2000

Provo City Corporation v. Sean Thompson : Brief of Appellant

Utah Court of Appeals

Vernon \"Rick\" Romney; Deputy Provo City Attorney; Counsel for Appellee.
Dana M. Facemyer; Counsel for Appellant.

IN THE UTAH COURT OF APPEALS

PROVO CITY CORPORATION, Plaintiff/Appellee	:	Case No. 20000071-CA
v.	:	Priority No. 2
SEAN THOMPSON, Defendant/ Appellant	:	

SUPPLEMENTAL BRIEF OF APPELLANT

APPEAL FROM THE FOURTH DISTRICT COURT, UTAH COUNTY,
PROVO DEPARTMENT, FROM A CONVICTION OF TELEPHONE
HARASSMENT, A CLASS B MISDEMEANOR,
BEFORE THE HONORABLE ANTHONY W. SCHOFIELD

Vernon "Rick Romney
Deputy Provo City Attorney
P.O. Box 1849
Provo, UT 84603

Counsel for Appellee

DANA M. FACEMYER #7714
3507 North University, Suite #150
Jamestown Square, Hanover Building
Provo, UT 84604
(801) 375-7680

Counsel for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statuary and Constitutional Provisions

Cases Cited

Other

IN THE UTAH COURT OF APPEALS

PROVO CITY CORPORATION,	:	
Plaintiff/Appellee,	:	Case No.20000071-CA
vs.	:	
	:	Priority No. 2
SEAN THOMPSON,	:	
Defendant/Appellant.	:	

JURISDICTION OF THE UTAH COURT OF APPEALS

This Court has appellate jurisdiction in this matter pursuant to the provisions of Utah Code Annotated 78-2a-3(2)(e) (1999).

ISSUES PRESENTED AND STANDARDS OF REVIEW

1. Whether Utah Code Annotated 76-9-201 is unconstitutional on its face and as applied? A constitutional challenge to a statute presents a question of law which is reviewed for correctness. *State v. Mohi,* 901 P. 2d 991, 995 (Utah 1995). Moreover, this Court should apply "strict scrutiny" to this case as it impacts freedom of speech as located in the and First Amendment. *See, St. George v. Turner,* 860 P.2d 929, 932 (Utah 1993).

CONTROLLING STATUTORY PROVISIONS

Utah Code Annotated §76-9-201

(1) A person is guilty of telephone harassment and subject to prosecution in the jurisdiction where the telephone call originated or was received if with intent to annoy, alarm another, intimidate, offend, abuse, threaten harass, or frighten any person at the called number or recklessly creating a risk thereof, the person:

(a) makes a telephone call, whether or not a conversation ensues;
(b) makes repeated telephone calls, whether or not a conversation ensues, or after having been told not call back, causes the telephone of another to ring repeatedly or continuously;
(c) makes a telephone cal and insults, taunts, or challenges the recipient of the telephone call or any person at the called number in a manner likely to provoke a violent or disorderly response;
(d) makes a telephone call and uses any lewd or profane language or suggests any lewd or lacivious act; or
(e) makes a telephone call and threatens to inflict injury, physical harm, or damage to any person or the property of any person.

(2) Telephone harassment is a class B misdemeanor.

United States Constitution, Amendment I

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 of the right of the people peaceably to assemble, and to petition the Government for redress of grievances.

United States Constitution, Amendment XIV

....No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person, of life liberty or property, without due process f law; nor deny any person within its jurisdiction the equal protection of the laws.

Utah Constitution, Article I, § 7

No person shall be deprived of life, liberty or property without due process of law.

Utah Constitution, Article I, § 15

No person shall be passed to abridge or restrain the freedom of speech or of the press....

STATEMENT OF THE CASE

A. Nature of the Case

Sean P. Thompson appeals from a bench trial conviction of Telephone Harassment, a class B misdemeanor, in violation of Utah Code Annotated §76-9-201, as adopted by Provo City.

A. Course of Proceedings and Disposition in Trial Court

On or about May 1, 1999, Thompson was charged by Information with Telephone Harassment, a class B misdemeanor, in Fourth District Court, Provo Department.

On October 29, 1999, a bench trial was held before the Honorable Anthony W. Schofield. After testimony from the alleged victim, the responding officer, and Thompson, the Court ruled in favor of the City of Provo and convicted Thompson of telephone harassment. On December 20, 1999, Thomson was sentenced to 15 hours of community service and a $250 fine. On January 19, 2000, Thompson filed a notice of appeal in the Fourth District Court.

