

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

LC2003-106126-001 DT

05/07/2004

JUDGE PRO TEM GERALD PORTER

CLERK OF THE COURT  
P. M. Espinoza  
Deputy

FILED: 05/11/2004

STATE OF ARIZONA

GERALD R GRANT  
DOUGLAS W JANN

v.

NICHOLAS C SALAMONE (001)

JERALD C THOMPSON

PEORIA JUSTICE COURT  
REMAND DESK-LCA-CCC

RECORD APPEAL RULE / REMAND

PEORIA JUSTICE COURT

Cit. No. #A537724

Charge: A) THREAT-INTIMADATION W/INJURY-DAMAGE PROPERTY

DOB: 12/05/31

DOC: 01/30/03

This Court has jurisdiction of this appeal pursuant to the Arizona Constitution Article VI, Section 16 and A.R.S. Section 12-124 (A).

This matter has been under advisement since April 16, 2004 when it was assigned pursuant to Rule 9.9 of the Maricopa County Court Local Rules of Practice. The Court has considered and reviewed the record of the proceedings from the Peoria Justice Court, the exhibits made of record and the memoranda submitted.

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Appellant, Nicholas C. Salamone, was convicted in the Peoria Justice Court on August 25, 2003 of Threatening and Intimidating, in violation of A.R.S. section 13-1202 (A) (1). Salamone argues that this court should reverse because his statements are constitutionally protected speech and do not constitute a “true threat” required for conviction under the statute. Appellee, the State of Arizona, disputes Appellant’s contention that his comments are protected speech and argues that the comments constitute a “true threat” actionable by the State.

For the reasons that follow, this court holds that the statements made by Salamone in the letter addressed to the Board of the Recreation Centers of Sun City, Inc. (hereafter RCSC) do not constitute a “true threat” and are therefore constitutionally protected speech.

**FACTUAL HISTORY**

Salamone is a resident of Sun City and has regularly attended meetings of the RCSC for seven years. He has actively participated and frequently expressed opinions on matters he felt were not properly addressed. On January 30, 2003, the RCSC was scheduled to hold a meeting that Salamone understood would include discussion of the possibility of foreclosing on properties to collect unpaid homeowner dues and assessments. Salamone strongly opposed such action and drafted a letter that he addressed to the RCSC and delivered prior to the meeting. The letter was left with the RCSC receptionist. He asked her to give the letter to the board members. The letter was distributed and read.

The letter reads as follows:

What is the meaning of a Membership Meeting? Not anything that I have seen in my eight years or so here. I have seen a controlling [sic.] Board and a lot of B.S. going on.

A Membership Meeting when run properly is when a motion comes up on the floor, it is to be voted on by the membership present. You say you want members to attend. Well give them a reason to attend. Like a voice in the way things are being done.

In the VFW or American Legion, we have Membership Meeting [sic.] and we give our members the right to vote. Without a voice a Membership Meeting is worthless waste of time [sic.]. Time is precious to most of us.

Now I must speak out for our future resident’s [sic.], you want to change the way our fee’s [sic.] are being paid. Well it was done before and we had a few law suits. Now we will try it again. Next thing on my

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mind is this talk about foreclosure on a person's house [sic.] I think you Board members are really [sic.] going to make trouble for yourselves [sic.] and others. Look at what happened at Ventura Lakes. You know if that happen's [sic.] to me, I may crack up and do something like that. Who knows what a person would do? Do you?

Well I hope you come to your sense's [sic.] and think before you act.

Salamone did not attend the board meeting. It is undisputed in the record that Salamone testified he had never been behind on fee payments to the RCSC and he testified that he did not intend to threaten members of the Board with his letter.

### **STANDARD OF REVIEW**

The Court will review the evidence in the light most favorable to sustaining the adjudication. *In re Julio L.*, 197 Ariz. 1, (2000). The court will not re-weigh the evidence, and will only reverse on the grounds of insufficient evidence when there is a complete absence of probative facts to support a judgment or when a judgment is clearly contrary to any substantial evidence. *State v. Sanders*, 118 Ariz. 192, 196, 575 P.2d 822, 826 (App. 1978).

