

Summary of SC92846, *State of Missouri v. Mark Wooden*

Appeal from the St. Louis city circuit court, Judge Paula Bryant
Argued and submitted Dec. 10, 2012; opinion issued Jan. 8, 2013

Attorneys: Wooden was represented by Amanda P. Faerber of the public defender's office in St. Louis, (314) 340-7226; and the state was represented by Jerome McDonald of the circuit attorney's office in St. Louis, (314) 622-4941.

This summary is not part of the opinion of the Court. It has been prepared by the communications counsel for the convenience of the reader. It neither has been reviewed nor approved by the Supreme Court and should not be quoted or cited.

Overview: A man appeals his convictions under a statute defining the use of certain language in certain circumstances as “harassment” as violations of the First Amendment and the companion state constitutional provision. In a 6-0 per curiam decision that cannot be attributed to any particular judge, the Supreme Court of Missouri reverses the man's one conviction under a portion of the statute that this Court already has deemed unconstitutional and affirms the rest of the judgment. The other portion of the statute the man challenges is not unconstitutional as applied to him, and there is sufficient evidence to support this conviction.

Facts: In February 2011, Mark Wooden sent various St. Louis-area public officials – including an alderwoman for the city's sixth ward – a number of electronic-mail messages containing text, audio attachments or both. Wooden did not send any e-mail to the alderwoman exclusively, and each e-mail included as many as 40 recipients. The alderwoman received the e-mails at an address displayed on her official website. One of these e-mails contained a 19-minute-long audio attachment that specifically referenced her and compared her to the biblical character Jezebel, who, Wooden stated, abused her weaker subjects. Wooden repeatedly used profanity to refer to the alderwoman and, in the audio attachment, made reference to dusting off a sawed-off shotgun, stating he was going to make “a mess of everything with his sawed-off.” Wooden also referred to himself as a domestic terrorist and referred to the assassination of President John F. Kennedy as well as the murder of a federal judge and the shooting of a congresswoman, presumably the murder of United States District Court Judge John Roll and the shooting of Congresswoman Gabrielle Giffords. Wooden's tone throughout a majority of the audio recording was menacing and, at times, maniacal. After receiving a fourth e-mail from Wooden, the alderwoman replied to Wooden and asked him to stop e-mailing her. He subsequently sent her three additional e-mails. At some point, the alderwoman contacted police because she felt threatened by the e-mails. She also sought a restraining order because, as she testified at trial, she feared for her safety due to the messages' threatening nature and the references to a sawed-off shotgun. Wooden was arrested and charged with one count of possessing marijuana and two counts of harassment under section 565.090.1, RSMo – count I under subdivision 2 of the statute and count II under subdivision 5 of the statute. Wooden moved to dismiss the harassment charges, arguing they violated his state and federal constitutional rights to freedom of speech and to petition the government for redress of grievances. The circuit court overruled his motion, the case proceeded to a jury trial, and Wooden was found guilty of all three charges and was sentenced to concurrent sentences of one day in jail for each count. He appeals.

AFFIRMED IN PART AND REVERSED IN PART.

Court en banc holds: (1) Wooden has not carried his burden of demonstrating that subdivision 2 of section 565.090.1, as applied to him, clearly contravenes a constitutional provision. The constitutional rights to free speech is not absolute at all times and under all circumstances. Speech that is unprotected by the constitution includes “the lewd and obscene, the profane, the libelous, and the insulting or ‘fighting’ words – those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.” *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942). In addition to his criticism of the alderwoman and other public officials, Wooden discussed using a sawed-off shotgun, domestic terrorism, and the assassination or murder of politicians, all while referring to the alderwoman using a profane epithet and while likening her to a biblical character who was eaten by dogs as punishment for her abuse of power. These communications, taken together, inflict injury or tend to incite an immediate breach of the peace and are not protected by the First Amendment or the state constitution. This case is distinguishable from the United States Supreme Court decision in *Cohen v. California*, 403 U.S. 15 (1971). In *Cohen*, the statute criminalized only “offensive conduct,” here section 565.090.1(2) required the jury to find that Wooden used “coarse language offensive to one of average sensibilities” and further required the jury to find that such communication put the alderwoman “in reasonable apprehension of offensive physical contact or harm.” While portions of Wooden’s messages constituted actual criticism of the alderwoman, there is nothing unconstitutional about punishing him for those unprotected portions that placed the alderwoman in reasonable apprehension of offensive physical contact or harm.

(2) There was sufficient evidence in the record from which a juror reasonably could find that the coarse language Wooden used placed the alderwoman in reasonable apprehension of offensive physical contact or harm. By sending the alderwoman the e-mail containing the audio attachment, Wooden directed at her the attachment’s references to her using a profane epithet, to his making a mess of everything with his sawed-off shotgun and his discussion of a president’s assassination. Additionally, there is nothing in this Court’s precedent or the plain meaning of the statute indicating that the only way a person can be put in reasonable apprehension of harm is through specific threats. Wooden singled out the alderwoman in his audio attachment, discussed the assassination of politicians, referred to himself as a domestic terrorist and stated he would make a mess of things with his shotgun. There is no way for the alderwoman or a reasonable juror to know Wooden’s subjective intent simply by listening to the audio attachment or reading the e-mails.

(3) In *State v. Vaughn*, 366 S.W.3d 513 (Mo. banc 2012), this Court held that subdivision 5 of section 565.090.1 is unconstitutionally overbroad. As the state concedes, allowing Wooden’s count II conviction under this subdivision to stand would constitute a manifest injustice. The judgment as to this count is reversed.