STATEMENT OF RELEVANT FACTS

In the bench trial the alleged victim, Ms. Thayer, testified that Thompson called numerous times within the hour.(Tr. At 7). Thayer testified that she asked Thompson to cease his phone calls.(Tr. At 8) The responding police officer, Bastian, testified that while he was at the home of Thayer investigating the telephone calls, Thompson again called, wherein Bastian picked up the receiver and spoke with Thompson.(Tr. at 13). Bastian requested to meet with Thompson at Thompson's home.(Tr. at 14). Upon arriving at Thompson's home Bastian indicated that he smelled

alcohol and Thompson admitted to drinking beer.(Tr. at 14).

Thompson took the stand and testified that he received a telephone call from Thayer and she told Thompson that she was going to harm herself (suicide) and possibly harm Thompson's daughter.[1](Tr. at 17 & 20). Thompson testified that he called Thayer numerous times because he feared Thayer was a danger to herself and to Thompson's daughter.(Tr. at 21). Thompson repeatedly called Thayer because he was taught in school to keep calling to assist the person threatening suicide.(Tr. at 20).

Mr. Means was appointed to be defense counsel for Mr. Thompson by the 4th District Court in May, 1999. Mr. Means told Mr. Thompson that he would be in contact with him in order to prepare for the trial which was to be held in October 1999. Over the months before trial, Mr. Means never called Mr. Thompson, in fact the only contact was initiated by a worried Mr. Thompson a few days before he was to be back in court. Instead of immediately meeting with his client to prepare his case, Mr. Means asked Mr. Thompson to meet with him at the courthouse about half and hour before they were to appear before the court for the trial. Mr. Thompson arrived early, and waited for his attorney, and Mr. Means showed up with only a few minutes before they were to be in court. As they were reviewing a few factual issues in preparation for trial, they were called into the courtroom unprepared.

In meeting with Mr. Means, the Appellant, Mr. Thompson provided substantial evidence that would support his innocence. Mr. Thompson had evidence of a prior occasion in which Ms. Thayer threatened to kill herself and all passengers and all the passengers who were with her while she was driving a car. Mr. Thompson felt that this evidence would surely have an impact on the trial,

---

[1] The alleged victim and Thompson were recently divorced and are parents of a daughter.

tending to prove that Mr. Thompson was indeed acting with the best of intentions to prevent anyone from getting hurt by repeatedly calling Ms. Thayer while she was contemplating suicide. Mr. Means did not use this evidence to impeach Ms. Thayer when she claimed that she had never been suicidal in her life. (Tr. at 27).

Mr. Thompson had evidence that he called Ms. Thayer only in response to her initial call to him. His return calls were only due to the call which was first made to him. During trial, Ms. Thayer claimed that she did not call Mr. Thompson on the night in question. (Tr. at 10). She later admitted that she did indeed call Mr. Thompson that day. (Tr. at 27).

Due to the lack of evidence and lack of effort on the part of Mr. Means, Mr. Thompson was found guilty of telephone harassment. (Tr. at 33).

SUMMARY OF ARGUMENT

Since the Utah Court of Appeals has declared applicable sections of Utah Code Annotated §76-9-201 unconstitutional, Thompson asks that this Court reverse the conviction. The facts of this case provide standing for Thompson to challenge the telephone harassment statute's constitutionality. The telephone harassment statute in this case has a real and substantial deterrent effect on protected speech and a court's narrowing construction of the statute is not possible. Because the statute is overbroad and vague it must be stricken down because it violates the guarantees of the First and Fourteenth Amendments of the United States Constitution as well as Article I, §§ 7 and 15 of the Utah Constitution. Given the above the telephone harassment statute cannot be applied to Thompson or anyone else.

Appellant Sean Thompson was denied due process by the poor effort put forth by Mr. Means as his defense attorneys who was appointed to defend the Appellant. Mr. Means failed to contact Mr. Thompson as promised.

Mr. Means also failed to consider or prepare any kind of defense on his behalf. Mr. Means disregarded the considerable amount of evidence that Mr. Thompson brought to his attention regarding a different occasion in which Ms. Thayer threatened suicide and homicide. Mr. Means, though bound by a duty to do so, did not investigate this evidence.

When Ms. Thayer claimed that she had never been suicidal (Tr. at 27), Mr. Means, though he had been informed of her prior bad act, failed to attempt to impeach her by bringing up her prior threats. In addition, after the State's principal witness for its case in chief gave contradictory statements from the stand, Mr. Means did not even try to impeach the witness. Such a blatant failure to render effective assistance of counsel constitutes a severe infringement on Mr. Thompson's right to counsel and due process.

