

In the Third Judicial District Court, Salt Lake County, State of Utah	
STATE OF UTAH, Plaintiff, vs. JASON CHRISTOPHER HALL, Defendant.	ORDER DENYING THE DEFENDANT'S MOTION TO DISMISS COUNT TWO AND THREE Case No. 221906445 Judge Paul B. Parker

Defendant, Jason Christopher Hall is charged in the Information with three counts arising from conduct alleged to have occurred on and between March 1, 2021, and December 31, 2021. These charged offenses are Count One: Threatening Elected Officials-Assault, in violation of U.C.A. §§ 76-8-313; 76-8-315; 76-5-102; Count Two: Stalking, in violation of U.C.A. §§ 76-5-106.5 (2) (a) (b), (6) (a); 76-2-202 and Count Three: Threats to Influence Official or Public Action, in violation of U.C.A § 76-8-104.

Defendant's Motion to Dismiss

Pursuant to Utah Rules of Criminal Procedure, Rule 25 Mr. Hall moves the Court to dismiss counts two and three of the Information on the grounds that the statutes used to charge these offenses are unconstitutional as applied to him and unconstitutionally overbroad. Plaintiff, the State of Utah, opposes Mr. Hall's motion.

In support of his motion to dismiss counts two and three, Mr. Hall contends that U.C.A. §§ 76-5-106.5 and 76-8-104 violate his Constitutional rights to freedom of expression and speech by prohibiting a wider range of conduct than the First Amendment allows, by criminalizing substantial amounts protected conduct, and by punishing speech regardless of the speaker's subjective awareness that it may be considered threatening by the person at whom it is directed. Central to Mr. Hall's argument is the recent decision by the U.S. Supreme Court in *Counterman v. Colorado*, 600 U.S. 66 (2023).

The Constitutionality of U.C.A. §§ 76-5-106.5 and 76-8-104

Under the Utah Code Annotated (U.C.A.) § 76-5-106.5 (2) an actor commits the offense of Stalking if the actor "intentionally or knowingly (a) engages in a course of conduct directed at a specific individual and knows or should have known that the course of conduct would cause a reasonable person: (i) to fear for the individual's own safety or the safety of a third individual; or (ii) to suffer other emotional distress..." This is the section Mr. Hall is charged with violating in Count Two, and one against which he lodges his challenge. Per U.C.A. § 76-5-106.5 (1) (a) (i) (A) threats are included in the prohibited conduct encompassed by the offense.

Courts have long recognized the constitutionality of laws that proscribe certain areas of speech such as incitement, defamation, and obscenity. *United States v. Stevens*, 559 U.S. 460, 468 (2010). (For incitement, see *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969). On defamation see *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340, 342 (1974). For proscriptions against obscenity, see *Miller v. California*, 413 U.S. 15, 24 (1973)). Speech which constitutes a true threat also falls within this area of permissibly restricted expression. *Virginia v. Black*, 538 U.S. 343, 359 (2003). This is the type of speech Utah’s Stalking statute ostensibly seeks to curtail. A true threat is a “serious expression” communicating an intent to “commit an act of unlawful violence.” *Id.* at 359. In *Counterman v. Colorado*, 600 U.S. 66 (2023), the U.S. Supreme Court found that in prosecutions of a true threat offense, “the First Amendment requires proof that a defendant acted with a subjective understanding as to the threatening nature of his statements.” *Id.* at 69. *Counterman* holds as unconstitutional a true threats prosecution that does not require, at a minimum, proof that a defendant acted with recklessness. *Id.* at 81.

A violation of U.C.A. § 76-5-106.5 requires that an actor “knowingly or intentionally” engage in threats, when threats are included in a course of conduct alleged, and that the actor possess the same subjective mental state as to the nature of the threatening statements. U.C.A. § 76-5-106.5 (2) goes further to add the requirement that the actor “knows or should know that the [threats] would cause a reasonable person” to fear harm to himself, herself or to another, or to suffer emotional distress. Where a charge alleges that an actor “know” that any purported threats would reasonably cause fear to another, the subjective mental state requirement of U.C.A. § 76-5-106.5 (2) is made plain regarding threatening speech. This construction exceeds the recklessness requirement of *Counterman* when true threats are alleged and is constitutional on its face.

An alternative statutory construction permits the State to charge that an actor “should know” that his or her course of conduct would cause a person to fear for their safety or to suffer emotional distress. This would not fall short, or even within the requirements of *Counterman*, where “follow[ing], monitor[ing], observ[ing], photograp[ing] [or] surveil[ling]” acts are included, but “threat[s], or communicat[ion]” are not alleged in a course of conduct. (See U.C.A. § 76-5-106.5 (1) (a) (i) (A)). There, no offense to the Constitution would lie either.

The only instance where U.C.A. § 76-5-106.5 (2) would potentially run afoul of *Counterman*’s subjective mental state requirement for true threats would be where threatening speech was alleged in a course of conduct and the State charged only that a defendant “should know” that such speech would cause a reasonable person to fear harm or to suffer emotional distress. Using the statute in this way, especially where threats constitute a large part or the whole of the alleged course of conduct, would substantially mirror the salient facts of *Counterman* and similarly violate the First Amendment.

