IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH

STATE OF OREGON,	)	
	)	
Plaintiff,	)	No. 12-02-41613
	)	
v.	)	
	)	ORDER AND GENERAL
DANIEL KAUFMAN,	)	JUDGMENT OF ACQUITTAL
	)	
Defendant.	)	

This case came before me for trial on October 5, 2012. Mr. Brian Lowney appeared on behalf of the state. Ms. Kate Stebbins appeared on behalf of the defendant. The court heard testimony and viewed video evidence. The court also viewed as demonstrative evidence "The Disco Trike" that is the subject of the case. This case arose out of the group of "Occupy Portland" cases.

The parties stipulate that the State would be able to present evidence that Mr. Kaufman committed acts that meet the elements of Portland City Ordinance 14A.30.020, Unlawful Operation of Sound Producing Equipment. The sole issue is whether Mr. Kaufman has a defense to his acts under Article I, Section 8 of the Oregon Constitution or the First Amendment of the United States Constitution as made applicable to the states by the 14th Amendment. The burden is on the

state to show the constitutional defense does not apply. *State v. Dameron,* 316 Or 448, 460-461 (1993).

The penalty for a violation of PCC 14A.30.020 is a fine of not more than $500 and/or imprisonment of not more than six months. PCC 14A.20.060. Portland ordinances are generally considered to be Class B misdemeanors based on the potential imprisonment of six months. See, ORS 161.615(2); *Portland v. Tuttle,* 295 Or 524, 531 (1983). The District Attorney's office elected to issue this case as a violation pursuant to ORS 161.566. The court previously ruled in the "Occupy Portland" cases that misdemeanors reduced to violation by district attorney election carry a burden of proof of beyond a reasonable doubt. See, Order Granting in Part Denying in Part Defendants' Motions for Application of Constitutional Rights. Thus, the state must also prove beyond a reasonable doubt Mr. Kaufman did not have a constitutional right to operate sound equipment in a manner that was audible beyond a distance of 100 feet. ORS 161.055; *State v. Dameron,* 316 Or at 462.

This is the only Occupy Portland case that addresses this particular ordinance.

FACTUAL FINDINGS

Mr. Kaufman was participating in a demonstration related to the Occupy Portland movement on January 25, 2012. The event was a permitted march that started with several dozen marchers around 6 p.m. and ended with a smaller group around 9 p.m. The route generally followed a loop through the downtown core. The downtown core is dominated by office towers, governmental buildings, parking garages, retail outlets, hotels and transportation centers. The protestors were marking the First Anniversary of the uprising at Tahrir Square in Egypt.

Sergeant Craig Dobson was the operations sergeant. He testified police officers had information that people identified as

anarchists would join the march. Police believe anarchists are more disruptive and violent in their form of protests than are the members of the Occupy movement who do not identify themselves as anarchists. There was also an unrelated police-involved shooting earlier in the day and police officers anticipated the protestors might be more agitated or prone to violence against the police because of that. There was a strong police presence for the march, including the Mounted Police unit.

Mr. Kaufman brought his "Disco Trike," an adult-sized tricycle that is outfitted with a speaker that broadcasts music. He also conducted visual recordings of the event. He either rode the tricycle in the street or walked with it on the sidewalk. The sound varied throughout the march. Early in the march, Sergeant Dobson and a Captain asked Mr. Kaufman to turn the sound down and warned him he could get a citation if it was audible beyond 100 feet. Mr. Kaufman complied at that time.

Mr. Kaufman testified regarding the way he utilizes the sound equipment at protests. He's used the tricycle at the first Occupy march on October 6, 2011, the park blocks demonstration in December 2011 and the May Day marches of 2012. He believes it lifts the spirits of the protestors and helps make demonstrations more positive. People sometimes dance to the music, and he turns it down at other times if he believes it is contributing to the agitation of the crowds. He believes it contributed to helping to diffuse a police-protestor skirmish line at the park blocks demonstration.

The protestors began the march at Pioneer Square. They were on the sidewalk for a few blocks but then a significant number of people got into the street. The officers tried to get the group back on the sidewalk but protestors were hostile and resisting did not comply. Police officers had to push the protestors back onto the sidewalks. Officers observed crosswalk violations and began issuing citations. Some protestors who were not being cited

physically interfered with the citation process and there was some pushing and shoving between officers and the protestors. Sergeant Dobson described physical confrontations between protestors and police at a few locations on the route. He noted that at one point a group of protestors surrounded police officers and taunted them with remarks such as, "Now you know how that feels." He also noted a punch being thrown at an officer by a demonstrator and that there were five lit flares thrown into the street by protestors. He testified that police also decreased their presence at times to help de-escalate the tension of the crowd. Mr. Kaufman testified when he first saw police and demonstrators being contentious, he turned the music down to help settle things.

