IN THE COURT OF APPEALS
OF THE CONFEDERATED SALISH AND KOOTENAI TRIBES
OF THE FLATHEAD INDIAN RESERVATION

CONFEDERATED SALISH, AND KOOTENAI TRIBES, Plaintiff/Appellant	)	Cause No. AP-09-1549-CR
vs.	)	OPINION
GEORGINA OLD PERSON, Defendant/Appellee	)	

Appeal from the Tribal Court of the Confederated Salish and Kootenai Tribes, Honorable Chief Judge Winona Tanner, presiding.

Appearances:

Laurence Ginnings, Confederated Salish and Kootenai Tribes, Attorney for the Appellant.

James Gabriels, Confederated Salish and Kootenai Tribal Defenders Office, Attorney for the Appellee.

Before Chief Justice Eldena Bear Don't Walk, Special Justice Carolynn Fagan and Associate Justice Robert McDonald.

INTRODUCTION

The Confederated Salish and Kootenai Tribes (hereafter, "CSKT"), through its criminal prosecutors office, appeals the Tribal Court's Decision on Motion to Dismiss and Order issued on March 16, 2010 dismissing the criminal complaint against the

Appellee, Georgina Old Person (hereinafter "Old Person"). We AFFIRM the Tribal Court's decision.

ISSUES PRESENTED

We re-state the issues on appeal as follows:

1. Did the Trial Court err in not allowing the question of whether Defendant's conduct consisted of uttering fighting words to be decided by a jury?
2. Did the Trial Court err in concluding that the fighting words doctrine did not apply in this case?
3. Is § 2-1-1001, CSKT Laws Codified, unconstitutionally overbroad and/or void for vagueness?

STATEMENT OF THE FACTS

Georgina Old Person was charged by Criminal Complaint in the CSKT Tribal Court on August 18, 2009, with one count of Disorderly Conduct under CSKT Laws Codified Section 2-1-1001. The charging document and a Probable Cause Affidavit, issued the same day, stated that Old Person "committed the offense of Disorderly Conduct" by knowingly and purposely disturbing the peace of Sara McDonald by using profanity and/or abusive language when McDonald was administering medical attention to the Defendant."

On August 11, 2009, Old Person was admitted to the emergency room of St. Luke's Hospital in Ronan, MT for medical treatment. Sarah McDonald was the nurse at St. Luke's tending to Old Person's treatment. At some point during McDonald's attempts to treat Old Person, McDonald alleged that Old Person verbally abused her by calling her a "honky" and a "dumb white girl." McDonald also alleged that when she attempted to

take Old Person's temperature with an ear thermometer, Old Person said "Don't touch me, bitch." McDonald said that Old Person jerked out her own I.V. and refused further medical treatment. At some point during this exchange, a Tribal Officer was requested to assist with a "disruptive female" receiving medical treatment. Upon arrival, the Tribal Officer was provided with a written statement by McDonald about her interactions with Old Person. In this statement, McDonald further alleged that Old Person told her to "get my (McDonald's) ass off her (Old Person's) reservation." McDonald said Old Person refused to sign the medical discharge instructions and left the hospital.

Old Person was charged in CSKT Tribal Court with misdemeanor Disorderly Conduct and pled Not Guilty.

On January 28, 2010, Old Person, through counsel, filed a Motion to Dismiss and Brief in Support. The basis for her request to dismiss was that the alleged abusive language did not rise to level of "fighting words" and was not likely to provoke a violent reaction by McDonald, the emergency room nurse. Old Person argued that because her words did not rise to the appropriate level necessary to charge her, that her speech was protected and asked the Court to dismiss the complaint against her. CSKT opposed the Motion to Dismiss. On March 16, 2010, the Lower Court concluded that Old Person's words did not rise to the level necessary to be considered "fighting words" as required by the federal case law and granted Old Person's motion to dismiss. It is this Order from which CSKT appeals.

STANDARD OF REVIEW

This Court reviews question of law de novo. *Northwest Collections, Inc. v. Pichette*, AP-93-077-CV (1995).

DISCUSSION

Issue 1

Did the Trial Court err in not allowing the question of whether Defendant's conduct consisted of uttering fighting words to be decided by a jury?

Appellant CSKT first argues that the lower court erred in granting the motion to dismiss because the "issue of whether or not the Defendant's words and conduct on the night in question constituted the offense of Disorderly Conduct is an issue of fact which, in criminal cases, is required by law to be resolved by jury."

"All questions of law must be decided by the judge." Section 2-2-1003 CSKT Laws Codified. It is the role of the judiciary to interpret the Constitution and to protect individual rights. *Marbury v. Madison*, 5 U.S. 137, 177 (1803). Consequently, the question of whether speech is constitutionally protected is a question of law, which must be determined by the judge. If the judge had concluded that the speech was not protected, the case could have been submitted to the jury to determine whether the facts proved beyond a reasonable doubt that the Appellee had committed the offense of Disorderly Conduct.

