12-6-2018

State v. Sanchez Appellant's Reply Brief Dckt. 45627

Electronically Filed
12/6/2018 11:40 AM
Idaho Supreme Court
Karel Lehrman, Clerk of the Court
By: Brad Thies, Deputy Clerk

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	
Plaintiff-Respondent,	)	**NO. 45627**
	)	
v.	)	**ADA COUNTY NO. CR01-16-34457**
	)	
BYRON LEE SANCHEZ,	)	**REPLY BRIEF**
	)	
Defendant-Appellant.	)	
	)	

REPLY BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

HONORABLE STEVEN J. HIPPLER
District Judge

ERIC D. FREDERICKSEN
State Appellate Public Defender
I.S.B. #6555

JENNY C. SWINFORD
Deputy State Appellate Public Defender
I.S.B. #9263
322 E. Front Street, Suite 570
Boise, Idaho 83702
Phone: (208) 334-2712
Fax: (208) 334-2985
E-mail: documents@sapd.state.id.us

ATTORNEYS FOR DEFENDANT-APPELLANT

KENNETH K. JORGENSEN
Deputy Attorney General
Criminal Law Division
P.O. Box 83720
Boise, Idaho 83720-0010
(208) 334-4534

ATTORNEY FOR PLAINTIFF-RESPONDENT

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

Cases

Statutes

STATEMENT OF THE CASE

Nature of the Case

Bryon Sanchez appeals from the district court's judgment of conviction for threats against a public servant. Mr. Sanchez raised five issues on appeal: (1) whether the district court erred by denying his motion to dismiss due the facial overbreadth of I.C. § 18-1353(1)(b); (2) whether the district court abused its discretion by admitting irrelevant evidence of the prosecutor's reaction to the threat; (3) whether the district court abused its discretion by admitting irrelevant and prejudicial evidence of Mr. Sanchez's prior conviction; (4) whether the district court abused its discretion by admitting irrelevant evidence of Mr. Sanchez's post-conviction petition; and (5) whether the accumulation of errors violated Mr. Sanchez's due process rights. The State responded. This Reply Brief is necessary to address some, but not all, arguments raised in the State's response.

Statement of Facts and Course of Proceedings

Mr. Sanchez's Appellant's Brief previously articulated the statement of facts and course of proceedings. (*See* App. Br., pp.2–6.) They are not repeated in this Reply Brief, but are incorporated here by reference.

ISSUES

I. Did the district court err by denying Mr. Sanchez's motion to dismiss because I.C. § 18-1353(1)(b) is facially overbroad?

II. Did the district court abuse its discretion by admitting irrelevant evidence of Mr. Thomson's reaction to Mr. Sanchez's letter?

III. Did the district court abuse its discretion by admitting irrelevant and prejudicial evidence of Mr. Sanchez's prior conviction for injury to a child?

IV. Did the district court abuse its discretion by admitting irrelevant evidence of Mr. Sanchez's post-conviction petition?

V. Did these errors in the aggregate deprive Mr. Sanchez of his right to a fair trial?

ARGUMENT

I.

The District Court Erred By Denying Mr. Sanchez's Motion To Dismiss Because I.C. § 18-1353(1)(b) Is Facially Overbroad

Mr. Sanchez first argued the district court erred by denying his motion to dismiss the charge against him due to the criminal statute's overbreadth. (*See* App. Br., pp.8–15.) He asserted I.C. § 18-1353(1)(b) prohibited a substantial amount of protected speech because it criminalized any threat of "harm," which was vaguely defined by statute as "loss, disadvantage, or injury." I.C. § 18-1351(4). (App. Br., pp.11–14.) Based on the plain language of these terms, and the absence of any limiting language, such as unlawful harm, Mr. Sanchez submitted there was a realistic, substantial danger that I.C. § 18-1353(1)(b) compromised First Amendment protections. (App. Br., pp.11–15.) As such, he contended the statute was facially overbroad. (*See* App. Br., pp.8–15.)

In response, the State maintained I.C. § 18-1353(1)(b) was not overbroad on its face. (Resp. Br., pp.5–13.) The State argued, inter alia, three cases from other jurisdictions were instructive: *State v. Stephenson*, 950 P.2d 38 (Wash. Ct. App. 1998), *People v. Janousek*, 871 P.2d 1189 (Colo. 1994) (en banc), and *State v. Spottedbear*, 380 P.3d 810 (Mont. 2016). (Resp. Br., pp.10–13.) Mr. Sanchez respectfully disagrees. These cases have little, if any, persuasive value for the State's position.

