Circuit Court for Howard County
Case No. C-13-CR-19-000703

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0026
September Term, 2020

GARY ISAIAH GREEN

v.

STATE OF MARYLAND

Fader, C.J.,
Friedman,
Shaw Geter,

JJ.

Opinion by Friedman, J.

Filed: August 26, 2021

Gary Green, a homeless veteran, was angry after being told that although he had been readmitted, he could not register for classes at Lincoln Technical Institute until he had repaid an outstanding debt of $1,600. Green tore some signs from the school walls and reportedly shouted, "I'll come back and blow this place up" and "I'm going to blow this fucking place up. I'm going to shoot these motherfuckers." As we understand it, the police were called and Lincoln Tech was locked down for two hours.

Green was charged with threatening arson, MD. CODE, CRIM. LAW ("CR") § 6-107, and threatening mass violence, CR § 3-1001(b). Green moved to dismiss the charges on First Amendment grounds. When that motion was denied, Green pleaded guilty pursuant to a conditional plea agreement, MD. R. 4-242(d), which preserved his right to appeal the denial of his motion to dismiss. Green was sentenced to 18 months' incarceration on each charge, to be served concurrently.

Green has filed a timely appeal in which the sole question is whether the threat of mass violence statute, CR § 3-1001(b), is constitutional under the First Amendment.[1]

[1] The right to free speech protected by the First Amendment to the U.S. Constitution became incorporated against the States by enactment of the 14th Amendment. *Gitlow v. United States*, 268 U.S. 652 (1925). Green also argues that CR § 3-1001(b) violates his rights under the Maryland Constitution. Regrettably, in so doing, Green makes two errors. *First*, Green locates his right in the wrong place. He argues that his speech rights are protected by Article 10 of the Maryland Declaration of Rights. The rights protected in Article 10 belong to members of the Maryland General Assembly while engaging in speech and debate in the state legislature. MD. CONST., DECL. OF RTS., Art. 10; *see also*, MD. CONST., Art. III, § 18 (protecting speech and debate in General Assembly); *see, e.g.*, *Blondes v. State*, 16 Md. App. 165, 175 (1972) (discussing Art. 10), *overruled on other grounds*, 273 Md. 435 (1975). Rather, the Court of Appeals has generally located a citizen's right to free speech in Article 40 of the Declaration of Rights. MD. CONST., DECL. OF RTS., Art. 40 ("… that every citizen of the State ought to be allowed to speak, write[,]

Green's specific argument is that while the statute was constitutional when adopted in 2014, the 2019 amendments removed necessary limitations, making the statute, as amended, unconstitutionally overbroad.

When initially adopted in 2014, the statute defined the crime:

> (c) A person may not knowingly threaten to commit or threaten to cause to be committed a crime of violence, as defined in § 14–101 of this article,[2] that would place others at substantial risk of death or serious physical injury, as defined in § 3–201 of this title,[3] if as a result of

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and publish his sentiments on all subjects, being responsible for the abuse of that privilege"); *see, e.g.*, *State v. Brookins*, 380 Md. 345, 350 n.2 (2004). We would certainly forgive this relatively minor error. More critically, however, although the two constitutional provisions are capable of divergent interpretation, *id.*; *The Pack Shack, Inc. v. Howard Cnty.*, 377 Md. 55, 64 n.3 (2003), Green fails to make an argument that he is entitled to different or greater protection under the state constitution than he is under the federal First Amendment. *See generally* Dan Friedman, *The History, Development, and Interpretation of the Maryland Declaration of Rights*, 71 TEMPLE L. REV. 637, 645-46 (1998) (describing how to make an argument under the Maryland Declaration of Rights). That is fatal to his claim under the state constitution, MD. R. 8-504 (a)(6); *DiPino v. Davis*, 354 Md. 18, 56 (1999), and, as a result, we will consider his claim exclusively under the First Amendment.

[2] Section 14-101(a) defines twenty-six crimes as "crimes of violence": (1) abduction; (2) arson in the first degree; (3) kidnapping; (4) manslaughter, except involuntary manslaughter; (5) mayhem; (6) maiming, …; (7) murder; (8) rape; (9) robbery…; (10) carjacking; (11) armed carjacking; (12) sexual offense in the first degree; (13) sexual offense in the second degree; (14) use of a firearm in the commission of a felony except possession with intent to distribute a controlled dangerous substance under § 5-602(2) of this article, or other crime of violence; (15) child abuse in the first degree …; (16) sexual abuse of a minor [under certain circumstances]; (17) home invasion …; (18) … felony [human trafficking]; (19) an attempt to commit any of the crimes described in items (1) through (18) of this subsection; (20) continuing course of conduct with a child under § 3-315 of this article; (21) assault in the first degree; (22) assault with intent to murder; (23) assault with intent to rape; (24) assault with intent to rob; (25) assault with intent to commit a sexual offense in the first degree; and (26) assault with intent to commit a sexual offense in the second degree. CR § 14-101(a).

