IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
February 22, 2023 Session

STATE OF TENNESSEE v. TIBILA AIDA TEKLE

Appeal from the Criminal Court for Monroe County
No. 21-052 Sandra Donaghy, Judge

No. E2022-00686-CCA-R3-CD

Tabila Aida Tekle was charged in the Monroe County Criminal Court with two counts of harassment and one count of retaliation for past action for statements she made on Facebook about employees of the Department of Children's Services ("DCS"). The Defendant filed motions to dismiss the indictment, asserting that her statements were protected by the right to free speech, and the trial court dismissed the charges. The State appeals the trial court's dismissal of the harassment charges, arguing that the court made a pretrial factual determination about an element of the offense, which was a determination for the jury. Based upon the oral arguments, the record, and the parties' briefs, we reverse the judgments of the trial court, reinstate the charges for harassment, and remand the case to the trial court for further proceedings consistent with this opinion.

Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Criminal Court Reversed, Case Remanded

JOHN W. CAMPBELL, SR., J., delivered the opinion of the court, in which JAMES CURWOOD WITT, JR., P.J., and ROBERT W. WEDEMEYER, J., joined.

Jonathan Skrmetti, Attorney General and Reporter; Garrett D. Ward, Assistant Attorney General; Stephen D. Crump, District Attorney General; and Matthew L. Dunn, Assistant District Attorney General, for the appellant, State of Tennessee.

Stephen Hatchett, Athens, Tennessee, for the appellee, Tabila Aida Tekle.

OPINION

FACTS

In March 2021, the Monroe County Grand Jury indicted the Defendant for two counts of harassment pursuant to Tennessee Code Annotated section 39-17-308(a)(1),

which provides that a person commits an offense when the person intentionally communicates a threat to another person, the person communicating the threat intends the communication to be a threat of harm to the victim, and a reasonable person would perceive the communication to be a threat of harm. Tenn. Code Ann. § 39-17-308(a)(1)(A), (B). The first count alleged that the Defendant communicated the threat to Jennifer Brown on or between June 1 and September 30 2020, and the second count alleged that the Defendant communicated the threat to Hillary Smiley on or between June 1 and June 30, 2020. The grand jury also charged the Defendant in a third count with retaliation for past action pursuant to Tennessee Code Annotated section 39-16-510. Regarding that charge, the indictment alleged that on or between September 1, 2020, and September 25, 2020, the Defendant threatened to harm Judge Dwaine Thomas by stating that she would kill him and that she would "'get him.'"

In October 2021, the Defendant filed a motion to dismiss the indictment, asserting that her statements were protected speech under the First Amendment of the United States Constitution and article I, section 19 of the Tennessee Constitution. On December 9, 2021, the trial court held a hearing on the motion.[1] During the hearing, defense counsel advised the trial court that the Defendant was not challenging the constitutionality of the statutes but that she was challenging the statutes as "applied in this case" because she made the statements at issue as a matter of public concern; therefore, the statements were protected speech. The State responded that "this is very much just fact-specific as far as the communications that are at issue [in] this matter, and do they rise to the level of whether it's a threat or not." The trial court asked defense counsel, "Is this not a jury issue, or are you all waiving the right to a jury trial and are we doing a bench trial today?" Defense counsel answered,

> [I]t's not a jury issue unless and until Your Honor finds that this is constitutionally allowable. The jury would not make that determination. So if Your Honor says this is not -- this prosecution is not prohibited by the First Amendment or Article I, Section 19, of the Tennessee constitution, then at that point a jury can still make the determination of whether or not the statute has been violated.

The State asserted that threats had been criminalized and that the issue of whether the Defendant committed harassment and retaliation for past action was a factual determination for the jury. The State also said as follows:

[1] The Defendant claims that the hearing occurred on January 18, 2022. However, the hearing transcript shows that the trial court heard the motion to dismiss on December 9, 2021.

