

APPENDIX

Supreme Court STATE OF ARIZONA
ROBERT BRUTINEL Chief Justice
ARIZONA STATE COURTS BUILDING TRACIE K.
LINDEMAN Clerk of the Court
1501 WEST WASHINGTON STREET, SUITE 402
PHOENIX, ARIZONA 85007
TELEPHONE: (602) 452-3396

June 3, 2022

**RE: STATE OF ARIZONA v MARK ELLIOTT
STUART**
Arizona Supreme Court No. CR-21-0389-PR
Court of Appeals, Division One No. 1 CA-CR 20-0620
Maricopa County Superior Court No. LC2020-
000239-001
Scottsdale Municipal Court No. M-0751-SC-
2017003568

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on June 3, 2022, in regard to the above-referenced cause:

ORDERED: Petition for Review of a Decision of the Court of Appeals = DENIED.
Tracie K. Lindeman, Clerk

NOTICE: NOT FOR OFFICIAL PUBLICATION.
UNDER ARIZONA RULE OF THE SUPREME
COURT 111(c), THIS DECISION IS NOT
PRECEDENTIAL AND MAY BE CITED ONLY AS
AUTHORIZED BY RULE.

IN THE ARIZONA COURT OF APPEALS
DIVISION ONE
STATE OF ARIZONA, Appellee,
v.
MARK ELLIOTT STUART, Appellant.
No. 1 CA-CR 20-0620
Appeal from the Superior Court in Maricopa County
No. LC2020-000239-001
The Honorable Douglas Gerlach, Judge Retired
AFFIRMED
COUNSEL
Scottsdale City Attorney's Office, Scottsdale
By Kenneth M. Flint Counsel for Appellee
Stanley M. Slonaker Attorney at Law, Phoenix
By Stanley M. Slonaker Counsel for Appellant
FILED 11-30-2021

STATE v. STUART
Decision of the Court

MEMORANDUM DECISION

Presiding Judge Peter B. Swann delivered the court's
decision, in which Judge David D. Weinzweig and
Judge Paul J. McMurdie joined.

S W A N N, Judge:

¶1 Mark Elliot Stuart appeals from his conviction for
failing to obey a peace officer. For the following
reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 Police officers removed Stuart from a Scottsdale City Council meeting after he refused to comply with city officials' requests to refrain from soliciting ballot-initiative signatures during the public comment portion of the meeting. Because Stuart refused to follow the officers' repeated commands, he was convicted in the city court under Scottsdale City Code ("Code") § 19-13, which provides that "[n]o person shall refuse to obey a peace officer engaged in the discharge of his duty, or any other person authorized to aid in quelling any riot, rout or affray."

¶3 Stuart appealed his conviction to the superior court, challenging the constitutionality of Code § 19-13. The superior court rejected Stuart's claims and affirmed his conviction, specifically finding Code § 19-13 constitutional as drafted and applied. Stuart timely appeals to this court.

DISCUSSION

¶4 Stuart contends that Code § 19-13 is unconstitutionally vague and overbroad.

¶5 We held in *State v. Kaiser* that Code § 19-13 is constitutional. 204 Ariz. 514, 519, ¶ 20 (App. 2003). In *Kaiser*, we explained that Code § 19-30 is neither unconstitutionally vague nor overbroad because it "provides sufficient objective standards for one charged with its enforcement to know what conduct is unlawful" without "encourag[ing] arbitrary enforcement," *id.* at ¶ 16, and it poses no "risk [to] the First Amendment rights of those persons not before the court," *id.* at ¶ 18. We noted that "[t]he refusal to obey a legitimate order of a sworn peace officer does not implicate the constitutional rights of a person." *Id.* at ¶ 18. Stuart provides no compelling

reason for us to depart from our holding in Kaiser. See State v. Hickman, 205 Ariz. 192, 200, ¶ 37 (2003) (holding that appellate courts will not depart from precedent absent compelling reasons).

¶6 Because we find Code § 19-13 to be constitutionally valid on its face, we will not address Stuart's attempts to challenge the constitutionality of the ordinance as applied. "Because this matter originated in municipal court, our jurisdiction is limited to a review of the facial validity of the ordinance. Accordingly, if the regulation is facially valid, we do not proceed to analyze how it was applied to the individual defendant." Kaiser, 204 Ariz. at 516-17, ¶ 4 (internal citation omitted); see also State v. McLamb, 188 Ariz. 1, 4 (App. 1996). To the extent Stuart suggests that we treat his appeal as a petition for special action, we decline. The superior court provided an adequate forum for Stuart to challenge the constitutionality of Code § 19-13, and he has failed to assert a purely legal issue of first impression likely to arise again. See Ariz. R.P. Spec. Act. 1(a); Vo v. Superior Court (Romley), 172 Ariz. 195, 198 (App. 1992).

