HESS v. INDIANA

SUPREME COURT OF THE UNITED STATES
414 U.S. 105
November 19, 1973
[6 - 3]

OPINION: PER CURIAM...Gregory Hess appeals from his conviction in the Indiana courts for violating the State's **disorderly conduct** statute. Appellant contends that his conviction should be reversed because the statute is unconstitutionally vague...because the statute is overbroad in that it forbids activity that is protected under the First and Fourteenth Amendments...and because the statute, as applied here, abridged his constitutionally protected freedom of speech. These contentions were rejected in the City Court...and...the Superior Court...The Supreme Court of Indiana...affirmed his conviction.

The events leading to Hess' conviction began with an **antiwar demonstration** on the campus of Indiana University. In the course of the demonstration, approximately 100 to 150 of the demonstrators moved onto a public street and blocked the passage of vehicles. When the demonstrators did not respond to verbal directions from the sheriff to clear the street, the sheriff and his deputies began walking up the street, and the demonstrators in their path moved to the curbs on either side, joining a large number of spectators who had gathered. Hess was standing off the street as the sheriff passed him. The sheriff heard Hess utter the word "fuck" in what he later described as a loud voice and immediately arrested him on the disorderly conduct charge. It was later stipulated that what appellant had said was "We'll take the fucking street later," or "We'll take the fucking street again." Two witnesses who were in the immediate vicinity testified, apparently without contradiction, that they heard Hess' words and witnessed his arrest. They indicated that Hess did not appear to be exhorting the crowd to go back into the street, that he was facing the crowd and not the street when he uttered the statement, that his statement did not appear to be addressed to any

particular person or group, and that his tone, although loud, was no louder than that of the other people in the area.

Indiana's disorderly conduct statute was applied in this case to punish only spoken words. It hardly needs repeating that "the constitutional guarantees of freedom of speech forbid the States to punish the use of words or language not within 'narrowly limited classes of speech.'" The words here did not fall within any of these "limited classes." In the first place, it is clear that the Indiana court specifically abjured any suggestion that Hess' words could be punished as obscene under *Roth v. United States*[1] and its progeny. Indeed, after *Cohen v. California (1971)*[2], such a contention with regard to the language at issue would not be tenable.

We will eventually get to the law as it relates to free speech and obscenity. For now, all we need to know is that these words "could not be punished as obscene," at least in this context. We will seek the "why not" reasoning down the road.

By the same token, any suggestion that Hess' speech amounted to "fighting words," *Chaplinsky v. New Hampshire*[3], could not withstand scrutiny.

Again, we will eventually get to the "fighting words" issue. There is no easy way to ease into this broad topic of "free speech."

Even if under other circumstances this language could be regarded as a personal insult, the evidence is undisputed that Hess' statement was not directed to any person or group in particular. Although the sheriff testified that he was offended by the language, he also stated that he did not interpret the expression as being directed personally at him, and the evidence is clear that appellant had his back to the sheriff at the time. Thus, under our decisions, the State could not punish this speech as "fighting words." *Cantwell v. Connecticut.*[4]

In addition, there was no evidence to indicate that Hess' speech amounted to a public nuisance in that privacy interests were being invaded. "The ability of government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it is...dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner." *Cohen v. California.* The prosecution made no such showing in this case.

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[1]Case 1A-S-10 on this website.

[2]Case 1A-S-20 on this website.

[3]Case 1A-S-8 on this website.

[4]Case 1A-R-3 on this website.

The Indiana Supreme Court placed primary reliance on the trial court's finding that Hess' statement "was intended to incite further lawless action on the part of the crowd in the vicinity of appellant and was likely to produce such action." At best, however, the statement could be taken as counsel for present moderation; at worst, it amounted to nothing more than advocacy of illegal action at some indefinite future time. This is not sufficient to permit the State to punish Hess' speech. Under our decisions, "the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing ***imminent* lawless action** and is **likely to incite or produce such action**." *Brandenburg v. Ohio*[5]. Since the uncontroverted evidence showed that Hess' statement was not directed to any person or group of persons, it cannot be said that he was advocating, in the normal sense, any action. And since there was no evidence, or rational inference from the import of the language, that his words were intended to produce, and likely to produce, ***imminent*** disorder, those words could not be punished by the State on the ground that they had "a 'tendency to lead to violence.'"