> And so if the statute itself is not at issue, then essentially, why are we here? That would be a pertinent subject for a rule 29 motion at that point, or, you know, or a jury -- a jury question or a rule 29, if Your Honor determines that it does not rise to that level.[2]

The State called Officer Jason Fillyaw of the Monroe County Sheriff's Office ("MCSO") to the stand. Officer Fillyaw testified that in June 2020, DCS filed a report with the MCSO "about some threats being placed towards a couple of their case managers." DCS sent Officer Fillyaw "a link" to a couple of videos the Defendant had posted on her Facebook account. Officer Fillyaw said that he watched the videos, which were "for public view," and that the videos showed the Defendant "threatening that if they came back on her property, that she would commit bodily harm to those caseworkers." Officer Fillyaw prepared an affidavit of complaint charging the Defendant with harassment, and an arrest warrant was issued.

Officer Fillyaw testified that a couple of days later, he learned that DCS had obtained a juvenile court order allowing DCS to remove the Defendant's daughter from the Defendant's home. Jennifer Brown and Hillary Smiley were the two DCS caseworkers involved in the Defendant's case. Officer Fillyaw said that Ms. Brown and Ms. Smiley "appeared to be in fear" and that Ms. Brown told him, "'You know, we're not going up there by ourselves. We need law enforcement to go with us. We're afraid . . . that she may try to hurt us.'" Officer Fillyaw and other officers accompanied Ms. Brown and Ms. Smiley to the Defendant's residence. Officer Fillyaw planned to arrest the Defendant for harassment, but she was not present. Officer Fillyaw said that "she did show up to the justice center shortly after, . . . inquiring about where her child was at, and she was taken into custody at that point."

Officer Fillyaw testified that in addition to the Facebook videos about the DCS caseworkers, the Defendant posted videos on her Facebook account involving some threats to her attorney and the juvenile court judge who presided over her DCS case. Officer Fillyaw viewed those videos and charged the Defendant with retaliation for past action for her threats to the judge.

The State played four Facebook videos for the trial court. In the first video, which was just over five minutes in length, the Defendant stated as follows:

[2] Tennessee Rule of Criminal Procedure 29(b) provides, "On defendant's motion or its own initiative, the court shall order the entry of judgment of acquittal of one or more offenses charged in the indictment . . . after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses."

> If people are wondering what pushes people to the last resort of killing? People like her. . . . If she goes out of her [f*cking] way, I think I will shoot her. And if she does trespass, I will kill you. I'm so fed up that I'm willing to go to jail for the rest of my life for taking a life. And I have to actually think about like is that person's life worth the jail time? Yours is because I'll be at ease. Whether you'll be successful at taking my child away, I don't give a [f*ck]. All I know is that I'll be at peace knowing that your dead and there's others that will be protected because you're dead. So it's for the better good type of deal. . . . So if I have to [f*cking] kill, I will. They could say guns are illegal. I'll still keep a [f*cking] weapon, just to [f*cking] kill. And a gun is not the only thing at my disposal. I could throw a potted plant and [f*cking] breaking a skull. I could use a [f*cking] kitchen knife. I could throw that [f*cking] t.v., while it's on, on her [f*cking] head and electrocute the [f*cking b*tch]. And I'll be alright because the laws aren't working. Does she have probable cause to come to my house? No. And she's probably violated everybody's rights that she's had a case on. And I'm not [f*cking] kidding. Now do I need that extra stress after all the hell that you people put me through? No. So am I willing to kill? If you mess with my [f*cking] child and you try to take her away, yes. She's gonna lose [f*cking] custody of her kid is what I'm hearing. Yes, but somebody's about to lose their life in that [f*cking] process. And I'm okay with that.