First, *Stephenson* is not instructive because Washington's statute contains a more limited definition of harm than the one at issue here. Revised Code of Washington ("RCW") § 9A.76.180 prohibits the use of a threat to attempt or influence a public servant's vote, opinion, decision, or other official action. RCW § 9A.76.180(1). "Threat" is defined by

statute in multiple ways,[1] including "[t]o do any other act which is intended to harm *substantially* the person threatened or another with respect to his or her health, safety, business, financial condition, or personal relationships." RCW § 9A.04.110(28)(j) (emphasis added). Examining this definition, the Washington Court of Appeals held, "By targeting only threats of '*substantial* harm,' the challenged portion of the statute is narrowly tailored to address the overall problem it seeks to correct." *Stephenson*, 950 P.2d at 42 (emphasis added). The court reasoned, "It prohibits only those threats related to future decision making and to *substantial* interests. It does not encompass threats of harm based upon past decisions. Nor does it prohibit threats to do *minor injury* to the official's financial situation or other protected interests." *Id.* at 42–43 (emphasis added). Unlike the statute in *Stephenson*, I.C. § 18-1353(1)(b) does not target only threats of "substantial" harm. It targets all "harm," no matter how minor or insignificant. Along the same

---

[1] Threat also means: "[t]o communicate, directly or indirectly, the intent immediately to use force against any person who is present at the time," RCW § 9A.76.180(3)(a), or

> to communicate, directly or indirectly the intent:
> (a) To cause bodily injury in the future to the person threatened or to any other person; or
> (b) To cause physical damage to the property of a person other than the actor; or
> (c) To subject the person threatened or any other person to physical confinement or restraint; or
> (d) To accuse any person of a crime or cause criminal charges to be instituted against any person; or
> (e) To expose a secret or publicize an asserted fact, whether true or false, tending to subject any person to hatred, contempt, or ridicule; or
> (f) To reveal any information sought to be concealed by the person threatened; or
> (g) To testify or provide information or withhold testimony or information with respect to another's legal claim or defense; or
> (h) To take wrongful action as an official against anyone or anything, or wrongfully withhold official action, or cause such action or withholding; or
> (i) To bring about or continue a strike, boycott, or other similar collective action to obtain property which is not demanded or received for the benefit of the group which the actor purports to represent . . . .

RCW § 9A.04.110(28)(a)–(i).

lines, Washington's statutory scheme further limits the substantial harm to specific areas: "health, safety, business, financial condition, or personal relationships." RCW § 9A.04.110(28)(j). Idaho's statute has no such limitation. Harm is broadly defined as "loss, disadvantage, or injury" with no restrictions. I.C. § 18-1351(4). In light of *Stephenson*'s emphasis on the statute's prohibition of only "substantial" harm, *Stephenson* is not instructive to uphold I.C. § 18-1353(1)(b) as constitutional.

Moreover, *Stephenson*'s comparison of the Washington statute with a separate, invalidated city ordinance supports the determination that I.C. § 18-1353(1)(b) is facially overbroad. *Stephenson*, 950 P.2d at 43–44. A Seattle municipal ordinance prohibited the use of a threat to compel or induce a person (1) to engage in conduct that he or she has a right to abstain from or (2) to abstain from conduct that he or she has a right to engage in. *Stephenson*, 950 P.2d at 43 n.5; *see also City of Seattle v. Ivan*, 856 P.2d 1116, 1117 (Wash. Ct. App. 1993) (reviewing, and striking down, ordinance as overbroad). This ordinance used the same definitions of "threat" as the Washington statute, RCW § 9A.76.180. *Stephenson*, 950 P.2d at 43 & n.5. But, looking at all of the threat definitions as a whole, the Washington Court of Appeals had struck down the ordinance as facially overbroad. *Stephenson*, 950 P.2d at 43; *see also Ivan*, 856 P.2d at 1118–23. The *Stephenson* court distinguished the overbroad ordinance from Washington's statute due to, in large part, the "substantial" restriction to harm. For example, the court explained that the ordinance prohibited coercion against any person, while RCW § 9A.76.180 prohibited "[t]he threat of *substantial* harm to a public servant's 'health, safety, business, financial condition, or personal relationship,' which "jeopardizes" "[t]he public's interest in open and fair government decision making." *Stephenson*, 950 P.2d at 43. Next, the court considered that its prior decision to invalidate the ordinance examined all definitions of

