In The

Supreme Court of Virginia

RECORD NO. 161804

JACK EUGENE TURNER,

Appellant,

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

BRIEF OF APPELLANT

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STATEMENT OF THE CASE

On August 3, 2015, Jack Eugene Turner ("Mr. Turner") was indicted with violating Virginia Code § 18.2-423.2 for displaying a noose on a public place in a manner having a direct tendency to place another person in reasonable fear or apprehension of death of bodily injury and with the intent of intimidating a person or group of persons. (Appendix (hereinafter abbreviated "Ap.") (Ap. 3)

On August 20, 2015, Mr. Turner appeared in the trial court and moved to dismiss the charge against him, arguing that the displaying of a noose on his private property was protected by the First Amendment to the United States Constitution, mainly Freedom of Speech. (Ap. 6). Mr. Turner also argued that he did not violate Virginia Code § 18.2-423.2 because displaying the noose on his private property was not a prohibited conduct under Virginia Code § 18.2-423.2. (Ap. 6, 35-43). The Commonwealth opposed the Motion to Dismiss arguing that although the noose was in Mr. Turner's "front yard" that it was "open to the public" and thus satisfied the public place requirement of Virginia Code § 18.2-423.2. (Ap. 43-44). The trial court took the Defendant's Motion to Dismiss under advisement. (Ap. 11, 50).

On September 22, 2015, Mr. Turner appeared for trial before the Honorable A. Joseph Canada, Jr. ("Judge Canada"). The trial court heard evidence and considered arguments of counsel. The Commonwealth's first witness, Traze Witcher, testified that the mannequin or "dummy" was hanging in Mr. Turner's yard. (Ap. 69). The Commonwealth's second witness, John Mitchell, testified that Mr. Turner never made any derogatory comments about him and that the "mannequin or dummy" was located on Mr. Turner's property. (Ap. 99). The Commonwealth's third witness, Keena Mitchell, testified that the "dummy" was located on Mr. Turner's property. (Ap. 109). At the conclusion of the Commonwealth's case, the Defendant made a Motion to Strike. (Ap. 125-130). The trial court denied the Motion to Strike. (Ap. 132).

The defense presented no evidence and renewed its Motion to Strike. (Ap. 132). The trial court overruled the Motion to Strike and Judge Canada found Mr. Turner guilty of violating Virginia Code § 18.2-423.2. (Ap. 132-133). The defendant noted his objection to the trial court's finding of guilt. (Ap. 133). The defendant noted to the trial court of his plan to appeal the case and the trial court stated "I understand. I figured you would." (Ap. 135).

Before sentencing, Mr. Turner filed a Motion to Reconsider the trial court's finding of guilt and it's ruling on the Motion to Dismiss on the grounds the trial court erred in the application of law and that the conviction violated the Defendant's First Amendment right, mainly Freedom of Speech (Ap. 166). On the day of sentencing, the trial court overruled Mr. Turner's Motion to Reconsider. (Ap. 177, 215).

After consideration of the pre-sentence report, sentencing guidelines, testimony on behalf of the Commonwealth's witnesses and argument of counsel, the trial court sentenced Mr. Turner to five (5) years with four (4) years and six (6) months suspended. Mr. Turner noted his objections to the trial court's ruling on both the Motion to Dismiss (Ap. 166) and the Motion to Reconsider (Ap. 166, 185).

On December 18, 2015, Mr. Turner timely filed a Notice of Appeal to the Virginia Court of Appeals (Ap. 224) and this appeal followed. On April 18, 2016, appellant's Petition for Appeal was filed with the Court of Appeals of Virginia, Record Number 2039-15-3. On November 22, 2016, the Court of Appeals of the State of Virginia issued a written opinion affirming the judgment of the Circuit Court convicting Turner of displaying a noose with the intent to intimidate, in violation of Virginia Code § 18.2-423.2. Timely,

appellant filed his Notice of Appeal with the Court of Appeals of Virginia on December 6, 2016. (Ap. 247).