In the second video, which was three minutes, sixteen seconds in duration, the Defendant stated as follows:

> Guess where I was at yesterday? Court. . . . They made a change in my whole [f*cking] case after I left. After it was over, the judge decided that it was not healthy for me to talk to my [f*cking] daughter. I think they want me to like go vandalize them or [f*cking] kill them or something. . . . I don't know. They haven't been specific but that's what they're pushing. Is what it seems like. . . . And then the judge, [f*cking, s*tty-a** f*cking b*tch], I hope you [f*cking] go to hell. And my lawyer, avoiding my call. Says his secretary didn't give him the message of me calling supposedly. And tells me the judge changed his mind when he went back in. I was like did you even [f*cking] defend me? He's like yeah I defended you. How is that? How is that [f*cking] possible? If I'm being defended, I have my rights. And then the judge said that adjudication is better and it's way faster and this is for you and all this [f*cking sh*t]. But it's not because if the case was dismissed, we wouldn't need an adjudication. I'm supposed to be that dumb that I wouldn't understand that, right? [N*gger] on a leash? This [n*gger] fights back, mother [f*cker]."

In the third video, which was about four minutes in duration, the Defendant stated as follows:

> To the young cop, though. Um, just as a [f*cking] police officer, just know that you made yourself a [f*cking] target. If I was some vicious person, you could easily be taken down in a [f*cking] heartbeat because now I know what triggers you. You're not supposed to have that. You're supposed to have a [f*cking] poker face. . . . If something of her fear transferred onto you, that you're unable to think rationally, to even assess the [f*cking] situation, you're putting more people at risk. Just by your anger, you could cause a reaction in me. If I cared, if I cared. But I really don't give a [f*ck]. Obviously, if I'm doing this. . . . You would never listen to me. Never, cause I guess I'll just always be a [n*gger]. You should be a bit more level-headed, a whole lot more level-headed. Not to judge and not to go on somebody's fear to cause more fear to cause me annoyance, irritation if I was that type of person they say I was. I can [f*cking] see that. But yeah, I'm angry. But you're not going through my [f*cking] situation. Do you think I give a [f*ck] about her feelings when I give a [f*ck] about my daughter a whole lot more? . . . You shouldn't need a [f*cking] Facebook video to listen to anybody. You should know better. All of you guys should know better. But I'm not white. That's the [f*cking] problem with you guys, not me. The skin tone will make me stronger. Even though I'm more prone to [f*cking] abuse because of it. Still, I'm stronger.

The fourth video is not in the appellate record. However, later in the hearing, the trial court summarized the video and stated, in pertinent part, "The defendant is highly derogatory in her description of case manager Jennifer Brown, describing her as a pig – and I'm going to leave off the expletives. . . . She spoke about thinking about, quote, 'Knocking the back side off of Jennifer Brown.'"

After the State played the videos, it resumed questioning Officer Fillyaw. He said that he was not the "cop" the Defendant referred to in the third video and explained, "This was when . . . she was charged for the threats against the judge, and we went to arrest her at her home that night, and it was one of the deputies that went with us."

On cross-examination, Officer Fillyaw acknowledged that in the videos, the Defendant expressed her belief that DCS had racially discriminated against her and had falsely accused her. He also acknowledged that the videos were the only evidence of her threats and that she did not do anything to harm Ms. Brown or Ms. Smiley. In the affidavit of complaint Officer Fillyaw prepared for the harassment charge, he referred to the Defendant's statements as "'slander.'" He said that he thought the Defendant was being

"sarcastic" in the videos and acknowledged that she clearly said she did not want the caseworkers to trespass on her property. He also acknowledged that the Defendant never said she would "get" the judge as alleged in the indictment.

On redirect examination, Officer Fillyaw testified that he thought the Defendant's statements in the videos were "threatening." Furthermore, although the Defendant did not say she was going to "get" Judge Thomas, Officer Fillyaw thought the Defendant's statements toward the judge were of a "threatening nature."

