 771 (2013).

Words that are disrespectful, discourteous, and annoying nevertheless enjoy constitutional protection. *State v. E.J.J.*, \_\_\_ Wn.2d \_\_\_, \_\_\_ P.3d \_\_\_, 2015 WL 3915760 (*slip op.* no. 88694-6, June 25, 2015). The First Amendment to the U.S. Constitution encompasses “the freedom to publicly express one’s opinions . . . including those opinions which are defiant or contemptuous.” *Street v. New York*, 394 U.S. 576, 593, 89 S. Ct. 1354, 22 L.Ed.2d 572 (1969). In recognition that criminal statutes may not penalize free expression, Washington courts “have long limited the application of obstruction statutes based upon speech” and have requires that some conduct, in addition to speech, must be established to support a conviction. *State v. Williams*, 171 Wn.2d 474, 477-78, 251 P.3d 877 (2011). Likewise, disorderly conduct ordinances have been limited to the use of fighting words, which by their use “inflict injury or tend to incite an immediate breach of the peace.” *State v. Montgomery*, 31 Wn. App. 745, 754, 644 P.2d 747 (1982) (*citing Chaplinsky v. New Hampshire*, 315 U.S. 568, 62 S. Ct. 766, 86 L.Ed. 1031 (1942)). In the absence of evidence that the words spoken injured anyone or threatened to incite an immediate breach of the peace, a disorderly conduct conviction that rests

upon the defendant's speech cannot be sustained. See *City of Kennewick v. Keller*, 11 Wn. App. 777, 787, 525 P.2d 267 (1974); *City of Pasco v. Dixson*, 81 Wn.2d 510, 523, 503 P.2d 76 (1972).

In the present case, Cordova and her mother were sitting at a table inside McDonalds when Perry contacted them. RP 41. Cordova was arguing with her mother, using foul language, and being belligerent in a manner Perry described as "I wouldn't say loud, but it was louder than normal people who were eating in a restaurant at that point." RP 42. Cordova then yelled at Perry and people began to turn around to see what was going on. RP 42-43. When she refused to leave the restaurant, Perry then forcibly took her into physical custody to force her to go outside. RP 43. Nothing in the record reflects that Cordova's disagreement with her mother threatened to incite any breach of the peace, or that her words offended anybody besides Perry.

*Dixson* addressed a similar encounter between a law enforcement officer and a member of the public who was not suspected of any crime when the officer made contact. In *Dixson*, the Court observed,

Without legal justification so far as this record shows, some of the officers ordered the defendant and those near him to sit down when they had an apparent legal right to stand; told him to 'shut up' when he had a right to speak; told him to put his cigarettes in his pocket when he had a right—

without littering—to place them on the ground before him; told him he could not smoke when the law allowed him to smoke; ordered him and others to leave the park when he had a right to remain. His solitary 6-word utterance, made under these circumstances, did not, we think, as a matter of law, constitute a public disorder nor otherwise rise to the magnitude of a criminal violation of the Pasco disorderly conduct ordinance prohibiting public obscenity toward others. There was nothing about the situation in the park that summer evening endangering the public safety or threatening injury to life or property as shown by this record to warrant the police in ordering people about or running them out of the park before closing time. The public peace and safety was not and had not been threatened; there was no threat of riot impending; there was no dangerous or unlawful assemblage.

81 Wn.2d at 522. Similarly here, Cordova was inside a restaurant with her mother, where she had a right to be, speaking words she had a right to say, when Perry ordered her to go outside when she had committed no crime and had a right to stay. No evidence was presented that any other person inside the restaurant did more than notice that the interaction was occurring. This scant disruption of lunch fails to meet the standard of imminent riot required to sanction Cordova for verbally disagreeing with her mother and Perry.

When a statute is alleged to be unconstitutional as applied to a defendant's behavior, the court will affirm only if the conviction could not have been based only upon constitutionally protected speech. *E.J.J.*, slip

*op.* at 2. Here, up until the point of seizure<sup>2</sup>, Cordova had done nothing but speak. That the conviction was based upon her speech is further borne out by the nature of the accusation set forth in the information – that Cordova violated the Pasco ordinance by being “intentionally loud and belligerent” during the contact with Perry. Put another way, considering the interaction without reference to Cordova’s speech, the record does not reflect that she did anything other than sit in a restaurant with her mother and eat. Consequently, the court cannot be certain that Cordova was not convicted for speech alone and the conviction must be reversed. *See E.J.J., slip op.* at 5.

B. Because Perry lacked a lawful basis to detain Cordova, he was not engaged in an official police duty sufficient to support a conviction for obstructing.

The crime of obstructing a law enforcement officer requires proof that the person willfully hindered, delayed, or obstructed any law enforcement officer in the discharge of his or her official powers or duties. RCW 9A.76.020(1). Here, the charge arose when Cordova resisted

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<sup>2</sup> When an officer by means of physical force or show of authority, has in some way restrained the liberty of a citizen, a seizure has occurred. *Terry v. Ohio*, 392 U.S. 1, 19 n. 16, 88 S. Ct. 1868, 20 L.Ed.2d 889 (1968). Perry seized Cordova when he ordered her out of the restaurant and then physically took control of her arm to force her to comply.

Perry's efforts to detain her, when Perry conceded that being a runaway was not a crime and when the seizure for disorderly conduct occurred in contravention of Cordova's First Amendment rights.

