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Ramsey County Criminal, MN

STATE OF MINNESOTA DISTRICT COURT

COUNTY OF RAMSEY SECOND JUDICIAL DISTRICT

State of Minnesota, District Court File No. 62SU-CR-12-4910

Plaintiff,

vs.

Andrew Joseph Henderson, **ORDER**

Defendant.

The above-entitled matter came on for hearing before the undersigned Judge of District Court on May 22, 2013 on the defendant's motion to dismiss. Kevin Beck and Joseph Kelly, Assistant Little Canada City Attorneys, appeared on behalf of the State of Minnesota. Kevin C. Riach, John W. Lundquist, and Teresa J. Nelson, Attorneys, appeared on behalf of the defendant.

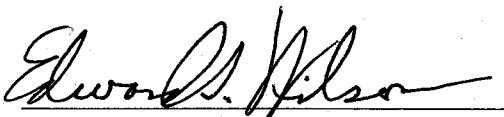
Based upon all the files, records, and proceedings herein, and the arguments of counsel, the Court makes the following:

ORDER

1. The defendant's motion to dismiss is denied in all respects.
2. The attached memorandum is hereby made a part of this Order.

BY THE COURT:

Dated: August 19, 2013



EDWARD S. WILSON
Judge of District Court

MEMORANDUM

FACTS

At approximately 11:50 p.m. on October 30, 2012, Ramsey County Dispatch received a call from a woman who was concerned about the well-being of her brother, M.D.V. She stated that she had attempted to contact her brother without success that day. She added that her brother was a chronic alcoholic who had recently been involved in a motor vehicle accident and as a result was facing a charge of DWI, and had recently quit his job. Ramsey County Deputy Muellner believed that these were serious signs that M.D.V. might harm himself or others. Deputies were dispatched to 205 County Road B2 East, Apartment No. 328, in Little Canada, Minnesota, to conduct a welfare check on M.D.V.

When the deputies arrived, M.D.V. answered the door and said that he was into his second liter of vodka. His face was bruised, which he explained was the result of his traffic accident. M.D.V. agreed to go to the hospital, and the deputies summoned an ambulance. The deputies met Allina paramedics Joshua Nordgaard and Jennifer Oksanen at the apartment building. After M.D.V. was patted down, Deputy Muellner left him in the care of the paramedics and went to her squad car to fill out a transport hold detainer.

Oksanen then began to conduct a medical assessment on M.D.V. near the back of the ambulance. At approximately the same time, the defendant Andrew Joseph Henderson began to videotape the medical assessment from approximately three to five feet away. M.D.V. was uncomfortable with being videotaped and asked the

paramedics to stop the defendant from doing so. Nordgaard stopped providing medical care to M.D.V. and asked defendant to stop filming, but the defendant refused to do so. Nordgaard then left the medical assessment and notified the deputies of the defendant's conduct. The defendant was charged with interfering or obstructing a member of an ambulance crew in violation of Minn. Stat. § 609.50, subd. 1(4) and disorderly conduct in violation of Minn. Stat. § 609.72, subd. 13.

DISCUSSION

In the instant motion, the defendant asks the court to dismiss the complaint on the grounds that

> [The] statutes under which Defendant has been charged are overbroad and infringe upon the right of free speech under the First Amendment to the United States Constitution, as applied herein [and] … there does not exist probable cause to believe that the defendant committed the offenses charged in those counts of the complaint. (Def. Mot. 1-2.)

Minn. Stat. § 609.50, subd. 1(4) provides that it is a crime to … intentionally interfere[ ] with or obstruct[ ] a member of an ambulance service personnel crew, as defined in section 144E.001, subdivision 3a, who is providing, or attempting to provide, emergency care.

Minn. Stat. § 609.72, subd. 1(3) provides

> Whoever does any of the following in a public or private place, knowing, or having reasonable grounds to know that it will, or will tend to, alarm, anger or

disturb others or provoke an assault or breach of the peace, is guilty of disorderly conduct, which is a misdemeanor:

> (3) engages in offensive, obscene, abusive, boisterous, or noisy conduct or in offensive, obscene, or abusive language tending reasonably to arouse alarm, anger, or resentment in others.

In support of his motion to dismiss the defendant argues that his actions are protected by the First Amendment of the United States Constitution. Specifically, he maintains:

1. The First Amendment protects the filming of public officials.
2. M.D.V. did not have a reasonable expectation of privacy while in the building parking lot.
3. Minn. Stat. § 609.50 complies with the First Amendment only where the charged conduct involves actual physical interference or "fighting words."
4. Minn. Stat. § 609.50 is unconstitutional as applied here.
5. Minn. Stat. § 609.72 violates the First Amendment to the extent that it seeks to punish a defendant's conduct. (Def. Mem. 5-12.)