At the conclusion of Officer Fillyaw's testimony, the trial court asked if the State's case was "based 100 percent on what is in these videos." The State advised the trial court that the videos "constitute the two counts of harassment and the count of retaliation" but that the State also would present "testimony regarding context or interactions" at trial. Regarding the charges for harassment, defense counsel argued that the victim's speech was protected because she made allegations of public corruption and discrimination by DCS; made the allegations in a public forum; and made the allegations against state employees, not private individuals. Defense counsel further argued that the Defendant simply was expressing her anger and exasperation with DCS in the videos and noted that Ms. Brown and Ms. Smiley did not testify as to their reactions to the Defendant's statements. Regarding the charge for retaliation for past action, defense counsel argued that the Defendant did not threaten Judge Thomas. The State responded that "basically we've had a rule 29 months ahead of time" but that, regardless,

> [t]he officer has testified that he would deem those, as a reasonable person, to be threatening, and certainly I think Your Honor can make that determination as well.
>
> . . . .
>
> [W]e would suggest, Your Honor, that this is well within your province to determine does this constitute a threat or not, and we would submit that these do and would request that the case go forward.

The trial court found Officer Fillyaw to be a credible witness and accredited his testimony that Ms. Brown and Ms. Smiley were fearful and scared. The trial court noted that the word "threat" was not defined in the harassment statute but stated that "[a] threat, as I perceive it to be, is a statement conveying an intent to harm." The trial court analyzed the Defendant's statements in each video and found that most of them were not threats. Addressing the first video, though, the trial court stated that some of the Defendant's statements were "threatening." However, the trial court said it was unable to determine to whom the threatening statements were directed. Addressing the fourth video, the trial court

stated that the Defendant made a "conditional threat[]" and "express[ed] a thought process about doing harm to Jennifer Brown."

The trial court said that it thought it was being asked to rule on a motion for summary judgment, which did not exist in criminal cases, or on a Rule 29 motion for judgment of acquittal and noted that the State claimed it had additional proof to present. The trial court said, "I've gone though, painfully, my notes and my interpretation of what I heard on those videotapes." The trial court then ruled as follows:

> This case should be decided by a finder of fact that hears all the proof, and at the conclusion of all of the proof, if all that is available is what I have heard here today, this Court will be required under the laws to dismiss the action for failing to -- even considering the proof in a light most favorable to the State, for failing to articulate sufficient evidence to go forward, but I can't make that decision today.
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> . . . .
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> There is no motion for summary judgment. I do not believe that -- with full evidence, the State still may not have enough proof, but I would be premature in judging the State's case without hearing the totality of their case.
>
> So I deny the motion as it relates to counts 1 and 2.

As to the charge of retaliation for past action in count three, the trial court granted the State's motion to dismiss "as unsupported by the proof in the case."

More than two months later, on February 22, 2022, the Defendant filed a second motion to dismiss the two harassment charges on the basis that the Defendant's statements in the videos were not threats; therefore, they were protected speech. At a hearing on the motion on April 25, 2022, defense counsel asserted:

> I'm renewing my motion, Your Honor. In effect -- as I -- as I took your Ruling, you basically held in abeyance my motion, pending whatever other evidence being presented. No other evidence has been presented, I don't think there is any other evidence that -- that can be presented that's relevant. So, I'm asking, Your Honor, that it be dismissed, which I think is a foregone conclusion.

The State maintained that the Defendant's statements in the videos constituted threats, and defense counsel responded, "These are not threats. Your Honor has already ruled they're not threats. . . . [T]his case is done. The dismissal just needs to be put down[.]" The trial court again stated that "this feels like a motion for a summary judgment" but asked if the State had "any other communication" to present. The State said no. The trial court ruled, "So, then there is nothing for a jury to determine, because there would have to be a Rule 29 motion at the close of the State's case. And if there is nothing else, then the charges should be dismissed." The trial court did not enter a written order dismissing the indictment but entered judgments of conviction dismissing all three counts of the indictment. The State appeals the trial court's dismissal of the harassment charges in counts one and two.

