

FILED

STATE OF INDIANA)
)SS:
COUNTY OF DEARBORN)

IN THE DEARBORN SUPERIOR COURT JAN 31 2012

F. Kelly DeWane
CLERK OF DEARBORN CIRCUIT COURT

STATE OF INDIANA,)
Plaintiff,)
)
v.)
)
DANIEL BREWINGTON,)
Defendant.)

CAUSE NO. 15D02-1103-FD-084

CORRECTED MEMORANDUM IN SUPPORT OF PETITION FOR BAIL PENDING APPEAL¹

Defendant, Daniel Brewington, by counsel, hereby submits his Memorandum of Law in Support of Petition for Bail Pending Appeal.

Ind. Code § 33-33-9-1 permits a convicted criminal defendant to petition the trial court for bail pending appeal. In considering the petition, the trial court is to examine three factors: (1) the probability of reversible error at trial; (2) the risk of flight; and (3) the potential dangerousness of the defendant. *Tyson v. State*, 593 N.E.2d 175, 178 (Ind. 1992). These factors weigh in favor of granting Brewington reasonable bail pending appeal of his convictions.

A. Probability of Reversible Error

1. Brewington's convictions on Counts I through IV violate the First Amendment.

Four of five counts on which Brewington was convicted—the three counts of intimidation (Counts I-III) and attempt to commit obstruction of justice (Count IV)—stem from

¹ On January 20, 2012, the undersigned counsel for Defendant filed Defendant's Petition for Bail Pending Appeal and supporting Memorandum. Counsel inadvertently printed and filed a draft of the Memorandum, which contained some factual errors. This Corrected Memorandum in Support of Petition for Bail Pending Appeal has corrected those errors, but it otherwise unchanged. The Court should consider this Corrected Memorandum, rather than the version previously filed, when ruling on Defendant's Petition for Bail Pending Appeal.



allegedly threatening statements that Brewington made in public forums. These statements mostly consisted of Internet postings, but also included statements made in court filings, which the State contends were threatening. The evidence presented at trial was insufficient to support these convictions.

“[Statutes] such as [these], which make[] criminal a form of pure speech, must be interpreted with the commands of the First Amendment clearly in mind. What is a threat must be distinguished from what is constitutionally protected speech.” *Watts v. U.S.*, 394 U.S. 705, 707 (1969). The First Amendment requires that the State prove that Brewington’s statements were “true threats.” *Id.* at 708; *Virginia v. Black*, 538 U.S. 343, 359 (2003). “‘True threats’ encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals.” *Black*, 538 U.S. at 359. “Intimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or a group of persons with the intent of placing the victim in fear of bodily harm or death.” *Id.* at 360. A true threat must be distinguished from political hyperbole or other strident statements made on public issues. The First Amendment recognizes a “profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wideopen, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.” *Watts*, 394 U.S. at 708 (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)). “The language of the public arena, like the language used in labor disputes, ... is often vituperative, abusive, and inexact.” *Id.* (internal citations omitted).

The State failed to prove beyond a reasonable doubt that any of Brewington’s allegedly intimidating statements were true threats, as opposed to hyperbolic complaints about government

actions.² There was no evidence that, in using admittedly strident language, Brewington intended to place any of the alleged victims in fear of bodily harm or death. *Black*, 538 U.S. at 360.

All of the conduct for which Brewington was convicted on these counts involved Brewington's actions during his divorce proceedings before Judge James Humphrey. The strongest evidence refuting these charges was Judge Humphrey's failure to attempt to control Brewington's behavior through the inherent powers of his court. If Brewington's conduct toward Dr. Connor was so intimidating that it constituted obstruction of justice, Judge Humphrey could have ordered Brewington to stop, backed with the threat of contempt. But he did not. Dr. Connor could have sought a restraining order. But he did not. None of the alleged victims took any steps to protect themselves from Brewington. Yet the State contends that Brewington was allegedly such a threat that it needed to step in and stop him using the harshest means possible. The alleged victims' failure to take any less drastic steps belies any such contention. Instead of utilizing other means, such as using the inherent power of the court or a restraining order, to stop Brewington from continuing his alleged threats, these alleged victims were content to wait out the long process of a grand jury investigation and criminal prosecution. This shows that they were not concerned about an immediate risk of violence from Brewington, but rather wanted to punish him for not treating them with the respect they felt they deserved. One of the core principals of the First Amendment is that the State cannot criminalize disrespect. *Watts*, 394 U.S. at 708; *Black*, 538 U.S at 358.

² The indictment for Count IV (attempt to commit obstruction of justice) relied on the exact same conduct as the charge for intimidation of Dr. Connor (Count I): "Daniel Brewington ... did engage in conduct that constituted a substantial step toward the commission of the crime of Obstruction of Justice, to-wit: did intimidate and/or harass Dr. Edward Connor, who was a witness in an official proceeding." The First Amendment requirements for conviction on both counts is therefore the same, and do not need to be considered separately.

