

**STATE OF NEW YORK
COUNTY COURT: COUNTY OF CHEMUNG**

**THE PEOPLE OF THE STATE OF NEW YORK,
Plaintiff/Respondent**

**ORDER
JC 2583
ECC DOCKET NOS:**

vs.

**Julian Raven
Gloria Raven
Walter Quick
Maurice Kienenberger,**

**2007-56740
2007-56736
2007-56737
2007-56734**

Defendants/Appellants

The Defendants/Appellants have appealed a judgment of conviction entered on February 29, 2008 following a bench trial in Elmira City Court. The trial court found that the defendants created a reckless risk of disturbance of a lawful assembly in the City of Elmira and imposed a fine as well as a one year conditional discharge. The alleged disturbance occurred in connection with a Southern Tier Pride Festival held with a lawful permit on the west side of Wisner Park in the City of Elmira on June 23, 2007. It is undisputed that the defendants gathered with others on the east side of Wisner Park, and then crossed the street to the location of the Festival and reclined on the ground near other event participants by the stage area. Defendants admit that they were conducting a demonstration as Christians concerned about the spiritual welfare of those who engage in homosexual behavior. They contend that they were arrested simply because others reacted to their message in a hostile manner and that their arrest and conviction was unconstitutional. Defendants also allege that the People have failed to prove the elements of the violations beyond reasonable doubt, that the charging instruments were insufficient on their faces, and that the Disorderly Conduct statute is unconstitutional.

The People assert not only the constitutionality of the Disorderly Conduct Statute, but also its application to these defendants. Although the situation did not become violent, defendant Julian Raven did inform the police officers on duty that he and the other defendants planned to confront the participants and share their beliefs. In response, one of the police officers assured him that he and the other protesters were free to participate in the event, which was open to the public, but asked him not to engage in confrontation of any kind and to limit any protesting to the east side of the street. In addition, the same police officer testified that she told Julian Raven he could be subject to arrest if he and any members of his group were “to enter the event, confront the event participants and cause a disruption.” The officer then testified that when Mr. Raven began to taunt her, she told him the event was not to be disturbed and that she was charged with the safety of everyone at the park.

Following this colloquy, Julian Raven returned to the east side of the park and then returned with the remaining defendants to the west side; walked through the crowd, causing the participants to move out of their way; and lay down in front of the stage where people had been dancing. The atmosphere changed from pleasant to serious; some angry exchanges occurred between the demonstrators and the event participants; and the event was clearly disrupted or disturbed until the defendants were arrested while lying on the ground without further warnings from the police officers.

Defendants were convicted of violating Penal Law §240.20(4) Disorderly Conduct. A person is guilty of this charge when, “with intent to cause public inconvenience, annoyance, or alarm, or recklessly creating a risk thereof,” and “without lawful authority,” he or she “disturbs any lawful assembly or meeting of persons.” As pointed out by the People, “the purpose of this statute is to protect the First Amendment rights of those who assemble

lawfully and punishes those who unlawfully act in a manner that disrupts such lawful meeting. An individual may not exercise his or her own rights and in the process, infringe on the constitutional rights of others. Adderley v Florida, 385 U.S. 39. The First Amendment does not guarantee an absolute right to express one's views in 'any place, at any time, and in any way.' See Heffron v International Socy. For Krishna Consciousness, 452 U.S. 640, 647 (1981); Adderley, [supra at 47-48 (1966).]” Appellee’s Brief at p. 11. It would not be a violation of this statute, for instance, where a pedestrian did nothing more than stand in the middle of the sidewalk at 2:00 a.m., when there was no indication of his intent or recklessness in creating a risk of causing “public inconvenience, annoyance or alarm.” “Something more than a mere inconvenience of pedestrians is required to support the charge.” *People v Jones*, 9 NY3d 259 (2007).

On the other hand, when an anti-mask statute was challenged, the court in *People v ABOAF*, 187 Misc.2d 173 (2001) concluded that a law “subjecting the exercise of First Amendment freedoms to the prior restraint of a license” must contain “ narrow, objective and definite standards to guide the licensing authority,” and must not be “so vague that ‘men of common intelligence must necessarily guess at its meaning.’ Where the legislation gives no indication that a different meaning is intended, the plain meaning of statutory words controls.” And, “where conduct and not merely speech is involved, a facial overbreadth challenge will not lie unless the overbreadth is ‘real and substantial,’ and the statute is incapable of a reasonable limiting construction.”

