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Recent Developments: Vulgarity vs. Vemacular

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Vulgarity vs. Vernacular

In *Diehl v. State*, 294 Md. 466, 451 A.2d 115 (1982), the Court of Appeals of Maryland held that loudly uttering "Fuck you," in response to an unlawful order by a police officer does not constitute disorderly conduct in violation of Maryland Code art. 27, §121 (1976 Repl. Vol.) nor is it an unprotected exercise of freedom of speech (i.e. expression of obscenity or "fighting words"). The court also reversed Diehl's conviction for resisting arrest on the basis that the officer had no legal justification for the arrest.

Robert Diehl was a passenger in a car and got out of that car after it had been stopped by the police for a traffic violation. Officer Gavin, the arresting officer in this case, ordered Diehl back in the car. Diehl refused, loudly asserting his right to remain outside the car—"Fuck you, Gavin," "I know my rights." In reviewing the lower court's decision, Judge Cole supported the policy of avoiding regulation of speech where the words do not constitutionally infringe on the rights of others.

Non-Speech Regulation of Verbal Behavior

The court noted that Diehl's utterance did not constitute disorderly conduct as a non-speech regulation of verbal behavior because his words did not violate either of two proscriptions of the statute:

(1)"willfully disturb[ing] any neighborhood . . . by loud and unseemly noises" and

(2)"profanely curs[ing] and swear[ing] or us[ing] obscene language" at a place within the hearing of persons passing by.

Maryland Ann. Code art. 27 §121 (1976 Repl. Vol.)

With regard to the first proscription, Diehl's choice of words were held to be used to *emphasize* rather than to offend or willfully *disturb* anyone. Diehl's words were directed only at Police Officer Gavin. "[H]e was not trying to disturb others or exhort them to breach the peace," *Diehl*, 294 Md. at 471, 451 A.2d at 118, even though a subsequent "fracas" between another individual and another police officer at the scene ensued. Although Diehl's words and conflict with Officer Gavin drew a crowd, there was "no evidence showing any of the observers was [sic] disturbed." *Id.* at 472, 451 A.2d at 119.

With regard to the second proscription the court adopted the Supreme Court of Rhode Island's standard for defining profanity: "importing an imprecation of divine vengeance or implying divine condemnation or irreverance toward God or holy things." *State v. Authelet*, 385 A.2d 642 at 644 (R.I. 1978). Although arguably distasteful, Diehl's words do not fall within this standard, and thus, he was found not to have violated the profanity aspect of the statute. The obscenity aspect of the second proscription was left to be addressed in the verbal regulation section of the opinion.

Judge Rodowsky, joined by Judge Murphy and Judge Smith, dissented only to the reversal of the trial court's guilty verdict for the charge of resisting arrest. There was significant contradiction between the testimony of Diehl and Gavin with regard to the facts of the incident. The dissent was of the opinion that there was testimony sufficient for the jury to find probable cause for arrest. "Officer Gavin, while being vulgarly abused by a person whose yelling and screaming was drawing a crowd, was . . . entitled to rely on the terms of the statute and on the case law statements of what traditionally has constituted disorderly conduct." *Diehl*, 294 Md. at 485, 451 A.2d at 125. In determining whether the lawfulness of Gavin's order was dispositive of probable cause to arrest for disorderly conduct, the dissent contended that the court should have followed the test for lawfulness adopted in *Drews v. State*, 224 Md. 186, 167 A.2d 341 (1961), *vacated and remanded on other grounds*, 378 U.S. 547 (1964) stated as: "the refusal to obey an order (to move on) of a police officer ' "can be justified only where the circumstances show conclusively that the police officer's direction was purely arbitrary and was not calculated in any way to promote the public order." ' " (citations omitted) *Diehl*, 294 Md. at 486, 451 A.2d at 126.

The majority opinion establishes that one who is acting lawfully has the right to strongly assert the lawfulness of one's actions and to assert one's rights as a law-abiding person to the extent of using some expletives to emphasize the expression and to resist unlawful arrest with minor physical force and with continued use of those expletives.

Speech Regulation

"Diehl's oral communication in this situation clearly constituted speech," *Id.* at 471, 451 A.2d at 118, because it was held to be a part of an attempt to convey a message expressing his outrage with the unlawful police conduct.

The court used the test for obscenity established in *Roth v. United States*, 354 U.S. 476 (1957): that the expression must be erotic. Again, although the expletive was arguably distasteful, Diehl was not in violation of the statute because his utterance did not "[tend] to excite sexual desire." *Diehl*, 294 Md. at 474, 451 A. 2d at 120.

Diehl was also found not guilty of using "fighting words" intended to incite Officer Gavin to breach the peace. Citing *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1962), the Diehl court stated that "[s]uch words are not constitutionally protected because their 'slight social value as a step to truth . . . is clearly outweighed by the social interest in order and morality.' " (citation omitted) *Diehl*, 294 Md. at 474, 451 A.2d at 120. The court recognized that in *Cohen v. California*, 403 U.S. 15

(1971),"the Supreme Court shifted the emphasis from the words themselves to the context in which they were uttered and thereby limited the doctrine as announced in *Chaplinsky*." *Diehl*, 294 Md. at 475, 451 A.2d at 120.

