

IN THE CIRCUIT COURT OF MONROE COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA,

Plaintiff,

v.

Case No. CC-32-2019-B-17
(Hon. Robert A. Irons)

HOLDEN CARTER DOMETRIUS,

Defendant.

MOTION TO DISMISS WITH PREJUDICE

Pursuant to Rule 12 (b), W. Va. R. Crim. Proc., Defendant Holden Carter Dometrius, by his Counsel, William V. DePaulo, Esq. respectfully requests that this Court enter an order dismissing with prejudice the charges in this proceeding brought against this Defendant alleging violation of W. Va. Code § 61-6-24, entitled “Threats of terrorist acts, conveying false information concerning terrorist acts and committing terrorist hoaxes prohibited; penalties.”

I. Preliminary Statement

In support of this motion, Defendant contends that the so-called “Terrorist Threat” statute requires, at a minimum, an allegation that the

Defendant made some communication -- verbal or written -- that contains the requisite elements of a terrorist threat as defined in the statute.

In the present matter, the arresting officer, Sgt. McKenzie of the West Virginia State Police and Deputy Sheriff Hunt of the Monroe County Sheriff's Office both testified that Defendant made no statement beyond a few "yes" and "no" responses to questions from the arresting officers.

The Defendant did verbalize (i) his name; (ii) the fact that he had an identification paper in his shoe, which the officers obtained confirming the identity, and (iii) the fact that a piece of aluminum foil the officers removed from Defendant's person had a food in it, which the officer for reasons not testified to declined to confirm.

Apart from those few responses, Defendant made, in the arresting officers' own words, *"no statement of any significance."* See **EXHIBIT A**, Stipulation re May 1, 2019 Preliminary Hearing.

Defendant respectfully submits that the foregoing language -- attributed to him in the statements testified to, under oath, by the arresting officers -- cannot sustain a charge of "terrorist threat" for purposes of W. Va. Code § 61-6-24, and that the felony charge of terrorist threat under that statute be dismissed with prejudice.

II. The West Virginia “Threat of Terror” Statute

W. Va. Code § 61-6-24, entitled “Threats of terrorist acts, conveying false information concerning terrorist acts and committing terrorist hoaxes prohibited; penalties,” provides in its entirety as follows:

(a) As used in this section:

(1) "Economic harm" means all direct, incidental and consequential pecuniary harm suffered by a victim as a result of criminal conduct. Economic harm includes, but is not limited to, the following:

(A) All wages, salaries or other compensation lost as a result of the criminal conduct;

(B) The cost of all wages, salaries or other compensation paid to employees for time those employees are prevented from working as a result of the criminal conduct;

(C) The cost of all wages, salaries or other compensation paid to employees for time those employees spent in reacting to the results of the criminal conduct; or

(D) The overhead costs incurred for the time that a business is shut down as a result of the criminal conduct.

(2) "Hoax substance or device" means any substance or device that is shaped, sized, colored, marked, imprinted, numbered, labeled, packaged, distributed, priced or delivered so as to cause a reasonable person to believe that the substance or device is of a nature which is capable of causing serious bodily injury or damage to property or the environment.

(3) "Terrorist act" means an act that is:

(A) Likely to result in serious bodily injury or damage to property or the environment; and

(B) Intended to:

(i) Intimidate or coerce the civilian population;

(ii) Influence the policy of a branch or level of government by intimidation or coercion;

(iii) Affect the conduct of a branch or level of government by intimidation or coercion; or

(iv) Retaliate against a branch or level of government for a policy or conduct of the government.

(b) Any person who knowingly and willfully **threatens to commit a terrorist act**, with or without the intent to commit the act, is guilty of a felony and, upon conviction thereof, shall be fined not less than \$5,000 nor more than \$25,000 or confined in a state correctional facility for not less than one year nor more than three years, or both.

(c) Any person who knowingly and willfully conveys false information knowing the information to be false concerning an attempt or alleged attempt being made or to be made of a terrorist act is guilty of a felony and, upon conviction thereof, shall be fined not less than \$5,000 nor more than \$25,000 or confined in a state correctional facility for not less than one year nor more than three years, or both.

