

No. 19 –

IN THE
SUPREME COURT OF THE UNITED STATES
_____ Term, 2019

JOHNATHAN MASTERS

Petitioner,

v.

COMMONWEALTH OF KENTUCKY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF KENTUCKY

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

JOHN GERHART LANDON
Counsel of Record
Assistant Public Advocate
KY Department of Public Advocacy
5 Mill Creek Park, Section 100
Frankfort, Kentucky 40601
502-782-3578 (direct)
732-539-0614 (cell)
502-564-8006 (office)
502-564-34949 (fax)
John.Landon@ky.gov

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Supreme Court of Kentucky

2017-SC-000628-D
(2015-CA-001755)

JOHNATHAN MASTERS

MOVANT

V.

BRECKINRIDGE CIRCUIT COURT
2015-XX-00003

COMMONWEALTH OF KENTUCKY

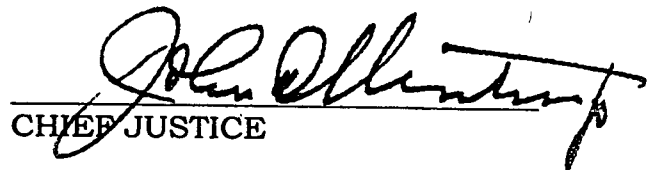
RESPONDENT

ORDER DENYING DISCRETIONARY REVIEW

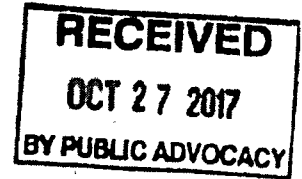
The motion for review of the decision of the Court of Appeals is denied.

VanMeter, J., would grant discretionary review.

ENTERED: August 8, 2018.


CHIEF JUSTICE

RENDERED: OCTOBER 27, 2017; 10:00 A.M.
TO BE PUBLISHED



Commonwealth of Kentucky
Court of Appeals

NO. 2015-CA-001755-DG

JOHNATHAN MASTERS

APPELLANT

ON DISCRETIONARY REVIEW FROM BRECKINRIDGE CIRCUIT COURT
v. HONORABLE BRUCE T. BUTLER, JUDGE
ACTION NO. 15-XX-00003

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

BEFORE: COMBS, D. LAMBERT, AND NICKELL, JUDGES.

LAMBERT, D., JUDGE: Johnathan Masters challenges the constitutionality of Kentucky Revised Statutes (KRS) 161.190, a Kentucky statute addressing teacher abuse. The Breckinridge District Court held the statute constitutional, and the Breckinridge Circuit Court affirmed. This Court granted discretionary review and now affirms.

I. BACKGROUND

In December 2014, Masters got into a verbal disagreement with Keith Haynes, the principal of Clover Independent Schools. The disagreement took place in the foyer of the school building after Haynes reneged on a deal to help Masters, a graduate school student, complete a school project.

During the disagreement, Haynes asked Masters to leave the school premises multiple times. Masters responded by calling Haynes a profane name and proposing that the two resolve their differences by fighting outside. Specifically, Masters invited Haynes to meet him outside so he could "kick [Haynes'] ass." Masters left after Haynes declined the invitation.

Once Masters was off campus, Haynes placed the school in a temporary lock down. Haynes also contacted the Breckinridge County Attorney's office to have a criminal complaint issued. Masters was charged with violating KRS 161.190, a misdemeanor offense, two days later. The full text of the statute reads as follows:

Whenever a teacher, classified employee, or school administrator is functioning in his capacity as an employee of a board of education of a public school system, it shall be unlawful for any person to direct speech or conduct toward the teacher, classified employee, or school administrator when such person knows or should know that the speech or conduct will disrupt or interfere with normal school activities or will

nullify or undermine the good order and discipline of the school.

KRS 161.190.

In the subsequent criminal proceedings, Masters filed a motion challenging the constitutionality of KRS 161.190.¹ The statute, from Masters' perspective, punished more behavior than necessary, did not define some of its key terms, and chilled otherwise protected speech. The district court denied the motion. A jury ultimately found Masters guilty of the offense, and he was fined \$500.

Following his conviction and sentence, Masters appealed the case to the circuit court. He once again argued that KRS 161.190 was unconstitutional. The circuit court disagreed and explained in a thorough opinion and order that the statute was neither overbroad nor vague. The circuit court also ruled that the words Masters used were not protected speech, but "fighting words" under *Chaplinsky v. State of New Hampshire*, 315 U.S. 568, 62 S. Ct. 766, 86 L. Ed. 1031 (1942). This Court granted Masters' motion for discretionary review.