Accordingly,...the judgment of the Supreme Court of Indiana is reversed.

It would appear we have come full circle from *Schenck*.

DISSENT: Justice Rehnquist/Burger/Blackmun...Certain facts are clearly established. Appellant was arrested during the course of an antiwar demonstration conducted at Indiana University in May 1970. The demonstration was of sufficient size and vigor to require the summoning of police, and both the Sheriff's Department and the Bloomington Police Department were asked to help university officials and police remove demonstrators blocking doorways to a campus building. At the time the sheriff arrived, "approximately 200-300 persons" were assembled at that particular building.

The doorways eventually were cleared of demonstrators, but, in the process, two students were placed under arrest. This action did not go unnoticed by the demonstrators. "[I]n apparent response to these arrests, about 100-150 of the persons who had gathered as spectators went into Indiana Avenue in front of Bryan Hall and in front of the patrol car in which the two arrestees had been placed." Thus, by contrast to the majority's somewhat antiseptic description of this massing as being "in the course of the demonstration," the demonstrators' presence in the street was not part of the normal "course of the demonstration" but could reasonably be construed as an **attempt to intimidate and impede** the arresting officers. Furthermore,...the demonstrators "did not respond to verbal directions" from the sheriff to clear the street. Thus, the sheriff and his deputies found it necessary to disperse demonstrators by walking up the street directly into their path. Only at that point did the demonstrators move to the curbs...

Sheriff Thrasher arrested...Gregory Hess for disorderly conduct. The remainder of the stipulation merely summarizes testimony, particularly the testimony of Sheriff Thrasher, two female witnesses

[5]Case 1A-S-17 on this website.

(both students at Indiana University) who were apparently part of the crowd, and Dr. Owen Thomas, a professor of English at the university. The only "established" facts which emerge from these summaries are that "Hess was standing off the street on the eastern curb of Indiana Avenue" and that he said, in the words of the trial court, "We'll take the fucking street later (or again)." The two female witnesses testified, as the majority correctly observes, that they were not offended by Hess' statement, that it was said no louder than statements by other demonstrators, "that Hess *did not appear* to be exhorting the crowd to go back into the street," that he was facing the crowd, and "that his statement *did not appear* to be addressed to any particular person or group."

The majority makes much of this "uncontroverted evidence," but I am unable to find anywhere in the opinion an explanation of why it must be believed. Surely the sentence "We'll take the fucking street later (or again)" is susceptible of characterization as an exhortation, particularly when uttered in a loud voice while facing a crowd. The opinions of two defense witnesses cannot be considered *proof* to the contrary, since the trial court was perfectly free to reject this testimony if it so desired. Perhaps, as these witnesses and the majority opinion seem to suggest, appellant was simply expressing his views to the world at large, but that is surely not the only rational explanation.

The majority also places great emphasis on appellant's use of the word "later," even suggesting at one point that the statement "could be taken as counsel for present moderation." The opinion continues: "At worst, it amounted to nothing more than advocacy of illegal action at some indefinite future time." **From that observation, the majority somehow concludes that the advocacy was not directed towards inciting imminent action.** But whatever other theoretical interpretations may be placed upon the remark, there are surely possible constructions of the statement which would encompass more or less immediate and continuing action against the harassed police. They should not be rejected out of hand because of an unexplained preference for other acceptable alternatives.

The simple explanation for the result in this case is that the majority has interpreted the evidence differently from the courts below. In doing so, however, I believe the Court has exceeded the proper scope of our review...[T]he Court has...fashioned its own version of events from a paper record, some "uncontroverted evidence," and a large measure of conjecture. Since this is not the traditional function of any appellate court, and is surely not a wise or proper use of the authority of this Court, I dissent.