2017 WL 5900363

Colorado Court of Appeals,
Div. VII.

The PEOPLE of the State of Colorado, Plaintiff-Appellant,
v.
Mark IANNICELLI, Defendant-Appellee.
and
The People of the State of Colorado, Plaintiff-Appellant,
v.
Eric Patrick Brandt, Defendant-Appellee.

Court of Appeals No. 16CA0210, Court of Appeals No. 16CA0211
|
Announced November 30, 2017

City and County of Denver District Court No. 15CR3981, Honorable Kenneth M. Plotz, Judge
City and County of Denver District Court No. 15CR4214, Honorable Kenneth M. Plotz, Judge

Attorneys and Law Firms

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Opinion

Opinion by JUDGE J. JONES

***1** ¶ 1 The People charged defendants, Mark Iannicelli and Eric Patrick Brandt, with jury tampering. [1] The charges were based on allegations that defendants handed out fliers discussing the concept of "jury nullification" to persons entering a courthouse. The People appeal the district court's dismissal of the charges.

¶ 2 We construe the jury tampering statute, section 18-8-609, C.R.S. 2017, to require that the People prove that a defendant attempted to influence a juror's or potential juror's action in a case in which the juror had been chosen to serve on a jury in a particular case or in which the potential juror had been selected as a member of a venire from which a jury in a particular case would be chosen. Because the People didn't charge defendants with such conduct, we affirm the district court's orders.

I. Background

¶ 3 Defendants are members of the "Fully Informed Jury Association," a group that advocates what is commonly referred to as jury nullification. They believe that jurors aren't obligated to follow a court's jury instructions on the law, but may decide cases based on their own views of whether the laws at issue are just and fair.

¶ 4 According to the People, defendants stood by the main entrance to the Lindsey-Flanigan Courthouse in Denver next to a cardboard stand marked "Juror Information." They asked people entering the building if they were reporting for jury duty or if they'd already been chosen to serve as a juror.[2] If a person answered "yes" to either, one of the defendants would give them one of three pamphlets containing information about jury nullification. Those pamphlets included phrases such as the following:

- "Juror nullification is your right to refuse to enforce bad laws and bad prosecutions."
- "Judges say the law is for them to decide. That's not true. When you are a juror, you have the right to decide both law and fact."
- "Once you know your rights and powers, you can veto bad laws and hang the jury."
- "When you're questioned during jury selection, just say you don't keep track of political issues. Show an impartial attitude. Don't let the judge and prosecutor stack the jury by removing the thinking, honest people."
- "Instructions and oaths are designed to bully jurors and protect political power. Although it all sounds very official, instructions and oaths are not legally binding."
- "So, when it's your turn to serve, be aware: 1. You may, and should, vote your conscience; 2. You cannot be forced to obey a 'juror's oath'; 3. You have the right to 'hang' the jury with your vote if you cannot agree with other jurors."
- If asked about jury nullification, "the best answer to give is: 'I have heard about jury nullification, but I'm not a lawyer so I don't think I fully understand it.' "

***2** ¶ 5 Based on this alleged conduct, the People charged each defendant with seven counts of jury tampering. Each count alleged that on a particular date the defendant communicated with a named "JURY POOL MEMBER" intending to influence that person's vote, opinion, decision, or other action in "a case" in violation of section 18-8-609.

¶ 6 Defendants moved to dismiss the charges, arguing that the jury tampering statute is unconstitutional on its face and as applied to their alleged conduct.

¶ 7 The parties briefed the issues and submitted exhibits, which included the three pamphlets. Following a hearing, the district court ruled that the statute isn't unconstitutional on its face. But it also ruled that the statute is unconstitutional as applied to defendants' conduct, which it determined to be speech protected by the First Amendment.[3] The district court therefore dismissed the charges.

