

COLORADO COURT OF APPEALS

2 E. 14th Ave., Third Floor
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DENVER DISTRICT COURT and ST. JOHN'S
CHURCH IN THE WILDERNESS, et.al.

Plaintiffs-Appelles.

Vs.

KENNETH TYLER SCOTT and CLIFTON POWELL,
Pro Se,

Defendants-Appellants.

_ COURT USE ONLY _

Case No.: 06CA2421

Appeal from the District Court, City and County of Denver, State of Colorado
Trial Court Case No.: 05CV2290 - Judge John N. McMullen, presiding
Party Initiating Appeal: Kenneth Tyler Scott (Defendant)

REPLY BRIEF

TABLE OF AUTHORITIES..... i

STATEMENT OF THE CASE..... 1

ARGUMENT 2

A. The Injunction Was Not Narrowly Tailored..... 2

**B. The Scope of “Religious Services” was impermissibly enlarged, giving
 organizations license to define speech-free zones**..... 3

**C. Conduct Repeatedly Cited in Appellees’ Answer Brief is Traditional First
 Amendment Territory** 5

CONCLUSION 10

CERTIFICATE OF SERVICE 11

TABLE OF AUTHORITIES

Cases

City of Houston v. Hill, 482 U.S. 451 (1987)..... 5

Edwards v. South Carolina, 372 U.S. 229 (1963)..... 6

Furr v. Town of Swansea, 594 F. Supp. 1543 (Dist. S.C. 1984) 6

Hill v. Colorado, 120 S.Ct. 2480 (2000)..... 5

Lozano v. Lozano, 52 S.W.3d 141 (Tex. 2001)..... 7

Terminiello v. Chicago, 337 U.S. 1 (1949)..... 6

United States v. Eichman, 469 U.S. 310 (1990)..... 5

Appellant (“Scott”) replies, as follows, to the Answer Brief submitted by the St. Johns plaintiff-appellees (collectively, “St. Johns appellees”) on October 15, 2007.

STATEMENT OF THE CASE

Appellees have failed to include any language concerning the applicable Standard of Review. They have, however, through both concession and argument, made clear in their Answer Brief that their objective is to create a license to use both state civil conspiracy theory and their religious activities to convert a speech-free zone out of a free-speech zone. Said differently, they are using a theory of law and religious classification to deliberately suppress dissenting views from proximity of their church building.

Appellees contend that, “The gravamen of this appeal is whether the government may, through a narrowly-tailored injunction, prevent persons from intentionally interfering with religious worship services.” In so doing, they not only call attention to whether the injunction actually is narrowly tailored but, also whether the scope of “religious worship services,” has been enlarged to become so broad, as to create an unacceptable precedent –specifically, to license a religious organization to convert, as a matter of prerogative, an entire city block in an urban setting into a “captive audience” zone that entitles them to selective silence.

“Selective silence,” means that they are afforded protection not from the sounds of trains, sirens, barking dogs and city traffic but, rather, from adjacent exercise of First Amendment speech.

ARGUMENT

A. The Injunction Was Not Narrowly Tailored

The answer to the first question –whether the injunction was narrowly tailored—is contained in Appellee’s Answer Brief. Although appellees argue on page 6 of their Brief that, “The injunction prohibits *only* focused picketing and screaming in limited areas adjacent to the cathedral *during worship and preparation for worship*,” [emphasis in the orig.], the plain language of the injunction (appearing on the same page) reads quite differently:

During worship and preparation for worship, from a period beginning one-half hour before and ending one-half after a religious event or series of religious events, including but not limited to worship services on Sundays between the hours of 7:00 a.m. and 1:00 p.m.

Id. The, language, itself, clearly recognizes a “series of religious events” to encompass the services held throughout a given day from morning until afternoon and does not prevent any reasonable person (*e.g.* a police officer acting under

qualified immunity) from interpreting the entirety of Holy Week or Lent or Advent as “a series of religious events.”

In addition, appellees have repeatedly emphasized (from the record as well as in argument) the alleged tortious interference to have occurred and intended to occur on Palm Sunday, which occurs only once per year. Yet, appellees did not dispute that the injunction applies not only on Palm Sunday but, rather, throughout the entire year. Thus, as the plain language of the injunction demonstrates, the injunction is not narrowly tailored.

