O'Mara v. Commonwealth, 33 Va. App. 525, 535 S.E.2d 175 (2000)

IN THE COURT OF APPEALS OF VIRGINIA
ARGUED AT CHESAPEAKE, VIRGINIA

JONATHAN STEPHEN O'MARA
v.
COMMONWEALTH OF VIRGINIA

Record No. 0992-99-1*

RICHARD J. ELLIOTT
v.
COMMONWEALTH OF VIRGINIA

Record No. 0997-99-1**
Decided: October 3, 2000***

Present: Judges Coleman, Bray and Bumgardner

FROM THE CIRCUIT COURT OF THE CITY OF VIRGINIA BEACH, Frederick B. Lowe, Judge

Affirmed. **[Page 528]**

COUNSEL

Kevin E. Martingayle (Stallings & Richardson, P.C., on briefs), for Jonathan Stephen O'Mara.

James O. Broccoletti (Zoby & Broccoletti, on brief), for Richard J. Elliott.

H. Elizabeth Shaffer, Assistant Attorney General; John H. McLees, Jr., Senior Assistant Attorney General (Mark L. Earley, Attorney General, on briefs), for appellee.

OPINION

BRAY, J. — Pursuant to the terms of a plea agreement, Jonathan O'Mara pled guilty to "Attempted Cross Burning" and "Conspiracy to Commit a Felony," violations of Code §§ 18.2-423 and 18.2-22, respectively, expressly reserving the right to appeal a prior order of the trial court which denied his challenge to the constitutionality of Code § 18.2-423. In a separate proceeding, Richard J. Elliott, codefendant with O'Mara, was convicted by a jury for attempted cross burning, after joining with defendant O'Mara in the unsuccessful challenge to the constitutionality of Code § 18.2-423 before the trial court.[1] **[Page 529]**

Accordingly, both O'Mara and Elliott (defendants) maintain on appeal "that the code section is unconstitutional as violative of the free speech and expression protections" guaranteed by both the United States and Virginia Constitutions. Joining the two appeals for resolution by this Court, we affirm the respective convictions.

I.

The substantive facts are uncontroverted. On the evening of May 2, 1998, defendants, together with "approximately fifteen individuals," were "consuming alcohol" at the Virginia Beach home of David Targee. When defendant Elliott expressed unspecified "complaint[s] . . . about his neighbor," James Jubilee, and his desire to "'get back' at him," someone "suggested that they burn a cross in [Jubilee's] yard." In response, Targee and defendants immediately constructed a crude cross in Targee's garage and proceeded in Targee's truck to the Jubilee home. Elliott "handed the cross" to defendant O'Mara, who erected and ignited it on Jubilee's property, and the three returned to Targee's residence. The respective records do not clearly specify Jubilee's race.

Jubilee later discovered the "partially burned cross" and notified police, resulting in the subject prosecutions for violations of Code § 18.2-423 and the attendant conspiracy.

II.

Code § 18.2-423 provides:

> It shall be unlawful for any person or persons, with the intent of intimidating any person or group of persons, to burn, or cause to be burned, a cross on the property of another, a highway or other public place. Any person who shall violate any provision of this section shall be guilty of a Class 6 felony. **[Page 530]**
>
> Any such burning of a cross shall be prima facie evidence of an intent to intimidate a person or group of persons.

Defendants contend that the statute impermissibly infringes upon expressive conduct, speech protected by the First and Fourteenth Amendments to the Constitution of the United States and Article I, § 12 of the Virginia Constitution, and, therefore, is "plainly unconstitutional."[2]

"'In assessing the constitutionality of a statute . . . [t]he burden is on the challenger to prove the alleged constitutional defect.'" *Woolfolk v. Commonwealth*, 18 Va. App. 840, 848, 447 S.E.2d 530, 534 (1994) (quoting *Perkins v. Commonwealth*, 12 Va. App. 7, 14, 402 S.E.2d 229, 233 (1991)).

