STATE OF MICHIGAN

IN THE INGHAM COUNTY 30th CIRCUIT COURT

GENERAL TRIAL DIVISION

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JARED RAPP,

Defendant-Appellant.
/

OPINION AND ORDER

Hon. Paula J.M. Manderfield

District Court No.: 08-4850-SM

Circuit Court No.: 09-639-AR

Defendant-Appellant ("Appellant") challenges the constitutionality of MSU Ordinance 15.05, based on it being overbroad and violative of his First Amendment right to free speech. The Court finds, for the reasons set forth herein, that the trial court erred in denying Appellant's motion to dismiss and in denying Appellant's motion JNOV, both of which were based on this argument. Accordingly, the Court reverses Appellant's conviction and dismisses the charges.

FACTS

In September 2008, a Michigan State University Parking Enforcement employee, Ricardo Rego ("Rego"), was given a work assignment to issue parking citations in the Shaw Ramp on the MSU campus. While Rego was in the process of arranging for an unrelated vehicle to be towed from the ramp, Appellant approached Rego and engaged in a five-minute, allegedly heated conversation

with Rego concerning a parking citation Appellant had just received. This conversation included Appellant demanding to know Rego's name, and taking Rego's picture with his cell phone. Because he feared the confrontation might turn violent, Rego called for back up.

While he waited for back up to arrive, Rego completed the paperwork necessary to process the tow. Once back up arrived, Appellant was charged with violation of MSU ordinance 15.05. That ordinance makes it a violation "to disrupt the normal activity or molest the property of any person, firm, or agency while that person, firm, or agency is carrying out service, activity or agreement for or with" MSU.

Prior to trial, defense counsel brought a motion to dismiss the case, arguing that the ordinance under which Appellant was charged was unconstitutionally overbroad on its face and as applied to Appellant. The trial court denied that motion.

The case then proceeded to trial, and at the close of the prosecution's case, defense counsel moved for a directed verdict, arguing that the prosecution had failed to prove beyond a reasonable doubt the element of disruption. The trial court denied this motion and Appellant was subsequently convicted of violating the ordinance.

Prior to sentencing, defense counsel moved for a judgment notwithstanding the verdict, again arguing that the ordinance that Appellant had been convicted of violating was unconstitutionally overbroad. The trial court denied this motion and Appellant was sentenced to probation. The trial court granted Appellant a stay of enforcement of the order of probation pending appeal to this Court.

Appellant now raises four arguments: (1) the ordinance under which Appellant was convicted is unconstitutionally overbroad on its face; (2) the ordinance is unconstitutional in its application to Appellant; (3) the trial court abused its discretion in allowing the prosecution to introduce evidence of prior traffic citations received by Appellant and Appellant's history of appealing those citations; and (4) the trial court erred in denying Appellant's motion for a directed verdict.

STANDARD OF REVIEW

A trial court's decision on the constitutionality of an ordinance is reviewed de novo.[1]

ANALYSIS

Appellant asserts that MSU Ordinance 15.05 is unconstitutionally overbroad on its face. In *City of Houston, Texas v Hill*,[2] the U.S. Supreme Court set forth the analysis to be employed in resolving a claim that a statute is facially overbroad and vague. That Court stated as follows:

> The elements of First Amendment overbreadth analysis are familiar. Only a statute that is substantially overbroad may be invalidated on its face. We have never held that a statute should be held invalid on its face merely because it is possible to conceive of a single impermissible application. . . . Instead, in a facial challenge to the overbreadth and vagueness of a law, a court's first task is to determine whether the enactment reaches a substantial amount of constitutionally protected conduct. Criminal statutes must be scrutinized with particular care; those that make unlawful a substantial amount of constitutionally protected conduct may be held facially invalid even if they also have legitimate application.[3]

1 *People v Rogers*, 249 Mich App 77, 94; 641 NW2d 595 (2001).
2 *City of Houston, Texas v Hill*, 482 US 451, 458-459; 107 S Ct 2502; 96 L Ed 2d 398 (1987).
3 *Id.* (Internal quotation marks and citations omitted).

In that case, the plaintiff had been charged with, but acquitted of violating, a municipal ordinance which held that it was "unlawful for any person to assault, strike or in any manner oppose, molest, abuse or interrupt any policeman in the execution of his duty, or any person summoned to aid in making an arrest."[4] The plaintiff then brought an action seeking, among other relief, declaratory judgment that the ordinance was unconstitutional.

The Court first noted that the enforceable portion of the statute made it unlawful for any person to "in any manner oppose, molest, abuse or interrupt" a policeman in the execution of his duty, and not the portion of the statute that prevented a person assaulting or striking a police officer, because the portion making it unlawful to assault or strike a police officer was pre-empted by the state penal code. Accordingly, the Court noted that the enforceable portion of the statute dealt not with core criminal conduct, but rather with speech.[5] The Court then went on to discuss the scope of First Amendment protection, stating as follows:

> [T]he First Amendment protects a significant amount of verbal criticism and challenge directed at police officers. Speech is often provocative and challenging . . . . [but it] is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest. In [one recent case], for example, the appellant was found to have yelled obscenities and threats at an officer who had asked appellant's husband to produce his driver's license. Appellant was convicted under a municipal ordinance that made it a crime for any person wantonly to curse or revile or to use obscene or opprobrious language toward or with reference to any member of the city police while in the actual performance of his duty. We vacated the conviction and invalidated the ordinance as facially overbroad. Critical to our decision was the fact that the ordinance punished only spoken words and was not limited in scope to fighting words that by their very utterance inflict injury or tend to incite an immediate breach of the peace. Moreover, in a concurring opinion . . . [Justice Powell] suggested that even the fighting words exception . . . might require a narrower application in cases involving words addressed to a police officer, because a

4 *Id.* at 455.
5 *Id.* at 460-461.

