

**IN THE COURT OF APPEALS
EASTERN DISTRICT OF MISSOURI**

D.M. and J.M.,	}	
Appellants.	}	
v.	}	Cause No. ED89744
	}	
Philip W. Livesay, Juvenile Officer	}	
Tenth Judicial Circuit	}	
Marion County, Hannibal, Missouri	}	
Petitioner/Respondent.	}	

APPEAL FROM
THE CIRCUIT COURT OF MARION COUNTY, MISSOURI
DISTRICT 2 JUVENILE DIVISION
TENTH JUDICIAL CIRCUIT
Honorable David C. Mobley
Case No. 06MR-JU00069

D.M. & J.M. Reply Brief

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Table of Contents

Table of Contents	1
Table of Authorities	2
Argument	3
Conclusion	13
Certification of Word Count	14
Certification of Scanned Disk	14
Affidavit of Service	15

Table of Authorities

<i>Renton v. Playtime Theatres, Inc.</i> , 475 U.S. 41, 46-47, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986)	10
<i>State v. Carpenter</i> , 736 SW2d 486 (Mo.banc 1987)	4, 5, 11
<i>State v. Helgoth</i> , 691 SW2d 281 (Mo.banc 1985)	9, 10
<i>State v. Molasky</i> , 765 SW2d 597 (Mo.banc 1989)	12
<i>State v. Moore</i> , 90 SW3d 64 (Mo. 2002)	11
<i>State v. Swoboda</i> , 658 SW2d 24 (Mo.banc 1983)	5, 11
<i>United States v. Alkhabaz</i> , 104 F.3d 1492 (6th Cir. 1997)	6, 8, 9
<i>United States v. Baker</i> , 890 F.Supp. 1375, 1385 (E. D. Mich. 1995).....	6, 8
<i>Watts v. United States</i> , 394 U.S. 705, 89 S.Ct. 1399, 22 L.Ed.2d 664 (1969)	6, 12
Section 574.010.1(1)(c) RSMo.	3, 6

Argument

Constitutional Issues Preserved for Review

The issue of the constitutionality of Section 574.010.1(1)(c) RSMo. was preserved by raising it at the earliest opportunity and persisting in presenting the issue through the conclusion of the proceedings. The parents moved to dismiss the allegation in Count I alleging a violation of the peace disturbance statute stating,

“1. The provisions of Section 574.010.1(1)(c) RSMO violate the provisions of the 1st, 5th, and 14th Amendments to the United States Constitution as applied to the State of Missouri and Article I, Section 8 of the Missouri Constitution of 1945 by abridging and impairing freedom of speech.

2. The provisions of Section 574.010.1(1)(c) RSMO deny this defendant due process of law because the provisions are void for vagueness and are so vague and uncertain that they do not convey to an ordinary person the understanding of their duties under the law in violation of the 5th and 14th

Amendments to the United States Constitution and Article I, Section 10 of the Missouri Constitution of 1945.”

On October 31, 2006, the parents provided the Trial Court with a copy of *State v. Carpenter*, 736 SW2d 486 (Mo.banc 1987). (Supp. Tr. 19). The case was argued to the Trial Court. (Supp. Tr. 21). Overbreadth was specifically argued. (Supp. Tr. 21).

The Trial Court overruled the Motion to Dismiss on the record on December 27, 2006. (Supp. Tr. 39). The issue was briefed extensively to the Trial Court in the form of suggested findings of fact and conclusions of law. (LF 36-46). In addition, the Trial Court expressly ruled upon these constitutional issues in the Findings of Fact, Conclusions of Law and Judgment filed on March 2, 2007. (LF 18, et seq.) The parents raised this constitutional issue at the earliest opportunity expressly citing the United States and Missouri constitutional provisions which apply. The parents persisted in this claim throughout the course of the litigation before the Trial Court. The Trial Court expressly ruled upon these issues. The Juvenile Office’s argument that the issues were not preserved should be rejected.

The Juvenile Office erroneously contends that the failure to use the word “overbreadth” in the motion to dismiss filed November 6, 2006, fails to preserve the constitutional issue of First Amendment violations for review. This argument is without merit because overbreadth is simply the method of analysis for analyzing First Amendment rights protecting freedom of speech. *State v. Carpenter*, 736 SW2d 486 (Mo.banc 1987); and *State v. Swoboda*, 658 SW2d 24 (Mo.banc 1983). In the motion to dismiss and arguments presented to the Trial Court, the Trial Court was clearly and expressly informed of a violation of constitutionally protected free speech which includes the claim of overbreadth. (Supp. Tr. 19, 21; LF 36, et seq.; LF 85, et seq.). The issue was preserved for review.

