

ANALYSIS OF THE CASE AGAINST HENRY LOUIS GATES, JR.

STATEMENT OF FACTS

Henry Louis Gates, Jr. (hereinafter, "Gates"), a distinguished scholar and professor at Harvard University, was arrested at his home in Cambridge, Massachusetts by a local police officer responding to a 911 caller's report of men breaking and entering a residence. The arrest occurred just after Gates returned home to Cambridge after taking a trip overseas. Gates found the front door to his home jammed shut and with the help of his driver tried to force it open. A local witness reported their activity to the police as a burglary in progress. After Gates gained entry to his university owned home, his driver left. Gates then placed a call to the Harvard University Maintenance Department to inform them of the issue. Subsequently, Cambridge Police arrived to the scene and police officer Sergeant James Crowley arrested Gates.

According to a recitation of the police report, Sergeant James Crowley (hereinafter, "Crowley") arrived at the scene, went up to the door and asked Gates to step outside. Crowley explained that he was investigating a burglary in progress. As he explained this, Gates opened the door and said, "Why, because I am a black man in America?" Crowley's report states that he believed Gates was lawfully in the residence but that he was surprised and confused by Gates' behavior. Crowley then asked Gates for a photo ID so as to verify he was the resident of the house. Gates initially refused but then eventually supplied his Harvard University identification card and driver's license. Crowley then told Gates that he was leaving his residence and that if he wanted to continue discussing the incident they could do so outside. It is alleged in the police report that Gates replied, "Yeah I'll speak to your mama outside." Further, it was noted on the

911 dispatcher audio recordings that a man's loud voice was heard in the background at several points during Crowley's transmissions.

Gates stepped out onto his front porch and continued to yell at Crowley accusing him of racial bias and saying he had not heard the last of him. Faced with this tumultuous behavior from Gates, now outside his residence, Crowley warned Gates that he was becoming disorderly. When Gates ignored this warning and persisted in his behavior and likewise ignored a second warning from Crowley, Crowley informed him that he was under arrest. Crowley told Gates to place his hands behind his back and proceeded to arrest Gates. Gates was subsequently charged with disorderly conduct. Gates' accounts differ from those in the police report and they are more advantageous to his defense. For purposes of evaluating the charges and invoking a legal analysis the police report and statements made by Crowley are deemed to be true.

POLICE OFFICERS

I. ENTERING THE HOME WITHOUT AN ARREST/SEARCH

WARRANT

The Fourth Amendment of the Constitution applies equally to seizures of persons and property as well as the warrantless arrest of a person. The warrantless arrest of a person is a species of seizure required by the amendment to be reasonable. *Payton v. New York*, 455 U.S. 573 (1980). Before agents of the government can invade the sanctity of the home without a search or arrest warrant, the burden is on the government to demonstrate exigent circumstances that overcome the presumption of unreasonableness that attaches to all warrantless home entries. *Welsh v. Wisconsin*, 466 U.S. 740 (1984).

A warrantless entry to private premises to effect an arrest may be obtained by the suspect's voluntary consent. *People v. Green*, 157 A.D.2d 745, 550 N.Y.S. 2d 41 (2nd Dept. 1990). Where there are no specific words of consent such consent can be inferred from the individual's words, deeds and gestures as by failing to direct the police to leave or by failing to indicate that they did not have permission to remain. *People v. Long*, 124 A.D. 2d 1016, 508 N.Y.S. 2d 744 (4th Dept. 1986); *People v. Schof*, 136 A.D. 2d 578, 523 N.Y.S. 2d 179 (2nd Dept. 1988).

In order to arrest any citizen within his home and without a warrant, there must be exigent circumstances or consent under these circumstances. For exigent circumstances, the danger must be an immediate one that involves the suspect possibly escaping or evidence being destroyed. The belief that a burglary is in progress or has been committed has often sufficed for exigent circumstances and therefore, no warrant is required to effectuate an arrest within the home. If the citizen provides consent, this consent must be voluntary as courts have repeatedly held. Consent can be inferred by citizens not telling the officer to leave. If one is arrested in public, the police need probable cause to arrest and not an arrest warrant.

II. DISORDERLY CONDUCT -DISORDERLY CONDUCT AS TO FIRST AMENDMENT FREE SPEECH

Under New York law, a person is guilty of the violation of disorderly conduct when "with intent to cause public inconvenience, annoyance or alarm or recklessly creating a risk thereof": (1) he engages in fighting or in threatening, violent or tumultuous behavior; or (2) he makes unreasonable noise; or (3) in a public place he uses abusive or

obscene language or makes an obscene gesture; or (4) without lawful authority he disturbs any lawful assembly or meeting of persons ; or (5) he obstructs vehicle or pedestrian traffic; or (6) he congregates with other persons in a public place and refuses to comply with a lawful order of the police to disperse; or (7) he creates a hazardous or physically offensive condition by any act which serves no legitimate purpose. N.Y. Penal Law § 240.20.

