

2015 WL 2163752 (Mass.App.Ct.) (Appellate Brief)
 Appeals Court Of Massachusetts.

COMMONWEALTH OF MASSACHUSETTS,

v.

Richard BOWDEN, Defendant-Appellee.

No. 2014-P-1928.

April 25, 2015.

**Brief and Record Appendix for Defendant, Richard Bowden, On Appeal
 from a Judgement of the Boston Municipal Court, Dorchester Division**

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*1 ISSUE PRESENTED

The Motion Judge dismissed the Complaint, ruling that the facts contained in the Application did not support probable cause to believe Mr. Bowden threatened to do bodily harm under [G.L. c. 275, § 2](#), where:

(1) Mr. Bowden, a 51 year-old disabled, African-American, United States Armed Services veteran, telephoned the University of Massachusetts, Boston Human Resources Department to lodge a complaint about being accosted by six UMASS campus security officers while riding a campus shuttle bus, and then severely beaten by several of the officers; and

(2) When the Human Resources representative asked what resolution Mr. Bowden was seeking, he stated that the security officers should be fired “or someone will bleed.” When the representative asked him what he meant by “someone will bleed,” Mr. Bowden made clear that he was not threatening violence, stating:

“that he would make a complaint to the Mayor's Office as there are laws against **abusing elderly** disabled people.”

Mr. Bowden then reiterated the non-violent nature of his threat by stating that the “bleeding” meant “he *2 would sue the university,” and “his family has political connections.”

Based on these facts, was the Motion Judge's ruling of law correct?

STATEMENT OF THE CASE

Mr. Bowden's case is before this Court on the Commonwealth's interlocutory appeal from a March 27, 2014 decision of the Boston Municipal Court, Dorchester Division, (Tynes, J.), allowing Mr. Bowden's Motion to Dismiss the Complaint for Lack of Probable Cause [R.A. 4].¹

The subject Complaint issued on November 26, 2013, and charged Mr. Bowden with threatening to commit a crime, “to wit: to do bodily harm” in violation of [G.L. c. 275, § 2](#). [R.A. 1] On March 27, 2014, Mr. Bowden filed a Motion, Memorandum and Affidavit to Dismiss for Lack of Probable Cause. [R.A. 11] After hearing, the Honorable Jonathan Tynes granted Mr. Bowden's motion. [R.A. 4, 11] On April 22, 2014, the Commonwealth filed a Notice of Appeal and the case was entered in this Court on December 18, 2014. [R.A. 41]

*3 STATEMENT OF FACTS

The day after Mr. Bowden was released from the hospital for treatment of injuries inflicted on him by University of Massachusetts, Boston (“UMASS”) Campus Security Officers, he called the UMASS Human Resources Department to complain. [R.A. 10, 22] Mr. Bowden's complaint to the UMASS Human Resources representative consisted of explaining that after visiting his brother, (a vendor at a booth in the UMASS Campus Center), he boarded a campus shuttle bus. [R.A. 10.] Thereafter, the bus was boarded by several UMASS campus security officers who approached Mr. Bowden and said he “was the suspect they were looking for.” *Id.* The officers told Mr. Bowden to drop his cane. *Id.* When Mr. Bowden would not drop his cane, the officers snatched it away from him, threw him to the ground when he struggled to hold onto it, and then stomped on him, bruising Mr. Bowden's ribs and hitting him in the head. *Id.*

Another security officer then boarded the bus and ordered everyone else off, the driver exiting as well. *Id.* Three more security officers then boarded the bus and all six proceeded to stomp on Mr. Bowden some more. *Id.* Mr. Bowden described the first officer to *4 approach him as a “short, fat Puerto Rican,” and two of the UMASS officers who stomped on him as “white males, clean-shaven, dark hair, about 6', in their 20's.” *Id.*

Mr. Bowden was never charged with any crime by UMASS campus security. *Id.* Nevertheless, he was handcuffed after the beating and sent to the hospital in handcuffs via an ambulance UMASS security called to transport him there for treatment of the injuries he sustained as a result of the beating. *Id.*

The Complaint Application

The Statement of Facts in the Commonwealth's Brief, (“Comm.”), selectively quotes from the UMass Department of Public Safety incident report appended to the Complaint Application, [R.A. 8], conspicuously leaving out those facts that hurt its case contained in the UMB Human Resources representative's written statement which was also part of the Complaint. [R.A. 10]

Critical facts left out of the Commonwealth's Brief include Mr. Bowden's explanations of what he meant by his statements that “someone will bleed,” and “there will be bleeding”:

*5 I asked Mr. Bowman [sic] what resolution he was seeking. He stated that the university better fire all the security officers ‘or someone will bleed.’ *I asked him what he meant by that and he said that he would make a complaint to the Mayor's Office as there are laws against abusing elderly disabled people.*

I said ok. He then said that he is a veteran of wars and fought for this country and saw his brother die and there will be bleeding if this is not dealt with immediately. He said he knows how to use weapons. *But then he said he would sue the university and that his family has political connections.*

[R.A. 10]

Probable Cause Determination

At the hearing on Mr. Bowden's motion to dismiss, the Motion Judge went through the elements of the charge. The judge asked the Commonwealth:

who is it communicated to, the threat? Do you know who's the subject of the threat?