At the 24 Hour Fitness on SW 4th Ave., there was another physical confrontation and Mr. Kaufman turned up the sound at that time. The parties stipulate the volume made the speaker audible beyond 100 feet. Mr. Kaufman testified that after officers had pulled people out of a crowd to give them citations and he saw the anger level rising. He believed playing Bob Marley would help calm down the crowd. His observation was that the crowd settled down and moved on and officers became less combative in response. When the march reached City Hall, he played disco songs while people danced in a more festive atmosphere.

Sergeant Dobson testified he noticed the volume when it was turned up and developed a basis to charge Mr. Kaufman. He indicated that there is some residential housing at that location, that there was no permit for a sound variance, that it was adding to the commotion and that it made it difficult to communicate with the group to perform their duties. He also stated the loud, rhythmic sounds tended to make the demonstrators more boisterous and and made the job of crowd control more difficult. He noticed the energy level of the crowd dropped when there was a lack of sound.

Sergeant Dobson waited until resources were in place before

directing officers to enforce the ordinance. At the location of the elk statute on SW Main Street between Chapman and Lownsdale Squares, mounted police surrounded Mr. Kaufman and seized his bike and video equipment. He was in custody for 40 minutes. Sergeant Dobson told Mr. Kaufman something to the effect of, "When you bring music the protest lasts longer." Sergeant Dobson has known Mr. Kaufman to be at other protest events with the Disco Trike and has not cited or charged Mr. Kaufman in relation to any of those events. Mr. Kaufman had not been involved in any of the physical confrontations during the march.

ARTICLE I, SECTION 8

Article I, Section 8 of the Oregon Constitution provides, "No law shall be passed restraining the free expression of opinion, or restricting the right to speak, write, or print freely on any subject whatever; but every person shall be responsible for the abuse of this right. "

Mr. Kaufman did not write the music he plays, nor was it written by any of the march participants. The music is commercial music intended for mass distribution to consumers and listeners. The issue is whether it constitutes an "expression of opinion" or other type of speech that is protected under the constitutional provision. Physical acts that have an expressive component constitute protected expression. *State v. Ciancanelli,* 339 Or 282, 311 (2005). In fact, Article I, Section 8 is intended to prohibit broadly any laws directed at restraining verbal or nonverbal expression of ideas of any kind. *Id.* Mr. Kaufman testified he brings the Disco Trike to political demonstrations, and that it was designed for such a purpose. He selects songs and volume in an attempt to keep the energy level of marchers positive and to keep the march or demonstration going. The fact that the content of songs such as "Funkytown" may not relate to the message of the protest is immaterial. Playing music is a nonverbal action that is expressive by contributing to the overall tenor and tone of a demonstration.

Using sound and rhythm to communicate is akin to speakers who modulate the volume, rhythm, pace, tone, and inflection of their voices to enhance their message and attempt to sway their listeners. Mr. Kaufman is also communicating in the form of choosing verbal messages to be conveyed through the music. As such, the court finds playing music at a political demonstration constitutes protected expression.

Speech accompanying punishable conduct does not transform conduct into expression. Similarly, government cannot target expression under the guise of a content-neutral law. *City of Eugene v. Lincoln.* 183 Or App 36, 43 (2002). While playing music at a political demonstration constitutes expression, the conduct of increasing volume beyond the limits set by the ordinance is not an example of protected expression. While volume may assist in making the message heard, it is not intrinsic to the message. Setting decibel limits on a message is not the same as restraining it from occurring. The city provides for permits for sound limit variances as testified by Sergeant Dobson. As such, the ordinance does not impermissibly restrain expression by specifying the volume of that expression and is a content-neutral ordinance.

Expressive material is not exempt from all content-neutral regulation. *City of Eugene v. Miller,* 318 Or 480, 486 (1994). Conversely, even if the law is not directed at curtailing expression, a law cannot escape scrutiny merely because it is content-neutral. *Id* at 487. When the regulation involves "noise" that happens to be expression, as it is here, enforcement is unconstitutional only if the enforcement is directed toward the speech's content and not its noncommunicative elements. *State v. Rich,* 218 Or App 642, 648 (2009).