1. Are paramedics "public officials," and, if so, may they be filmed while performing medical assessments?

The defendant argues that the First Amendment protects the filming of public officials. He maintains that public officials may be filmed as they do their work and that paramedics are public officials for the purpose of Constitutional analysis. (Def. Mem. 6-7.)

He cites *Vanderwaart v. Baltimore Cty.*, 1987 WL 10259 (D. Md. Apr. 8, 1987), and *Kari v City of Maplewood*, 582 N.W.2d 921, 924 (Minn. 1998) in support of his

contention that paramedics are public officials for the purpose of Constitutional analysis. Neither case held that paramedics were public officials "for the purposes of Constitutional analysis." In *Vanderwaart*, the plaintiffs sued Baltimore County, Maryland pursuant to 42 U.S.C. § 1983. In that case, two paramedics had responded to a drug overdose report at Vanderwaart's home and were allowed into the home by Ms. Vanderwaart's daughter. Paramedics, at the direction of police officers present in the plaintiff's home, restrained the plaintiff during a struggle. The Court held, in part, that "once an occupant admits some public officials [paramedics], he or she has given up the expectation of privacy with respect to other officials [police officers].

In *Kari v. Maplewood*, 582 N.W.2d 921 (Minn. 1998), also cited by the defendant, the Minnesota Supreme Court granted official immunity to a paramedic who may have violated a section of the Minnesota Traffic Code when he struck a pedestrian while responding to an emergency call. The court held that "the considerations leading to the immunity of police officers in emergency circumstances also apply to paramedics driving emergency medical vehicles." *Id.* at 924. *Vanderwaart* and *Kari* answered the question of whether immunity should be granted to paramedics under certain circumstances. Neither case suggested that paramedics were on an equal footing with police officers such that they could be filmed while administering to patients even though it may have interfered with their work.

Even assuming for the sake of argument, that paramedics are "public officials" in common understanding and as envisioned in the cases which defendant cites, his

argument must fail for a number of reasons.[1] Defendant cites *Glik v. Cunniffe*, 655 F.3d 78, 82-84 (1st Cir. 2011) in support of his argument that one may film public officials as they go about their duties. Neither *Glik,* nor any of the other cases defendant cites, deal with the central issue in this case – whether the First Amendment allows a person to film a medical assessment done by paramedics when he is requested to stop because it interferes with the paramedic's performance of his or her duties.

The issue in *Glik* was whether the plaintiff had a constitutionally protected right to videotape police carrying out their duties in public. The Court held that he did, but that is a very different question than the one before this court. Here the court must determine whether or not the defendant had a First Amendment right to film a paramedic over the objections of his patient and whether the defendant's conduct could reasonably be said to have interfered with the paramedic's ability to carry out his duties.

Again, for the sake of argument, conceding that paramedics are public officials and that public officials may be filmed by virtue of one's First Amendment right of freedom of expression, the question still remains as to whether or not the petitioner's "speech" is constitutionally protected under the circumstances presented in this case. Stated another way, is the defendant's act of filming a medical assessment, standing by itself, a form of constitutionally protected expression? The United States Supreme

[1] "Official" is defined in part as "holding office or serving in a public capacity." American Heritage College Dictionary, fourth edition.

Court noted in *United States v. O'Brien*, 391 U.S. 367, 376, 88 S. Ct. 1673, 1678 (1968), "We cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea." In *Spence v. Washington*, 418 U.S. 405, 94 S. Ct. 2727 (1974) the Court set forth a test for determining whether conduct is sufficiently expressive to merit First Amendment protection. "The inquiry looks at whether an intent to convey a particularized message was present, and in the surrounding circumstances the likelihood was great that the message would be understood by those who viewed it." *Id.* 418 U.S. at 410–11, 94 S. Ct. at 2730, *State v. Macholz*, 574 N.W.2d 415, 419-20 (Minn. 1998).

In this case, the only material facts of which the court is aware are that the defendant saw paramedics performing a medical assessment and decided that he would film it. He apparently said nothing before or during the filming which would suggest to anyone in the area that he was trying to convey a particular message. As such, there was little likelihood that any "message" he may have meant to convey would be understood by those who viewed it. The defendant's behavior on this occasion appears to the court to fall into the realm of the "limitless variety of conduct" which is not constitutionally protected expression.

