

IN THE SUPREME COURT OF OHIO

CITY OF BOWLING GREEN,

Appellee,

vs.

LORIEN D. BOURNE,

Appellee.

* Supreme Court Case No.:
*
* On Appeal from the
* Wood County Court of
* Appeals, Sixth Appellate
* District
*
* Court of Appeals
* Case No. WD-07-007

**MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANT,
LORIEN D. BOURNE**

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**EXPLANATION OF WHY THIS IS A CASE OF PUBLIC OR GREAT
GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL
QUESTION AND WHY LEAVE TO APPEAL SHOULD BE GRANTED**

This case addresses two important questions.

1. Are women denied the equal protection of the law when they are prosecuted for behavior when men whose behavior is identical are not prosecuted?

2. May the government, consistent with the right of free speech, prosecute a woman for the "physically offensive" act of revealing her breasts as a means of political speech and for a purpose neither unlawful nor unreasonable?

Appellant, Lorien Bourne, was a student at Bowling Green State University. Concerned about double standards and sexism, she and her friends found a particular focus of their attention in the disparate treatment of topless men and women. Men could be topless in public, in parks, say, with no repercussions. Women could be publicly topless without legal sanction only in certain strip clubs and other venues where their breasts would serve as entertainment for men.

To call attention to this inequality, Ms. Bourne and her allies formed the "Titty Committee," and invited the public to attend a "Solidarity Potluck" in City Park. At the potluck, and as a form of political speech, Ms. Bourne and two other women took off their shirts. They were cited and Ms. Bourne was prosecuted for and convicted of disorderly conduct for being "physically offensive."

The issues which drove her are real. The underlying concerns are substantial. As we enter a Presidential election year in this state which has been and will likely be again ground zero for the campaigns, the boundaries of free expression must be clarified.

Similarly, in this year when one of the major parties may for the first time nominate a woman to run for the office of President, we should make clear just what equal protection means when women and men perform the same act but are treated differently under the law.

These are, in fact, matters of grave public concern. This Court should accept jurisdiction over the case and resolve the issues.

STATEMENT OF THE CASE AND FACTS

As part of a political action, Lorien Bourne took off her shirt in a Bowling Green park, allowing her breasts to be seen. For that action, she was charged with disorderly conduct "because her bare breasts were 'physically offensive' to other park guests."

Bowling Green v. Bourne, 2007-Ohio-5748, ¶ 14.

Specifically, Ms. Bourne, then a student at Bowling Green State University, and several of her friends organized the "Titty Committee" and held a "Solidarity Potluck" at the City Park in Bowling Green, Ohio. Fliers advertising the event made clear that the event was a response to incidents where women were prosecuted for being topless in public while men were not. The event would provide an opportunity to work against "Sexism, the sexualization of women, and double standards," and to "support equal protection under the law."

A number of people, men and women, came to the potluck. A sign was posted saying "Titty Committee." During the event, Ms. Bourne and two other women took off their shirts, as did some of the men at the potluck. Other men in the park that day also had their shirts off. There were also families in the park that day. Someone apparently complained, and Bowling Green Police Officer Keilman came up to the potluck, asked the women who were topless, including Ms. Bourne, to put their shirts back on, which they immediately did. He then issued them citations for disorderly conduct. He told Ms. Bourne that if she ever again was topless in the park, he would cite her for a more serious misdemeanor.

Officer Keilman did not ask any topless men to cover up. He did not threaten any topless men with citations or issue any of them with citations. He did not warn them against future toplessness.

In Bowling Green Municipal Court, Ms. Bourne moved to dismiss the charges as violative of her rights to free speech and equal protection of the law. The court denied the motion and convicted her of Disorderly Conduct for being "physically offensive" or "present[ing] a risk of physical harm." Her fine was stayed pending appeal.

Ms. Bourne appealed her conviction to the Wood County Court of Appeals, raising three propositions of law:

- I. THE TRIAL COURT ERRED BY FAILING TO DISMISS THE DISORDERLY CONDUCT CHARGE AGAINST DEFENDANT-APPELLANT UNDER BOWLING GREEN ORDINANCE SECTION 132.04(A)(5) IN VIOLATION OF THE EQUAL PROTECTION CLAUSE.
- II. THE TRIAL COURT ERRED BY FAILING TO DISMISS THE SELECTIVELY ENFORCED DISORDERLY CONDUCT CHARGE AGAINST DEFENDANT-APPELLANT UNDER BOWLING GREEN

ORDINANCE SECTION 132.04(A)(5), IN VIOLATION
OF THE EQUAL PROTECTION CLAUSE.
III. THE TRIAL COURT ERRED IN FINDING THE
DEFENDANT-APPELLANT GUILTY OF VIOLATING
BOWLING GREEN ORDINANCE SECTION
132.04(A)(5) BECAUSE SHE WAS EXERCISING
HER RIGHT OF FREE SPEECH AND EXPRESSION.