State v. Robertson, 293 Or 402 (1982) sets out the oft-used framework for determining whether regulations or their enforcement violate Article I, Section 8. The ordinance at issue

here falls under the category of laws that are targeted to forbidden effects without referring to expression. *State v. Plowman,* 314 Or 157, 164 (1992). Laws that fall in this category may be challenged on the grounds that the statute cannot constitutionally be applied to the particular expression that is the subject of the case. *Id,* citing *State v. Robertson,* 293 Or at 417. If the law does not refer to expression at all, then the appropriate inquiry is whether the law could be constitutionally applied to the defendant's specific act or acts of expression. *City of Eugene v. Miller,* 318 Or at 490. Put another way, the question becomes whether the law or ordinance is applied in a manner that impermissibly burdens expression. *Id.*

The Supreme Court in Miller does not articulate a test or doctrine to determine how application of an ordinance might impermissibly burden expression, but does appear to set out a rational basis review. *See, City of Eugene v. Miller,* 318 Or at 491 ([T]here does not appear to be any rational basis for the burden the city has chosen to place on defendant's expressive activity.) However, in *City of Eugene v. Lee,* the court rejects that standard in favor of a determination as to whether, as applied to defendant, a law imposes an "impermissible burden" on protected expression. 177 Or App 492, 497 (2001).

In *City of Eugene v. Lincoln,* the court looked to whether the enforcement of the law at issue, a criminal trespass statute, had as its objective the prevention of harm within its power to prevent or whether its objective was to prevent protected speech. 183 Or App at 43. *State v. Rich,* 218 Or App 642, 650 (2007) outlines a similar test and notes as follows:

> "[A] statute proscribing unreasonable noise, although content neutral, can nonetheless can be challenged when its application restrains expression, and will be deemed to be unconstitutionally applied when the application was motivated, not by a desire to inhibit the noncommunicative elements of the activity, but by the

> desire to stifle expression. Thus, the outcome of this case depends on whether defendant was arrested and convicted because of the volume, duration, place, or manner of his words, or because his words were obscene, offensive, "annoying," "alarming," or the like."

Most recently, *State v. Babson,* 249 Or App 278, 289 (2012) applied the *Lincoln* analysis to a trespass statute used against protestors who were located on the steps of the Oregon State Capitol beyond closing hours. The court cited the following passage from *Lincoln:*

> "Those who enforce and execute the law, like those who make it, must target regulable harm and not expression *per se* apart from harm. We must therefore decide, in this as-applied challenge, whether the city's enforcement of the criminal trespass statute against defendant had as its objective the prevention of some harm within its power to prevent or whether its objective was to prevent protected speech." *State v. Babson,* 249 Or App at 289, citing *City of Eugene v. Lincoln,* 183 Or App at 43.

Thus, in an as-applied challenge, the court looks behind the stated purpose of the law to the subjective reason for its enforcement by an officer. In *Lincoln,* the court determined the officer's motive in enforcing a trespass statute was to prohibit protected speech. *State v. Babson,* 249 Or App at 289. In *Babson,* the court found there was sufficient evidence in the record to conclude the judge was within her discretion in finding the officers had the motive to stop the harms targeted by the ordinance being enforced and not to interfere with protected speech. *Id,* 249 Or App at 291.

An officer can have concurrent motives. There is nothing impermissible about enforcing a regulation to address the harm targeted by the ordinance while also having a motive to prohibit expression. Additionally, there may be times when an officer has a motive to prohibit expression for an underlying reason related to

safety or other concerns. However, the ordinance at issue addresses the harm of noise in the community, not safety issues. Moreover, restraining expression because of the expression's effect on others goes directly to its content, and expression is protected even if it is provocative, creates a tense atmosphere with the potential for violence or is likely to provoke a disorderly response. *City of Eugene v. Lincoln,* 183 Or App at 45.

The issue then is, in light of all of the evidence, what is the greater motive. It is the state's burden to establish beyond a reasonable doubt that the particular enforcement of the regulation was aimed at the harm targeted by the ordinance and did not have as its motive the restriction of expression. In this case, based on the video evidence and testimony outlined above, the court has a reasonable doubt that the motive to enforce Portland City Ordinance 14A.30.020 against Mr. Kaufman was for its stated purpose. As such the court enters a finding of not guilty and enters a judgment of acquittal as to Mr. Kaufman.

IT IS SO ORDERED AND ADJUDGED, this 9th day of October, 2012.

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Judge Cheryl Albrecht

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