In *Cohen*, the Supreme Court refused to classify the expression "Fuck the Draft" lettered on the back of a jacket worn in a courthouse as "fighting words" because they were not directed to the person of the hearer nor intentionally provoked a given group to hostile action. The Court of Appeals of Maryland applied this narrowed application of the "fighting words" doctrine in *Downs v. State*, 278 Md. 610, 366 A.2d 41 (1976), *cert. denied*, 431 U.S. 974 (1977). The court in *Diehl* adopted the *Downs* holding stating that "even though the views expressed might be offensive to someone who overheard them, they were not directed to such persons and, as a result, were not under the rubric of fighting words." *Diehl*, 294 Md. at 476-77, 451 A.2d at 121. However, Diehl's words were directed toward someone, specifically, Officer Gavin. The court opted not to address the question whether a different and higher standard applies when the addressee is a police officer.

The court found direction from *Downs*, which "teaches us that the use of the word 'fuck' is not punishable in the absence of compelling reason." *Id.* at 477, 451 A.2d at 122. No such compelling reason was found in this case. The court held that Diehl had a right to verbally protest the unlawful exercise of police authority, and the utterance in question "though distasteful, forcefully conveyed the intensity of his objection." *Id.* at 478-79, 451 A.2d at 122. Diehl's words were held to be no more than an emotional and emphatic response to Gavin's order. "In such moments, one man's vulgarity may well be another's vernacular." *Id.* at 479, 451 A.2d at 122.

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State v. Randall Book Corp.

In *State v. Randall Book Corp.*, ___ Md. App. ___ ,452 A.2d 187 (1982), the Court of Special Appeals of Maryland reviewed the dismissal of charges against the Randall Book Corporation, where the trial court found Article 27, §416D of the Annotated Code of Maryland to be unconstitutionally vague and overbroad. Section 416D is basically an obscenity statute, although the Maryland Legislature deleted the word "obscene" (primarily due to the confusion in the law on obscenity handed down by the United States Supreme Court). Section 416D, in essence, states that "advertising the human body depicting sadomasochistic abuse, sexual conduct or sexual excitement" is a crime. *See Randall Book Corp.*, ___ Md. App. at ___ , 452 A.2d at 188.

The appellate court in *Randall Book Corp.* noted the recent court of appeals' opinion in *Blaine Wilson Smiley v. State*, ___ Md. ___ , 450 A.2d 909 (1982) and found that case to be determinative of the constitutional issue before them. In *Smiley*, the court held that Section 416D was enacted to broadly prohibit advertising which depicted obscenity, enabling the court to apply the standards enuciated in *Miller v. California*, 413 U.S. 15 (1973).The court in *Smiley* found that:

> [w]hen the *Miller* standards are embodied in section 416D, it becomes patent that the statute is not overbroad and vague. By requiring compliance with the *Miller* standards, "a person of ordinary intelligence [is given] fair notice that his contemplated conduct is forbidden by the statute," and the statute is not "so indefinite that 'it encourages arbitrary and erratic arrests and convictions.' "

Smiley, ___ Md. at ___ , 450 A.2d at 912, citing *Colautti v. Franklin*, 439 U.S. 379 (1979).

The primary issue—the constitutional question—raised in *Randall Book Corp.* was answered fully by the decision in *Smiley*, and the Maryland Court of Special Appeals reversed the trial court's decision and remanded the case against Randall for further proceedings.

Miller v. State

In *Miller v. State*, ___ Md. App. ___ , ___ A.2d ___ (1982), Miller was indicted on charges of robbery with a deadly weapon, kidnapping, rape and various other sex offenses. The charges arose out of an incident that occurred on October 28, 1980. On June 16, 1981 Miller's trial began and he was convicted by June 19, 1981. On appeal, the appellant raised issues based on lack of trial by impartial jury, lack of speedy trial and based on error in permitting a State witness to testify despite non-disclosure of the witness' name during the discovery process.

The appellate court addressed the speedy trial issue first, examining in detail the circumstances surrounding the appellant's arrest and trial in relation to Maryland Rule 746. Rule 746 provides in part that:

> a trial date shall be set which shall be not later than 180 days after the appearance or waiver of counsel or after the appearance of defendant before the court pursuant to Rule 723 (hereinafter referred to as the "180 day rule").

Counsel for the appellant first entered his appearance on December 11, 1980 and pre-trial motions were heard on June 9, 1981. The appellant contended that June 9, 1981 constituted the 181st day after appearance of counsel. The court corrected this miscalculation, citing Maryland Rule 8 which in essence requires that the day which triggers the time period is not to be included in the calculation.

Upon further examination of the speedy trial issue, the court found the case of *State v. Lattisaw*, 48 Md. App. 20, 425 A.2d 1051 (1981) to be controlling. As a result of this case, the court held the appellant had