

MOTION TO DISMISS

Comes now the Defendant, [name], by counsel, and pursuant to I.C. 35-34-1-4(a)(11) and -8 moves to dismiss the pending charge of Intimidation. In support hereof the Defendant says:

1. The Defendant is charged with Intimidation in violation of I.C. 35-45-2-1(a)(2)(B)(i) in that he is alleged to have threatened Officer David King of the Richmond Police Department in order that Officer King “be placed in fear of retaliation for a prior lawful act, to wit: the arrest of [name] by Officer Dave King...” (See the attached Information.).

2. According to the depositions of the officers involved in this investigation, the facts relating to the arrest of the Defendant clearly indicate that, as a matter of law, Officer King’s arrest of the Defendant was unlawful. Specifically, in the course of the depositions of the arresting officer, David King, as well as the other officers on the scene of the Defendant’s arrest, it is beyond doubt that the Defendant’s initial arrest for disorderly conduct was unlawful in that it infringed upon his rights of free speech under both the Federal and Indiana Constitutions because the Defendant was engaged in protected free speech in criticizing the police officers’ conduct and his speech did not inflict particularized harm analogous to tortious injury on readily identifiable private interests in that it caused actual discomfort to persons of ordinary sensibilities or interfere with an individual's comfortable enjoyment of his privacy.

3. That in the absence of a “prior lawful act” the Intimidation charge is subject to dismissal as a matter of law.

4. That attached hereto and incorporated herein by reference is a **Memorandum of Law** in support of this Motion.

5. That with respect to a **Motion to Dismiss** filed under I.C. 35-34-1-4, I. C. 35-34-1-8(a) provides:

If the motion is expressly or impliedly based upon the existence or occurrence of facts, the motion shall be accompanied by affidavits containing sworn allegations of these facts. The sworn allegations may be based upon personal knowledge of the affiant or upon information and belief, provided that in the latter event the affiant discloses the sources of the information and the grounds for the belief.

In compliance with the foregoing, all assertions of various facts herein are based upon counsel's taking of depositions of the officers involved in the arrest of the Defendant.

VERIFICATION

The undersigned verifies that any assertions of fact contained in this Motion are based upon information and belief gained as a result of the sworn testimony of the arresting officers.

Wherefore, the Defendant moves the Court to dismiss the charge pending herein.

Respectfully submitted,

Memorandum of Law

The Defendant's **Motion to Dismiss** is premised upon the fact that in order to establish the Intimidation charge, there must be a "prior lawful act." The prior lawful act the State alleges is the Defendant's arrest for disorderly conduct. However, that arrest was, in fact, unlawful in that it violated the Defendant's free speech rights under the First Amendment as well as Article I, Section 9 of the Indiana Constitution. Therefore, if there was no lawful arrest there is no "prior lawful act" upon which to base this charge and it is subject to dismissal as a matter of law.

Article I, Section 9 of the Indiana Constitution provides, "No law shall be passed, restraining the free interchange of thought and opinion, or restricting the right to speak, write, or print, freely, on any subject whatever: but for the abuse of that right, every person shall be responsible." **I.C. 35-45-1-3** provides, in relevant part, "A person who recklessly, knowingly, or intentionally: (1) engages in fighting or in tumultuous conduct; (2) makes unreasonable noise and continues to do so after being asked to stop; or (3) disrupts a lawful assembly of persons; commits disorderly conduct, a Class B misdemeanor."

When reviewing the constitutionality of an application of the disorderly conduct statute, it must first be determined whether state action has restricted a claimant's expressive activity. **Shoultz v. State**, 735 N.E.2d 818 (Ind. Ct. App. 2000) trans denied. It is clear that when a person is arrested for disorderly conduct based upon making unreasonable noise that consists of complaining about the conduct of a police officer engaged in actions under the color of law,

expressive activity being restricted by the state is involved. Whittington v. State, 669 N.E.2d 1363, 1367 (Ind. 1996); Johnson v. State, 719 N.E.2d 445 (Ind. Ct. App. 1999) (concluding that a person's conviction for making unreasonable noise based solely on his loud speaking during a police investigation constitutes a restriction of claimant's expressive activity by state action). (See also, Price v. State, 622 N.E.2d 954 (Ind. 1993) (where the defendant was found to have engaged in political speech when she screamed profanities at a police officer while objecting to the arrest of a third party); Shoultz v. State, 735 N.E.2d 818 (where defendant was found to have engaged in political speech when it was directed to the legality and appropriateness of police conduct toward a third party and constituted criticism of an official acting under color of law).

The next issue is whether the restricted activity constituted an abuse of the right of free speech. Shoultz, Id. Generally, when reviewing the State's determination that a claimant's expression was an abuse of the right of free speech under the Indiana Constitution, we are required to find only that the determination was rational. Id. If the claimant's speech giving rise to the disorderly conduct conviction is political, however, the State must demonstrate that it has not materially burdened the claimant's opportunity to engage in political expression. Id. Such expression is not materially burdened if the State produces evidence that the speech inflicted particularized harm analogous to tortious injury on readily identifiable private interests. To demonstrate the requisite level of harm, there must be evidence that the speech caused actual discomfort to persons of ordinary sensibilities or that it interfered with an individual's comfortable enjoyment of his privacy. Evidence of mere annoyance

or inconvenience is insufficient. **Shoultz**, 735 N.E.2d at 825-26; **Madden v. State**, 786 N.E.2d 1152 (Ind. Ct. App. 2003); **Johnson v. State**, 747 N.E.2d 623 (Ind. Ct. App. 2001).

The facts as established by the depositions of the arresting officers clearly establish that the Defendant was arrested for disorderly conduct in that he was allegedly creating unreasonable noise after being asked to stop. However, because the “noise” he was making was nothing beyond his repeated complaints about the actions of the police in their conducting of an investigation, that “noise” was protected, politically expressive speech. In the absence of the State being able to establish that the Defendant’s complaints inflicted particularized harm analogous to tortious injury on readily identifiable private interests, the initial arrest of the Defendant for disorderly conduct was unlawful. Because the initial arrest was unlawful, there is no “prior lawful conduct” as alleged by the State in the charging Information and it must be dismissed.

Respectfully submitted,