> "Every act of the legislature is presumed to be constitutional, and the Constitution is to be given a liberal construction so as to sustain the enactment in question, if practicable." *Bosang v. Iron Belt Bldg. & Loan Ass'n*, 96 Va. 119, 123, 30 S.E. 440, 441 (1898). "When the constitutionality of an act is challenged, a heavy burden of proof is thrust upon the party making the challenge. All laws are

presumed to be constitutional and this presumption is one of the strongest known to the law." *Harrison v. Day*, 200 Va. 764, 770, 107 S.E.2d 594, 598 (1959).

Moses v. Commonwealth, 27 Va. App. 293, 298-99, 498 S.E.2d 451, 454 (1998).

The First Amendment declares, "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." The Fourteenth Amendment prohibits state action in violation of the First Amendment. **[Page 531]**

Similarly, Article I, § 12 of the Virginia Constitution establishes:

That the freedoms of speech and of the press are among the great bulwarks of liberty, and can never be restrained except by despotic governments; that any citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that right; that the General Assembly shall not pass any law abridging the freedom of speech or of the press, nor the right of the people peaceably to assemble, and to petition the government for the redress of grievances.

"Our courts have consistently held that the protections afforded under the Virginia Constitution are co-extensive with those in the United States Constitution." *Bennefield v. Commonwealth*, 21 Va. App. 729, 739-40, 467 S.E.2d 306, 311 (1996).

Although "[t]he First Amendment literally forbids the abridgement only of 'speech,'" the Supreme Court has "long recognized that its protection does not end at the spoken or written word." *Texas v. Johnson*, 491 U.S. 397, 404 (1989). "[C]onduct may be 'sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments.'" *Id.* (quoting *Spence v. Washington*, 418 U.S. 405, 409 (1974)). In identifying expressive conduct, the Court must determine "whether '[a]n intent to convey a particularized message was present, and [whether] the likelihood was great that the message would be understood by those who viewed it.'" *Id.* (alterations in original) (quoting *Spence*, 418 U.S. at 410-11). If so, a proscription of such activity by government "because of disapproval of the ideas expressed" is "content based" suppression of free speech, offensive to the First Amendment and "presumptively invalid." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992).

However, "our society . . . has permitted restrictions upon the content of speech in a few limited areas, which are 'of such slight social value as a step to truth that any benefit that **[Page 532]** may be derived from them is clearly outweighed by the social interest in order and morality.'" *Id.* at 382-83 (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942)). Thus, First Amendment protection "does not include a freedom to disregard these traditional limitations," thereby allowing government to regulate obscenity, defamation, "fighting words," *id.* at 383 (citing *Chaplinsky*, 315 U.S. at 572), and threats of violence. *See id.* at 383, 388 (citing *Watts v. United States*, 394 U.S. 705, 707 (1969)); *see also In re: Steven S.*, 31 Cal. Rptr. 2d 644, 647 (Ct. App. 1994) (holding that threats and fighting words are "remove[d] . . . from the scope of the First Amendment"); *Florida v. T.B.D.*, 656 So. 2d 479, 480-81 (Fla. 1995), *cert. denied*, 516 U.S. 1145 (1996) (concluding that threats of violence and fighting words

are proscribable because government has "valid interest" in protecting citizens both from fear of violence and violence).

The "'true threat'" doctrine articulated by the Supreme Court in *Watts* permits punishment of actual speech or expressive conduct "when a reasonable person would foresee that the threat would be interpreted as a serious expression of intention to inflict bodily harm." *In re: Steven S.*, 31 Cal. Rptr. 2d at 647 (citing *Orozco-Santillan*, 903 F.2d 1262, 1265-66 (9th Cir. 1990)). Similarly, the Court's "fighting words doctrine" expressed in *Chaplinsky* removes the shield of the First Amendment from "statements 'which by their very utterance inflict injury or tend to incite an immediate breach of the peace.'" *Id.* (quoting *Chaplinsky*, 315 U.S. at 572); *see Cohen v. California*, 403 U.S. 15, 20 (1971) (describing fighting words as expressions likely to provoke a violent reaction when directed to another).