A warrantless seizure is per se unreasonable under the Fourth Amendment. *State v. Houser*, 95 Wn.2d 143, 149, 622 P.2d 1218 (1980). The seizure may nevertheless be upheld if the State demonstrates that the warrantless seizure falls within an exception to the warrant requirement. *State v. Kinzy*, 141 W.2d 373, 384, 5 P.3d 668 (2000). Here, the trial court determined that the detention occurred as the result of Perry exercising a community caretaking function to "ensure the child will voluntarily comply with the parents' wishes." CP 99.

The community caretaking function is completely divorced from a criminal investigation. *Cady v. Dombrowski*, 413 U.S. 433, 441, 93 S. Ct. 2523, 37 L.Ed.2d 706 (1973). It encompasses the provision of emergency aid and routine checks on health and safety, where police may be required to render aid or assistance. *Kinzy*, 141 Wn.2d at 386. Whether the encounter falls within the exception depends upon balancing "the individual's interest in freedom from police interference against the public's interest in having the police perform" the function. *Id.* at 387

(quoting *Kalmas v. Wagner*, 133 Wn.2d 210, 216-17, 943 P.2d 1369 (1997)).

In *Kinzy*, the Court concluded that the community caretaking function allowed police to approach the defendant to ask her questions; but when she began to walk away and police grabbed her arm, an unlawful seizure occurred. 141 Wn.2d at 390-91. In striking the balance between the government's interest in ensuring the safety of children and the rights of those same children to free association, expression, and movement, the *Kinzy* Court favored the child's privacy and observed that police may continue to intervene so long as they have a reasonable suspicion of criminal activity before initiating the seizure. *Id.* at 392-93.

Under *Kinzy*, the community caretaking function certainly authorized Perry to approach Cordova in the restaurant and ask her questions. It did not authorize him to physically detain her when she did not cooperate. Accordingly, the seizure can only be justified based upon a suspicion of criminal activity – in this case, the alleged disorderly conduct. However, as discussed above, disorderly conduct cannot be sustained on the facts present here because Cordova's speech is constitutionally protected. As such, Perry lacked legal justification for seizing Cordova.

The Courts of Appeal are divided on the question whether an unlawful detention can give rise to a conviction for obstructing a law enforcement officer. The obstructing statute requires that an officer be engaged in discharging official powers or duties. RCW 9A.76.020. Division Three of the Court of Appeals has held that “[a]n unlawful detention is by definition not part of lawful police duties” sufficient to support an arrest for obstructing. *State v. Barnes*, 96 Wn. App. 217, 225, 978 P.2d 1131 (1999). *Barnes* both followed and is consistent with *State v. Valentine*, 132 Wn.2d 1, 21, 935 P.2d 1294 (1997), in which the Supreme Court held that an individual being unlawfully arrested may use reasonable and proportional force to resist attempts to inflict injury, but may not use force when faced only with loss of freedom. *Valentine* concerned a defense to a charge of assaulting a law enforcement officer, whereas here, there is no evidence that Cordova assaulted Perry, she merely attempted to pull away from his unlawful restraint. RP 67.

Moreover, even under those authorities that hold an officer is engaging in official duties so long as he is not acting in bad faith or engaging in a “frolic” of their own, Perry’s detention of Cordova fails to meet the required standard. In *State v. Hudson*, 56 Wn App. 490, 496-97, 784 P.2d 533 (1990), Division One of the Court of Appeals held that the use of drawn guns during a traffic stop did not constitute arbitrary or

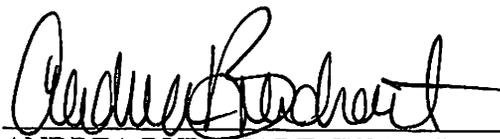
harassing conduct because the police had a reasonable apprehension of fear. Similarly, in *State v. Turner*, 103 Wn. App. 515, 526, 13 P.3d 234 (2000), absence of probable cause to arrest did not amount to bad faith because the officer's observations supported a reasonable suspicion that he was committing the crime of public indecency. Here, by contrast, Perry took Cordova into physical custody without reasonable suspicion that she had done anything but exercise her rights of expression and movement, notwithstanding her right to terminate an unwanted consensual encounter with police. *See generally Kinzy*, 141 Wn.2d 373. In the absence of a founded suspicion of wrongdoing that does not consist of the exercise of constitutionally protected rights, Perry's unlawful arrest was in bad faith and does not constitute an official duty.

Under the circumstances presented in this case, Cordova's resistance to unlawful arrest by Perry does not violate the obstructing statute because the unlawful arrest was not an official duty. Accordingly, the conviction for obstructing must be reversed.

## **VI. CONCLUSION**

For the foregoing reasons, Cordova respectfully requests that this court REVERSE the convictions and dismiss the case.

RESPECTFULLY SUBMITTED this 29 day of June, 2015.

A handwritten signature in black ink, appearing to read "Andrea Burkhart", written over a horizontal line.

ANDREA BURKHART, WSBA #38519  
Attorney for Appellant

**DECLARATION OF SERVICE**

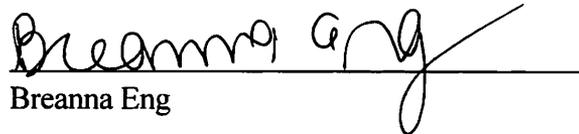
I, the undersigned, hereby declare that on this date, I caused to be served a true and correct copy of Appellant's Brief upon the following parties in interest by depositing them in the U.S. Mail, first-class, postage pre-paid, addressed as follows:

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Signed this 29th day of June, 2015 in Walla Walla, Washington.

  
Breanna Eng