1994

City of Provo v. Frank Lifang : Reply Brief

Utah Court of Appeals

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Thomas H. Means; Aldrich, Nelson, Weight & Esplin; Attorney for Appellant.

IN THE COURT OF APPEALS

STATE OF UTAH

CITY OF PROVO,	:	
	:	
Plaintiff-Appellee,	:	Case No. 940717-CA
	:	
vs.	:	
	:	Category No. 2
FRANK LIFANG,	:	
	:	
Defendant-Appellant.	:	

REPLY OF DEFENDANT-APPELLANT

APPEAL FROM A CONVICTION OF THE CRIME OF STALKING, A CLASS "B" MISDEMEANOR, IN THE FOURTH CIRCUIT COURT - PROVO DEPARTMENT
UTAH COUNTY, STATE OF UTAH
THE HONORABLE STEVEN L. HANSEN, JUDGE, PRESIDING

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REPLY BRIEF OF DEFENDANT-APPELLANT

COMES NOW Defendant-Appellant and herewith submits his reply to the brief of Plaintiff-Appellee as follows:

POINT I

U.C.A. §76-5-106.5 IS UNCONSTITUTIONALLY OVERBROAD BECAUSE IT MAKES A SUBSTANTIAL AMOUNT OF CONSTITUTIONALLY PROTECTED ACTIVITY UNLAWFUL

A. Defendant-Appellant's Standing to Raise Issue of Statute's Facial Overbreadth.

The government misinterprets the law as to standing. [Brief of Appellee, at 10] For two reasons this Appellant has standing: (1) First Amendment issues are at stake, and (2) Rights of Association are also impaired by statute. The law set out in *Provo City Corp. V. Willden*, 768 P.2d 455, 457-58 (Utah 1989) makes it clear that a person, when arguing that a statute is facially overbroad, can still make a claim of "overbreadth" when a person is subjected to a statute which "chills the exercise of First Amendment rights of others." *Id.*, at 457. The rationale for allowing an

imperfect plaintiff standing is because the First Amendment protected interests are so important that their protection need not wait for the perfect plaintiff. *Id.* Because the Stalking Statute includes elements that require verbal or written communications, it is very clear that First Amendment issues are at stake. Because they are at stake, the Court need not wait for the perfect plaintiff. The government correctly points out an overbreadth challenge can be made where standing exists because "rights of association were ensnared in statutes which, by their broad sweep, might result in burdening innocent associations." *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973). Rights of association are clearly at issue in this anti-stalking statute because the statute itself can require proximity to a specific person, and rights of association are directly associated with proximity to a person.

B. The Statute's Overbreadth.

The government attempts to limit the First Amendment to "only spoken words." [See generally, *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973)]. By arguing that when speech is accompanied by conduct, such speech is no longer protected by the First Amendment. [Brief of Appellee, at 11 ("The Utah statute does not regulate speech alone, but speech accompanied by conduct.")]. The government wrongly relies on *Broadrick* for the idea that the First Amendment applies only to spoken words. In *Broadrick*, the conduct at issue was against the law in and of itself--(solicitation of campaign funds as a state employee). In the case at bar, the conduct accompanying the speech is being in the presence of someone, which clearly is not illegal. The government argues that speech "accompanied by conduct in the form of addressing" another person is not protected by the First Amendment. This is an erroneous interpretation of this constitutionally protected right. The very foundations of the First Amendment presumes that such speech will be heard by specific people. This is true whether the communication is heated and even offends people. To rule otherwise would

place every Utah business person, legislator, lawyer or sibling under the over inclusive cloud of the Utah Stalking statute if they simply contact someone twice and cause the person hurt feelings.

The government correctly points out that an overbreadth challenge can be made where standing exists because "rights of association [are] ensnared in statutes which, by their broad sweep, might result in burdening innocent associations," [*Broadrick v. Oklahoma*, 413. U.S. 601, 612 (1973)], but also argues that by requiring the course of conduct to be intentional and specifically directed at a particular person, the Utah Stalking statute does not burden innocent associations. [Brief of Appellee, at 13]. The scenarios set out on page 10 of Appellant's brief are clearly intentional and directed toward a specific person, i.e., intentionally approaching a mechanic, a lawyer, a repairman or a restauranteur to complain about perceived inefficiencies with a product or service. The course of conduct proscribed by the statute is so expansive as to criminalize legitimate and protected conduct simply because the conduct is intentionally directed toward a particular person. Under the current statute and the government's interpretation of the statute, even siblings could be prosecuted if they intentionally quarreled with and hurt another's feelings. Relying on "intentional conduct" as the mens rea of the crime does not afford adequate protection for innocent associations.