Here, the provisions of Code § 18.2-423 specifically prohibit the burning of a cross "on the property of another, a highway or other public place," "with the intent of intimidating **[Page 533]** any person or group of persons." Historically, a flaming cross is "inextricably linked . . . to sudden and precipitous violence – lynchings, shootings, whippings, mutilations, and home-burnings," a "connection . . . [with] forthcoming violence [that] is clear and direct." *T.B.D.*, 656 So. 2d at 481. Hence, "a burning cross conveys ideas capable of eliciting powerful responses from those engaging in the conduct and those receiving the message." *State v. Ramsey*, 430 S.E.2d 511, 514 (S.C. 1992).

Manifestly, the pernicious message of such conduct, a clear and direct expression of an intention to do one harm, constitutes a true threat envisioned by *Watts*, irrespective of racial, religious, ethnic or like characteristics peculiar to the victim. Moreover, the attendant fear and intimidation subjects the victim to an immediate and calculated injury that invites a breach of the peace, fighting words within the intendment of *Chaplinsky*. Thus, although such expressive conduct doubtless constitutes speech, the prohibition of which unavoidably implicates content, the message is beyond the protection of the First Amendment and appropriately subject to proscription by government.

Defendants' reliance upon *Brandenburg v. Ohio*, 395 U.S. 444 (1969), to support the contention that Code § 18.2-423 unconstitutionally prohibits "merely intimidating someone," at once ignores the well-established symbolism of the burning cross and misapplies *Brandenburg*. *Brandenburg* addressed a challenge to the constitutionality of Ohio's "Criminal Syndicalism statute," which proscribed, *inter alia*, the "'advocacy . . . [of] the duty, necessity, or propriety of crime, sabotage, violence or unlawful methods of terrorism as a means of accomplishing industrial or political reform.'" *Id.* at 444-45. Thus, the *Brandenburg* Court was concerned with the propriety of governmental restrictions on the "advocacy of the use of force or of law violation" in the context of a reform movement, an issue unrelated to the vile and malevolent expression contemplated by Code § 18.2-423. *Id.* at 447. Accordingly, the *Brandenburg* admonishment that states may **[Page 534]** "forbid or proscribe [such] advocacy" only if "directed to inciting or producing imminent lawless action and . . . likely to incite or produce such action" does not similarly delimit proscribable threats and fighting words. *Id.*

Defendants' assertion that *R.A.V. v. St. Paul*"makes it clear . . . § 18.2-423 is unconstitutional" is, likewise, without merit. *R.A.V.* examined the constitutionality of a St. Paul, Minnesota ordinance, which provided, in pertinent part,

> Whoever places on public or private property a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross . . . which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender commits disorderly conduct and shall be guilty of a misdemeanor.

R.A.V., 505 U.S. at 380 (citing Minn. Legis. Code § 292.02 (1990)). Unlike Code § 18.2-423, which proscribes cross burnings with the intent to intimidate anyone, the St. Paul ordinance prohibited such "speech solely on the basis of the subjects the speech addresses," race, color, creed, religion or gender. *R.A.V.*, 505 U.S. at 381.

In declaring the enactment unconstitutional, the Supreme Court accepted the "authoritative statement" by the Minnesota Supreme Court "that the ordinance reaches only those expressions that constitute 'fighting words,'"[3] *id.* at 381, and reaffirmed the doctrine that "areas of speech can, consistently with the First Amendment, be regulated *because of their constitutionally proscribable content* — (obscenity, defamation, [threats, fighting words] etc.)." *Id.* at 383 (emphasis in original). However, the Court cautioned that such "categories of speech [are not] entirely invisible to the Constitution" and cannot "be made the vehicles for content discrimination unrelated to their distinctively proscribable content." *Id.* at 383-84. **[Page 535]** Thus, when "St. Paul . . . proscribed fighting words of *whatever* manner that communicates messages of racial, gender or religious intolerance," the city impermissibly engaged in "[s]electivity [which] creates the possibility that [it] is seeking to handicap the expression of *particular* ideas." *Id.* at 394 (emphasis added); *see In re: Steven S.*, 31 Cal. Rptr. 2d at 649 ("speech and expressive conduct may be regulated [but] such regulation may not discriminate within that category on the basis of content"); *T.B.D.*, 656 So. 2d at 481 (such regulation may not "play[ ] favorites").

