Are “Fighting Words” Protected Under the First Amendment?

Description

I am sure you are no stranger to the fact that there are certain members of your community that feel strongly against the police. Everyday we hear anti-police rhetoric and learn about groups that want to defund the police. We also find out about people like our suspect today who simply wanted to rile law enforcement up and film it. Coming to us from the Sixth Circuit, our case today deals with First Amendment Rights and “fighting words”.

The Supreme Court has defined fighting words as words that, “by their very utterance inflict injury or tend to incite an immediate breach of the peace.” It is a hard thing to prove in court and there are many exceptions to the rule, but as officers we are held to a higher standard when handling these types of utterances. Let’s dive into today’s case and see if Mr. Wood’s actions and words were an exception to the rule.

Facts

In July 2016, Michael Wood went to the Clark County Fair wearing a shirt that said, “F**k the Police.” A few hours after Wood arrived, the Sheriff’s department received a call complaining about his shirt. Deputies approached Wood and asked him to identify himself, but Wood declined to do so. Wood attempted to record the encounter but stopped when he realized his camera was not working and walked away.

Several hours later, six deputies and Dean Blair, the Executive Director of the county fairgrounds, approached Wood. Wood was no longer wearing the shirt in question. Blair asked Wood, “Where’s this shirt? I want to see this shirt.” Blair then asked Wood if he had changed. Wood did not answer but instead asked if he had committed a crime or was being detained. Blair replied that he wanted Wood to leave, that Wood was not welcome, and that Wood needed to get off the fairgrounds. Wood agreed to leave if his admission fee was refunded. After Blair refunded Wood’s admission fee, Blair and the officers escorted Wood to an exit.

While being escorted to an exit, Wood voiced many profane and harsh insults towards Blair and the officers. The officers eventually arrested Wood for disorderly conduct under Ohio Rev. Code § 2917.11(A)(2) and obstructing official business under § 2921.31. The prosecutor later dismissed both charges.

Wood sued the six officers involved in his arrest under 42 U.S.C. § 1983. Wood alleged that: (1) the officers violated the Fourth Amendment because they arrested him without probable cause; and (2) the officers arrested him in retaliation for the words on his shirt, which were protected speech under the First Amendment. The district court held that the officers were entitled to qualified immunity regarding Wood’s false arrest claim and dismissed Wood’s second claim, ruling that there was insufficient evidence of retaliation by the officers. Wood appealed.

Sixth Circuit Court Opinion

The Sixth Circuit Court of Appeals found that the Ohio Supreme Court has clearly established that a person may not be punished for disorderly conduct unless the speech in question constitutes “fighting words.” However, the fighting words exception is very limited because it is inconsistent with the general principles of free speech guaranteed by the First Amendment. The court then noted that this limitation is reflected in Ohio’s disorderly conduct statute and the First Amendment, which both require more than the use of profanity, by itself, to establish a criminal offense. The court added that police officers are held to a higher standard than average citizens, because the First Amendment requires that they tolerate “coarse criticism.”

The officers argued that they had probable cause to arrest Wood for disorderly conduct because his language consisted of personally abusive labels that constituted fighting words. The officers claimed their position was supported by body camera footage which captured Wood referring to them at various time during the encounter as “thugs with badges,” “f**king thugs with guns,” “f**king thugs with badges,” “six b***h ass f**king pigs,” “dirty rat b****rds,” and “eight p*****s with badges,” among other things.

The court cited prior cases, in which it had found that use of profanity toward police officers without other conduct did not rise to the level of fighting words because these monikers were no more than “coarse criticism.” The court then cited cases in which behavior involving more than mere epithets established probable cause for a disorderly conduct arrest. For example, a man who told an officer, “I’ll rip your head off,” and a man who waved his finger approximately one-inch from the faces of officers after being warned to stop, were both properly charged with disorderly conduct.

In this case, while Wood’s speech was profane, the court concluded that the circumstances did not create a situation where violence was likely to result. The court commented that none of the officers reacted with violence or appeared to view Wood’s words as an invitation to engage in a physical confrontation. As a result, the court held that the First Amendment protected Wood’s speech; therefore, the officers did not have probable cause to arrest him for disorderly conduct.

In addition, the court found that Wood’s right to be free from false arrest was clearly established; therefore, the officers were not entitled to qualified immunity. The court added that this conclusion was consistent with those of the Seventh, Eighth, and Ninth circuits, which have considered similar issues.

Concerning Wood’s First Amendment retaliation claim, the court had to consider whether Wood’s shirt was “a substantial or motivating factor” in the officers’ decision to arrest him. The court held that the district court improperly dismissed this count in Wood’s lawsuit. The court based its ruling on the fact that the parties disputed whether Wood’s shirt “was a substantial or motivating factor” in the decision to arrest Wood. The officers claimed that they removed Wood from the fairgrounds because he was filming people. On the other hand, Wood alleged that Blair walked up behind him flanked by the officers and yelled, “Where’s the shirt? I want to see the shirt.” In addition, while driving to the jail, Wood claimed that an officer said to Wood, “How’s that work? You got a shirt that said, ‘f the police,’ but you want us to uphold the Constitution?” The court held that a reasonable jury, considering these facts, could conclude the officers were motivated to confront Wood and require him to leave the fairgrounds, in part, because of the words on his shirt.

Takeaways

The takeaway is pretty obvious here: yes, there are going to be people who get in your face and say horrible things; but that does not mean that you can arrest them. In an age where everyone has a phone and is just trying to go viral as quickly as possible, know that you are being held to a higher standard with even more scrutiny. This case applied Ohio Case law in its argument, but the Court noted that this ruling is consistent across the board, including in the Seventh, Eighth, and Ninth circuits. As always, check your local statutes to ensure that you fully understand what constitutes disorderly conduct and what obnoxious behavior may be protected.

Wood v. Eubanks, 25 F.4th 414 (6th Cir. 2022)

Date Created
07/25/2022