

SUPREME COURT OF CONNECTICUT

State v. Baccala

326 Conn. 232 (2017) · Decided July 11, 2017

SUMMARY

This is a concurring and dissenting opinion in State v. Baccala concerning whether profane and abusive language directed at a store manager constituted unprotected fighting words under the First Amendment and the Connecticut Constitution. The opinion argues that State v. Szymkiewicz controlled the federal constitutional analysis, that the defendant inadequately briefed her federal claim, and that the state constitution did not provide broader protection. The author would nevertheless reverse and remand for a new trial because the jury charge was insufficient on imminence.

CASE DETAILS

COURT	Supreme Court of Connecticut
WRITING FOR THE COURT	Eveleigh, J.; D'Auria, J.; Espinosa, J.; McDonald, J.; Palmer, J.; Robinson, J.; Rogers, C. J.
JURISDICTION	Connecticut
DECIDED	July 11, 2017
DISPOSITION	reversed_and_remanded
PROCEDURAL POSTURE	The defendant appealed from a jury conviction for breach of the peace in the second degree based on profane and abusive language allegedly constituting fighting words. This separate opinion concurred in part and dissented in part from the majority's disposition.
STANDARD OF REVIEW	Whether speech is protected is a question of law reviewed de novo, with independent examination of the whole record; subsidiary credibility determinations and findings not clearly erroneous are accepted. Unpreserved instructional claims may be reviewed for plain error, which requires a patent and obvious error whose consequences are so grievous that failure to reverse would result in manifest injustice.
PRECEDENTIAL VALUE	Published separate opinion; the concurrence and dissent are nonbinding, while the underlying Supreme Court decision is precedential.
PARTIES	Nina C. Baccala v. State of Connecticut

TOPICS

first amendment

free speech

criminal procedure

appellate procedure

due process

PRACTICE AREAS

constitutional law

criminal procedure

criminal appeals

free speech

QUESTIONS PRESENTED

1. Whether the defendant's abusive language constituted unprotected fighting words under the First Amendment and the Connecticut Constitution.
2. Whether the Connecticut Constitution affords greater protection than the First Amendment for fighting words by requiring a direct challenge to fight.
3. Whether the evidence was sufficient to sustain the breach-of-peace conviction under the proper fighting-words standard.
4. Whether the jury instruction improperly broadened the fighting-words standard by referring to speech that could provoke retaliation, other wrongful conduct, or speech that merely portended violence.
5. Whether an unpreserved instructional claim could be reviewed under the plain-error doctrine despite a possible implied waiver under *State v. Kitchens*.

HOLDINGS

1. The Connecticut Constitution does not require that abusive speech directly challenge the listener to fight before it may be treated as fighting words. The proper standard is whether the speech is so abusive that it would provoke an ordinary person, as the recipient, to respond with immediate violence.
2. The evidence was sufficient, under the ordinary-person fighting-words standard, to sustain the conviction because the defendant used belligerent, personally directed, and extremely abusive language while gesticulating with her cane.
3. The jury instruction was constitutionally inadequate because it broadened the fighting-words standard beyond speech likely to provoke an ordinary person, as the recipient, to respond with immediate violence.
4. A possible implied waiver under *State v. Kitchens* does not preclude plain-error review of an unpreserved instructional claim.

KEY QUOTATIONS

"In order to constitute fighting words, the abusive language must be "directed to the person of the hearer.""
(326 Conn. 232)

"The necessary tool for constitutional consonance is a simple, yet narrowly drawn definition of fighting words: abusive language likely to provoke an ordinary person, as the recipient of such abusive language, to respond with imminent violence." (326 Conn. 232)

“The instruction impermissibly describes the state’s burden of proof to be proof of a broader class of speech than that which would provoke an ordinary person, as recipient of the abusive language, to respond with immediate violence.” (326 Conn. 232)

FACTUAL BACKGROUND

The defendant went to a grocery store to retrieve a money transfer but was told by assistant manager Tara Freeman that Freeman lacked authority to access the money-transfer machine. The defendant became belligerent, raised her cane toward Freeman, and directed profane and insulting language at her, including calling her a "fat ugly bitch" and a "cunt." The encounter lasted approximately fifteen to twenty minutes, and the defendant was convicted of breach of the peace based on the in-store conduct.

PROCEDURAL HISTORY

The defendant was convicted by a jury under General Statutes § 53a-181 (a) (5) and sentenced to twenty-five days of incarceration. The Supreme Court of Connecticut reviewed the conviction, including the sufficiency of the evidence, the state and federal constitutional treatment of fighting words, and the adequacy of the jury instruction. Judge Eveleigh would reverse the conviction and remand for a new trial because the jury instruction impermissibly broadened the fighting-words standard.

DISPOSITION

reversed_and_remanded

REMAND INSTRUCTIONS

Reverse the trial court's judgment and remand for a new trial on the breach-of-peace charge using a constitutionally accurate fighting-words instruction.

CASES CITED

- State v. Szymkiewicz, 237 Conn. 613, 678 A.2d 478 (1996)
- State v. Geisler, 222 Conn. 672, 684–86, 610 A.2d 1225 (1992)
- Chaplinsky v. New Hampshire, 315 U.S. 568, 572–74 (1942)
- Gooding v. Wilson, 405 U.S. 518, 521–28 (1972)
- Texas v. Johnson, 491 U.S. 397, 409 (1989)
- Cohen v. California, 403 U.S. 15, 20 (1971)
- State v. Caracoglia, 78 Conn. App. 98, 110, 826 A.2d 192 (2003), cert. denied, 266 Conn. 903, 832 A.2d 65 (2003)
- State v. DeLoreto, 265 Conn. 145, 152–53, 169, 827 A.2d 671 (2003)
- State v. McClain, 324 Conn. 802, 804, 155 A.3d 209 (2017)
- State v. Sanchez, 308 Conn. 64, 76–78, 60 A.3d 271 (2013)
- State v. Buhl, 321 Conn. 688, 724, 726–29, 138 A.3d 868 (2016)

- State v. Trusz, 319 Conn. 175, 191–93, 206, 123 A.3d 1212 (2015)
- State v. Linares, 232 Conn. 345, 379–82, 655 A.2d 737 (1995)
- State v. Indrisano, 228 Conn. 795, 812, 640 A.2d 986 (1994)
- State v. Read, 165 Vt. 141, 153–56, 680 A.2d 944 (1996)
- State v. Robertson, 293 Or. 402, 412, 649 P.2d 569 (1982)
- Cantwell v. Connecticut, 310 U.S. 296, 309–11 (1940)
- State v. Krijger, 313 Conn. 434, 447, 97 A.3d 946 (2014)
- State v. Kitchens, 299 Conn. 447, 10 A.3d 942 (2011)