To be charged with disorderly conduct, the conduct must fall into one of the seven aforementioned categories along with the requisite intent of causing public inconvenience, annoyance or recklessly creating a risk thereof. If your behavior is categorized as tumultuous the charge is under the first provision of engaging in fighting or in threatening, violent or tumultuous behavior. In order for a citizen to be found guilty of this behavior under provision (1) of the statute he must have intended to cause public inconvenience, annoyance or recklessly created a risk thereof.

Tumultuous is defined as being marked by violent or overwhelming turbulence or upheaval. See Merriam Webster Online Dictionary available at <http://www.merriam-webster.com/dictionary/tumultuous> (last visited August 28, 2009). Factors to be considered in determining whether the defendant's conduct constitutes disorderly conduct include: (1) extent to which defendant's conduct annoyed others; (2) whether defendant persisted in the conduct after warnings by others or police; (3) whether defendant's conduct created at least risk that disorder might result; (4) whether defendant's conduct occurred in a public location. *People v. Dennis*, 13 Misc 3d 41, 823 N.Y.S. 2d 830 (2006).

Based on the facts in this matter, it appears that three people were possibly present at time of incident which includes Gates, Crowley, and perhaps one other unnamed police officer. Crowley was the only individual disturbed by Gates' conduct. The extent to which Gates' conduct annoyed Crowley was probably of great magnitude considering that Gates made comments with regard to Crowley's mother, racial bias as well as stating that he had not heard the last of him. Gates did in fact persist in his conduct after warnings made by Crowley. Whether Gates' conduct created at least a risk that disorder might result is questionable. Gates' conduct would have probably created a risk that disorder might result in and of itself however, Gates would have been the only individual acting disorderly. Under New York law as applied to the facts in this matter, this type of conduct does not constitute disorder as defined by the disorderly conduct statute. Lastly, Gates' conduct did not occur in a public location. The incident occurred either on the porch of or in the front of Gates' home. A public location/public place is defined as a place to which the public or a substantial group of persons has access, and includes but is not limited to, highways, transportation facilities, school, places of amusement, parks, playgrounds and hallways, lobbies and other portions of apartment houses and hotels, not constituting rooms or apartments designed for actual residence. N.Y. Penal Law §240.00. Though the public could have been exposed to Gates' behavior, which is not even alleged, the location where the incident took place is not a public location.

The disorderly conduct statute was promulgated to address public acts affecting the public in general, not private acts which in essence constitute a private nuisance. In order to sustain a conviction, offensive conduct must be public in nature and must cause

inconvenience, annoyance or alarm to a substantial segment of the public or to be of a nature and character that it would appear beyond a reasonable doubt that the conduct created a risk that a breach of peace was imminent. *People v. Chesnick*, 302 N.Y.58, N.E.2d 87 (1950).

The disorderly conduct statute punishes behavior of a public rather than of an individual dimension and it is limited to situations carried beyond the concern of individual disputants to a point where they have become potential or immediate public harm. The Court of Appeals has held that the clear aim of the disorderly conduct statute is for conduct to rise to the point where there is a potential or immediate public problem. The Court of Appeals has clearly stated that in deciding whether an act carried public ramifications, courts must assess the nature and number of those attracted, taking into further account surrounding circumstances including time and place of episode under scrutiny. *People v. Munafo*, 50 N.Y.2d 326, 406 N.E.2d 780 (1980). In *Munafo*, relative to the small space those present were small in number. There was nothing to indicate that the defendant intended to incite or involve the spectators, all of whom were present before the confrontation, not a single bystander was attracted to the scene and there was no proof that anyone aided or abetted Gates or was encourage to do so. Most importantly, the differences between the authority and the disputant were confined to those disputants rather than spread to the public. The court in *Munafo* relied on the aforementioned facts in reversing the defendant's conviction for disorderly conduct.

Here, the presence of others or a crowd is not alleged. It may not be inferred that when Gates yelled and cursed that he intended to create a public disturbance as opposed to expressing displeasure. However, this incident is limited to the original disputants,

Gates and Crowley, neither the alleged conduct nor communications therein did not spread to the public. Consequently, Gates could not be convicted of disorderly conduct pursuant to New York Penal Law §240.20

Each subsection of the Disorderly Conduct Statute has been constitutionally challenged. It has been held many times that the statute is constitutional and not unconstitutional for vagueness or overbreadth. *People v. Perkins*, 150 Misc. 2d 543, 576 N.Y.S. 2d 750 (1991); *People v. Bakolas*, 59 N.Y.2d 51, 449 N.E.2d 738 (1983). *People v. Tichenor*, 89 N.Y.2d 769, 680 N.E.2d 606 (1997).