ARGUMENT

I. THOMPSON'S CONVICTION OF TELEPHONE HARASSMENT SHOULD BE REVERSED BECAUSE UTAH CODE ANNOTATED §76-9-201 HAS BEEN DECLARED UNCONSTITUTIONAL ON ITS FACE AND AS APPLIED

Recently this court has ruled on the issue of Utah Code Annotated §76-9-201 in *Provo City v. Whatcott*. *Provo v. Whatcott*, 1 P.3d 1113, (Ut. App. 2000). In *Whatcott,* this court ruled that provisions within Utah Code Annotated §76-9-201 are overbroad, Id. at 6. A statute that is determined to be unconstitutional on its face must be stricken down in its entirety, disallowing the statute to be applied against Thompson or anyone else. *Provo City Corp. v. Willden,* 768 P.2d at

459(Utah 1989); *Logan City v. Huber*, 786 P.2d at 1377(Utah App. 1990). Given this court's recent ruling, which is on point, Thompson's conviction should be reversed.

In General

Speech is protected by the First Amendment to the United States Constitution as well as Article I, Section 15 of the Utah Constitution.[2]

D. Standing

A defendant has "general standing" when he can show " 'some distinct and palpable injury that gives him a personal stake in the outcome of the legal dispute.' " *Willden,* 768 P2d. at 456 (quoting *Jenkins v. Swan,* 675 P.2d 1145, 1148 (Utah 1983)). Thompson was convicted under Utah's telephone harassment statute demonstrating he "indisputably has standing to challenge the ordinance, at least as it has been applied to him." *Willden,* 768 P.2d at 457.

Thompson also has standing to challenge the statute on its face as to the statute's constitutional validity. A statute may be held facially invalid even if it can be applied legitimately in the facts of this particular case. *Logan City v. Huber,* 786 P.2d 1372 (Utah App. 1990). Upon a determination that the statute is unconstitutional on its face the statute must be stricken down in its entirety, disallowing the statute to be applied against Thompson or anyone else. *Willden,* 768 P.2d at 459; *Huber*, 786 P.2d at 1377.

Generally, a person may not challenge the facial validity of a statute on grounds that it may conceivably be applied unconstitutionally to others not before the court. *State v. Haig,* 578 P. 2d

---

[2]Article I, Section 15 of the Utah Constitution provides in part "No law shall be passed to abridge or restrain the freedom of speech ...." and has been interpreted as granting at least as much protection as the First Amendment of the United States Constitution.. *KUTV, Inc. v. Conder,* 668 P.2d 513 (Utah 1983).

837, 841 (Utah 1978). However, this is not so when we are dealing with First Amendment protections. The First Amendment overbreadth and vagueness standing doctrines represent a departure from the traditional rule. The doctrines are designed to give standing to anyone who is subject to an overbroad or vague statute that chills the exercise of First Amendment rights of others. *Gooding v. Wilson,* 405 U.S. 518, 521, 92 S.Ct. 1103, 1105, 31 L.Ed.2d 408; *Willden,* 768 P.2d at 457. The doctrine "gives a defendant standing to challenge a statute on behalf of others not before the court even if the law could be constitutionally applied to the defendant." *Salt Lake City v. Lopez,* 935, P.2d 1259, 1263 n. 2 (Ut. Ct. App. 1997); *See Bigelow v. Virginia,* 421 U.S. 809, 816, 95 S. Ct. 222, 2230, 44 L.Ed.2d 600 (1975); *Broadrick v. Oklahoma,* 413 U.S. 601, 612, 93 S. Ct. 2908, 2916, 37 L.Ed.2d 830 (1973); *State v. Haig,* 578 P.2d 837, 840 (Utah 1978). The rationale for this exception is that the First Amendment rights infringed upon are so important that their protection need not wait for the perfect litigant. *Willden,* 768 P.2d at 457. Hence, a defendant does have standing to challenge the statute on grounds of *both* unconstitutional overbreadth and vagueness as applied to others. *Gooding,* 405 U.S. at 521, 92 S. Ct. at 1105. When faced with First Amendment overbreadth and vagueness attacks on a statute, this Court should first address overbreadth. *Logan City v. Huber,* 786 P. 2d 1372, 1375 (Ut. Ct. App. 1990).