CONCLUSION

¶7 We affirm Stuart's conviction.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY
Clerk of the Superior Court
Filed 8:00 a.m. 11-17-2020

LC2020-000239-001 DT tlt13t2020
HONORABLE DOUGLAS GERLACH
CLERK OF THE COURT T. DeRaddo Deputy
STATE OF ARIZONA KENNETH M FLINT
V. MARK ELLIOTT STUART (001)
MARK ELLIOTT STUART
8629 E CHERYL DR
SCOTTSDALE AZ 85258
COMM. POPKO REMAND DESK.LCA.CCC
SCOTTSDALE MUNICIPAL COURT
JUDGE CERLACH
RECORD APPEAL RULING / REMAND
Lower Court Case No: SC2017003568

This is a case in which Mark Stuart was convicted in the Scottsdale City Court of a class I misdemeanor because he refused to comply with an instruction of an on-duty police officer given in the performance of that officer's duties, viz., an instruction to sit down on a bench so that the officer could prepare and issue a citation. With this appeal, Stuart attempts to recast his refusal as an exercise in aid of his constitutional free speech rights, and thus, the conviction as a denial of those rights.

The court has considered Stuart's appellate brief, the response filed on behalf of the State of Arizona, the arguments presented at a hearing that took place on October 29, and relevant matters in the record. Because Stuart had no legally sufficient basis for refusing to sit down on the bench as directed, this

court has decided to affirm the judgment of the
Scottsdale City Court.

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Pages two to four are omitted

B. Issues Presented.

Stuart's brief contends that a reversal of his
conviction is required for any of the following
reasons

- (i) Stuart was wrongfully convicted for failing to
comply with a police officer's order because the
conviction arose out of the denial of his constitutional
right to speak. [Stuart Br. ar17-241]
- (ii) **Stuart was wrongfully convicted for
violating a provision of the Scottsdale city code
(viz., section 19-13) that is both
unconstitutionally vague and
unconstitutionally overbroad. Id. at 24-321**
- (iii) Stuart was denied due process because the
prosecutor who conducted the trial was afflicted with
what should have been treated as a disqualifying
conflict of interest. Vd. at 12-391
- (iv) Stuart was the victim of prosecutorial
vindictiveness. lld. at3942l

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Pages six to thirteen omitted

2, Stuart's Asserted Right to Disobey.

It should be remembered that Stuart was not
convicted for speaking or trying to speak, nor

was he convicted for refusing to leave the speaker's podium after Lane asked him to do so. He was convicted only for refusing to sit down after being asked to do so by a police officer so that a citation could be issued.

As such, even if one were to assume that Stuart was impermissibly denied the opportunity to speak at the city council meeting, under no authority cited in Stuart's brief or that this court's own research has uncovered, does that negate Stuart's conviction. The general rule is that a person must obey a police officer's commands, even if the command is unlawful. See e.g., *State v. Storer*, 583 A.2d 1016, 1021 (Me. Sup. Ct. 1990) ("The legality of the arrest for obstructing government administration does not turn upon either the legality of the order... or [the officers'] knowledge of the legality of that order. [Defendant] had an obligation to obey the commands of the police, at least if issued in a good faith belief in their lawfulness" (citations and internal quotation marks omitted)); cf. *State v. Herrera*, 21 I N.J. 308, 334-35 (2012) ("[S]uspects must obey a police officer's commands during an investigatory stop, even if the stop is unlawful, and test the stop and detention later in court. . . . Even though the suspect may have done nothing wrong, he cannot be the judge of his own cause").

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To put it differently, *Wright v. Georgia*, on which the Stuart brief relies (at 17, 55), states that "one cannot be punished for failing to obey the command of an officer if that command is a violation of the Constitution." 373 U.S. 284, 291-92 (1963) (emphasis added). Stuart does not contend that the

instruction itself violated any constitutional principle. Instead, unsupported by any authority, the Stuart brief adopts what amounts to a derivative theory, viz, because the refusal to allow him to speak violated his constitutional rights, what then occurred after that refusal also violated his rights. That, however, is not what Wright says: Wright says that the police officer's command must be unlawful itself and not derivatively so.

