In the District of Columbia Court of Appeals

No. 20-AA-26

Ibrahim I. Ahmed,

Petitioner,

v.

D.C. Department of For-Hire Vehicles,

Respondent.

On Petition for Review of an Order of the
D.C. Office of Administrative Hearings,
Case No. 1934601504

MOTION FOR SUMMARY REVERSAL

Appellant Ibrahim I. Ahmed hereby moves for summary reversal of the Order of the District of Columbia Office of Administrative Hearings entered December 12, 2019.

INTRODUCTION

The Office of Administrative Hearings upheld a citation imposing a $500 fine on taxi driver Ibrahim Ahmed after finding that he shouted "fuck you" to a Department of For-Hire Vehicles enforcement officer as he drove by the officer, who (Mr. Ahmed felt) had treated him in an unreasonable and disrespectful manner.

Because Mr. Ahmed's statement was clearly protected by the First Amendment, the decision below should be summarily reversed.

Alternatively, the regulation that Mr. Ahmed was found to have violated should be construed not to prohibit his statement, thereby avoiding the need for a constitutional holding.

APPLICABLE LEGAL STANDARD

"'The standard for summary disposition is well-established: the movant must show that the basic facts are both uncomplicated and undisputed, and that the lower court's ruling rests on a narrow and clear-cut issue of law.'" *Watson v. United States*, 73 A.3d 130, 131 (D.C. 2013) (quoting *Carl v. Tirado,* 945 A.2d 1208, 1209 (D.C. 2008)).

STATEMENT OF FACTS

The material facts here are both uncomplicated and undisputed.

Petitioner Ibrahim Ahmed is a taxi driver. On September 25, 2019, Officer Nettina Wren-Perkins of the Department of For-Hire Vehicles issued him a Notice of Infraction carrying a $500 fine. The Officer's write-up of the justification for the citation is as follows:

> DRIVER WAS TRYING TO SIT AT THE TAXICAB STAND AT 200 22ND STREET NW AT THE STATE DEPARTMENT. I WAVED AT DRIVER TO MOVE BECAUSE THE TAXI STAND WAS AT CAPACITY, THE DRIVER PROCEEDED TO TURN AROUND BEFORE DRIVING PASSED ME [*sic*, should be "driving past me"] ME HE STOP AND LOOKED ME IN MY FACE AND SAID FUCK YOU!! AND PROCEEDED TO DRIVE OFF.

Record, Tab 1, p. 2.[1] Officer Perkins then pursued the driver and conducted a traffic stop to issue a citation. *Id*. The officer's written summary of the violation was, "DRIVER USED ABUSIVE LANGUAGE TOWARDS OFFICER (PROFANITY)." *Id*. Specifically, Mr. Ahmed was charged with violating 31 DCMR § 1906.2, which provides that "No private sedan operator shall threaten, harass, or engage in abusive conduct, or attempt to use or use physical force against any District enforcement official."

Mr. Ahmed appealed the citation to the Office of Administrative Hearings. At the hearing, Officer Perkins testified about the events:

[1] The record filed by the agency is not consecutively paginated.

[OFFICER PERKINS:] I was sitting in the cruiser at the time the gentleman was driving up. Me and him made eye contact. He asked me could he sit at the taxi cab stand. I advised him that he could not sit at the taxi cab stand because it was already at capacity.

And he was like, "It's moving." I said, "No, nobody's moving. Everybody is sitting here. There's no room for you to sit here that's why we out here so the cab drivers are not loitering out here.

So he went around the taxi cab stand -- it's like a circle, he went around and he stopped. So me and him had eye contact again, he looked at me. And he said – I don't know if I can say the word?

JUDGE CRICHLOW: Yes

OFFICER PERKINS: "Fuck you." And I looked at him. He looked at me. And then he pulled off.

Record, Tab 3, pp. 10-11.

Mr. Ahmed told essentially the same story, except that he denied saying "fuck you":

[MR. AHMED:] And then when I was making a turn, I saw one of them loading, the three that's allowed, one of them was loading and about to leave. . . .

JUDGE CRICHLOW: Okay.

MR. AHMED: And I asked, "Officer, somebody's leaving, could I get in line." And she did not respond to me. And I was like, "Can I get in line because somebody is leaving?" And then she laughed at me and she said, you know, "Get the hell out." And I was like -- I left.

When I left, drove up, I made a left turn on to Constitution. As soon as I turn, I saw her siren lights were coming after me. I stopped. I asked, "What did I do?" What, "You know, you harassed me." I said, "I'm sorry if you thought that, but you know, I didn't mean anything. I just asked you if I could get in."

She wouldn't respond to me. She wouldn't (inaudible) took my license and everything. Came back to me with a ticket, $500. And that's what happened.

* * *

JUDGE CRICHLOW: all right. I have a question. So, Mr. Ahmed, are you denying that you cursed at the officer?

MR. AHMED: Yes, I am.

Record, Tab 3, pp. 17-18, 20.

