



AlaFile E-Notice

52-CC-2014-000762.00

Judge: JUDGE GLENN THOMPSON

To: CARL ALLEN COLE III
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NOTICE OF ELECTRONIC FILING

IN THE CIRCUIT CRIMINAL COURT OF MORGAN COUNTY, ALABAMA

CITY OF DECATUR V. MCCLAIN ROLANDO
52-CC-2014-000762.00

The following matter was FILED on 4/8/2015 2:09:39 PM

D001 MCCLAIN ROLANDO

MOTION TO DISMISS

[Filer: COLE CARL ALLEN III]

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MORGAN COUNTY CIRCUIT COURT
STATE OF ALABAMA

People of the State of Alabama,
Plaintiff,

v.

Rolando McClain,
Defendant.

Case Number: CC 2014 000762.00

MOTION TO DISMISS

The Defendant, Rolando McClain, by and through his attorneys, Harvey A. Steinberg, from the law firm of Springer and Steinberg, P.C., and Carl A. Cole, III, from the Cole Law Firm, hereby moves this Court for the entry of an Order Dismissing the above-captioned case.

AS GROUNDS THEREFOR, the Defendant states as follows:

1. The Defendant is charged with Resisting Arrest in violation of Ala. Code § 13A-10-41, and Disorderly conduct in violation of Ala. Code § 13A-11-7(a)(2), in Circuit Court case number CC 2014 000762.00. The basis for these charge are that the Defendant is alleged to have shouted "Fuck the police" and then when he was being taken into custody for this alleged offense, struggled against the officer's grip on his arm.
2. The Defendant does not concede that he was the person who made this statement or that the statement was even made. Assuming, arguendo, that the statement was made and was made by the Defendant, the Defendant asserts that prosecution for such a statement is barred as such a statement is protected by the First and Fourteenth Amendments to the United States Constitution and Section Four of the Alabama Constitution. As a result, no probable cause existed in support of a lawful arrest of the Defendant. While the Defendant does not concede he resisted arrest, assuming, arguendo, that he did, it is not a crime to resist an unlawful arrest.
3. In the instant case, on April 21, 2013, Decatur Police Officer Todd Walker was dispatched to Pines Park, located at 1612 5th Street NW, (near the baseball diamond) in regards to a fight between four black males. The fight was reported to be in front of the barbershop located on the west corner entrance to the park. Officer Walker's police cruiser was equipped with audio and video recording equipment and Officer Walker was wearing a body microphone. The recording equipment was operational at the time of the underlying incident and the incident was recorded. A copy of that recording will be provided to the Court with this motion, marked as Defendant's Exhibit A, for the Court's review.
4. When Officer Walker arrived on scene he observed a crowd of people standing in the street. Officer Walker exited his patrol car and approached the crowd. Officer Walker

began by politely ordering the crowd to move out of the street. When the crowd did not instantly disperse, Officer Walker yelled, “Alright. Here’s what we’re gonna do. Tell the people to move out of the street and if they don’t move out the street they’re going to fuckin’ jail, right now.” The video then captured what sounds like another officer though it is unclear who precisely, yelling at the top of his lungs, repeating Officer Walker’s epithet-laden arrest threat.

5. Moments later the Defendant is being arrested and accused of shouting, “Fuck the police.”
6. Following the Defendant’s arrest Officer Walker is heard explaining to the Defendant that the crowd contained around 1,000 people (though later Officer Walker writes in his report that the crowd contained around 500 people) and that Officer Walker was standing five feet away from the Defendant. The video shows the Defendant walking away from Officer Walker and Officer Walker hurriedly walking up behind the Defendant and so the Defendant had his back to Officer Walker when the Defendant allegedly made this statement.
7. Alabama case-law is clear in regard to the application of the charge of disorderly conduct to so-called “fighting words.” While Alabama law permits such a charge, in light of the First Amendment implications, it only permits such a charge when the words in question “have a likelihood of causing a violent response by the person to whom they are addressed. They are words that by their very utterance provoke a swift physical retaliation and incite an immediate breach of the peace.” *Robinson v. State*, 615 So.2d 112, 113 (Ala. Crim. App. 1992) quoting *Skelton v. City of Birmingham*, 342 So.2d 933, 936-37 (Ala. Crim. App. 1976). In other words, in the context of disorderly conduct, abusive or obscene language’ has been “interpreted narrowly to apply only to ‘fighting words.’” *Swann v. City of Huntsville*, 455 So.2d 944, 950 (Ala. Crim. App. 1984).
8. The facts in *Robinson* are similar to the instant facts in that Willie Robinson was accused of shouting, “Fuck R. Lewis” as Police Officer Corporal R. Lewis was passing by while on patrol. *Robinson v. State*, 615 So.2d at 113. The *Robinson* Court determined that the phrase “Fuck R. Lewis” was not “fighting words.” *Robinson v. State*, 615 So.2d at 114.
9. The use of epithets have, unfortunately, grown common in the United States. “Words must be evaluated in the era in which they are uttered—words that constitute fighting words change from generation to generation, or even more quickly.” *B.E.S. v. State*, 629 So.2d 761,764 (Ala. Crim. App. 1993). The use of epithets directed at police are especially common; so common that in 1991 the Court of Criminal Appeals wrote in a concurring opinion,

Unfortunately, epithets ... directed at a police officer in the performance of his duties are not uncommon in today’s law enforcement environment. The fact that an officer encounters such vulgarities with some frequency, and the fact that his training enables him to diffuse a potentially volatile situation without physical retaliation, however, means that words which

might provide a violent response from the average person do not, when addressed to a police officer, amount to “fight words.”