STATEMENT OF FACTS

On June 17, 2015, John Mitchell, Keena Mitchell, and Traze Witcher saw a "life size dummy" or mannequin with a black ski mask hanging in a tree, by a rope, located in the front yard of 108 Lindsey Lane, Rocky Mount, Virginia, (Ap. 180-182). 108 Lindsey Lane is owed by Mr. Turner. After viewing the mannequin, the local residents contacted law enforcement. (Ap. 209). After a brief investigation, Mr. Turner was arrested for violating Virginia Code § 18.2-423.2.

Prior to trial, Mr. Turner filed a Motion to Dismiss arguing that the conduct for which he was charged was protected free speech guaranteed by the First Amendment to the United States Constitution. Specifically, the Motion to Dismiss argued that the displaying of a noose on his private property was protected by the First Amendment to the United States Constitution, mainly Freedom of Speech. (Ap. 6). Mr. Turner also argued that he did not violate Virginia Code § 18.2-423.2 because displaying the noose on his private property was not a prohibited conduct under Virginia Code § 18.2-423.2. (Ap. 6, 14-22). Further, displaying a noose on his private property violated the First Amendment of the United States

Constitution, mainly Freedom of Speech. Mr. Turner did not violate Virginia Code § 18.2-423.2 because his displaying a noose was done so on his property. (Ap. 6, 14-22) The trial court took the Defendant's Motion to Dismiss under advisement. (Ap. 29).

On September 22, 2015, Mr. Turner appeared in the Circuit Court of Franklin County. At that time, he entered a plea of not guilty. (Ap. 33-). The Commonwealth's first witness, Traze Witcher, testified that the mannequin or "dummy" was hanging in Mr. Turner's yard. (Ap. 69). The Commonwealth's second witness, John Mitchell, testified that Mr. Turner never made any derogatory comments about him and that the "mannequin or dummy" was located on Mr. Turner's property. (Ap. 99). The Commonwealth's third witness, Keena Mitchell, testified that the "dummy" was located on Mr. Turner's property. (Ap. 109). The trial court found Mr. Turner guilty after the summary of the Commonwealth's evidence, a Motion to Strike by the Defendant (which was denied), and a renewed Motion to Strike by the Defendant (which was denied). (Ap. 125, 130-134). The trial court continued Mr. Turner's case until December 8, 2015, for sentencing. (Ap. 135).

On December 8, 2015, Mr. Turner appeared in the trial court for sentencing. Prior to the sentencing hearing, the trial court heard argument

on the Defendant's Motion to Reconsider the finding of guilt, this motion was denied. (Ap. 175-177, 185).

At the sentencing hearing on December 8, 2015, the trial court accepted evidence from the Commonwealth's witnesses and Mr. Turner was sentenced to five (5) years in the Virginia State Penitentiary with four (4) years and six (6) months suspended, leaving an active sentence of six (6) months to serve. (Ap. 212). The defense noted again for the record its objection to the sentence. (Ap. 213).

ASSIGNMENTS OF ERROR

1. The Court of Appeals and the trial court erred in holding that the appellant did not have a Constitutional right to express his freedom of speech by displaying a noose on his own property. (Preserved at J.A., p. 134).

2. The Court of Appeals erred in upholding the trial court's denial of the Mr. Turner's Motion to Dismiss by failing to find that the displaying of the noose on private property was Constitutionally protected free speech. (Preserved at J.A., p. 134).

3. The Court of Appeals and the trial court erred in holding Mr. Turner did not have a Constitutional right to express his freedom of speech by displaying a noose on his own property (Preserved at J.A., p. 134).

4. The Court of Appeals erred in upholding the trial court's finding of guilt under Virginia Code § 18.2-423.2 for displaying a noose on private property. (Preserved at J.A., p. 134).

5. The Court of Appeals erred in its finding that the definition of a public place endorsed in Hackney is correct to define the phrase in Virginia Code § 18.2-423.2.

