IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 99-1443

UNITED STATES OF AMERICA,

Appellee

v.

J. FREDERICK HART,

Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS

RESPONSE BY THE UNITED STATES IN OPPOSITION TO PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

In response to this Court's order, dated May 22, 2000, the United States urges the Court to deny J. Frederick Hart's petition for rehearing and the suggestion for rehearing en banc. The panel's judgment affirming Hart's convictions for communicating a threat in violation of the Freedom of Access to Clinic Entrances Act, 18 U.S.C. 248, is correct, does not conflict with any decision of this Court or the Supreme Court, and raises no issue of exceptional importance.

STATEMENT

1. On September 24, 1997, Hart rented two Ryder trucks from an Exxon station in Little Rock, Arkansas (Tr. 246).[1/] He parked

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[1/] "R.A. __" refers to the Record on Appeal; "R. __" refers to the docket number for a document on the district court's docket sheet; "Tr. __" refers to the transcript of the trial; "Br. __" refers to Appellant's Brief; "Pet.__" refers to the Petition for Rehearing En Banc.

one truck at the Women's Community Health Center and the other truck at the Little Rock Family Planning Services Clinic. Both clinics provide abortion-related services (Tr. 86, 175). In addition to testimony from witnesses who observed the trucks and believed them to be bombs, the government presented a stipulation of testimony from Hart's father. Based on conversations with his son, Hart's father concluded Hart knew that using the Ryder truck would "cause some turmoil" (Tr. 315). Hart's father affirmed that Hart thought "if people believed that there was a bomb on one or more of those Ryder trucks, that it would have been worth it in order to save at least the life of one baby" (Tr. 314).

Witnesses testified why they thought the trucks were bombs. Andrea Brown, an employee at the Women's Community Health Center, testified that the truck she saw was parked "as close to the [abortion clinic] as it could possibly be" (Tr. 92). There was apparently neither a valid reason for the truck's presence (Tr. 92), nor any note explaining why it was there (Tr. 92). Brown had learned, through newsletters from the National Abortion Federation, that abortion clinics tend to be targets of violent attacks (Tr. 89). The Ryder truck reminded her of the 1994 bombing of the federal building in Oklahoma City when explosives were detonated inside a Ryder truck (Tr. 91).

Anne Krebs, an employee of the Little Rock Family Planning Services Center, testified about the circumstances of the Ryder truck blocking the entrance to that clinic's driveway (Tr. 173-174). There were no signs on the truck explaining why it was

parked in the clinic's driveway and no apparent valid reason for its presence (Tr. 174). Krebs was "very scared" that the truck was a bomb because of the suspicious circumstances and because she was reminded of the Oklahoma City bombing incident when a truck "blew up the Federal Building" (Tr. 175, 182).

Officers of the Little Rock Police Department and Fire Department, who reported to the scenes of the bomb threats, also testified. For instance, Captain Sherwood, the Operations Officer of the Little Rock Fire Department's bomb squad, testified that the trucks were "high threat level[s]," because they were placed at abortion clinics (Tr. 201-202), and no one at the clinics could determine why the vehicles were there. (Tr. 206).

2. a. On July 29, 1998, the United States filed a two-count indictment against Hart (R.A. 1). The indictment alleged that Hart violated the Freedom of Access to Clinic Entrances Act, 18 U.S.C. 248(a) (Access Act), by placing two Ryder trucks at two different clinics that provide reproductive health services with the intent to intimidate and interfere with persons who are seeking or providing reproductive health services (R.A. 1-2).

Trial began on October 28, 1998 (R. 34). At the close of the government's case, Hart filed a motion for judgment of acquittal, which the court denied (Tr. 366-380). On November 2, 1998, the jury convicted Hart on both counts (R. 36). The court sentenced Hart to 12 months of home detention, 200 hours of

community service, four years' probation, and a $50 special assessment (R. 45).

b. On May 1, 2000, a panel of this Court affirmed Hart's convictions and sentence. United States v. Hart, No. 99-1443, 2000 WL 554672 (8th Cir. May 1, 2000). The Court first rejected Hart's claim that his conduct did not constitute a threat of force under the Access Act. The Court explained that, in United States v. Dinwiddie, 76 F.3d 913 (8th Cir.), cert. denied, 519 U.S. 1043 (1996), it previously held that to constitute a threat of force under the Access Act, a court must "analyze the alleged threat in light of its entire factual context and determine whether the recipient of the alleged threat could reasonably conclude that it expresses a determination or intent to injur[e] presently or in the future." Id. at *2, (quoting Dinwiddie, 76 F.3d at 925). The Court held that given the context and manner in which Hart parked the Ryder trucks and the reactions of clinic staff, patients and others, it was reasonable for the jury to find that Hart's conduct constituted a true threat. Id. *4.

