

SUPREME COURT OF MONTANA

City of Billings v. Oltrogge

2014 MT 104N (2014) · No. DA 13-0517 · Decided April 15, 2014

SUMMARY

The Montana Supreme Court affirmed Joey Jean Oltrogge’s conviction for disorderly conduct arising from profane and insulting remarks directed at a 13-year-old neighbor. The court held that the remarks constituted unprotected fighting words and applied its analysis from the related City of Billings v. Nelson appeal to reject the remaining issues. The memorandum opinion was issued as a noncitable decision under the Montana Supreme Court’s Internal Operating Rules.

CASE DETAILS

COURT	Supreme Court of Montana
WRITING FOR THE COURT	Chief Justice Mike McGrath; Mike McGrath; Beth Baker; Patricia Cotter; Michael E. Wheat; Jim Rice
JURISDICTION	Montana
DECIDED	April 15, 2014
DOCKET	DA 13-0517
DISPOSITION	affirmed
PROCEDURAL POSTURE	Appeal from a Yellowstone County District Court order affirming Oltrogge's disorderly-conduct conviction in the City of Billings Municipal Court.
STANDARD OF REVIEW	The court reviewed legal issues under settled Montana law and reviewed issues involving judicial discretion for abuse of discretion.
PRECEDENTIAL VALUE	Nonprecedential memorandum opinion; expressly designated noncitable under Montana Supreme Court Internal Operating Rules.
PARTIES	Joey Jean Oltrogge v. City of Billings

TOPICS

- criminal procedure
- first amendment
- free speech
- appellate procedure
- statutory interpretation

PRACTICE AREAS

- criminal law
- criminal procedure
- constitutional law
- municipal law
- appellate procedure

QUESTIONS PRESENTED

1. Whether Oltrogge's gesture and statement constituted unprotected fighting words under Montana's disorderly-conduct statute.
2. Whether the District Court correctly affirmed the municipal court's resolution of the related constitutional, evidentiary, sentencing, and judicial-bias issues.

HOLDINGS

1. Oltrogge's act of flipping off the child and saying "Fuck you" was inherently inflammatory and constituted fighting words with the potential to incite an immediate violent response; therefore, the speech was not constitutionally protected and supported the disorderly-conduct conviction.
2. The District Court correctly affirmed the municipal court's rulings concerning the responding officer's alleged misstatement, replay of recordings, authentication of a McDonald's receipt, consideration of the victim's age at sentencing, and the unpreserved judicial-bias claim.

KEY QUOTATIONS

"Similarly, Oltrogge's words were inherently inflammatory and fall within the 'fighting words' doctrine. Her speech was not constitutionally protected." (§ 5)

"this case is decided by memorandum opinion and shall not be cited and does not serve as precedent." (§ 1)

FACTUAL BACKGROUND

Oltrogge and her mother saw the victim, a thirteen-year-old neighbor, walking home from school while they were driving to the mother's house. Oltrogge raised her middle finger and said, "Fuck you," while her mother used a racial slur. The child's mother called police, and Oltrogge and her mother were tried together and convicted of disorderly conduct.

PROCEDURAL HISTORY

Oltrogge was convicted of disorderly conduct in municipal court after making an insulting and profane remark toward a thirteen-year-old child. The District Court affirmed, and Oltrogge appealed to the Montana Supreme Court. The Supreme Court decided the appeal by memorandum opinion and affirmed.

DISPOSITION

affirmed

CASES CITED

- City of Billings v. Nelson, 2014 MT 98
- City of Whitefish v. O'Shaughnessy, 216 Mont. 433, 704 P.2d 1021 (1985)
- State v. Robinson, 2003 MT 364, 319 Mont. 82, 82 P.3d 27

OPINION

PER CURIAM.

April 15 2014

DA 13-0517

IN THE SUPREME COURT OF THE STATE OF MONTANA

2014 MT 104N

CITY OF BILLINGS,

Plaintiff and Appellee,

v.

JOEY JEAN OLTROGGE,

Defendant and Appellant.