[R.A. 28] The Commonwealth responded that “it's the Commonwealth's position that it's the security officers.” *Id.* The judge then asked:

what about the intent and the ability to carry [the threat] out.

Id. There was no response from the Commonwealth. Defense counsel did respond to the judge's questioning as to whether the essential elements of intent and ability to carry the alleged threat out were present: *6 [t]here's nothing mentioned about that. [Mr. Bowden] talks about he's going to sue or go to the mayor's office. He does not say, “I'm going to go to -- come to UMass and make any of these individuals bleed for what they did to me.”

[R.A. 28-29] The Court then allowed Mr. Bowden's motion to dismiss over the Commonwealth's objection. [R.A. 29]

ARGUMENT

Standard of Review

A motion judge's determination as to whether probable cause exists to support the issuance of a criminal complaint is a question of law that is reviewed de novo. *Commonwealth v. Humberto H.*, 466 Mass. 562, 566 (2013).

I. MR. BOWDEN'S STATEMENTS THAT "SOMEONE WILL BLEED" AND "THERE WILL BE BLEEDING" UNLESS HIS COMPLAINT ABOUT BEING BEATEN BY UMASS SECURITY OFFICERS WAS DEALT WITH IMMEDIATELY AND THE SECURITY OFFICERS WERE FIRED, WAS NOT A THREAT UNDER G.L. c. 275, § 2, WHERE MR. BOWDEN EXPLICITLY STATED IN RESPONSE TO QUESTIONING REGARDING WHAT HE MEANT BY THE STATEMENTS WAS THAT HE INTENDED TO FILE A COMPLAINT WITH THE MAYOR'S OFFICE FOR VIOLATING LAWS AGAINST ABUSING ELDERLY DISABLED PEOPLE, SUE THE UNIVERSITY, AND USE HIS FAMILY'S POLITICAL CONNECTIONS.

"Heads will roll." "Bleed you dry." "Tongue-lashing." Idioms. Phrases or fixed expressions that have a figurative meaning, different from the literal *7 meaning. Here, Mr. Bowden's turns of phrase "someone will bleed" and "there will be bleeding" were figurative; clarifying when asked what he meant how it was different from the literal meaning. Literally speaking, Mr. Bowden threatened to file a complaint with the Mayor's office against the security officers for beating him because they violated laws against abusing elderly disabled people; he threatened to sue the University; and he threatened to use his family's political connections. These are not threats under G.L. c. 275, § 2. See *Commonwealth v. Troy T.*, 54 Mass. App. Ct. 520, 528 (2002) ("A threat is 'the expression of an intention to inflict evil, injury, or damage on another' (citation omitted)). Rather, they are all lawful ways to complain about and address abusive, criminal, treatment at the hands of UMB Campus Security.

Probable cause is considerably less than proof beyond a reasonable doubt, however, it is "more than mere suspicion." *Commonwealth v. Humberto H.*, 466 Mass. 562, 565 (2013) (citations omitted). In analyzing a putative threat, this Court will "eschew a technical parsing of the words used and instead consider the entire context in which a statement is *8 made, including the defendant's actions and demeanor at the time, and prior communications between the defendant and the recipient." *Commonwealth v. Troy T.*, *supra*. See also *Commonwealth v. Meier*, 56 Mass. App. Ct. 278, 279-280 (2002).

Here, there was no evidence of any prior communications between Mr. Bowden and the UMASS Human Resources representative or Department, or between Mr. Bowden and UMASS Campus Security. Mr. Bowden had never telephoned, written to, or visited the Human Resources office or UMASS campus security. Rather, he telephoned the Human Resources office one time to lodge a complaint about being beaten by UMASS campus security officers the day after he was discharged from being hospitalized as a result of the beating. Compare *Commonwealth v. Meier*, *supra*. (Defendant's claim that statements were expressions of exasperation and despair rather than threats rejected where it was reasonable to infer from broader context of statements that she intended them as threats, i.e., the defendant had embarked upon a series of telephone calls and written communications to the attorney who had represented an opposing party in a lawsuit resulting in damages being awarded and an injunction being *9 issued against the defendant. During the first call, the defendant said "Maybe it's time for me to get a gun." Over the course of the next five years, the defendant exhibited increasingly hostile behavior culminating in her statement to a third party that she intended to obtain a gun and shoot the attorney.)