II. STANDARD OF REVIEW

Whether a criminal statute is constitutional is a legal question for courts to review de novo. *Wilfong v. Commonwealth*, 175 S.W.3d 84, 95 (Ky. App. 2004).

¹ He also served the Kentucky Attorney General pursuant to KRS 418.075(1).

III. DISCUSSION

Masters urges this Court to declare KRS 161.190 unconstitutional on several grounds. He first claims the statute offends due process because its language is too vague to notify a person of ordinary intelligence when it is applicable. He then claims the statute is overly broad because it criminalizes speech and conduct protected by the First Amendment. From there, Masters claims the statute was also unlawfully applied against him. Masters maintains the particular words he used during the disagreement were protected by the First Amendment. For the following reasons, we disagree.

1. KRS 161.190 is not unconstitutionally vague

“The root of the vagueness doctrine is a rough idea of fairness.” *Colten v. Kentucky*, 407 U.S. 104, 110, 92 S. Ct. 1953, 1957, 32 L. Ed. 2d 584 (1972). The simple idea is “that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed.” *United States v. Harriss*, 347 U.S. 612, 617, 74 S. Ct. 808, 812, 98 L. Ed. 989 (1954).

Here, the statute authorizes conviction for directing speech toward a school administrator that will reasonably disrupt normal school activities. Standing in the schoolhouse foyer and angrily offering to fight the principal while class is in session is conduct that will disrupt day-to-day school activities.

Accordingly, Masters should have understood that he could be convicted under KRS 161.190.

2. **KRS 161.190 is neither overbroad nor unconstitutional as-applied**

“[A] statute is overbroad if in an effort to control impermissible conduct, the statute also prohibits conduct which is constitutionally permissible.” *State Bd. for Elementary and Secondary Educ. v. Howard*, 834 S.W.2d 657, 662 (Ky. 1992). A statute challenged as overbroad must be construed in a manner that “avoid[s] constitutional problems” *Martin v. Commonwealth*, 96 S.W.3d 38, 54 (Ky. 2003) (quoting *New York v. Ferber*, 458 U.S. 747, 769 n. 24 (1982)). In the free speech context, this means courts must construe the challenged statute so that only unprotected speech is punished. *See Commonwealth v. Ashcraft*, 691 S.W.2d 229, 231 (Ky. App. 1985) (holding KRS 161.190’s predecessor statute unconstitutional).

Under the First Amendment, “words which merely offend, disgrace, anger or frustrate may not be prohibited in violation of one’s right to freedom of speech.” *Id.* (citing *Lewis v. City of New Orleans*, 415 U.S. 130, 94 S. Ct. 970, 39 L. Ed. 2d 214 (1974)). On the other hand, “fighting words” or those “which by their very utterance inflict injury or tend to incite an immediate breach of the peace” are unprotected. *Id.* (quoting *Chaplinsky*, 315 U.S. at 573). Moreover, restrictions on the time, place, or manner of speech violate the First Amendment if

they are content-based and fail intermediate scrutiny—that is, the restrictions target expression and do not achieve a substantial governmental interest through reasonably limited means. *Blue Movies, Inc. v. Louisville/Jefferson County Metro Government*, 317 S.W.3d 23, 29 (Ky. 2010).

Here, the statute is a proper time-place-manner restriction and not overbroad. The statute does not seek to suppress expression, but rather attempts to preserve a suitable learning environment by curbing unreasonable, and potentially dangerous, disruptions to routine school operations. Construing the plain text of KRS 161.190 narrowly, students, parents, and members of the public may still reasonably express frustration with school employees, even during the school day. They may also express their concerns through traditional means such as meeting with school administrators, attending school board meetings, participating in parent-teacher conferences, and wearing black arm bands. *See Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503, 89 S. Ct. 733, 21 L. Ed. 2d 731 (1969)). An example of what they cannot do, however, is express their frustrations the way Masters did. Although Masters was upset with Haynes and likely exempt from criminal prosecution for merely calling Haynes a vulgar or derogatory name in light of *Ashcraft, supra*, Masters did not engage in protected speech when he challenged Haynes to fight. Angrily telling someone you are going to physically harm them is precisely the type of speech that would incite a

reasonable person to violence. Not only that, such a threat of physical force against a principal during the school day foreseeably triggers a safety protocol which disrupts the orderly function of the classroom. Accordingly, KRS 161.190 is constitutional and the order of the Breckinridge Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

John Gerhart Landon
Frankfort, Kentucky

Ronald Pence
Rineyville, Kentucky

BRIEF FOR APPELLEE:

Andy G. Beshear
Attorney General of Kentucky

James Havey
Frankfort, Kentucky

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COMMONWEALTH OF KENTUCKY
46TH JUDICIAL DISTRICT
BRECKINRIDGE CIRCUIT COURT
CASE NO. 15-XX-00003

ENTERED
CIRCUIT/DISTRICT COURT
OCT 21 2015
GINDY M. RHODES, CLERK
BY: [Signature] D.C.

