

1989

Logan City v. Ralph Lowell Huber : Brief of Appellant

Utah Court of Appeals

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**UTAH COURT OF APPEALS
BRIEF**

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DOCKET NO. 89-0093

IN THE UTAH COURT OF APPEALS

LOGAN CITY,)	
)	
Plaintiff-Respondent,)	No. 890093-CA
)	
vs.)	CASE TYPE: APPEAL
)	
RALPH LOWELL HUBER,)	PRIORITY NUMBER 2
)	
Defendant-Appellant.)	
)	

BRIEF OF APPELLANT

Appeal from the First Circuit Court
Cache County, State of Utah, Logan City Department
The Honorable Burton H. Harris, Presiding

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MAY 25 1989

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TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF AUTHORITIES.....	ii,iii,iv
STATEMENT OF NATURE OF PROCEEDINGS.....	1
STATEMENT OF ISSUES PRESENTED.....	1
CONSTITUTIONAL PROVISIONS GOVERNING CASE.....	2
STATUTES AND RULES GOVERNING CASE.....	2
STATEMENT OF FACTS.....	6
SUMMARY OF ARGUMENTS.....	9
POINT I.....	12
POINT II.....	24
POINT III.....	34
POINT IV.....	35
POINT V.....	35
CONCLUSION.....	36
CERTIFICATE OF SERVICE.....	37

TABLE OF AUTHORITIES

<u>CASES</u>	<u>PAGE</u>
<u>BROWN v. OKLAHOMA</u> 408 U.S. 901.....	24
<u>CHAPLINSKY v. NEW HAMPSHIRE</u> 315 U.S. 568, 62 S.Ct. 766, 86 L.Ed. 1031 (1942).....	11,12,13, 19,20
<u>COHEN v. CALIFORNIA</u> 403 U.S. 15, 29 L. Ed. 2d 284, 91 S. Ct 1780 (1971).....	23,23,31
<u>COMMONWEALTH v. A JUVENILE</u> , 368 Mass. 580, 344 N.E. 2d 617, 624-625 (1975).....	21
<u>GOODING v. WILSON</u> 405 U.S. 518, 92 S. Ct. 1103, 31 L.Ed. 2d 408 (1972).....	12,13,16, 20,23,24
<u>HAMMOND v. ADKISSON</u> , 536 F 2d 237 (8th Cir. 1976).....	21
<u>HARBIN v. STATE</u> , Fla.App., 358 So. 2d 856,(1978).....	21,26
<u>HOFFMAN ESTATES v. FLIPSIDE, HOFFMAN ESTATES, INC.</u> 455 U.S. 489, N. 5, 71 L.Ed. 2d 362, 102 S.Ct. 1180 (1982).....	22
<u>IN RE A CRIMINAL INVESTIGATION SEVENTH DISTRICT COURT</u> number CS-1 754 P 2d 633 (Utah 1988).....	13
<u>JENKINS v. SWAN</u> 675 P2d 1145 (Utah 1983).....	14
<u>KARLEN v. CINCINNATI</u> 416 U.S.924.....	24
<u>KEARNS - TRIBUNE CORP. v. LEWIS</u> 685 P 2d 515, (Utah 1984).....	12,13
<u>KOLENDER v. LAWSON</u> 461 U.S. 352, 75 L.Ed. 2d 903, 103, S.Ct. 1955 (1983).....	14,22,24
<u>LANDMARK COMMUNICATIONS INC v. VIRGINIA</u> 435 U.S. 829, 98 S.Ct. 1535, 56 L.Ed. 2d 1 (1978).....	20
<u>LEWIS v. CITY OF NEW ORLEANS</u> 415 U.S. 130, 93 S.Ct. 970, 39 L.Ed. 2d 214 (1974).....	23,25
<u>LUCAS v. ARKANSAS</u> 416 U.S. 919.....	24
<u>MORRIS v. STATE</u> , Fla., 335 So. 2d 1, (1976).....	21

TABLE OF AUTHORITIES CONTINUED

<u>NORWELL v. CINCINNATI</u> 414 U.S. 14, 94 S.Ct. 187, 38 L.Ed. 2d 170 (1973).....	33
<u>ORATOWSKI v. CIVIL SERVICE COMMISSION</u> 3 Ill. App. 2d 551, 123 N.E. 2d 146 (1954).....	26,32
<u>PAPISH v. BOARD OF CURATORS</u> , 410 U.S. 667, 93 S.Ct. 1197, 35 L.Ed. 2d 618; Annot., 39 L.Ed. 2d 925 (1976).....	33
<u>PEOPLE v. JUSTICE</u> , 57 Ill.App. 3d 164, 14 Ill.Dec. 836, 372 N.E. 2d 1115, (1978).....	32
<u>PROVO CITY CORP. v. WILLDEN</u> 100 Utah Adv. Rep 7 (1989).....	13,14,18,22
<u>ROSEN v. CALIFORNIA</u> 416 U.S. 923.....	24
<u>ROSENFELD v. NEW JERSEY</u> 408 U.S. 901.....	24
<u>SCHENCK v. U.S.</u> 249 U.S. 47, 39 S.Ct. 241 63 L.Ed. 470 (1919).....	19
<u>STATE v. AUTHELET</u> , R.I., 385 A. 2d 642 (1978).....	21
<u>STATE v. HANSEN</u> 732 P 2d 127; 45 Ut. Adv. Rep. 19 (1983).....	34,35
<u>STATE v. HOSKINS</u> , 35 Conn. Sup. 587, 401 A2d 619 (1978).....	21
<u>STATE v. JOHN W.</u> 418 A 2d 1097 14 ALR 4th 1238 (Maine 1983).....	18,21,30,33
<u>STATE v. JORDAN</u> 665 P 2d 1280 (Utah 1983).....	18
<u>TINKER v. DES MOINES INDEPENDENT COMMUNITY SCHOOL DIST.</u> , 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed. 2d 731 (1969).....	21
 <u>STATUTES CITED</u>	
Utah Code Anno. §76-9-102.....	2,14,21
Utah Code Anno. §77-35-26.....	1,3

TABLE OF AUTHORITIES CONTINUED

17 A.M.S.R.A.	19
Logan City Ordinance 12/8/9.....	5
Logan City Ordinance 12/8/2.....	33
Logan City Ordinance 42/7/1.....	30

CONSTITUTIONAL PROVISIONS

United States Constitution, First Amendment.....	2
Utah Constitution Article I Section 5.....	2
Maine Constitution Article I Section 4.....	19

AUTHORITIES CITED

Blacks Law Dictionary 4th Ed. Rev. (1972).....	15
9 Harv. Civil Right - Civil Liberties L.Rev. 1 (1974).....	34

STATEMENT OF NATURE OF PROCEEDINGS

This is an appeal from a jury verdict convicting Appellant of violation of the Logan City disorderly conduct ordinance and from the sentence of the court each rendered on 1 February 1989. The appeal is taken to the Utah Court of Appeals from the Second Circuit Court, Cache County, Logan City Department pursuant to Rule 26 of the Utah Code Of Criminal Procedure title 77, chapter 35.

STATEMENT OF ISSUES PRESENTED

1. Does the Logan City Ordinance violate the protections afforded the Appellant under Article 1 Section 15 of the Constitution of the State of Utah and the First Amendment to the Constitution of the United States of America.

2. Did the Logan City Ordinance have Constitutional application to the Appellant under the facts of this case.

3. Did the Court properly and adequately instruct the jury.

4. Did the Court, in admonishing the Appellant before the jury, diminish the possibility of a fair trial.

CONSTITUTIONAL PROVISIONS GOVERNING CASE

UNITED STATES CONSTITUTION, FIRST AMENDMENT;

"[Religious and political freedom.]

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

UTAH CONSTITUTION ARTICLE I SECTION 15

"[Freedom of speech and of the press - Libel]

No law shall be passed to abridge or restrain the freedom of speech or of the press. In all criminal prosecutions of libel the truth may be given in evidence to the jury; and if it shall appear to the jury that the matter charged as libelous is true, and was published with good motives, and for justifiable ends, the party shall be acquitted; and the jury shall have the right to determine the law and the fact".

STATUTES AND RULES GOVERNING CASE

Utah Code Annot. 76-9-102

"(1) A person is guilty of disorderly conduct if:

(a) He refuses to comply with the lawful order of the police to move from a public place, or knowingly creates a hazardous or physically offensive condition, by any act which serves no legitimate purpose; or

(b) Intending to cause public inconvenience, annoyance, or alarm, or recklessly creating a risk thereof:

(i) He engages in fighting or in violent, tumultuous, or threatening behavior; or

(ii) He makes unreasonable noises in a public place; or

(iii) He makes unreasonable noises in a private place which can be heard in a public place; or

(iv) He engages in abusive or obscene language or makes obscene gestures in a public place; or

(v) He obstructs vehicular or pedestrian traffic.

(2) 'Public place,' for the purpose of this section, means any place to which the public or a substantial group of the public has access and includes but is not limited to streets, highways, and the common areas of schools, hospitals, apartment houses, office buildings, transport facilities, and shops.

(3) Disorderly conduct is a class C misdemeanor if the offense continues after a request by a person to desist. Otherwise it is an infraction".

77-35-26. Rule 26 — Appeals.

(1) An appeal is taken by filing with the clerk of the court from which the appeal is taken a notice of appeal stating the order or judgment appealed from and by serving a copy of it on the adverse party or his attorney of record. Proof of service of such copy shall be filed with the court.

(2) An appeal may be taken by the defendant from:

- (a) the final judgment of conviction;
- (b) an order made, after judgment, affecting the substantial rights of the defendant;
- (c) an interlocutory order when, upon petition for review, the appellate court decides that the appeal would be in the interest of justice; or
- (d) any order of the court judging the defendant by reason of a mental disease or defect incompetent to proceed further in a pending prosecution.

(3) An appeal may be taken by the prosecution from:

- (a) a final judgment of dismissal;
- (b) an order arresting judgment;
- (c) an order terminating the prosecution because of a finding of double jeopardy or denial of a speedy trial;
- (d) a judgment of the court holding a statute or any part of it invalid; or
- (e) an order of the court granting a pretrial motion to suppress evidence when, upon a petition for review, the appellate court decides that the appeal would be in the interest of justice.

(4) (a) All appeals in criminal cases shall be taken within 30 days after the entry of the judgment appealed from, or, if a motion for a new trial or

arrest of judgment is made, within 30 days after notice of the denial of the motion is given to the defendant or his counsel. Proof of giving notice shall be filed with the court.

(b) An appeal may not be dismissed except for a material defect in taking it, or for failure to perfect the appeal, or upon motion of the appellant. The dismissal of the appeal affirms the judgment unless another appeal can be, and is, timely taken.

(5) Cases appealed in which the defendant is unable to post bond shall be given a preferred and expeditious setting in the appellate court.