As for the UMASS Human Resources representative's characterization of Mr. Bowden's speech as loud and forceful, considering the entire context in which his statements were made, the volume and tone of Mr. Bowden's voice arguably evidences only the fact that he was upset about being beaten so badly by UMASS campus security officers that he had been hospitalized. Notable too is the fact that Mr. Bowden did not contact UMASS campus security to complain. Rather, he telephoned the UMASS Human Resources Department which presumably would have the authority to sanction the abusive officers as employees of the University. Compare *Commonwealth v. Sholley*, 432 Mass. 721, 726 (2000) (Context of the defendant's statement, "Watch out, Counselor," along with his demeanor and tone of voice at the time the statement was made, would permit jury to conclude it was intended as a threat where the defendant, a known *10 father's rights activist, made the statement to the prosecutor

responsible for the conviction of the defendant's friend, in circumstances where the defendant was “‘yelling’ and ‘screaming’ in an angry tone of voice, he had just been crying out a prediction of ‘war’ and ‘bloodshed, and he stood only inches from [the victim] pointing his finger in her face”).

The Commonwealth's Brief entirely fails to address Mr. Bowden's explanations for what he meant by the turns of phrase, “someone will bleed” and “there will be bleeding,” and fails to account for the entire context in which Mr. Bowden's statements were made. Probable cause was lacking that Mr. Bowden's statements constitute threats as defined in [G.L. c. 275, § 2](#).

II. EVEN IF THIS COURT CONSIDERS THE PHRASES “SOMEONE WILL BLEED” AND “THERE WILL BE BLEEDING” EXPRESSIONS OF A THREAT TO COMMIT A CRIME, THE MOTION JUDGE'S DISMISSAL OF THE COMPLAINT WAS CORRECT AS A MATTER OF LAW WHERE THE APPLICATION DID NOT INCLUDE INFORMATION TO SUPPORT PROBABLE CAUSE AS TO EACH OF THE ESSENTIAL ELEMENTS.

The Motion Judge's job was to determine whether the complaint application set forth information to support probable cause as to each essential element of *11 the offense. See *Commonwealth v. Humberto H.*, *supra* at 565-566, citing *Commonwealth v. Hanright*, 466 Mass. 303, 312 (2013), citing *Commonwealth v. Moran*, 453 Mass. 880, 884 (2009). The term “threat” is not statutorily defined, but its elements have been held to “include an expression of intention to inflict a crime on another and an ability to do so in circumstances that would justify apprehension on the part of the recipient of the threat.” *Commonwealth v. Troy T.*, 54 Mass. App. Ct. 520, 524 (2002), quoting *Commonwealth v. Robicheau*, 421 Mass. 176, 183 (1995).

A. Probable cause was lacking on the essential element of communication.

“Menacing words alone, even those that express a threat to commit a crime, do not constitute an offense under [G.L. c. 275, § 2](#). For a statutory violation to occur, such words must first be communicated in some manner to the defendant's intended victim, directly or through an intermediary.” *Commonwealth v. Furst*, 56 Mass. App. Ct. 283, 284 (2002), citing *Commonwealth v. Troy T.*, *supra* at 525-526. See also *Commonwealth v. Hokanson*, 74 Mass. App. Ct. 403, 406 (2009) (“Though not explicitly stated, communication is a critical element ‘of the threat in the sense that it must be *12 uttered, not idly, but to the target, to one who the defendant intends to pass it on to the target, or to one who the defendant should know will pass it on to the target.’”), quoting *Commonwealth v. Maiden*, 61 Mass. App. Ct. 433, 435 (2004). However, even if the threatening words reach their target, that is not enough. “‘The Commonwealth must [also] prove, beyond a reasonable doubt, that the defendant intended that her threats be communicated to [the victim].’” *Commonwealth v. Furst*, *supra*, quoting *Commonwealth v. Meier*, *supra* at 282.

Assuming arguendo that Mr. Bowden's statements, “someone will bleed” and “there will be bleeding,” were threats to commit a crime (they were not), the Commonwealth's position at the motion to dismiss hearing was that the UMB officers who beat Mr. Bowden were his intended victims. Accordingly, the complaint application would have to contain information to support probable cause that Mr. Bowden's statements were communicated in some manner to those officers, directly or through an intermediary. The UMASS Department of Public Safety police report indicates that Police Officer Dianne M. Kirkpatrick took the UMASS Human Resources representative's statement. *13 There is no evidence that Officer Kirkpatrick or the UMASS Human Resources representative communicated the alleged threat to the security officers involved in the beating.