Administrative Judge Crichlow's findings of fact were as follows:

On September 25, 2019, in the 2100 block of Constitution Avenue, NW, Officer Perkins observed a public vehicle for hire, bearing tag number H90991 operated by Respondent. The vehicle was pulled up behind a taxi stand that was at full capacity. The Officer made eye contact with Respondent who asked if he could remain outside of the taxi stand. The Officer said no and Respondent pulled from the taxi stand. He drove passed [*sic*] the Officer who was parked in a marked cruiser. The

> Officer laughed at Respondent when he again asked if he could park. Respondent got angry, used an expletive and drove off. The Officer stopped the vehicle and issued the NOI [Notice of Infraction].

Record, Tab 2, p. 3. The Administrative Judge ordered Mr. Ahmed to pay a fine of $500. *Id*. at 4.

ARGUMENT

As the record reflects, the facts were essentially undisputed except on the question whether Mr. Ahmed said the alleged words. In the context of this appeal, the answer to that question is irrelevant.

I. 31 DCMR § 1906.2 is Unconstitutional as Applied to Mr. Ahmed.

It has been clear for many years that "cursing a cop" is constitutionally protected speech. As the Supreme Court explained in *Houston v. Hill*, 482 U.S. 451 (1987), "[t]he First Amendment protects a significant amount of verbal criticism and challenge directed at police officers," *id*. at 461, because "[t]he freedom of individuals verbally to oppose or challenge police action without thereby risking arrest is one of the principal characteristics by which we distinguish a free nation from a police state." *Id*. at 462-63.

Lewis v. City of New Orleans, 415 U.S. 130 (1974), is directly on point. There, the Court struck down on its face a municipal ordinance that made it unlawful "for any person wantonly to curse or revile or to use obscene or opprobrious language toward or with reference to any member of the city police while in the actual performance of his duty." *Id.* at 132. Saying "fuck you" to an officer obviously qualifies as "curs[ing]" or using "obscene or opprobrious language." The holding of *Lewis* therefore fits this case like a glove and requires reversal.

Lewis left open the possibility that an ordinance limited to prohibiting "fighting words" directed to a police officer could be constitutional if it used the "constitutional definition" of that

term, "namely, 'those (words) which by their very utterance inflict injury or tend to incite an immediate breach of the peace.'" *Lewis*, 415 U.S. at 132. But in *Houston v. Hill*, the Court suggested that "even the fighting words exception . . . might require a narrower application in cases involving words addressed to a police officer, because a properly trained officer may reasonably be expected to exercise a higher degree of restraint than the average citizen, and thus be less likely to respond belligerently to fighting words." 482 U.S. at 462 (quoting *Lewis*, 415 U.S. at 135 (Powell, J., concurring)) (internal quotation marks omitted).

In any event, 31 DCMR § 1906.2 is self-evidently not limited to fighting words. And even if it were, shouting "fuck you" from a passing vehicle cannot satisfy the constitutional definition of fighting words. *See Sandul v. Larion*, 119 F.3d 1250, 1255 (6th Cir. 1997) (holding it clearly established that shouting "fuck you" while extending a middle finger is protected speech when the speaker is in a passing vehicle and the recipients of the insult therefore cannot start a fight).

This Court's precedents are equally clear. In *Matter of M.W.G.*, 427 A.2d 440 (D.C. 1981), the Court reversed the delinquency adjudication of a juvenile who said to an officer, "if you wasn't wearing that gun, I'd f you up." *Id*. at 441. Echoing the Supreme Court's suggestion in *Houston v. Hill*, the Court explained that "[p]olice officers are trained to deal with unruly and uncooperative members of the public. A police officer is expected to have a greater tolerance for verbal assaults . . . we expect them to remain peaceful in the face of verbal abuse that might provoke or offend the ordinary citizen."

In *In re W.H.L.,* 743 A.2d 1226, 1227 (D.C. 2000), the Court likewise reversed the delinquency adjudication of a juvenile who yelled "Y'all petty as s___, F___ y'all" at police officers several times. In *Shepherd v. District of Columbia*, 929 A.2d 417 (D.C. 2007), the Court

reversed the conviction of man who was "cussing" at an officer while the officer was writing him a ticket, yelling, among other things, "you don't know who you are fucking with." *Id*. at 418. The Court reiterated that "'[a] police officer is expected to have a greater tolerance for verbal assaults' and is 'especially trained to resist provocation' by 'verbal abuse that might provoke or offend the ordinary citizen.'" *Id*. at 419 (quoting *In re W.H.L.* and *Matter of M.W.G*.).

Most recently, in *Martinez v. District of Columbia*, 987 A.2d 1199, (D.C. 2010), the Court made clear that the exact action at issue in this case—shouting "fuck you" at a police officer—was protected speech unless, under the circumstances, the phrase amounted to "fighting words" likely to provoke immediate violence. *Id*. at 1204 n.10. As already explained, the words uttered here could not possibly have amounted to "fighting words" (even if directed at someone other than a law-enforcement officer) because Mr. Ahmed was driving away as he said them. *See Sandul v. Larion*, *supra*.

Accordingly, 31 DCMR § 1906.2 was unconstitutionally applied to punish Mr. Ahmed for his constitutionally-protected speech.