JONATHAN MASTERS

APPELLANT

VS.

OPINION AND ORDER

COMMONWEALTH OF KENTUCKY

APPELLEE

This matter is before the Court pursuant to appeal from the District Court's ruling finding KRS 161.190 constitutional. The appellant filed a motion to dismiss the case asserting that the statute was unconstitutional. The district court overruled said motion and the case continued to trial at which a jury found the appellant guilty of violating KRS 161.190.

FACTUAL AND PROCEDURAL BACKGROUND

The appellant, Jonathan Masters, went to the Cloverport School for the purpose of handing out surveys regarding American Civics as a part of his enrollment in a Master's degree course. Mr. Masters went to the school on two separate occasions and met with the principal of Cloverport Schools, Keith Haynes. At the first meeting Mr. Masters sought Mr. Haynes' permission to distribute the surveys to students. Mr. Haynes indicated he would discuss handing out the surveys with some of the teachers. Mr. Masters returned to the school the following day in order to collect the results from the surveys. Mr. Masters met with Mr. Haynes in his office and at that time Mr. Haynes indicated he was unable to distribute the surveys due to final exams taking place. Mr. Haynes suggested that Mr. Masters email the surveys to various teachers for them to distribute. Mr. Haynes observed the appellant to be in an agitated state at which time Mr. Haynes asked him to leave the premises prompting Mr. Masters to say "you're a dick," again Mr.

[Handwritten initials]

Haynes insisted that he leave the premises to which Mr. Masters stated "fuck you." At this time Mr. Haynes again directed Mr. Masters to leave and Mr. Masters began to get up and walk out the door and as he was leaving said to Mr. Haynes "Why don't you come out here so I can kick your ass?" Mr. Masters exited the building and Mr. Haynes watched through the window to ensure he was in fact leaving. Mr. Haynes then placed the school on a soft lock down and then walked around the campus and ensured all exterior doors were locked and that Mr. Masters had left.

The Kentucky Attorney General has been provided notice of the challenge to the constitutionality of the statute pursuant to KRS 418.075 (1) and the Kentucky Rules of Civil Procedure 24.03. The record does not indicate that the Kentucky Attorney General has filed any documents pertaining to this issue in this case.

ANALYSIS

The issue before the Court is the constitutionality of KRS 161.190, both as enacted and as applied in the instant case and, whether in its current state passes constitutional muster and is not void for vague or overbroad provisions. The statute provides as follows:

"Whenever a teacher, classified employee, or school administrator is functioning in his capacity as an employee of a board of education of a public school system, it shall be unlawful for any person to direct speech or conduct toward the teacher, classified employee, or school administrator when such person knows or should know that the speech or conduct will disrupt or interfere with normal school activities or will nullify or undermine the good order and discipline of the school."

It is a settled principle that when the legislature has enacted a statute, it is presumed to have done so in accordance with the constitutional requirements, and that its provisions are not contrary to any constitutional right. A statute will not be struck down as unconstitutional unless its violation of the constitution is clear, complete and unequivocal. Moreover, the

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Commonwealth does not bear the burden of establishing the constitutionality of a statute, rather the one who questions the validity of an act bears the burden to sustain such a contention.

Cornelison v. Commonwealth, 52 S.W.3d 570, 572 (Ky. 2001)(internal citations and quotations omitted.)

First, the appellant argues that the statute is unconstitutionally vague and fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by statute. The statute prohibits speech or conduct, directed towards one of the above described individuals, which by its utterance would have a tendency to disrupt or interfere with normal school activities, or, would nullify or undermine the good order and discipline of the school.