B. The Scope of “Religious Services” was impermissibly enlarged, giving organizations license to define speech-free zones

The answer to the second question — whether the scope of “religious worship services,” was enlarged to license a religious organization to convert, as a matter of prerogative, a free-speech zone into a speech-free zone — is also contained in their Answer Brief:

Indeed, appellees do not seriously dispute that there was insufficient evidence in the record to support the allegation of interference with religious worship that was taking place inside the place of worship (where, indeed, most worship in this country occurs), citing only the testimony of Thompson, which testimony was not corroborated by any other evidence in the record (such as empirical measurements). Rather, appellees argue that, “[T]he focus of Judge

McMullen’s findings was that Episcopal tradition calls for an *outdoor* Palm Sunday procession” [Ans. Brief at 13; emphasis in the orig.] and that, “Judge McMullen found that an outdoor liturgy and procession was a traditional element of Palm Sunday celebration in the Episcopal tradition.” Ans. Brief at 2.

In so doing, appellees are impermissibly seeking to expand the “captive audience” doctrine to include any locations of their own choosing under the rubric of religious “tradition.” For example, plaintiff-appellees explained in Para. 17 of their First Amended Complaint that, “Traditionally, Episcopalians, and those, who attend Episcopal services, prepare for religious worship in contemplative silence,” which the trial court expanded to include walking along public sidewalks from their bus-stop or vehicle on the way to the cathedral. Findings at 20:3-4. Appellees, therefore, argue that an injunction should operate to limit a tradition public forum (“access to streets and sidewalks immediately adjacent to St. John’s Cathedral”). Ans. Brief at 27. This public forum is denoted by appellees as, “where outdoor worship and prayer service take place.” *Id.*

This expansion not only has already caused irreparable harm to Scott’s right to express contrary thoughts and ideas within this particular public forum but, also creates a dangerous precedent, affecting the Public Interest. The trial court’s finding that the injunction does not adversely affect the public interest, because it purportedly protects its expanded scope of “religious services” [findings at 29:17-

23] and “the protection of children” [*id.*] is a mixed question of law and fact, subject to de novo review.

C. Conduct Repeatedly Cited in Appellees’ Answer Brief is Traditional First Amendment Territory

Appellees’ description of defendants’ conduct does nothing to support their legal position, because each example provided is conduct that has been historically protected under the First Amendment. For example, they allege that Scott, “harassed parishioners walking from their cars to the church, ‘in a voice that has been described at various times as loud, angry, and confrontational’ . . . In response to the conduct of Defendants, ‘many people were visibly upset, showing, crying, trembling, fear, and anger.’ ” Ans. Brief at 15.¹

However, speech that is popular or pleasant has little need for constitutional protection. City of Houston v. Hill, 482 U.S. 451, 462 n.11 (1987). The true test of the right to free speech under the Amendment I and its counterpart in the Colorado Constitution is the strength of the protection that right affords to speech that is unpopular, unpleasant, disturbing or, even, despised. See, e.g., United States v. Eichman, 469 U.S. 310 (1990); see also Hill v. Colorado, 120 S.Ct. 2480 (2000) (messages that may be offensive does not deprive them of constitutional

¹ In support of this, appellees argue that, “Judge McMullen found that Defendants had been previously cited,” under Denver’s ordinance § 38-90 (Ans. Brief at 5 & 19) yet, failed to disclose that each and all of those charges were dismissed or resulted in acquittal. Vol. XIV at pp. 18, 71, 234; Vol VIII at 218-221.

protection; right of free speech includes right to attempt to persuade others to change their views and may not be suppressed simply because speaker's message is offensive to his audience). Even "loud" and "boisterous . . . harangue" is constitutionally protected speech, especially when it occurs in a traditional public forum, such as the Pearl Street Mall. See Edwards v. South Carolina, 372 U.S. 229, 233 (1963). See also Furr v. Town of Swansea, 594 F. Supp. 1543, 1546 (Dist. S.C. 1984).

A function of free speech under our system of government is to invite dispute. It may, indeed, best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech . . . is . . . protected against censorship or punishment . . . There is no room under our Constitution for a more restrictive view.

Terminiello v. Chicago, 337 U.S. 1, 4-5 (1949).

Appellees have tried to obfuscate the First Amendment issues by citing, "the Children." In support of that contention, they point to the fact that the trial judge concluded that Jo Scott appeared on "Tapestry of Life" and said, "We're gonna be at St. John's Sunday, picketing. We're gonna take all the kids that we have pictures of . . . big posters of aborted babies and we're going to bring them out and make them look at them because they [the parents] have children there with them." Ans. Brief at 15 (citing findings at 4:9-17).