6. The Court of Appeals erred in finding Mr. Turner procedurally defaulted by failing to comply with provisions of Rule 5A:20(e) with regards to his assignment of error in which he argues he has an absolute right under the First Amendment to use symbolic or offensive conduct however reprehensible or offensive and with the intent to intimidate if he did so upon his own property.

AUTHORITIES and ARGUMENT

I. The Court of Appeals and trial court erred in holding that the appellant did not have a Constitutional right to express his freedom of speech by displaying a noose on his own property. (Relating to Assignment of Error 1).

II. The Court of Appeals erred in upholding the trial court's denial of the Mr. Turner's Motion to Dismiss by failing to find that the displaying of the noose on private property was Constitutionally protected free speech. (Relating to Assignment of Error 2).

III. The Court of Appeals and the trial court erred in holding Mr. Turner did not have a Constitutional right to express his freedom of speech by displaying a noose on his own property. (Relating to Assignment of Error 3).

A. The First Amendment

The First Amendment of the United States of America states as follows:

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.

"It is well established that non-verbal, symbolic expression is "speech," and is as fully protected by the *First Amendment to the United States Constitution* as more traditional means of communication." Black v. Commonwealth, 262 Va. 764; 553 S.E.2d 738; 2001 Va. LEXIS 144, 146 (also see e.g., Tinker v. Des Moines Indep. Sch. Dist., 393 U.S. 503, 21 L. Ed. 2d 731, 89 S. Ct. 733 (1969) (students wore black arm bands to protest the Vietnam War). In Texas v. Johnson, the Court held "if there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable", *Id*. At 146, also see Texas v. Johnson 491 U.S. 397, 414, 105 L. Ed. 2d 342, 109 S. Ct. 2533 (1989). Justice Lemons opined in Black v. Commonwealth, that "under our system of government, people have the right to use symbols to communicate. They may patriotically wave the flag or burn it in protest; they may reverently

worship the cross or burn it as an expression of bigotry" 2001 Va. Lexis 144, 150.

"The First Amendment permits a State to ban "true threats." See e.g. Watts v. United States, 394 U.S. 705, 708 (1969). True threats, encompass statements where the speaker intends to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals. *Id*. at 708.

The trial court found that Turner hung the noose with the intent "to scare people" and found that Turner hung the noose "way up in the air so it could be seen by the public". (App. 33, 135, 185.) The trial court did not find that Turner hung the noose with the intent of placing someone in fear of bodily harm or death. In Black, the United States Supreme Court held that the First Amendment permits a state to prohibit "only those forms of intimidation that are most likely to inspire fear of bodily harm." *Id*. at 363. This is not such a case.

This distinction is highlighted in Watts v. United States 394 U.S. 705 (1969). In *Watts*, the defendant stated, "they always holler at us to get an education. And now I have already received my draft classification as 1-A and I have got to report for my physical this Monday coming. I am not going. If they ever make me carry a rifle the first man I want to get in my

sights is L.B.J.". L.B.J. stood for the current President Lyndon B. Johnson. *Id.* The statute in which Watts was charged required the Government to prove a true "threat" *Id.* at 707. The Supreme Court was given the task of distinguishing a threat from what is constitutionally protected speech. The Supreme Court held that the speech was political hyperbole and Watts' conviction was overturned. *Id.* at 708-709.

Watts made a direct statement that if he was given a rifle he would put the President in his sights. In the present case, Turner placed a dummy in his yard. He did not put any names, signs or words with the dummy on the noose. Turner made no statements to the Mitchells or Witcher that he was intending to do harm to them nor was there any mention of any particular group of people by race or any other form.

The hanging of a noose and dummy alone are not a true threat, therefore, cannot suffice for a conviction. Turner's conduct was more akin to a display in a haunted house. Every year at Halloween, haunted houses display nooses to "scare" the visitors. Some even display a life-like "person" hanging from them is a true threat and would violate the statute. The conduct here is comparable to Watts and is markedly different from that of a cross burning in Black.