II. Mr. Ahmed Did Not Violate 31 DCMR § 1906.2.

It would be unnecessary to hold that 31 DCMR § 1906.2 is unconstitutional as applied to Mr. Ahmed's speech if he did not violate that regulation in the first place. And he did not, because he did not "engage in abusive conduct" within the meaning of the regulation.

31 DCMR § 1906.2 provides that "No private sedan operator shall threaten, harass, or engage in abusive conduct, or attempt to use or use physical force against any District enforcement official." Officer Perkins did not cite Mr. Ahmed for threatening her, harassing her, using physical force against her, or attempting to use physical force against her. The Notice of Infraction alleges: "DRIVER USED ABUSIVE LANGUAGE TOWARDS OFFICER

(PROFANITY)." Record, Tab 1, p. 2. But it would be unreasonable to interpret the prohibition on "engag[ing] in abusive conduct" to include the simple act of using a profanity to protest perceived unreasonable treatment (including, as the Administrative Judge found, "laugh[ing] at Respondent" after refusing to let him wait for a moment until another taxi finished loading and left the taxi stand).

"Abuse" has no single meaning. It can mean a variety of things in a variety of contexts. Sexual abuse, for example, means something very different from abuse of process. While there is no definition of "abusive conduct" in the Vehicles-for-Hire regulations, the words in a statute or regulation "are known by the company they keep." *Basch v. George Washington University,* 370 A.2d 1364, 1367 (D.C. 1977); *see also Graham County Soil & Water Conservation District v. U.S. ex rel. Wilson,* 559 U.S. 280, 287 (2010) ("the interpretive maxim *noscitur a sociis,* literally translated as 'it is known by its associates,' counsels lawyers reading statutes that 'a word may be known by the company it keeps.'") (cleaned up). Looking at the company kept by "abusive conduct" in 31 DCMR § 1906.2—threats, harassment, and the use or attempted use of physical force—it seems likely that more than an expletive from a passing car is required to constitute "engag[ing] in abusive conduct."[2]

This Court should not lightly conclude that the drafters of the Vehicles-for-Hire regulations intended the phrase "engage in abusive conduct" to include a single instance of rude speech, because such a conclusion invites not just serious but meritorious constitutional

[2] As reflected in this Court's cases cited above, "fuck" has, for better or worse, become a common expletive in 21st Century Washington. "[T]he word has become increasingly less vulgar and more publicly acceptable, an example of the 'dysphemism treadmill,' wherein former vulgarities become inoffensive and commonplace." Wikipedia, "Fuck" at https://en.wikipedia.org/wiki/Fuck. Its utterance therefore would not qualify as "abusive conduct" even under a very broad construction of that term.

challenge, and the cannon of constitutional avoidance teaches that a statute or regulation should, if reasonably possible, "'be construed to avoid serious constitutional doubts.'" *Competitive Enterprise Institute v. Mann*, 150 A.3d 1213, 1236 (D.C. 2016, *as amended* 2018) (quoting *FCC v. Fox Television Stations, Inc*., 556 U.S. 502, 516 (2009)).[3]

Accordingly, the Administrative Judge's finding that Mr. Ahmed did use the words charged was insufficient, as a matter of law, to support her conclusion that he violated 31 DCMR § 1906.2, and her decision should alternatively be reversed for that reason.

CONCLUSION

For the reasons given above, the Order of the Office of Administrative Hearings should be summarily reversed and the case remanded to that Office with instructions to dismiss the Notice of Infraction against Mr. Ahmed.

June 29, 2020

Respectfully submitted,

/s/ *Arthur B. Spitzer*

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[3] To be sure, threats and harassment, which are also prohibited by 31 DCMR § 1906.2, can be carried out using only speech. But "true threats" are not protected by the First Amendment, *see In re S.W.,* 45 A.3d 151, 156 (D.C. 2012), and harassment generally requires a persistent course of conduct, not a single instance. *See, e.g.,* www.merriam-webster.com/dictionary/harass ("to annoy persistently"); www.dictionary.com/browse/harass?s=t ("to disturb persistently; torment, as with troubles or cares; bother continually; pester; persecute"). Profanity, by contrast—specifically including "fuck" as a term of angry criticism—is constitutionally protected. *See Cohen v. California*, 403 U.S. 15 (1971) ("Fuck the draft" protected by the First Amendment); *cf. Iancu v. Brunetti*, 139 S. Ct. 2294 (2019) (U.S. Patent and Trademark Office cannot refuse trademark registration to "FUCT").

CERTIFICATE OF SERVICE

I hereby certify that the forgoing motion for summary reversal was served upon Loren AliKhan, Solicitor General of the District of Columbia, at loren.alikhan@dc.gov, via the Court's electronic filing system, this 29th day of June, 2020.

Courtesy copies were also sent by email to Principal Deputy Solicitor General Caroline S. Van Zile at caroline.vanzile@dc.gov, and to Assistant Attorney General Richard Love at richard.love@dc.gov.

/s/ *Arthur B. Spitzer*