B. Overbreadth

The Supreme Court has stated that when a statute or ordinance aims at penalizing an unprotected class of speech, it "must be carefully drawn or be authoritatively construed to punish only unprotected speech and not be susceptible of application to protected expression." *Gooding,* 405 U.S. at 522, 92 S.Ct. at 1106; *See Huber,* 786 P.2d at 1375. The constitutional guarantees of freedom of speech do not allow the government to punish words outside of "narrowly limited classes

of speech." *Huber* 786 P.2d at 1374. An overbroad enactment is one "'which does not aim specifically at evils within the allowable area of state control, but, on the contrary, sweeps within its ambit other activities that in ordinary circumstances constitute an exercise of freedom of speech or the press.' " *Huber,* 786 P.2d at 1375 (quoting *Thornhill v. Alabama,* 310 U.S. 88, 97, 60 S.Ct. 736, 741-42, 84 L.Ed. 1093 (1940)).

The merit of a First Amendment overbreadth challenge is determined by analyzing two factors: (1) Whether the statute's " 'deterrent effect on legitimate expression is both real and substantial;' : and (2) Whether the statute is ' readily subject to a narrowing construction by the state courts.' " *State v. Haig* 578 P.2d 837, 841 (Utah 1978) (quoting *Erznoznik v. City of Jacksonville,* 422 U.S. 205, 216, 95 S.Ct. 2268, 2276, 45 L.Ed,2d 125(1975)). If the statute's deterrent effect on protected expression is both real and substantial and the statute is not readily subject to a narrowing construction by state courts then it is unconstitutionally overbroad.

1. Substantial Deterrent Effect.

Utah's telephone harassment statute has a real and substantial deterrent effect on protected speech. For example, the statute precludes one from making a telephone call with intent to "alarm" another. The deterrent effect of this language on constitutionally protected speech has no limits. This overbroad choice of words conceivably makes it criminal in Utah to call one's neighbor and warn him that his house is on fire, or to call a friend and forecast an approaching storm. *See Bolles v. People,* 541 P.2d 80, 83 (Col. 1975) (en banc).

The statute also precludes one from making a telephone call with intent to "annoy" another. There are many instances where one may call another with the intention of causing a slight annoyance for perfectly legitimate constitutionally protected purposes. Conceivably, this statute

could make criminal a single telephone call made by the following individuals: a consumer who wishes to express dissatisfaction over the performance of a produce or service; a businessman disturbed with another's failure to perform a contractual obligation; an irate citizen who wishes to complain to a public official; an individual bickering over family matters; or a creditor seeking to collect payment of a past due bill. *See People v. Klick.* 362 N.E.2d 329, 331-32 (Ill. 1977).

The term "harass"[3] as used in the statute is merely a persistent annoyance and should be considered on the same guidelines as "annoy". Conceivably, this statute could make criminal repeated telephone calls made by the following individuals: a consumer who wishes to express dissatisfaction over the performance of a produce or service that continues to fail after being repaired. Indeed the "lemon laws" to handle such situations expect the dissatisfaction of a consumer who expresses dissatisfaction on more than one occasion.; a businessman disturbed with another's failure to perform a contractual obligation after being told once of the dissatisfaction but because of no change behavior must call back and "harass"; or even a person/therapist/police officer attempting to stop a suicide and calling back to ensure the person does not harm herself.

The first Amendment is made of "sterner stuff." *Bolles,* P.2d at 83. The people of Utah must not live in continual fear that something they say over the telephone with intent to "annoy", "harass", "offend ", or "alarm" the listener will invoke the statute. Free speech may best fulfill its high purpose when it induces a condition of unrest, creates dissatisfaction with present conditions or even stirs people to anger. *Cox v. Louisiana,* 379 U.S. 536, 551-52, 85 S.Ct. 453, 462-63, 13 L.Ed.2d 471 (1965).

---

[3] Meriam Webster's Collegiate Dictionary, Tenth Edition, "Harass - 1b - annoy persistently."

Unquestionably, the State of Utah has a legitimate and substantial interest in protecting its residents from fear and abuse at the hands of persons who employ the telephone to torment others. *United States v. Lampley,* 573 F.2d 783, 787 (3rd Cir. 1978); *Klick*, 362 N.E.2d at 331. The State also has a legitimate interest in protecting the privacy of its residents' homes from the intrusion of unwanted and perverse phone calls. *City of Everett v. Moore,* 683 P.2d 617, 619 (Wash. Ct. App. 1984). However, the means chosen by the legislature to address these interests sweep to broadly. Clearly, the legislature failed in its duty to employ the least drastic means available to achieve these purposes. *Shelton v. Tucker,* 364 U.S. 479, 488, 81 S.Ct. 247, 252, 5 L.Ed.2d 231 (1960).