The United States Supreme Court has set forth that personally directed abusive insults or “fighting words” are completely outside the protection of the first amendment therefore, the states can proscribe this kind of speech as offensive. A state can proscribe the use of specific words in public as disorderly conduct per se. *Cohen v. California*, 403 U.S 15 (1971). *Chaplinsky v. State of New Hampshire*, 315 U.S. 568 (1942). Fighting words are words likely to provoke a violent reaction when heard by an ordinary citizen *Cohen v. California*, 403 U.S. 15 (1971). When words present a clear and present danger of inciting those listening to lawless action, they are not entitled to constitutional protection and may be punished. The words in question must be: (1) directed to inciting or producing imminent lawless action; (2) likely to incite or produce such action. *Brandenburg v. Ohio*, 395 U.S. 444 (1969). Where no listeners are being incited, or the remarks are not likely to produce imminent disorder, the speaker’s comments remain subject to constitutional protections. *Hess v. Indiana*, 414 U.S. 105 (1976).

Here, Gates made statements such as, “Why, because I am a black man in America?” “Yeah I’ll speak to your mama outside” and other statements concerning

racial bias some of which may have been provocative. These statements were not directed to inciting or producing imminent lawless action as there was no individual or group to incite therefore, they could not be directed as such. The only individuals present were the original disputants, Gates, Crowley and perhaps a third unnamed police officer.

Similarly, Gates' words were not likely to incite or produce such action as no one but the original disputants were present. Therefore, Gates did not utter or display fighting words. Gates' speech is entitled to constitutional protection.

Furthermore, relevant to the Gates matter the Supreme Court has held that the First Amendment protects a significant amount of verbal criticism and challenge directed at police officers. Only fighting words directed at police officers can be criminalized and the fighting words doctrine is narrower in application toward police officers due to the fact that they may be reasonably expected to exercise a higher degree of restraint than the average citizen. *Lewis v. City of New Orleans*, 415 U.S. 130 (1974); *City of Houston, Tex. v. Hill*, 482 U.S. 451 (1987). Thus, provocative speech directed at officers "is protected against censorship or punishment unless shown likely to produce clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance or unrest." *Id* at 461 (quoting *Terminiello v. Chicago*, 337 U.S. 1 (1949)).

Yelling to police officers, "Fuck that this is my hood, we don't have to talk to y'all niggers" is constitutionally protected speech and in and of itself does not warrant an arrest for disorderly conduct. Even if police officers found the defendant's responses to be offensive, the statements made by the defendant could not be categorized as fighting words especially considering that police officers are expected to "exercise a higher degree of restraint" than ordinary citizens when dealing with belligerent responses.

People v. Wharton, 11 Misc. 3d 1085 (A), 819 N.Y.S. 2d 850 (N.Y. Dist. Ct. 2006) citing *Lewis v. New Orleans*. Repeatedly clutching one's genitals and yelling offensive epithets at a police officer was not impermissibly violent, tumultuous or threatening behavior which violated the disorderly conduct statute, even though crowd gathered and joined Defendant's chants on city streets at 4am in the morning. These activities amount to speech protected by free speech clauses of federal and state constitutions, although alleged behavior could be described as provocative, offensive and verbally abusive, it was neither violent nor tumultuous under the disorderly conduct statute. *People v. Stephen*, 153 Misc. 2d 382, 581 N.Y.S. 2d 981 (N.Y. City. Crim. Ct. 1992). Nevertheless, it is important to note that conduct that does not rise to the level of disorderly conduct may violate other statutes such as the harassment statute. *People v. Gingello*, 67 Misc. 2d 224, 324 N.Y.S 2d 122 (N.Y. City Ct. 1971).

