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Disorderly Conduct: Why are these Cases being Dropped?

By: David Stamey: Assistant State Attorney

Prosecutors are often asked by law enforcement why their disorderly conduct cases are frequently dropped. The answer is that although the defendant's conduct seems disorderly, under the law the conduct is many times protected by the First Amendment to the United States Constitution. In 1959, Florida Statutes Section 877.03 was created and has ever since been known as the Disorderly Conduct law. In its current form it states that "Whoever commits such acts as are of a nature to corrupt the public morals, or outrage the sense of public decency, or affect the peace and quiet of persons who may witness them, or engages in brawling or fighting, or engages in such conduct as to constitute a breach of the peace or disorderly conduct, shall be guilty of a misdemeanor of the second degree, punishable as provided in s. 775.082 or s. 775.083. Unlike other criminal statutes that are very specific in describing the acts that are prohibited, the disorderly conduct statute is more general. As a result, disorderly conduct charges come from many very diverse fact patterns. There are three different types of behavior that support the charge of disorderly conduct: conduct based on actions alone, conduct based on speech alone, and conduct based on a combination of both actions and speech.

Assistant State Attorney, David Stamey has been with our office for 15 years.

Actions Amounting to Disorderly Conduct

In analyzing what behavior supports a good disorderly conduct case, the best place to start is non-verbal conduct. Some acts alone have been found to be in violation of the disorderly conduct statute; however they are routinely charged under other more specific statutes. From a plain reading of the statute, it is clear that fighting or brawling in public places is a violation of this statute. However, this act is routinely charged as an affray under section 870.01. In addition, the statute indicates that the legislature intended to prevent corruption of the public morals. As such, appellate courts have found that females appearing in public places with openly exposed breasts are in violation of the disorderly conduct law. However this conduct is often filed, when shown to be lewd, as an exposure of sexual organs charge pursuant to section 800.03.

Speech Amounting to Disorderly Conduct

The next category of disorderly conduct is based on purely verbal conduct. In 1976, in a case called *State v. Saunders*, the Florida Supreme Court gave a narrow, restrictive construction to the language of section 877.03. In it the Court Stated:

"In light of these considerations, we now limit the application of Section 877.03 so that it shall hereafter only apply either to words which 'by their very utterance… inflict injury or tend to incite an immediate breach of the peace'; or to words known to be false, reporting some physical hazard in circumstances where such a report creates a clear and present danger of bodily harm to others. We construe the statute so that no words except 'fighting words' or words like shouts of 'fire' in a crowded theatre fall within its proscription, in order to avoid the constitutional problem of overbreadth, and **'the danger that a citizen will be punished as a criminal for exercising his right to free speech.'** With these two exceptions, Section 877.03 should not be read to proscribe the use of language in any fashion whatsoever. To this extent, we modify our previous decisions construing the statute."

As a result of these restrictions many disorderly conduct cases are declined for prosecution. Many of these cases involve loud, profane and offensive language. Typically the officer is the target of the tirade. However, the courts have repeatedly and consistently ruled that this conduct alone is not enough for a criminal charge. In the case of *L.A.T. v. State*, the court stated, "As we all know, the freedom of individuals 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." In that case the court stated that while the defendant's speech created a **scene,** the First Amendment does not permit imposition of criminal sanctions for **making a scene.**

Combination of Actions and Speech Amounting to Disorderly Conduct

The last type of disorderly conduct case is based on conduct that is both action and speech. Many times the actions are minimal. The bulk of the activity is speech (loud, profane and offensive language) and the action tends to be the icing on the cake. Consequently, law enforcement officers, prosecutors , and judges over the years have struggled to distinguish this type of combination behavior that is a violation of the law from conduct that is nothing more than protected free speech under the First Amendment to the United States Constitution.

In *C.L.B. v. State*, the defendant displayed the typical loud, profane and offensive language; however this was joined by actions that amounted to more than just creating a scene. The defendant refused to calm down and continually approached the officers. The court concluded that this amounted to a breach of the peace (in violation of the disorderly conduct statute) as these actions hindered the arrest of a separate suspect.

Similarly, in *Delaney v. State*, the court found that the defendant committed disorderly conduct. In that case the defendant combined profane name calling of the officer with behavior that interfered with the officer's investigation. By continually interrupting the officer, yelling obscenities, and ignoring the officer's requests to wait, the defendant committed disorderly conduct. This behavior is routinely charged as a resisting an officer without violence under section 843.02.