(6) Appeals may be submitted on briefs and if an appellant's brief is filed the appeal shall be decided even though a party, upon notice of the hearing, fails to appear for oral argument.

(7) The rules of civil procedure relating to appeals govern criminal appeals to the appellate court, except as otherwise provided.

(8) In appeals to the Supreme Court of capital cases where the sentence of death has been imposed, appellant briefs shall be filed within 60 days of the filing of the record on appeal. Respondent briefs shall be filed within 60 days of receipt of the appellant brief. All issues to be raised on appeal shall be included by each party in its appellate brief. Appellant reply briefs shall be filed within 30 days of receipt of the respondent's brief. One 30-day extension of the 60-day filing period may be granted to each party, but only upon application to the Supreme Court showing extraordinary circumstances warranting an extension. The Supreme Court shall schedule the oral arguments of the case to be heard not more than ten days after the date of filing of the final brief. Following oral arguments, the case shall be placed first on the Supreme Court's calendar, for expeditious determination.

(9) After an initial appeal has been resolved, a subsequent appeal of a capital case where the sentence of death has been imposed may not be entertained by any court, nor may a stay of execution of the sentence be granted, when the appeal does not raise any new matter not previously resolved or when new matter could have been raised at the previous appeal.

(10) In capital cases where the sentence of death has been imposed, and the defendant has chosen not to pursue his own appeal, the case shall be automatically reviewed by the Supreme Court within 60 days after certification by the sentencing court of the entire record, unless the time is extended by the Supreme Court for good cause. A case involving the sentence of death has priority over all other cases in setting for hearing and in disposition by the Supreme Court.

(11) The rules of practice for the Court of Appeals and circuit courts promulgated by the Judicial Council and approved by the Supreme Court relating to appeals from circuit courts govern criminal as well as civil appeals.

(12) An appeal may be taken to the Supreme Court or the Court of Appeals, as is appropriate, from all final orders and judgments rendered in a district court or juvenile court under the provisions of this rule.

(13) An appeal may be taken to the circuit court from a judgment rendered in the justice court in accordance with the provision of this rule, except:

(a) The case shall be tried anew in the circuit court and the decision of the circuit court is final except where the validity or constitutionality of a statute or ordinance is raised in the justice court.

(b) Within 20 days after receipt of the notice of appeal, the justice court shall transmit to the circuit court a certified copy of the docket, the original

pleadings, all notices, motions, and other papers filed in the case, and the notice and undertaking on appeal.

(c) Stay of execution and relief pending appeal are under Rule 27.

(d) All further proceedings are in the circuit court, including any process required to enforce judgment.

12-8-5. Disturbing the peace. It shall be unlawful for any person to maliciously or wilfully disturb the peace and quiet of any neighborhood, family or person, by loud or unusual noise, or by tumultuous or offensive conduct, or by threatening, traducing, quarreling, challenging to fight or fighting within the limits of Logan City.

12-8-6. Disturbances at public places prohibited. It shall be unlawful for any person to excite or cause disturbances or contention at any public place, public house, court, election, or any lawful meeting of citizens within the limits of Logan City. (out?)

12-8-7. Disturbance of religious meeting prohibited. It shall be unlawful for any person to disturb at public assembly, congregated for religious or other lawful purposes, within the limits of Logan City, by undue noise, or by offensive, unbecoming, or indecent behavior.

12-8-8. Disorderly house. It shall be unlawful for any person to keep an ill-governed house, or to suffer or permit any drunkenness, quarreling, fighting, unlawful games, riotous or disorderly conduct whatever on his premises. (rague)

12-8-9. Disorderly Conduct. (a) A person is guilty of disorderly conduct if:

(1) He refuses to comply with the lawful order of the police to move from a public place, or knowingly creates a hazardous or physically offensive condition, by any act which serves no legitimate purpose; or

(2) Intending to cause public inconvenience, annoyance, or alarm, or recklessly creating a risk thereof:

(A) He engages in fighting or in violent, tumultuous, or threatening behavior; or

(B) He makes unreasonable noises in a public place; or

(C) He makes unreasonable noises in a private place which can be heard in a public place; or

(D) He engages in abusive or obscene language or makes obscene gestures in a public place; or

(E) He obstructs vehicular or pedestrian traffic.

(b) "Public place," for the purpose of this section, means any place to which the public or a substantial group of the public has access and includes but is not limited to streets, highways, and the common areas of schools, hospitals, apartment houses, office buildings, transport facilities and shops.

(c) Disorderly conduct is a class C misdemeanor if the offense continues after a request by a person to desist. Otherwise it is an infraction.

(SEC. 12-8-9 ADDED 2/19/87)

(THIS IS A COPY OF THE LOGAN CITY ORDINANCE ON FILE IN THE CITY OFFICES.
THE MARGINAL NOTATIONS SHOWN APPEAR ON THE ORIGINAL.)

STATEMENT OF FACTS

It is alleged by the arresting officer, one Roper, a peace officer, that on 11 December 1988 at about 1:30 a.m. (T. 26) Defendant drove his Datsun around the corner of 300 North 100 East at a high rate of speed, swerving wide to the right then accelerating very rapidly past the parked position of the officer Roper at a speed which was estimated as 35 to 38 mph in a 25 mph zone (T. 27-28). Defendant stopped for the traffic semaphore and upon it changing to green pulled up in front of his business and exited his car. Roper, followed Defendant and determined to make contact based on the questionable turn and upon the estimation of speed in excess of posted limits. Upon being hailed by officer Roper, Defendant is alleged to have become immediately loud, belligerent, profane and uncooperative using offensive language and telling officer Roper to leave his private property (T. 40), to "get their fucking lights out of my car" etc. (T. 62). After alleged attempts to calm the situation, Defendant continued to remonstrate verbally, sometimes gesturing and standing as close as 18 inches to Roper (T.81). No threats were made, there was no fight and no squaring off of offers to combat by any party. Defendant was arrested and transported to jail whereupon Defendant quickly posted cash bail and walked back to his business, 1 block away. Another officer at the scene, one Monroe, taped most of the conversation and a transcript was put in evidence as follows at (t. 85 - 93);

" DEF: You're two blocks down the road.

MONROE: We weren't two blocks down the road.

DEF: You were clear the hell down by Taco Time.

MONROE: Do you really know---or do you want to know where we really were? When you came around the corner, when you came around the corner awfully fast, right at the road here, we were parked just off the road, but we do need to see your drivers license.

DEF: This is my property and your on it without my permission and that's it, that's what it boils down to. If it---I'm tired of being harassed.

MONROE: We need to see your registration, too, please.

DEF: Bullshit, now look, your on my property, this is my building, I haven't done anything wrong, I want to be left alone, I'm tired of this harassment because I come out of my bar and you guys start harassing, and I don't want it.

MONROE: We need to see your drivers license and registration.

DEF: The registration is current it's on the back and your going to run it through the radio, you can find out just as quick as I can.

MONROE: Look, Mr. Huber, were trying to be decent here.

DEF: No, your not, why did you pull me over?

MONROE: You were going too fast.

DEF: No, it's because what time it is, because you have nothing else to do and that's it.

MONROE: In just about two seconds, were not

going to be decent. Okay? We need to see the registration.

DEF: Fine, fine, fine, get your light out.

MONROE: We'll be with you in just a second.

DEF: This is a bunch of crap. You know what the car--it-- it's mine, it's always here. Get you fucking lights out of my car, goddamit, you guys piss me right off.

MONROE: Here's the deal, Mr. Huber, you are under arrest for disorderly conduct. We're going to jail. Put your hands behind your back. Turn around and put your hands behind your back.

DEF: What's the deal, here?

MONROE: You are under arrest?

DEF: For what? For what? Hold your horses, let me put my keys in my pocket.

MONROE: Okay we'll do that.

DEF: Turn my car off, can I turn my car off?

MONROE: Not now.

DEF: Wait a minute, can I call my attorney right now? This is stupider than hell, You guys want to go for this, you sit there in my car for no reason whatsoever.

ROPER: Are they too tight?

DEF: That ones way too tight.

ROPER: Would you like me to loosen them a little bit for you?

DEF: I'd like not to be wearing them. Hello. Can you explain to me why these guys are pulling this stunt?

Monroe estimated the time of the contact as between 5 and 6

minutes (T. 93).

SUMMARY OF ARGUMENTS

1. The Logan City Ordinance is facially defective and should be declared violative of Article I Section 15 of the Constitution of the State of Utah in that;

(a). Any abridgement of free speech is presumed void and is of primary importance to each member of society.

(b) Regardless of whether Appellant is a person aggrieved by the unconstitutional aspects of the ordinance, he has standing to assert that unconstitutionality under the overbreadth doctrine.

(c) The ordinance is void for vagueness in that there is no articulable standard with sufficient definition against which one may measure conduct.

(d) The constitutional protections afforded by the First Amendment have become somewhat cluttered by varying interpretations of the doctrine of "fighting words" and of the doctrine of "clear and present danger".

(e) All speech should be declared protected by the Utah Constitution, although if in connection with its use, the speaker becomes involved to the point that crimes are committed, that is his risk.

2. The Logan City Ordinance is facially flawed and should be declared violative of the protections afforded to the appellant by the First Amendment of the Constitution of the

United States of America in that;

(a) The terms abusive and obscene have, despite possible narrowing constructions by state courts, been declared by the United State Supreme Court to encompass protected speech

(b) The ordinance as written may be used to prohibit and punish protected speech.

(c) The terms "public inconvenience", "alarm", and "annoyance" as modified by "recklessly create a risk thereof" do not clearly limit prosecutions to speech consisting of "fighting words" or speech creating a "clear and present danger".

3. The Logan City Ordinance, as applied to the appellant under the facts of this case, is violative of the protections afforded the appellant by Article I Section 15 of the Utah Constitution and the First Amendment to the Constitution of the United State of America in that;

(a) The doctrines prescribing limitations to unfettered expression such as "fighting words" and "clear and present danger" have no application to confrontations between a citizen and police in arrest and detention situations; particularly when the initial contact was pursuant to police intrusion.

(b) Absent a face to face personal insult intended and irretrievably destined to incited an immediate violent response, no speech will support a conviction of disorderly conduct.

(c) Offensive and vulgar language, at least when not addressed to a captive audience, will not support a conviction of

disorderly conduct.

(d) The language in evidence was, as used by appellant, devoid of prurient content or connotation and was no obscene.

(e) Speech, to a public official, has a political aspect, and is absolutely protected, regardless of content, intended result or actual result.

(f) Even if, under the standard of the U.S. Supreme Court, the physical aspects of the confrontation might be considered, the mixing of speech and physical behavior in making a determination of disorderly conduct is forbidden by the questioned ordinance in its present form.

4. Instruction number 3 was given in error, over objection of appellant in that;

(a) It was a paraphrase of the entire disorderly conduct ordinance.

(b) It has no relation to the violation as pleaded by respondent.

(c) No proof was adduced respecting many elements set forth in the instruction.