ANALYSIS

The State contends that the trial court erred by dismissing the harassment charges because the trial court improperly determined that the State failed to prove the Defendant's statements constituted "a threat," which was an element of the offense that should have been determined by a jury. The Defendant argues that we should dismiss the State's appeal because the State failed to serve the Defendant personally with a copy of the State's notice of appeal. The Defendant also argues that, in any event, the trial court correctly determined that the Defendant's statements were not threats; therefore, the trial court properly found that her statements were free speech and properly granted her motion to dismiss on constitutional grounds. In response, the State concedes that it should have served the Defendant personally with the notice of appeal but claims that dismissal of the State's appeal is not warranted. The State also disputes the Defendant's argument that the trial court dismissed the harassment charges on constitutional grounds and maintains that the trial court inappropriately dismissed the charges based on a factual determination that should have been left to a jury. We agree with the State.

First, we will address the Defendant's claim that we should dismiss the State's appeal. Tennessee Rule of Appellate Procedure 5(b) provides, "When the state or other prosecuting entity is the appellant, a copy of the notice of appeal shall be served on the defendant and the defendant's counsel." The State acknowledges that it did not comply with Rule 5(b) because it served defense counsel, but not the Defendant, with a copy of the notice of appeal. However, the State contends that we should not dismiss the appeal because the Defendant has failed to show prejudice. This court has held that, while not condoning the State's failure to comply with Rule 5(b), dismissal of an appeal may not be necessary when a defendant fails to "identify any manner in which she was prejudiced by the State's noncompliance." *State v. Hastings*, 25 S.W.3d 178, 180 (Tenn. Crim. App. 1999). The Defendant has not alleged any prejudice or offered any proof showing that she was prejudiced by the State's failure to serve her with a copy of the notice of appeal.

Therefore, we agree with the State that dismissal of the appeal is not warranted in this case and turn to the merits of the State's claim.

Although not cited by the Defendant in either of her motions to dismiss, Tennessee Rule of Criminal Procedure 12(b) provides that "[a] party may raise by pretrial motion any defense, objection, or request that the court can determine without a trial of the general issue." A motion to dismiss pursuant to Rule 12 "allows the trial court to decide issues that are ripe for resolution without a full trial on the merits. This preliminary procedure is designed to avoid 'unnecessary interruption and inefficiency' and it secures the right of the State to appeal without offending double jeopardy." *State v. Sherman*, 266 S.W.3d 395, 403 (Tenn. 2008) (quoting *State v. Goodman*, 90 S.W.3d 557, 561 (Tenn. 2002)). Generally, "pretrial motions to dismiss that are 'capable of determination' involve questions of law, rather than fact." *Id*. (citing *United States v. Schulman*, 817 F.2d 1355, 1358 (9th Cir.1987)). However, when considering such motions, "the trial court may make some findings of fact, so long as it does not encroach upon the province of the jury." *Id*. (citing *United States v. Jones*, 542 F.2d 661, 665 (6th Cir. 1976)). When the State can establish other or additional facts at trial to contradict the facts claimed by the Rule 12 movant, dismissal is not warranted. *See id*. at 407.

Appellate courts are to use a two-step process to review a trial court's decision to grant a motion to dismiss pursuant to Rule 12, Tennessee Rules of Criminal Procedure. *Id*. at 403. First, the reviewing court determines whether the trial court based its decision on findings of law, which would be appropriate, or findings of fact, which should have been presented to a jury. *Id*. Second, for questions of law, we review the trial court's findings de novo with no presumption of correctness. *Id*.