"threat" as a whole, not only the one subsection of substantial harm. *Stephenson*, 950 P.2d at 43–44. The court recognized that the vast threat definitions in the ordinance "prohibited 'such a wide range of speech that it is impossible to find its proscriptions reasonable.'" *Id.* at 44 (quoting *Ivan*, 856 P.2d at 1120).[2] In contrast, the single subsection of "substantial harm" was not specifically targeted in its prior opinion striking down the ordinance. *Id.* "And," the court noted, threats of substantial harm "are distinguishable" from the ordinance "in that *they must be substantial, not threats that merely embarrass or inconvenience their target*." *Id.* (emphasis added). Here, the threats of harm do not need to be "substantial." A threat that merely embarrasses or inconveniences a public servant will easily suffice because it falls under the vague, expansive terms of "loss, disadvantage, or injury." Therefore, *Stephenson* is not instructive on the State's position and, if anything, lends support to a determination that I.C. § 18-1353(1)(b) is facially overbroad.

Next, *Janousek* is equally unpersuasive because Colorado's statute again contains narrower definition of harm. Colorado criminalizes an attempt to influence a public servant "by means of deceit or by threat of violence or economic reprisal against any person or property," with the intent to alter or affect the public servant's "decision, vote, opinion, or action concerning any matter which is to be considered or performed by him or the agency or body of

---

[2] For example:

> the prohibition against accusing another of a crime could "proscribe prosecutors from plea bargaining," the prohibitions against exposing or publicizing facts and revealing significant information could "impinge on freedom of the press to release information," the prohibition against testifying or providing information about a legal claim could "discourage a witness from testifying," and the prohibition against threats to strike and boycott could "chill the ability of groups to engage in boycotts and collective bargaining."

Stephenson, 950 P.2d at 44 (quoting *Ivan*, 856 P.2d at 1120).

which he is a member." 871 P.2d at 1192 n.6. The Colorado Supreme Court held the statute was not facially overbroad. *Id.* at 1193. In upholding the statute, the court identified that the statute "clearly prohibits a person from using deceit or threats of violence or economic reprisal to influence a public servant's actions." *Id.* The court then reasoned, "The statute is narrowly tailored to enable the People to proscribe the type of *conduct that rises to a level of criminal culpability*." *Id.* (emphasis added). The court further held that the statute placed a "minimal burden" on the exercise of First Amendment rights, and there was "no constitutionally protected right to make threats of violence to a public servant." *Id.* In sum, *Janousek* held that any overbreadth in the statute was not real and substantial because the statute prohibited the use of unlawful conduct. The statute here contains no unlawful conduct limitation. Again, I.C. § 18-1353(1)(b) prohibits threats of "loss, disadvantage, or injury" to a public servant. *See* I.C. § 18-1351(4) (defining harm). There is no requirement that the threatened harm rises to a level of criminal culpability. Accordingly, *Janousek*, like *Stephenson*, demonstrates why the broad definition of "harm" for I.C. § 18-1353(1)(b) is unconstitutional.

Lastly, *Spottedbear* provides little guidance because it addresses an overbreadth challenge in the context of a post-conviction appeal. The petitioner argued his trial counsel was ineffective for failing to challenge Montana's threats to public servants statute as unconstitutionally overbroad. 380 P.3d at 814–15. Although the petitioner appears to have made similar arguments as Mr. Sanchez, and the statute is similar as well, the Montana Supreme Court examined whether counsel's decision not to challenge the statute was objectively reasonable. *Id.* at 814–16; *see also* Mont. Code. Ann. § 45-2-101(27) (defining harm as "loss, disadvantage, or injury or anything so regarded by the person affected, including loss, disadvantage, or injury to a

person or entity in whose welfare the affected person is interested"). This is a different analysis than whether the statute itself is constitutional. The court explained:

> Spottedbear asserts that his counsel had "no plausible" justification for failing to raise a constitutional challenge because it would have ended Spottedbear's prosecution at its inception. But [Mont. Code. Ann.] § 45-7-102(1)(a)(i) . . . serves a plainly legitimate purpose—to deter people from threatening harm to a public servant in order to influence that person's actions as a public servant. Spottedbear acknowledges that his conduct falls within the statute's legitimate sweep. Given these surrounding circumstances, and our overbreadth precedent discussed above, Spottedbear's trial counsel reasonably may have concluded that an overbreadth challenge to the statute would not have been successful.