First of all, Utah's telephone harassment statute is not limited to intrusions into the home. Furthermore, it is not limited to communications which abuse the listener "in an essentially intolerable manner" as required by the Constitution when the government seeks to "shut off discourse solely to protect others from hearing it." *Cohen v. California,* 403 U.S. 15, 21, 91 S.Ct. 1780, 1786, 29 L.Ed.2d 284 (1971). Plainly, the statute lacks the "precision of regulation" required by a statute "so closely touching our most precious freedoms." *NAACP v. Button,* 371 U.S. 415, 438, 83 S.Ct. 328, 340, 9 L.Ed.2d (405) (1963). Thus, the deterrent effect of the statute on legitimate speech is both real and substantial.

2. Narrowing Judicial Construction.

Utah Code Annotated § 76-9-201 is not readily subject to a narrowing construction by the State's courts. While Utah courts favor construing a law so as to carry out its legislative intent and avoiding constitutional conflicts, it will not rewrite a statute or ignore its plain intent. *Provo City Corp. v. Willden,* 768 P.2d 455, 458 (Utah 1989); *Salt Lake City v. Lopez,* 935 P.2d 1259, 1262 (Ut, Ct. App. 1997); *Logan City v. Huber,* 786 P.2d 1372, 1377 (Ut. Ct. App. 1990). One may argue that

the statue should be narrowly construed to prohibit phone calls made "with intent to annoy, alarm ... or frighten any person ...," but only when made for no lawful purpose. While such a narrowing construction of the statute may eliminate some of its constitutional inadequacies, it is clear that the legislature did not intend to qualify the statute in that manner. In 1994, the statute was amended to *delete* the words "without purpose of lawful communications." Hence, narrowly construing the statute to apply only in situations where the phone call was made for now lawful purpose would do "impermissible violence to the clear language of the ordinance," *Willden,* 768 P.2d at 458, and would be contrary to the legislature's plain intent.

3. Examples of Overbroad Telephone Harassment Statutes:

Several courts have held statutes similar to the one at issue here to be unconstitutional on grounds of overbreadth. *E.g., People v. Klick*, 362 N.E. 2d 329 (Ill. 1977); *Bolles v. People,* 541 P.2d 80 (Colo. 1975) (en banc); *City of Everett v. Moore*, 683 P.2d 617 (Wash. Ct. App. 1984). The language of these statutes and Utah's statute is clearly distinguishable from the narrowly tailored telephone harassment statutes that were upheld in *Iowa v. Jaeger,* 249 N.W. 2d 688 (Iowa 1977), *Jones v. Municipality of Anchorage,* 754 P.2d 275 (Alaska Ct. App. 1988), and *Arizona v. Hagen,* 558 P.2d 750 (Ariz. Ct. App. 1976). Similar to Utah's statute, these statutes specified the intent with which the call must be made; however, contrary to Utah's statute, these valid statutes also specify the nature of the speech prohibited (e.g., obscene, lewd, profane, and threatening).[4] The categories of language prohibited by these statues are consistent with those held to be unprotected by the

---

[4]The statues upheld in *Jaeger* and *Hagen* read as follows: "It shall be unlawful for any person, with intent to terrify, intimidate, threaten, harass, annoy or offend, to telephone another *and use obscene, lewd or profane language or suggest any lewd or lascivious act, or threat to in flict injury or physical harm to the person or property of any person"* (emphasis added).

Constitution in *Chaplinsky v. New Hampshire,* 315 U.S. 568, 572, 62, S.Ct. 766, 769, 86 L.Ed.1031 (1942). Subsections 1(a) and (b) of Utah's telephone harassment statute, on the other hand, make no attempt to specify the nature of speech prohibited. As in the case at hand subsections (a) and (b) directly apply.

C. Vagueness

If this Court determines that Utah Code Annotated § 76-9-201 is unconstitutionally overbroad, it may be held facially invalid and this Court need not even address the vagueness challenge. However, if the overbreadth challenge fails then this Court should next examine the facial vagueness challenge. *Logan City v. Huber,* 786 P.2d 1372, 1375, 1377 n.13 (Ut. Ct. App. 1990).

Virtually every potentially vague term used in Utah's telephone harassment statute has been challenged in one State or another. The court's decisions have been anything but consistent.[5] Usually, however, statutes containing similarly vague terms such as "annoy" and "alarm" or "lewd" and "profane" are upheld by the courts. This is largely due to the clarifying effects of other statutory elements or because of the willingness of courts to impose narrowing judicial constructions on the terms; the survival of the statutes can hardly be attributed to the precision of the terms themselves. M. Sean Royall, *Constitutionally Regulating Telephone Harassment: An Exercise in Statutory Precision,* 56 U. Chi. L. Rev. 1403, 1412 (Fall 1989). The Case of *State v. L.G.W.,* 641 P.2d 127,

---

[5]*Compare, e.g., State v. Sanderson,* 575 P.2d 1025, 1027 (Or. Ct. App. 1978), *City of Everett v. Moore,* 683 P.2d 617, 619 (Wash. Ct. App. 1984), and *People v. Norman,* 703 P.2d 1261, 1266 (Colo. 1985) (en banc) (statues containing the phrase "alarms or seriously annoys" were found void for vagueness; *with Kinney v. State.* 404 N.E. 2d 49, 51 (Ind. Ct. App. 1980) and *Donley v. City of Mountain Brook,* 429 S.2d 603, 611 (Ala. Cr. App. 1982) (upholding two nearly identical statutes).

