

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

LC2015-000086-001 DT

06/12/2015

THE HON. CRANE MCCLENNEN

CLERK OF THE COURT

J. Eaton

Deputy

STATE OF ARIZONA

SETH W PETERSON

v.

RANDON LEE MILLER (001)

CAMERON A MORGAN

REMAND DESK-LCA-CCC

SCOTTSDALE MUNICIPAL COURT

RECORD APPEAL RULING / REMAND

**Lower Court Case Number M-0751-CR-2013-000773.**

Defendant-Appellant Randon Lee Miller (Defendant) was convicted in Scottsdale Municipal Court of Disorderly Conduct, Refusal To Provide Truthful Name, and Failure To Obey a Police Officer. Defendant makes the following contentions: (1) The trial court erred in not holding a preliminary hearing for these misdemeanor charges; (2) the trial court abused its discretion in not holding an evidentiary hearing on his Motion To Dismiss for Outrageous Government Conduct; and (3) the State did not present sufficient evidence to support the convictions. For the following reasons, this Court affirms the judgment and sentence imposed.

I. FACTUAL BACKGROUND.

On January 10, 2013, Defendant was cited for Threatening or Intimidating, A.R.S. § 13-1202(A)(1); Disorderly Conduct, A.R.S. § 13-2904(A)(1) (two counts); Unlawful Consumption of Liquor by Licensee, A.R.S. § 4-244(12); Disorderly Conduct by an Employee, A.R.S. § 4-244(12); Harassment, A.R.S. § 13-2921(A)(1); Refusal To Provide Truthful Name, A.R.S. § 13-2412(A); and Failure To Obey a Police Officer, S.C.C. § 19-13 (two counts). On January 24, 2014, Defendant's attorney filed a Motion To Dismiss "for lack of probable cause and pursuant to the due process clause for outrageous governmental conduct." On January 29, 2014, the State filed a Response to Defendant's Motion To Dismiss (Outrageous Government Conduct) and a Response to Defendant's Motion To Dismiss (Probable Cause to Arrest), in both cases contending there was no need for a pre-trial evidentiary hearing because each issue was purely one of law, and on March 19, 2014, the State filed a Supplemental Response to Defendant's Motion To Dismiss (Outrageous Government Conduct).

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On March 26, 2014, the trial court held a hearing on Defendant's Motion To Dismiss for Outrageous Government Conduct. Defendant's attorney claimed they needed an evidentiary hearing so he could present witnesses. (R.T. of Mar. 26, 2014, at 73.) The prosecutor contended there was no need for an evidentiary hearing, and that the trial court had the authority under Rule 35.2 of the Arizona Rules of Criminal Procedure to resolve the issue without an evidentiary hearing. (*Id.* at 73–74.) Both attorneys stated there was no dispute in the facts. (*Id.* at 74, 86, 89, 91–95, 95, 97, 99.) The trial court said it was not going to hold an evidentiary hearing because it was taking as true the factual allegation made by Defendant's attorney. (*Id.* at 100.) It then ruled that those facts taken as true did not "raise to the level of dismissal on the basis of outrageous conduct." (*Id.*) The trial court stated further:

THE COURT: I just want to let you know that at this point in time, after reading your briefs, studying this thoroughly, discussing the case, I don't see that this raises to the level of dismissal on the basis of outrageous conduct. I don't see that.

(R.T. of Mar. 26, 2014, at 102.)

On June 3, 2014, Defendant's attorney filed a Motion for Reconsideration asking the trial court to reconsider its denial of Defendant's Outrageous Government Conduct Motion based on the facts Defendant's attorney expected would be adduced at trial. On June 5, 2014, the State filed a Response contending Rule 16.1(d) of the Arizona Rules of Criminal Procedure precluded the trial court from reconsidering this issue.

Trial in this matter began on June 9, 2014, and Defendant's attorney addressed Defendant's Motion for Probable Cause. (R.T. of Jun. 9, 2014, at 114.) Defendant's attorney argued as follows:

So I submit to this Court that you have the authority to determine probable cause pursuant to the Equal Protection Act, the due process clause, and in terms in this case whether we're going to go forward.

(R.T. of Jun. 9, 2014, at 119.) After hearing arguments from both attorneys, the trial court denied Defendant's motion. (*Id.* at 125.)