The Court also rejected Hart's arguments that his conviction violated the First Amendment. Id. at *5. The Court explained that Dinwiddie previously held that the Access Act's prohibition against threats of force properly satisfies the intermediate scrutiny test which is applied to regulation of conduct that has the potential to impact expressive conduct, because: (1) the government had a significant interest in protecting those seeking

reproductive health services and ensuring the availability of reproductive health services; (2) the government's interest is not related to restricting free speech; and (3) the Access Act is narrowly tailored, because "it imposes criminal liability for only three types of activities: uses of force, threats of force, and physical obstructions." Id. at *5. The Court held that the fact that anti-abortion protesters are convicted under the Access Act more than others does not render the Access Act content-based. Finally, the Court reaffirmed its holdings, in Dinwiddie, that the Act is neither overbroad nor vague and is a valid exercise of Congressional power to regulate interstate commerce. Ibid.

ARGUMENT

Hart has failed to identify any issue in this case that meets the standard, under Fed. R. App. P. 35(b), for en banc rehearing, or the standard, under Fed. R. App. P. 40, for the grant of a petition for rehearing. The unanimous panel decision does not conflict with any decision of this Court or the Supreme Court. Indeed, as the panel decision points out, its holding is fully consistent with this Court's previous judgment in United States v. Dinwiddie, 76 F.3d 913 (8th Cir.), cert. denied, 519 U.S. 1043 (1996), that a true threat of violence is not protected by the First Amendment, and thus, the Access Act, 18 U.S.C. 248, can properly prohibit such threats. The panel properly distinguished this case from those decisions striking down prohibition of aggressive speech.

1. Hart contends (Pet. 2) that the Access Act, 18 U.S.C. 248, does not prohibit activity protected by the First Amendment, and his actions are protected by the First Amendment. While he is correct that the Access Act does not prohibit expression protected by the First Amendment, the Act does prohibit "threat[s] of force." 18 U.S.C. 248(a)(1). As this Court held in Dinwiddie, it is "'well settled that threats of violence are ... unprotected speech.'" 76 F.3d at 922 (quoting United States v. J.H.H., 22 F.3d 821, 825 (8th Cir. 1994)). The district court (Tr. 427) and the panel correctly applied the proper test in determining whether Hart's actions constituted a "true threat" of force. That test requires a court to "analyze the alleged threat in light of its entire factual context and determine whether the recipient of the alleged threat could reasonably conclude that it expresses a determination or intent to injury presently or in the future." United States v. Hart, No. 99-1443, 2000 WL 554672 at *2 (8th Cir. May 1, 2000) (quoting Dinwiddie, 76 F.3d at 925).

The evidence established that Hart communicated true threats of violence. Those who observed the trucks testified about the suspicious circumstances under which they were parked and concluded that the trucks were bomb threats. The Ryder trucks were parked at clinics that perform abortion related services; the trucks were not parked normally in the parking lot but so as to block entrances to the clinics; there was no apparent justification, nor any note explaining, why the trucks were

parked in such a manner; and abortion clinics are frequently targets of violence. Id. at *4.

The government also presented a stipulation of testimony from Hart's father that, based on his conversations with his son, he believed his son was aware that his actions would cause turmoil, but that his son believed the turmoil was appropriate as long as it would save the life of one baby (Tr. 313-314). Girlene Crain, a former employee of Hart at his old law firm, testified that she gave him a ride to the Exxon station on September 2, 1997. Hart told her "he hoped he wasn't getting [her] in any trouble" (Tr. 261-263), and he said "I'm sorry" (Tr. 266). Crain testified this was strange because he had nothing to be sorry about (Tr. 266). Hart's admissions and conduct suggest he expected witnesses to conclude the trucks were bomb threats, not harmless protests against abortion.