In short, at the moment Stuart refused to comply with what he was told to do, he was not engaged in any constitutionally protected activity. In those circumstances, he should have acceded to the police officers instruction by sitting down on the bench and accepting a copy of the citation that was issued, while contesting the citation's validity in court later on.

3. Constitutionality of Section 19-13.

The only speech to which section 19-13 refers consists of words in the form of instructions or commands coming from Scottsdale police officers who are carrying out their duties. In other words, section 19- 13 does not regulate constitutionally protected speech. Thus, section 19-13 does not implicate free speech concerns under either the federal or state constitutions, and that alone is sufficient to end the inquiry regarding the constitutionality of that code provision. See State v. Brown, 207 Aiz. 231, 236 (App. 2004) (concluding that statute that "regulates neither constitutionally protected speech nor expressive conduct . , does not implicate the First Amendment"); Slate ex rel. Napolitano v. Gravano,204 Aiz. 106, 113, n2a

(App.2002) (recognizing that "statutes [that] contain no reference to the content of speech or expressive materials , . . are speech- and content-neutral").

As explained in the following two sections for additional reasons, Stuart's void for vagueness and overbreadth challenges each independently lack merit.

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a. Void for Vagueness.

Stuart insists that his conviction must be set aside because section 19-13 of the Scottsdale city code is void for vagueness. [stuart Br. at 24-27] That same argument was rejected in State v. Kaiser , where the court concluded that section 19-13 (i) can be understood by a person of ordinary intelligence, (ii) "provides sufficient objective standards for one charged with its enforcement to know what conduct is unlawful," and (iii) "does not encourage arbitrary enforcement." 204 Ariz. 514, 519, 116 (App. 2003). That should end the inquiry about purported vagueness, especially when the Stuart brief does not mention Kaiser, much less make any attempt to explain why the Kaiser-Court's reasoning is in any way flawed or, otherwise, why this court should ignore the holding in that case. See generally City of Tucson v. Clear Channel Outdoor, Inc.,218 Ariz. 172, 195,1188 (App. 2008) (recognizing that when appellant "fails to adequately develop its argument," it is waived); Sholes,Z2B Ariz. at 457 n.1, tjl (stating that issues 'not argued sufficiently" are not considered).

Leaving that aside, a void for vagueness argument implicates due process and not first

amendment rights United States v. Williams, 3 U.S. 285, 304-05 (2008) ("Vagueness doctrine is an outgrowth not of the First Amendment but of the Due Process Clause of the Fifth Amendment"). To succeed on a claim based on the denial of due process, the claimant must show resulting prejudice. E.g., County of LaPaz v. Yakima Compost Co., 224 Inz. 590, 598, fil2 (App. 2010) (stating that denial of due process is not reversible error when the appellant "fails to demonstrate how it was unreasonably prejudiced by the deprivation"); see also Fisher v. Arizona State Bd. of Nursing, No. I CA-CV 18-0167, 2019 WL 764028, at *2, 19 (A.I.Z. Ct. App. 2019) ("The party asserting a denial of due process must show prejudice"). Because the refusal to comply with a police officer's instruction is not a constitutionally protected activity, Stuart was not denied due process, and for that reason as well, the void for vagueness argument fails. E.g., Stotev. Smith, 130 Ariz. 74, 76 (App. 1981) ("A person may not urge the unconstitutionality of a statute unless he is harmfully affected by the application to him of the particular feature of the statute alleged to be violative of the constitution" (citing State v. Varela, 120 Ariz. 596, 600 (1978))).

b. Overbreadth.

Stuart maintains that his conviction should be set aside because section 19-13 is unconstitutionally overbroad. [Stuart Br. al27-32] That argument was also rejected in Kaiser, where the court held that section 19-13 posed "no realistic danger to" individuals' first amendment rights." 204 Ariz. at 519, ¶¶17-18. Because the Stuart brief makes no attempt

to explain why, in the circumstances here, Kaiser must be revisited or otherwise ignored, the holding in that case regarding section 19-13 ends the overbreadth inquiry. E.g., *City of Phoenix v. Leroy's Liquors, Inc.*

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,177 Ariz.375,378 (1993) (recognizing that lower level appellate court may not "overrule , modify , or disregard" higher court case law).