When examining the language of the statute's prohibitions it prohibits speech or conduct that will "...disrupt or interfere with normal school activities or will nullify or undermine the good order and discipline of the school." The dictionary defines "disrupt" as "to cause (something) to be unable to continue in the normal way: to interrupt the normal progress or activity of (something)," and "interfere" as "to become involved in the activities and concerns of other people when your involvement is not wanted." Merriam-Webster.com. Merriam-Webster, n.d. Web. 20 Oct. 2015. These words are of common parlance and provide a person with ordinary intelligence adequate notice of the type of speech and conduct that are prohibited. This Court concludes that KRS 161.190 is not impermissibly vague.

Next the appellant argues that the statute is overbroad. A challenge to a statute on the basis that it is overbroad is essentially an argument that in an effort to control impermissible conduct, the statute also prohibits conduct which is constitutionally permissible. Commonwealth v. Ashcraft, 691 S.W.2d 229, 232 (Ky. App. 1985). In a facial challenge to the overbreadth and

vagueness of a law, a court's first task is to determine whether the enactment reaches a substantial amount of constitutionally protected conduct. If it does not, then the overbreadth challenge must fail. Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 494, 102 S. Ct. 1186, 1191, 71 L. Ed. 2d 362 (1982).

A basic tenant of our education system is to provide an environment which promotes learning. Though the First amendment guarantees to free speech are not checked at the door in our schools it is a place in which the government has a legitimate interest in prohibiting speech that will undermine the goals of our education system. "First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students. It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate". Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503, 506, 89 S. Ct. 733, 736, 21 L. Ed. 2d 731 (1969). The statute must be carefully drawn or be authoritatively construed to punish only unprotected speech and not be susceptible of application to protected expression. Gooding v. Wilson, 405 U.S. 518, 522, 92 S. Ct. 1103, 1106, 31 L. Ed. 2d 408 (1972). The Court finds that KRS 161.190 has been carefully drawn to punish unprotected speech which satisfies Gooding v. Wilson.

Further this Court notes that the words the appellant used were a part of an unprotected class of speech, fighting words. Such language or "words by their very utterance inflict injury or tend to incite an immediate breach of the peace" are not protected by the first amendment. Chaplinsky v. State of New Hampshire, 315 U.S. 568, 572, 62 S. Ct. 766, 769, 86 L. Ed. 1031 (1942).

BTP

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ORDER

The District Court properly denied the appellant's Motion to declare KRS 161.190 unconstitutional. Accordingly, the judgment of conviction by the Breckinridge District Court is affirmed.

This is a final and appealable Order and there is no just cause for delay in its entry.

DATED this 28 day of OCTOBER 2015.



BRUCE T. BUTLER
JUDGE, BRECKINRIDGE CIRCUIT COURT
DIVISION I



BRECKINRIDGE COUNTY COURT SYSTEM

Judge No: 746003

Filed: 02/20/2015

Defendant Information			
MASTERS, JONATHAN		ID Type:	OLKY D98156633
187 MOOK CENTERVIEW RD	W/M	DOB: 02/08/1982	Jail ID:
HUDSON, KY 40145-0000		Height: 601	SSN: 400219812
		Eyes: BN	
		Race: W	Crim Hist:
		Weight: 195	State ID:
		Hair: BN	
		Sex: M	



AKA/ALI Information	
AKA	DEATON, KEVIN

Witnesses	
CW HARDIN, TYLER SBC708TH,	SBC708TH

Charges			
12/16/2014	Cit#5M7650283-1	Chg: 1	UOR 0150040 ABUSE OF TEACHER, PROHIBITED (M) (A)
	Ba. Lvl 0		161190

Scheduled Events			
ARR	02/24/2015	0900AM	D /

Bail / Bond Information			
2/20/2015	UN	\$1,000.00	02/20/2015

Monetary Events Information	
02/20/2015 Monetary Event E	Bond Filing Fees 25.00

2/24/15 N/G PTC 3-10-15
 -10-15 order of indigency continue 3-31-15
 3/13/15 R/S served Keith Haynes
 4/13/15 continue 4-14-15
 4/14-15 drug screen filed
 4/16 to hold A in contempt for being late and request drug test
 Judge agreed if A agrees to drug test, contempt will be held off
 A agreed & tested clean so motion held in abeyance
 Amend bond to have random drug screens
 PTC 6-9-15 JT 6-26-15
 7-16-15 R/S X2 (Keith Haynes)
 8-1-15 R/S served Alexia Booth
 8-2-15 Motion to Dismiss filed by DPA
 8-2-15 Motion overruled
 8-26-15 A exhibits 1-12 filed, strike sheets, jury question
 my instructions, verdict A, verdict B
 02/25/2015 9:21:14AM
 court finds A guilty \$500 fine + cost for total \$763 paid in full \$5471

COMMONWEALTH OF KENTUCKY
BRECKINRIDGE DISTRICT COURT
CASE NO. 15-M-00042

COMMONWEALTH OF KENTUCKY

PLAINTIFF

V.

