IN THE NEBRASKA COURT OF APPEALS-LINCOLN, NE

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| STATE OF NEBRASKA, | ) | |
| | ) | CASE NO. A-08-000628 |
| Appellee/Plaintiff, | ) | |
| | ) | |
| vs. | ) | BRIEF OF APPELLANT/DEFENDANT |
| | ) | |
| DARREN DRAHOTA | ) | |
| | ) | |
| Appellant/Defendant, | ) | |

## Facts

From January 27, 2006 through February 10, 2006 Darren Drahota and William Avery exchanged email messages. (E1, 1-11:9, 10). William Avery was a professor of political science (3:6-8) and at some time Mr. Drahota was a student in one or more of Professor Avery's classes at the University of Nebraska – Lincoln (UNL). (20:21-23). During the summer of 2006 Professor Avery was a candidate for the Nebraska Unicameral. (22:13-16).

On June 14 and again on June 16, 2006 Mr. Avery received two email messages from the address averylovesalqueda@yahoo.com. (E1, 12:10) Mr. Avery contacted the Lincoln Police Department to investigate. (30:4-9). Investigator Edward Sexton contacted Mr. Avery and obtained copies of the June 14 and June 16, 2006 emails. (33:13-18). Eventually, Inspector Sexton obtained copies of the January and February 2006 email messages between Mr. Avery and Mr. Drahota. (34:9 to 35:2). Sometime in September 2006 Inspector Sexton traced the June email messages to Darren Drahota's roommate and the Inspector made contact with Mr. Drahota. (38:4-18). Under duress (40:23-25 & 41:1-4) Mr. Drahota admitted to sending email messages to Mr. Avery, although it is not at all clear from the Inspector's testimony, which email messages Mr. Drahota admitted sending. (38:19-25 & 39:9). Later Mr. Drahota met the Inspector at the Police Department and Mr. Drahota was issued a citation for Disturbing the Peace. (39:13-15).

On November 1, 2006 Mr. Drahota was arraigned on the charge of Disturbing the Peace and he entered a plea of not guilty. (T4). A bench trial was held in Lancaster County Court on December 13, 2006 and January 30, 2007 and Mr. Drahota was found guilty and ordered to pay a fine of $250 plus court costs. (T5 & 9).

## Issues

1. The Court erred in overruling Defendant's Motion To Dismiss after the State rested.

2. The verdict is not sustained by sufficient evidence that proves the Defendant's guilt beyond a reasonable doubt.

## Argument

The County Court should have dismissed the charge against Mr. Drahota when the State rested. Even accepting all of the State's relevant evidence as true, giving the State the benefit of every inference that reasonably can be drawn from the evidence, and resolving every controverted fact in the State's favor, *State v. Canady*, 263 Neb. 552, 641 N.W.2d 43 (2002), the Defendant's Motion to Dismiss should have been sustained. The Motion should have been sustained because the email messages (E1) sent by Mr. Drahota to Mr. Avery contained speech that is protected by the First Amendment to the United States Constitution and Article I, Section 5 of the Nebraska Constitution. Protected speech includes free expression or exchange of ideas, communication of information or opinions, and dissemination and propagation of views and ideas, as well as advocacy of causes. *State v. McKee*, 253 Neb. 100, 568 N.W.2d 559 (1997). Political Science Professor Avery, (3:6-8) also candidate for political office Avery, (22:13-16) and student Darren Drahota (20:21-23) exchanged email messages, (E1) "engaged in this banter

back and forth" (45:18) that was nothing more than an exchange of ideas; even though some of those ideas may be viewed as repulsive. According to the County Court, Mr. Avery insulted Mr. Drahota and vice versa, (45:19-20) but insults alone, especially via email, should not be sufficient to convict someone of a criminal act.

