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Legal Opinion 2011-026

TO: Mayor John Engen, City Council, Bruce Bender, Marty Rehbein, Nikki Rogers, Kelly Elam, Mark Muir, Mike Brady, Chris Odlin, Scott Hoffman, Mike Colyer, Brent Ramharter

CC: Dept. Attorney

FROM: Jim Nugent, City Attorney

DATE December 2, 2011

RE: Montana criminal law provides that a person commits the criminal offense of disorderly conduct if the person knowingly disturbs the peace by disturbing or disrupting any public meeting.

FACTS:

City elected officials and City employee concern has arisen pertaining to citizen disruptions and/or breaches of the peace/disturbing the peace during public meetings that are being conducted by the City Council. The current concern is generated by reportedly uncivil citizen conduct, reportedly including in part, loud yelling by citizens from the audience and some citizen conduct that some considered to be threatening citizen conduct that occurred Wednesday afternoon November 30, 2011 during a City Council administration and Finance Committee meeting. City of Missoula police were contacted and dispatched to assist with ensuring peace and orderliness at the public meeting.

ISSUES:

- (1) Does Montana state law regulate a person's conduct if the person's conduct disturbs or disrupts any public meeting?
- (2) If a presiding officer of a public meeting at which disturbing the peace or disrupting conduct is occurring determines to have the disruptive/disorderly person removed from the public meeting, does the citizen have any right to physically resist their removal?
- (3) Does a disruptive person's physical resistance to removal from a public meeting for disturbing or disrupting any public meeting fit into the concept of protected speech under the Constitution?
- (4) What are the primary elements of the offense of disorderly conduct pursuant to 45-8-101(1)(g) MCA with respect to a person committing the offense of disorderly conduct by disturbing any public meeting?
- (5) How does Montana state criminal code define the term "knowingly?"

CONCLUSIONS:

(1) Yes, Montana state criminal law pertaining to disorderly conduct provides that “a person commits the offense of disorderly conduct if the person knowingly disturbing the peace by

[. . .] disturbing or disrupting any lawful assembly or public meeting,” 45-8-101(1)(g) MCA.

(2) No, the Montana Supreme Court in *State v. Lowery* (1988) stated that “the decision of a presiding officer to have a citizen physically removed from a public meeting for disrupting the meeting cannot lawfully be challenged by forcible resistance by the citizen.” The Court upheld the person’s conviction for disorderly conduct for fighting with law enforcement who were attempting to remove the disruptive person.

(3) No, the Montana Supreme Court in *State v. Lowery* (1988) pertaining to the Darby Town Council’s requested removal of the Darby City Judge from a public Town Council meeting when the Judge attempted to physically resist removal from the public meeting, stated that “after reviewing the facts in the transcript, we conclude that Mr. Lowery’s actions in physically resisting removal from the council meeting do not fit within the concept of speech protected under the Constitution.”

(4) The Montana Supreme Court has indicated that with respect to disorderly conduct at a public meeting pursuant to 45-8-101(1)(g) MCA there are at least two conditions that must be shown by the evidence to exist. The conditions are as follows. (A) the defendant knowingly disturbed the peace; and (B) the defendant disturbed the peace through disrupting a lawful assembly or public meeting.

(5) Pursuant to 45-2-101(35) MCA, the term “knowingly” is defined in pertinent part as meaning “a person acts knowingly with respect to conduct or to a circumstance described by a statute defining an offense when the person is aware of the person’s own conduct or that the circumstance exists.”

LEGAL DISCUSSION:

Montana state law regulates a person’s disturbing or disruptive conduct that disturbs the peace at a public meeting pursuant to 45-8-101(1)(g) MCA pertaining to the criminal offense of disorderly conduct. Potential pertinent provisions of Montana’s criminal offense of disorderly conduct with respect to a person’s conduct at a public meeting are as follows.

“45-8-101. Disorderly Conduct. (1) A person commits the offense of disorderly conduct if the person knowingly disturbs the peace by:

- (a) quarreling, challenging to fight, or fighting;
- (b) making loud or unusual noises;
- (c) using threatening, profane or abusive language;
- [. . .]
- (f) Rendering the free ingress or egress to public or private places impassable;
- (g) Disturbing or disrupting any lawful assembly or public meeting; (Emphasis added).

The Montana Supreme Court in *State v. Ytterdahl*, 22 Mont. 258, 721 P. 2d 757, 1986 Mont. LEXIS 962 (1986) stated, supra at 759, with respect to the criminal offense of disorderly conduct pursuant to 45-8-101(1)(g) MCA that:

“It is certain that from the provisions of our statute defining disorderly conduct, in this case, at least two conditions must be shown in the evidence; (1) that the defendant knowingly disturbed the peace; and (2) that he disturbed the peace through disrupting a lawful assembly or public meeting.

The gravamen of the statute defining the offense is ‘knowingly disturbing the peace’ [. . .]

Although disorderly conduct is in the general sense a broader term than breach of the peace, in Montana, under the statute the crime of disorderly conduct is not committed, unless the person so acting, ‘knowingly disturbs the peace’. We hold that disturbing the peace is synonymous with breaching the peace.

To establish a misdemeanor under section 45-8-101(1)(g), MCA, it is essential to show, as an element of the offense, a disturbance of public order and tranquility by acts or conduct not merely amounting to unlawfulness, but tending to create public tumult and incite others to break the peace.” (Emphasis added).

The Montana Supreme Court in *State v. Compas*, 1998 MT 140, 290 Mont 11, 964 p.2d, 703, 1998 Mont. Lexis (1990), held that the two elements must be proved beyond a reasonable doubt to convict under 48-8-101(1)(b), MCA. Those two elements that are “1) That she knowingly disturbed the peace, and 2) that she did so by making loud or unusual noises.”