(d) Any person who uses a hoax substance or device with the specific intent to commit a terrorist act is guilty of a felony and, upon conviction thereof, shall be fined not less than \$10,000 nor more than \$50,000 or confined in a state correctional facility for not less than one year nor more than five years, or both.

(e) The court shall order any person convicted of an offense under this section to pay the victim restitution in an amount not to exceed the total amount of any economic harm suffered.

(f) The court shall order any person convicted of an offense under this section to reimburse the state or any subdivision of the state for any expenses incurred by the state or the subdivision incident to its response to a violation of this section.

(g) The conviction of any person under the provisions of this section does not preclude or otherwise limit any civil proceedings arising from the same act.

W. Va. Code § 61-6-24 (underscoring, bold and indentation added).

III. West Virginia Case Law

The West Virginia Supreme Court of Appeals has construed W. Va. Code § 61-6-24 on several occasions, carefully assessing the language the individual defendant was alleged to have used, against the language of W. Va. Code §61-6-24 (b) declaring that “any person who knowingly and willfully threatens to commit a terrorist act, with or without the intent to commit the act, is guilty of a felony,” and defining a “terrorist act” as one that, if committed, was:

(A) likely to result in serious bodily injury or damage to property or the environment; and

(B) intended to:

(i) Intimidate or coerce the civilian population;

(ii) Influence the policy of a branch or level of government by intimidation or coercion;

(iii) Affect the conduct of a branch or level of government by intimidation or coercion; or

(iv) Retaliate against a branch or level of government for a policy or conduct of the government.

WV. Code §61-6-24 (a)(3)(A) and (B).

In *State v. Yocum*, 233 W. Va. 439, 759 S.E. 2d 182 (W. Va. 2014), the West Virginia Supreme Court of Appeals reversed a conviction for terrorist threat under W. Va. Code §61-6-24 where a person threatened violence against a police officer's spouse and daughter after the officer arrested him for domestic violence. The Court in *Yocum* ruled that, because the threat in that case was not aimed at a branch or level of government, but was rather directed solely at the family of an individual police officer, the evidence was insufficient to the requirement in W. Va. Code 61-6-24 (a)(3)(B) that a terroristic threat be intended to influence, affect the conduct of, or retaliate against "a branch or level of government." W. Va. Code 61-6-24(a)(3)(B)(emphasis added).

The substance of the threat as reported in *Yocum* was as follows:

While at the hospital awaiting to be examined, Mr. Yocum had been loud and used profanity. After leaving the hospital, Mr. Yocum continued to yell, as he had at the hospital, that he was not going to jail. He leaned on the partition in the patrol car and shouted at Sergeant A. that he knew where the police officer lived and that "[h]e was going to fu*k my [Sergeant

A.'s] daughter.” Following this statement, Mr. Yocum stated “[y]eah, after I get out of jail, I’ll be fu*king your wife, and I’ll fu*k your daughters.”

759 S.E.2d 185.

Over the vigorous dissent of Justice Benjamin, the majority, held that the defendant’s threat was aimed at individuals related to the arresting officer, but not to a “branch or level of government.” In reaching its decision, the *Yocum* court relied heavily upon *People v. Morales*, 20 N.Y.3d 240, 958 N.Y.S.2d 660, 982 N.E.2d 580 (2012), a decision of the New York Court of Appeals which examined whether a gang member’s multiple acts of violence directed at rival gangs could properly come within that state’s anti-terrorism statute that required that the threat be intended “to intimidate or coerce a civilian population,” nearly verbatim language to the prohibition in W. Va. Code §61-6-24(a)(3)(B)(1).

Morales declined to apply the terrorism statute, which barred threats to the “civilian population,” to what it characterized as a discrete criminal transaction against identified gang enemies, rather than, for instance, an attempt to intimidate or coerce the entire Mexican–American community in this Bronx neighborhood. *Id.*, 958 N.Y.S.2d 660, 982 N.E.2d 580 at 585. The *Yocum* court analogized the threat to a subset of police officer family members as akin to that of the threat in *Morales* against a subset of the local

population, focusing on the specific language of the threat made by the defendant. 756 S.E.2d 190.