II. Discussion

¶ 8 The People's appeals challenge the district court's ruling that the jury tampering statute is unconstitutional as applied to defendants' conduct. After considering the parties' briefs, we asked the parties to brief two other questions: (1) is the prohibition of the jury tampering statute limited to attempts to influence a person's vote, opinion, decision, or other action in a specifically identifiable case; and (2) if so, did the People charge defendants with attempting to so influence a juror in a specifically identifiable case? After considering the parties' supplemental briefs on those questions, we conclude that the answer to the first question is yes, and that the answer to the second question is no. As a result, we affirm the district court's orders dismissing the charges without addressing whether the statute is unconstitutional as applied to defendants' alleged conduct. *See People v. Heisler*, 2017 COA 58, ¶ 44 (we may affirm a district court's ruling for any reason supported by the record); *see also People v. Valdez*, 2017 COA 41, ¶ 6 (a court should address constitutional issues

only if necessary) (citing *Developmental Pathways v. Ritter*, 178 P.3d 524, 535 (Colo. 2008), and *People v. Lybarger*, 700 P.2d 910, 915 (Colo. 1985)).

A. Our Jurisdiction

¶ 9 Section 16-12-102(1), C.R.S. 2017, provides that "[t]he prosecution may appeal any decision of a court in a criminal case upon any question of law." So prosecutorial appeals under that section are "necessarily limited to questions of law only." *People v. Martinez*, 22 P.3d 915, 919 (Colo. 2001). The questions before us are entirely questions of law, and therefore we have jurisdiction.

B. The Merits

1. Standard of Review

¶ 10 The People's challenge to the district court's ruling presents questions of statutory interpretation. We review such questions de novo. *Marsh v. People*, 2017 CO 10M, ¶ 19.

2. Applicable Statutes

***3** ¶ 11 The jury tampering statute, section 18-8-609(1), provides in relevant part as follows: "A person commits jury-tampering if, with intent to influence a juror's vote, opinion, decision, or other action in a case, he attempts directly or indirectly to communicate with a juror other than as a part of the proceedings in the trial of the case." Section 18-8-601(1), C.R.S. 2017, defines a "juror" for purposes of part 6 of article 8 of title 18 [4] as

> any person who is a member of any jury or grand jury impaneled by any court of this state or by any public servant authorized by law to impanel a jury. The term "juror" also includes any person who has been drawn or summoned to attend as a prospective juror.

3. Analysis

¶ 12 We construe a statute to give effect to the General Assembly's intent, which we discern by looking first to the statute's language. *Mosley v. People*, 2017 CO 20, ¶ 16. "If the language is clear and unambiguous, we must interpret the statute according to its plain meaning." *Marsh*, ¶ 20. "To reasonably effectuate the legislature's intent, a statute must be read and considered as a whole, and should be interpreted to give consistent, harmonious, and sensible effect to all its parts." *Mosley*, ¶ 16. "And we consider the words or phrases at issue in context—both in the context of the statute of which the words or phrases are a part and in the context of any comprehensive statutory scheme of which the statute is a part." *People v. Berry*, 2017 COA 65, ¶ 13.

¶ 13 The People argue that the General Assembly's use of the phrase "a case" in section 18-8-609(1), coupled with the definition of "juror" in section 18-8-601(1), shows that the General Assembly didn't intend to limit prosecutions under the jury tampering statute to attempts to influence jurors in specifically identifiable cases—that is, cases in which the person sought to be influenced had been selected to serve on a jury or had been selected to be part of a venire from which a jury in a particular case would be chosen. At first glance, this argument has some force. After all, the definition of

"juror" in section 18-8-601(1) includes persons who have merely been summoned for jury duty. But on closer inspection, we conclude that the language of section 18-8-609(1) limits application of the definition in that section.

¶ 14 We begin by acknowledging the rule that "when the legislature defines a term in a statute, that definition governs," and it governs "wherever [the term] appears in the statute, except where a contrary intention plainly appears." *Farmers Ins. Exch. v. Bill Boom Inc.*, 961 P.2d 465, 470 (Colo. 1998) (citing *R.E.N. v. City of Colorado Springs*, 823 P.2d 1359, 1364 (Colo. 1992)). We believe a contrary intention appears from the language of section 18-8-609(1).