Even if the Motion to Dismiss was properly overruled, there was insufficient evidence for the County Court's guilty verdict. Upon close examination of the evidence, there is no conclusive proof that Mr. Drahota actually sent the emails in June, 2006 for which the County Court appears to have convicted him of disturbing the peace. Maybe at the Motion to Dismiss stage the County Court was correct to assume that the evidence in the State's favor established a prima facie case that the emails may have been sent by Mr. Drahota. But evidence beyond a reasonable doubt is severely lacking to establish that Mr. Drahota actually sent the June emails.

Investigator Sexton of the Lincoln Police Department testifies that he traced the June 14 and June 16, 2006 emails using the internet protocol address registered to Roadrunner to Jennifer Schultz on West C Street. (37:4-23). The investigator further testifies that he contacted Ms. Schultz and she indicated that she lived at the West C address with Darren Drahota. (37:24-25 & 38:1-3). Investigator Sexton called Mr. Drahota on the telephone and told him that he was being contacted about "some emails that had been sent to Professor Avery." (38:4-15). Mr. Drahota was told that the investigator believed "he was the one that did it." (38:16-18).

Q "Did you specify the e-mails on June 14th and June 16th?" (38:19).

A " I believe so. I don't recall exactly." (38:20).

After this dubious response the investigator goes on to testify that Mr. Drahota, under duress, (40:23-25 & 41:1-4) made an admission that he sent the emails. (39:1-6). The question is,

"which emails?" The evidence is not clear and it is certainly not proof beyond a reasonable doubt. The investigator's next response does nothing to clear up the confusion.

Q "Did he – did that admission include sending the e-mails from the address of Avery loves Al-Qaida?" (39:7-8)

A "That was my impression, yes." (38:9)

Obviously the investigator was not certain at the time he spoke with Mr. Drahota as to which emails were being discussed. This is not conclusive proof that the June emails were sent by Mr. Drahota and the County Court should not have convicted Mr. Drahota based upon this unclear testimony.

Even assuming that Mr. Drahota sent the June 2006 emails, the County Court appears to find not so much the language or content of the messages as important in his decision to convict Mr. Drahota, as the fact that Mr. Avery had tried to put a stop to any more communications from Mr. Drahota. (45:20-21). Mr. Avery did not agree with the messages Mr. Drahota was sending. Mr. Avery told Mr. Drahota to stop communicating with him or he would contact the police. (4:22-25; 5:1-8). Under these circumstances, the situation in *State v. Hai Dang*, 220 Neb. 120, 368 N.W.2d 486 (1985) is somewhat analogous.

> "The defendant was convicted in the county court for Lancaster County on the May 4, 1984, charge of disturbing the peace.... Basically, this case deals with the alleged disturbance of the peace of a former girl friend of the defendant, by use of the telephone. Simply stated, the victim alleged that she had broken up with the defendant, that he continued to call her, and that on the occasion of the last phone call informed her that he was bringing over a birthday card. She told him not to do

so and called the police, and when the defendant arrived at her house he was arrested and charged with this offense. *Hai Dang* at 120-121.

The defendant made repeated phone calls to the victim, an ex-girlfriend. The Nebraska Supreme Court reversed the conviction "and remanded with directions to dismiss the complaint." *Id* at 122. The Court ruled that the evidence was insufficient to support a conviction for disturbing the peace, as there was no testimony that defendant created any sort of disturbance when defendant came to the victim's home and the testimony of the victim was so confusing and disconnected that it was utterly lacking in probative force sufficient to support a finding of guilty beyond a reasonable doubt. Therefore, the phone calls themselves were not enough to support the charge, though the call coupled with further action may have been sufficient had the victim rationally testified that such further action occurred.

Again, assuming it is true that Mr. Drahota sent the June 14 and June 16 emails to Mr. Avery, this behavior is similar that of the defendant's in *Hai Dang*. The defendant telephoned his ex-girlfriend after she told him not to call and not to come over to her house. In *Hai Dang* the simple act of telephoning someone, even after being told not to, was not sufficient, without more, to convict the defendant of disturbing the peace. Similarly, the simple act of sending emails, even if they were sent after being told not to send any more, is not sufficient evidence of disturbing someone's peace. If that were the case, there are plenty of spammers who could be charged with criminal behavior. As tempting as making it a crime to send unwanted email messages may sound in an attempt to deter such annoying behavior, it is not and should not be the purpose of our criminal laws to eliminate actions simply because those acts irritate us.