2. Hart's claim (Pet. 3) that "[p]olitical expression having the effect of intimidation is constitutionally protected speech" is meritless. The appellant in Dinwiddie raised the same claim, contending that a prohibition against "threats of force that 'intimidate' * * * imposes a content-based restriction on speech because it punishes the speech based on its communicative impact." 76 F.3d at 922. The Dinwiddie Court rejected the argument and noted that, in Watts v. United States, 394 U.S. 705, 707 (1969), the Supreme Court upheld the constitutionality of a statute criminalizing threats to the President. 76 F.3d at 922.

Hart's reliance (Pet. 3) upon cases, such as Simon & Schuster, Inc. v. Members of New York State Crime Victims Board, 502 U.S. 105, 118 (1991), Texas v. Johnson, 491 U.S. 397,(1989), NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982), and Organization for a Better Austin v. Keefe, 402 U.S. 415, 419 (1971), is misplaced. Those cases hold that peaceful expressive conduct and speech, even if somewhat offensive to its audience, is entitled to First Amendment's protection. None of those decisions, however, overruled the principle that threats of violence are not protected by the First Amendment.

In decisions more recent than those cited by Hart, the Supreme Court has reaffirmed that "threats of violence are outside the First Amendment." R.A.V. v. St. Paul, 505 U.S. 377, 388 (1992); see also, Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 773-774 (1994); Wisconsin v. Mitchell, 508 U.S. 476, 484 (1993). Every court of appeals that has addressed this constitutional challenge to the Access Act has held that the First Amendment does not protect threats of violence.[2/]

The panel correctly rejected Hart's claim (Pet. 5) that the Access Act is targeted against those with a particular viewpoint

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[2/] United States v. Weslin, 156 F.3d 292, 296 (2d Cir. 1998), cert. denied, 525 U.S. 1071 (1999); United States v. Wilson, 154 F.3d 658, 663 (7th Cir. 1998), cert. denied, 525 U.S. 1081 (1999); Hoffman v. Hunt, 126 F.3d 575, 588 (4th Cir. 1997), cert. denied, 523 U.S. 1136 (1998); United States v. Bird, 124 F.3d 667, 683 (5th Cir. 1997), cert. denied, 523 U.S. 1006 (1998); Terry v. Reno, 101 F.3d 1412, 1419 (D.C. Cir. 1996), cert. denied, 520 U.S. 1264 (1997); Cheffer v. Reno, 55 F.3d 1517, 1521 (11th Cir. 1995); American Life League, Inc. v. Reno, 47 F.3d 642, 648 (4th Cir.), cert. denied, 516 U.S. 809 (1995).

because it is aimed at abortion protesters. Hart, 2000 WL 554672 at *5, (citing Dinwiddie, 76 F.3d at 923. As the panel concluded, the Access Act is content-neutral. It prohibits conduct that interferes with the provision of reproductive health services, without regard to the motivation for the actions. Ibid. That anti-abortion protesters are frequently convicted under the Access Act does not transform the Act into a content-based restriction. Ibid. The plain language of the Act would prohibit threats of force used by pro-abortion activists. 18 U.S.C. 248(a).

The panel was also correct in holding that the Access Act satisfies the intermediate scrutiny test established in United States v. O'Brien, 391 U.S. 367, 381 (1968) for restrictions of conduct that may apply to expressive conduct: the government had a significant interest in protecting those seeking reproductive health services and ensuring the availability of reproductive health services; the government's interest is not related to restricting free speech; and the Access Act is narrowly tailored because "it imposes criminal liability on only three types of activities: uses of force, threats of force, and physical obstructions." Hart, 2000 WL 554672 at *5. As the Dinwiddie Court explained, the Access Act "leaves open ample alternative means for communication." 76 F.3d at 924 (citation omitted).

CONCLUSION

This Court should deny Hart's petition for rehearing and suggestion for rehearing en banc.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 31st day of May 2000, two copies of the United States' Response In Opposition To Hart's Petition for Rehearing and Suggestion for Rehearing En Banc were mailed first class, postage prepaid, to the following counsel of record:

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