IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 23-0462

CITY OF KALISPELL,

Plaintiff and Appellee,

v.

SEAN MICHAEL DOMAN,

Defendant and Appellant.

REPLY BRIEF OF APPELLANT

On Appeal from the Montana Eleventh Judicial District Court,
Flathead County, The Honorable Robert Allison, Presiding

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

ARGUMENT

I. The dispositive issue is whether Sean had a constitutional right to film the traffic stop. Sean cannot be held criminally liable for engaging in constitutionally protected conduct.

The City of Kalispell's Response Brief has glaring omissions. First, the City does not consider Sean's constitutional right to record in its legal analysis. Second, the City completely ignores whether Minaglia ordering Sean "to leave"[1] was a reasonable restriction on Sean's right to record. The City reaches numerous erroneous conclusions—all of which are predicated upon it turning a blind eye to the constitutional protections that insulate Sean from criminal liability.

Even more surprising, the City boldly announces its flawed logic and argues subsection (2) of § 45-7-302, Mont. Code Ann. prohibits Sean from asserting his constitutional rights *at all*. (Appellee's Resp. at 25.) According to the City, subsection (2) prohibits Sean from asserting *any* constitutional defenses. *(Id.)* The City's interpretation of subsection (2) flies in the face of the Supremacy Clause.

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[1] Minaglia testified that he ordered Sean "to leave" the scene. (Tr. Audio at 04:56:13–04:56:35

A. Because Sean had a right to record the officers from a public sidewalk, his conduct could not satisfy the voluntary act element.

The City does not dispute that Sean had a right to record the traffic stop under both the United States and Montana Constitutions. But, when applying § 45-7-302, Mont. Code Ann. to the facts of this case, the City fails to consider whether Sean's conduct was protected speech. Sean's right to record is guaranteed under the "Supreme Law of the Land." Sean cannot be held criminally liable under § 45-7-302, Mont. Code Ann. for engaging in constitutionally protected behavior. *See e.g. State v. Dugan*, 2013 MT 38, 369 Mont. 39, 303 P.3d 755.

The City asserts that this case is like *State v. Eisenzimer*, 2014 MT 208, 376 Mont. 157, 330 P.3d 1166, because in both cases the officers' attention was diverted. (Appellee's Resp. at 20.) However, unlike in *Eisenzimer*, here, there is no voluntary act. To be guilty of obstruction, the City must establish a voluntary act. Mont Code Ann. § 45-2-202. The City cannot use a constitutionally protected act to satisfy the voluntary act element. U.S. Const. Art. VI, cl. 2. Conversely, "an omission to perform a duty that the law imposes" establishes a voluntary act. *Id*.

> For criminal liability to be based upon a failure to act, there must be a duty imposed by the law to act…In the absence of a duty that the law imposes, a person cannot be criminally liable for failure to…[act].

State v. Hocter, 2011 MT 251, ¶ 23, 362 Mont. 215, 262 P.3d 1089.

The difference between *Eisenzimer* and this case is that Sean's behavior was constitutionally protected, whereas Eisenzimer's conduct was not. Eisenzimer did not have a constitutional right to walk up to the police officer sitting in his car and drunkenly badger him for a ride home. His conduct was drunken antics, not constitutionally protected free speech. However, Sean had a right to stand on public sidewalk 15 feet away from a traffic stop and record. His conduct was constitutionally protected.

Eisenzimer needed to walk away because he was not exercising a constitutional right. Eisenzimer confronted the police officer and was lawfully ordered to "keep walking," but Sean never approached the officer. Minaglia approached Sean because Sean was recording the traffic stop. Sean immediately asserted his right to record. He did not have a duty to abandon his constitutional right simply because Minaglia unlawfully ordered him to leave. "In the absence of a duty that

the law imposes, [Sean] cannot be criminally liable for failure to…[act]." *Hocter*, ¶ 23,

Under the City's logic, every time a person engages in behavior that "distracts" a police officer, they are guilty of obstructing a peace officer. Adopting that logic would lead to the erosion of constitutional protections. Consider the following example:

> A police officer is in the middle of investigating a homicide when he gets a call from the mayor saying that twenty-five people have gathered on the courthouse lawn for a protest. The mayor asks the officer to go to the courthouse lawn to watch the protesters and ensure that the event does not become violent. The officer goes to the courthouse lawn and tells the protestors that he has more important things to be doing, he needs to investigate a homicide, and he orders the protesters to disperse. The protesters continue with their plans and stay on the courthouse lawn for another three hours, distracting the officer from his more important task.

Under the City's theory, all twenty-five people have committed the offense of obstruction because they "distracted" the officer from investigating the homicide.

The dispositive inquiry must be whether the protester's speech was protected and whether the officer's order to leave was a lawful restriction on their speech. Because the protesters, like Sean, were engaged in lawful speech, they cannot be convicted of a crime.

Similarly, the protesters, like Sean, had no duty "to leave" based on an unlawful police order. Individuals cannot be punished for engaging in conduct that the United State Constitution authorizes.

The City does not identify a compelling interest that would justify restricting Sean's constitutional right. Law enforcement not being able to "tolerate [Sean's] behavior" is not a government interest, let alone a compelling one. (Appellee's Resp. at 20.) The government does not have a compelling interest in preventing Sean from standing on the public sidewalk and observing police activity. "In our society, police officers are expected to endure significant burdens caused by citizens' exercise of their First Amendment rights." *Glik v. Cunniffe*, 655 F.3d 78 (1st Cir. 2011). That is even more true here because Sean was in a traditional public forum where his constitutional rights are subject to the most protection. The police were expected to tolerate him recording the stop.