In contrast, Code § 18.2-423 regulates, without favor or exception, conduct, which, despite elements of expression and content, is unprotected by the First Amendment.[4]

Finally, defendant challenges Code § 18.2-423, first, as overbroad, regulating both protected and unprotected speech, and, secondly, as underinclusive, ignoring other modes of proscribable speech. However, overbreadth assumes constitutional dimension only when "'there [is] a realistic danger that the statute . . . will significantly compromise recognized First Amendment protections of parties not before the court.'" *Parker v. Commonwealth*, 24 Va. App. 681, 690, 485 S.E.2d 150, 154-55 (1997) (quoting *Members of City Council of City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 800-01 (1984)). **[Page 536]** The prohibition of Code § 18.2-423 is expressly limited to a person or persons burning a cross with the specific intent to intimidate another, a threat and fighting words unworthy of First Amendment guarantees. Further, underinclusiveness is condemned by *R.A.V.* only if the result is content discrimination. *See R.A.V.*, 505 U.S. at 387. Code § 18.2-423 criminalizes a long recognized, particularly virulent and incendiary mode of proscribable expressive conduct, a prohibition free of content discrimination.

We, therefore, conclude that Code § 18.2-423 suffers from none of the several unconstitutional infirmities advanced by defendants. The statute targets only expressive conduct undertaken with the intent to intimidate another, conduct clearly proscribable both as fighting words and a threat of violence. The statute does not discriminate in its prohibition and is neither overbroad nor underinclusive.

Accordingly, we affirm the convictions.

Affirmed.

FOOTNOTES

[*] [Editor's Note: Appeal to the Supreme Court of Virginia refused, No. 010038]

[**] [Editor's Note: Appeal to the Supreme Court of Virginia refused, No. 003014]

[***] [Editor's Note: Appealed to the Supreme Court of Virginia, *see* 262 Va. 764, 535 S.E.2d 175 (2000)]

[1] Although Judge Lowe presided at the trials of both O'Mara and Elliott, defendants' constitutional challenges were decided by Judge Alan E. Rosenblatt, following an extensive hearing and related argument and memoranda of law.

[2] "[L]itigants may challenge a statute on first amendment grounds even when their own speech is unprotected." *Coleman v. City of Richmond*, 5 Va. App. 459, 463, 364 S.E.2d 239, 241-42 (1988) (citing *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973)).

[3] In overruling defendants' constitutional challenges in the instant prosecutions, Judge Rosenblatt also determined that Code § 18.2-243 regulated fighting words.

[4] Post-*R.A.V.* decisions of other jurisdictions cited by defendant in support of a different result involve statutes substantially dissimilar from Code § 18.2-423. *See Pinette v. Capitol Square Review and Advisory Bd.*, 874 F. Supp. 791 (S.D. Ohio 1994) (statute established permit requirements to conduct public assembly); *State v. Shelton*, 629 A.2d 753 (Md. 1993) (statute proscribed cross burning to protect property owners from unwanted fires and safeguard community from fires generally); *State v. Vawter*, 642 A.2d 349 (N.J. 1994) (statute proscribed messages based upon race, color, creed or religion); *State v. Talley*, 858 P.2d 217 (Wash. 1993) (statute proscribed certain conduct related to the race, color, religion, ancestry, natural origin, or mental, physical or sensory handicap of another).

In contrast, jurisdictions examining the constitutionality of statutes more akin to Code § 18.2-423 are in accord with our conclusion. *See In re: Steven S.*, 31 Cal. Rptr. 2d 644 (statute proscribed cross-burning intended to terrorize owner or occupant); *T.B.D.*, 656 So. 2d 479 (statute proscribed burning of cross on property of another without permission).