Additionally, even if the UMASS Human Resources representative's report to the UMASS Department of Public Safety constitutes communication of Mr. Bowden's statements to those officers (it should not), that would not be enough. The application would also have had to contain information to support probable cause that Mr. Bowden intended his statements to be communicated to the officers.

While evidence of the defendant's intent to have an intermediary communicate the alleged threat to the proposed victim may be proven circumstantially, there was no such evidence here. Rather, all of the available evidence indicates that Mr. Bowden's

intentions were for his complaint about being beaten by UMASS employees to be handled lawfully by the UMASS Human Resources Department, which would be in the position to address the officers' behavior internally within the University. If the UMASS Human Resources Department did not, Mr. Bowden's statements that "someone will bleed" and "there will be bleeding" *14 clearly concerned his intent to go public with his complaint about being beaten by UMASS officers. Mr. Bowden's "weapons"? Filing a complaint with the Mayor's office for violation of laws protecting the **elderly** and disabled from **abuse**, suing the university, and using his family's political connections. *Compare Commonwealth v. Hokanson, supra* (Defendant's conduct evidenced an intent to communicate his threat through intermediary where he entered police station, sat next to intermediary, pointed his finger at a group of police officers, and pantomimed the killing of those officers while uttering the words "the next time I come in here, boom, boom, boom, boom. Every fuckin' one of them. Nobody will be standing," and the threatening gesture was made in a public area and plainly visible to the police officers themselves).

There was no probable cause to support the essential element of communication.

B. Probable cause was lacking on the essential elements of intent and ability to carry out the alleged threat.

First, contrary to the Commonwealth's claims in its Brief [Comm. at 11], Mr. Bowden did in fact specifically challenge the lack of probable cause supporting the elements of intent and ability to carry *15 out the alleged threat. [R.A. 28-29] And, the motion judge did in fact appear to rely on the lack of probable cause on those elements in making his ruling. *Id.* Second, the motion judge's determination as to the absence of probable cause on these essential elements was correct as a matter of law.

As with the determination of whether there was evidence of intent to communicate the alleged threat, "attending circumstances, such as demeanor, prior behavior, and statements" may be relevant to probe the intent to carry out the alleged threat. *See Commonwealth v. Troy T., supra* at 529. Here, probable cause as to intent to carry out the alleged threat was lacking given the context of Mr. Bowden's statement (he was lodging a complaint about being severely beaten by employees via telephone to the Human Resources Department overseeing those employees); the attending circumstances (Mr. Bowden did not contact or visit the offending officers in person, nor did he visit the Human Resources Department in person but instead contacted the department by telephone because his complaint concerned a severe beating by UMASS employees that resulted in his hospitalization); prior behavior and statements (there was no evidence *16 that Mr. Bowden had any previous interaction with either the UMASS Human Resources Department or UMASS campus security).

Mr. Bowden's words have "to be viewed in the context of the actions and demeanor which accompanied them." *Commonwealth v. Sholley, supra* at 725. As argued above, Mr. Bowden's statements taken alone and on their face do not rise to the level of a threat given his stated explanation for what he meant by the turns of phrase "someone will bleed" and "there will be bleeding." Putting his words in the context of the actions and demeanor which accompanied them makes it even more clear that probable cause was lacking that Mr. Bowden had any intent to do bodily harm to the UMASS campus security officers.

Likewise, there is no evidence that Mr. Bowden had the ability to carry out the alleged threat, except in a considerably attenuated sense that is insufficient to support a finding of probable cause on this element. The Commonwealth points to Mr. Bowden's knowledge of how to "access the University, his ability to "make people bleed [because] he had fought in wars, and substantiated by that claimed knowledge of how to use weapons." [Comm. at 13]. However, again *17 the Commonwealth fails to account for Mr. Bowden's stated explanations that what he meant by "someone will bleed" was that he would file a complaint with the Mayor's Office. And, the Commonwealth fails to account for the fact that his references to his years of military service to the United States and his knowledge of how to use weapons was immediately followed by explanation concerning his intention to file a lawsuit and use his family's political connections if UMass did not fire the officers immediately. *Compare Commonwealth v. Milo M., 433 Mass. 149, 155-156 (2001)* (juvenile made two drawings depicting images of himself perpetrating violence on his teacher, held the second of two very violent drawings out to his teacher in an angry and defiant manner, and was seen loitering near his teacher's car later the same day).

CONCLUSION

The Motion Judge's determination that probable cause did not exist to support the issuance of a criminal complaint against Mr. Bowden for threatening to commit a crime was correct as a matter of law. For all of the reasons stated, Mr. Bowden respectfully requests this Court affirm the Order of Dismissal.

Footnotes

- 1 The record appendix is cited as "R.A. (pg.)" and is reproduced *post*.

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