(d) The instructions expanded the case into non-verbal areas and would permitted the jury to combined verbal and non verbal conduct, which is not permitted by the ordinance, in reaching their circumstances.

5. The Court, by admonishing Defendant before the jury damaged the appearance of impartiality and suggested to the jury

that he favored the Plaintiff's claims.

6. The jury was not instructed that if the disorderly conduct was terminated by the actor on request, they could find the Appellant guilty of an infraction.

POINT I

THE LOGAN CITY ORDINANCE IS FACIALLY DEFECTIVE IN ITS OVERBREADTH. THE ORDINANCE CRIMINALIZES CONDUCT PROTECTED BY ARTICLE I SECTION 15 OF THE CONSTITUTION OF THE STATE OF UTAH AND PROTECTED BY THE FIRST AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA.

ARGUMENT

Regardless of the whether or not the City of Logan has forbade and criminalized the conduct for which Defendant stands convicted, the questioned ordinance enfolds constitutionally protected conduct. An analysis of constitutional protections afforded by either the Utah Constitution or the United States Constitution compels a declaration that the challenged ordinance is unconstitutional.

THE UTAH CONSTITUTION

Article I Section 15 of the Utah Constitution provides that "no law shall be passed to abridge or restrain the freedom of speech or of the press". In KEARNS - TRIBUNE CORP. v. LEWIS 685 P 2d 515, 521 (Utah 1984) the Utah Supreme Court held that "the freedom of speech and press are fundamental to the effective exercise of the ultimate power of the people". Appellant

submits that an infringement of this right as claimed by the Defendant, in light of the above cited case is so important that the time to assert the infringement need not await the perfect Plaintiff KEARNS (ibid). In the case of PROVO CITY CORP. v. WILLDEN 100 Utah Adv. Rep 7 (1989), although the Utah Supreme Court held short of declaring an ordinance violative of the Utah Constitution, the Court employed language which might guide this court to utilize the Utah Constitution in deciding this case. Citing IN RE A CRIMINAL INVESTIGATION SEVENTH DISTRICT COURT number CS-1 754 P 2d 633 (Utah 1988) for the proposition that a court should construe laws so as to carry out the legislative intent while avoiding constitutional conflicts; the court went on to observe that "in seeking a constitutional construction, we will not rewrite a statute or ignore its plain intent" WILLDEN (supra) was a freedom of speech case in which the Supreme Court observed, at page 7, that "in its zeal to eliminate such offensive behavior, Provo City has chosen to fashion a tool that sweeps far too deeply into the protected province of the First Amendment". This holding was made manifest, despite the conclusion by the court that the respondent city might forbid Defendant's alleged conduct by a properly worded ordinance.

Looking at the instant case, appellant not only asks that this court review a city ordinance in light of the protection afforded by the Utah Constitution either under the concept of

"void for vagueness" or "overbreadth",¹ but also asserts that, unlike the situation in WILLDEN (supra), here we have the perfect appellant. See also JENKINS v. SWAN 675 P2d 1145 (Utah 1983). The Logan City Ordinance 12/8/9, with the exception of the penalty provisions, is but a duplication of the Utah disorderly conduct statute². Disorderly conduct, as defined by the city ordinance or state statute, is not necessarily verbal although the respondent city elected, in this case, to proceed under 12/8/9(c) which provides that a person is guilty of disorderly conduct if [while]

"intending to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof; he engages in abusive or obscene language or makes obscene gestures in a public place".

Appellant submits that the city has thereby limited the scope of inquiry to verbal conduct and verbalization by appellant. In support of this contention, the courts attention is invited to the information filed in connection with appellants prosecution as well as to instruction number 2 given to the jury over the objection of Appellant (T. 153).

The proscriptions of the ordinance as applied in this action are to the effect that abusive language, obscene language and

¹. The United States Supreme Court has traditionally viewed vagueness and overbreadth as logically related or similar doctrines, see KOLENDER v. LAWSON 481 U.S. 352, 75 L Ed 2d 903, 103 S. Ct.

². UCA 76-9-102

obscene gestures are forbidden. The court on motion of appellant, (T. 118 through 121) struck out "or makes obscene gestures" from the charge to the jury, recognizing that there was no evidence of any obscene gestures by the Defendant. The viability of the ordinance then requires that the court place a constitutional construction on each of the terms "public inconvenience"; "annoyance"; "alarm"; "recklessly"; "risk"; "abusive" and "obscene" in connection with verbal expression.

As to the term "public inconvenience" appellant submits that the term is, by its very nature, one which refers to areas of regulation which are civil in nature. Creation of utilities, banks and a host of other governmentally franchised entities are based upon a finding that they are required for the convenience of the public. Deference is often given to a finding of convenience, it being noted that many imprecise factors may bear on the public convenience. In Blacks Law Dictionary, Fourth Edition (1968) Convenient is defined variously as proper; just; suitable; fit; adapted; proper; or becoming appropriate. The term inconvenience then, is not subject to any easy resolution as to what standard should be applied or what minimum standard of conduct the ordinance requires.

Perhaps verbal dissent is one of the most inconvenient facts of legislation and/or rule-making and much proposed legislation has come a cropper on account of dissent voiced by members of the legislative body or by members of the public. The public voice

is made manifest in varying ways, almost all of which are inconvenient to the administration of government. A speech by a fellow legislator, opposition from the assemblage at a town meeting, picketing and placarding before public buildings, arguments with civil servants in their offices or remonstrances with policemen on their beat are all inconvenient and do little, in and of themselves, to enhance the orderly and efficient administration of the existing public weal or to render the task of the public servants an easy one. Despite the inconvenience factor, unfettered expression is one of the most cherished and protected facets of our democratic system. Consider that there is scarcely a voluntary act that one can perpetrate which does not operate to the inconvenience of some member of the public. Must the jury then consider the possible affront to a member of the public or only the inconvenience to the system under which we live. The question is basic to democracy and requires a finer definition than can be made by an inquiry as to whether an act is "inconvenient".

Public alarm is likewise subject to no easy definition. Certain members of the public are easily alarmed and it is submitted that any outcry, dissent or tumult will alarm some persons. Conversely, a verbalization, of whatever nature, in most situations, would not be sufficient to ignite a public panic, stampede or a general tumult. As is often observed, freedom of speech does not allow one to cry fire in a crowded

theater and thereby create a general alarm, but does this proscription apply to pure speech? However coarse or inappropriate, is not speech protected if only uttered in expression of one's views? Does the fact that there are those who might be willing to strike out upon hearing of any vulgarity make such speech any less protected?

Now we come to annoyance. It is a fine question as to whether the public, as a body, can be annoyed. When it comes to verbal expression one must carefully distinguish that act from non-verbal conduct which creates a din, a foul stench or a noisome and untidy condition. Appellant would not argue but that the officers in this case were annoyed, but submits that too often this frustrating condition "goes with the job".

All of what has been said regarding inconvenience, alarm or annoyance might be subject to a more easy resolution in favor of the ordinance by incorporation of the modifying term "unreasonable". Appellant submits, however, that with or without the non-existent modifier, the result would be the same. The process of finding a probable result of the proscribed verbal expression is unavoidably subject to imprecise direction and the ordinance gives too little guidance as to the multitude of possible situations which might be created by the questioned verbal expression and which must exist to sustain a conviction. Is not an expression of ones views, no matter how unreasonable his contentions be, a protected and permitted act?

Appellant contends that no amount of judicial construction (or reconstruction) will bring the questioned ordinance within constitutionally permissible bounds.

Respecting the terms "abusive" and "obscene" much of the discussion with respect to the United States Constitutional argument has application here. In WILLDEN (SUPRA) the Utah Court apparently adopted the "overbreadth doctrine", cf STATE v. JORDAN 665 P 2d 1280 (Utah 1983), and applied this doctrine to confer standing on one who would assert facial challenges. In light of the limitations imposed by this doctrine, the question then becomes, can the terms "abusive" and "obscene", as employed in the questioned ordinance, be saved by judicial construction. A valid judicial construction, sufficiently narrow to avoid constitutional strictures, said construction allowing it to meet constitutional muster, will prove fatal to a facial challenge by one not aggrieved thereby CHAPLINSKY v. NEW HAMPSHIRE (infra).

Abusive, by whatever generally accepted definition encompasses constitutionally protected utterances. In the case of STATE v. JOHN W. 418 A 2d 1097 14 Alr 4th 1238 (Maine 1983) the Maine Court was called upon to construe a statute which declared actions to be disorderly conduct when:

"in a public or private place, he knowingly accosts, insults, taunts or challenges any person with offensive, derisive, or annoying words, or by gestures or other physical conduct, which would in fact have a direct tendency to cause a violent response by an ordinary person in the situation of the person so accosted, insulted, taunted or

challenged"³.

The statute was declared unconstitutional and the holding is discussed in detail at page 30, 31, and 32 of this brief.

In light of the uncertainty of Federal First Amendment law with respect to the "fighting words" doctrine⁴ and the "clear and present danger" doctrine⁵, the case was primarily decided on the protection afforded by the Maine Constitution⁶. It seems that the Maine statute made a conscious effort to espouse the doctrines of CHAPLINSKY (infra) and SCHENCK (infra). Likewise some of the language in the Logan City Ordinance suggest that the drafting was done with CHAPLINSKY and SCHENCK doctrines in mind. Appellant suggests that all of that care to espouse these essential doctrines is for naught; neither "abusive" nor "obscene" satisfy the requirements of the Utah Constitution.

Appellant suggests that this court likewise decide the instant case on State Constitutional grounds, thus avoiding the inconsistencies and uncertainties of the federal doctrines of "fighting words" and "clear and present danger". In recent times, the most cogent analysis of a state statute in light of

³. 17 A.M.R.S.A. § 501(2)

⁴. CHAPLINSKY v. NEW HAMPSHIRE 315 U.S. 568, 62 S. Ct. 766, 86 L. Ed 1031 (1942)

⁵. SCHENCK v. U.S. 249 U.S. 47, 52, 39 S.Ct. 241, 249

⁶. The Maine Constitution Article I Section 4, in pertinent part, provides that "every citizen may freely speak, write and publish his sentiments on any subject, being responsible for abuse of this liberty;...."

CHAPLINSKY (supra) was in GOODING v. WILSON 405 U.S. 518, 92 S. Ct. 1103, 31 L. Ed. 2d 408 (1972) where, against the accusation of the dissenters that the court was "merely paying lip service to CHAPLINSKY", the court struck down the Georgia statute in that it could be applied "to utterances where there is no likelihood that the person addressed would make an immediate violent response". Thus in the 30 years since CHAPLINSKY, the court moved from words "whose speaking constitute a breach of the peace by the speaker...." to a measurement of the words in terms of the subjective response of the addressee. Not only does the shift fail to represent a rational refinement or extension of the same doctrine but it forces a subjective approach into an area crying for a workable objective standard. To add to the confusion, consider the statement of the "clear and present danger" doctrine as found in LANDMARK COMMUNICATIONS INC v. VIRGINIA 435 U.S. 829, 98 S. Ct. 1535, 56 L.Ed 2d (1978). The court said

"properly applied, the test requires a court to make its own inquiry into the imminence and magnitude of the danger said to flow from the particular utterance and then to balance the character of the evil, as well as its likelihood, against the need for free and unfettered expression".