Shinault v. City of Huntsville, 579 So.2d 696, 700 (Ala. Crim. App. 1991).

10. In the instant case Officer Walker did not employ training to diffuse the situation. Instead Officer Walker shouted that he was going to send people to “fuckin’ jail, right now.” Under the continued assumption for sake of this argument that the Defendant shouted “fuck the police” as he walked away it is clear that such a comment was an expression of frustration over the disrespectful way Officer Walker addressed the crowd. In fact the complete phrase recorded on the video was “Fuck the police. We not doin’ nothin’.”
11. Such a statement was not “calculated to cause an immediate breach of the peace.” *Skelton v. City of Birmingham*, 342 So.2d 933, 937 (Ala. Crim. App. 1976); see also *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942) (The utterance itself must “tend to incite an immediate breach of the peace.”) Said slightly differently, while Officer Walker’s use of the word “fuckin’” might have been calculated to incite, the Defendant’s alleged use of the words “fuck the police” would not, “by their very utterance provoke a swift physical retaliation and incite an immediate breach of the peace.” *Skelton v. City of Birmingham*, 342 So.2d at 936-37.
12. There is no evidence in this case that the words “fuck the police” were inciting violent response and in fact there is evidence to the contrary—the police video shows that the crowd remained calm and sluggish in response to police presence and the order to vacate the street. It was instead Officer Walker’s escalation, changing from his initial polite order to vacate the street, to a loud and epithet-laden threat of arrest, that lead to some increased tension and potential for violence. Nonetheless, the only sign that the crowd was turning toward such action was only seen after Officer Walker unlawfully arrested the largest of the men he saw at the scene (referring to the Defendant repeatedly as “big fella”) as an apparent demonstration of power, and even then the crowd remained relatively calm. It appears from the video that the only excited movement was from an off-duty police officer, Quinn Birgans, seen wearing a bright pink shirt, interacting with the Defendant as Officer Walker took the Defendant into custody and as the Defendant vocalized his belief that the arrest was unlawful.
13. The only conduct the State seeks to punish in this case is communication. The facts in this case are thus similar to the facts in the landmark case of *Cohen v. California*, 403 U.S. 15 (1971). In the *Cohen* case, Paul Cohen was charged with disturbing the peace for walking through a crowded courthouse where women and children were present wearing a jacket emblazoned with the words “Fuck the Draft.” *Cohen v. California*, 403 U.S. at 16. The *Cohen* Court held that, “so long as there is no showing of an intent to incite disobedience to or disruption of the draft, Cohen could not, consistently with the First and Fourteenth Amendments, be punished for asserting the evident position on the inutility or immorality of the draft his jacket reflected.” *Cohen v. California*, 403 U.S. at 18. In other words, Mr. Cohen was expressing his frustration with the government’s draft and expression of frustration with government action is protected speech. Similarly, the

alleged expression here was merely an expression of frustration with the government's conduct and is thus protected speech.

14. With regard to the charge of Resisting Arrest, because "fuck the police" is not disorderly conduct subjecting the Defendant to arrest, the arrest of the defendant was unlawful. As noted in *Shinault, supra*, "'a person [may] use reasonable force to resist an unlawful arrest.' Ms. Shinault's conviction for resisting arrest is due to be reversed because her arrest for harassment was unlawful." 579 So.2d at 699 quoting Commentary to Ala. Code. 1975 § 13A-3-28 at 71 and § 13A-10-41 at 380, internal citations omitted. Just as Ms. Shinault could not face jeopardy for resisting an unlawful arrest in her case, so too should the Defendant here not be prosecuted for resisting this unlawful arrest.
15. For the above-stated reasons, the Defendant moves that this matter be dismissed in its entirety as this prosecution is barred by the protections afforded to the Defendant pursuant to the First and Fourteenth Amendments to the United States Constitution and Section Four of the Alabama Constitution. The Defendant seeks a hearing on this motion.

WHEREFORE, the Defendant prays for the relief requested, and for such other and further relief as the Court deems just and proper in the premises.

DATED this 1st day of April, 2015.

Respectfully submitted,

By: /s/ Carl A. Cole
Carl A. Cole, III, Esq.
THE COLE LAW FIRM, LLC

By: /s/ Harvey A. Steinberg
Harvey A. Steinberg, Esq.
SPRINGER AND STEINBERG, P.C.

CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of April, 2015, I served a true and correct copy of the foregoing MOTION TO DISMISS by causing same to be electronically filed and served on all those entered in this case.

/s/Carl A. Cole