By Decision and Judgment Entry issued and Journalized on October 26, 2007, the court of appeals affirmed Ms. Bourne's conviction. *Bowling Green v. Bourne*, 2007-Ohio-5748.

The court held that she was not prosecuted because of her gender but because her breasts are anatomically and socially different than men's. *Id.* ¶ 15. Similarly, the court held that although topless men may also be physically offensive, *id.* ¶ 14, she was not a victim of selective enforcement because men and women are anatomically different. *Id.* ¶ 18. Finally, the court concluded that although Ms. Bourne was engaged in expressive conduct, she was not clearly enough "making a political statement" to qualify for full protection under the First Amendment. The court explained that since the government's interest in "protecting societal norms . . . is unquestionably unrelated to" Ms. Bourne's message that those norms are discriminatory, her right to free speech was not violated.

From that decision and those holdings, Ms. Bourne brings this appeal.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. 1: A woman's right to the equal protection of the law is violated when she is arrested and prosecuted solely because female anatomy is deemed "physically offensive."

The Fourteenth Amendment to the United States Constitution, and Section 2, Article I of the Ohio Constitution guarantee that all persons shall be entitled to the equal protection of the law. Prosecution based on gender, pure sex discrimination in application of the criminal law, violates that right.

In *United States v. Virginia* (1996), 518 U.S. 515, Justice Ginsburg, writing for the Court, set forth a summary of equal protection law in this context:

Focusing on the differential treatment or denial of opportunity for which relief is sought, the reviewing court must determine whether the proffered justification is "exceedingly persuasive." The burden of justification is demanding and it rests entirely on the State. See *Mississippi Univ. for Women*, 458 U.S., at 724, 102 S.Ct., at 3336. The State must show "at least that the [challenged] classification serves 'important governmental objectives and that the discriminatory means employed' are 'substantially related to the achievement of those objectives.'" *Ibid.* (quoting *Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142, 150, 100 S.Ct. 1540, 1545, 64 L.Ed.2d 107 (1980)). The justification must be genuine, not hypothesized or invented post hoc in response to litigation. And it must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females. See *Weinberger v. Wiesenfeld*, 420 U.S. 636, 643, 648, 95 S.Ct. 1225, 1230-1231, 1233, 43 L.Ed.2d 514 (1975); *Califano v. Goldfarb*, 430 U.S. 199, 223-224, 97 S.Ct. 1021, 1035-1036, 51 L.Ed.2d 270 (1977) (Stevens, J., concurring in judgment).

Id. at 532-533.

Those principles apply with equal force here where the law is neutral but its

application is not. There were topless men and topless women in the park. None of the topless men was cited or prosecuted. Ms. Bourne was cited and prosecuted not because she was topless but because she was a topless woman.¹ The prosecutor suggested in the court of appeals that this was justified because other people in the park were an unwilling audience, somehow forced to observe "the offensive conduct of removing her top." (City Brief at 4.) But the activity was "offensive," if at all, solely because Ms. Bourne is female. No males were cited, though many were topless.

Both the trial court and the court of appeals found the discrimination lawful because women are different than men. But if that were the test, then all discrimination would be enshrined, since absent a difference of some sort, there would be nothing on which to discriminate. The only plausible government interest to justify the discrimination here is the protection of the sensibility of a captive audience. But there was no captive audience in the park. The potluck was held at the edge of the park. Nobody was forced to look. Ms. Bourne did not accost passersby or others in the park. As the New York Court of Appeals held, invalidating a statute prohibiting the public display of the female but not male breast,

there was nothing to demonstrate that the

nonlewd exposure of the female breast is in any way harmful to the public's health or well-being. . . . The mere fact that the statute's aim is the protection of "public sensibilities" is not sufficient to satisfy the State's burden of showing an "exceedingly persuasive justification" for a classification that expressly discriminates on the basis of sex (see, *Kirchberg v Feenstra*, 450 US 455, 461).

¹Or because it is offensive to be a topless woman, but not a topless man, which amounts to the same thing.

People v. Santorelli (1992), 80 N.Y.2d 875, 882-883, 600 N.E.2d 232, 587 N.Y.S.2d 601.

This case is no different. The prosecution and conviction of Ms. Bourne violated her right to equal protection of the law.

Proposition of Law No. 2: When a facially neutral law is applied in such a way that women who act in a certain way are prosecuted under it but men, who act in precisely the same way are not, the selective enforcement violates the women's right to equal protection of the law.

A person claiming to be the victim of selective prosecution must make a showing that she was singled out for prosecution while others, similarly situated, were not. In the ordinary case, she must also demonstrate a discriminatory animus. *Wayte v. U.S.* (1985), 470 U.S. 598, 608. No showing of discriminatory intent is necessary, however, when the equal protection claim is based on an overtly discriminatory classification. *Id.* at fn. 10, citing *Strauder v. West Virginia* (1880), 10 Otto 303, 100 U.S. 303. Discrimination on the basis of gender is such a classification. See, e.g., *United States v. Virginia, supra*.