B. Mr. Turner has a constitutional right to display a noose on his private property and his indictment and conviction for violation Virginia Code § 18.2-423.2 violates his First Amendment rights.

The Commonwealth, in its opening brief filed in the Court of Appeals, relies on case law held in Virginia's indecent exposure statute to determine a "public place" comprises places and circumstances where the offender does not have a reasonable expectation of privacy, because of the foreseeability of non-consenting public witnesses. (Comm. Opening Br. Court of Appeals at 24.) Indecent exposure and displaying a noose are two entirely different actions. One is intentional conduct and one is an expressive symbol and pure speech. The First Amendment does not protect standing in your front yard naked if visible to the public. However, the First Amendment does protect speech, even cross burning or displaying a noose.

A public place, when dealing with protections offered by the First Amendment, cannot be private property. The private property's visibility to the public should not be considered. Private property affords the owner exclusive and absolute rights to display any symbol or symbols regardless of how reprehensible or offensive we may find them and these symbols are protected speech.

Freedom of Speech is a basic freedom we are provided as citizens of the United States of America. While we may not always agree with certain types of speech, through actions or words, we all have the right to voice our opinions and beliefs under the *First Amendment of the United States Constitution*. Every citizen has an absolute right under the *First Amendment of the United States Constitution*, however reprehensible or offensive, to burn a cross, fly any flag or to hang a noose in/on one's own private property or on the private property of another with permission. The property in question is the property owned by the Appellant and is protected to allow, however reprehensible or offensive, such actions.

The trial court's failing to protect Mr. Turner's right to freedom of speech was erroneous.

Mr. Turner asks that this Court grant his petition and reverse the Court of Appeals and the trial court's finding of guilt.

IV. The Court of Appeals and trial court erred in finding Mr. Turner guilty of Virginia Code § 18.2-423.2 for displaying a noose on his private property. (Relating to Assignment of Error 4).

STATUTORY INTERPRETATION IN VIOLATION OF VIRGINIA CODE § 18.2-423.2

Virginia Code Section 18.2-423.2, under which Mr. Turner was convicted, states as follows:

(A) Any person who, with the intent of intimidating any person or group of persons, displays a noose on the private property of another without permission is guilty of a Class 6 felony.

(B) Any person who, with the intent of intimidating any person of group of persons, displays a noose on a highway or other public place in a manner having a direct tendency to place another person in reasonable fear or apprehension of death or bodily injury is guilty of a Class 6 felony.

SUBSTANTIVE ARGUMENT

VIRGINIA CODE § 18.2-423.2(A)

A person is NOT allowed to display a noose on the private property of another without permission (Code of Virginia § 18.2-423.2(a)).

Private property is defined by Black's Law Dictionary as property - protected from public appropriation - over which the owner has exclusive and absolute rights.

It is apparent that if a person were to have permission to display a noose on the private property of another they would not be in violation of the Virginia Code Section 18.2-432.2(a). However, this subsection does not apply in this case because the "noose" was not placed on the property of another.

The reasoning behind allowing nooses to be hung with permission on the private property of another is simple, *The First Amendment of the United States Constitution*, specifically Freedom of Speech.

VIRGINIA CODE § 18.2-423.2(B)

Virginia Code Section 18.2-432.2(b) prohibits displaying a noose on a highway (public property) or other public place in a manner having a direct tendency to place another person in reasonable fear or apprehension of death or bodily injury.

Public property is defined by Black's Law Dictionary as state or community-owned property not restricted to any one individual's use or possession.

Public place is defined in Virginia Code § 4.1-100 (Alcoholic Beverage and Control Act) as "any place, building, or conveyance to which the public has, or is permitted to have, access, including restaurants, soda fountains, hotel dining areas, lobbies, and corridors of hotels, and any highway, street, lane, park, or place of public resort or amusement."

Private property is defined by Black's Law Dictionary as property - protected from public appropriation - over which the owner has exclusive and absolute rights.