Absence of a True Threat

The parents in this case have raised two constitutional issues. First, we have challenged whether or not the statute under which DJM was charged is constitutional. Second, we have challenged whether there was sufficient evidence to sustain a finding of a “true threat” consistent with constitutional standards. There is an essential core question which both of these issues have in common. In both issues this Court is asked to wrestle with the question of exactly what is included within the scope of threatening

to commit a crime as proscribed in Section 574.010.1(1)(c) RSMo. Not all of the words which might be written or spoken about a potential crime are threats. *Watts v. United States*, 394 U.S. 705, 89 S.Ct. 1399, 22 L.Ed.2d 664 (1969); *United States v. Baker*, 890 F.Supp. 1375, 1385 (E. D. Mich. 1995); and *United States v. Alkhabaz*, 104 F.3d 1492 (6th Cir. 1997).

There are many things which a person may discuss which could be disturbing or alarming, but are not “true threats” for the purpose of the First Amendment. Not all words talking about an injurious act constitute a “true threat.”

In order to judge both the constitutionality of Section 574.010.1(1)(c) RSMo. and to judge the sufficiency of the evidence in this case, the Court must evaluate this question in the context of the culture and society in which we live. Most of us who have siblings have at one time or another stated our desire to harm a sibling. However, that was not a true threat and should not be construed to be criminal conduct. Many parents have at one time or another stated a desire to “beat a child within an inch of their life.” Particularly when these words are spoken to another parent or confidant outside the presence of the child, this should not be construed to be a threat or a crime.

Our culture is absolutely full of statements in which speakers and writers have expressed a desire to injure or kill. If you wonder about this, you could Google similar words and phrases to obtain countless examples of similar statements. In one notable example, Mel Gibson lashed out at New York Times columnist, Frank Rich, stating, "I want to kill him. I want his intestines on a stick. I want to kill his dog."

(http://www.worldnetdaily.com/news/article.asp?ARTICLE_ID=34497).

There is a musical quintet named "I Want to Kill You."

(<http://cdbaby.com/cd/killyou>). "I want to kill a president" is a famous single by Estonian punk rock band Nyrok City. ([http://en.wikipedia.org/wiki/I_Want_To_Kill_A_President_\(Nyrok_City_song\)](http://en.wikipedia.org/wiki/I_Want_To_Kill_A_President_(Nyrok_City_song))). We live in a culture in which there are many crude and offensive statements which are not true threats and should not be held to be within the scope of a criminal statute.

First Amendment cases involving alleged threats are each fact specific. They have arisen under a wide variety of circumstances. There are three tests which are particularly revealing to show that the child's statement in this case was not a threat. First, there was no imminence to the statement. Second, the statement was not communicated to any threatened individual. Third, there was no purpose to achieve some goal

through intimidation. *United States v. Baker*, supra; and *United States v. Alkhabaz*, supra.

There was no imminent threat. Even the Trial Court found “there was no evidence presented to the effect that Carly Moore believed the threats were imminent.” (LF 21). There was simply no imminence to the statements of DJM.

There was no statement intended to be communicated to anyone who was the object of a threat or anyone on their behalf. There is no evidence to suggest that DJM expected his internet communication to be conveyed to any of the people about which he or Carly Moore wrote. Carly Moore was not the object of any of the statements. (Tr. 44). The Trial Court expressly found that the messages were “communicated privately to Carly Moore. There was no evidence to any public access to the private communication.” (LF 19). In this respect, the evidence fails the test of a communication directed to the threatened individual.

Finally, there is absolutely no evidence that DJM had any desire or purpose to achieve any kind of goal through intimidation. This fails the test that the expression was “communicated to effect some change or achieve some goal through intimidation.” *United States v.*

Alkhabaz, supra at 1494. Even the Juvenile Office agrees that there must be a desire to have some effect or achieve some goal through intimidation.

At page 13 of their Brief, they have cited with approval cases delineating a requirement of “the specific intent to threaten.” (Resp. Br. responding to App. Parent’s Brief, page 13). We agree that in order to constitute a true threat, there must be some specific intent or purpose to threaten. This means there must be some specific intent or purpose to frighten or otherwise obtain some goal.