Presumably, the defendant does not suggest that his First Amendment rights are unbridled and that he is free to film any public official under any conditions he sees fit. For example, he could not in Minnesota as a private citizen enter a courtroom and film the proceedings even though courtroom proceedings are open to

the public and are presided over by judges who are clearly public officials. *See, e.g.*, Minn. Gen. R. Prac. 4.02(c)(vi), and Minn. R. Civ. App. P., 134.10. And it would be absurd to believe, as the State points out, that a person could presume to film the work of doctors in the public waiting area of a public hospital on the basis of a First Amendment "right" to do so. Under the facts before it, the court finds that the filming of the paramedics during an emergency assessment is not protected speech.

2. Did M.D.V. have a reasonable expectation of privacy while on the building parking lot?

The defendant argues that M.D.V. had no reasonable expectation of privacy which would overcome the defendant's right to engage in filming the medical assessment which was being conducted upon him. He cites several cases, most of which involve defendants in criminal cases who challenged the admission of evidence obtained, they argued, in violation of their Fourth Amendment right against unreasonable search and seizure. *See, e.g.*, *State v. Baumann*, 759 N.W.2d 237, 241 (Minn. App. 2009). The considerations present in that line of cases are not present here. In this case, the issue is whether M.D.V. had a right of privacy which is superior to any First Amendment right to film the medical assessment that the defendant may have had. Both the United States Supreme Court and the Minnesota Supreme Court have recognized the right of privacy as a constitutionally protected right. *See Roe v. Wade*, 410 U.S. 113, 152-53, 93 S. Ct. 705, 726-27 (1973), and *State v. Gray*, 413 N.W.2d 107, 111 (Minn. 1987) . The right of privacy protects only fundamental rights. *Roe* at 410 U.S. at 152, 93 S. Ct. at 726. Fundamental rights are

"those which have their origin in the express terms of Constitution or which are necessarily to be implied from those terms." *Gray*, 413 N.W.2d at 111. The right of privacy, like all Constitutional rights, *places restrictions on the government, rather than individuals,* to invade a person's privacy. *See State v. Wicklund*, 589 N.W.2d 793, 797, 801 (private conduct not subject to constitutional restrictions). Although filming someone in a public parking lot who is being subjected to a medical assessment is rude and obnoxious behavior, it does not violate a Constitutional right to privacy held by M.D.V. But there are several reasons why the defendant's behavior in this case cannot be shielded under the cloak of the First Amendment.

3. Minn. Stat. § 609.50 only requires the effect of physical interference to comply with the First Amendment.

The defendant contends that the Minnesota Supreme Court concluded that Minn. Stat. § 609.50, subd. 1(1), is not unconstitutionally overbroad because its application is limited to acts of "physical" interference with the police. In *State v. Krawsky*, 426 N.W.2d 875, 877 (Minn. 1988), the Court held that "[Section 609.50] forbids intentional physical obstruction or interference with a police officer in the performance of his official duties. But the Court also held that the statute may be used to punish "fighting words" *or any other words that by themselves have the effect of physically obstructing or interfering* with a police officer in the performance of his duties...." *Id.* (emphasis added) As an example, the court stated that a person could be convicted under the statute if he ran beside an officer who was pursuing a felon in a public street while shouting and cursing at the officer if the shouting and cursing

physically obstructed the officer's pursuit and if the person intended by his conduct to obstruct or interfere with the officer. *Id.* The court reaffirmed this holding in *State v. Ihle*, 640 N.W.2d 910, 912 (Minn. 2002) when it ruled "if the obstruction amounts to verbal conduct, juries must be instructed that obstructing legal process requires that the words have the effect of physically obstructing or interfering with a police officer in the performance of her duties."

The defendant is charged under a different subsection of the statute than the defendants in *Krawsky* and *Ihle*, but the underlying reasoning is the same. The defendant may be convicted of violating the statute if, among other things, a jury finds that his conduct of filming the medical assessment had the effect of physically obstructing or interfering with the paramedics in the performance of their duties. The defendant's actions in this case do not consist of words, but he himself argues strenuously that they constitute "speech." The complaint alleges that the defendant "interfered with and obstructed [paramedics] from providing or attempting to provide emergency care because the [paramedics] had to stop the medical assessment to ask Henderson to stop videotaping. When Henderson refused to stop, [a paramedic] had to leave the area of the ambulance to notify the deputies." Under these circumstances, a jury must determine whether or not the defendant's actions were such as to constitute a violation of the statute.

