

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 23, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

No. 99-3149-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

JONATHAN R. BRISTOL,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Brown County: WILLIAM C. GRIESBACH, Judge. *Affirmed.*

¶1 HOOVER, P.J.¹ Jonathan R. Bristol appeals a judgment convicting him of possession of THC, contrary to WIS. STAT. § 961.41(3g)(e), and an order denying his motion to suppress. The parties identify the issue before this court as

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f). All references to the Wisconsin Statutes are to the 1997-98 version.

whether the act by an occupant of a vehicle of yelling "You fucking pigs" at a law enforcement officer provides the officer with reasonable suspicion sufficient to justify an investigatory stop of the vehicle. Bristol contends that because his speech was protected by the First Amendment, it could not be prosecuted as a crime, and thus could not properly form reasonable suspicion for a traffic stop. He further contends that the marijuana discovered as a result of the illegal seizure must be suppressed.

¶2 This court concludes that the act provided the officer with probable cause that Bristol engaged in the crime of disorderly conduct. The officer was thus justified in stopping the motor vehicle, and any evidence obtained as a result of the stop was not tainted. Therefore, the order and judgment are affirmed.

FACTS

¶3 Bristol was one of four occupants in an automobile that was southbound on North Webster Avenue in the City of Green Bay. Green Bay police officer Joseph Merrill and field training officer Eric Allen were northbound on Webster in a marked squad car, on their way to follow up on an investigation. As the Bristol vehicle passed the squad car, Merrill heard someone yell² in a very loud voice, "You fucking pigs." The statement came from the direction of the Bristol vehicle. Merrill immediately turned, looked at the vehicle, and saw the four occupants looking in the direction of the squad car and laughing. Bristol was pointing in the officers' direction. Merrill immediately turned the squad car around, pursued and stopped the Bristol vehicle. He informed the driver that she

² Merrill also characterized the manner in which the words were communicated as a "shout" and as "screaming."

was stopped because of her passenger's disorderly conduct. The driver agreed that the passenger had been "out of line." During a consent search, Allen discovered a small amount of marijuana under Bristol's seat.

STANDARD OF REVIEW

¶4 The material facts are not disputed. The application of facts to constitutional principles is a question of law that this court reviews de novo. *See State v. Woods*, 117 Wis. 2d 701, 715, 345 N.W.2d 457 (1984).

ANALYSIS

¶5 Bristol argues that "yelling" the abusive profanity he directed at Merrill involved the exercise of protected speech and therefore, as a matter of law, could not constitute reasonable suspicion that Bristol engaged in disorderly conduct. In support of his contention, Bristol cites, among others, United States Supreme Court cases that considered the interplay between laws purporting to criminalize speech and the First Amendment.³ Of these Supreme Court cases, only *Lewis v. City of New Orleans*, 415 U.S. 130 (1974), even remotely approaches the issue whether screaming abusive profanities at a law enforcement officer may be criminalized. That case, however, concerned an overbreadth challenge to a statute substantially more far-reaching than Wis. STAT. § 947.01

³ See, e.g., *Lewis v. City of New Orleans*, 415 U.S. 130 (1974); *Hess v. Indiana*, 414 U.S. 105 (1973); *Gooding v. Wilson*, 405 U.S. 518 (1972); *Cohen v. California*, 403 U.S. 15 (1971). Bristol provides brief recitations of the ultimate holding in each of these cases, but offers no analysis as to the reasoning employed and why they inform on or control the precise issue before this court. This court will not develop an appellant's amorphous arguments for him. *See Barakat v. DHSS*, 191 Wis. 2d 769, 786, 530 N.W.2d 392 (Ct. App. 1995).

and therefore offers no guidance.⁴ Ultimately, Bristol provides no authority to support his major premise. Consequently, we reject his argument.

¶6 This court interprets Bristol's next contention to be that his shouted epithet was not of a character likely to provoke Merrill to engage in retaliatory conduct or to disturb the general public. In this regard, Bristol relies on Merrill's status as a law enforcement officer for the tacit proposition that officers must expect to withstand verbal abuse in light of the public's freedom of expression. He also asserts that there were no pedestrians present in the street at the time of the stop.⁵ Taking Bristol's argument to its unstated conclusion, Merrill could not have

⁴ The ordinance in *Lewis* proscribed wantonly cursing or reviling or using obscene or opprobrious language toward or with reference to a police officer while in the performance of his or her duties.

⁵ The testimony is ambiguous in this regard. Merrill testified at the motion hearing as follows:

Q: Did you notice if there were any pedestrians on the street as you made the stop?

A: As I made the stop, no.

Q: You didn't notice or there weren't any?

A: I didn't notice.

Q: I asked the question poorly. Let me try again, I'm stepping over your words, I apologize. You didn't notice any other pedestrians on the street while you made the stop; is that right?

A: No, not at the point that I made the stop.

It is unclear that Merrill's testimony established that there were no pedestrians "on the street while [he] made the stop." Literally all that can be said is that Merrill did not notice any. In any event, Merrill's testimony is obviously factually irrelevant. Bristol was alleged to have engaged in disorderly conduct before, and not at the time of, the stop. There was no testimony as to the presence of pedestrians at the time of the shouting.

had a reasonable suspicion of a WIS. STAT. § 947.01 violation because the second element is not satisfied.⁶ Bristol's argument misconstrues the law.

¶7 It is not necessary that a public disturbance actually resulted, nor is it necessary that Merrill was actually provoked to retaliate. The law requires only that the conduct be of a type that tends to cause or provoke a disturbance, that is, has the tendency to disrupt good order under the circumstances as they then existed. *See City of Oak Creek v. King*, 148 Wis. 2d 532, 544-45, 436 N.W.2d 285 (1989). Moreover, in Wisconsin, the rule is well-settled: "The fact that the abusive language is directed to a policeman or other law-enforcement officer and is not overheard by others does not prevent it from being a violation of such statute or ordinance." *Lane v. Collins*, 29 Wis. 2d 66, 72, 138 N.W.2d 264 (1965). Although, as the trial court appreciated, there is inherent tension between WIS. STAT. § 947.01 and the First Amendment, this court is bound by the supreme court's decisions. *State v. Lossman*, 118 Wis. 2d 526, 533, 348 N.W.2d 159 (1984). This court concludes that Bristol's statement, especially in the manner communicated, was of a type that tends to cause or provoke a disturbance.

⁶ WISCONSIN STAT. § 947.01 provides: "Whoever, in a public or private place, engages in violent, abusive, indecent, profane, boisterous, unreasonably loud or otherwise disorderly conduct under circumstances in which the conduct tends to cause or provoke a disturbance is guilty of a Class B misdemeanor."

There are two distinct elements of disorderly conduct under WIS. STAT. § 947.01. *See City of Oak Creek v. King*, 148 Wis. 2d 532, 540, 436 N.W.2d 285 (1989); *State v. Givens*, 28 Wis. 2d 109, 115, 135 N.W.2d 780 (1965). "First, the conduct must be of the type enumerated in the statute or similar thereto in having a tendency to disrupt good order. Second, the conduct must be engaged in under circumstances which tend to cause or provoke a disturbance." *King*, 148 Wis. 2d at 540.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.