Appellant also states as part of this argument that the Tribal Code does not specifically provide for filing a pretrial motion to dismiss in criminal cases and that Defendant in this case based her motion on *State v. Cole*, 174 Mont. 380, 571 P.2d 87 (1977). This Court notes that § 2-2-801(1), CSKT Laws, specifically states that "any defense objection or request which is capable of determination without trial on the general issues must be raised before trial by motion to dismiss or for other appropriate

relief." Here, the question of whether Defendant's speech was protected under the Tribe's Constitution and the U.S. Constitution was appropriately raised through a motion to dismiss.

We AFFIRM and conclude that the Lower Court correctly determined that whether Appellee's speech was protected was a question of law for the Court to determine and not for a jury.

Issue 2

Did the Trial Court err in concluding that the fighting words doctrine did not apply in this case and in therefore granting the Motion to Dismiss?

Appellee was charged by Criminal Complaint as follows:

> That on or about August 11, 2009, at approximately 7:02 p.m., at or near St. Luke's Hospital, Ronan, Montana, on the Flathead Indian Reservation, the above named Defendant committed the offense of DISORDERLY CONDUCT by knowingly and purposely disturbing the peace with Sara McDonald by using profanity and/or abusive language when McDonald was administering medical attention to the Defendant.

Appellee filed a Motion to Dismiss the charge against her based upon her right to freedom of speech. The Trial Court granted the Motion to Dismiss and the Tribe appeals. The Tribe argues that the speech in this case rises to the level of "fighting words" and is therefore, not protected speech. Appellee argues that the speech here does not rise to the level of "fighting words." Appellee argues the speech was, at most, vulgar, annoying and insulting. The speech was uttered in the context of refusing medical treatment and was, in fact, protected speech.

Article VII, Section 3 of the Constitution of the Confederated Salish and Kootenai Tribes of the Flathead Reservation ("the Tribe's Constitution") states that "All members of the Confederated Tribes may enjoy without hindrance freedom of worship, speech,

press, and assembly." Additionally, the First Amendment of the U.S. Constitution protects freedom of speech and other expressions, including conduct. This protection applies to Indian Tribes through the Indian Civil Rights Act of 1968. 25 U.S. C. § 1302.

Freedom of speech is one of the fundamental personal rights and liberties granted to tribal members and U.S. citizens. "It is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry. *Cohen v. California*, 403 U.S. 15, 19, 91 S. Ct. 1780, 1785. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects. *Terminiello v. City of Chicago*, 337 U.S. 1, 4, 69 S.Ct. 894, 896 (1949).

However, freedom of speech is not absolute. Narrowly limited classes of speech are not protected. *Id.* One of the classes of speech that is not protected are the so-called "fighting words," "those personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction." *Cohen v. California*, 403 U.S. 15, 19, 91 S. Ct. 1780, 1785. Words that merely tend to arouse alarm, anger or resentment in others are not fighting words.

Several state courts have held that words that may be rude or improvident are protected speech under the First Amendment. *See State v. Klimek*, 398 N.W.2d 41, 43 (Minn. 1986), *Jefferson v. Superior Court, County of Alameda,* 51 Cal. App.3d 721, 724 (CA 1975), *People v. Kieran*, 26 N.Y.S.2d 291 (1940), *In the Matter of S.L.J.*, 263 N.W.2d 412, 416 (Minn. 1978). Bad manners alone are not grounds for arrest for disorderly conduct. Vulgar, offensive and insulting words condemned by the majority of

citizens are not punishable under criminal law. We agree with the analysis of these state courts.

The Probable Cause Affidavit in this case states that the Appellee was verbally abusive to the nurse, Sarah McDonald, by calling her a "honky," and "dumb white girl" and that she told Ms. McDonald "don't touch me bitch," and to get her ass off her reservation. Some of this speech occurred when Ms. McDonald tried to take Appellee's temperature and when Appellee pulled out her I.V. and refused further medical treatment.

This Court cannot imagine any of the above utterances provoking a violent reaction in a reasonable individual. This is especially true in the context here, where Appellee was a patient and Ms. McDonald was a professional who should have some experience dealing with unruly patients. The speech may be derisive, offensive and insulting, but no more.

We conclude that the Trial Court correctly determined that the speech in this case does not rise to the level of "fighting words" under the U.S. Constitution or the Tribal Constitution.

Issue 3

Is § 2-1-1001, CSKT Laws Codified, unconstitutionally overbroad and/or void for vagueness?