Leaving Kaiser aside, Stuart has the burden to demonstrate that section 19-13 is unconstitutionally overbroad. 8.g., *State v. Brock*, 248 Ariz. 583, 588, tfl0 (App. 2020). That requires a showing that section 19-13 will produce unconstitutional results in "a substantial number of its applications." Committee for Justice & Fairness,235 Ariz. at 356 n.16, ¶35 (citing United States v. Stevens,559 U.S. 460, 473 (2010) and Washington State Grange v. Wash. State Republican Party, 552 U.S. 442, 449 n. 6 (2008)) (internal quotation marks omitted)); see also *State v. Musser*, 194 Ariz. 31,32,n6 (1999) (stating that the effect on legitimate expression must be real and substantial (citing *Broadrick v. Oklahoma*,413 U.S. 601, 615 (1973)). And, "[t]he merc fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge." *Musser*,194 Ariz. at32, (quoting *Members of City Council v. Taxpayers for Vincent*,466 U.S. 789, 799 (1984) (alteration omitted)); *Kaiser*, 204 Ariz. at 519, ¶18 (same). Instead, Stuart "must demonstrate . . . from[^] actual fact that a substantial number of instances exist in which the law cannot be applied constitutionally." *New York*

State Club Ass'n, Inc. v. City of New York, 487 U.S.1, 14 (1988) (emphasis added).

The Stuart brief fails to show "from actual fact that a substantial number of the applications of section 19-13 have yielded or even would yield unconstitutional results. Instead, the only event described in the memorandum that is offered in support of the overbreadth claim is the police order given to Stuart after he was led out of the city council meeting. A single event is, however, insufficient to support a finding that a law is overbroad. See Ritchie v. Coldwater Cnty. Schools, 947 F.Supp.2d 791, 824 (W.D. Mich. 2013) (rejecting overbreadth challenge based only on claimant's own first amendment activity (citing de la O v. Housing Auth. of El Paso, 417 F.3d 495, 505-06 (5th Cir. 2005) (rejecting overbreadth claim because it "is predicated on plaintiffs own supposed injury resulting from the alleged unconstitutionality of the [housing authority] regulations"), abrogated on other grounds, Regan Nat'l Adr. of Austin, Inc. v. City of Austin, No. 19-50354, 2020 WL 5015455, at *5 n.3 (5th Cir. Aug. 25, 2020)); see also Musser, 194 Ariz. at 32-33 ("While Musser has conceived of some applications of the statute, he has provided no indication that any likelihood exists that the state would use the statute to reach such activities").

Moreover, Stuart's argument relies significantly on references to what transpired during the trial, for which Stuart chose to submit only a partial transcript. [Stuart Br. a127, 29] As such, his argument also fails for lack of record support. Baumert, 118 Ariz. at 260-61 ("Faced with an incomplete transcript the Superior Court abused its discretion by not affirming the municipal trial court").

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Pages 18 to 24 Omitted

IT IS ORDERED:

1. The State of Arizona's motion to strike Stuart's 56-page appellate brief for failing to comply with Rule 8(a)(4) of the Superior Court Rules of Appellate Procedure (Criminal) is denied.
2. The Stuart motion for recusal is denied.
3. The judgment of the Scottsdale city court in State v. Stuart (case no, SC 2017003568) is affirmed.
4. All other pending motions are moot and require no court action.
5. This case is remanded to the Scottsdale city court for any further proceedings that may be necessary.
6. No matters remain pending in connection with this appeal. This is a final order. See Rule 12(b), Superior Court Rules of Appellate Procedure (Criminal).



Honorable Douglas Gerlach
Judge of the Superior Court

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State Of Arizona Case#: M-0751-SC-2017003568
Complaint #: 01997588,20190787

VS.

STUART, MARK ELLIOTT
8629 E CHERYL DR
SCOTTSDALE, AZ 85258

MINUTE ENTRY

PURSUANT TO:

Defendant's Rule 24.2 Motion to Vacate the
Judgment of Guilty on Scottsdale City Code 19.13 on
the grounds that the conviction was obtained in
violation of both the Arizona and the United States
Constitutions

Defendant's request to extend the Appellate Memorandum due date until July 14, 2020 or until sixty days after the court rules on the pending Motion to Vacate the Judgment

IT IS ORDERED:

Defendant's Rule 24.2 Motion to Vacate Judgment of Guilty on Scottsdale City Code 19-13 on Grounds that the Conviction was Obtained in Violation of Both the Arizona and United States Constitution is **DENIED**.

**Additional material
from this filing is
available in the
Clerk's Office.**