The State did present evidence that the alleged victims felt threatened, but this is not sufficient. Both the First Amendment and Ind. Code § 35-45-2-1 require that the State prove that Brewington intended his statements to be threatening. *Black*, 538 U.S at 360; Ind. Code § 34-45-2-1. There was simply no evidence that Brewington intended his statements to be threatening, as opposed to strident or forceful complaints about public officials.

All of Brewington's allegedly intimidating statements were made about public officials. Judge Humphrey, as an elected official, was undoubtedly a public official. Dr. Connor, who was a court-appointed custody evaluator in Brewington's divorce case, was carrying out official duties. Brewington's conduct toward Heidi Humphrey involved what he believed to be her membership on an ethics and professionalism committee attached to the Indiana Supreme Court, and concerned his opinions about Judge Humphrey's performance as a public official.

Brewington's complaints about Judge Humphrey and Dr. Connor may have been "vehement, caustic, [or] unpleasantly sharp[.]" *Watts*, 394 U.S. at 708, but there was no evidence that he intended them to be threats of physical violence.

Because Brewington's conviction on these charges cannot withstand scrutiny under the First Amendment, they will likely be overturned on appeal.

2. There was insufficient evidence to support Brewington's conviction on Count V.

In Count V, Brewington was tried for and convicted of perjury. Brewington's allegedly perjured statements were made during his grand jury testimony. At the grand jury, Brewington was asked a series of questions about Internet postings wherein he urged readers of his blog to write letters concerning Judge Humphrey's handling of his divorce case to Heidi Humphrey. Brewington identified Heidi Humphrey as an "Ethics and Professionalism advisor" to the Indiana

Supreme Court “Ethics and Professionalism Committee.”³ Brewington directed his readers to send the letters Heidi Humphrey’s home address. Brewington testified that he found all of this information on the Internet: Heidi Humphrey was listed as an ethics and professionalism advisor for Dearborn County on the website for the Indiana Supreme Court, and her address was listed on the Dearborn County tax assessor website. Brewington also testified that the Dearborn County tax assessor website also listed James Humphrey listed at that address. (Grand Jury Tr. 163-66). Three individuals wrote letters to Heidi Humphrey at that address.

Brewington was asked whether he knew that the address he posted on the Internet was Judge Humphrey’s home address. Brewington testified that he was not certain, but that it was a possibility. The following colloquy between the prosecutor and Brewington was held:

Mr. Negangard: It said James Humphrey who happens to be the name of your judge and you’re under oath and you’re actually expecting this Grand Jury to believe that you didn’t know that that was his wife?

Dan: Oh, it very well could be a possibility. I’m not from Dearborn County. I don’t know but the thing is ...

Brewington was interrupted by the prosecutor and not allowed to elaborate further. (Grand Jury Tr. 166).

³ Heidi Humphrey testified at the grand jury that the “Ethics and Professionalism Committee” did not actually provide advice on ethics and professionalism issues. (Grand Jury Tr. 291-92) (Excerpts from the Grand Jury Transcript are attached hereto as Exhibit A). This was irrelevant to the perjury charge. First, there was no evidence that Brewington knew that the “Ethics and Professionalism Committee” was a misnomer. Moreover, Brewington was indicted for lying about whether he knew that the address he listed was Judge Humphrey’s. It does not matter whether he directed his readers to write letters to the proper authority.

In a subsequent grand jury session, the Dearborn County Sheriff testified about his search on the Dearborn County tax assessor website. Sheriff Kreinhop testified that his searches for “Heidi Humphrey” and “Humphrey Heidi” yielded no results, and that a search for “Humphrey” yielded three results, only one of whom was named James Humphrey. (Grand Jury Tr. 241)

The prosecutor and Sheriff Kreinhop then had the following exchange:

Mr. Negangard: Brewington would obviously have to know that the Dearborn County Circuit Court Judge would obviously be required to live in Dearborn County?

Mr. Kreinhop: That’s correct. All elected officials are required to.

Mr. Negangard: So judging from how your investigation, how that system worked, it is clear that Dan Brewington lied to the grand jury yesterday when he stated that he did not know for certain that James Humphrey and Heidi, that Heidi Humphrey was Judge Humphrey’s spouse?

Mr. Kreinhop: That is correct. He was lying.

(Grand Jury Tr. 241-42).

No further evidence was presented concerning Brewington’s knowledge of Judge Humphrey’s marital status at the time of his testimony.