Again, in *State v. Knotts*, 233 W. Va. 665, 760 S.E.2d 479 (W.Va. 2014)(the case which triggered Justice Benjamin’s revisiting his dissent in *Yokum*), the West Virginia Supreme Court of Appeals addressed verbal threats from a mentally disturbed person who had a dispute with a savings and loan association that resulted in his calling them and threatening violence against the bank personnel. At issue on appeal was whether Knott’s threatened conduct constituted a “[t]errorist act” for purposes of § 61-6-24(a)(3), which defined “terrorist act” to include acts “[l]ikely to result in serious bodily injury or damage to property or the environment; and . . . [i]ntended to . . . [i]ntimidate or coerce the civilian population[.]” *Id.* The Court found sufficient evidence to sustain a guilty verdict, its narrow statutory construction in *Yokum* notwithstanding, by ruling that:

[E]ven though the threat was made to a credit union employee, by the express words used by the Petitioner it was “intended to intimidate or coerce the civilian population” as the Petitioner threatened “to let the world know how he felt about the credit union,” by not only using explosive devices, but also by “let[ting] everybody see what he was going to do, because he was going to put DVD’s across our property to let everybody watch.”

760 S.E.2d 481.

Justice Benjamin, concurring in *Knotts*, stated that:

I am concerned that, to this point, the majority's jurisprudence regarding W. Va. Code § 61-6-24 may be characterized as conflicting and contradictory in that it leaves criminal defendants, lawyers, and judges guessing how this Court might rule in any given case on a sufficiency of the evidence challenge to a conviction under W. Va. Code § 61-6-24.

Id.

The importance of *Yokum* and *Knotts* is not the specific point at which the Court drew the line in a specific cases and the threats analyzed in each. Rather, the importance is what Justice Benjamin's concurrence in *Knotts* described as the "stringent analysis in determining the sufficiency of the evidence." 760 S.E.2d 486 (emphasis added).

In short, the question is not what the Court decided, but how they decided it. And the answer to that question is straight forward: the Court looked carefully at the specific language in the particular threat alleged to have occurred in the individual cases before it.

Critical in both *Yokum* and *Knotts* was the fact that the Court had before them detailed descriptions of a threat to analyze. No such details are presented in the current case for the simple reason that there is no evidence to support the proposition that Defendant made any threat -- let alone a terrorist threat -- on the morning of April 25, 2019.

IV. Testimony of Arresting Officers

At the preliminary hearing on May 2, 2019, Sgt. Charles McKenzie, Commander of the West Virginia State Police detachment in Union, WV, testified that at approximately 8:20 AM on April 25, 2019, he received a call from an employee of Trinity Services, a service company employed to assist with the construction of the Mountain Valley Pipeline, that the employee believed a larceny was taking place, and requested assistance.

Responding to the scene at Little Mountain off Back Valley Road in Lindside, WV, Sgt. McKenzie was joined by Deputy Sheriff Hunt of the Monroe County Sheriff's office. At the preliminary hearing, Sgt. McKenzie testified that upon arrival he observed not a larceny, but rather an individual (identified as Holden Carter Dometrius, the Defendant) attached to a welding sled (a non-self propelled, towed vehicle) by a device commonly referred to as a "sleeping dragon." In the course of removing the device from the Defendant and the towed vehicle, Sgt. McKenzie testified that the Defendant made no spontaneous statements and generally did not respond to questions with comments beyond "yes" and "no." The Defendant did identify himself and stated that he had identification in his shoe, which Sgt. McKenzie retrieved and found to confirm the Defendant's stated identity. Additionally, Sgt. McKenzie testified that, upon inquiry of the Defendant as

to the contents of a piece of aluminum foil, the Defendant advised Sgt. McKenzie that it contained food, a fact which Sgt. McKenzie testified he did not bother to confirm. Sgt. McKenzie testified that the Defendant did not respond to a question whether he had permission to be on the property, and when advised to remove the “sleeping dragon,” declined stating “No, I’m not.” Sgt. McKenzie, in response to whether the Defendant made any other statements, testified “nothing of any significance.” Sgt. McKenzie testified that the Defendant slept on the way to the State Police detachment in Union, WV for finger printing, and that he had supplied a date of birth and social security number.

