

1 DISTRICT COURT  
COUNTY OF ADAMS  
2 STATE OF COLORADO  
1100 Judicial Center Drive  
3 Brighton, Colorado 80601

4  
Plaintiff:  
5 THE PEOPLE OF THE STATE OF COLORADO

6 v.

7 Defendant:  
DAVID BRADY

^FOR COURT USE ONLY^

Case No. 08CR2001

Division E

10 REPORTER'S TRANSCRIPT  
11 March 9, 2010

12 The above-referenced matter came on for hearing on  
13 Tuesday, March 9, 2010, before The HONORABLE JOHN BRYAN, Judge  
of the District Court.

14 (This transcript contains only the judge's ruling  
15 regarding the judgment of acquittal and motion to dismiss.)

16  
17 A P P E A R A N C E S

18 For the People:  
Toni Wehman, DDA  
19 Adams County District Attorney's Office  
1100 Judicial Center Drive, Suite 100  
20 Brighton, Colorado 80601

21 For the Defendant:  
22 Terry O'Malley, Esq.  
7340 East Caley Avenue, Suite 360  
23 Centennial, Colorado 80111

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2 TUESDAY, MARCH 9, 2010, MORNING SESSION 10:15 a.m.

3

PROCEEDINGS

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5 THE COURT: As to the Federal Second Amendment,  
6 it does appear that, unlike the State provision, it isn't  
7 regarded as self-executing and, of course, that's what recent  
8 litigation has all been about.

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9 But the Supreme Court, apparently, has held that  
10 the Colorado, sort of, parallel provision is self executing to  
11 the extent it constitutes an affirmative defense, and I guess I  
12 have to consider that as well.

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I guess I would analyze it this way, starting  
with the First Degree Assault on a Peace Officer, taking the  
evidence in the light most favorable to the prosecution,  
together with all the reasonable and favorable inferences,  
based upon that evidence, and noting that standard at this  
point, the elements of the offense are fairly straightforward.

The prosecution has to prove beyond a reasonable  
doubt that with the intent to cause serious bodily injury upon  
the person of a peace officer or a firefighter, the defendant  
threatens, with a deadly weapon, a peace officer or firefighter  
engaged in the performance of his or her duties, and the  
offender knows or reasonably should know that the victim is a  
peace officer or firefighter acting in the performance of his  
or her duties.

1           I would have to say, at the outset, I don't think  
2 there's any sufficient evidence to find there was any intent to  
3 cause serious bodily injury. There's ample evidence that the  
4 defendant wanted the peace officer off of his property, that he  
5 asserted his rights to eject the peace officer from his  
6 property.

7           I've already determined, as necessitated at the  
8 motions hearing, that this was an unlawful entry, and I haven't  
9 heard anything today that would call that into question.

10           I have to say a few words about that, I guess.  
11 This seems to be the subject of some confusion, and I'm not  
12 exactly sure why, but I think it's this sort of shift into the  
13 modern world where people live in subdivisions with houses and  
14 walkways up to the front door, and it's generally accepted that  
15 people can walk up to the front door and seek contact and seek  
16 entry; police officers can come up and seek consent to enter  
17 and search, even.

18           But there's a difference when there's a sign at  
19 the entrance of a very long driveway that says, Keep out,  
20 you're not allowed to come in here, and no exception would  
21 apparently apply.

22           The Federal Constitution and State Constitution  
23 both recognize the right of a person to exclude others from  
24 their own property, that we sort of cavalierly assume that the  
25 existence of a walkway to the front door invites contact and

1 sort of waives that right to exclude everyone from the property  
2 may or may not be reasonable. I tend to think it generally is,  
3 but that's not what we're dealing with here.

4 As we discussed at the motions hearing, and I've  
5 pondered since, I think if someone were to have that walkway up  
6 to their front door but posts a sign that says, Keep out, no  
7 unauthorized persons are allowed to enter, I don't think that  
8 is a waiver of the right to exclude people from that property.  
9 It's an assertion of the right to exclude people from the  
10 property, and I think, at that point, police officers and state  
11 actors, in general, would be in violation of Fourth Amendment  
12 and the corollary constitutional principles in the Colorado  
13 Constitution by entering and seeking contact even if they then  
14 respected an insistence that the people leave, I think they're  
15 already in violation.

