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FACTS

Defendant Barry Elton Black ("Black") burned a cross at a Ku Klux Klan rally held on private property with the permission of the owner, following speeches promoting racial, ethnic, and religious bigotry.[1] In a separate incident, Richard J. Elliott ("Elliott") and Jonathan O'Mara ("O'Mara") attempted to burn a cross in the backyard of an African-American neighbor, James S. Jubilee ("Jubilee"), without permission.[2] Elliott told people at a party he was attending, that his neighbor, Jubilee, had complained about Elliott discharging firearms in his own backyard.[3] Elliott suggested they burn a cross in Jubilee's yard in response.[4] Elliott, O'Mara and the host of the party, David Targee ("Targee") constructed a wooden cross in Targee's garage.[5] Elliott repeatedly referred to Jubilee with a racial epithet while transporting the cross to Jubilee's home.[6] According to trial testimony, Jubilee's race was clear to all three individuals before they attempted to burn the cross.[7] After arriving at Jubilee's backyard, O'Mara put the cross in the ground and attempted to light it.[8]

The Commonwealth charged Black, Elliott, and O'Mara with violating Va. Code § 18.2-423, which provides that:

> It shall be unlawful for any person or persons, with the intent of intimidating any person or group of persons, to burn, or cause to be burned, a cross on the property of another, a highway or other public place. Any person who shall violate any provision of this section shall be guilty of a Class 6 felony. Any such burning of a cross shall be prima facie evidence of an intent to intimidate a person or group of persons.[9]

Virginia's General Assembly enacted the cross burning statute in 1952 in response to Ku Klux Klan activity throughout the state.[10] The General Assembly later amended the statute to prohibit cross burning in more

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1. Black v. Commonwealth, 553 S.E.2d 738, 740 (Va. 2001).
2. *Black*, 553 S.E.2d at 740.
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.*
9. Va. Code Ann. § 18.2-423 (1999).
10. *Black*, 553 S.E.2d at 742.

locations.[11] The assembly also added that cross burning would e prima facie evidence of intent to intimidate.[12]

The trial court indicted Black for violating the cross burning statute, and Black moved for dismissal of the indictment on the grounds that the statute was unconstitutional.[13] The trial court denied Black's motion and a jury convicted Black.[14] Black appealed his conviction and the Court of Appeals affirmed the judgment of the trial court.[15]

O'Mara pled guilty to attempted cross burning and conspiracy to commit cross burning, pursuant to a plea agreement. Under the agreement, O'Mara retained the right to appeal the constitutionality of Virginia's cross burning statute.[16] The trial court found Elliott guilty of attempted cross burning. Both defendants appealed, alleging that § 18.2-423 violated the free speech clauses of both the United States and Virginia Constitutions.[17] The Court of Appeals affirmed the convictions, and held that the statute "targets only expressive conduct undertaken with the intent to intimidate another, conduct clearly proscribable both as fighting words and a threat of violence."[18] The Virginia Supreme Court consolidated these two cases on appeal.[19]

HOLDING

The Supreme Court of Virginia, in a 4-3 decision, struck down § 18.2-423, the state law banning cross burning, stating that it violated the First Amendment.[20] The Court held that the law was facially unconstitutional because it prohibited otherwise permitted speech solely on the basis of its content and that the statute was overbroad.[21] The Court vacated the

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11. *Id.*
12. *Id.*
13. *Id.* at 741.
14. *Id.*
15. *Id.*
16. *Id.* at 740.
17. *Id.* at 741.

U.S. Const. amend. I, § 1. Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

V.A. CONST. art. I, § 12. That the freedoms of speech and of the press are among the great bulwarks of liberty, and can never be restrained except by despotic governments; that any citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that right; that the General Assembly shall not pass any law abridging the freedom of speech or of the press, nor the right of the people peaceably to assemble, and to petition the government for the redress of grievances.

18. O'Mara v. Commonwealth, 535 S.E.2d 175, 181 (2000).
19. *Black*, 553 S.E.2d at 741.
20. *Id.* at 746.
21. *Id.* at 740.

defendants' convictions and dismissed the indictments.[22]

ANALYSIS

Justice Lemons, writing for the court, stated that, "non-verbal, symbolic expression is 'speech,' and is as fully protected by the First Amendment as more traditional means of communications."[23] The Supreme Court of Virginia's opinion compared the Virginia cross burning statute to the Minnesota statute the United State Supreme Court found unconstitutional in *R.A.V. v. City of St. Paul*[24].[25] That case concerned the prosecution of a teenager who allegedly assembled a crudely made cross and burned the cross inside the fenced yard of a black family.[26] The City of St. Paul prosecuted under its Bias-Motivated Crime Ordinance, which states:

> Whoever places on public or private property a symbol, object, appellation, characterization or graffiti, including but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender commits disorderly conduct and shall be guilty of a misdemeanor.[27]

