

To: Commission
From: Laura C. Tharney
Re: *State v. Bessey* - Mental State Required for Violation of N.J.S. 2C:33-7b
Date: September 8, 2015

MEMORANDUM

Executive Summary

In the case *State v. Bessey*,¹ the Appellate Division considered the mental state or mens rea element that must be proved in order to find that a defendant committed the disorderly persons offense of “obstructing highways and other public passages” pursuant to N.J.S. 2C:33-7(b)(2). The Court determined that although the statutory language does not expressly identify the necessary mental element, the Legislature’s inclusion of the word “refuse” in that subsection requires a “knowing and willful act of defiance” on the part of the defendant.²

Background

The Defendant, Marianne Bessey, is an attorney who frequently advocates on behalf of animal rights. In May of 2012, Defendant distributed leaflets outside of the Sun National Bank Center Arena (Arena) in advance of a performance by the Ringling Brothers and Barnum and Bailey Circus.³ Defendant explained that she had gone to circuses “‘hundreds’ of times” to protest the abuse of circus animals and to educate the public about animal rights issues in a manner that was both peaceful and legal.⁴

On this particular evening, Defendant was one of a small number of protesters outside of the Arena. Police on the scene indicated the area in which the protesters could stand so as to avoid obstructing the flow of vehicular traffic or pedestrians.⁵ Defendant declined, more than once, to follow the officers’ directions. A witnessing police officer testified that the area in which Defendant stood to distribute leaflets experienced heavy pedestrian and vehicular traffic, and concluded that the actions of the Defendant were “contributing to, if not actually exacerbating, this traffic congestion.”⁶ After a second warning from an officer to stay away from the crosswalks, Defendant asked what would happen if she went beyond the location identified

¹ *State v. Bessey*, 2014 WL 9928205 (App. Div. 2015).

² *Id.* at *8.

³ *Id.* at *1.

⁴ *Id.*

⁵ *Id.* at *3 - *4.

⁶ *Id.* at *4.

as acceptable; the officer informed her that she would be arrested. She then moved into the area deemed unacceptable by the officer, and was arrested.⁷

N.J.S. 2C:33-7

The language of N.J.S. 2C:33-7 is as follows:

a. A person, who, having no legal privilege to do so, *purposely or recklessly* obstructs any highway or other public passage whether alone or with others, commits a petty disorderly persons offense. “Obstructs” means renders impassable without unreasonable inconvenience or hazard. No person shall be deemed guilty of recklessly obstructing in violation of this subsection solely because of a gathering of persons to hear him speak or otherwise communicate, or solely because of being a member of such a gathering.

b. A person in a gathering commits a petty disorderly persons offense if he *refuses* to obey a reasonable official request or order to move:

(1) To prevent obstruction of a highway or other public passage; or

(2) To maintain public safety by dispersing those gathered in dangerous proximity to a fire or other hazard.

An order to move, addressed to a person whose speech or other lawful behavior attracts an obstructing audience, shall not be deemed reasonable if the obstruction can be readily remedied by police control of the size or location of the gathering. [emphasis added]

While subsection a. of the statute requires that a defendant act “purposely or recklessly,” subsection b. does not establish the necessary mens rea for the disorderly persons offense with which Defendant was charged. N.J.S. 2C:2-2 contains the general requirements of culpability and subsection c. specifically addresses the construction of statutes with regard to culpability requirements.⁸ Accordingly, both parties relied on N.J.S. 2C:2-2 subsection c.(3), to import a “knowing” standard of culpability to N.J.S. 2C:33-7 subsection b. With regard to “knowingly,” N.J.S. 2C:2-2 provides that a person “acts knowingly with respect to the nature of his conduct or the attendant circumstances if he is aware that his conduct is of that nature, or that such circumstances exist, or he is aware of a high probability of their existence. A person acts knowingly with respect to a result of his conduct if he is aware that it is practically certain that

⁷ *Id.* at *4 - *5.

⁸ In particular, N.J.S. 2C:2-2 c.(3) expressly provides that “[a] statute defining a crime, unless clearly indicating a legislative intent to impose strict liability, should be construed as a crime with the culpability defined in paragraph b.(2) of this section. This provision applies to offenses defined both within and outside of this code.” Paragraph b.(2) refers to the “knowingly” standard of culpability.

his conduct will cause such a result. “Knowing,” “with knowledge” or equivalent terms have the same meaning.”⁹

The Court rejected the parties’ argument that N.J.S. 2C:2-2 c.(3) imposes a “knowing” mens rea onto N.J.S. 2C:33-7 subsection b, holding that N.J.S. 2C:2-2 c.(3) pertains only to statutes defining crimes, not disorderly persons offenses. Instead, the Court relied on the Legislature’s statutory use of the word “refuse” and was guided by its dictionary definition as “an act of defiance” that is “both knowing and willful”¹⁰ in establishing the mens rea required for this offense.

Conclusion

The case law in this area is limited, and N.J.S. 2C:33–7 was enacted in 1978 and has not been modified since that time. Staff seeks authorization to conduct additional research in this area in order to determine whether a modification to the statutory language to incorporate the mental element necessary for a violation of subsection b. of the statute would be appropriate.

⁹ N.J.S. 2C:2-2 c.(2).

¹⁰ *State v. Bessey*, 2014 WL 9928205, *7 - *8 (App. Div. 2015).