16 It is permissible, by law, to exclude everyone,  
17 including peace officers and caseworkers and anyone else from  
18 private property. It's just beyond dispute, in my mind anyway,  
19 that this was an unlawful entry.

20 But having said that, there's just no evidence  
21 from which a reasonable juror could find that there was any  
22 intent to cause an injury to the person of a peace officer.

23 Had Mr. Brady intended to hurt him, he would  
24 presumably have fired the weapon, pointed it at the officer, at  
25 least fired it if he could. The fact that he didn't do so, I

1 think, negates the fact that there was any intent to cause an  
2 injury. And so as to that element, that offense, I would have  
3 to find that a judgment of acquittal must be entered.

4           Menacing is a little different, and it applies to  
5 people who are not peace officers, but in this case who are,  
6 nevertheless, state actors, as far as what I can tell from my  
7 research on the issue. And they rather cavalierly didn't even  
8 look to see if there were signs excluding them, apparently,  
9 missed them, although the deputy saw them, and believed they  
10 had some sort of statutory mandate or right to go on and  
11 protect children.

12           And while I understand that to some degree, I  
13 think it is quite clear that they don't understand exactly how  
14 that works, and I think it is the same confusion that applies  
15 as I described earlier. They, generally, are permitted to  
16 approach a private dwelling and seek entry, seek contact, and  
17 seek anything they want at that point.

18           This is different. This land was posted, it  
19 says, Do not enter, keep out, unauthorized personnel not  
20 allowed. I don't know there could be any more clear expression  
21 of intent to exclude others, and that applies to case workers.

22           So I don't know that I would call them  
23 trespassers, because that's a legal conclusion that might have  
24 defenses that I'm not aware of, it certainly was not an  
25 unlawful entry.

1           In terms of Mr. Brady's understanding of this  
2 situation, he was entitled to eject them. So then turning  
3 to -- I guess, basically, let me say, I think as to the  
4 elements of Menacing, though, setting aside the unlawful entry,  
5 the evidence is probably sufficient to meet those, at least in  
6 the eyes of a reasonable juror, in the light most favorable to  
7 the prosecution.

8           But that means we'd have to then turn to the  
9 statute that I've been discussing and thinking about, 18-1-705.  
10 At least initially, there are several other that might have to  
11 be considered as well.

12           But 18-1-705 provides that a person in  
13 Mr. Brady's circumstances is entitled to use reasonable and  
14 appropriate physical force upon a person when and to the extent  
15 that it is reasonably necessary to prevent or terminate what,  
16 in this case, Mr. Brady believes to be the commission or  
17 attempted commission of an unlawful trespass by the other  
18 person, in or upon the building, realty, or premises.

19           Given that it was an unlawful entry, it is almost  
20 as a matter of law, that it was, in that sense, trespass. It  
21 is not unreasonable for a reasonable juror to find that  
22 Mr. Brady did not believe this was a commission or attempted  
23 commission of an unlawful trespass, and that that belief was  
24 reasonable, especially in the light of the posting of his  
25 property, he clearly had the right to exclude them.

1                   They ignored that, they came onto the property.  
2                   He used a reasonable degree of force. I would have to stop and  
3                   say it isn't even physical force, he intimidated them into  
4                   leaving. He displayed a firearm, perhaps with the intent of  
5                   enforcing his desire that they move off the property, perhaps  
6                   it was incidental, it doesn't matter in my mind.

7                   He had it, but he used an appropriate and  
8                   reasonable degree of force to remove trespassers or unlawfully  
9                   entered persons from his property.

10                  This would be different, and I would probably let  
11                  it go to the jury if he had pointed the gun at the officer or  
12                  the case workers, and determined whether that was a reasonable  
13                  degree of force.