The United States Supreme Court held that, even if the expression reached by the ordinance was proscribable under the "fighting words" doctrine, the ordinance was "facially unconstitutional in that it prohibited otherwise permitted speech solely on the basis of the subjects the speech addresses."[28] The Virginia Supreme Court held that the Virginia cross burning statute was indistinguishable from the ordinance struck down in *R.A.V.*[29]

Justice Lemons echoed the *R.A.V.* opinion, "the government may not regulate use based upon hostility--or favoritism-- towards the underlying message expressed."[30] The court also found that the statute was unconstitutional because "a statute that sweeps within its ambit both protected and unprotected speech is overbroad."[31] The opinion further emphasized the

22. *Id.* at 746.
23. *Id.* at 742.
24. 505 U.S. 377 (1992).
25. *Black*, 533 S.E.2d at 742.
26. *Id.*
27. *Id.*
28. *Id.*
29. *Id.*
30. *Id.* at 744.
31. *Id.*

unconstitutionality of prohibiting speech on the basis of the subjects the speech addresses, "Under our system of government, people have the right to use symbols to communicate. They may patriotically wave the flag or burn it in protest; they may reverently worship the cross or burn it as an expression of bigotry."[32]

One of the majority's leading arguments for the unconstitutionality of § 18.2-423 was that the enhanced probability of prosecution under the statute chilled the expression of protected speech sufficiently to render the statute overbroad.[33] The court found that the clause in § 18.2-423, that stated "any burning of a cross shall be prima facie evidence of an intent to intimidate a person or group of persons," chilled free expression because a critical element of the offense required no evidence other than a statutorily supplied inference.[34] The Court stated that the act of burning a cross alone, with no evidence of intent to intimidate, would nonetheless suffice for arrest and prosecution and would insulate the Commonwealth from a motion to strike the evidence at the end of its case-in-chief.[35] This would result in arrest and prosecution for otherwise protected speech, with no evidence for a critical element of the offense other than an inference in the statute. [36] A statute selectively addressed to the content of symbolic speech is not permitted under the First Amendment because it inhibits free expression.[37]

DISSENTING OPINION

Justice Hassell dissented with Chief Justice Carrico and Justice Koontz. The dissent focused on the use of the term intimidation in the statute, and adopted the view that the First Amendment does not "permit a person to burn a cross in a manner that intentionally places another person in fear of bodily harm."[38] The dissent also found no foundation in the Constitution of Virginia or the United States Constitution that would prohibit the General Assembly from enacting this statute.[39]

The dissent distinguished § 18.2-423 from the ordinance in *R.A.V.*[40] The opinion stated that the Virginia statute only prohibits the burning of a cross

32. *Id.* at 746.
33. *Id.*
34. *Id.*
35. *Id.*
36. *Id.*
37. *Id.*
38. *Id.* at 748.
39. *Id.*
40. *Id.* at 753.

when such act is performed with the intent to intimidate.[41] The St. Paul ordinance, however, targeted cross burning on the basis of race, color, creed, religion or gender.[42] The Virginia statute does not contain these limitations.[43] Justice Hassell interpreted the purpose of § 18.2-423 was to "proscribe physical acts intended to inflict bodily harm upon the victims of cross burning, not to suppress repugnant ideas."[44] The dissent stated that, "the Virginia statute does not prohibit the burning of a cross so long as that act is committed without an intent to place a person in fear of bodily harm."[45] The dissent cited *In re Steven S.*, a California Court of Appeals decision that upheld a statute proscribing the act of "burning a cross on the private property of another for the purpose of terrorizing the owner or occupant or in reckless disregard of that risk." [46] The California Court of Appeals held that this statute was a permissible content-based prohibition on speech within the meaning of the First Amendment.[47] The dissent also cited a Washington Supreme Court case, decided after *R.A.V.*, which also upheld a statute proscribing cross burning that places another person in reasonable fear of harm to his person or property.[48] The Washington Supreme Court held that this statute did not violate the First Amendment.[49]

CONCURRING OPINION

Justice Kinser agreed fully with the majority, but wrote solely to "address certain inferences and conclusions drawn by the dissent."[50] The first issue was the use of the word intimidation. Justice Kinser found that the "dissent's attempt to equate an intent to intimidate with a 'true threat' or a physical act intended to inflict bodily harm, had no legal basis."[51] Justice Kinser stated that the dissent had misconstrued the definition of intimidation as established in *Sutton v. Commonwealth*.[52]

The opinion also stated that § 18.2-423 does not adhere to the principle

41. *Id.* at 751.
42. *Id.*
43. *Id.* at 753.
44. *Id.*
45. *Id.*
46. *In re* Steven S., 31 Cal. Rptr. 2d 644, 646 (Cal. Ct. App. 1994).
47. *In re* Steven S., 31 Cal. Rptr. 2d at 644.
48. State v. Talley, 858 P.2d 217 (Wash. 1993).
49. *Talley*, 858 P.2d at 217.
50. *Black*, 533 S.E.2d at 747.
51. *Id.*
52. Sutton v. Commonwealth, 324 S.E.2d 665, 670 (1985).