The problem with this cliché emotional plea (regarding “the Children”) — aside from its transience— is that a material fact should not be inferred from circumstantial evidence, which could give rise to any number of inferences, none more probable than another.² Indeed, a reasonable person could have alternately concluded that, what Jo Scott meant was simply that, because some parents would “have children with them,” those persons would be more receptive to the message of what abortion does to *children*. Indeed, this was not an admission by Jo Scott that she (or they) intended to target children with their message. More importantly, Mrs. Scott was dismissed from the trial (and this appeal) by stipulation. Vol. I-II at 493-95. Her representations, therefore, are not a legal justification or evidentiary basis for an injunction against Clifton Powell and Kenneth Scott.

Appellees’ reliance on case from another jurisdiction, St. David’s Episcopal Church v. Westboro Baptist Church, 921 P.2d 821 (Kan.App. 1996) is unavailing, because St. Davids is predicated on dissimilar facts to the case at bar: In imposing a restraining order, the St. David’s trial court made a determination that the restraining order was necessary because of the threat of violence. See id. at 829-30 (“The express purpose of the temporary injunction in this case was to thwart

² In some jurisdictions, this is called the Equal Inference Rule. See, e.g., Lozano v. Lozano, 52 S.W.3d 141, 158 (Tex. 2001) (Equal Inference Rule a species of the No Evidence Rule, emphasizing that when the circumstantial evidence is so slight that any plausible inference is purely a guess, it is in legal effect no evidence. Equal Inference Rule is a method of confutation whereby the opposing inference is considered for the purpose of determining whether the necessary supporting inference may be drawn with reasonable certainty).

potential violence around [plaintiff]'s property during specific times of the day when prior encounters between the two groups occurred. . . The trial court here also found that the temporary injunction was warranted because of harassment and threats of violence and injury surrounding the picketing of [plaintiff]'s by [defendant]”). See also Ans. Brief at 26 (“*St. David’s* held that the express purpose of the injunction was to prevent potential violence between church members, as occurred during previous encounters”). Here, as the record accurately reflects, neither Scott nor Powell was involved in any violence or threat of violence. Thus, the rationale used by the St. David’s court in issuing a restraining order is not present here.

Moreover, the St. David’s panel expressly deferred making any determination regarding constitutionally protected speech:

As a final matter under this issue, Westboro would like for this court to resolve the question of whether a court can enjoin picketing outside of a church on public sidewalks. *St. David's* argues that this issue was not considered by the trial court and should not be considered on appeal. Westboro's arguments on this issue seem to presume that its speech is constitutionally protected, an issue expressly left open by the trial court.

Id. at 832. The trial court had noted that, **if** the speech were unprotected, then that would further strengthen the propriety of granting the motion. Id. at 828. Here, plaintiff-appellees have already conceded that Scott’s speech was constitutionally protected by characterizing it as a message “based on sincerely held religious

beliefs” (Vol. IV at 1067, ¶ 12), and further noted that “speech, in general, is entitled to First Amendment protection.” Vol. IV at 1066, ¶ 5.

Finally, St. David’s also stands for the proposition that the trial court could not proscribe members of the defendant church from making noise during plaintiff church's services, where there was nothing in record suggesting that noise from defendant's picketing activity was substantially interfering with plaintiff's worship services:

We do have a problem with the court's order proscribing noise contained in the third paragraph of its injunction order . . . As Westboro points out . . . there is nothing in the affidavits which accompanied St. David's petition which suggests that the noise from Westboro's picketing activity was interfering with the worshipping by St. David's. Although the petition did request an injunction on such noise, St. David's has yet to provide the trial court, or this court, with any basis for such an injunction. On the present record, we reverse the trial court's order enjoining noise by Westboro.

921 P.2d at 832. Therefore, St. David’s is inapplicable on this point, too, unless the plaintiff-appellees are permitted to convert the area outside and adjacent to their cathedral as a speech-free area shielded selectively from targeted dissenting views.

CONCLUSION

Contrary to the appellee's assertions, the only "conspiracy" that took place here was to lawfully exercise First Amendment rights. Absent considerations of public safety, threat of violence, criminal mischief or obstruction of public or private rights-of-way, the trial court's findings were clearly based on the content of the message and the subjective, unmeasured volume of one man's voice. As a matter of law, there is no legally insufficient rationale to warrant an injunction purported to shield from targeted protesting on Palm Sunday yet, which was imposed for all church services, the definition of which has been expanded to include any locations and terrain claimed by appellees as part of their "tradition." For the foregoing reasons, appellant-Scott prays in the name of his Lord, Jesus Christ, and respectfully requests this Court of Appeals to vacate the trial court's judgment and injunction.

Respectfully submitted November 11, 2007

KENNETH TYLER SCOTT

CERTIFICATE OF SERVICE

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