Additionally, despite what is considered to be settled law by the highest court, certain lower courts are emphasizing how legitimate the officer's role was in determining whether certain words breach the peace. To say to a police officer in the reasonable discharge of his duties, "Where the hell do you get off, we will do as we like, we don't care what you say..." is recognized as breaching peace. *People v. Fenton*, 102 Misc. 43, 168 N.Y.S. 725 (N.Y.Co. Ct. 1917). In *Fenton*, the defendants were driving an unsafe truck on a public highway while refusing to abide by police officers instructions as the officers were trying to make the truck safe. A key factor in determining whether there is or will be a breach of peace is how legitimate the police presence is. In *Fenton*, the police were in the process of making an unsafe truck safe. The condition was already problematic and statements such as, "We don't care what you say" may suggest that a

breach of the peace is imminent. In *Wharton* the constitutionally protected comment, “We don’t have to talk to y'all niggers” was made to police in response to their simple asking of questions to non suspects with regard to activity in the neighborhood. Thus, it suggests that the closer the police are to making a proven unsafe condition or environment safe, the more likely provocative speech uttered by a defendant may be constitutionally unprotected.

III. RESISTING ARREST

A person is guilty of resisting arrest when he intentionally prevents or attempts to prevent a police officer or peace officer from effecting an authorized arrest of himself or another person. Resisting arrest is a Class A Misdemeanor. Under the penal law, the key element to support a conviction of resisting arrest is the existence of an authorized arrest including the finding that the arrest was based on probable cause. N.Y. Penal Law §205.30. The crime of resisting arrest does not occur if the arrest was illegal or unlawful. *People v. Perez*, 47 A.D. 3d 1192, 851 N.Y.S. 2d 747 (4th Dept. 2008). The Court of Appeals has made it abundantly clear that the arrest must be authorized. In *Peacock*, the Court of Appeals held that where the defendant was convicted in the village court of resisting arrest, her arrest was not authorized as she was simply crying and arguing with another individual. Considering that her arrest was not authorized, the defendant did not resist arrest or engage in harassment by striking arresting officer’s arm in reaction to his attempt to detain her. *People v. Peacock*, 68 N.Y.2d 675, 496 N.E.2d 683 (1986).

If Gates were charged with resisting arrest, the concern would be as to whether Gates’ arrest was authorized. The term “authorized arrest” refers to the legality of the

arrest as determined by the probable cause standard and not merely to the presence or absence of statutory authority for making an arrest for the offense charged. *People v. Barton*, 30 A.D. 2d 726, 291 N.Y.S. 2d 577 (3rd Dept. 1968). There can still be a conviction for resisting arrest if acquitted of other charges or not charged with the crime that lead to resisting arrest. *People v. Thomas*, 239 A.D. 2d 246, 657 N.Y.S. 2d 184 (1st Dept. 1997). In *Sowell*, police accompanied the defendant's mother to her apartment for purposes of serving an order of protection against the defendant who when told of the Order responded belligerently and ignored the officers suggestion that he calm down. He repeatedly and aggressively sought to push past officers and confront his mother, providing probable cause for arrest. The officers were injured and it was established that the defendant possessed the intent to violate the Order. Police had a lawful duty here to protect everyone. *People v. Sowell*, 25 A.D. 3d 386, 808 N.Y.S. 2d 46 (1st Dept. 2006).

Whether Gates can be convicted under the disorderly conduct statute is not dispositive in assessing the charge of resisting arrest. What is entirely relevant as to the charge of resisting arrest is whether Crowley had probable cause to arrest Gates. Here, there is a distinction between meeting the statutory requirements for disorderly conduct and probable cause to arrest. Simply because a charge can not be maintained for disorderly conduct as to Gates' conduct does not mean that his arrest was unauthorized. There must be a determination as to reasonable or probable cause to arrest and a hearing can be held on that issue.

Facts leading to the arrest must give reasonable or probable cause to arrest in order for the arrest to be authorized. Probable cause requires that knowledge of the facts must repose in the officer's mind and form a rational basis for the belief that a crime

has been committed and such facts must be known before the arrest. *People v. Martin*, 52 A.D. 2d 988, 383 N.Y.S. 2d 425 (3rd Dept. 1976) citing CPL §140.10. Gates was not acting suspiciously when Crowley approached him. Based on the allegations in the police report, Gates gave no indication that he burglarized the home. Gates had just finished making a phone call notifying the Harvard University Maintenance Department of his front door's faulty lock. Further, Gates was arrested after he showed identification stating that he resided in the home that he was suspected of burglarizing. Crowley arrested Gates for the crime of disorderly conduct. This occurred in or around Gates' home with no additional individuals or groups present. Crowley could have left the premises once Gates proved to not be burglarizing the home. Gates did make provocative statements toward Crowley though this was after the investigation could have and perhaps should have been concluded. Crowley invited Gates outside to continue to "discuss" the incident in light of Gates' statements which is questionable in and of itself. A rational basis that the crime of disorderly conduct occurred can not be found and ultimately there was no probable cause to arrest Gates. Therefore, Gates' arrest was unauthorized and he could not be convicted of resisting arrest if charged.