APPEAL FROM: District Court of the Thirteenth Judicial District,

In and For the County of Yellowstone, Cause No. DC 13-227

Honorable Gregory R. Todd, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Joey Jean Oltrogge, self-represented; Worden, Montana

For Appellee:

Timothy C. Fox, Montana Attorney General, Tammy A. Hinderman,

Assistant Attorney General, Helena, Montana

Brent Brooks, Billings City Attorney, Stacy Tenney, Deputy Billings City

Attorney, Billings, Montana

Submitted on Briefs: March 19, 2014

Decided: April 15, 2014

Filed:

Clerk

Chief Justice Mike McGrath delivered the Opinion of the Court.

¶1 Pursuant to Section I, Paragraph 3(d), Montana Supreme Court Internal Operating

Rules, this case is decided by memorandum opinion and shall not be cited and does not serve

as precedent. Its case title, cause number, and disposition shall be included in this Court's quarterly list of noncitable cases published in the Pacific Reporter and Montana Reports.

¶2 Joey Jean Oltrogge appeals from an order of the Thirteenth Judicial District Court, Yellowstone County, affirming her conviction of disorderly conduct in the Municipal Court of the City of Billings. We affirm.

¶3 Oltrogge was convicted of disorderly conduct after an incident in which she and her mother, Lorena Fatouros Nelson, used insulting and profane language toward Nelson's 13-year-old neighbor. Oltrogge and Nelson saw the child walking home from school as they were driving to Nelson's house. Oltrogge raised her middle finger and said, "Fuck you." Nelson said, "Spic bastard." The child's mother called the police. Oltrogge and Nelson were tried together and appealed their convictions on identical grounds. The circumstances of the offense and trial are described in greater detail in Nelson's related appeal. *City of Billings v. Nelson*, 2014 MT 98, ___ Mont. ___, ___ P.3d ___.

¶4 In that appeal, we concluded that the disorderly conduct statute, § 45-8-101, MCA, does not require proof that the defendant disturbed the peace of more than one person. *Nelson*, ¶ 20. We determined that, although Nelson and Oltrogge were inside a vehicle when they made their offensive remarks, the remarks were still face-to-face communications with the potential to incite an immediate violent response from a listener on the street, and were therefore within the "fighting words" doctrine. *Nelson*, ¶ 24. We also concluded that an

2

alleged misstatement by the responding officer that Nelson and Oltrogge had refused to speak to him did not affect the women's constitutional rights, *Nelson*, ¶¶ 27-28; the Municipal Court did not err by refusing to allow the women to replay recordings already in evidence and requiring authentication of a McDonald's receipt, *Nelson*, ¶¶ 30-31; and the Municipal Court did not err by considering the victim's age during sentencing, *Nelson*, ¶ 33. Finally, we declined to address allegations of bias against the Municipal Court Judge Pro Tempore, because the issue was raised for the first time on appeal. *Nelson*, ¶ 53. We apply

the same analysis of these issues to Oltrogge's appeal and also affirm her conviction.

¶5 Oltrogge's appeal differs from Nelson's only in the content of the women's speech.

In Nelson's appeal, we specifically addressed her use of a racial slur. Nelson, ¶ 24. Oltrogge did not use racially inflammatory language, instead flipping the child off and saying, "Fuck you." She argues this was not sufficiently insulting or offensive to fall within the "fighting words" doctrine. In *City of Whitefish v. O'Shaughnessy*, 216 Mont. 433, 438-39, 704 P.2d 1021, 1024 (1985), we held that the phrase "mother fucker" was sufficiently inflammatory to constitute "fighting words." In *State v. Robinson*, 2003 MT 364, ¶ 24, 319 Mont. 82, 82 P.3d 27, we held that the phrase "fucking pig" could also be considered "fighting words."

Similarly, Oltrogge's words were inherently inflammatory and fall within the "fighting words" doctrine. Her speech was not constitutionally protected.

¶6 We have determined to decide this case pursuant to Section I, Paragraph 3(d) of our Internal Operating Rules, which provides for memorandum opinions. The legal issues in this case are controlled by settled Montana law, which the District Court correctly interpreted. With respect to issues of judicial discretion, there clearly was not an abuse of discretion.

3

¶7 Affirmed.

/S/ MIKE McGRATH

We Concur:

/S/ BETH BAKER

/S/ PATRICIA COTTER

/S/ MICHAEL E WHEAT

/S/ JIM RICE

4