Clear and present danger then, has been drawn into the arena of subjectivity, balancing the nature of the conduct against anticipated evils with a result based on each courts inquiry into the facts and construction thereof.

Many states, in the wake of GOODING (supra), have sought to

fashion their own standard; perhaps the Utah legislature proposes UCA 76-9-102 as a standard satisfying constitutional mandate. In STATE v. JOHN W. (supra) the Maine Court notes the efforts of other states to define fighting words and comments as follows:

"Many other courts, faced with the task of determining what constitutes fighting words, have applied tests quite similar to that applied by § 501(2), tests which are objective, but which focus on the context of the incident rather than solely on the content of the words. See, e.g., HAMMOND v. ADKISSON, 536 F 2d 237 (8th Cir. 1976) (words must be employed "under such circumstances that they are likely to arouse an immediate and violent anger in the person to whom the words were addressed" (emphasis in original)); MORRIS v. STATE, Fla., 335 So. 2d 1, 2 (1976) and HARBIN v. STATE, Fla.App., 358 So. 2d 856, 857 (1978) (overturning convictions for using profanity to a police officer on the ground that the words did not "tend to incite an immediate breach of the peace"); COMMONWEALTH v. A JUVENILE, 368 Mass. 580, 587, 344 N.E. 2d 617, 624-625 (1975) (fighting words must be "personally abusive ... in the sense that they are a face to face personal insult," but "the determination may not rest on subjective perceptions since 'an undifferentiated fear ... of disturbance is not enough to overcome the right to freedom of expression,'" quoting TINKER v. DES MOINES INDEPENDENT COMMUNITY SCHOOL DIST., 393 U.S. 503, 89 S. Ct. 733, 21 L. Ed. 2d 731 (1969); STATE v. HOSKINS, 35 Conn. Sup. 587, 401 A2d 619 (1978) ("fighting words concept has two aspects ... the quality of the words themselves ... [and] the circumstances under which the words are used"); STATE v. AUTHELET, R.I., 385 A. 2d 642, 649 (1978) "[fighting words] must be personally abusive and inherently likely to provoke violent reaction').

One might question whether any of the tests above propounded

would satisfy the constitutional mandate but most courts seem to agree that the words must constitute a personal insult directed at a person with intention to provoke an immediate violent response. This construction would seem to demand more of an ordinance than Logan's enactment would provide in that the contested ordinance inadequately deals with the result or probable result of the speech. Perhaps the best test is no test at all, appellant suggests that this Court should take the position that speech, though protected, may lead to criminal conduct which might ultimately involve the speaker and the speaker thereby embarks into certain areas at his risk. Certainly this standard would not preclude criminal sanctions in the area of nuisance, assault, terroristic threat, and obscenity as well as any other essentially non verbal conduct now mentioned within the disorderly conduct ordinance.

THE UNITED STATES CONSTITUTION

in KOLENDER v. LAWSON 461 U.S. 352, 75 L.Ed. 2d 903, 103, S.Ct. 1955 (1983) the Court said at page 908;

"In evaluating a facial challenge to a State law; A Federal Court must, of course, consider any limiting construction that a State Court or enforcement agency has proffered"⁷

The recent case of PROVO CITY CORPORATION v. WILLDEN (supra) seems to ascribe to the FLIPSIDE (infra) doctrine, in each case

⁷. Quoting from HOFFMAN ESTATES v. FLIPSIDE, HOFFMAN ESTATES, INC., 455 U.S. 489, 494 n. 5, 71 L. Ed. 2d 362, 102 S. Ct. 1180 (1982)

emphasis is upon questions of free speech and free association.

The court in KOLENDER (supra) went on to say that;

"the void for vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement"

Aside from the previous discussion regarding the terms "public inconvenience", annoyance" and "alarm". This court may be assisted by Federal cases construing "abusive" and "obscene", Respecting the term "abusive", in GOODING v. WILSON (supra at p. 415) the court struck down a State statute, declaring that abusive encompassed other than "fighting words".

In the case of COHEN v. CALIFORNIA 403 U.S. 15, 23, 29 L. Ed. 2d 284, 91 S. Ct 1780 (1971) it was held that merely offensive or vulgar language could not be punished, at least when addressed to an audience which was not captive. While it is well settled that obscenity is not protected speech, the coarse and vulgar terms as employed by appellant certainly could not be judicially construed as having prurient connotations and the city did not specifically suggest otherwise at the trial, apparently concentrating on the "fighting words" aspect of the utterances of appellant. LEWIS v. NEW ORLEANS (supra) struck down and ordinance that made it unlawful:

"for any person wantonly to curse or revile or use obscene or opprobrious language toward or with reference to any member of the City Police while in actual performance of his

duty"

The federal cases cited, along with ROSENFELD v. NEW JERSEY^o and BROWN v. OKLAHOMA⁹ which were remanded for reconsideration in light of GOODING and COHEN (supra) as well as the cases remanded for reconsideration in light of LEWIS (infra) they being LUCAS v. ARKANSAS^{1o}, ROSEN v. CALIFORNIA¹¹, and KARLEN v. CINCINNATI¹², make it abundantly clear that appellants speech, in the instant case, did not come within the area of fighting words. Regardless of intrusion into that area, the speech complained of in this case is protected. In summary the City has adopted a content based speech regulation and has thereby impinged upon the guarantees of free speech enjoyed by us all.

POINT II

THE LOGAN CITY ORDINANCE 12/8/9 IS OVERBROAD AND IS UNCONSTITUTIONALLY VAGUE AS APPLIED TO THIS DEFENDANT IN THE SITUATION IN WHICH HE WAS INVOLVED AND IS THEREBY VIOLATIVE OF THE PROTECTIONS AFFORDED THE DEFENDANT BY ARTICLE I SECTION 15 OF THE CONSTITUTION OF THE STATE OF UTAH AND BY THE FIRST AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES OF AMERICA.

Appellant contends that under the facts of this case, his

^o. 408 U.S. 901

⁹. 408 U.S. 914

^{1o}. 416 U.S. 919

¹¹. 416 U.S. 923

¹². 416 U.S. 924

actions were protected and that his conduct did not constitute a crime and that the prosecution and conviction that resulted therefrom violated rights afforded him under the due process clause and equal protection clause of the Constitution of the United States of America and parallel provisions of the Utah Constitution. The record of this trial is replete with references to coarse and vulgar utterances where the terms "goddamn", "fuck", "fucking", "bullshit", "piss me off" and "hell" were employed (T. 97 through 100). On the other hand, there is no real issue but that the only purpose of appellant in making these utterances was to question the authority of two police officers to detain him, cite him and search his vehicle and for the further reason to assert his right to be free from the intrusion of the officers onto his property and into his affairs. Appellant asserts that he has the right to inquire, whether or not his opinion enjoys any support in the law.

In LEWIS v. CITY OF NEW ORLEANS 415 U.S. 130, 93 S.Ct. 970, 39 L.Ed. 2d 214 (1974) Justice Powell in concurrence said;

"The issue in a case of this kind is whether 'fighting words' were used. Here a police officer, while in performance of his duty, was called 'g__ d__ m__ f__ police'. If these words had been addressed by one citizen to another, face to face and in a hostile manner, I would have no doubt that they would be "fighting words". But the situation may be different where such words are addressed to a police officer trained to exercise a higher degree of restraint than the average citizen".

Mr. Justice Powell went on to find that the Louisiana

statute;

"confers on police a virtually unrestrained power to arrest and charge persons with a violation the present type of ordinance tends to be invoked only when there is no other valid basis for arresting an objectionable or suspicious person"

A good many State Courts have adopted the reasoning of Mr. Justice Powell in LEWIS (supra), appellant submits that the reasoning has singular application to the facts of the instant case.

ORATOWSKI v. CIVIL SERVICE COMMISSION 3 Ill. App. 2d 551, 123 N.E. 2d 146 (1954) at page 151 observed that;

"words addressed to an officer in an insolent manner do not, without any other overt act, tend to breach the peace because it is the sworn duty and obligation of a peace officer not to breach the peace and beyond this to conduct himself to keep others from so doing. He has an obligation to exercise a great deal of restraint in dealing with the public and should not permit abusive statements to so arouse him that he will commit a breach of the peace".

No comment more adequately summarizes and narrows the issue presented by this case than that found in HARBIN v. STATE (supra) where the Florida Court said that [in these prosecutions]"the police officer is the only person who arguably could have been incited to an immediate breach of the peace".

In the instance case, the officers effected a traffic stop¹³

¹³. Although not placed at issue at the trial level nor argued here, the circumstances of the stop suggest the possibility of a pretextual stop.(T. 34-35)

(T. 39-40). A claim is made that the detained person at once became argumentative and profane and ordered the officers from his property (T. 40-42). On cross examination, Defendant's counsel elicited the following testimony (T. 97 line 16 to T. 101 line 2) as follows;

"Q. And so he reached in the vehicle and produced his registration; is that right?

A. That's correct.

Q. Okay. Didn't take a gun out or anything like that?

A. No, sir.

Q. So, you arrested him?

A. Yes, sir.

Q. Okay. So, you had his drivers' license, you had his registration, everything you'd asked for; but then you arrest him anyway?

A. Because of the situation, I didn't see any other way out of it.

Q. Why? What else were you going to do at that point, that you were afraid that he was going to interfere with?

A. Because he had already demonstrated to me disorderly conduct.

Q. So, you didn't--so, whether he had said that last 'Get your fucking light out of my car, goddamit', you would have arrested him anyway?

A. That's hard to say. If he would have settled down, probably--it's hard to say. I can't sit--you know, sit back and second-guess what we were going to do.

Q. Well, what you--don't you think that it was maybe just the shock of that last obscenity, as it were?

A. No, sir.

Q. You don't think it was that?

A. That was the fin--that was the straw that broke the camel's back, so to speak.

Q. At that point, you became angry; is that right?

A. No, sir.

Q. Did you feel like the next thing that was going to happen was he was going to swing on somebody?

A. I felt that was going to happen prior to

that.

Q. But it didn't?

A. No, sir. It did not.

Q. And he got his driver's license out and his registration out, and he didn't hit anybody; is that right?

A. That is correct.

Q. So, actually, at that point, I suppose, from what you've said, that the situation was pretty well defused?

A. No, sir. It was not.

Q. Why didn't you just, at that point, you had his driver's license, registration, write him a ticket for speeding, and leave?

A. Because that's not the way it happened.

Q. Well, then, this is wrong, this recording?

A. No, sir.

Q. When did he hand you the registration?

A. If he handed it to me, it would have been--it occurred right after, 'This is a bunch of crap. You know that the car's mine'.