The State then presented the testimony of various police officers and several customers from the night in question. Lieutenant Robert Bonnette testified he was investigating several complaints the department had received concerning Sushi Brokers. (R.T. of Jun. 9, 2014, at 143–44.) In one instance, while officers were investigating a reported burglary at a nearby bank, the owner of Sushi Brokers Restaurant and Bar (Defendant) interfered with the efforts of the officers to do their investigation. (*Id.* at 145–48, 186.) In another instance, an officer was doing paperwork in his vehicle, which was parked near the Sushi Brokers, when Defendant started yelling at the officer to move. (*Id.* at 149–50, 187–89, 193.) Other instances occurred when officers made traffic stops with the driver of the suspect vehicle stopped in front of the Sushi Brokers, and Defendant approached the officers, yelling at them to move. (*Id.* at 152, 194–95, 201, 230, 235.) Lieutenant Bonnette also said they had received complaints of liquor violations. (*Id.* at 153, 221.)

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In order to determine exactly what was happening, Lieutenant Bonnette and Detective Miller put together a plan whereby an officer would appear to do a traffic stop on a vehicle, which would be driven by a law enforcement person, and that vehicle would stop in front of the Sushi Brokers. (*Id.* at 154–56, 204, 213, 215.) In that way, they would be able to see Defendant’s reaction to the situation. (*Id.* at 163–64, 182, 204.)

The officers put their plan in motion on January 10, 2013. (R.T. of Jun. 9, 2014, at 143.) After the officers “stopped” the other vehicle, which was in the parking lot near the Sushi Brokers, Defendant came out of the restaurant and began yelling at the officers. (*Id.* at 169.) One of the officers told Defendant to stop yelling, so Defendant went back into the restaurant. (*Id.* at 169–70.) Defendant later came out of the restaurant and began yelling at the officers again, so they attempted to arrest him. (*Id.* at 170, 174–75, 178.) Defendant ran back into the restaurant, so the officers had to follow him into the restaurant to make the arrest. (*Id.* at 170–71, 179–81, 231.) During this time, he was not obeying the orders given by the officers. (*Id.* at 181, 232.) All of this disturbed various patrons in the restaurant. (*Id.* at 180.)

At no point did any of the officers initiate a conversation with Defendant. (R.T. of Jun. 9, 2014, at 172–73.) Lieutenant Bonnette said that, if Defendant had not come into contact with the officers, they would have left. (*Id.* at 172, 237.) Although Defendant may have been upset with the presence of the police officers in the parking lot, the owner of the shopping center there supported the work the officers were doing on the property. (*Id.* at 179, 249–580.)

Detective John Miller testified about the complaints they had received about Defendant and his behavior toward police officers. (R.T. of Jun. 9, 2014, at 254–55, 257, 259–68, 271–73, 301–09.) He testified about formulating the plan with Lieutenant Bonnette. (*Id.* at 274, 305, 310–13.) He described how the plan unfolded and Defendant’s reaction to the officers’ conduct, including refusing to obey the officers’ orders and refusing to provide his name. (*Id.* at 181, 287–88, 290–91, 328–29.) He also described Defendant’s efforts to avoid being arrested and how this affected the persons in the restaurant. (*Id.* at 182–86, 332, 334.)

Officers Daniel Safsten, Paul Wein, and Steve Negrón testified about their involvement in the plan and Defendant’s reactions to the officers’ actions, and about the effect Defendant’s actions had on the persons in the area. (R.T. of Jun. 9, 2014, at 378–92, 404–23; R.T. of Jun. 10, 2014, at 434–40, 464, 466–74, 485, 498–500, 502–03, 506–07, 538–55, 570–71, 574–85, .) This included Defendant’s refusal to obey the officers’ orders. (R.T. of Jun. 10, 2014, at 434–35, 553, 582.)

Julio Picchio was a patron who had been in the restaurant on January 10, 2013, and described the events of that evening. (R.T. of Jun. 9, 2014, at 339–48, 361, 370.) The prosecutor played a recording of Mr. Picchio’s call to the police describing Defendant’s violent behavior. (*Id.* at 253–54.) Christopher Reavis was also a patron who had been in the restaurant on January 10, 2013, and described the events of that evening. (R.T. of Jun. 30, 2014, at 603–13.) This included Defendant’s refusal to obey the officers’ orders. (*Id.* at 612.)

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After the above testimony, the State rested. (R.T. of Jun. 30, 2014, at 652.) Defendant's attorney recalled Officer Safsten and asked him about the events of that night. (*Id.* at 654–91.) Officer Safsten said that, in his 6 years of being a police officer, he had never witnessed the violent actions Defendant displayed that night. (*Id.* at 695.) Defendant's attorney presented the testimony of Elise Moldovan and Nicole DeRienzo, who were employees at the Sushi Brokers and described the events of that night. (*Id.* at 714–22, 734–39.)