established in *Brandenburg v. Ohio*.[53] The *Brandenburg* Court established that "the constitutional guarantees of free speech and free press do not permit a State to forbid speech advocating the use of force or crime and could only be proscribed if two conditions were satisfied: the advocacy is 'directed to inciting or producing imminent lawless action' and the advocacy is also 'likely to incite or produce such action.'"[54] Justice Kinser stated that "the act of burning a cross with the intent to intimidate is not necessarily speech aimed at 'producing imminent lawless action'," therefore it does not satisfy the *Brandenburg* test.[55]

Finally, Justice Kinser opined that the dissent had misinterpreted the majority opinion. He wrote that "the dissent's statement that the majority has concluded that the Constitution of the United States prevents the General Assembly from enacting a statute that prohibits persons from burning a cross in a manner that intentionally places citizens in fear of bodily harm" is inaccurate.[56] Justice Kinser stated that a more accurate interpretation of the majority opinion is "that the General Assembly may, in a statute of neutral application, proscribe expressive conduct performed with the intent to intimidate another individual, but that the General Assembly may not selectively prohibit only certain acts of intimidation based upon the content of the underlying message."[57]

CONCLUSION

Cross burning has been used by the Ku Klux Klan throughout its history as "a tool for the intimidation and harassment of racial minorities, Catholics, Jews, Communists, and any other groups hated by the Klan."[58] Virginia's Attorney General, Randolph A. Beales stated that, "Cross burning with the intent to intimidate is a form of domestic terrorism, which is intolerable in a free society."[59] Dissatisfied with the Virginia Supreme Court's decision, the state filed a petition for certiorari on January 24, 2002. However, the Virginia Supreme Court's holding follows the precedent of *R.A.V. v. St. Paul* so it is unlikely that the United States Supreme Court would uphold § 18.2-423. One of the majority's leading arguments for the unconstitutionality of § 18.2-

53. Brandenburg v. Ohio, 395 U.S. 444, 447 (1969).
54. *Bradenburg*, 395 U.S. at 444.
55. *Black*, 553 S.E.2d at 747.
56. *Id.*
57. *Id.*
58. *Id.* at 741.
59. Supreme Court of Virginia Strikes Cross Burning Law, V.A. LAWYER'S WEEKLY, Nov. 12, 2001, at 1.

423 was that the statute was overbroad. The language of the statute makes the act of burning a cross prima facie evidence of intent to intimidate. Even if the statute was reworded or amended to exclude the mere act of burning as prima facie evidence of intent to discriminate the statute would still suffer from viewpoint discrimination.

Maryland and South Carolina have overturned cross burning statutes similar to § 18.2-423, while California and Washington have passed similar cross burning statutes, but the dissent stated that there were significant differences between the Virginia statute and the Maryland and South Carolina statutes.[60] This narrow 4-3 decision may prompt other states to examine the language of their statutes more carefully, rather than instantly putting it under the blanket of *R.A.V. v. St. Paul.*

Although these cases were consolidated, the situations of these defendants were very different. Both cases could be tried under different statutes. Although, Black had permission of the owner to be on her property, the speeches given at the rally he led could be considered fighting words. A witness of the rally testified that in the speeches given during the rally one speaker said that "he would love to take a .30/.30 and just random shoot the blacks and talked about how they would like to send the blacks and Mexicans back from where they come from."[61] This witness, a Caucasian female testified that she was "scared" that her home would get burned or that something would happen to her children.[62] Her testimony demonstrates that racial animus does not only affect its intended targets. Defendants Elliott and O'Mara can be tried under trespass or arson laws.

New legislation regarding cross burning would have to pass the Constitutional requirements that § 18.2-423 failed. Virginia's strongest possibility of protecting its citizens from the type of crime that § 18.2-423 intended to punish is to institute penalty enhancements on arson or trespass if there is a racial motivation for the crime. The United States Supreme Court upheld penalty enhancements for an offense where the defendant "intentionally selects the person against whom the crime is committed because of the race, religion, color, disability, sexual orientation, national origin or ancestry of that person" in *Wisconsin v. Mitchell.*[63]

An Anti-Hate Crime Law would afford minorities more protection against acts of violence and intimidation but given Virginia's current legislature such a law is unlikely to pass. The decision to overturn § 18.2-423 broadens the

60. *Id.* at 754.
61. *Id.* at 748.
62. *Id.* at 749.
63. Wisconsin v. Mitchell, 508 U.S. 476, 480 (1993).

First Amendment free speech rights of Virginians. However, Virginia must now take measures to ensure that the civil rights of its citizens will not suffer instead.

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