Thus, of the ways U.C.A. § 76-5-106.5 (2) has been construed above there are constitutional and unconstitutional interpretations. Here Count Two charges that Mr. Hall committed the offense of Stalking by “intentionally or knowingly engaging in a course of conduct...and knew or should have known that the course of conduct would cause a reasonable person to fear for the person’s own safety or the safety of a third person or to suffer emotional distress...” As it relates to speech included in a course of conduct, *Counterman* provides that

using an objective mens rea standard is insufficient. See 600 U.S. at 82. In other words, using a negligent culpable mental state requirement, which allows the State to prove that Mr. Hall “should have known” his alleged statements would be considered threatening, is unconstitutional. See *Id.* at 79 FN5.

If a provision of the criminal code is held invalid or if the application to any person or circumstance is held invalid, the remainder shall not be affected. Utah Code Annotated § 76-1-1-8. In this case, this court’s ruling that the “should have known” provision as applied to true threats alone without reference to conduct is unconstitutional does not affect the validity of the remainder of the statute. Therefore, Defendant’s challenge to the statute as a whole is denied and the State may proceed against Mr. Hall by proof that he “knew” that a reasonable person would consider his statements to be threats. .

As for the State’s prosecution of Mr. Hall for the offense of Stalking, as with any true threat alleged, the State must prove that Mr. Hall acted by more than merely a minimal subjective understanding as to the nature of that threat. In this instance, proof of recklessness is insufficient. To stay within constitutional bounds and to comply with U.C.A. § 76-5-106.5 (2), the State must prove that Mr. Hall acted with knowledge of the threatening nature of his alleged statements.

Mr. Hall also challenges U.C.A. § 76-8-104 as charged in Count Three, under *Counterman*, asserting that it violates his rights under the First Amendment. Although this section does not explicitly apply a culpable mental state to the conduct it prohibits, U.C.A § 76-2-102 provides that for offenses not involving strict liability, “when the definition of the offense does not specify a culpable mental state...intent, knowledge or recklessness shall suffice to establish criminal liability.” Furthermore, this section requires evidence of both a threat to harm a public official and a specific purpose to influence official “action, decisions, opinion, recommendation, nomination, vote, or other exercise of discretion.” The intent requirement imposed by U.C.A § 76-2-102 and this specific purpose requirement meet the need for proof of a subjective culpable mental state in the prosecution of a true threat offense as required by *Counterman*. Thus, U.C.A. § 76-8-104 does not violate the Constitution.

Aside from the very limited circumstances where the *Counterman* would bear upon the constitutionality of the statutes at issue, the Defendant’s claim that these statutes are overbroad is unavailing. The Court’s application of the “overbreadth doctrine” to invalidate duly enacted laws, as Mr. Hall requests here, is “manifestly, strong medicine...[to be] employed by the Court sparingly and only as a last resort.” *Broaderick v. Oklahoma*, 413 U.S. 601, 613 (1973) (citations omitted). The statutes challenged are presumed constitutional, and any reasonable doubts must be resolved in favor of constitutionality. *State v. Garner*, 2008 UT App. 32 ¶ 10, 177 P.3d 637. Mr. Hall carries the burden of persuasion and must demonstrate that the statutes he challenges are unconstitutional. *State v Jones*. 2018 UT App ¶9, 427 P.3d 538, 541. To do so he must show that each statute “does not aim specifically at the evils within the allowable area of state control, but on the contrary, sweeps within its ambit other activities that in ordinary circumstances constitute an exercise of freedom of speech or the press.” *Provo City v. Whatcott* 2000 UT App 86 ¶8 (citation omitted).

The Court is simply not persuaded that that either statute is unconstitutional, nor that either statute takes aim at anything other than conduct that is properly within the purview of legislative concern.

Order

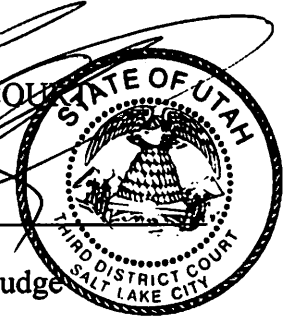
As such, and for the reasons stated herein, the Defendant's motion to dismiss Counts Two and Three of the Information is DENIED.

DATED this 24 day of October, 2023

THIRD DISTRICT COURT

Paul B. Parker

Third District Court Judge



CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 221906445 by the method and on the date specified.

EMAIL: TRINITY JORDAN TJORDAN@ATLLP.COM

EMAIL: D LOREN WASHBURN LOREN@WASHBURNLAWGROUP.COM

EMAIL: JACOB LEE JRLEE@ATLLP.COM

EMAIL: AARON CLARK ACLARK@ATLLP.COM

EMAIL: STEVEN WUTHRICH SWUTHRICH@AGUTAH.GOV

EMAIL: HEATHER WAITE-GROVER HEATHERGROVER@AGUTAH.GOV

10/24/2023

/s/ AUSTIN MELINE

Date: _____

Signature