After presenting those witnesses, the defense rested. (R.T. of Jun. 30, 2014, at 762.) During final arguments, Defendant's attorney discussed his Motion for Reconsideration of the trial court's denial of his Motion To Dismiss for Outrageous Government Conduct and asked the trial court to reconsider based on the testimony heard at trial. (*Id.* at 782–83.) He also discussed entrapment as a matter of law. (*Id.* at 782.) The trial court asked whether a defendant has to admit guilt to argue entrapment, and Defendant's attorney contended a defendant did not have to do so. (*Id.* at 807–08.)

After hearing the arguments from the attorneys, the trial court ruled there was no outrageous government conduct and no entrapment. (R.T. of Jun. 30, 2014, at 822.) The trial court found Defendant guilty of disorderly conduct (one count), failure to obey a police officer (one count), and refusal to provide his truthful name, and not guilty on the other counts. (*Id.* at 823–27.) The trial court then imposed sentence. (*Id.* at 832–33.) On that same day, Defendant filed a timely notice of appeal. This Court has jurisdiction pursuant to ARIZ. CONST. Art. 6, § 16, and A.R.S. § 12–124(A).

## II. ISSUES.

### A. *Was Defendant entitled to a preliminary hearing for the misdemeanor charges and has Defendant waived any issue about holding a preliminary hearing.*

Defendant contends he was entitled to a preliminary hearing for the misdemeanor charges. For two reasons, this Court concludes Defendant is not entitled to relief on this claim.

First, a defendant is not entitled to a preliminary hearing for a misdemeanor offense. *State v. Cole*, 20 Ariz. 193, 194, 178 P. 983, 983 (1919) (“We have held that it is unnecessary to hold a preliminary examination in a misdemeanor case prior to the filing of an information charging the offense.”); *accord*, *Earp v. State*, 20 Ariz. 569, 574, 184 P.2d 942, 943 (1919); *see also* *Burke v. Superior Ct.*, 3 Ariz. App. 576, 577, 416 P.2d 997, 998 (1966) (“A preliminary examination is not required in the absence of statute since such proceeding was unknown to the common law.”). Misdemeanor offense actions triable in limited jurisdiction courts are commenced by filing a Uniform Traffic Ticket and Complaint, a short form complaint approved by the Arizona Supreme Court, or by a long form complaint. Rule 2.1(b), ARIZ. R. CRIM. P. The Arizona Rules of Criminal Procedure provide that a defendant is entitled to a preliminary hearing only if charged with a felony:

**a. Right to Preliminary Hearing.** When a complaint is filed charging the defendant with the commission of a felony, a preliminary hearing shall commence before a magistrate not later than 10 days following defendant's initial appearance if the defendant is in custody and not later than 20 days following defendant's initial appearance if the defendant is not in custody . . . .

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Rule 5.1(a), ARIZ. R. CRIM. P. Thus, Defendant was not entitled to a preliminary hearing for these misdemeanor offenses.

Second, a defendant may challenge the denial of a motion for a new finding of probable cause only by special action, and once the defendant is found guilty, the question of probable cause is no longer open, thus the defendant may not raise this issue on appeal. *State v. Apelt (Rudi)*, 176 Ariz. 369, 372, 861 P.2d 654, 657 (1993) (court rejected defendant's claim that he was denied effective assistance of counsel at the preliminary hearing because same attorney represented both defendant and his brother); *State v. Charo*, 156 Ariz. 561, 566, 754 P.2d 288, 293 (1988) (once jurors found defendant guilty, any challenge to the grand jury proceeding was moot). Because the trial court found Defendant guilty, any challenge to the lack of a preliminary hearing is moot.

B. *Did the trial court abuse its discretion in not holding an evidentiary hearing on Defendant's Motion To Dismiss for Outrageous Government Conduct.*

Defendant contends the trial court abused its discretion in not holding an evidentiary hearing on his Motion To Dismiss for Outrageous Government Conduct. Rule 35.2 of the Arizona Rules of Criminal Procedure gives the trial court the discretion in holding a hearing on a party's motion. In the present case, Defendant's attorney gave the trial court his view of what the facts would show, and the prosecutor agreed those were the facts. (R.T. of Mar. 26, 2014, at 74, 86, 89, 91–95, 95, 97, 99.) The trial court said it was not going to hold an evidentiary hearing because it was taking as true the factual allegation made by Defendant's attorney. (*Id.* at 100.) There was thus no need for the trial court to hold an evidentiary hearing.