Sometimes, loud profane words combined with the (potential) actions of others amount to disorderly conduct. This situation occurs when words and behavior pass the limits of protected speech and are construed to be inciting a riot. In *K.G. v. State*, the defendant was observed in the roadway talking to the driver of a stopped vehicle. When asked, defendant exited the roadway, however he became boisterous and loud. People began to gather, exiting their homes to watch and join in by yelling at the officers. The court found that this behavior created a disturbance which affected the peace and quiet of persons witnessing the incident, and thus constituted a disorderly conduct.

However, the mere fact that other people come outside or stop to watch what is going on is insufficient to create a charge of disorderly conduct. Onlookers who are curious or just annoyed are not enough. What is necessary to show is that the crowd that gathers reacts in some way to the defendant's words that threatens to breach the peace. If the crowd reacts in a way that causes the officer to develop safety concerns (back-up is called), then a disorderly conduct has been committed.

CONCLUSION

Is it a disorderly conduct or not? That question is many times difficult to answer. One thing that is clear however is that words alone are rarely enough to cause a disorderly conduct. Words alone cause a disorderly conduct only when they are **fighting words** (inciting a riot) or **false words** knowingly stated which causes a clear and present danger of harm to others (yelling fire in a crowded theatre). If a situation occurs where the defendant's words causes a crowd to gather, and that crowd reacts in a way that causes the officer to call for back-up because he has safety concerns, then disorderly conduct has been committed. Likewise, words coupled with actions that interfere with a lawful investigation constitute a disorderly conduct.

As we enter the holiday season, I would like to take a moment to thank each of you for the selfless service you render to the citizens of the Tenth Judicial Circuit throughout the year. I and the entire staff of this office wish you a joyous Christmas and a safe and prosperous New Year.

Jerry Hill

http://www.sao10.com

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Witness Management	**534-4021**
Fax	**534-4034**

Officers now can submit their vacation to Witness Management at the following email address:

witmanagement@sao10.com

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FROM THE COURTS...

WHEN IS DWLSR-HTO A FELONY?

The defendant was charged with the felony of driving with license suspended as a habitual traffic offender. Subsequently she filed a motion to reduce the charge to a first degree misdemeanor on the grounds that two of the three convictions supporting her HTO status were based on financial responsibility suspensions. The trial court denied the motion, and the defendant was convicted as charged. On appeal, the Fifth District affirmed, holding that in order for driving on suspended license as a habitual traffic offender to be a misdemeanor, all three convictions underlying the HTO status must result from financial defaults. *Wyrick v. State*, 35 FLW D2666 (Fla. 5th DCA Dec. 3, 2010).

RESIDENTIAL DOG SNIFF REQUIRES PROBABLE CAUSE

The defendant was charged with manufacture of cannabis and filed a motion to suppress evidence. The facts on which the motion was based were that police received a Crime Stoppers tip that the defendant was growing marijuana at his house. They went to his residence with a drug dog, and the dog alerted outside of the front door. The police then obtained and executed a search warrant. As they expected, they found marijuana growing in the house. The trial court granted the motion to suppress, and on appeal, the Florida Supreme Court affirmed, holding that police must have probable cause before using a dog to do a drug sniff at a residence. *Jardines v. State*, 36 FLW S147 (Fla. Apr. 14, 2011).

POSSESSION OF FIREARM BY CONVICTED FELON STATUTE IS CONSTITUTIONAL

The defendant was charged with and convicted of possession of a firearm by a convicted felon in violation of section 790.23, Florida Statutes. On appeal, he argued that in light of recent rulings by the U.S. Supreme Court on the Second Amendment, section 790.23 was unconstitutional. The First District rejected this argument and affirmed. *Epps v. State*, 36 FLW D475 (Fla. 1st DCA Mar. 2, 2011).

FMLA DOES NOT RELEIVE YOU OF SUBPOENA OBLIGATIONS

Being out on leave for a medical emergency or a family medical issue does not release your obligation to appear in Court or at a deposition if you have been served with a subpoena. Likewise, contacting Witness Management of the State Attorney's Office to report times for medical leaves of absence, once you have been served, will not excuse your obligation to comply with the subpoena.

Reporting medical leaves to SAO Witness Management will only keep you from being subpoenaed/scheduled for dates subsequent to the date you contacted Witness Management. Witness Management does not have the authority nor the ability to cancel your subpoena or the action that was scheduled.

If you cannot, for any reason, make a Court hearing, deposition, or anything scheduled by subpoena, you **MUST** contact in advance the Assistant State Attorney who subpoenaed you. Otherwise, you are obligated by law to appear.