¶ 15 First of all, by using the phrase "a case," the General Assembly plainly demonstrated an intent to limit the statute's application to attempts to influence a juror in a case. One who has merely been summoned for jury duty is not serving in "a case," and indeed may ultimately not serve. On the other hand, one serving as a juror obviously is serving in a case, as is one who has been selected for a venire from which a jury in a particular case will be chosen.

***4** ¶ 16 Additionally, in the same sentence, the General Assembly limited prohibited communications to those "other than as a part of the proceedings *in the trial of the case*." § 18-8-609(1) (emphasis added). In twice using the definite article "the," the General Assembly intended to limit the statute's reach to conduct relating to a trial of a particular case. *See Brooks v. Zabka*, 168 Colo. 265, 269, 450 P.2d 653, 655 (1969) ("It is a rule of law well established that the definite article 'the' particularizes the subject which it precedes. It is a word of limitation as opposed to the indefinite or generalizing force of 'a' or 'an.' "); *see also People v. Madden*, 111 P.3d 452, 457 (Colo. 2005) (a court must give effect to every word in a statute); *Colo. Ground Water Comm'n v. Eagle Peak Farms*, 919 P.2d 212, 218 (Colo. 1996) (courts "are not to presume that the legislative body used the language idly and with no intent that meaning should be given to its language") (citation omitted). Coupled with the phrase "other than as part of the proceedings," then, the use of the phrase "the trial of the case" indicates that attempts by counsel or witnesses to influence jurors in a trial aren't prohibited, but attempts by anyone else to do so are.

¶ 17 And lastly, the statute requires a specific intent which necessarily limits the statute's reach to jurors or potential jurors selected for a venire from which a jury in a particular case will be chosen. The defendant must intend "to influence a juror's *vote, opinion, decision, or other action* in a case." § 18-8-609(1) (emphasis added). A person who has merely been summoned for jury duty and sits in a room waiting to (possibly) be called to a courtroom in a particular case isn't in any position to take any action in a case. It's only when a potential juror is selected to be a part of a venire from which a jury in a particular case will be chosen that a person is able to take any such action.

¶ 18 The Alaska Supreme Court similarly analyzed Alaska's jury tampering statute in *Turney v. State*, 936 P.2d 533 (Alaska 1997). That statute says,

> A person commits the crime of jury tampering if the person directly or indirectly communicates with a juror other than as permitted by the rules governing the official proceeding with intent to
>
> (1) influence the juror's vote, opinion, decision, or other action as a juror; or
>
> (2) otherwise affect the outcome of the official proceeding.

Alaska Stat. § 11.56.590(a) (West 2017).

¶ 19 The *Turney* court rejected an overbreadth challenge[5] to that statute because it interpreted it to prohibit only "communications intended to affect *how the jury decides a specific case"* where the speaker "intend[ed] to influence the outcome." *Turney*, 936 P.2d at 540-41 (emphasis added). The court's analysis turned on two aspects of the statute's language.

¶ 20 First, the court reasoned that

> [t]he words 'vote, opinion, decision' specify salient components of the principal duty of a juror—to decide the outcome of the case. The phrase 'or other action as a juror,' must be read in the context of those specified juror functions; it connotes juror activities that carry out the responsibilities entrusted to the juror.

Id. at 540.

¶ 21 Second, the court construed the phrase "the official proceeding" as "limit[ing] the scope of the prohibited communication with jurors to the context of their participation in *an* actual, specific proceeding." *Id.*

¶ 22 Having construed the statute's language in this way, the court concluded that the statute was limited to attempts to influence only jurors and those summoned jurors selected for a venire from which a jury in a particular case would be chosen.

***5** ¶ 23 The language of Alaska's jury tampering statute doesn't differ materially from that of Colorado's jury tampering statute. Granted, the *Turney* court apparently didn't have to grapple with a statutory definition of the term "juror." But its analysis was based on the plain language of Alaska's jury tampering statute, and, as noted, such plain language may narrow a seemingly applicable, broader definition of a term.