The government argues that Appellant has not presented any credible evidence that the statute's overbreadth is real and substantial [Brief of Appellee, at 16], and that a person does not have a constitutionally protected right to intentionally communicate with another when the communication eventually results in emotional distress to the person to whom the communication is being made. The government errs in its interpretation of the First Amendment. If the Constitution were intended to protect only that speech which is not stressful or disturbing, the exceptions would quickly swallow the rule. In contrast to the government's position, the First Amendment is specifically meant to

protect speech that is distressing, unpopular or disturbing.

The government argues that a limiting construction of the statute could ensure that it is applied only to the type of conduct the legislature seemed to find odious enough to criminalize. [Brief of Appellee, at 16]. The government points to the language in the statute that requires that the alleged victim must reasonably suffer emotional distress, thus attempting to demonstrate a cure for the statute's overbreadth. But even limiting this one element of the crime does not cure the statute's overbreadth. To limit application of the statute to those instances where a "victim" has been "reasonably" distressed is to argue that the statute is meant to criminalize upsetting another. Making someone feel emotional distress should not be made illegal. The statute essentially prohibits legitimate intentional confrontations that occur every day between neighbors, businessmen and even families. Simply finding that the statute prohibits contact with another that causes the other to "reasonably" feel distressed, as opposed to contact in which the other is "unreasonably" distressed, does not cure the statute's overbreadth. This Appellant has a constitutional right to speak to another person, even if the other is "reasonably" disturbed by that contact.

POINT II

THE UTAH STALKING STATUTE IS UNCONSTITUTIONALLY VAGUE FACIALLY BECAUSE IT DOES NOT CLEARLY DEFINE WHAT CONDUCT IS PROHIBITED.

The government correctly points out that in considering a facial vagueness challenge to a statute, as opposed to a facial overbreadth challenge, Appellant must show that the enactment implicates constitutionally protected conduct, or show that the enactment is impermissibly vague in all of its applications. *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494-95 (1982). It is also true that a person that engages in some conduct that is "clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others." *Id.* At 495. The

problem with the government's analysis is that the statute at issue does not specify "conduct that is clearly proscribed," thus encouraging arbitrary and discriminatory enforcement of the statute. [See *Kolender v. Lawson*, 461 U.S. 352, 357 (1982)]. Minimal guidelines to govern and direct law enforcement do not exist in this statute; it does not clearly describe what Mr. Lifang could or could not do. The statute affords police and prosecutors almost unlimited discretion to decide when it has been violated. [See *Kolander*, at 360 (stating that when full discretion is given to the police to decide which conduct is criminal, a statute must fail for vagueness)]. "Repeatedly maintaining a visual or physical proximity to a person or repeatedly conveying verbal or written threats or threats implied by conduct or a combination thereof directed at or toward a person" does not give a police officer adequate instructions on enforcement of this statute. This statute merely "furnishes a convenient tool for harsh and discriminatory enforcement by local prosecuting officials." *[Kolender*, at 360]. In this case, there was no evidence of threats being made toward the alleged victim. Ms. Roring testified at trial that Appellant never threatened her or any of her family members with physical harm. [Transcript at 70-73]. Furthermore, the transcript is replete with testimony from the witnesses and the security staff that Appellant never made any threats to physically harm Roring or any of her family members. Appellant also testified that Ms. Roring was never afraid of him. [Transcript at 239]. Therefore, the police were left with enforcing the statute based solely on Appellant's "maintaining a visual or physical proximity to a person." How close does a person have to be? Maintaining such proximity easily includes casual contact with those with whom we work, study and worship on a repeated basis. The definition of "course of conduct" in the statute is plainly too vague to prevent unfettered interpretations made by law enforcement officials.

POINT III

THE UTAH STATUTE IS DIFFERENT THAN OTHER STATUTES THAT HAVE NOT BEEN HELD UNCONSTITUTIONAL

The Utah Statute is unlike the statutes of some other states that have been scrutinized for constitutionality. [See Brief of Appellee, at 17, 24]. The Utah anti-stalking statute's "course of conduct" is satisfied by intentionally being in visual or physical proximity to a person twice. It does not require a plan, or a pattern or a series of events, but only two isolated--even accidental--encounters would suffice according to the plain language. Therefore, the statute violates the Due Process Clause of both the U.S. Constitution and the Utah Constitution.

CONCLUSION

Section 76-5-106.5 is overbroad facially and as applied to this case. It also fails to clearly define prohibited conduct in a manner that persons of ordinary intelligence can understand. It violated Appellant's guarantees of equal protection and uniform operation of laws. The government has not adequately argued that the statute can be enforced without violating these constitutional protections, even with limiting construction. This Court should rule the statute unconstitutional and reverse the trial court's denial of Appellant's Motion to Dismiss.

RESPECTFULLY SUBMITTED this 19th day of October, 1995.

ALDRICH, NELSON, WEIGHT & ESPLIN

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MAILING CERTIFICATE

I hereby certify that I mailed, postage prepaid, this 19th day of October, 1995, two copies of the foregoing Reply Brief of Defendant-Appellant to the following:

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