Spottedbear, 380 P.3d at 815–16. The court recognized that the petitioner "would have a high hurdle to clear" to show real and substantial overbreadth. *Id.* at 816. The court also recognized that the petitioner could not overcome the presumption of objectively reasonable assistance with "the mere fact" that the petitioner could "conceive of some impermissible applications of the statute." *Id.* (citations, quotation marks, and alterations omitted). But, most importantly, the court stated, "We decline to consider the statute's alleged overbreadth in this appeal." *Id.* The court left any constitutional deficiencies for another case because the petitioner's conduct "plainly came within the statute's legitimate sweep." *Id.* Thus, *Spottedbear* is not instructive for this case because it expressly declined to rule on the statute's constitutionality. Like *Janousek* and *Stephenson*, this Court should not consider *Spottedbear* as persuasive authority for the State's position.

In summary, Mr. Sanchez submits *Stephenson*, *Janousek*, and *Spottedbear* offer no support to the State's position that I.C. § 18-1353(1)(b) is constitutionally valid. Mr. Sanchez maintains I.C. § 18-1353(1)(b) is facially overbroad due to the expansive statutory definition of harm. For the reasons stated herein, and in the Appellant's Brief, Mr. Sanchez asserts the district

court erred by denying his motion to dismiss the charge of threats against a public servant due to I.C. § 18-1353(1)(b)'s facial overbreadth.

II.

The District Court Abused Its Discretion By Admitting Irrelevant Evidence Of Mr. Thomson's Reaction To Mr. Sanchez's Letter

Mr. Sanchez does not reply herein and respectfully refers this Court to his argument in his Appellant's Brief on this issue. (App. Br., pp.15–20.)

III.

The District Court Abused Its Discretion By Admitting Irrelevant And Prejudicial Evidence Of Mr. Sanchez's Prior Conviction For Injury To A Child

Next, Mr. Sanchez argued the district court failed to apply the correct legal standards and therefore abused its discretion by admitting evidence of the nature of his prior felony conviction: injury to a child. (App. Br., pp.20–29.) The State responded the nature of Mr. Sanchez's prior conviction was relevant to motive and intent, any unfair prejudice did not outweigh the probative value, and any error was harmless. (Resp. Br., pp.25–36.) Mr. Sanchez replies to some, but not all, of the State's arguments.

The State initially asserted the evidence of the crime as injury to a child "had no more tendency to indict Sanchez's character" than the evidence that Mr. Sanchez was imprisoned as a result of a serious criminal offense. (Resp. Br., p.29.) Mr. Sanchez contends evidence of a conviction for injury to a child does "indict" his character more than evidence of an unspecified felony conviction and imprisonment. As asserted in his Appellant's Brief, crimes against children are particularly inflammatory. (App. Br., pp.27–28.) Without specific evidence on the nature of the felony, the jury would not have known Mr. Sanchez lost custody of his children

because he committed the offense of injury to children. It is far less prejudicial for the jury not to know the specific felony and simply assume that some felony offense, including those unrelated to harming children, led to the loss of custody.

Second, the State argues Mr. Sanchez's conviction for injury to a child was relevant to intent and motive. (*See* Resp. Br., pp.30–33.) The State asserted:

> Evidence that Sanchez was convicted of injury to a child in the case prosecuted by Mr. Thomson tended to make it more probable that Sanchez had a motive to threaten harm to Mr. Thomson and his family, that he intended the statements about Mr. Thomson and his family as threats, and that he made the threats in order to influence Mr. Thomson to take action to assist in restoring Sanchez's freedom and reuniting him with his own children, who had been removed from his care as a result of his injury to a child conviction.