In considering the constitutionality of the disorderly conduct statute at issue here, the provision is capable of a reasonable limiting construction, and is not unnecessarily vague. “Reasonable ‘time, place and manner’ regulations may be necessary to further significant

governmental interests and are allowed.... The well-established tests for assessing the validity of such a restriction require that it (1) be content-neutral, (2) be narrowly tailored and meet a significant government interest, and (3) leave open ample alternative means of communication.” *People v Maher*, 137 Misc.2d 162 (1987). In that case the court reasserted that the requirement of having people demonstrate or picket behind a barrier has “long been recognized as a reasonable regulation by the police and an acceptable limitation on First Amendment rights,” provided the three prongs of the above-cited test are met. The defendant in *Maher* was asked to limit her picketing of an abortion clinic to the area behind a physical barrier, which kept the limitation on her movement “to an absolute minimum, merely enough to regulate the safety of the public on the sidewalk. When defendant, of her own volition, chose to ignore this reasonable police regulation, she left herself open to the possibility of criminal prosecution.” *Id.*

Applying these tests to the case at bar, the disorderly conduct statute itself is content-neutral and meets a significant government interest of regulating the safety of the public and protecting the First Amendment freedoms of those who have obtained a valid permit to engage in peaceful conduct within a narrowly defined time and space. The limitations placed on the defendants were kept to an absolute minimum. They were permitted to say and do whatever they pleased from the other side of the street. This left open to them ample alternative means of communication. The testimony made it clear that what they were shouting could be heard from the festival area and that their written words, on signs and the shirts they were wearing, could be seen. They were not prevented from joining in the festival, only from disrupting it and confronting the participants. The testimony demonstrates that Julian Raven chose, of his own volition to ignore this reasonable police request and left

himself open to the possibility of criminal prosecution, of which he had been forewarned.

“Sincere beliefs are not an excuse for lawless conduct.” *People v Arbeiter*, 169 Misc.2d 771 (1996).

The lower court in this case weighed the evidence carefully and concluded that “although the intent may have been to be nonviolent, the nature of the total actions all blended together were just too reckless. Going through the middle of the crowd; going to the front of the crowd, putting oneself between the crowd and the stage. The stage was the centerpiece; the stage was where all of those people were going to be focusing their attention. They no longer had an option to avoid dealing directly with your message... So the court finds that each of the defendants by acting in the fashion that they did created a reckless risk of disturbance of a lawful assembly in the city of Elmira.” The trial court also reviewed the accusatory instrument and found it to be satisfactory on the basis that it contained factual allegations sufficient to give the accused defendants notice to prepare a defense and detailed enough to prevent them from being tried twice for the same offense. In addition, it provided reasonable cause to believe the defendants committed the offense charged.

Although the disorderly conduct statute is not overbroad nor facially unconstitutional, the trial court failed to address the direct application of each of the terms of the statute to each of the defendants. Seven were arrested; four have appealed the verdict; but, from the evidence presented at trial, there is only documentation that one of the defendants had an actual conversation with the police officer on duty who provided him with a clear and lawful directive limiting his right to protest the lawful gathering on the west side of the park. It is this conversation with the officer followed by his taunting of the officer’s directive and then actual crossing of the street carrying a Bible and lying down in front of the stage that

demonstrated his culpable mental intent to violate the statute by disturbing the assembly. Although the other defendants followed him across the street, it is not clear, from the record, that the other defendants were aware of Sgt. Moyer's instructions regarding permissible locations for the protest vis-a-vis participation in the festival. In other words, it is not clear, from the record, that the other defendants were aware of Sgt. Moyer's directions concerning protesting from the east side of the street, but otherwise being welcome to participate in the festival.

It was the verbal exchange with the police sergeant coupled with his subsequent actions that constituted evidence of (and manifested) Raven's intent to cause public inconvenience, annoyance or alarm or recklessly created a risk thereof. *See: People v Nixon*, 248 NY 182 (1928); *People v Carter*, 163 Misc.2d 643 (1994); *People v Maher*, 137 Misc.2d 162 (1987). No such evidence exists regarding the other defendants. Our criminal statutes apply to individuals, not groups. In other words, to be legally sufficient, there must be evidence of each individual's culpable mental state to create criminal liability. *People v Barrett*, 13 Misc.3d 929 (2006); *People v Bezzak*, 11 Misc.3d 424 (2006). Equally, to recklessly create a risk, evidence must establish that defendants consciously disregarded a substantial and unjustifiable risk. Again, while there was legally sufficient evidence of Julian Raven's culpable mental state, no such evidence of the remaining defendants' culpable state existed. This is because the intent to commit the crime, the culpable mental state, cannot be inferred merely from the actions of the defendants in the unique factual posture of the case at bar. It is, however, not necessary to draw an inference as to Julian Raven, because he manifested his intent during his conversation with the police officer.

The officer had made it clear to Julian Raven that there was a legitimate concern about

the safety of all involved and that her limitations regarding where Mr. Raven would be allowed to protest were based on the reasonable need to prevent any disturbance of the lawful assembly on the west side of the park. Julian Raven responded directly to this directive by informing the officers that he rejected their directive and instead took the position that he was permitted by law to cross the street and confront those assembled and that he intended to do so. Since there is only evidence that Julian Raven responded in this way to the officer's directive, and since the directive was legitimate, it is clear to this court that only Julian Raven was proven guilty of violating the statute.

ORDERED that the judgment is affirmed as to Julian Raven and reversed as to Gloria Raven, Walter Quick, and Maurice Kienenberger. The stay of judgment entered April 1, 2008, is lifted.

Dated: January 11, 2010

ENTER: 
JAMES T. HAYDEN
COUNTY COURT JUDGE

cc: Court Clerk
Elmira City Court
Defense counsel
District Attorney