The term “knowingly” is defined in Montana state criminal law in pertinent part pursuant to subsection 45-2-101(35) MCA as follows.

A person acts knowingly with respect to conduct or to a circumstance described by statute defining an offense when the person is aware of the person’s own conduct or that the circumstance exists.” (Emphasis added).

The *Ytterdahl* Montana Supreme Court decision involved a defendant who was a landowner who had been in civil litigation with Musselshell County concerning an easement, and a judgment had been entered in that action. Mr. Ytterdahl was later invited to a Musselshell County Commissioner meeting to discuss, apparently, a different easement across his land. The only people at the meeting were the three county commissioners, the public works director, the county attorney, and Mr. Ytterdahl. Mr. Ytterdahl arrived at the meeting upset because the county, without his permission, had bladed a roadway across his property to provide access to the fairgrounds during road repairs. There was evidence that Mr. Ytterdahl was “discourteous, bordering on the irrational, and was hollering and screaming at the commissioners.” When the county attorney informed the defendant that he could initiate a lawsuit in regard to his new complaint of trespass, the defendant “‘mumbled a bad word,’ got up stomped out and slammed the door so hard that the glass in the room rattled.”

Musselshell County charged Mr. Yetterdahl with disorderly conduct pursuant to 45-8-101(1)(g) MCA. While the lower court convicted Mr. Yetterdahl of disorderly conduct, the Montana Supreme Court reversed the ruling, stating “we hold that under the evidence here, the actual conduct of Ytterdahl was not sufficient to constitute the offense of disorderly conduct.”

Approximately, two years later the Montana Supreme Court decided another disorderly conduct case in which the disorderly conduct occurred at a Darby Town Council meeting. The Montana Supreme Court in *State v. Lowery*, 233 Mont. 96, 759 P. 2d 158, 1988 Mont. LEXIS

(1988) upheld a disorderly conduct conviction for fighting with a law enforcement officer. The criminal charge was filed against the Darby City Judge pursuant to 45-8-101(1)(a) MCA pertaining to disturbing the peace through fighting when it was requested that the Judge be removed from the public Town Council meeting. The Darby City Judge physically, forcibly resisted his removal from the public meeting by fighting with the law enforcement officer. Three counts were charged, but the Justice Court dismissed count two pertaining to loud and unusual noises, and the District Court dismissed count three pertaining to disturbing a public meeting. However, the conviction pursuant to count one was upheld by the Montana Supreme Court. The Montana Supreme Court, in Lowery, *supra* at 99, stated as follows.

“Count One clearly relates to Section 45-8-101(1)(a), MCA: ‘A person commits the offense of disorderly conduct if he knowingly disturbs the peace by quarreling, challenging to fight, or fighting.’

[. . .]

Mr. Lowery argues that his forcible removal from the council meeting was a physical censorship and that it is the police officer who should be charged with disturbing the peace, not he. This assertion is without legal support. The decision of a presiding officer to have a citizen physically removed from a public meeting for disrupting the meeting cannot lawfully be challenged by forcible resistance. [. . .] After reviewing the facts in the transcript, we conclude that Mr. Lowery’s actions in physically resisting removal from the council meeting do not fit within the concept of speech protected under the Constitution. We further conclude that there is sufficient evidence in the record from which the lower court could find that Mr. Lowery violated the prohibition against fighting in section 45-8-101(1)(A) MCA. We hold that it was not unlawful to prosecute Mr. Lowery under Count One of the complaint.” (Emphasis added).

The Montana Supreme Court then went on *supra* at page 100 to state as follows.

“The criminal law commission comments to Section 45-8-101, MCA, state that, for a charge of breach of the peace, ‘It is not sufficient that a single person or a very few persons have grounds for complaint.’ However, in *City of Billings v. Batten*, (Mont 1985) (218 Mont. 64), 705 P. 2d 1120, 42 St. Rep.1398, defendant was convicted of using ‘fighting words’ toward his neighbor in the presence of the neighbor’s family and several passers-by and within the hearing of other neighbors. The total number of persons present was about ten. In *City of Whitefish v. O’Shaughnessy* (Mont. 1985)(216 Mont. 433), 704 P. 2d 1021, 42 St. Rep. 928, defendant was convicted of using ‘fighting words’ in the presence of two friends and a police officer. We hold that the circumstances presented here involve a disturbance to a sufficient number of persons to justify prosecution under section 45-8-101(1)(A), MCA.” (Emphasis added).

Factually, the Lowery case involved defendant Darby City Judge being allowed to speak at a January Town Council meeting concerning a non-partisan initiative which the Darby City Judge supported, but which the Darby Town Council refused to put on the ballot at the previous November election. During the course of the Darby City Judge’s testimony, his discussion with a particular town council member escalated in volume and emotion and the Darby City Judge also complained about irregularities in the council meeting. It was requested that the

Darby City Judge be escorted from the public meeting room; instead the Darby City Judge forcibly resisted and a scuffle ensued. The county sheriff had to be called to assist with removing the Darby City Judge from the public meeting room.

Every public entity has an inherent right to control peace and tranquility at their public meetings. There is no citizen right to disturb the peace through disrupting a public meeting. While the public body has the right to have a citizen removed from a public meeting in order to maintain peace, tranquility, and civility during that meeting, there is no requirement that the person who is removed must also be charged with disorderly conduct.

CONCLUSIONS:

(1) Yes, Montana state criminal law pertaining to disorderly conduct provides that “a person commits the offense of disorderly conduct if the person knowingly disturbing the peace by

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/s/

Jim Nugent, City Attorney

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