14                  But, in the bottom line of the analysis here,  
15                  there really wasn't any physical force, and I think he's  
16                  entitled to use some physical force even to eject them. How  
17                  that would be done, I don't know. Obviously, pushing the  
18                  automobiles off with a bulldozer would be excessive force,  
19                  grabbing them and attempting to remove them physically in that  
20                  fashion probably wouldn't have been effective, he was  
21                  outnumbered three to one if he had attempted that.

22                  But the bottom line is, I don't think the display  
23                  of a firearm is an unreasonable degree of physical force  
24                  because I don't think it's physical force at all, and I think  
25                  it is permissible.

1           As an alternative, I think we have to dismiss  
2 these charges as well, but let me note that it is well  
3 established that a judgment for motion of acquittal has to be  
4 granted to both counts of Menacing. But as to all three  
5 counts, if it became an issue, I would ultimately end up having  
6 to dismiss them after the fact, even if the jury were to find  
7 the defendant guilty of anything, I think it is clearly  
8 established that all that Mr. Brady did was possess a firearm  
9 as he ejected trespassers or unlawfully entered persons from  
10 his land.

11           He had a reasonable belief that he was entitled  
12 to do so. I would find he was legally justified in that belief  
13 that he was entitled to remove them from his property, and if  
14 he happens to possess a firearm while he's doing that, so long  
15 as he doesn't do in an unlawful manner, something the Second  
16 Amendment would not shield him from, I think both the Federal  
17 right to bear and keep arms, as well as the Colorado corollary  
18 to that as well, also justifies his actions in this case.

19           I would note that reasonable doesn't mean  
20 necessarily customary. What was reasonable a hundred years ago  
21 was also customary. It is still reasonable today, even though  
22 it is no longer customary for people to thoroughly exclude  
23 others from their property. There seems to be some sort of a  
24 confusion that this general change in society authorizes people  
25 to enter onto clearly marked property to attempt contact with

1 people there, and I don't believe that that's appropriate under  
2 the Fourth Amendment, and I don't believe that the second  
3 amendment requires that Mr. Brady not possess a firearm while  
4 he's approaching what he believes to be trespassers on his  
5 land.

6 He's not charged with failing to comply with an  
7 order of a police officer for putting the weapon down. If he  
8 had been, I think I would have to dismiss that, as well,  
9 because I don't think that order would be lawful issued to him  
10 on his own land under those circumstances.

11 For many reasons, I do believe that the motion  
12 for judgment of acquittal must be granted. And, also, in the  
13 alternative, the motion for dismissal is an assertion of the  
14 defendant's constitutional right to keep and bear arms, and for  
15 both reasons, I will dismiss all the counts.

16 I don't know what else to say about this. This  
17 has been my concern with this case for some time now, and I  
18 don't think it is appropriate to go further with it at this  
19 point. While I would prefer, in a lot of ways, to let the jury  
20 make the ultimate determination, and I have very little doubt  
21 what that determination would be, nevertheless, I think at this  
22 point it is my job to make that difficult determination that  
23 the evidence will not support these charges, and that the  
24 defendant's defenses are both impossible to disprove based on  
25 the state of the evidence, and appropriately asserted in this

1 case.

2 None of that makes me very happy, but that is, I  
3 think, the judgment of the Court.

4 Anything further we need to address?

5 MS. WEHMAN: Just for the record, obviously, the  
6 People would object and ask that the reasonableness be allowed  
7 up to the community and the jury to determine.

8 THE COURT: And I understand the objection.

9 MR. O'MALLEY: There is some property that was  
10 seized as part of the search warrant, not a lot of things, but  
11 a BB gun, I think, and some gun locks and some indicia of  
12 ownership, some different property that was seized from  
13 Mr. Brady's home in return on a warrant the Court had issued.  
14 Would the Court order that property be returned to him and  
15 release his bond in this matter?

16 THE COURT: Any objection to the return of the  
17 property?

18 MS. WEHMAN: Your Honor, at this time, until the  
19 People have an opportunity to determine what their next step  
20 would be, in light of this ruling, the People would ask that  
21 the property be maintained until that decision has been made  
22 and the case is completely final.