> properly trained officer may reasonably be expected to exercise a higher degree of restraint than the average citizen, and thus be less likely to respond belligerently to fighting words.[6]

The Court noted that the ordinance at issue in the *Houston* case was much more sweeping than the ordinance struck down in the case it had just discussed, because it was not limited to fighting words nor even to obscene or opprobrious language, but rather prohibited speech that in any manner interrupted an officer. The Court found explicitly that the constitution did not allow such speech to be made a crime, stating emphatically:

> The freedom of individuals verbally to oppose or challenge police action without thereby risking arrest is one of the principal characteristics by which we distinguish a free nation from a police state.[7]

The Court then went on to explain that their decision did not leave municipalities powerless to punish physical obstruction of police action, and that such conduct might constitutionally be punished under a properly tailored statute. What a municipality may **not** do, the Court explained, is to attempt to punish such conduct by broadly criminalizing speech directed to an officer, such as in the *Houston* case where the city authorized the police to arrest a person who in any manner verbally interrupted an officer.[8] Because the ordinance in question in that case was not narrowly tailored to prohibit only disorderly conduct or fighting words, and thereby criminalized a substantial amount of constitutionally protected speech and accorded the police unconstitutional discretion in enforcement, the Court found that the ordinance was constitutionally overbroad on its face.[9]

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6 *Id.* at 461-462 (Internal quotation marks and citations omitted).
7 *Id.* at 462-463.
8 *Id.* at 463.

Here, as noted above, the ordinance under which Appellant was charged and convicted made it unlawful for a person to "disrupt the normal activity or molest the property of any person, firm, or agency while that person, firm, or agency is carrying out service, activity or agreement for or with" MSU.[10] While the ordinance, by barring any person from "[molesting] the property" of a person, firm, or agency connected with MSU, obviously criminalizes core criminal activity, the ordinance, by barring any person from "[disrupting] the normal activity" of such a person, firm, or agency just as obviously criminalizes an extremely broad range of speech. Moreover, just as in *Houston, supra*, there is nothing in the ordinance that tailors the rule to prohibit only disorderly conduct or fighting words. Thus, in this instance a demand for the name of the individual who was issuing the parking citations was sufficient to result in violation of the statute. Moreover, again just as in *Houston, supra*, the ordinance accords the police unconstitutional discretion in enforcement, because the question of what constitutes "disrupting the normal activity" of someone associated with MSU is an extremely subjective determination.

The Court notes that Appellee has pointed to a number of cases in an attempt to establish that ordinances similar to the one challenged here have been found not to be unconstitutionally vague.[11] None of those cases, however, are binding on this Court or factually similar to the case at bar.

Under the circumstances, the Court is persuaded that MSU Ordinance 15.05, like the ordinance at issue in *Houston, supra*, is unconstitutionally overbroad on its face. In light of this finding, the Court declines to consider the remaining arguments Appellant has raised.

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9 *Id.* at 466-467.
10 MSU Ordinance 15.05.
11 Specifically, *State v Linares*, 232 Conn 345; 655 A 2d 737 (1995); *Lawrence v 48th District Court*, 560 F 3d 475 (CA 6, 2009); *State v Bower*, 725 NW2d 435 (Iowa 2006); *City of Seattle v Patu*, 108 Wn App 364; 30 P3d 522 (2001); *Wilkerson v State*, 556 So2d 453 (Fla App 1990); *Rendon v Transportation security Administration*, 424

The Court notes that Appellant also has filed a motion requesting that the Court prohibit Appellee's oral argument based on Appellee's violation of MCR 7.101. MCR 7.101(I)(1) provides that an Appellee who wishes to file a brief on appeal must do so within 21 days after the appellant's brief is served on the Appellee. MCR 7.101(K) provides that only a party who has timely filed his or her brief is entitled to oral argument. Here, Appellant filed his brief with the Court and served it on Appellee on July 8, 2009. Appellee, however, filed its brief on August 10, 2009, some 33 days after being served. Accordingly, the Court finds that, pursuant to MCR 7.101(K) Appellee is not entitled to oral argument.

Finally, the Court notes that Appellant has also filed a Motion for Peremptory Reversal and a Motion to Strike Non-Conforming Brief. In light of the Court's rulings above, however, it is unnecessary for the Court to consider these motions.

ORDER

IT IS HEREBY ORDERED that MSU Ordinance 15.05 is found to be facially unconstitutional.

IT IS FURTHER ORDERED that Appellant's conviction is **REVERSED** and the charges against him are **DISMISSED WITH PREJUDICE.**

This decision resolves the last pending claim and closes this case.

Dated: October 1, 2009.

Hon. Paula J.M. Manderfield (P-34319)
Circuit Court Judge

F3d 475 (CA 6, 2005); *Fair v City of Galveston*, 915 F Supp 873 (SD Texas 1996).

PROOF OF SERVICE

I hereby certify that I served a copy of the Opinion and Order upon Guy L. Sweet and J. Nicholas Bostic by placing said order in an envelope and placing same for mailing with the United States Mail at Lansing, Michigan, on October 1, 2009.

Jean M Smydra

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