¶ 24 Based on all this, we conclude that the plain language of section 18-8-609(1) limits prosecution to attempts to influence persons who have been chosen as jurors or who have been selected as part of a venire from which a jury in a particular case will be chosen. [6] Contrary to the People's suggestion, our interpretation doesn't render meaningless the definition of juror in section 18-8-601(1). That definition plainly applies to other sections of part 6, such as section 18-8-612, C.R.S. 2017 (concerning failure to obey a juror summons), and section 18-8-614, C.R.S. 2017 (concerning harassment of a juror by an employer). And it continues to apply in large part to section 18-8-609(1).

¶ 25 At the very least, our jury tampering statute is susceptible of two reasonable interpretations, one of which is that it applies only in the limited fashion discussed above. When a statute is, for that reason, ambiguous, we construe statutory terms "in a manner that avoids constitutional infirmities. Thus, if a statute is capable of alternative constructions, one of which is constitutional, then the constitutional interpretation must be adopted." *People v. Zapotocky*, 869 P.2d 1234, 1240 (Colo. 1994) (citations omitted); *accord, e.g.*, *Fields v. Suthers*, 984 P.2d 1167, 1172 (Colo. 1999); *People v. Henley*, 2017 COA 76, ¶ 19. Were we to construe the jury tampering statute as applying to communications with summoned citizens about matters unrelated to a particular case, there is a real danger the statute could encroach on a substantial amount of protected speech.

¶ 26 The First Amendment to the United States Constitution prohibits laws "abridging the freedom of speech." U.S. Const. amend. I; *see Curious Theatre Co. v. Colo. Dep't of Pub. Health & Env't*, 220 P.3d 544, 551 (Colo. 2009) ("The guarantees of the First Amendment are applicable to the states through the Due Process Clause of the Fourteenth Amendment...."). [7] Under the First Amendment, the government generally can't regulate speech "based on its substantive content or the message it conveys." *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828 (1995); *see Nev. Comm'n on Ethics v. Carrigan*, 564 U.S. 117, 121 (2011) (as a general matter, "government has no power to restrict expression because of its message, its ideas, its subject matter, or its content" (ultimately quoting *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 65 (1983)). And the Supreme Court recently affirmed that "[n]o form of speech is entitled to greater constitutional protection" than leafletting. *McCullen v. Coakley*, 573 U.S. ——, ——, 134 S. Ct. 2518, 2536 (2014) (quoting *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 347 (1995)).

***6** ¶ 27 But the right to speak isn't absolute. It may be limited, for example, to protect the administration of justice. *See Cox v. Louisiana*, 379 U.S. 559, 562 (1965) ("A State may adopt safeguards necessary and appropriate to assure that

the administration of justice at all stages is free from outside control and influence."). Such limits are delineated in a series of Supreme Court cases.

¶ 28 In *Turney v. Pugh*, 400 F.3d 1197 (9th Cir. 2005), which addressed the constitutionality of Alaska's jury tampering statute, [8] the Ninth Circuit Court of Appeals surveyed those Supreme Court cases and concluded that they hold that "the First Amendment, while generally quite protective of speech concerning judicial proceedings, does not shield the narrow but significant category of communications to jurors made outside of the auspices of the official proceeding and aimed at improperly influencing the outcome *of a particular case*." *Id.* at 1203 (emphasis added). The court noted that "[e]ven in the strongly speech-protective decisions of the [Supreme Court], the Court was careful to distinguish the publications it deemed protected under the First Amendment from speech aimed at improperly influencing jurors." *Id.* at 1202. [9]

¶ 29 Similarly, in *United States v. Heicklen*, 858 F. Supp. 2d 256 (S.D.N.Y. 2012), the court, relying in part on the principle that a court should, if possible, construe a statute in a way to avoid constitutional problems, interpreted the federal jury tampering statute [10] as "squarely criminaliz[ing] efforts to influence the outcome of a case, but exempt[ing] the broad categories of journalistic, academic, political, and other writings that discuss the roles and responsibilities of jurors in general." *Id.* at 266. After reviewing relevant case law, the court observed that

> [a] broad construction of [the federal jury tampering statute] that encompassed speech to a juror on any subject that could be considered by a juror would arguably chill protected speech because it could sweep within its prohibitions speech *that was not made with the intent of influencing the outcome of a particular case* and that did not pose a clear and present danger to the administration of justice.