Deputy Sheriff Hunt testified at the May 2, 2019 preliminary hearing that he had no conversation with the Defendant at Lindsie, Asked if the Defendant had made any other comments of significance, Deputy Sheriff Hunt testified “no.”

V. Argument

A. Can “*Nothing of Significance*” Constitute a threat of terrorist acts for purposes of W. Va. Code §61-6-24.

One need not resort to arcane rules of statutory construction, or sift the subtle differences between the threats in *Yokum* and *Knotts* (with whatever guidance one might glean from *Morales*) to analyze the case at

hand. Before one can determine that a threat satisfies the criteria of §61-6-24 (a) (3)(A) (“likely to result in serious bodily injury or damage to property or the environment;” and (B) is “intended to intimidate or coerce the civilian population,” or a level of government, one needs to find a threat -- any threat.

The conspicuous fact of this case is the absence of any language from the Defendant, beyond banal comments about the contents of a piece of aluminum foil, that threatened anybody, with anything, for any reason. To be sure, there was no testimony that the Defendant made any comment which could plausibly fit the classic algorithm of a threat, such as “If you do X, I will do Y.”

In short, before analyzing the horrific consequences of “Y” under *Yokum* and *Knotts*, there needs to be a statement, utterance or reasonably articulate grunt that conveys the idea that the Defendant is going to do something bad, if something he wants is not provided (or opposes doesn’t cease). Here, there is, to use Sgt. McKenzie’s spontaneous formulation, “nothing of significance.”

B. Dictionary Definitions of “Threat”

W. Va. Code §61-6-24 has a definitional subsection (a) which defines “economic harm,” “hoax substance or device,” and “terrorist act,” but

subsection (a) does not define “threat” or “threatens” for purposes of the felony prohibition in §61-6-24 (b) against threatening a terrorist act. In the absence of a statutory definition, any effort to give those terms meaning must consider the common usage in every day language of the word “threat,” for which dictionary reference is relevant.

And one can search dictionaries from Dr. Samuel Johnson’s initial dictionary forward without finding a definition of “threat” that inculcates this Defendant for the few utterances he might have made on April 25, 2019 atop Little Mountain while appended to a towed welding sled by means of a “sleeping dragon.”

To be sure, none of the following dictionary definitions support any construction of the term “threat” or “threaten” that does not require a verbal or written utterance from the person alleged to be threatening another.

WEBSTER’S 1855 UNABRIDGED DICTIONARY

Webster’s one volume, 1855 edition of his Unabridged Dictionary, in the, recites the following series of definitions pertaining to “threat”:

THREAT, (thret,) n. [Sax. threat. See the verb.] A menace; denunciation of ill; declaration of an intention or determination to inflict punishment, loss or pain on another loss, or pain on another. *There is no terror, Cassius, in your threats. Shak.*

THREAT, (thret,) v. t. To threaten,

THREAT EN, (thret'n,) v. t. [Sax. threotian, from threat].

1. To declare the purpose of inflicting punishment or other evil on another for some sin or offense; to menace. God threatens the finally impenitent with everlasting banishment from his presence.

2. To menace; to terrify or attempt to terrify by menaces; as for extorting money. To send threatening letters is a punishable offense.

3. To charge or enjoin with menace, or with implied rebuke; or to charge strictly. Let us straightly threaten them, that they speak henceforth to no man in this name. — Acts iv.

4. To menace by action; to present the appearance of coming evil; as, rolling billows threaten to overwhelm us.

5. To exhibit the appearance of something evil or unpleasant approaching; as, the clouds threaten us with rain or a storm.

THREAT'EN-ED, (thret'nd,) pp. or a. Menaced with evil.

THREAT'EN-ER, (thret'n-er,) n. One that threatens. Milton.