Mr. Turner's yard/property does not fall under the definition of public place. Mr. Turner has the absolute right to ban someone from his property and is the sole owner giving him exclusive and absolute rights over his yard/property. Public place is properly defined in Virginia Code § 4.1-100. When the public has unlimited access to a certain area speech should be limited. When the public does not have unlimited access to a certain area the speech should not be limited unless it states a direct threat to a certain individual that constitutes a true threat.

The intention of this subsection is not to disallow nooses to be hung on private property, but to ban nooses from public property. The Court of Appeals and the trial court's finding that Mr. Turner's property/yard are a public place is erroneous. Finding a yard is a public place if it is visible from a highway would allow anyone to go in any yard whether or not they are the owner. This is a dangerous slope. Limiting what "speech" a person can displaying in his yard or on his property is a clear violation of the *First Amendment of the United States Constitution*. The trial court's finding of guilt violates Mr. Turner's First Amendment Right to Freedom of Speech and further this finding of guilt was inconsistent with the statutory meaning.

Mr. Turner asks that this Court grant his petition and reverse the trial court's finding of guilt.

V. The Court of Appeals erred in its finding that the definition of a public place endorsed in Hackney is correct to define the phrase in Virginia Code § 18.2-423.2. (Relating to Assignment of Error 5).

Black's Law Dictionary defines "public place" as "[a]ny location that the local, state, or national government maintains for the use of the public, such as a highway, park or public building." Public Place, Black's Law Dictionary (10th ed. 2014).

Public place is defined in Virginia Code § 4.1-100 (Alcoholic Beverage and Control Act) as "any place, building, or conveyance to which the public has, or is permitted to have, access, including restaurants, soda fountains, hotel dining areas, lobbies, and corridors of hotels, and any highway, street, lane, park, or place of public resort or amusement."

On the other hand, in Hackney v. Commonwealth, 186 Va. 888, 45 S.E.2d 241 (1947), the Supreme Court decided "if any person behaves in a riotous or disorderly manner in any street, highway, public building, or any other public place..., he shall be guilty of a misdemeanor." Id. at 890, 45 S.E.2d at 242 (emphasis added). The Supreme Court added offensive language does not always constitute a violation unless "that person communicates it to the public; for example, shouts offensive language from a window on a public street and thus annoys and disturbs some person or persons who are within hearing of the voice." Id. at 893, 45 S.E.2d at 243.

The Court of Appeals erred in concluding that Hackney properly defines "public place" as it appeals to Virginia Code § 18.2-423.2. Hackney is a case based on conduct, not symbolic speech. Public place is properly defined by Black's Law Dictionary as a place that is maintained for public use, as well as the definition given in Virginia Code § 4.1-100 which defines public places as an area where the public has or is permitted access. Private property owned by an individual is not open to the public nor is the public allowed without an invitation. The government does not maintain and control one's private property or yard.

VI. The Court of Appeals erred in finding Mr. Turner procedurally defaulted by failing to comply with provisions of Rule 5A:20(e) with regards to his assignment of error in which he argues he has an absolute right under the First Amendment to use symbolic or offensive conduct however reprehensible or offensive and with the intent to intimidate if he did so upon his own property. (Relating to Assignment of Error 6).

Mr. Turner in his opening brief argued that he has an absolute right under the First Amendment to use symbolic or offensive conduct however reprehensible or offensive and with the intent to intimate if he did so upon his own private property. The Court of Appeals, in its opinion, concluded that he has procedurally defaulted on that issue because pursuant to Rule 5A:20(e), "an appellant's opening brief must contain "[the principles of law, the argument, and the authorities relating to each question presented."

"Statements unsupported by argument, authority, or citations to the record do not merit appellate consideration." Further the Court of Appeals added, "Turner failed to cite any authority whatsoever in support of his argument that the First Amendment offers blanket protection for threats made on his private property...". Turner in fact cited numerous citations including the First Amendment of the United States Constitution, Black, and Watts. Turner argued that because his conduct did not constitute a true threat the protection of the First Amendment applied to him. The Court of Appeals erred in concluding that Turner procedurally defaulted on that issue (second assignment of error in the opening brief and the second assignment of error in this petition).