Q. Okay. So that's when he handed you the registration?

A. Yes, sir.

Q. So, you had the registration, you had the driver's license?

A. Yes, sir.

Q. And then you arrested him?

A. Yes, sir.

Q. So that was, I take it, a forgone conclusion at that point, you were going to arrest him anyway?

A. At that point, yes, sir.

Q. Okay. Whatever he came up with?

A. That's correct.

Q. So, that was really before he said anything, any swear words for quite a while, for at least a page of testimony here, he hadn't sworn once during that time. You--so, you'd made the decision prior to--before you even engaged him with the tape recorder; is that right?

A. No, sir. That's not correct.

Q. So, it wasn't the swearing, that's not the reason that you arrested him; is that what you're saying?

A. No, sir. That's not what I'm saying.

Q. You did arrest him for the swearing?

A. That was part of it.

Q. Okay. Because you felt that anybody that said fuck in Logan City was guilty of disorderly conduct; is that correct?

Mr. Brady: Your Honor, I'm going to object. It's argumentative.

THE COURT: I think it is. I'll sustain it¹⁴.

Appellant submits that all salient portions of the confrontation that led to the arrest are read from a transcript of a recording made at the scene (T. 85-91). It is probably not important in this case but the contention of officer Roper and Monroe in light of officer Ropers testimony that the first statement of import was "I need to see your driver license" and that is the subject under discussion at the commencement of the tape (T.40). The conclusion is inescapable that there was no real activity perceived by the officer that was disorderly until the appellant said "Get you fucking lights out of my car, Goddamit you guys piss me right off" (T. 88-89. This conclusion is fortified by the exchange (T. 96 line 25, T. 97 lines 1 & 2)

"Q. So that last swear word was the one that keyed the whole thing I take it.

A. That kinda--yes sir".

Interestingly enough, for all of the discussion during and after the arrest, the officer never do answer appellants queries as to why he is being arrested. Perhaps, the arrest was for

¹⁴. Appellant submits that this ruling was clearly erroneous.

speeding¹⁵ and the other charge was by way of afterthought. Although the officer made much of continual profanity, officer Roper testifying in response to the question,

"Q: As he continued to talk to officer Monroe he kept using the work 'fuck', is that right?

A: That's correct". (T. 51)

Officer Monroe stated that his conversation with appellant was almost entirely recorded (T. 84) and the only use of the "F" word is concerning the shining of a flashlight into appellants car. Officer Monroe also stated that Appellant calmed considerably upon being told he was under arrest (T. 93).

Despite the apparent inconsistencies in the accounts of the participants, the fact remains that the officer dealt with a difficult and taxing conversation with an argumentative citizen by the simple expediency of arresting him and taking him to jail.

In STATE v. JOHN W. (supra) the court found facts as follows:

"With these general principles in mind and viewing the evidence in the light most favorable to the State, we turn to the facts of this case. Shortly after 1:00 a.m. on the night of April 1, 1979, John W., a juvenile, was driving his car in Saco accompanied by his older sister Maria. Saco police officer Ronald Rochefort stopped them, approached the car and asked John for his license and registration. When Maria asked why they had been stopped, Rochefort said nothing. Maria got out of the car and again asked why they had been stopped and Rochefort again refused to answer. Maria came out into the street and began yelling. Rochefort took her back

¹⁵. Defendant was cited for violation of Logan City Ordinance 42-7-1 speeding 25 in a 35 mph zone, the jury acquitted him of that charge.

to the sidewalk and went back to the driver's window, whereupon Maria began calling him a "fucking pig" and prevented him from talking to the driver. Rochefort arrested Maria for disorderly conduct, took her to his car and handcuffed her. She later entered a guilty plea to the charge of disorderly conduct. Shortly after Maria's arrest Officer Bradley Paul arrived in another police cruiser. John asked both Rochefort and Paul what was going on. Officer Paul walked toward John and advised him that Rochefort has arrested his sister for disorderly conduct. John hollered, 'I want to know what the hell is going on.' Officer Paul again explained that this sister has been arrested for disorderly conduct. John kept repeating, 'I want to know what the hell is going on.' Officer Paul tried to explain to John that he should come to the station and arrange for bail for his sister. John became more abusive so Officer Paul turned and walked back to his cruiser. As Officer Paul walked away, John screamed at him, 'Hey, turn around and come back here' and 'Hey, you fucking pig, you fuckin kangaroo.' Officer Paul then ordered John to get back into his car. John hollered, 'Fuck you.' Officer Paul thereupon arrested him."

Considering those facts, the court observed that;

"In this case, the police initially had intruded into the activities of the person involved. The police had accosted the juvenile and his sister and had arrested his sister. Persons involved in an arrest have a right under both the Maine and the United States Constitution, to remonstrate, to object, or to protest the arrest. We do not condone or encourage abusive language, but even crude speech may be entitled to constitutional protection, COHEN v. CALIFORNIA, supra, and the right of that constitutional protection is heavier after a police intrusion. The right to remonstrate against a police intrusion into our activities is one element which distinguishes our democratic society from the police state. See 9 Harv. Civil Rights-Civil Liberties

L.Rev. 1, 10 (1974).

(arguing that speech addressed to any public official has a political aspect, bringing it within the central concerns of the first amendment). In PEOPLE v. JUSTICE, 57 Ill.App. 3d 164, 166, 14 Ill.Dec. 836, 838, 372 N.E. 2d 1115, 1117 (1978), the Appellate Court of Illinois, citing ORATOWSKI, (supra) said: 'Arguing with a police officer, even if done loudly, will not of itself constitute disorderly conduct' Defendant's conduct may have been intemperate, unreasonable and unjustified,. but there is no proof that her action caused public disorder."

The Maine Court went on to hold that;

"[The] language and accompanying conduct while engaged in the permissible activity of verbally protesting the arrest were not so egregiously offensive and likely to provoke a violent response as to forfeit the protection of (the State and Federal Constitution)"

The respondent, at trial, made much of the police officers subjective impressions;

"The situation began to deteriorated just most immediately" (T. 82 line 25)

...I was standing just to--just behind officer Roper and just a couple of feet to the right of him when I saw the situation deteriorating to the point ... that I felt it was becoming a fight. (T.82 lines 14-18)

The situation, as I said, got worse, and by my appraisal of worse, he became closer, I was backing up from him, and at times, he was within 6 to 8 inches from my face, yelling at me...(T.42 lines 3-6)"

This is always the problem with subjective impressions, certainly there are situations in which an unarmed citizen would deliberately challenge and fight with two armed police officers-

but can we, from an objective standpoint, credit this impression. One might ask if there was a threat with a show of force or violence, why wasn't appellant arrested for assault?^{1e}

STATE v. JOHN W.(supra) also considered the case of NORWELL v. CINCINNATI 414 U.S. 14 94 S.Ct. 187, 38 L.Ed. 2d 170 (1973) and analyzes its applications to argument with arresting officers and observed;

"the court held that a 69-year-old man who objected to detention by a police officer in a manner that was "hostile" and "annoying" to the officer, could not be punished for disorderly conduct because the record clearly showed that there was no "abusive language or fighting words." The court did not attempt to suggest what would have constituted such language. It is at least clear, however, that "fighting words" implies a direct, face-to-face confrontation and provocation; it is also particularly clear that arguing with an arresting officer is not per se disorderly conduct. We must bear in mind Justice Harlan's characterization, in COHEN, of those who might be willing to strike out upon the hearing of any vulgarity as "lawless and violent." 403 U.S. at 23, 91 S.Ct. at 1787. See also PAPISH v. BOARD OF CURATORS, 410 U.S. 667, 93 S.Ct. 1197, 35 L.Ed. 2d 618 (1973); Annot., 39 L.Ed. 2d 925 (1976)"

In conclusion it seems apparent that both State and Federal courts have been reluctant, if they have not refused, to extend the fighting words doctrine to confrontations between officers and citizens in arrest or detention situations. It is suggested that this court hold that speech addressed to any public official

^{1e}. Logan City Ordinance 12-8-2

has a "political aspect", bringing it within the central concerns of the First Amendment and at least this court should require that as a result of the verbal conduct a public disorder occurred.¹⁷

POINT III

THE JURY WAS IMPROPERLY AND INADEQUATELY INSTRUCTED BY THE COURT.

Appellant contends that the court erred in giving instructions 2 and 3. Each of these were objected and excepted to during trial (T. 121)(T.154) Appellant contended in arguments throughout the trial that the ordinance was unconstitutional and declined to participate in any attempt to clothe the ordinance with a constitutionally permissible interpretation. Since the court was bound, upon giving instruction number 2, to modify or explain it in light of the required elements of "fighting words" and "clear and present danger", it was plain error to fail to instruct the jury that they must find these elements beyond a reasonable doubt. STATE v. HANSEN 732 P 2d 127; 45 Ut.Adv.Rep. 19 (1983) held that it is the duty of the judge to instruct the jury on all relevant law. Accordingly the judge may, over objection of Defendant's counsel give any instruction that is in proper form, states the law correctly and does not not prejudice

¹⁷. 9 Harv Civil Rights - Civil Liberties L.Rev 1, 10 (1974)

the Defendant.

POINT IV

THE COURT IMPROPERLY CHARGED THE JURY WITH THE ELEMENTS OF DISORDERLY CONDUCT.

The giving of instruction number 3 was fatal to a fair trial of the case. The Respondent was bound by their pleading (see information in file) and the case not only was limited thereby but in addition, no proof was adduced which bore upon the other portions of the ordinance incorporated in instruction number 3. Appellant did timely object (T.154). One would have to speculate, in light of the giving of instruction number 3, as to whether Appellant's conviction by the jury was based on verbal or non-verbal conduct. STATE v. HANSEN (ibid)

POINT V

THE COURT, IMPROPERLY, AND AT THE INSTANCE OF THE PROSECUTION, ADMONISHED THE DEFENDANT AND COUNSEL IN THE PRESENCE OF JURY.

During the respondents case in chief, commencing at (T.61 line 8) and ending at (T. 62 line 5) the following exchange took place.

"MR. BRADY: Your Honor, can I--maybe we need to stop. I notice Mr. Huber's having problems controlling himself. I wonder if we need a drink of water or something for him.

THE COURT: Mr. Huber, I--

MR. HUBER: I'm having a hard time swallowing this.

MR. BRADY: Maybe he needs a drink.

THE COURT: Well, I realize that, but I'm admonishing you, Mr. Huber, to not make any

gestures in the presence of this jury.

MR. HUBER: Okay. I'm sorry, your Honor.

THE COURT: You'll have your chance to testify when your turn comes, and I don't want you to shake your head one way or another. Just sit there and listen to the--

MR. LAURITZEN: Well, I object to that, your Honor. He can certainly do that, that's not testimony.

THE COURT: He's not going to do it in my Court, Mr. Lauritzen I want you to understand that.