At the time Ms. Bourne and the other members of the Titty Committee were cited because their breasts were exposed, there were also topless men in the park. None of the similarly situated males in the park at the time were cited because their breasts were exposed.

It is particularly telling that all the topless men in the park appear to have been topless purely as a matter of personal express - with no motivation other than comfort or the desire to get a tan. Ms. Bourne and her colleagues, by contrast, were topless in order to make a political point and to challenge the very norms they were prosecuted for

violating.

It is also telling that every one of those men was in clear violation of Bowling Green Codified Ordinance 97.06(E) which requires everyone in the park to wear "clothing that covers the upper body."

The court of appeals held that because women's breasts are different than men's the prosecution of women for being topless in the park had nothing to do with their being women as opposed to men. In fact, that is precisely what it had to do with. And it violated their right to the equal protection of the law.

Proposition of Law No. 3: Expressive conduct that is designed and explained as a protest against social norms is a form of protected free speech that may not be deemed beyond Constitutional protection merely because social norms militate against it.

Nobody disputes that nudity can be a form of expression entitled to some degree of protection under the First and Fourteenth Amendments to the United States Constitution and Section 11, Article I of the Ohio Constitution. See, *e.g.*, *Barnes v. Glen Theater, Inc.* (1991), 501 U.S. 560. Everyone agrees that when women of the Titty Committee took off their shirts in the park, they were, in fact, engaged in expressive conduct. But this was not merely expressive conduct. It was clearly and intentionally political speech.

The Solidarity Potluck was advertised as an event designed to challenge sexism and advocate equal protection. The flyers for the event specifically referenced a prosecution of a woman for being topless in Bowling Green as the issue about which they were organizing. The name of their group, the "Titty Committee" emphasized that focus.

They posted a sign at their potluck proclaiming the Titty Committee.

The court of appeals said that Ms. Bourne was not entitled to heightened speech protection because she did not loudly enough proclaim her purpose. "Absent a verbal written explanation, observers could have easily believed that appellant was merely sunbathing rather than making a political statement about sexism and double-standards." *State v. Bourne, supra* at ¶ 23. Short of having someone standing on a picnic table with a megaphone, it is difficult to see just what else they might have done to make their point.

In any event, the court determined that since they did not express themselves clearly enough to gain the protection of political speech, it would apply the four-part test of *United States v. O'Brien* (1968), 391 U.S. 367:

[A] government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

Id. at 377.

In finding that prosecution was proper in this case, the court held that the government interest in "protecting societal norms" was "unquestionably unrelated to appellant's message that men and women should be treated equally." *State v. Bourne* at ¶ 24. That may be true as a wholly abstract statement. It is emphatically not true in this case where the particular societal norm allegedly being protected was that men and women should not be treated equally when it comes to public toplessness.

The court was equally misguided in its comments on Officer Kielman's actions. He

did the minimum, the court said. He "did not attempt to disband the group or bar their message." *Id.* In fact, by having the three topless women put their shirts back on, he was precisely barring their message.

Ms. Bourne was engaged in protected political speech. The government had no interest sufficient to stop it.

Proposition of Law No. 4: Political protest is a "lawful and reasonable purpose" which precludes prosecution for disorderly conduct for the creation of "a condition that is physically offensive."

Neither the trial court nor the court of appeals actually examined whether Ms. Bourne was guilty of the offense charged. Specifically, both courts ignored the last clause of Bowling Green Codified Ordinance Section 132.04(A)(5). That clause provides an important qualification. For the act at issue to be criminal, it must be an "act that serves no lawful and reasonable purpose of the offender."

There is no dispute that Ms. Bourne removed her shirt not for sexual gratification, not in order to pander pornography, not to advance some criminal purpose. She removed her shirt in order to make a political point about sexism and double standards and the equal protection of the law. Regardless of whether one were to agree with her political perspective or to find that her tactics for advancing that perspective were wise, there can be no doubt that the purpose is both lawful and reasonable.

R.C. 2901.04(A) provides that ""sections of the Revised Code defining offenses or penalties shall be strictly construed against the state, and liberally construed in favor of the accused." That section is a codification of the common law Rule of Lenity. Given that

standard, and given the language of the ordinance, Ms. Bourne simply did not commit the offense with which she was charged and of which she was convicted.

CONCLUSION

For these reasons, this Court should accept jurisdiction, reverse the decision of the court of appeals, adopt appellant's propositions of law, and remand the case.

Respectfully submitted,

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PROOF OF SERVICE

This is to certify that a copy of the foregoing Memorandum in Support of Jurisdiction was sent by regular U.S. Mail, postage prepaid, to the office of the Bowling Green Prosecutor, 711 South Dunbridge Road, Bowling Green, Ohio 43402, counsel for appellee, this ____ day of December, 2007.

Respectfully submitted,

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