(Resp. Br., p.31.) The State similarly stated, "[E]vidence that Sanchez had been convicted of injury to a child in the case prosecuted by Mr. Thomson was relevant to demonstrate both why Sanchez may have been inclined to threaten harm to Mr. Thomson and that he intended by the statements in his letter to do so." (Resp. Br., p.32.) The only way, however, to reach the State's proposed motive and intent to threaten harm is to consider Mr. Sanchez's conviction for injury to a child as propensity evidence. Evidence that Mr. Sanchez had been convicted of injury to a child is only relevant to demonstrate Mr. Sanchez's motive and intent if the nature of the conviction is given special significance. Otherwise, there is nothing distinguishable between one felony conviction and another. There is no reason why Mr. Sanchez "may have been inclined to threaten harm to Mr. Thomson" and "that he intended by the statements in his letter to do so" unless the nature of the conviction itself—injuring a child—demonstrates a propensity to harm (or threaten to harm) others. Therefore, Mr. Sanchez maintains the district court failed to apply the correct legal standards by admitting irrelevant evidence of the nature of Mr. Sanchez's prior conviction. (*See* App. Br., pp.20–27.)

In addition, Mr. Sanchez disputes the State's contention that the limiting instruction properly instructed the jury on the purpose of this evidence. (Resp. Br., pp.32–33, 34–35.) The district court instructed the jury:

> Evidence has been introduced for the purpose of showing that the defendant committed acts other than that for which the defendant is on trial. Such evidence is not to be considered by you to prove the defendant's character or that the defendant has a disposition to commit crimes. Such evidence may be considered by you only for the limited purpose of proving the defendant's motive and/or to demonstrate the underlying facts and circumstances giving rise to the charge and/or to prove the existence and nature of the proceedings from which the state claims the defendant was seeking relief.

(R., p.266.) This instruction thus informed the jury that it could consider the nature of Mr. Sanchez's prior conviction for motive. As explored above, and in the Appellant's Brief, any consideration of the prior conviction as "motive" leads to its consideration as propensity evidence. Accordingly, this instruction was, at best, confusing to the jury and, at worst, sanctioning the jury's use of propensity evidence under the guise of motive. Mr. Sanchez submits this instruction did not properly instruct the jury or cure any error because this evidence was plainly inadmissible.

Finally, Mr. Sanchez argues the probative value of this evidence did not substantially outweigh the danger of unfair prejudice. (*See* App. Br., pp.27–28.) The nature of the felony as injury to a child is "more damning" than the fact of a serious, but unspecified, felony. (*See* Resp. Br., p.36.) In addition, Mr. Sanchez submits the State did not prove, beyond a reasonable doubt, that the erroneous admission of this evidence was harmless. (*See* Resp. Br., pp.35–36.) Mr. Sanchez contends the district court abused its discretion by admitting this irrelevant and prejudicial evidence. (*See* App. Br., pp.20–29.)

IV.

The District Court Abused Its Discretion By Admitting Irrelevant Evidence Of Mr. Sanchez's Post-Conviction Petition

Fourth, Mr. Sanchez argued the district court failed to apply the correct legal standards and thus abused its discretion by admitting evidence of his pending post-conviction petition, which challenged his prior conviction for injury to a child. (App. Br., pp.29–32.) Mr. Sanchez contended this evidence was irrelevant, and the State could not show this error was harmless. (App. Br., pp.29–32.) The State responded that the evidence was relevant and, even if in error, any admission was harmless. (Respt. Br., pp.37–39.) The State's response is unremarkable, and Mr. Sanchez respectfully refers this Court to his Appellant's Brief on this issue. (App. Br., pp.29–32.)

V.

These Errors In The Aggregate Deprived Mr. Sanchez Of His Right To A Fair Trial

Finally, Mr. Sanchez respectfully refers this Court to his argument in his Appellant's Brief on the aggregation of the errors and their prejudicial effect. (App. Br., pp.32–33.)

CONCLUSION

Due to the facial overbreadth of I.C. § 18-1353(1)(b), Mr. Sanchez respectfully requests that this Court reverse the district court's order denying his motion to dismiss and remand this case for an order of dismissal. In the alternative, he respectfully requests that this Court vacate his judgment of conviction and remand his case for a new trial in light of the evidentiary errors.

DATED this 6th day of December, 2018.

/s/ Jenny C. Swinford
JENNY C. SWINFORD
Deputy State Appellate Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 6th day of December, 2018, I caused a true and correct copy of the foregoing APPELLANT'S REPLY BRIEF, to be served as follows:

KENNETH K. JORGENSEN
DEPUTY ATTORNEY GENERAL
E-Service: ecf@ag.idaho.gov

/s/ Evan A. Smith
EVAN A. SMITH
Administrative Assistant

JCS/eas