



Virginia Court of Appeals Reverses Conviction Under Profane Speech Statute

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In a 2-1 decision, the Virginia Court of Appeals recently overturned a conviction for a violation of Va. Code § 18.2-152.7. That statute provides as follows:

Any person who uses obscene, vulgar, profane, lewd, lascivious, or indecent language, or makes any suggestion or proposal of an obscene nature, or threatens any illegal or immoral act with the intent to coerce, intimidate, or harass any person, over any telephone or citizens band radio, in this Commonwealth, is guilty of a Class 1 misdemeanor.

The defendant in *Barson v. Commonwealth*, Dennis B. Barson, Jr., was convicted under the statute for sending e-mails to his ex-wife, her friends, and family members that portrayed his ex-wife as, shall we say, an unchaste person. (Read the case for yourself for the lurid content of the e-mails). At trial, Barson admitted sending the e-mails and explained that he sent them to prompt his ex-wife to respond to his allegations of adultery as well as to embarrass her.

Interestingly, Barson did not argue on appeal that the statute was unconstitutionally vague or overly broad. He instead argued that the evidence was insufficient to prove that the e-mails at issue were "obscene" because they demonstrated only anger and did not thematically appeal to a prurient interest in sex.

The test for obscenity utilized by the court derives from the test established by the United States Supreme Court in *Miller v. California*, 413 U.S. 15 (1973). Accordingly, material is obscene under the statute when it "has as its dominant theme or purpose an appeal to the prurient interest in sex, that is, a shameful or morbid interest in nudity, sexual conduct, sexual

excitement, excretory functions or products thereof or sadomasochistic abuse, (2) substantially exceeds the customary limits of candor in description or representation of such matters, and (3) taken as a whole, does not have serious literary, artistic, political or scientific value.?

After applying the test, the court found as a matter of law the following:

Barson's e-mails to Ms. Barson unquestionably contained vulgar, offensive, and sexually explicit language. However, his use of these words "considered as a whole," and in the context of the marital discord and the angry, offensive tone and purpose of the e-mails, did not establish or support a factual or legal determination that Barson intended or had "as its dominant theme or purpose an appeal to the prurient interest in sex." The e-mails were not in any way intended to arouse or appeal to sexual desire, either Barson's own or any other individual's to whom he sent the e-mails. Rather, the evidence showed that Barson wrote the e-mails solely to convey his anger and disgust and that he forwarded them to his family and friends to embarrass Ms. Barson. Under these circumstances, we hold, using the definition of obscene set forth in Code § 18.2-372 and the requisite standard of review, that the evidence was insufficient to permit a reasonable trier of fact to conclude the e-mails were obscene.

The dissent, however, disagreed with the majority's focus on the intent of the communicating party, stating:

I believe a reasonable fact finder could conclude, as it did here, that the eighty-seven e-mails Barson sent to his wife between May 1, 2009, and May 14, 2009, contained language of such a graphic and explicit sexual nature as to manifest a "shameful or morbid" interest in his wife's sexual conduct, or in other words, a prurient interest in sex that "substantially exceeds the customary limits of candor in description or representation of such matters."

The principal disagreement between the majority opinion and the dissent concerned whether the motivation of the speaker was dispositive. According to the majority's approach, Barson could not be convicted under the statute because his purpose in using the vulgar language was to convey a message to his ex-wife that he was angry about her behavior. While, according to contemporary community standards, he chose his words poorly, he could not be convicted for using improper language to convey a lawful message. The dissent, on the other hand, reasoned that while purpose is a factor, it is not dispositive and, in this case, Barson's choice of words alone should be sufficient to support a conviction.

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