It is also true that Mr. Avery made a choice to open the alleged offending email messages. His email account contained a spam filter and Mr. Avery had to take steps to restore

something that he wanted to see. (21:13-20). Mr. Avery could have simply deleted any email messages that he did not want to read. (21: 25 – 22:1-3). No one needs consent to send spam or unwanted email messages, just as no one needs consent to make telephone solicitations. We can choose to opt out of receiving certain irritating telephone calls by placing our names on the Do Not Call Register. But if we simply tell an offending caller to stop calling us, the caller cannot and should not be prosecuted for disturbing our peace. There are civil penalties for violating the Do Not Call, if we choose to exercise that option, but there are not and should not be criminal penalties. Mr. Avery could have simply deleted any email messages that he did not want to read. That is why we have spam filters. Mr. Avery should not be allowed to use the criminal justice system to punish someone with whom he has philosophical or political differences of opinions. Nor should any of use be allowed to use the criminal justice system for our own political agenda.

As much as I would personally love to be able to stop hateful speech from being sent out over the airwaves because it certainly disturbs my peace, I do not advocate using the criminal laws to do so because I am proud to live in a nation that promotes the free exchange of ideas, no matter how much I may disagree with some of those ideas. And if I do not want to hear a particular commentator, I can simply change the radio channel, turn the radio off, or leave the room. Mr. Avery had the same choice with any emails he received. He could have simply deleted any emails from addresses he did not recognize. Mr. Avery is a political figure and should be afforded political protections as such. If George W. Bush saw it fit the way the judicial system has looked upon this case, millions of Disturbing the Peace cases could potentially hit court dockets. Mr. Avery has made comments in classes dealing with Oliver North and President Ronald Reagan accusing them of felonious behavior in the case of the Iran Contra Scandal. He said they both should have had to go to prison and that they should not be looked upon as heroes,

but rather criminals. He said "good riddance" when Ronald Reagan died. Bill Avery has used a lot of hateful speech inside of his classrooms and when someone wishes to call him out on it in a manner as private as an email in which no voices are raised and no interaction is even necessary, I fail to understand how that rises to the level of Disturbing the Peace. Not even the church out of Kansas that protests military funerals is charged with this crime and what they do probably DOES severely disturb the peace of the families and friends of the fallen heroes, but yet no prosecutors seem to think so.

**Conclusion**

The motion to dismiss was erroneously overruled because everything in the email exchanges between Mr. Avery and Mr. Drahota clearly indicate that this was a discussion, albeit often heated, of political and social issues. The emails, even the ones sent in June by whoever sent them, should be seen for what they are – expressions of opinions – and should not be punished as crimes. It was simply a heated Conservative vs. Liberal argument that started well before the emails in the case even did. While it may disturb a person every time he or she is offended, I do not believe that it was the legislature's intent to criminalize heated political correspondence that happens in the privacy of people's homes through computer interaction.

In addition, the evidence to convict Mr. Drahota is insufficient. Proof beyond a reasonable doubt is lacking to show even that defendant sent the alleged offending emails. The emails between student and professor or citizen and candidate for political office should not be punished as criminal simply because one party is irritated at the content and tone of the messages. Either party had the opportunity to simply delete the messages to avoid being offended.

Appellant/Defendant respectfully requests that this Court reverse the conviction with directions to dismiss the charge.

Respectfully submitted,

Darren Drahota, Appellant/Defendant

By: Darren Drahota

Certificate of Service

I, Darren Drahota, hand delivered this brief to the Attorney General's Office on 8-18-08.

Darren Drahota

Darren Drahota