131 (Utah 1982), is an example of the Utah Supreme Court applying such a narrowing construction on the term "lewdness" to avoid its inherent vagueness.

While there is no hard and fast rule indicating which words are vague and which ones are not, one may look to the purposes of the vagueness doctrine to determine whether the terms used in the statute at hand are indeed vague. The vagueness doctrine declares a law unconstitutional if persons "' of common intelligence must necessarily guess at its meaning and differ as to its application.' " *U.S. v. Lanier*, ___ U.S. ___, 117 S. Ct. 1219, 1225, 137 L.Ed.2d 432 (1997) (quoting *Connally v. General Construction Co.*, 269 U.S. 385, 391, 46 S.Ct. 126, 127, 70 L.Ed. 322 (1926)). The doctrine reflects the principle that no person should be held criminally responsible for conduct which he could not reasonably understand to be forbidden. *Lanier*, 117 S. Ct. at 1225. The reasons for the doctrine are three fold. Two of those reasons address Fourteenth Amendment due process concerns and the third addresses First amendment interests:

> First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them . . . . Third, but related, where a vague statute abuts upon sensitive areas of basic First Amendment freedoms, it operates to inhibit the exercise of those freedoms.

Grayned v. City of Rockford, 408 U.S. 104, 108-09, 92 S. Ct. 2294 2298-99-33 L.Ed.2d 222(1972); *See West Valley City v. Streeter,* 849 P.2d 613, 615 (Ut. Ct. App. 1993).

With regard to the First Amendment vagueness concerns, the Supreme Court has intimated that "stricter standards of permissible statutory vagueness may be applied to a statute having a potentially inhibiting effect on speech; a man may the less be required to act at his peril here, because

the free dissemination of ideas may be the loser." *Smith v. California,* 361 U.S. 147, 151, 80 S.Ct. 215, 217-18, 4 L.Ed.2d 205 (1960).

Utah Code Annotated § 76-9-201 prohibits an actor from using a telephone to "annoy, alarm another, intimidate, offend, abuse, threaten, harass, or frighten any person at the called number, or recklessly creating a risk thereof ...." Consequently, a caller could be prosecuted for espousing Catholic doctrine that offends a Mormon recipient, or for frightening a child at the called number who might overhear [e.g., through a speaker phone] a discussion of frightening scenes from *Hannibal*, or alarm a neighbor by informing him about a proposed property tax increase, or harass a friend by suggesting he will be whipped at the next game of pick-up neighborhood basketball, and so on, and so on, and so on .... The all encompassing language of the statute's specific intent provisions does not put one on adequate notice of when the content of a single call might be prohibited. When can one probe religious doctrine before the recipient is offended such that the call becomes criminal? Is it a crime if a child at the called number is frightened by a discussion of one's war experience? How does a caller know where to draw the line when calling about political topics which might alarm the listener" This statute simply does not provide one with a fair and understandable warning of when a crime will occur and how to avoid committing it.

The vagueness doctrine also exists to prevent arbitrary law enforcement and to prevent the inhibition of First Amendment freedoms. In fact, the requirement that a legislature establish clear guidelines to govern law enforcement is more important that providing fair notice. *Kolender v. Lawson,* 461 U.S. 352, 357-58, 103 S. Ct. 1855, 1858, 75 L.Ed.2d 903 (1983); See *Greenwood v. City of North Salt Lake,* 817 P.2d 716, 819 (Utah 1991). The lack of clear guidelines in the telephone harassment statute (ordinance) gives law enforcement unbounded discretion to apply the

vague law selectively and also subjects the exercise of free speech to an unascertainable standard. *Kramer v. Price,* 712 F.2d 174, 178 (5th Cir. 1983).

Lastly, because they may not know what exactly it means to "annoy", "harass", "alarm", or "offend" another, citizens of Utah may inhibit their speech to avoid the risk of being victimized by arbitrary law enforcement. Since a statute that is capable of reaching First Amendment freedoms demands a greater degree of specificity than in other contexts, the statute should be stricken on vagueness grounds. *Smith,* 361 U.S. at 151, 80 S. Ct. at 217-18.