Id. at 274-75 (emphasis added).

***7** ¶ 30 We agree with the analysis in *Turney* and *Heicklen*. Were we to construe Colorado's jury tampering statute as broadly as the People urge, it would, in all likelihood, be constitutionally overbroad.

¶ 31 In sum, we hold that section 18-8-609(1) applies only to attempts to improperly influence jurors or those selected for a venire from which a jury in a particular case will be chosen. Because the People didn't charge defendants with attempting to influence such a person (as they concede), it follows that the district court didn't err in dismissing the charges.

III. Conclusion

¶ 32 The orders are affirmed.

JUDGE FOX and JUDGE FREYRE concur.

All Citations

--- P.3d ----, 2017 WL 5900363, 2017 COA 150

Footnotes

1 The People charged defendants in separate cases, and the People separately appeal orders in both cases. We consolidate the appeals only for purposes of issuing a single opinion resolving both appeals.

2 Defendants deny that they asked anyone such questions, but for purposes of these appeals we'll assume they did.

3 The court more specifically ruled as follows:

> [T]hey engaged in an activity that's certainly no different from citizens of this county, this state, this city, holding up signs in a place where they knew jurors would see them, signs such as, you know, free the Chicago Seven or Eight, don't convict so and so, and that's similar—that's speech. It's similar to what the defendants did in this case. Activities such as those are protected by the First [A]mendment, because they are speech, they are in a public place, and I think that's all the Court needs to—that's as far as the Court needs to go.

4 Title 18, article 8, part 6 currently proscribes witnesses receiving bribes; bribing, intimidating, or tampering with jurors; jurors receiving bribes; and various other conduct intended to subvert the administration of justice. *See* §§ 18-8-601 to -615, C.R.S. 2017.

5 As the *Turney* court explained, "[a] statute regulating speech is overbroad, and thus unconstitutional, 'when constitutionally protected conduct as well as conduct which the state can legitimately regulate are included within the ambit of [a] statute's prohibition.' " *Turney v. State*, 936 P.2d 533, 539 (Alaska 1997) (quoting *Marks v. City of Anchorage*, 500 P.2d 644, 646 (Alaska 1972)).

6 The district court also thought the statute was limited to "conduct that influences a decision in a particular case in an extrajudicial manner," or "conduct which is meant to influence a verdict."

7 Article II, section 10 of the Colorado Constitution, which provides greater protection of speech than does the First Amendment, *see Lewis v. Colo. Rockies Baseball Club, Ltd.*, 941 P.2d 266, 271 (Colo. 1997), says, "No law shall be passed impairing the freedom of speech; every person shall be free to speak, write or publish whatever he will on any subject." Our discussion is limited to the statute's potential impact on speech protected by the First Amendment.

8 In *Turney v. Pugh*, 400 F.3d 1197 (9th Cir. 2005), the court denied a petition for habeas corpus filed by the defendant in *Turney v. State*, 936 P.2d 533, discussed above.

9 In *Bridges v. California*, 314 U.S. 252 (1941), for example, the petitioners had been found guilty of contempt for letters they wrote pertaining to pending litigation that were published in local newspapers. The Court held that the convictions could be justified only in reference to a "clear and present danger" to the administration of justice, and that the facts of the case didn't show such a danger. *Id.* at 260-63, 269-78. And, in *Wood v. Georgia*, 370 U.S. 375 (1962), the Court held that the First Amendment protected a sheriff's public criticism of a pending grand jury investigation because it did "not represent a situation where an individual is on trial; there was no 'judicial proceeding pending' in the sense that prejudice might result to one litigant or the other by ill-considered misconduct aimed at influencing the outcome of a trial." *Id.* at 389.

10 That statute says,

> Whoever attempts to influence the action or decision of any grand or petit juror of any court of the United States upon any issue or matter pending before such juror, or before the jury of which he is a member, or pertaining to his duties, by writing or sending to him any written communication, in relation to such issue or matter, shall be fined under this title or imprisoned not more than six months, or both.

18 U.S.C. § 1504 (2012).