Moreover, Defendant's attorney asked the trial court to consider the Motion To Dismiss for Outrageous Government Conduct based on the evidence presented at trial, which the trial court did. (R.T. of Jun. 30, 2014, at 782–83, 822.) The evidence presented at trial shows the trial court correctly denied Defendant's Motion To Dismiss for Outrageous Government Conduct. The Arizona Court of Appeals recently discussed the issue of outrageous government conduct in *State v. Williamson*, 236 Ariz. 550, 343 P.3d 1 (Ct. App. 2015), stating as follows:

The outrageous government conduct defense first was recognized by the United States Supreme Court in *United States v. Russell* (1973). There, the Court speculated that it may some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction. The Court stated that the government's conduct must be so egregious that it violates notions of fundamental fairness and is shocking to the universal sense of justice. But, although the Court has recognized the defense, to date, it has not reversed a conviction on the basis of outrageous government conduct. And, we are aware of only two reported cases in which federal appellate courts have granted relief on that basis.

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Although a claim of outrageous government conduct and the defense of entrapment are similar in some respects, they are legally distinct. The former is grounded in due process principles and is resolved by the trial court as a matter of law before trial. In contrast, the latter is based upon public policy considerations and is determined by the trier of fact in light of the evidence presented at trial. Additionally, the entrapment defense focuses on whether the defendant was predisposed to commit the crime, whereas a claim of outrageous government conduct focuses on the government's conduct.

To establish a claim of outrageous government conduct, a defendant must show either: (1) the government engineered and directed a criminal enterprise from start to finish, or (2) the government used excessive physical or mental coercion to induce the defendant to commit the crime. The defense is often raised but is almost never successful. ***It is not outrageous for the government to induce a defendant to repeat or continue a crime*** or even to induce him to expand or extend previous criminal activity. In inducing a defendant to repeat or expand his criminal activity, it is not improper for the government to suggest the illegal activity and provide supplies and expertise. And, coercion of any type must be particularly egregious before it will sustain an outrageous conduct defense. Government agents ***may employ appropriate artifice and deception in their investigation***, make excessive offers, and even utilize threats or intimidation if not exceeding permissible bounds. In short, a defendant must meet an extremely high standard.

There is no single test for resolving a claim of outrageous government conduct. Rather, the inquiry appears to revolve around the totality of the circumstances in any given case. Here, in denying Williamson's motion to dismiss, the trial court applied the factors identified in *United States v. Black* (9<sup>th</sup> Cir. 2013), that previous cases have considered relevant to whether the government's conduct was outrageous. The factors are as follows:

- (1) known criminal characteristics of the defendants;
- (2) individualized suspicion of the defendants;
- (3) the government's role in creating the crime of conviction;
- (4) the government's encouragement of the defendants to commit the offens[ive] conduct;
- (5) the nature of the government's participation in the offens[ive] conduct; and
- (6) the nature of the crime being pursued and necessity for the actions taken in light of the nature of the criminal enterprise at issue.

*Williamson* at ¶¶ 9–12 (emphasis added, citations and quotation marks omitted). Applying those six factors shows the trial court correctly ruled there was outrageous government conduct.

1. *Known criminal characteristics of the defendant.* In the present case, the police knew of Defendant's criminal characteristics from the numerous complaints they had received.

2. *Individualized suspicion of the defendants.* Because the police had received numerous complaints about Defendant, they had an individualized suspicion that Defendant was behaving in a criminal manner.

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3. *The government's role in creating the crime of conviction.* The government's role in creating the crime was limited to setting the circumstances for Defendant's actions.

4. *The government's encouragement of the defendants to commit the offensive conduct.* The officers merely set the circumstances for Defendant's actions and did not encourage him to commit any crime.

5. *The nature of the government's participation in the offensive conduct.* The officers' participation was limited to reacting to what Defendant did.

6. *The nature of the crime being pursued and necessity for the actions taken in light of the nature of the criminal enterprise at issue.* The crime pursued was Defendant's action in preventing the police from doing their lawful duty, thus the officers needed to do something to stop Defendant from interfering with lawful police activities.

The trial court therefore correctly denied Defendant's Motion To Dismiss for Outrageous Government Conduct.

*C. Did the State present sufficient evidence to support the convictions.*

Defendant contends the State did not present sufficient evidence to support the convictions. In addressing the issue of the sufficiency of the evidence, the Arizona Supreme Court has said the following:

We review a sufficiency of the evidence claim by determining "whether substantial evidence supports the jury's finding, viewing the facts in the light most favorable to sustaining the jury verdict." Substantial evidence is proof that "reasonable persons could accept as adequate . . . to support a conclusion of defendant's guilt beyond a reasonable doubt." We resolve any conflicting evidence "in favor of sustaining the verdict." "Criminal intent, being a state of mind, is shown by circumstantial evidence. Defendant's conduct and comments are evidence of his state of mind."