Appellee argues that the statute is overbroad in that, given its normal meaning, it "sweeps within its ambit protected activities. Appellee relies on *Thornhill v. Alabama,* 310 U.S. 88, 97, 60 S.Ct. 736, 742 (1941), for the proposition that "[t]he existence of such a statute, which readily lends itself to harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure, results

in a continuous and pervasive restraint on all freedom of discussion that might reasonably be regarded in its purview." *Id.*

The Tribe argues that the Disorderly Conduct statute is not overbroad and that it must be presumed to be constitutional and that it must be construed in such a manner as to put into effect the intent of the legislative body. The Tribe argues that the statute is based on a Montana statute and that it has been limited by an amendment and by previous interpretation by the Montana Supreme Court.

The offense of Disorderly Conduct is set forth in § 2-1-1001, CSKT Laws Codified, as follows:

> (1) A person commits the offense of disorderly conduct by knowingly disturbing the peace of another by:
>
> a. Knowingly uttering fighting words with a direct tendency to violence, challenging to fight, or fighting;
> b. Making loud or unusual noises;
> c. Using physically threatening, profane, or abusive language;
> d. Discharging firearms, except at a shooting range during established hours of operation;
> e. Obstructing vehicular or pedestrian traffic on a public way without good cause;
> f. Rendering the free entrance or exit to public or private places impassable without good cause; or
> g. Disturbing or disrupting any lawful assembly or public meeting after having been asked to cease such disturbance or disruption or leave the premises by one in authority at the assembly or meeting.

In this case, Appellee was charged with violation of subsection (1)(c) of the statute, "using physically threatening, profane, or abusive language." The Tribe's argument is that subsection (1)(c) is limited by subsection (1)(a) and that subsection (1)(a) was added "as a legislative incorporation of the standard pronounced by the United States Supreme Court in *Chaplinski v. New Hampshire*, 315 U.S. 568 (1942) and *Gooding v. Wilson*, 405 U.S. 518 (1972). This may have been the legislative intent, but

the language of the statute does not comport with that intention. As written, the offense of Disorderly Conduct is committed by actions which fall within any one of the different subsections (a) through (g) alone. Subsection (1)(a) does not limit subsection (1)(c), it is an alternative to (1)(c).

Additionally, the Tribe argues that the statute has been limited to "fighting words" by interpretation of the Montana Supreme Court. As pointed out by Appellee, the Montana Supreme Court's interpretation of Montana law is not binding on this Court.

In order to uphold the constitutionality of a statute that attempts to criminalize the use of abusive language, the statute must "by its own terms or as authoritatively construed by the state's courts, be limited in its application to "fighting words" and must not be susceptible of application to protected speech." *Gooding v. Wilson*, 405 U.S. 518, 522-23, 92 S.Ct. 1103, 1106 (1972). A statute which is overbroad cannot be applied to a person unless a satisfactory limiting construction is placed on it. *Plummer v. City of Columbus, Ohio,* 414 U.S. 2,3, 94 S.Ct. 17, 18 (1973).

In this case, we conclude that the statute is overbroad, in that it sweeps protected speech within its sweep. Here, a jury could have found that Appellee's speech was profane and/or abusive, even though these classifications fall within the scope of protected speech.

The presence of subsection (1)(a) as a charging option is clearly not a sufficient remedy because Appellee here was charged under subsection (1)(c). We conclude, therefore, that subsection (1)(c) of § 2-1-1001, CSKT Laws Codified, is unconstitutionally overbroad and is hereby stricken.

CONCLUSION

The Tribal Court correctly determined that whether or not Old Person's words were fighting words is a question of law and that all questions of law are to be decided by the Court, not by a jury. The Court, also, appropriately determined that the words uttered by the Defendant were not "fighting words" and properly dismissed the case. Finally, we find that the 2-1-1001 Subsection (1)(c) CSKT Law Codified is unconstitutionally overbroad and is stricken from the Code.

SO ORDERED this 27th of September, 2011.

Eldena N. Bear Don't Walk,
Chief Justice

Carolynn Fagan, Special Justice

Robert McDonald, Associate Justice

Cc: Laurence Ginnings, CSKT Prosecutor's Office

James Gabriels, Tribal Defender's Office

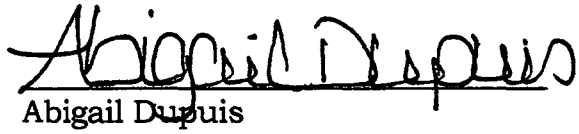
Certificate of Mailing

I, Abigail Dupuis, Appellate Court Administrator, do hereby certify that on this 3rd day of October, 2011, I served a true and correct copy of the ***OPINION*** to the persons specified below, via Tribal interoffice mail, at the address specified below and addressed as follows:

Laurence Ginnings
Tribal Prosecutors Office
PO Box 278
Pablo, MT 59855

James Gabriels
Tribal Defenders Office
PO Box 278
Pablo, MT 59855

Cara Croft
Clerk of the Tribal Court
PO Box 278
Pablo, MT 59855



Abigail Dupuis
Appellate Court Administrator