MR. LAURITZEN: Well, I continue my objection, because I can't believe--

THE COURT: You may have your objection. You may proceed.

MR. LAURITZEN: Thank you."

Plaintiff submits that the requirement of impartiality by the judge was severely eroded in the eyes of the jury by this exchange.

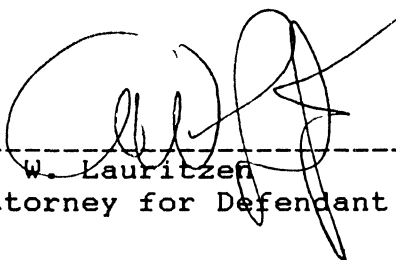
CONCLUSION

In light of the fact that the Logan City Ordinance is facially defective and violates the protections afforded Appellant under the Constitution of the State of Utah and the Constitution of the United States of America and considering that the Logan City Ordinance, as written, could not be constitutionally applied to the Defendant under the facts of this case, Appellants conviction should be reversed and the Appellant should be discharged.

In light of improper and inadequate instructions given to the jury and in light of prejudicial conduct of the Court, even if the Court finds that the enactment is Constitutional, the case

should be reversed and remanded for a new trial.

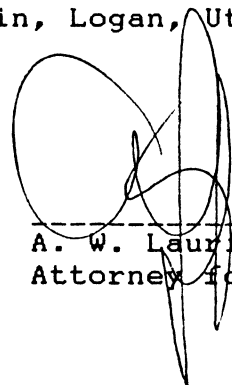
RESPECTFULLY SUBMITTED this 19th day of May, 1989.



A. W. Lauritzen
Attorney for Defendant

MAILING CERTIFICATE

I hereby certify that on the 19th day of May, 1989, I mailed four (4) copies of the foregoing Appellant's Brief to Scott Barrett, Esq., 255 North Main, Logan, Utah 84321.



A. W. Lauritzen
Attorney for Defendant

1 A Yes. I was.

2 Q Directing your attention to that date, approxi-
3 mately 1:45, 1:30 a.m., early morning hours, were you on
4 duty?

5 A Yes.

6 Q And did you have occasion to come in contact with
7 one Ralph Lowell Huber on that date, at approximately that
8 time?

9 A Yes. I did.

10 Q For the record, is Mr. Huber here in the courtroom?

11 A Yes. He's seated to your right in the light blue
12 shirt.

13 Q Seated next to Mr. Lauritzen?

14 A Yes.

15 Q Okay. Tell me, Officer, what is it that you were
16 doing that morning prior to your contact with Mr. Huber?

17 A As I mentioned, I was on duty, in uniform, in a
18 vehicle that did not have any outside markings, other than
19 a spotlight as you mentioned. I was working in conjunction
20 with another police officer.

21 Q And who was the other officer you were working
22 with?

23 A Officer Greg Monroe, of the Logan City Police
24 Department.

25 Q Okay. Now, there's a drawing on the board here to

1 my left; did you make that drawing?

2 A Yes. I did.

3 Q Would it be helpful for you to describe to the
4 Court what--where you were and what you observed prior to
5 your contact with Mr. Huber, if you were to step to the
6 board?

7 A I think it would.

8 Q Why don't you step to the board and show us where
9 you were and what you observed?

10 If you could stand over here to the right, so the
11 jury can sit up and see.

12 A It's early morning hours, it's darkness outside.
13 Officer Monroe and I, in this police vehicle, parked in the
14 parking lot of Wilson Motor. At that time, we were watching
15 a person who was walking up the sidewalk here; our attention
16 was drawn to that person, the late hours, we were wondering
17 what he was doing there.

18 At that time, our attention was taken from this
19 person to a vehicle that--

20 Q Tell me what your attention was taken to; not
21 what our attention was taken to, Officer.

22 A My attention was drawn to the driver of the
23 vehicle, I'm assuming about here. My attention was drawn
24 to the sound of engine noise as the vehicle was coming up
25 the roadway. As I looked to my left, I saw the vehicle, it

1 was a small car, the engine noise sounded to me like
2 deceleration. He turned the corner, and as it did, it
3 turned wide, and got into some small pea gravel, and started
4 to side slip, not excessively, but started to slide. At
5 that point, it accelerated very rapidly, came past our
6 position about ten to 15 feet in front of our car, accelerated
7 down and braked, and stopped for the red light at the
8 intersection of Third North and Main.

9 At that time, I pulled out from our position and
10 pulled up behind the car that had made the turn. We waited
11 for the semaphore to turn, the light turned green and as it
12 did, the vehicle drove through. At that time, I activated
13 the red spotlight, pointed it at the car. The vehicle pulled
14 over to the right, and into the parking lot of this
15 business, here at 301 North Main.

16 At that point, we pulled in behind, both Officer
17 Monroe and I exited the car, and made contact with the
18 single driver.

19 Q Take a seat again.

20 Officer, what's the length of this block here that
21 you're observing, between First East and Main Street, if
22 you know?

23 A I don't know. It's a regular city block.

24 Q All right. You say you saw the vehicle accelerate?

25 A Yes.

1 I've indicated there, and demonstrated to me like he was
2 going to go in the business, or he went up and grabbed hold
3 of the door.

4 Q And what did you say or do at that time?

5 A At that time, I heard Officer Monroe verbally call
6 to him and say that we needed to talk with him.

7 Q Let me just ask you one quick question. This all
8 occurred at the Third North and Main area of Logan City?

9 A Yes.

10 Q Okay. You heard Officer Monroe say, "We need to
11 talk to you"?

12 A Yes.

13 Q What happened then, or what was Mr. Huber's
14 response?

15 A At that time, he turned and faced us.

16 Q Okay. How close were you to him?

17 A At that time, I would have been three to four feet
18 from him.

19 Q Okay. And did he say anything?

20 A I believe at that time I asked him a question.

21 Q Okay. And what did you ask him?

22 A I asked him for his driver's license---no, I correct
23 that. I recall, I asked him how he was, I ask everyone
24 that question at the first initial contact. I said, "How
25 are you tonight?"

1 Q And his response?

2 A His response was, "Not very good."

3 Q Okay. What did you next ask him?

4 A I asked him what the problem was, why--what the
5 problem was, and he said that we were trespassing on his
6 private property, we had no reason to be there. If I can
7 recall, and he--and demonstrate his actions here.

8 Q Okay. Are you saying that he's not just saying
9 this? Is he moving as he's saying--

10 A No. He, at this point, he said, "Not very good",
11 and he raised his voice tone, and turned and faced, squared
12 off, faced us. And at that point, I said, "What's the
13 problem?" And he said, "You guys are on my private property,
14 you have no reason for being here, you're trespassing", and
15 he stepped closer to us and said, "Now git", pointing his
16 finger in a gesture I assumed as we should leave.

17 Q Okay. What was your response?

18 A My response at that time, I had no indication as
19 to why he was acting like that, I was trying to gain
20 information as to why he was in that train of thought. I
21 asked him for his driver's license, and his response to me
22 was he wasn't going to give it to me. I said, "I need to
23 see your driver's license. This is a simple situation, I
24 just need to see your driver's license". And he--he said,
25 "Fuck you, I'm not going to give it to you."

Q Okay. Just right out, like that?

Okay. What was your response?

A Well, at that time, I could see that we were going to encounter a problem, and in my mind, I was trying to figure out why, if something had happened that had set this person off before we had contact with him, I was trying to quell the situation. All I wanted was his driver's license and his registration, and to talk with him for a minute about his driving. I mentioned we were on a specific detail, an alcohol enforcement, was trying to obtain whether he had been drinking or not.

The situation continued to downhill, his attitude and his demeanor--

Q Now, don't tell me his attitude, his demeanor; tell me what he said and what you said?

A I continually, several times, asked him for his driver's license, and my--his responses included, as I say, continually, "Fuck you", "This is bullshit", "You know who I am", he pointed at Monroe and said, "You know who I am", and I said, "I don't know who you are, and I need to see your driver's license", and it was more of the same. He said, "You can run it on the computer and get it as quick as I can. This is bullshit. You guys are harassing me, you piss me right off", and he refused to get a driver's license.

Q Okay. Were you still standing there facing each other?

A The situation, as I said, got worse, and by my appraisal of worse, he became closer, I was backing up from him, and at times, he was within six to eight inches from my face, yelling at me, yes.

Q Okay. And when you say you were backing up, how far did you back up?

A I recall backing around the front of his car as he was walking and yelling, and then he would turn his attention towards the other officer, and then I would walk back up to the car. At that point, I was shining my flashlight in the car to obtain some information there, and he turned and he just--he screamed at me, and said, "Get your fucking flashlight out of my car."

Q Okay. And he never produced a driver's license or registration for you?

A Not to me, no.

Q What's the time frame here, from when you first stopped him and said, "How are you?" to the time you're flashing your flashlight?

A It would have been a couple, three minutes.

Q Okay. What happened at that point in time?

A At that point in time, I--I thought that I would try letting him talk to Officer Monroe. Apparently, he

A After he was handcuffed, or--

Q No. After he--you said that you decided to break off your conversation with him and--

A To call? To call on the radio?

Q Huh?

A To call on the radio, is that what you're referring to?

Q Yeah, uh huh (affirmative).

A I did go back up and stand with him, yes.

Q So, you were there present, with Officer Monroe and Mr. Huber, while Officer Monroe and he were discussing the matter further, as it were?

A Yes.

Q And did you say **anything** to him during that time?

A Not that I recall.

Q But as he continued to talk to Officer Monroe, he kept using the word "fuck", is that right?

A That's correct.

Q Okay. Do you recall Officer Monroe saying, "We weren't two blocks down the road"?

A Yes.

Q When was that?

A That was in the--would have been in about the middle of our conversation. I recall Mr. Huber saying that he had seen us down by Taco Time.

A Right.

Q And at that point, he produced the registration, didn't he?

A No.

Q What did he do?

A He never did produce a registration for the car. At that point, I--

MR. BRADY: Your Honor, can I--maybe we need to stop. I notice Mr. Huber's having problems controlling himself. I wonder if we need a drink of water or something for him.

THE COURT: Mr. Huber, I--

MR. HUBER: I'm having a hard time swallowing this

MR. BRADY: Maybe he needs a drink.

THE COURT: Well, I realize that, but I'm admonishing you, Mr. Huber, to not make any gestures in the presence of this jury.

MR. HUBER: Okay. I'm sorry, your Honor.

THE COURT: You'll have your chance to testify when your turn comes, and I don't want you to shake your head one way or another. Just sit there and listen to the--

MR. LAURITZEN: Well, I object to that, your Honor. He can certainly do that, that's not testimony.

THE COURT: He's not going to do it in my Court, Mr. Lauritzen. I want you to understand that.

MR. LAURITZEN: Well, I continue my objection, because I can't believe--

THE COURT: You may have your objection.

You may proceed.