THREAT'EN-ING, (thret'n-ing,) ppr. Menacing; denouncing evil.
2. a. Indicating a threat or menace; as, a *threatening* look.
3. Indicating something impending; as, the weather is *threatening*; the clouds have a *threatening* aspect.

THREAT'-EN-ING, (thret'n-ing,) n. The act of menacing; a menace; a denunciation of evil, or declaration of a purpose to inflict evil on a person or country, usually for sins and offenses.

Webster, Noah, An American Dictionary of the English Language, Unabridged, Springfield, MA, 1855, at 1149.

WEBSTER'S 1939 COLLEGIATE DICTIONARY

Webster's Collegiate Dictionary, Fifth Edition, published in 1939, confines its definitions to "threat" and "threaten" as follows:

"threat" (thret) n. [AS. Threat crowd, oppression.] The expression of an intention to inflict evil or injury on another; menace; threatening; denunciation – *v. t. & i. Archac & Dial.* To threaten.

"threaten" (thret'n),

v.t. [AS. *Threatnian.*]

1. To utter threats against; promise punishment, reprisal, or the like, to. 2. To give forewarning of, as by threat, sign, etc.; hence to hang over as a threat; as famine *threatens* the city.

– *v.i.*

1. To utter threats. 2. To have a menacing appearance; portend evil. – **threateningly**, *adv.* **Syn. Threaten, menace. Threaten** (the Saxon word) is rather more direct in its meaning than **menace** (the Latin), which often suggests a threatening or hostile aspect.

Webster's Collegiate Dictionary, Fifth Edition, Springfield, MA 1939, at 1039.

WEBSTER'S 1957 NEW WORLD DICTIONARY

In 1957, Webster's New World Dictionary of the American Language, College Edition, Cleveland and New York, offered the following definitions pertaining to threat and threaten:

threat (thret) *n.* [ME. Threte: AS. Threat, a throng painful pressure; akin to G. (ver)driessen, to grieve annoy; [E. base *treud-, to push press, seen also in intrude, protrude; cf. thrust] ,

1. a statement or expression of intention to hurt destroy punish, etc, as in retaliation or intimidation.
2. An indication of imminent danger, harm, evil, etc: I threat of mtimminent danger, harm. Evil, etc.: as the *threat* of war. v.t. & v.i. [Obs.], to threaten.

threaten (thret'n), v.t. [ME.; AS. Threatnian]

1. To make threats against; express one's intention of hurting, punishing, etc.
2. To be a menacing indication of (something dangerous, evil, etc.): as. Those clouds *threaten* snow.
3. To be a source of danger, harm, to.
4. To express intention to inflict (injury, retaliation. etc.),
v.i. I. to make threats. 2. To give indication of danger or distress; be menacing.

SYN.-- *threaten* implies a warning of impending punishment: danger, evil. etc. by words, actions, events, conditions, , signs etc. (he *threatened* to retaliate, the clouds *threaten* rain), *menace* stresses the frightening or hostile character of that which threatens (he **menaced** me with a revolver),

Webster's New World Dictionary of the American Language, College Edition, Cleveland and New York, 1957 at 1518.

BLACK'S LEGAL DICTIONARY

More recently, in 1979, *Black's Legal Dictionary* defined "threat" in as follows:

"Threat." A communicated intent to inflict physical or other harm on any person or on property. A declaration of an intention to injure another or his property by some unlawful act. *State v. Schweppe*, Minn., 237 N.W.2d 609, 615. A declaration of intention or determination to inflict punishment, loss, or pain on another, or to injure another by the commission of some unlawful act. *U. S. v. Daulong*, [D.C.La.](#), 60 F.Supp. 235, 236. A menace; especially, any menace of such a nature and extent as to unsettle the mind of the person on whom it operates, and to take away from his acts that free and voluntary action which alone constitutes consent. A declaration of one's purpose or intention to work injury to the person, property, or rights of another, with a view of restraining such person's freedom of action. The term, "threat" means an avowed present determination or intent to injure presently or in the future. A statement may constitute a threat even though it is subject to a possible contingency in the maker's control. The prosecution must establish a "true threat," which means a serious threat as distinguished from words uttered as mere political argument, idle talk or jest. In determining whether words were uttered as a threat the context in which they were spoken must be considered. Threats against the President and successors to the President, mailing of threatening communications, and other extortionate acts, are federal offenses. 18 U.S.C.A. § 851 et seq. See also Coercion; Duress; Extortion.