If this Court determines that the statute is facially vague, it may cure the statute's vagueness by instructing the jury in a way that sufficiently limits the meaning of the statute. *Kramer*, 712 F.2d at 178, n. 6. For example, the court may clearly define for the jury what it means to "annoy", "harass", "alarm", or to "offend" another and precisely what "lewd" or "profane" language is. In fact, a court is "obliged to seek to construe a criminal statute to give specific content to terms that might otherwise be unconstitutionally vague." *State v. L.G.W.*, 641 P.2d 127, 131 (Utah 1982). If the statute, as authoritatively construed by the court, passes constitutional scrutiny then it will not be overturned on vagueness grounds. *Chaplinsky v. New Hampshire,* 315 U.S. 568, 572-73, 62 S. Ct., 766, 769-770, 86 L.Ed. 1031 (1942). However, as argued above, the terms "lewd", "lascivious", and "profane", even if adequately defined for the jury, have no application to the facts of this case. Additionally, the terms "annoy", "harass", "alarm", and "offend" are not susceptible to one comprehensive definition that fits all factual settings but have different thresholds for different persons in different settings. For instance, loud and raucous music may be acceptable at a rock concert or in the privacy of some people's homes; but the same music may be offensive in other people's homes or in funeral or religious settings. "Annoy", "harass", "alarm", and "offend" will

likely have different meanings to each member of a jury, notwithstanding the Court's attempts at achieving defining instructions.

II. MR. THOMPSON'S RIGHT TO DUE PROCESS HAS BEEN VIOLATED DUE TO GROSSLY INEFFECTIVE ASSISTANCE OF COUNSEL.

The Sixth Amendment of the Federal Constitution is the basis for the right of a Defendant to have effective assistance of counsel. Utah courts have consistently relied on the ruling of *Strickland v. Washington* when deciding claims based on ineffective assistance of counsel under the Federal Constitution. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct 2052, 80 L Ed2d 674 (1984). (See *Parsons v. Barnes*, 871 P.2d 516 (Utah 1994); *State v. Tyler*, 850 P.2d 1250 (Utah 1993); *State v. Templin*, 805 P.2d 182 (Utah 1991); *State v. Bullock*, 791 P.2d 155 (Utah), cert denied, 497 U.S. 1024, 110 S.Ct. 3270 (1989); *State v. Carter,* 776 P.2d 886 (Utah 1989); *Fernandez v. Cook*, 783 P.2d 547 (Utah 1989) ; *State v. Verde*, 770 P.2d 116 (Utah 1989); *Bundy v. DeLand*, 763 P.2d 803 (Utah 1988); *State v,. Lovell*, 758 P.2d 909 (Utah 1988); *State v. Frame,* 723 P.2d 401 (Utah 1986)).

Strickland established a two-prong test in determining whether counsel for a defendant was ineffective:

> **First, the defendant must show that counsel's performance was deficient.** This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. **Second, the defendant must show that the deficient performance prejudiced the defense.** This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

State v. Templin, 805 P.2d 182, at 186 (Utah 1990) (quoting *Strickland v. Washington,* 466 U.S. at 687) (emphasis added). Both prongs of the test must be met for a court to affirm a claim of ineffective assistance of counsel. Additionally, when a defendant is represented by more than one attorney the courts review the actions of all attorneys as a single representation when evaluating ineffective assistance claims. *State v. Tyler,* 850 P.2d 1250, at 1254 (Utah 1993).

A. Defense Counsel's Performance Was Deficient.

The first prong of the *Strickland test* is met by defendant "show[ing] that counsel's representation fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 687. In this regard, the Utah Supreme Court has held, "**[i]f counsel does not adequately investigate the underlying facts of a case, including the availability of prospective defense witnesses, counsel's performance cannot fall within the 'wide range of reasonable professional assistance'.**" *Templin*, 805 P.2d at 188 (emphasis added). Indeed, the Templin Court has stated that **"a decision not to investigate cannot be considered a tactical decision."** *Templin*, 805 P.2d at 188 (emphasis added). In proving counsel's representation fell below an objective standard, Appellant cite's specific instances of ineffectiveness which resulted in defendant not presenting an adequate defense at trial.

The Utah Rules of Professional Conduct outline how an attorney should act in relation to a client's case. "A lawyer shall act with reasonable diligence and promptness in representing a client." URPC 1.3 (1981). "A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information." URPC 1.4(a) (1981). Mr. Means did not even attempt to contact Appellant before the trial, this is contrary to his duty as a licensed attorney.