This court has recognized that "situations occasionally arise in a criminal prosecution wherein a pretrial-evidentiary hearing on a motion to dismiss is appropriate." *State v. Tracey C. Clark*, No. M2007-00496-CCA-R3-CD, 2008 WL 1699425, at *4 (Tenn. Crim. App. Apr. 10, 2008). For example, trial courts may conduct pretrial hearings on motions to dismiss certain issues regarding statutes of limitations. *Id*. (citing *State v. Vickers*, 970 S.W.2d 444, 448 (Tenn. 1998)). Likewise, a trial court can properly dismiss an indictment when the issue raised in the pretrial motion involves the interpretation of a criminal statute. *Id*. (citing *Goodman*, 90 S.W.3d at 559-60). Such pretrial motions involve questions of law.

In contrast, "[w]here the factual findings necessary to resolve the motion are intertwined with the general issue, a ruling must be deferred until trial since, in criminal cases, there simply is no pretrial procedure akin to summary judgment for adjudicating questions of fact involving the general issue of guilt or innocence." *Goodman*, 90 S.W.3d at 561. For example, in *State v. Burrow*, 769 S.W.2d 510, 511 (Tenn. Crim. App. 1989),

the trial court held a pretrial hearing and dismissed charges that the State had filed against the defendants for various illegal acts involving the sales of securities. In finding dismissal appropriate, the trial court determined that the documents at issue were not "securities" as that term was defined in our Code. 769 S.W.2d at 511. The State appealed to this court, arguing that the trial court improperly entered summary judgment for the defendants. *Id*. This court agreed with the State, noting that summary judgments do not exist in criminal cases and concluding that the trial court improperly made a factual determination about an element of the offense. *Id*. at 512.

Turning to the instant case, the Defendant filed both pretrial motions to dismiss on the basis that her statements were protected speech under the federal and state constitutions. At the hearings on the motions, the Defendant argued, as she does on appeal, that her speech was protected because she was publicly commenting on what she considered to be corruption and racial discrimination by DCS employees. We note that the trial court apparently found that some of the Defendant's statements in the videos were threatening and that threats of violence are not constitutionally protected speech. *State v. Lanier*, 81 S.W.3d 776, 780 (Tenn. Crim. App. 2000). However, the trial court never addressed the Defendant's constitutional claim of free speech. Instead, the trial court considered whether the State had shown that the Defendant's statements constituted "threats" against the DCS caseworkers. The trial court dismissed the charges on that basis, and the following comment appears in the Special Conditions box on each judgment of conviction: "Dismissed upon Defendant's motion to dismiss, Court finding that the communications did not constitute a threat per the statute." Therefore, we disagree with the Defendant's argument that the trial court dismissed the charges on constitutional grounds.

The trial court saw the issue before it as whether the Defendant's statements constituted threats toward the victims named in the indictment. Before an accused can be convicted of harassment as charged in this case, the State must prove beyond a reasonable doubt that: (1) the Defendant intentionally communicated a threat to another person; (2) the Defendant intended the communication to be a threat of harm to the victim; and (3) a reasonable person would perceive the communication to be a threat of harm. Tenn. Code Ann. § 39-17-308(a)(1)(A), (B). Although the trial court repeatedly expressed concern that it was being asked to rule prematurely on a motion for judgment of acquittal or on a motion for summary judgment, which the trial court recognized was improper in criminal cases, the trial court nevertheless found that the Defendant's statements did not constitute harassment of Ms. Brown and Ms. Smiley. We agree with the State that such a determination was for the jury. *See State v. Michael Wiss*, No. M2012-01547-CCA-R3-CD, 2014 WL 1259178, at *4 (Tenn. Crim. App. Mar. 26, 2014) (concluding that evidence was sufficient to show that the defendant communicated threats to the victim). Accordingly, we conclude that the trial court erred by dismissing the harassment charges.

CONCLUSION

Based upon the oral arguments, the record, and the parties' briefs, we conclude that the trial court erred by granting the Defendant's motion to dismiss the charges of harassment in counts one and two of the indictment. Therefore, those judgments are reversed, the charges are reinstated, and the case is remanded to the trial court for further proceedings consistent with this opinion.

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JOHN W. CAMPBELL, SR., JUDGE