Black's Legal Dictionary, 5th Ed., 1979 at 1327.

"Terroristic threat" is also defined in *Black's* as:

Any threat to commit violence communicated with intent to terrorize another, or to cause the evacuation of any building, place of assembly or facility of transportation, or in wanton disregard of the risk of causing such terror or evacuation.

Id.

None of the foregoing dictionary definitions, even when given the most expansive reading, support any construction of the term “threat” or “threaten” that could plausibly bring within its ambit the mundane comments – described spontaneously by the arresting officer as of no significance. To the contrary, each definition requires a minimal verbal or written utterance, declaration or other communication from one person threatening another.

No such evidence exists in the present case.

C. Constitutional Ban on ex-post facto law

Nor may such evidence be concocted from claimed knowledge on the part of the prosecutor or a sitting judicial officer. Assistant Prosecutor Andrew Isabell, Esq. proffered the idea that acts can constitute threats, citing no language in the statute or any case law. The history of the present statute suggests a better analysis.

Originally, the West Virginia terrorist threat statute banned threats of terrorism “without an intent” to actually commit the terrorist act. The legislature (no doubt advised that some threats were serious) later substituted the current “with or without an intent” language to capture serious threats,

along with mere threats that intimidated without any intent of following through.

In the present case, the Assistant Prosecutor’s argument should be directed to the legislature, and not this Court. If the legislature were to substitute for the present “Any person who knowingly and willfully *threatens to commit a terrorist act*, with or without the intent to commit the act,” a new statute that read “Any person who knowingly and willfully *threatens to commit, or commits, a terrorist act*, with or without the intent to commit the act,” the interpretation offered by the Assistant Prosecutor would have traction.

Until then, such an interpretation of the statute, retroactive to April 25, 2019, is precluded by the ban on *ex post facto* law in Article I, Section 9 of the U. S. Constitution. See *Calder v. Bull*, 3 U.S. 386, 3 Dall. 386, 1 L.Ed. 648 (1798).

VI. Relief Requested

This situation is fundamentally different from the posture in *State ex rel. State v. Wilson*, 806 S.E.2d 458 (W. Va., 2017), where the W. Va. Supreme Court, exercising its jurisdiction under , W. Va. Code § 58-5-30,

reversed a Circuit Court decision dismissing a prosecution under the W. Va. terrorist threat statute at §61-6-24.

In *Wilson*, the Circuit Court acted, *sua sponte*, without any motion to dismiss having been filed (or responded to), on the basis of the allegations in the criminal complaint, and without taking any evidence whatsoever. The Supreme Court ruled that the State was entitled to a trial on the merits of its charges, which included clear and unambiguous threats of violence ("If they give me any more work to do and I can't do it, I am going to get a gun and I'm going to come in here and shoot people and their friends and their family").

Here, a motion to dismiss is present, the State has an opportunity to respond, and there has been testimony, under oath, subject to cross examination by all parties, on the issue before this Court, i.e., did this Defendant threaten anybody with anything. The answer, by the arresting officers, is no, at least according to their sworn testimony.

If the State wishes to now offer sworn affidavits from the same arresting officers recanting their May 2, 2019 testimony, a different result might obtain. Until then, the matter is ripe for decision by this Court. In the absence of retractions under oath, Defendant respectfully requests that this Court dismiss with prejudice the allegation of the criminal complaint in this

matter charging him with a felony threat of terrorism under W. Va. Code §61-6-24.

Respectfully submitted,

DEFENDANT HOLDEN CARTER DOMETRIUS

By Counsel

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Defendant.

CERTIFICATE OF SERVICE

I hereby certify that the Defendant's **MOTION TO DISMISS** was filed via the WV E-FILE system and thereby served on the Prosecuting Attorney for Monroe County this ___ day of _____, 2019

William V. DePaulo