

IN THE IOWA DISTRICT COURT IN AND FOR WAPELLO COUNTY
(Magistrate Division)

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CLERK OF DISTRICT COURT

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| <p>STATE OF IOWA</p> <p>vs.</p> <p>SCOTT WAYNE ROE Defendant</p> | <p>Case # SMSM022933</p> <p>ORDER</p> |
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Now on the 14th day of July 2006, this matter comes before the Court for hearing on Defendant's Motion to Dismiss and Defendant's Alternative Motion to Dismiss Without Prejudice. State of Iowa appears by Wapello County Attorney Mark Tremmel. Defendant appears in person with Attorney Randall Wilson.

The record shows that a Complaint and Affidavit was filed on June 5, 2006 charging the Defendant with Desecration of Flag or Insignia in violation of Iowa Code Sec. 718A.1. Defendant, by his Attorney, filed a Motion to Dismiss and Alternative Motion to Dismiss on July 5, 2006. Hearing was set for this time and date.

DEFENDANT'S MOTION TO DISMISS

Defendant argues that Iowa Code Sec. 718A.1 is unconstitutional as being vague and overly broad in violation of the First and Fourteenth Amendments to the United States Constitution and Article I, Sections 1, 7 and 9 of the Iowa Constitution. Defendant further argues that Sec. 718A.1 cannot be constitutionally applied to support trial or a conviction because such displays are exempt from prosecution and conviction under the Free Speech provisions of the United States Constitution and Article I, Section 7 of the Iowa Constitution.

Statutes are cloaked with a presumption of constitutionality. State v. Seering, 701 N.W.2d 655, 661 (Iowa 2005) The challenger bears a heavy burden, because it must prove the unconstitutionality beyond a reasonable doubt. *Id.* at 661. The challenger is required to refute all reasonable bases upon which the statute could be declared constitutional. *Id.* The Iowa Supreme Court has previously held that the Iowa flag desecration statute is not unconstitutionally vague. State v. Kool, 212 N.W.2d 518 (Iowa 1973). The statute (sec. 32.1, now sec. 718A.1) provides the requisite degree of certainty to provide men of ordinary intelligence with fair notice as to what conduct is proscribed. Kool citing State v. Waterman, 190 N.W.2d 809, 813 (Iowa 1971).

A statute is overbroad in violation of the Fourteenth Amendment to the United States Constitution if it seeks to control or prevent activities subject to regulation in a manner that is unnecessarily broad, thereby invading protected freedoms. State v. Reed, 618 N.W.2d 327, 331 (Iowa 2000). Overbreadth is a term generally understood to describe a statute which not only

forbids conduct constitutionally subject to proscription, but also sweeps within its ambit those actions ordinarily deemed to be constitutionally protected. State v. Farrell, 223 N.W.2d 270 (Iowa 1974) To rule on an overbreadth challenge at this stage in the proceedings would be premature. The record has not been adequately developed. No evidentiary hearing has taken place. To rule at this time would require the court to make assumptions and conclusions which may or may not be supported by the evidence. Ruling on the overbreadth challenge will therefore be deferred and made if necessary at the time of ruling on the case in chief.

The Defendant finally argues that Sec. 718A.1 cannot be constitutionally applied to support trial or a conviction for his allegedly illegal display of the flag because such displays are exempt from prosecution and conviction under the Free Speech provisions of the United States Constitution and Article I, Section 7 of the Iowa Constitution. The Defendant in this regard refers the Court to the ruling in State v. Kool. The Court finds no such "exemption" in the ruling in Kool or in any other current ruling cited to the Court.

DEFENDANT'S ALTERNATIVE MOTION TO DISMISS

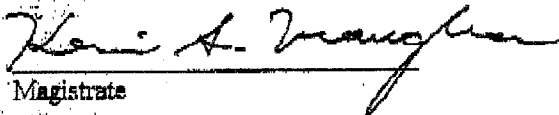
Defendant argues that he has a pending civil suit in U.S. District Court for the Southern District of Iowa seeking a declaration that Iowa Code Sec. 718A.1 is facially overly broad and unconstitutional and that in the interest of judicial economy this Court should defer the prosecution by dismissing the charge without prejudice, granting the State leave to refile at a later date.

Counsel at hearing admitted that the Alternative Motion to Dismiss was more of an offer to the County Attorney and that there is no statutory authority for this Court to grant the Alternative Motion. Iowa Rule of Criminal Procedure 2.33(1) provides that dismissal of a simple misdemeanor is a bar to another prosecution for the same offense. Because the Court does not have the statutory authority to "dismiss the charge without prejudice", Defendant's Alternative Motion to Dismiss should be denied.

IT IS THEREFORE ORDERED that Defendant's Motion to Dismiss is denied.

IT IS FURTHER ORDERED that Defendant's Alternative Motion to Dismiss Without Prejudice is denied.

IT IS FURTHER ORDERED that Trial is set for September 22, 2006 at 10:00 a.m.


Magistrate