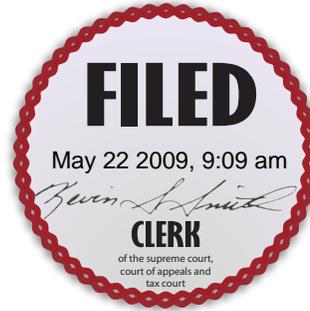


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

RONALD BARGER,)
)
Appellant-Defendant,)
)
vs.)
)
STATE OF INDIANA,)
)
Appellee-Plaintiff.)

No. 49A02-0811-CR-989

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Barbara Collins, Judge
The Honorable Jeffrey Marchal, Master Commissioner
Cause No. 49F08-0808-CM-203599

May 22, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

KIRSCH, Judge

Ronald Barger (“Barger”) appeals after a bench trial from his conviction of disorderly conduct¹ as a Class B misdemeanor. Barger presents the following restated issue for our review: whether there was sufficient evidence to support Barger’s conviction, with particular emphasis on whether his speech constituted free speech under the Indiana Constitution.

We affirm.

FACTS AND PROCEDURAL HISTORY

At approximately 3:30 a.m. on August 30, 2008, Indianapolis Metropolitan Police Department Officer Dean Fischer, who was the North District late shift supervisor, arrived in Broad Ripple at the scene of an altercation between two individuals. Two other officers had responded and Officer Fischer assisted the officers by securing the area.

While one of the persons involved in the altercation was being handcuffed and arrested for battery, Barger approached Officer Fischer and told him that he wanted to protest the arrest of that individual. Barger told Officer Fischer that the arrest was illegal and a violation of the individual’s civil rights. Officer Fischer told Barger that he could protest on the sidewalk, approximately five feet from the individual in custody. Barger sat on the sidewalk and continued to protest. Officer Fischer explained to Barger that the officers had witnessed a battery being committed by the person under arrest and that the arrest was justified. Barger’s protests became increasingly louder.

¹ See Ind. Code § 35-45-1-3(a)(2).

The officers walked across the street with the arrestees in order to finish up paper work when Barger approached Officer Fischer again telling him that he was protesting the arrest. Officer Fischer noticed that while the original crowd had dissipated, a new crowd was gathering as a result of Barger's loud protestations. Officer Fischer told Barger that he was interfering with the investigation and should return to the sidewalk. While Barger did return to the sidewalk, he approached Officer Fischer a third time and yelled his protestations. Officer Fischer arrested Barger for disorderly conduct and interfering with a police investigation.

The State charged Barger with disorderly conduct as a Class B misdemeanor. During Barger's bench trial, Barger admitted that during the incident the level of his voice escalated to the point of shouting. The trial court found Barger guilty of disorderly conduct and sentenced him to a term of one hundred eighty days, with one hundred seventy-six days suspended. Barger now appeals.

DISCUSSION AND DECISION

Barger challenges the sufficiency of the evidence supporting his conviction of disorderly conduct. In particular, he challenges whether the evidence supported a finding that his speech was not "free speech" under Article 1, section 9 of the Indiana Constitution.

Our standard of review for a sufficiency of the evidence claim is well-settled. In reviewing such a claim, we will affirm the conviction unless, considering only the evidence and all reasonable inferences favorable to the judgment, and neither reweighing the evidence nor judging the credibility of the witnesses, we conclude that no reasonable fact-finder could

find the elements of the crime proven beyond a reasonable doubt. *See Blackman v. State*, 868 N.E.2d 579, 583 (Ind. Ct. App. 2007).

Indiana Code section 35-45-1-3 provides that a person who recklessly, knowingly, or intentionally makes unreasonable noise and continues to do so after being asked to stop commits disorderly conduct, a Class B misdemeanor. Barger approached Officer Fischer and stated that he wanted to protest the arrest. However, after he was told that he could protest and where he would be allowed to protest without interfering with the officers, Barger continued to approach Officer Fischer each time speaking more loudly and attracting a new crowd of people. Barger's repeated interruptions and shouting when asked to stop doing so interfered with Officer Fischer's attempt to secure the area for the other police officers. The evidence here was sufficient to support the conviction.

The question is whether Barger's speech was "free speech," and therefore, constitutionally protected political speech under Article 1, section 9 of the Indiana Constitution. In the landmark case of *Price v. State*, 622 N.E.2d 954 (Ind. 1993), our Supreme Court held that Article 1, section 9 provides protections to Indiana citizens of the right of freedom of expression independent of its federal counterpart and that the State may not materially burden political expression, which is a core value under Indiana's Bill of Rights. The Court reversed Price's conviction holding that her loud and profanity-laced complaints about police officers conducting an arrest of a third party and then of Price herself was political expression which the State could not materially burden.

In *J. D. v. State*, 859 N.E.2d 341 (Ind. 2007), our Supreme Court held that speech, albeit political, was not entitled to constitutional protection under Article 1, section 9 of the Indiana Constitution where the speech “consisted of persistent loud yelling over and obscuring of [the arresting officer’s] attempts to speak and function as a law officer.” *Id.* at 344. The Court, distinguishing the facts from those in *Price*, concluded that the speech “clearly amounted to an abuse of the right to free speech” and thus subjected J.D. to accountability under Article 1, section 9. *Id.*

Here, Barger was arrested after refusing to conduct his protest in the area designated by the officer and by continuing to elevate the volume of his protestations, thus attracting a crowd and distracting Officer Fischer from his duties. Barger’s speech is precisely the kind of speech found not to be protected in *J. D.* At 3:30 a.m. Barger spoke in an increasingly loud manner refusing requests to reduce the volume of his speech, and drawing a crowd in the face of warnings that he would be arrested for disorderly conduct. Barger abused the right to free speech and thus was subject to accountability under Article 1, section 9.

Affirmed.

RILEY, J., and MATHIAS, J., concur.