Even if the City could identify a compelling interest, it fails to explain how Sean being ordered "to leave" the area was narrowly tailored and "le[ft] open ample alternative channels for communication." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (citation omitted); see *Askins*, 899 F.3d at 1044. "General assertions" about

safety concerns are not enough to justify broad restrictions on Sean's First Amendment right to record. *Askins,* 899 F.3d at 1045. Sean did not need "to leave" the area. Minaglia could have "watch[ed]" Sean—like Willey initially requested. (Tr. Audio at 04:10:00–04:11:00.) But, Minaglia never talked to Willey and instead immediately rushed at Sean and ordered him "to leave."

The City's interpretation and application of § 45-7-302, Mont. Code Ann. violates Sean's constitutional right to record. Montana's obstructing statute cannot trump the United States Constitution—the "Supreme Law of the Land." Sean had a right to record, and he cannot be held criminally liable for engaging in constitutionally protected conduct.

B. Subsection (2) cannot mean that Sean has no ability to raise his constitutional protections as a defense.

The City's erroneous understanding of Sean's constitutional protections is most blatant in its position that, even if Minaglia was violating Sean's First Amendment right to free speech, subsection (2) of § 45-7-302, Mont. Code Ann. prevents Sean from raising any constitutional defenses. (Appellee's Resp. at 25.) Tellingly, the State

fails to mention the Supremacy Clause at all when making this argument.

The City urges this Court not to look any further than the plain language of subsection (2) and prohibit Sean from raising *any* constitutional defenses. (Appellee's Resp. at 25.) However, the legislative history explains the statute's intent and helps this Court avoid an absurd result when interpreting subsection (2). *See City of Missoula v. Pope*, 2021 MT 4, ¶ 9, 402 Mont. 416, 478 P.3d 815. If Sean cannot assert his constitutional rights as a defense to an obstruction charge, his constitutional protections and the Supremacy Clause are meaningless. The outcome would be absurd. For example, any time a person refuses to answer an incriminating question while in custody they could be charged with obstruction. Under the City's interpretation of the statute, the person's right to remain silent would not be a defense. This Court must look beyond the plain language to the legislative intent and interpret subsection (2) more narrowly to mean that individuals cannot resort to violence or the threat of violence when threatened with illegal police activity.

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II. Even ignoring that Sean's conduct was constitutionally protected, the facts established at trial do not prove that Sean knowingly hindered the enforcement of criminal law.

Sean did not refuse to obey Minaglia's orders, and the State admits so much in its brief. Furthermore, Willey being "distracted' does not establish that his ability to issue a traffic ticket was obstructed, hindered, or impaired.

Responding rudely to an officer, without more, is not obstruction. *State v. Bennett*, 2022 MT 73, ¶ 11, 408 Mont. 209, 507 P.3d 1154; *State v. Cameron*, 2011 MT 276, 362 Mont. 411, 264 P.3d 1136. In *Cameron*, the defendant was "disrespectful and noncompliant" and undeniably disobeyed the officer's commands. *Cameron*, ¶ 21. In *Bennett*, the defendant called the officer "dumb" and walked away. *Bennett*, ¶ 4. This Court warned that it would be a "frightening departure if we were to begin imposing criminal liability on defendants because we found their responses to an officer's questions lacking in etiquette." *Bennett*, ¶ 11.

The City admits that Sean only "*verbally* refused to move," but he was backing up when arrested. (Appellee's Resp. at 17.) Sean did not refuse to separate himself from the scene contrary to what Minaglia alleged in the citation. Minaglia's body-worn camera undeniably shows

that Sean backed up several feet after being ordered to move and was, in fact, still backing up when arrested. Sean may have been rude, but lacking in etiquette is not a crime. It would be a "frightening departure" to impose criminal liability simply because Sean was "verbally" rude to Minaglia.

Because Sean was not actually refusing to separate himself from the scene, the City developed a new theory for trial. The City alleged that Willey was distracted from the traffic stop. Being "distracted" is not sufficient to prove that Sean obstructed the enforcement of criminal law. Even taking the City's argument as true, Willey taking his attention "completely off the traffic stop" had no impact on his ability to enforce the traffic stop. The driver did not take off or flee the scene while Willey was distracted. Willey still collected all the information he needed to issue the citation. The driver never even noticed that Willey changed his focus.

The City argues that whether Willey timely issued the citation is unimportant, but Willey issuing the citation without any delay demonstrates that he enforced the law without a problem. Even after Willey assisted Minaglia, he needed to wait for more information from

dispatch before issuing the citation. Sean did not delay, much less prevent, Willey from writing the citation. The law was enforced without obstruction. The City did not meet its burden at trial.

CONCLUSION

This Court should remand this case and order the municipal court to reverse the conviction and enter a judgment of acquittal, due to the insufficiency of the City's evidence. Alternatively, this Court should remand this case and order the municipal court to dismiss the case with prejudice because § 45-7-302 is unconstitutional as applied to the facts of this case.

Respectfully submitted this 6th day of June.

By: /s/ Carolyn Gibadlo
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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this primary brief is printed with a proportionately spaced Century Schoolbook text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 1913, excluding Table of Contents, Table of Authorities, Certificate of Service, and Certificate of Compliance.

/s/ Carolyn Gibadlo
CAROLYN GIBADLO

CERTIFICATE OF SERVICE

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