### **DISCUSSION**

Salamone argues that the letter did not constitute a "true threat" that is required for prosecution under the statute.

Section 13-1202 provides, in pertinent part, as follows:

- A. A person commits threatening or intimidating if the person threatens or intimidates by word or conduct:
  - 1. To cause physical injury to another person or serious damage to the property of another....

The State argues that the letter constituted a "true threat" and points to the testimony of three Board members who testified at trial that they took the threat seriously. They further point to Salamone's reference to the events that led to the death of several members in attendance at the community board meeting in Ventura Lakes.

It is well settled that the State may penalize threats, even those consisting of pure speech, provided it is not protected speech under the First Amendment to the United States

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Constitution. In this context, the goal of the First Amendment is to protect expression that engages in some fashion in public dialogue, that is, “communication in which the participants seek to persuade, or are persuaded; communication which is about changing or maintaining beliefs, or taking or refusing to take action on the basis of one’s beliefs....” *Shackleford v. Shirley* (5<sup>th</sup> cir. 1991) 948 F. 2d 935, 938, quoting Tribe, *American Constitutional Law* (2d ed. 1988) pp. 836-837.)

A threat on the other hand, is an “expression of an intent to inflict evil, injury or damage on another.” *U.S. v. Orozco-Santillan* (9<sup>th</sup> Cir. 1990) 903 F.2d 1262, 1265.

There can be no question, especially in light of events in and outside the United States post 9/11, that the state has an interest in protecting its citizens from violence and threats of violence. Fear of violence can itself attenuate a person’s actions and behavior.

Consistent with the decision in *Orozco-Santillan*, a violation of 13-1202 (A) (1) occurs only by communicating a “true threat,” a culpable mental state that is necessarily involved in the commission of the offense. *In re Kyle*, 200 Ariz. 447 (App. 2001).

Therefore, the State must prove that Salamone uttered a “true threat” in his written comments to the Board. To do so, it must show that Salamone made a statement in a context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of an intention to inflict bodily harm upon or take the life of {a person}. *United States v. Khorrami*, 895 F. 2d 1186, 1192 (7<sup>th</sup> Cir. 1990) (quoting *United States v. Hoffman*, 806 F.2d 703, 707 (7<sup>th</sup> Cir. 1986)). Adopted in Arizona by the court, *In re Kyle*, 200 Ariz. 447, 451 (App. 2001).

Salamone wrote a letter and expressed, though in artfully, his concerns about possible repercussions if the RCSC pursued a foreclosure remedy against Sun City residents. There is no dispute that he himself had never been late in paying dues and assessments to RCSC. His statement, “You know if that happens to me, I may crack up and do something like that....” is expressly conditional and in a manner of speaking, hyperbole, as he himself was facing no such action and is unlikely to ever face such action in the future. Further, it can certainly be said that Salamone’s statement may be more properly considered a warning; expressing concern that instituting a foreclosure remedy could result in negative consequences even violent actions from those whose homes would be taken.

Given this evidence, and the fact that the Board was in a position to know that Salamone was current on all assessments and dues, a reasonable person in Salamone’s position would not foresee that his words would be taken as a serious expression of an intent to inflict bodily harm.

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The State's argument that the Appellant's statement was a "true threat" as evidenced by the reaction of Board members is misplaced. The reaction of the recipients and their subjective opinions of whether the statement is a threat is not the issue in determining whether there has been a violation of the statute in question. The "true threat" doctrine is a reasonable person standard as applied to the person uttering the statement. In this case, Salamone knew that he was not behind in any payments to the board, knew that the Board was in a position to know such information and conditioned his statement on something that would not happen, certainly not with any immediacy.

For these reasons:

IT IS ORDERED reversing the decision of the trial court and vacating the judgment of guilt.

IT IS FURTHER ORDERED remanding this case back to the Peoria Justice Court for action consistent with this ruling.

/ s / JUDGE PRO TEM GERALD PORTER

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JUDICIAL OFFICER OF THE SUPERIOR COURT