4. The court does not find as a matter of law that prosecution of the defendant under § 609.72 offends the First Amendment

The defendant argues that § 609.72 can be applied to his conduct would be only if the conduct constituted "fighting words." It is true that the Minnesota Supreme Court has placed a limiting construction on Minn. Stat. § 609.72 to save it from overbreadth and vagueness. *State v. Crawley*, 819 N.W.2d 94, 105-06 (citing *In re Welfare of S.L.J.*, 263 N.W.2d 412, 418–19 (Minn.1978)). The court has found "a prohibition on *language* arousing 'alarm, anger or resentment' is overbroad and vague." *In re Welfare of S.L.J.*, 263 N.W.2d at 418–19 (emphasis added). Instead the statute is construed to prohibit only "fighting words" or "(1) personal insults whose utterance under the circumstances would be inherently likely to provoke retaliatory violence by the [person] at whom the insult was directed or (2) intended to and likely to produce imminent lawless action by the surrounding [individuals]." *In the Matter of Welfare of M.A.H.,* 572 N.W.2d 752 (1997) (citing *S.L.J.*, 263 N.W.2d at 419; *Hess v. Indiana*, 414 U.S. 105, 107–08 (1973); *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969)).

However, the defendant's argument is predicated on the assumption that his conduct was constitutionally protected speech. This court has already found that on the facts as they exist in the complaint the court cannot find that the defendant was engaging in "speech" when he was filming M.D.V. and the paramedics tending to him. "When protected free speech is involved, the offense of disorderly conduct has been interpreted narrowly and as restricting only 'fighting words.'" *State v. Peter*, 798 N.W.2d 552, 554 (2011). Conversely, if there is no protected free speech involved the narrowing construction does not apply. As previously discussed, this

court cannot find that all filming of public officials in any setting is always protected free speech. The facts of this case as alleged in the complaint do not show that the defendant was engaged in protected free speech and therefore his conduct must be analyzed under the statute as written.

5. There is probable cause to believe that the defendant committed the offenses with which he is charged.

The defendant seeks to dismiss the charges in this case on the grounds that there is insufficient probable cause to support a conviction. A motion to dismiss for lack of probable cause should be denied where the facts in the record would preclude the granting of a motion for directed verdict of acquittal if proved at trial. *State v. Lopez*, 778 NW.2d 700, 703 (Minn. 2010) (citations omitted). That is, if the facts before the trial court present a fact question for the jury's determination on each element of the crime charged, the charge will not be dismissed for lack of probable cause. *State v. Slaughter*, 691 N.W.2d 70, 74-75 (Minn. 2005). To support a charge, the State need only show that reasonable probability exists that the defendant committed a crime. *State v. Knoch*, 781 N.W.2d 170, 177 (Minn. App. 2010). The trial court must view the evidence in the light most favorable to the State. *Id.* at 178. The court may not assess the relative credibility or weight of conflicting evidence. *State v. Hegstrom*, 543 N.W.2d 698, 702 (Minn. App. 1996). When the evidence is considered using these standards, it is clear that there is ample support for the charges in this case.

With respect to the alleged violation of Minn. Stat. § 609.50, interfering or obstructing a member of an ambulance crew, the defendant argues that the State has not alleged that he physically obstructed or interfered with either the police or paramedics and that he "simply sat peacefully on a bench watching the scene unfold through the lens of his video camera." (Def. Mem. 15) Second, he maintains that, at most, his actions amounted to an act of interrupting a paramedic in the performance of his duties, rather than interfering with them. In support of this argument, he cites *Krawsky*, 426 N.W.2d at 877, for the proposition that Minn. Stat. § 609.50 "does not apply to the mere act of interrupting an [official] even intentionally." Defendant's argument falls far short of the requirements necessary to dismiss the charge of interfering or obstructing with a member of an ambulance crew for lack of probable cause. As previously noted, it is not necessary that one engage in a physical act to interfere or to obstruct. It is sufficient if the defendant's actions or conduct had the effect of physically obstructing or interfering with a member of an ambulance crew. The second portion of defendant's argument – whether his filming interfered with rather than merely interrupted the paramedics – raises a classic question of fact which a jury must determine and, therefore, the charge may not be dismissed for lack of probable cause.

Finally, the defendant argues that the charge of disorderly conduct should be dismissed because the defendant's actions did not amount to "fighting words." As previously discussed, the narrowing construction of § 609.72 subd. 1(3) does not

apply in this case as there are not sufficient facts to suggest that the defendant was engaged in protected speech. The statute prohibits "offensive, obscene, abusive, boisterous, or noisy conduct" where the actor knows or has reason to know that it would "tend to alarm, anger or disturb others or provoke an assault or breach of the peace." Minn. Stat. § 609.72. As the court cannot find that defendant's conduct is protected speech, a question of fact exists as to whether or not the defendant filming M.D.V.'s assessment was conduct so offensive as to alarm, anger, or disturb others. This is a question of fact for the jury to decide.

The defendant's motion to dismiss this charge for lack of probable cause and because it violates his First Amendment rights is denied in all respects.

ESW