This evidence was insufficient to prove beyond a reasonable doubt that Brewington intentionally lied in his grand jury testimony. Brewington testified that he was not certain that Heidi Humphrey was Judge Humphrey’s wife. Sheriff Kreinhop’s testimony did not refute that. Brewington never testified that he doubted that Heidi Humphrey was Judge Humphrey’s wife, or even that he suspected she was not. He only testified that he was not certain. There was no

evidence that the Dearborn County tax assessor website stated that Heidi Humphrey was James Humphrey's wife. Nor was there evidence that the website stated that the James Humphrey listed was Judge James Humphrey; Sheriff Kreinhop testified that *he* concluded that they were one and the same based on his knowledge that elected officials in Dearborn County are required to reside in the county, but there was no evidence that Brewington knew of that requirement. Moreover, Sheriff Kreinhop visited the Dearborn County tax assessor website some time after Brewington visited it. No evidence was presented showing what information was listed on the website at the time that Brewington visited it, other than Brewington's testimony. And Brewington did not testify that the website definitively stated that Heidi Humphrey was Judge Humphrey's wife.

Brewington testified that he was not certain that Heidi Humphrey was married to Judge Humphrey. There is simply no evidence showing that this was a knowingly false statement. This conviction will therefore likely be overturned on appeal.

B. Brewington does not pose a risk of flight.

Brewington has regularly appeared in this Court for proceedings in this matter. Brewington appeared voluntarily before the grand jury when it was investigating this matter.

Brewington cooperated fully when the warrant was issued for his arrest. Brewington did not know about the warrant until it was served on him at his home on March 7, 2011. When the Norwood (Ohio) police came to serve Brewington's arrest warrant, he surrendered to them voluntarily, and did not attempt to resist or flee. In fact, after the officers informed Brewington about the warrant, they sent him into his house alone to retrieve a jacket before taking him to the Hamilton County (Ohio) Jail. On March 9, 2011, Brewington was released from the Hamilton County Jail on \$1000 bond, and agreed to waive extradition to Indiana. By agreement with the

Dearborn County Prosecutor (Negangard), Brewington surrendered himself in Dearborn County on the morning of March 11, 2011.

Brewington has a strong interest in pursuing this appeal, as he believes that he was prosecuted for exercising his First Amendment rights. Obtaining a reversal of his convictions is thus necessary to vindicate his constitutional rights.

A reasonable appeal bond, not exceeding \$50,000 surety bond, will be sufficient to ensure Brewington's presence for any future proceedings, or, if his appeal is unsuccessful, the resumption of his incarceration. Additionally, Brewington is willing to agree to monitoring or other supervision during his release on bail.

C. Brewington is not dangerous.

There is no credible evidence that Brewington is dangerous. Other than these charges, Brewington has no history of violence. Although he has now been convicted of three counts of intimidation, the evidence adduced at trial failed to show that Brewington's statements were "true threats." Rather, all of his speech was protected by the First Amendment. If the First Amendment prohibits conviction and punishment for this speech, it follows that this speech cannot be the basis for depriving him of liberty by incarcerating him pending appeal. Brewington has shown that these convictions will likely be reversed on appeal because none of Brewington's allegedly intimidating speech or conduct contained a threat of violence.

When this Court previously denied Brewington's request for bond reduction, the Court relied in part on an allegation that Brewington "may have contemplated violence towards at least one alleged victim in this case." This stemmed from a conversation that Brewington allegedly

had with a fellow inmate in the Hamilton County jail. Evidence obtained since then shows that this evidence is not credible.

This other inmate, Keith Jones, alleged that, while Brewington was incarcerated in the Hamilton County Jail, Brewington attempted to hire someone to commit a drive-by shooting at Judge Humphrey's house. Jones alleged that he told Brewington that he knew of someone, and gave Brewington two phone numbers. The Dearborn County Sheriff's Department, accompanied by an ATF agent, interviewed Jones, and a recording of the interview was introduced at the bond reduction hearing in this case.

Keith Jones's allegations are not credible. Jail movement logs, attached hereto as Exhibit B, show that Jones and Brewington were never together at the Hamilton County Jail. Therefore, they could not have had any conversation. Additionally, when police investigated the allegation, someone called the person that Jones allegedly referred Brewington to, this individual claimed never to have heard of Daniel Brewington. Keith Jones has a significant criminal record, including convictions for federal offenses.

The investigation into this allegation shows that it was not credible. No charges were filed against Brewington, either in Hamilton County, Ohio, Dearborn County, or by the federal government. Brewington was never questioned about these allegations. After the allegations were made, Brewington's conversations at the Dearborn County Jail were monitored. It can be inferred that none of these conversations corroborated the allegations, as Brewington was not charged with attempted murder or conspiracy to commit murder.

As this evidence shows, Brewington never attempted to assassinate Judge Humphrey. This evidence should not be used in considering Brewington's request for bail pending appeal.

Brewington does not pose an actual threat to anyone. Therefore, he should be allowed reasonable bail pending appeal.

CONCLUSION

For these reasons, Brewington's Petition for Bail Pending Appeal should be granted.