Mr. Means had reason to, but failed to investigate the issue of other threats made by Ms. Thayer since Mr. Thompson shared information with Mr. Means in that regard. A simple investigation would have given Appellant a great advantage in his case, proving that his intent in calling Ms. Thayer was done with the purpose of protecting her.

1. Lack of investigation is prima facie ineffective assistance of counsel.

Only after an adequate inquiry is made can counsel make a reasonable decision to call or not to call particular witnesses for tactical reasons. *Templin*, 805 P.2d at 188.

If defense counsel would have investigated the case, ample evidence would have been found to prove that Ms. Thayer had indicated suicidal tendencies before, thereby giving Mr. Thompson the incentive to repeatedly call Ms. Thayer in order to protect her, and to protect Mr. Thompson's child.

Mr. Means, failed to consider the evidence that was proffered by Mr. Thompson, and was thereby directly hindering Mr. Thompson's possibility of obtaining a fair trial. This disregard for the client's interest, and failure to investigate is surely an issue that would have reversed the conviction in this case.

2. Counsel failed to attempt to impeach Ms. Thayer.

In representing a client, if an action by counsel is "below an objective standard for reasonableness" (*Strickland, Supra* at 688) it is grounds for finding that counsel was ineffective in representing the client. See *Strickland, Supra*. According to the Utah Rules of Professional Conduct, an attorney is held to the strict duty of providing competent representation. See URPC 1.1 (1981).

The direct contradiction between Ms. Thayer's statement that she did not call Appellant on the day in question (Tr. at 10), and the admitting that she had called him (Tr. at 27) was an obvious indication of impeachment testimony. To fail to point out such a blatant contradiction in testimony

is below the standard for reasonableness, and is unacceptable. This is especially true since the other evidence offered by Mr. Thompson would have

B. The Deficient Performance Prejudiced Mr. Thompson.

Mr. Thompson was found guilty of telephone harassment. (Tr. at 33). In ruling, the Judge stated his view, "I think the only clear evidence is that there was an intent to annoy." (Tr. at 33). This would have been directly disproved had defense counsel investigated, and presented evidence tending to indicate that Ms. Thayer had dangerous propensities. The intent would have also been disproved had defense counsel used the prior death threat made by Ms. Thayer to impeach her while on the stand.

The error of failing to attempt to impeach, like the error of failing to investigate is not harmless. It was prejudicial to not attempt to impeach Ms. Thayer because "such strong impeachment evidence would go to the central issue of the case..." *State v. Martin*, 984 P.2d 975, 979 (Utah 1999). The issue of Ms. Thayer's mental condition as pertaining to Mr. Thompson's intent was directly at issue. The failure to expose the evidence of a

CONCLUSION AND PRECISE RELIEF SOUGHT

Thompson requests that this Court reverse the conviction given the ruling of *Provo v. Whatcott,* finding Utah Code Annotated §76-9-201 to be unconstitutional. Thompson has standing to challenge the constitutionality of the telephone harassment statute as applied to the facts of his case. He also has standing to challenge the constitutionality of the statute on its face. The subject statute has a real and substantial deterrent effect on protected speech and the statute is not readily subject to a narrowing construction by the state's courts; therefore, it is unconstitutionally overbroad. Additionally, the statute is unconstitutionally vague and cannot be cured by a narrowing judicial

construction by the state's courts. Because the statute is overbroad and vague it must be stricken down because it violates the guarantees of the First Amendment of the United States Constitution as well as Article I, Section 15 of the Constitution of Utah, and it cannot be applied to defendant or anyone else.

Appellant's right of due process has been infringed by ineffective assistance of the counsel that was appointed to him to represent his case. Appellant's counsel failed to adequately represent him by inquiring sufficiently to offer evidence in support of his clam that Ms. Thayer had suicidal tendencies, and that his calls were made in with good intentions. Appellant's attorney also failed to diligently pursue the case since he failed to even make contact with the Appellant to ensure efficient preparation to defend against the charge of telephone harassment. Additionally, defense counsel was incompetent by not attempting to impeach Ms. Thayer based on her openly contradictory statements.

Respectfully submitted this 14 day of May, 2001.

DANA M. FACEMYER
Counsel for Appellant

Addendum

There is no addendum required in support of this brief.

Mailing Certificate

I certify that I mailed the Foregoing postage prepaid the Provo City Attorney VERNON "RICK" ROMNEY, Deputy Provo City Attorney, P.O. Box 1849, Provo, UT 84603 this 4 day of May, 2001.

DANA M. FACEMYER