MR. LAURITZEN: Thank you.

Q (By Mr. Lauritzen) Okay. And then didn't Monroe say, "Well, we'll be with you in just a second", right after he said, "Fine, fine, fine"?

A He could have done.

Q Okay. And then didn't Mr. Huber say, "This is a bunch of crap, you know what the car--it is mine, it's always here. Get your fucking light out of my car, goddamit, you guys piss me right off"; you remember him saying that, don't you?

A I do.

Q And that's when you shine your light in his car?

A I wasn't at that time, no.

Q Okay. What were you doing then?

A I had just come from shining the light in the car, and was walking around the back of his car over to where they were standing there.

Q Okay. And at that point, then, did Officer Monroe say, "Here's the deal, Mr. Huber, you're under arrest for disorderly conduct"?

A Let's put--let me try and put it in perspective.

forward and initiated the contact with the defendant.

Q And what did you hear Officer Roper say with his contact with the defendant?

A I recall that he ask--or informed him as to why we had stopped him, asked him for his driver's license. It was at that time that the situation went downhill.

Q Okay. Downhill can mean a lot of things; we go tubing down hills, Officer.

A Okay.

Q What's downhill mean? What happened?

A The defendant began to get very verbally abusive, very hostile towards Officer Roper.

Q Okay. Let me stop you again, Officer. Verbally abusive; what do you mean by verbally abusive?

A Okay. He was--maybe I can put this in--

Q Tell me what you observed.

A Where they were, where they were standing, basically.

Officer Roper was just in front of him, a couple of feet in front of him, probably five feet in front of him. Mr. Roper was standing very close to the face of Officer Roper, approximately this close, it--

Q You're indicating 18 inches?

A Approximately 18 inches away.

Q Okay.

A Officer Roper tried to explain why we were there. The situation began with Mr. Huber yelling, "Bullshit. This is my property. You have--do you have--why, or do you have my speed on radar?" We indicated that we did not have a radar, and that we did not have him clocked on radar, but that it was simply a visual observation.

I recall that the situation got progressively worse, with Mr. Huber raising his arms and saying, "This is bullshit. Fuck you. Get off of my property. When it comes right down to it, you don't have any good reasons why you stopped me. This is my property, now git".

Q Okay.

A I carry a tape recorder, a small tape recorder with me. And as I said, I was standing just to--just behind Officer Roper and just a couple of feet to the right of him. When I saw the situation deteriorating to the point--

Q Let me--

A --that I felt that it was becoming a fight.

Q Okay. You thought it was becoming a fight?

A Yes.

Q Let me stop you right here. What's the time frame from your contact to this time that you're saying it's deteriorating and you think it's becoming a fight?

A The situation began to deteriorate just almost immediately,--

question as to our integrity and to how many opportunities we gave Mr. Huber to settle down, to give us his driver's license as we had asked.

When I finally got the tape recorder started--I had met Mr. Huber one time prior, never obtained his driver's license or anything like that, I had simply met him down at the Vault, where I believe he's the owner or manager, I'm not certain, and I figured because the situation was becoming so violent, I felt that there was going to be a fight, I felt that Officer Roper was in danger because of the close proximity and the language being used, and the tone of voice being used, that I figured, maybe, because I know him, I'll step in and maybe it'll diffuse itself.

Q Okay. And did you step in, then?

A Yes, sir. I did. And what I--

Q Okay. What did you say when you stepped in?

A What I've got is the taped conversation from what--pretty much where it began, with me.

Q Okay. Okay. So, there is a taped conversation then that you had transcribed; is that correct?

A Yes, sir.

Q Okay. And does this start on your immediate contact with Mr. Huber, or you broke in for Officer Roper, or is there some lapse in time? Or tell me what you recall.

A As I recall, when I finally got the tape recorder started, I'm not--as I recall, I had just got the tape recorder started, then I initiated contact with Mr. Huber.

Q Okay. And you have a copy of that in front of you?

A Yes, sir.

Q Okay. And that starts with Mr. Huber saying, "You're two blocks down the road".

A Yes, sir. He--

Q Had you made any contact with Mr. Huber prior to this conversation right here? Had you asked him any questions prior to that coming out?

A Just simply for his driver's license when he made the stop. That's all I--yeah.

Q Okay.

A It's just when I informed him as to needing his driver's license.

Q Okay. And so you stopped--or you stepped up, and he said, "You're two blocks down the road"?

A Yes, sir.

Q Do you recall if that was just his comment, or was that in response to a question?

A That was in response to us telling him why we had stopped him, where we were.

Q When you say "we", who's doing the talking?

A That was Officer Roper speaking at that time.

Q Officer Roper's talking to him?

A Yes, sir.

Q And this is a response from Mr. Huber?

A Yes, sir.

Q Okay. And I assume then it goes verbatim--

A Yes, sir.

Q --as to that, what you had on the tape recording here?

A Yes, sir.

Q And you step in and say, "We weren't two blocks down the road"?

A That's correct.

Q Mr. Huber says, "You were clear the hell down by Taco Time"?

A Yes, sir.

Q And your response? Why don't you read to me what your response was, and I'll--

A My response was, "Do you really know--or do you want to know where we really were?" I says, "When you came around the corner, when you came around the corner awfully fast, right at the road here, we were parked just off the road, but we do need to see your driver's license".

Q And Mr. Huber's response is, "This is my property

and you're on it without my permission and that's it, that's what it boils down to. If it--I'm tired of being harassed"?

A The next--the next line was, "We need to see your registration, too, please".

Q Now, let me just stop you right here, Officer. "We need to see your registration, too, please"; has he already given you his driver's license, or--

A Finally--some time during the conversation, he had relented and did produce his driver's license.

Q Okay. Well, let's--let me ask you that question again here. Mr. Huber's response to, "We need to see your registration, too, please", is "Bullshit. Now look, you're on my property, this is my building, I haven't done anything wrong, I want to be left alone, I'm--I get tired of this harassment because I come out of my bar, and you guys start harassing, and I don't want it". And what's your response?

A "We need to see your driver's license and the registration".

Q So, he hadn't given you the driver's license, yet?

A What happened was, things are getting pretty--pretty intense. He did give us the driver's license right about this time.

Q Okay.

A And I simply asked for it again, after he had already produced it.

Q Okay.

A As I said, the situation was becoming so violent that I was certain that there was going to be a fight.

Q Okay. And Mr. Huber says, "The registration is current, it's on the back and you're going to run it through the radio, you can find out just as quick as I can." And what's your response?

A "Look, Mr. Huber, we're trying to be decent here".

Q And Mr. Huber says, "No, you're not. Why did you pull me over?"

A "As we said, you were going too fast."

Q And Mr. Huber's response is, "No, it's because what time it is, because you have nothing else to do, and that's it". And what's your response?

A "In just about two seconds, we're not going to be decent. Okay? We need to see the registration."

Q Mr. Huber says, "Fine, fine, fine. Get your lights out"?

A And I believe this was when Officer Guyer arrived at the scene, and says, speaking to him, "We'll be with you in just a second."

Q Okay. And Mr. Huber says, "This is a bunch of crap. You know what the car--it--it's mine, it's always here. Get your fucking lights out of my car, goddamit, you guys piss me right off".

A My response was, "Here's the deal, Mr. Huber. You are under arrest for disorderly conduct. We're going to jail. Put your hands behind your back. Turn around and put your hands behind your back."

Q And then we go to Page 2; is that right?

A Yes, sir.

Q Okay. Now, let me ask you. After looking at that Page 2, is Officer Guyer on the scene, yet?

A He had just arrived at the scene.

Q Okay. Now, who made the decision to arrest him for disorderly conduct?

A I'm the one that said he was under arrest.

Q Okay. And like I say, you just said, "Put your hands behind your back. Turn around and put your hands behind your back", and Mr. Huber says, "What is the deal, here?"

A I again informed him that--I said, "You are under arrest."

Q And Huber says, "For what? For what? Hold your horses, let me put my keys in my pocket".

A "Okay. We'll do that."

Q And Huber says, "Turn my car off, can I turn my car off?"

A And I replied, "Not now."

Q And Mr. Huber says, "Wait a minute. Can I call

my attorney right now? This is stupider than hell. You guys want to go for this, you sit there in my car for no reason whatsoever."

A That's when Officer Roper made comment, and asked Mr. Huber if the handcuffs were too tight.

Q Okay. What's the time frame that it took you to put the handcuffs on him?

A There was a couple minutes involved in that as well.

Q What happened when you put the cuffs on?

A What happened just prior, or during the cuffing process, Mr. Huber was facing his vehicle, Officer Roper had one arm and I had the other arm, and he was struggling to break free of us.

Q Okay. Let me ask you, how were you situated when you first told him he was arrest and started to cuff him? Were you facing his vehicle?

A I was facing him.

Q Okay.

A I was facing Mr. Huber. And we were--his vehicle would have been, was parked to our right facing north--

Q Uh huh (affirmative).

A --in the parking strip, and I was just off to the side of it, with Mr. Huber.

Q Okay. And you told him you were going to cuff him?

A Yes, sir.

Q And did you do that? I mean, you said "Put your hands behind you. Turn around and put your hands behind your back".

A Yes.

Q What happened then?

A He didn't. We physically had to turn him, turn him sideways and try to put his arms behind his back. He resisted. He didn't want us to put the handcuffs on him.

Q Most people don't.

A No. Most people don't.

Q Okay. Your tape recorder is still playing at this time?

A Yes, sir.

Q Did he say anything while you were cuffing him?

A Not--the only thing--what I have here is what there was,--

Q Uh huh (affirmative).

A --as far as my contact with him was.

Q Okay. Do you have any independent recollection of him saying anything while you're cuffing him?

A Other than what you--he said, "That one's way too tight", making reference to one of the handcuffs.

Q Okay. But that's after you got him cuffed?

A Uh huh (affirmative).

Q Okay. And my question is, while you were cuffing him, you say you struggled with him?

A Yes.

Q Was there any language or any comments whatsoever at that time that you recall?

A Other than what is in here, no.

Q Okay. You don't recall that? Okay. How close were you to him while you were cuffing him?

A I was on the right-hand side of him, directly-- right next to him.

Q Okay. And it took two or three minutes to get him cuffed?

A Yes, sir.

Q And the conversation continued that Roper's saying, "Are they too tight?" And Mr. Huber indicates that, "That one's too tight"

A Yes, sir.

Q Mr. Roper says, "Would you like me to loosen them a little bit for you?" And Huber says, "I'd like to not be wearing them. Hello. Can you explain to me why these guys are pulling this stunt?" Who are you talking to there?

A That would have been Sergeant Guyer.

Q Okay. So, Guyer actually arrived after you get him cuffed?

A He was--he was pulling up as that was occurring.

Q Okay. As you recall? Okay. And then the conversation continues as per the recording at that point in time; is that right?

A Yes, sir.

Q After you get him cuffed, and he has a brief conversation with Officer Guyer, then you still took him to jail?

