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NJ Justices Dodge Constitutionality of Anti-Cursing Statute

By Michael Booth

The New Jersey Supreme Court has opted not to rule on whether a century-old statute that criminalizes the habitual use of “profane, indecent or obscene” language in the presence of a minor violates constitutional free-speech guarantees.

In a unanimous ruling in *State v. Tate* on Feb. 2, the court said it did not have to address the constitutional challenge because a defendant who pleaded guilty to violating the statute did not go into enough detail about the language he used.

Justice Barry Albin, writing for the court, said Superior Court Judge Thomas Manahan should have engaged the defendant, John Tate, in a more in-depth colloquy as to the frequency of his bad language, and exactly what language he used in front of a 13-year-old foster child that was in his care.

“Our conclusion that the factual basis was inadequate to support the guilty plea does not require that we reach the constitutional questions that have been raised: whether the statute treads on free-speech rights and whether the statute is so hopelessly vague that a reasonable person would not have notice of the conduct that is proscribed,” Albin said.

Tate pleaded guilty in 2009 to a one-count charge of child abuse, N.J.S.A. 9:6-3, by violating the 1915 statute prohibiting the habitual use of curse words in the presence of a minor, N.J.S.A. 9:6-1(d). Although he voluntarily pleaded guilty, he later opted to challenge the constitutionality of the anticursing statute.

The statute prohibits the “habitual use ... in the hearing of [the] child, of profane, indecent or obscene language.”

In his guilty plea, Tate said he “cursed” often “in a way that would debauch his morals” and that he used “off-color” language. Albin said Manahan should have probed further.

“During the brief colloquy, defendant was not asked to repeat the offending language or the frequency with which he used the language,” Albin said. “The court did not assess whether defendant’s conception of a curse word or off-color language was equivalent to the statutory language prohibited by N.J.S.A. 9:6-1(d).”

“In short, the court could not—based on the plea colloquy—determine that defendant admitted to committing the crime of child abuse,” Albin said.

Tate’s attorney, Jersey City solo Michael Pastacaldi, said he was not disappointed that the court chose not to address the constitutional issue.

Rather, he said he was pleased the court made it clear that guilty pleas must be accompanied by an unambiguous factual foundation.

“The ruling keeps intact a very important rule: You have to get the defendant to say words,” Pastacaldi said. “You have to speak the words that make you guilty of the crime.”

When judges are rushed and hurried and accept guilty pleas without getting that factual foundation, “that’s when you get into trouble,” Pastacaldi said. “The court is saying, ‘This is an important rule and we’re not going to hedge on it.’”



MICHAEL PASTACALDI

Indeed, Albin stressed that point in the ruling.

“At a trial, the fact-finder must be satisfied that the proofs establish guilt; at a plea hearing, a judge must be satisfied that the defendant has given a factual account that makes him guilty of the crime,” Albin said. “Here, defendant was never asked precisely what words he uttered that fit the statutory language.”

“Eliciting an adequate factual basis should not be a complex or difficult undertaking if defendant is willing and able to give a truthful account of the conduct that violates a statute,” Albin said.

Because there was an inadequate colloquy, Albin said, it was not possible for the court to determine whether Tate did, in fact, violate the statute.

Merely telling the judge that he cursed frequently in front of the minor was not enough, Albin said.

“Curse words and off-color language many



PHOTO BY CARMEN NATALE

BARRY ALBIN

times will be synonymous with profane, indecent or obscene language, but not always,” Albin said. “Conceptions of what constitutes a curse word—even ones that debauch the morals of a minor—and off-color language may differ among reasonable people.

“What is profane or indecent may depend on social norms that are fluid,” Albin said.

Tate originally was indicted in October 2003 on charges of first-degree sexual assault on a minor, second-degree endangering the welfare of a child and third-degree sexual contact with a child, according to court documents. If convicted, he could have been sentenced to up to 20 years in prison.

Prosecutors alleged that he engaged in sexual acts with the boy between September and November 1999, when the youth was his foster son.

In June 2009, prosecutors gave Tate a one-day offer to plead guilty to the statute that he eventually challenged. He agreed to plead guilty and did so. As part of the plea bargain, Manahan sentenced Tate to 1,231 days in prison, which Tate had already served after he was originally indicted and was unable to post bail.

Tate attempted to withdraw his plea before being sentenced, but Manahan rejected the motion and said Tate had voluntarily agreed to plead guilty. In March 2013, Appellate Division Judges Margaret Hayden and Joseph Lisa said they saw no reason to overturn Manahan’s ruling, and the Supreme Court then agreed to hear his appeal.

The court vacated Tate’s plea and reinstated the full indictment.

Pastacaldi said Tate knew that was a possibility when he decided to pursue the right to have his guilty plea withdrawn.

“He has always maintained his innocence,” Pastacaldi said.

Officials from the Morris County Prosecutor’s Office could not be reached for comment.

Contact the reporter at mbooth@alm.com.