*State v. Bearup*, 221 Ariz. 163, 211 P.3d 684, ¶ 16 (2009) (citations omitted). When considering whether a verdict is contrary to the evidence, this court does not consider whether it would reach the same conclusion as the trier-of-fact, but whether there is "a complete absence of probative facts to support its conclusion." *State v. Mauro*, 159 Ariz. 186, 206, 766 P.2d 59, 79 (1988). In the present matter, this Court concludes there is not "a complete absence of probative facts to support its conclusion." The evidence was therefore sufficient to support the convictions.

Defendant contends he was merely exercising his right of free speech. The United States Supreme Court rejected a similar argument in *Colten v. Kentucky*, 407 U.S. 104 (1972):

The evidence warranted a finding, the Kentucky court concluded, that at the time of his arrest, "Colten was not undertaking to exercise any constitutionally protected freedom." Rather, he "appears to have had no purpose other than to cause inconvenience and annoyance. So the statute as applied here did not chill or stifle the exercise of any constitutional right."

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Based on our own examination of the record, we perceive no justification for setting aside the conclusion of the state court that, when arrested, appellant was not engaged in activity protected by the First Amendment. Colten insists that in seeking to arrange transportation for Mendez and in observing the issuance of a traffic citation he was disseminating and receiving information. But this is a strained, near-frivolous contention and we have little doubt that Colten's conduct in refusing to move on after being directed to do so was not, without more, protected by the First Amendment. Nor can we believe that Colten, although he was not trespassing or disobeying any traffic regulation himself, could not be required to move on. He had no constitutional right to observe the issuance of a traffic ticket or to engage the issuing officer in conversation at that time. The State has a legitimate interest in enforcing its traffic laws and its officers were entitled to enforce them free from possible interference or interruption from bystanders, even those claiming a third-party interest in the transaction. Here the police had cause for apprehension that a roadside strip, crowded with persons and automobiles, might expose the entourage, passing motorists, and police to the risk of accident. We cannot disagree with the finding below that the order to disperse was suited to the occasion. We thus see nothing unconstitutional in the manner in which the statute was applied.

*Colten* at 109–10 (citations omitted).

Defendant further claims the evidence showed entrapment. Under A.R.S. § 13–206(A), a defendant has to admit the elements of the offense to claim entrapment, which Defendant did not do. That statute further provides as follows:

B. A person who asserts an entrapment defense has the burden of proving the following by clear and convincing evidence:

1. The idea of committing the offense started with law enforcement officers or their agents rather than with the person.

2. The law enforcement officers or their agents urged and induced the person to commit the offense.

3. The person was not predisposed to commit the type of offense charged before the law enforcement officers or their agents urged and induced the person to commit the offense.

C. A person does not establish entrapment if the person was predisposed to commit the offense and the law enforcement officers or their agents merely provided the person with an opportunity to commit the offense. It is not entrapment for law enforcement officers or their agents merely to use a ruse or to conceal their identity. The conduct of law enforcement officers and their agents may be considered in determining if a person has proven entrapment.

A.R.S. § 13–206(B) & (C). A review of the evidence shows Defendant failed to prove (B)(1), (2), and (3). The evidence further showed subsection (C) applied and thus Defendant failed to establish entrapment.

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III. CONCLUSION.

Based on the foregoing, this Court concludes as follows: (1)(a) Defendant was not entitled to a preliminary hearing on the charges, which were misdemeanors, and (b) Defendant waived any issue about the lack of a preliminary hearing; (2) the trial court did not abuse its discretion in not holding an evidentiary hearing on Defendant's Motion To Dismiss for Outrageous Government Conduct, and the evidence presented at trial showed no outrageous conduct on the part of the government; and (3)(a) the State presented sufficient evidence to support the convictions; (b) Defendant was not merely exercising the right of free speech, and (c) Defendant failed to establish entrapment.

**IT IS THEREFORE ORDERED** affirming the judgment and sentence of the Scottsdale Municipal Court.

**IT IS FURTHER ORDERED** remanding this matter to the Scottsdale Municipal Court for all further appropriate proceedings.

**IT IS FURTHER ORDERED** signing this minute entry as a formal Order of the Court.

/s/ Crane McClennen

THE HON. CRANE MCCLENNEN  
JUDGE OF THE SUPERIOR COURT

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