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March 10, 2014

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You are hereby notified that the Court has entered the following opinion and order:

2013AP158-CR State of Wisconsin v. Brian T. Lawler (L.C. # 2008CF1456)

Before Lundsten, Sherman and Kloppenburg, JJ.

Brian Lawler appeals a judgment convicting him of eight counts of stalking, and an order denying his supplemental motion for postconviction relief. Lawler claims that counsel provided ineffective assistance by failing to challenge the constitutionality of the anti-stalking statute, WIS. STAT. § 940.32 (2011-12),[1] on vagueness and overbreadth grounds. After reviewing the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21. We further conclude that the circuit court's decision

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

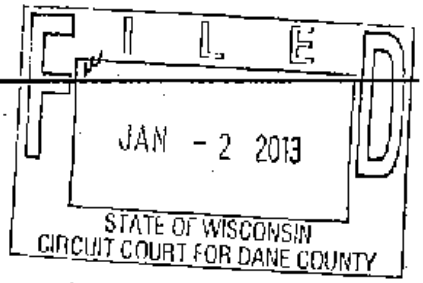
identified and applied the proper legal standards to the relevant facts to reach the correct conclusion. Specifically, we agree with the court's analysis that counsel did not provide ineffective assistance by failing to raise claims foreclosed by the controlling precedent of ***State v. Ruesch***, 214 Wis. 2d 548, 571 N.W.2d 898 (1997). We therefore incorporate into this order the circuit court's decision, which we are attaching, and summarily affirm on that basis. *See* WIS. CT. APP. IOP VI(5)(a) (Nov. 30, 2009).

IT IS ORDERED that the judgment and postconviction order are summarily affirmed under WIS. STAT. RULE 809.21(1).

Diane M. Fremgen
Clerk of Court of Appeals

STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY

BRANCH 16



STATE OF WISCONSIN

Plaintiff

vs.

BRIAN T. LAWLER

Defendant

Case No. 08CF1456

DECISION AND ORDER

BACKGROUND

Brian Lawler was convicted of eight counts of stalking on July 17, 2009. This is Lawler's second Wis. Stat. § 809.30 motion. Lawler previously filed a § 809.30 motion in which he challenged the jury instructions and claimed that his trial attorney was ineffective. This court denied Lawler's motion, and Lawler appealed. Lawler got new postconviction counsel and moved the court of appeals to dismiss his appeal so he could raise new issues that he did not raise in his first § 809.30 motion. The court of appeals granted Lawler's motion and dismissed Lawler's appeal without prejudice. That brings us to the § 809.30 motion at issue here. Lawler now claims that the stalking statute, Wis. Stat. § 940.32, is unconstitutionally vague and overbroad and that his trial attorney was ineffective for not raising vagueness and overbreadth challenges. The court limits its consideration and decision to Lawler's new claims.

DECISION

The court denies Lawler's motion without a hearing because the record conclusively demonstrates that Lawler is not entitled to relief on any of his claims. *See State v. Allen*, 2004 WI 106, ¶ 9, 274 Wis.2d 568, 682 N.W.2d 433 (Circuit court has discretion to deny a motion without a hearing "if the record conclusively demonstrates that the defendant is not entitled to relief."). Section 940.32 is neither unconstitutionally vague nor unconstitutionally overbroad, so Lawler's trial attorney was not ineffective for not raising vagueness or overbreadth claims.

A. ***Section 940.32.***

The stalking statute, § 940.32, prohibits conduct that causes a specific person to suffer serious emotional distress or induces in that person fear of bodily injury to or the death of himself or herself or a member of his or her family or household.

For a defendant to be convicted of stalking, the state must prove:

- The defendant engaged in a "course of conduct" consisting of "a series of two or more acts carried out over time that show a continuity of purpose" and that "would cause a reasonable person under the same circumstances to suffer serious emotional distress or to fear bodily injury to or the death of himself or herself, or a member of his or her family or household." Wis. Stat. § 940.32(2)(a).

- The defendant knew or should have known that at least one of the acts that constitute the course of conduct will cause the victim to suffer serious emotional distress or place the victim in reasonable fear of bodily harm to or the death of himself or herself or a member of his or her family or household. Wis. Stat. § 940.32(2)(b).

- The defendant's acts cause the victim to suffer serious emotional distress or induce fear in the victim of bodily injury to or the death of himself or herself or a member of his or her family or household. Wis. Stat. § 940.32(2)(c).

Section 940.32 contains a list of eleven examples of conduct that may comprise a course of conduct constituting stalking. *See* Wis. Stat. § 940.32(1)(a). Section 940.32 also specifically provides that it "does not apply to conduct that is or acts that are protected by the person's right to freedom of speech or to peaceably assemble with others." Wis. Stat. § 940.32(4).

B. ***Section 940.32 is neither unconstitutionally vague nor unconstitutionally overbroad.***

1. ***Lawler's burden of persuasion.***

To establish that § 940.32 is unconstitutionally vague or overbroad, Lawler must overcome the presumption of constitutionality and establish beyond a reasonable doubt that § 940.32 is unconstitutional. *See State v. Carpenter*, 197 Wis.2d 252, 263, 541 N.W.2d 105 (1995).

Lawler cannot satisfy his burden with respect to his vagueness or overbreadth claims.

2. ***Section 940.32 is not unconstitutionally vague.***

The vagueness doctrine "rests on the principle that procedural due process requires fair notice and proper standards for adjudication." *City of Oak Creek v. King*, 148 Wis. 2d 532, 546, 436 N.W.2d 285, 290 (1989). "A statute can be impermissibly vague for either of two independent reasons. First, if it fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits. Second, if it authorizes or even encourages arbitrary and discriminatory enforcement." *Hill v. Colorado*, 530 U.S. 703, 732 (2000).