The absence of evidence of these three elements highlights the insufficiency of evidence to prove a crime and the unconstitutionality of the statute for which the Trial Court applied no limiting construction. The adjudication of delinquency should be reversed.

Overbreadth

Some of the cases upon which the Juvenile Office relies are clearly distinguishable. The overbreadth standard in *State v. Helgoth*, 691 SW2d 281 (Mo.banc 1985) is one where conduct and not merely speech is involved. *Helgoth* involved prosecution of a defendant who had taken nude photographs of a minor. The very act of taking the photographs was

proscribed regardless of whether or not it was ever published. In conduct cases such as *Helgoth*, the courts are particularly cautious in utilizing the overbreadth doctrine. However, the case at bar did not involve conduct. This is a case of mere speech. It is internet chatter as distinguished from a face-to-face confrontation. It involves give and take and laughter between DJM and a confidant. This is content-dependent regulation of speech which presumptively violates the First Amendment. *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 46-47, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986).

The Juvenile Office persists in its error of arguing DJM's "identity as a goth" as evidence to support the charge. (Resp. Br. responding to App. Parents' Brief, page 25). The Juvenile Office argues that DJM chose an appearance that expressed an attitude relevant to assessing the evidence in this case. We are compelled to ask whether the Juvenile Office would make the same argument against a child who chose to wear clothing that symbolized a Jewish or Muslim religious affiliation. Would the Juvenile Office make the same argument because of the child's racial background which some people might consider to be frightening? There is absolutely no evidence that the child in this case had any history or reputation for violence. In fact, the social investigation disclosed that

there was no such history. (LF 12-17). At the request of the Juvenile Office, the Trial Court also made findings concerning DJM's goth appearance. (LF 20). Neither the Trial Court nor the Juvenile Office should be relying upon evidence of such appearance as evidence of guilt. The fact they are reduced to this type of argument should be considered as an admission that there was not substantial evidence to support the judgment of the Trial Court.

The Juvenile Office has misplaced its reliance upon the case of *State v. Moore*, 90 SW3d 64 (Mo. 2002). *Moore* involved a sexual solicitation by a 61 year old man directed to a 13 year old girl. This is factually distinguishable from the case at bar. In this case, DJM was engaged in an internet bantering with a confidant and friend. She egged him on and encouraged suggested conduct that was as bad or worse than anything DJM suggested. Carly Moore was neither the object nor the target of any threat by DJM. She was not a person intended to be protected under the peace disturbance statute. The case of *State v. Moore* has no application to the case of DJM.

Missouri courts have repeatedly and correctly rejected cases challenging pure speech. *State v. Carpenter*, supra; *State v. Swoboda*,

supra; *State v. Molasky*, 765 SW2d 597 (Mo.banc 1989). The Trial Court erred by failing to follow these cases. The Trial Court failed to impose a limiting construction which would restrict the application of the peace disturbance statute to “true threats.” The Trial Court erred by failing to take into account the context and the reaction of the listener in violation of *Watts v. United States*, supra. The Trial Court erred by an adjudication of delinquency when the evidence did not meet the test for a “true threat.” The adjudication of delinquency should be reversed.

Conclusion

First Amendment rights should be jealously guarded. Freedom of speech first won at Valley Forge and revolutionary battlefields should not be handed over easily. Freedom of speech is preserved to this day by patriots' blood. The Juvenile Office should not be allowed to convert internet banter between high school confidants and friends into a crime. The comments of both students were crude and offensive, but not criminal. This case should be ended not with a vindication of DJM. His parents have never attempted to excuse him for his statements. Instead, the case should be ended with a vindication for the First Amendment and our rights of free speech. The Judgment of the Trial Court should be reversed.

Respectfully submitted,

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Certification of Scanned Disk

Comes now D.M. & J.M. by the undersigned counsel and certifies that the disk containing D.M. & J.M. Reply Brief has been scanned for viruses and it is virus-free.

Certification of Word Count of Appellants' Reply Brief

Comes now D.M. & J.M. by the undersigned counsel and certifies that this Brief complies with the limitations contained in Rule 84.06(b), in that the Word Count for D.M. & J.M. Reply Brief is 2505 words, as calculated by the word count of the word-processing system used to prepare this Brief.

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