23 THE COURT: Well, that would obviously make sense  
24 as to everything that was admitted into evidence, but none of  
25 that, as I recall, is the defendant's property. What would be

1 the use of retaining that until --

2 MS. WEHMAN: Well, Your Honor, the People,  
3 obviously, have a concern with some of the rulings in the case  
4 regarding the suppression, because it's on the same issues as  
5 was finally determined in this case.

6 THE COURT: So evidence that might have been  
7 admitted but for the suppression ruling?

8 MS. WEHMAN: Yes, Your Honor.

9 THE COURT: I think that's probably well founded.  
10 So, at this point, at least, I'll have to defer that.

11 MR. O'MALLEY: I thought that the Court's ruling  
12 was anything that was seized from the search warrant was  
13 admissible. You specifically exempted out anything they  
14 received from the search warrant, so all of that was properly  
15 admissible, the People chose not to utilize that property in  
16 the trial.

17 THE COURT: I'm not sure we agree it was quite  
18 that broad. I think, in the spirit of that, they might well  
19 have had some legitimate belief that I had suppressed some of  
20 that evidence. I think it's just best to give them the  
21 opportunity to preserve that evidence for any possible appeal.  
22 Who knows, I may be wrong. I'm not sure how that would play  
23 out at that point, but I think the record is sufficiently clear  
24 that I'm not terribly concerned about it, but that's -- I guess  
25 that would be up to the Court of Appeals, I suppose.

1                   MR. O'MALLEY:  Would you give us a date certain  
2 then that the property should be returned?

3                   THE COURT:  I was thinking how long the appeal  
4 would be.

5                   MS. WEHMAN:  The People would have no objection  
6 to setting it for a review date if you want to readdress that  
7 issue in a two-month period so we'd have a better idea.

8                   THE COURT:  Obviously, up to 75 days to appeal if  
9 you choose.

10                  MS. WEHMAN:  Yes, but I think we would have an  
11 idea within two months.

12                  THE COURT:  I don't have any objection to that,  
13 we love to set hearings, we do it all day every day, so 60 days  
14 out on the status of the property is fine.  That will let me  
15 know if anybody is appealing.  Maybe you should all appeal,  
16 just to make it a clean sweep.

17                  THE CLERK:  How is Tuesday, May 18th?

18                  MR. O'MALLEY:  That's fine.  What time, please?

19                  THE CLERK:  8:30.  I'm sorry.

20                  THE COURT:  May 18th, 8:30 a.m., for a hearing on  
21 return of property and status of any appeal since we're going  
22 to do that all at the same time.

23                  Bond is released.

24                  Mr. Brady, you don't have to be here for that if  
25 you don't want to.

1 Anything else we need to address?

2 MS. WEHMAN: None from the People, Your Honor.

3 MR. O'MALLEY: No, thank you, Judge.

4 THE COURT: Thank you. We'll be in recess.

5 Oh, the jury. They will be back at 12:45. Do  
6 you want to be here for me to discharge them to hear what I say  
7 to them or do you want me to just discharge them and leave it  
8 at that?

9 MS. WEHMAN: I don't think I have any afternoon  
10 docket.

11 MR. O'MALLEY: I don't have any need to be here,  
12 if that's okay with the Court.

13 THE COURT: Okay. So you're planning to be here  
14 or not, since we don't have an afternoon docket?

15 MS. WEHMAN: Yeah, I don't need to be here.

16 THE COURT: I'll probably just go downstairs and  
17 meet them in the jury assembly room and do it nice and  
18 informal, unless somebody thinks there's a need for a record on  
19 that; I can't imagine why there would be.

20 MS. WEHMAN: I think the record has already been  
21 made.

22 THE COURT: I won't ask them what they were going  
23 to do. I promise I won't ask them that.

24 (Court's in recess.)

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REPORTER'S CERTIFICATE

I, Gayle R. Becker, Registered Professional Reporter in and for the State of Colorado, duly appointed to take the within proceeding, certify that the proceedings were reported by me at the time and place hereinabove set forth and were thereafter reduced to typewritten form by the use of computer-aided transcription under my direct supervision; that the same is a full, true, and correct transcription of my shorthand notes then and there taken.

DATED this 10th day of May, 2008.

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Gayle R. Becker, RPR  
Court Reporter