STANDARD OF REVIEW

On appeal, this Court views the evidence in the light most favorable to the Commonwealth and grants to the Commonwealth all reasonable inferences which might fairly be deduced therefrom. Archer v. Commonwealth, 26 Va. App. 1, 11, 492 S.E.2d 826, 831 (1997); Collins v. Commonwealth, 13 Va. App. 177, 179, 409 S.E.2d 175, 176 (1991).

Questions of law, however, are reviewed under a *de novo* standard of review. Phelps v. Commonwealth, 275 Va. 139, 141, 654 S.E.2d 926, 927 (2008). Likewise, the constitutionality of a statute is reviewed under a *de*

novo standard. Shivaee v. Commonwealth, 270 Va. 112, 613 S.E.2d 570, 574 (citing Wilby v. Gostel, 265 Va. 437, 440, 578 S.E.2d 796, 798 (2003); Eure v. Norfolk Shipbuilding & Drydock Corp., 263 Va. 624, 631, 561 S.E.2d 663, 667 (2002), cert. denied, 546 U.S. 1005, 126 S. Ct. 626, 163 L.E. 2d 509 (2005).

CONCLUSION

While race relations are at the forefront of nearly every news cycle, Courts should not stray from following the law as it is written, albeit at times unpopular or controversial.

The law in this matter is clear. You can hang a noose on private property with permission and you cannot hang a noose on public property. The noose and "dummy" were clearly on the property of Jack Eugene Turner and that property is protected from public appropriation. Mr. Turner has exclusive and absolute rights over his own property. In the trial court's finding, Judge Canada stated that had this been in lesser visible area the situation would be different. Property visible from the road cannot and should not be declared public property solely because it is visible from the highway.

Confederate flags have been banned from most "public places" throughout the nation (i.e. Courthouses, Courtrooms, etc.). With the trial

court's rationale, this should also be true for hanging them in one's yard or from a flag pole on their property.

While I agree with the Court of Appeals and trial court's rationale that hanging a noose and a "dummy" is reprehensible and offensive, both have erred on the side of public opinion and not the law. Poor and distasteful speech must still be protected. The First Amendment of the United States Constitution, mainly Free Speech, was not created for popular speech or symbols but rather to protect the controversial, distasteful and unpopular speech. Even the trial court Judge, Judge A. Joseph Canada questioned his decision stating "and maybe the wise men in Richmond might look at it, I don't know. I imagine they will be looking at it." Adding "I believe that there is a significant constitutional issue. I don't agree with it. I think it's a proper finding but I could be overruled by the higher Court." (Ap. 133, 136).

WHEREFORE, appellant Jack Eugene Turner, by counsel, respectfully moves that this Court grant his Petition for Appeal on the grounds that the Court of Appeals and the trial court erred in finding Mr. Turner guilty of Virginia Code §18.2-423.2 and reverse the trial court's finding of guilt.

Respectfully Submitted,

Jack Eugene Turner

By: _____

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CERTIFICATE

I, C. Holland Perdue III, certify this 12th day of October, 2017 that: 1) One electronic copy of the Opening Brief of Appellant was served, via email, and electronic copies of the Opening Brief of Appellant and Appendix were served, via UPS Ground Transportation, to Christopher P. Schandeval, Assistant Attorney General, Office of the Attorney General, 900 E. Main Street, Richmond, Virginia 23219 (telephone: 804-786-9642; fax: 804-371-0151; email: cschandevel@oag.state.va.us); 2) electronic copies of the Opening Brief and Appendix were e-filed, via VACES, and three bound copies of the Opening Brief and three bound copies of the Appendix were hand-filed in the Clerk's Office of the Supreme Court of Virginia, 100 North Ninth St., Richmond, Virginia 23219-2334; 3) I am an appointed attorney; 4) I request oral argument; 5) the word count is 4,409; and 6) I have complied with Rule 5:26.

C. Holland Perdue III