JONATHAN MASTERS

DEFENDANT

MOTION TO DISMISS BASED ON UNCONSTITUTIONALITY OF KRS 161.190

Comes the Defendant, Jonathan Masters, by and through counsel, and respectfully requests that this Honorable Court declare KRS 161.990, the abuse of a teacher statute, unconstitutional as enacted and as applied in the instant case. As grounds for said motion, the Defendant states as follows:

1. On December 16, 2014, Keith Haynes, working as principal of Cloverport public schools, filed a complaint against the Defendant. The complaint stated that Mr. Masters used profane language towards Mr. Haynes and suggested that the two should fight. No mention is made of what school activities were interfered with or disrupted. No mention is made of any students being present or how the aforementioned statements would affect good order and discipline in the school.

2. KRS 161.190 defines the Class A misdemeanor offense of abuse of a teacher as follows:

Whenever a teacher or school administrator is functioning in his capacity as an employee of a board of education of a public school system, it shall be unlawful for any person to direct speech or conduct toward the teacher or school administrator when such person knows or should know that the speech or conduct will disrupt or interfere with normal school activities or will nullify or undermine the good order and discipline of the school.

DIS : 000001 of 000004

3. Undersigned counsel respectfully contends that KRS 161.190 is unconstitutional both as enacted and as applied in the instant case for the following reasons:

A. None of the statute's terms are defined, failing "to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute." *United States v. Harriss*, 347 U.S. 612, 617 (1954). The Supreme Court has said that "no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed." *Id.* Because this statute leaves so much undefined, it is virtually impossible for an individual to determine when he has committed a criminal offense. Therefore, the statute is unconstitutionally vague, violating the Sixth and Fourteenth Amendments to the U.S. Constitution and Sections 2 and 11 of the Kentucky Constitution.

B. This lack of definition creates the potential for selective prosecution and inconsistent enforcement throughout the Commonwealth, which violates the child's equal protection rights that are set forth in the Fourteenth Amendment to the federal constitution and Section 3 of the Kentucky Constitution. The danger is greater when the *mens rea* that triggers liability under the statute requires than knowingly performing the conduct that is criminalized ("should know").

C. The statute is overly broad in violation of the First and Fourteenth Amendments to the U.S. Constitution and Sections 1(4) and 8 of the Kentucky Constitution. The statutory language is so ambiguous that it "criminalizes not only unprotected expression but expression protected by the First Amendment." *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 397 (1992). Potentially, a parent

NOTICE

Please take notice that the foregoing Motion to Dismiss will be heard in the Breckinridge District Court on June 9, 2015 at 9:00 a.m. or as soon thereafter as counsel may be heard.

/s/ R. Joshua Pence

R. JOSHUA PENCE

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Motion was served via facsimile to 502-564-2894 and via regular U.S. mail, first class postage prepaid, to Hon. Jack Conway, Attorney General, Commonwealth of Kentucky, 700 Capitol Avenue, Frankfort, KY 40601-3449, and via electronic filing to the office of Hon. Bradley Butler, Breckinridge County Attorney, on this the 2nd day of June, 2015.

/s/ R. Joshua Pence

R. JOSHUA PENCE

DIS: 000004 of 000004

Baldwin's Kentucky Revised Statutes Annotated

Title XIII. Education

Chapter 161. School Employees; Teachers' Retirement and Tenure (Refs & Annos)

Regulations as to School Employees

KRS § 161.190

161.190 Abuse of teacher, classified employee, or school administrator prohibited

Effective: June 24, 2015

Currentness

Whenever a teacher, classified employee, or school administrator is functioning in his capacity as an employee of a board of education of a public school system, it shall be unlawful for any person to direct speech or conduct toward the teacher, classified employee, or school administrator when such person knows or should know that the speech or conduct will disrupt or interfere with normal school activities or will nullify or undermine the good order and discipline of the school.

Credits

HISTORY: 2015 c 76, § 1, eff. 6-24-15; 1990 c 476, § 483, eff. 7-13-90

Notes of Decisions (6)

KRS § 161.190, KY ST § 161.190

Current through the end of the 2018 regular session

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