A Yes, sir.

Q How long were you with him when you took him to jail and left him at the jail?

A Just long enough to fill out the form for the jailers.

Q Okay. What was his comments, if any, while you were at the jail, to you?

A He seemed qui--he was very quiet. I don't recall him making any more comments.

Q Okay. He calmed down?

A Yes. He did.

Q Okay. Time frame, as best as you can recall, from when you initially contact him there, as you pull in behind him to make the stop, and the time frame that you finally got him arrested and Officer Guyer's on the scene talking with Mr. Huber at that point?

A Approximately, total time was approximately five to six minutes.

A That is correct.

Q Okay. After that, he calmed down quite a bit?

A No, sir.

Q Well, there's not very much hard language after you turned your recorder on; is that right?

A Not very much. No, sir.

Q But he didn't calm down?

A No, sir.

Q He didn't get any worse, he didn't get any better; is that right?

A It seemed to be pretty consistent all the way through.

Q Okay. He just quit swearing when you turned the recorder on?

A I don't believe that he knew that I had a recorder.

Q So that's not why he quit swearing? He just happened to quit swearing; is that right?

A I suppose.

Q The only time that he swore after the--after you turned the recorder on is when Mr. Roper shined the light in his car; is that right?

A That's correct.

Q And at that point, you arrested him?

A Shortly after that, yes, sir.

Q So, that last swear word was the one that keyed

the whole thing, I take it?

A That kinda--yes, sir.

Q And it was basically because he was objecting to looking in the car, and you didn't like that either, did you

A No. That's not what he was objecting--that is not my objections. My objections were to that, if a person's going in their vehicle, especially in a hostile situation and it's dark, I'm going to see what they're putting their hands on--

Q Okay. So--

A --for my own safety.

Q --at that point, he was entering the vehicle?

A He was leaning through the vehicle, yes, sir.

Q Okay. That's when he said, "Fine, fine, fine".

A Yes, sir.

Q And so he reached in the vehicle and produced his registration; is that right?

A That's correct.

Q Okay. Didn't take a gun out or anything like that?

A No, sir.

Q But he did say fuck?

A Yes, sir.

Q So, you arrested him?

A Yes, sir.

Q Okay. So, you had his driver's license, you had his registration, everything you'd asked for; but then you arrest him anyway?

A That's correct.

Q Why?

A Because the situation, I didn't see any other way out of it.

Q Why? What else were you going to do at that point, that you were afraid that he was going to interfere with?

A Because he had already demonstrated to me disorderly conduct.

Q So, you didn't--so, whether he had said that last "Get your fucking light out of my car, goddamit", you would have arrested him anyway?

A That's hard to say. If he would have settled down, probably--it's hard to say. I can't sit--you know, sit back and second-guess what we were going to do.

Q Well, what you--don't you think that it was maybe just the shock of that last obscenity, as it were?

A No, sir.

Q You don't think it was that?

A That was the fin--that was the straw that broke the camel's back, so to speak.

Q At that point, you became angry; is that right?

A No, sir.

Q Did you feel like the next thing that was going to happen was he was going to swing on somebody?

A I felt that that was going to happen prior to that.

Q But it didn't?

A No, sir. It did not.

Q And he got his driver's license out and his registration out, and he didn't hit anybody; is that right?

A That is correct.

Q So, actually, at that point, I suppose, from what you've said, that the situation pretty well diffused?

A No, sir. It was not.

Q Why didn't you just at that point, you had his driver's license, registration, write him a ticket for speeding, and leave?

A Because that's not the way it happened.

Q Well, then, this is wrong, this recording?

A No, sir.

Q When did he hand you the registration?

A If he handed it to me, it would have been--it occurred right after, "This is a bunch of crap. You know that the car's mine".

Q Okay. So that's when he handed you the registration?

A Yes, sir.

Q So, you had the registration, you had the driver's license?

A Yes, sir.

Q And then you arrested him?

A Yes, sir.

Q So that was, I take it, a foregone conclusion at that point, you were going to arrest him anyway?

A At that point, yes, sir.

Q Okay. Whatever he came up with?

A That's correct.

Q So, that was really before he said anything, any swear words for quite awhile, for at least a page of testimony here, he hadn't sworn once during that time. You--so, you'd made the decision prior to--before you even engaged him with the tape recorder; is that right?

A No, sir. That's not correct.

Q So, it wasn't the swearing, that's not the reason that you arrested him; is that what you're saying?

A No, sir. That's not what I'm saying.

Q You did arrest him for the swearing?

A That was part of it.

Q Okay. Because you felt that anybody that said fuck in Logan City was guilty of disorderly conduct; is that correct?

MR. BRADY: Your Honor, I'm going to object. It's

is saying, though, Mr. Brady, that the term itself is not obscene, in the Supreme Court's opinion.

MR. BRADY: The term?

THE COURT: Yes.

MR. BRADY: Well, I won't object with that argument. I can read Gooding and I think the Court can read Gooding, and the Goodsel case, the California Cohen case, and they have said, the terminology in Cohen vs. California case, it was an individual walking down a hallway with a leather jacket that said, "fuck the draft", and the court said that's not a fighting word because it wasn't uttered in a fighting word type situation.

MR. LAURITZEN: No, it said it wasn't an obscene word.

MR. BRADY: That word is a protected word. But then they start talking about fighting words, and--

THE COURT: Well, what I intend to do, gentlemen, is in the Instruction No. 2, I'm going to read it--leave it so it, after the word engaging in abusive, I'm going to leave the word "abusive" in and then I'm going to strike "or obscene language", take that out, or make obscene gestures. I don't see any obscene gestures in the evidence that's been presented that should come there, so that that instruction will read "engage in abusive manner in a public place", period.

THE CLERK: Just wipe that out, Judge?

THE COURT: Pardon?

THE CLERK: We just wipe that out?

THE COURT: Yes. I think we can just wipe that out, so what I'm going to do, I'm just going to mark the part here while I'm--just wipe that out, and then in the Instruction No. 3, I'm going to leave Paragraph 1 as its written, Paragraph 2 at the top, A, leave that in, B, I'm going to leave that in, engaged in abusive, and then from that point, I'm going to take out the words "or obscene language or obscene gestures", I'm going to have that stricken in that instruction at that point in time.

MR. BRADY: Your Honor, I would object on the record, simply--I don't have any problem with the Court saying they're going to strike obscene gestures in a public place. I firmly believe that it's obscene language, though, and I don't--I wish the Court had time to read these cases, because it's my interpretation of the cases that counsel is reading that you look at the totality of the circumstances to justify whether they're obscene or not, on their face. And I think we're taking that criteria away from the jury by not using the term, or leaving the term obscene language in there, in both 2 and 3. I have no problem with obscene gestures, I--

THE COURT: All right. I'll back up, I'll go that

far with you, Mr. Brady, I'll give you that chance, so leave the word obscene language in and then strike the word, "or make an obscene gesture", strike that.

THE CLERK: Okay.

MR. LAURITZEN: Let me point out to the Court that in State vs. John W.--

THE COURT: Is that a Utah case?

MR. LAURITZEN: No, it's a Maine case.

THE COURT: Okay.

MR. LAURITZEN: It is construing some of these others. The juvenile said, hey you fucking pig, hey you fucking pig, fuck you, and they arrested him. And the court said, indeed, the words used by the juvenile are coarse and vulgar, but have become so commonplace devoid of any prui¹ent content.

MR. BRADY: Sounds like--

MR. LAURITZEN: And that's exactly what Cohen said

THE COURT: But I think Mr. Brady's point is that he was using the language, in addition to these other gestures and other circumstances that were going on. So--

MR. LAURITZEN: As was the juvenile in John W.

MR. BRADY: John W., your Honor, the juvenile was making those comments, directing those to the officers who were arresting his sister for similar language, who pled guilty or was found guilty. It was not in a face-to-face

THE COURT: Well, I'm going to deny the motion and restrict the instructions as indicated.

MR. LAURITZEN: I'd except to the giving of that instruction in its whole.

THE COURT: Okay. We'll note your exception.

MR. LAURITZEN: Instruction No. 2.

THE COURT: We'll note your exception.

So, I guess we're back on--

MR. LAURITZEN: Well, I don't have 2, anyway, in point of fact. I don't have Instruction No. 2 in its--the form that the Court ordered it to be typed in. I've got it that the defendant did intend to cause public inconvenience, annoyance or alarm, or reckless risk thereof, by engaging in fighting, or violent, tumultuous or threatening behavior, let's see. Yeah, abusive or obscene language or make obscene gestures in a public place, okay. I've got the--

THE COURT: Yeah.

MR. LAURITZEN: I still object to it.

THE COURT: Right. Your objection will be noted, and I understand you'll take exceptions, and I guess now is not the time to do that on the instructions, so I guess at this point in time, Mr. Lauritzen, the burden now shifts to you to move forward.

MR. LAURITZEN: Okay. Now, I would make another motion to dismiss the speeding case.

THE COURT: Would you have the officer come back in please, with the jury?

MR. LAURITZEN: We have to settle the instructions. You said--

THE COURT: Oh, all right. Is there anything on instructions we need to settle outside the presence of the jury?

MR. BRADY: We correct 2 and 3?

THE COURT: We've corrected 2 and 3.

MR. BRADY: It's my understanding that 2--you have stricken 2 and 3, both, you simply struck the comments on make obscene gestures.

MR. LAURITZEN: I--okay. Are we on the record?

THE COURT: Yes.

MR. LAURITZEN: Okay. I've already made my objection to 2.

THE COURT: Right.

MR. LAURITZEN: All right. So, I will do so again since we are settling instructions. Comes now the defendant and objects specifically to giving of Instruction No. 2. Number one, because at this point in time, even what's on No. 2 does not constitute a public offense, but more importantly, it talks about obscene language, which there is no evidence before the Court on obscene language at this point in time. Abusive is not relevant because the

jury cannot consider an over-broad term such as abusive.

Further, there's no evidence that it's in a public place, as the Court sees on there, it was on Mr. Huber's private property, and there's been no other evidence that it was in a public place.

For that reason, I object to giving Instruction No. 2 and those are the specifics I object to on.

THE COURT: Okay. For the record, the exception is noted and your motion is denied.

MR. LAURITZEN: Okay. I object to the giving of Instruction No. 3 because it not only contains elements which are not in evidence, but elements which are not pleaded. The defendant knowingly created a hazardous or physically offensive condition. Now, I take it to be that that is a standard which is hazardous, or physically, that he's put up some kind of an obstruction, created some kind of a machine which is going to damage or hurt someone, or has at least the ability to do so. He did not do that. That does not refer to any offer to fight or gesture to fight, that refers to a physical situation such as icing a road, greasing stairs, something like that, that is what that is, it's a digging a trench and concealing it like a deadfall, something like that. That is a physically hazardous condition.

A physically offensive condition is something like a gross smell, hauling dead animals over and throwing them or