Lawler claims that § 940.32 is unconstitutionally vague because it did not clearly cover his conduct related to four examples of proscribed conduct: "maintaining a physical or visual proximity," "photographing, videotaping, or, through any other electronic means, monitoring or recording. . . .," "sending material by any means to the victim," and "causing a person to engage in any of the acts" (Supp-Br. at 11-26).

Lawler's claim that § 940.32 is unconstitutionally vague is foreclosed by *State v. Ruesch*, 214 Wis.2d 548, 571 N.W.2d 898 (1997). The Wisconsin Supreme Court held in *Ruesch* that § 940.32 did not satisfy either criteria for being deemed vague. The supreme court noted that Ruesch did not "even make a pretense of not knowing that his advances were absolutely unwelcome or deny that he knew of the anxiety and fear they produced." *Id.* at 562. The

supreme court stated with respect to the first vagueness criteria that "the inclusion of the element of intent significantly vitiates a claim that Ruesch (or any other defendant) was (or would be) misled about what conduct was proscribed." *Id.* at 563. The supreme court stated with respect to the second vagueness criteria that the "reasonable person" requirement avoided the possibility of arbitrary and discriminatory enforcement. *Id.*

Ruesch controls here.

Lawler was not convicted just for engaging in the acts he identifies in support of his vagueness challenge. Lawler was convicted for engaging in "a course of conduct that would cause a reasonable person under the same circumstances to suffer serious emotional distress or to fear bodily injury to or the death of himself or herself, or a member of his or her family or household." Wis. Stat. § 940.32(2)(a). Further, for Lawler to be convicted, the state had to prove that Lawler knew or should have known that one of his acts would cause his victims such emotional distress or fear *and* that Lawler's victims actually suffered such harm. *See* Wis. Stat. § 940.32(2)(b); *State v. Sveum*, 220 Wis.2d 396, 413, 584 N.W.2d 137 (1998). Like Ruesch, Lawler does not so much as suggest that he lacked the intent or that he failed to cause actual harm necessary to be convicted of stalking.

3. ***Section 940.32 is not unconstitutionally overbroad.***

The overbreadth doctrine prohibits a statute from "being written in such broad terms that it proscribes conduct which is constitutionally protected, as well as that which may be regulated." *Ruesch*, 214 Wis.2d. 548, 556. The doctrine serves two purposes: first, avoiding constitutionally-protected activity from being chilled, and second, similar to the vagueness doctrine, preventing "the selective enforcement of a statute that would target and discriminate against certain classes of persons." *State v. Stevenson*, 2000 WI 71, ¶¶ 11-13, 236 Wis.2d 86,

613 N.W.2d 90. The Wisconsin Supreme Court has cautioned that "courts should only sparingly utilize the overbreadth doctrine as a tool for statutory invalidation." *Id.* at ¶ 14.

Lawler's overbreadth challenge fails for the same reason Lawler's vagueness challenge does: Lawler was not convicted just for giving his neighbors the middle finger, or for posting negative comments on the Internet, or for taking some movies, or for the activities he picks out in support of his claims. Lawler was convicted for engaging in a protracted course of conduct: one the jury found was troubling enough to cause a reasonable person to suffer serious emotional distress or to fear bodily injury or death, one that included at least one act that Lawler knew or should have known would cause his victims such emotional distress or fear, and one that included at least one act that actually caused victims such emotional distress or fear.

Lawler's overbreadth challenge is also undermined by the plain language of § 940.32: with its exclusion of First Amendment activity, § 940.32 contains its own safeguard against the type of chilling effect the overbreadth doctrine protects against; a safeguard that notably matches the type of curative instruction a court could give as a remedy if § 940.32 were overbroad. *See, e.g., State v. Stevenson*, 2000 WI 71, ¶ 23, 236 Wis.2d 86, 613 N.W.2d 90 (2000).

C. Lawler's trial attorney was not ineffective for not raising meritless claims.

Lawler's ineffective assistance of counsel claim fails along with his vagueness and overbreadth claims: an attorney is not ineffective for not raising meritless claims. *See State v. Wheat*, 2002 WI App 153, ¶ 14, 256 Wis. 2d 270, 278, 647 N.W.2d 441, 445 ("Failure to raise an issue of law is not deficient performance if the legal issue is later determined to be without merit."); *State v. Toliver*, 187 Wis.2d 270, 278, 647 N.W.2d 441 (Ct. App. 1994) ("[T]rial counsel was not ineffective for failing or refusing to pursue feckless arguments.").

CONCLUSION

Though Lawler casts his claims in different terms, Lawler's gripe ultimately appears to have more to do with the jury's verdict than with § 940.32. Lawler voices surprise that the jury found him guilty of stalking. Lawler's surprise over the verdict, however, does not implicate the constitutionality of § 940.32. To the extent Lawler is really just claiming that he did not have the requisite intent or cause the requisite harm to be convicted of stalking or that some of his conduct fell within § 940.32's First Amendment exception, that is a sufficiency of the evidence claim different from the claims Lawler raises now (or, notably, from any claims Lawler raised in his first § 809.30 motion either). The court denies Lawler's postconviction motion without a hearing because the record clearly establishes that Lawler's claims lack merit.

This is a final order for purposes of appeal.

DATED: January 2, 2013

JUDGE REBECCA ST. JOHN