[3] Serious physical injury is defined as physical injury that:

> the threat, regardless of whether the threat is carried out, five or more people are:
>
> (1) placed in reasonable fear that the crime will be committed;
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> (2) evacuated from a dwelling, storehouse, or public place;
>
> (3) required to move to a designated area within a dwelling, storehouse, or public place; or
>
> (4) required to remain in a designated safe area within a dwelling, storehouse, or public place.

CR § 3-1001(c) (2014); Acts of 2014, ch. 236.

In 2019, the General Assembly modified the statute by removing several of the limitations. CR § 3-1001(b) (2019); Acts of 2019, chs. 30, 31. Thus today (and when Green made his threats), the statute defines the crime:

> (b) A person may not knowingly threaten to commit or threaten to cause to be committed a crime of violence, as defined in § 14-101 of this article, [4] that would place five or more people at substantial risk of death or serious physical injury, as defined in § 3-201 of this title,[5] if the threat were carried out.

CR § 3-1001(b).

> (1) creates a substantial risk of death; or
>
> (2) causes permanent or protracted serious:
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> (i) disfigurement;
>
> (ii) loss of the function of any bodily member or organ; or
>
> (iii) impairment of the function of any bodily member or organ.

CR § 3-201(d).

[4] *See supra* n.2.

[5] *See supra* n.3.

There is little doubt and no disagreement between the parties about what Green did or that his conduct constituted a "true threat" as that term is defined by the U.S. Supreme Court. As such, Green's conduct is not protected by the First Amendment and it is subject to prohibition by the General Assembly and punishment by the Circuit Court for Howard County. Green can, however, still challenge the statute's constitutionality under the First Amendment, because he is not making an "as applied" challenge, but a facial challenge to the constitutionality of the statute.

In most areas of the law, a defendant making a facial challenge to the constitutionality of a statute must show that the law is unconstitutional in every application. *See, e.g, United States v. Salerno,* 481 U.S. 739, 745 (1987). In the First Amendment context, a law that restricts both protected and unprotected speech can be struck down to avoid the chilling effect that an overbroad law might have on protected speech. *See, e.g., Bd. of Airport Comm'rs v. Jews for Jesus, Inc.*, 482 U.S. 569, 574 (1987). But the Supreme Court has cautioned,

> there are substantial social costs *created* by the overbreadth doctrine when it blocks application of a law to constitutionally unprotected speech, or especially to constitutionally unprotected conduct. To ensure that these costs do not swallow the social benefits of declaring a law "overbroad," we have insisted that a law's application to protected speech be "substantial," not only in an absolute sense, but also relative to the scope of the law's plainly legitimate applications, before applying the 'strong medicine' of overbreadth invalidation.

Virginia v. Hicks, 539 U.S. 113, 119-20, 124 (2003) (italics in original; citations omitted). Thus, we may not strike down CR § 3-1001(b) under the overbreadth doctrine unless we determine that it is overbroad, both absolutely and in comparison to legitimate applications.

There can be little doubt that the plain language of the 2019 amendments greatly expanded the scope of the provision absolutely and by the amount of legitimate, protected speech covered by the statute relative to the unprotected speech. In thinking about this, we note that under the revised statute it no longer matters whether the hearer was placed in reasonable fear ("placed in reasonable fear that the crime will be committed") or acted as if the hearer was placed in fear ("evacuated," "required to move," or "required to remain"). The language used by the General Assembly thus seemingly removed important limitations for protected speech.[6] If that was all, this would be a close case.

In *Abbott v. State*, however, we held that the scope of a threats-type statute (there, threatening a State official; here, making a mass threat), must be considered in light of the governing First Amendment law. 190 Md. App. 595, 648 (2010). That means a defendant is entitled to—and cannot be convicted without—a jury instruction limiting the jury to consider only "true threats," or, in other words, those threats outside of the constitutional protection. *Abbott*, 190 Md. App. at 648. As described above, however, Green was convicted by conditional guilty plea. Had he elected a jury trial instead, the jury would have been instructed on "true threats" pursuant to *Abbott.* Alternatively, had he elected a bench trial, both because trial judges are presumed to know and apply the law, and because the trial judge here clearly demonstrated that he, in fact, knew and would have applied the

[6] We understand the Senate sponsor's remarks explaining these changes to indicate that she was interested in regulating true threats to the limits of the First Amendment, not beyond.

limitations of "true threats" analysis, we can take it as fact, that Green could not have been convicted for constitutionally-protected speech. As such, we fail to see any overbreadth.

JUDGMENT OF THE CIRCUIT COURT FOR HOWARD COUNTY AFFIRMED. APPELLANT TO PAY COSTS.