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Spokane Municipal Court

IN THE SPOKANE MUNICIPAL COURT, COUNTY OF SPOKANE, STATE OF WASHINGTON

CITY OF SPOKANE, Plaintiff, vs. AFSHIN YAGHTIN, Defendant.	Case No. 9Z0389636 Report No. 1920109670 ORDER ON DEFENDANT'S MOTION TO DISMISS

I. BASIS

This case comes before the Court on Defendant, Afshin Yaghtin's motion. This is the second dispositive motion filed in this case. In response to the first motion, this Court held that, as presented, the case could not be decided on a *Knapstad* motion because there were disputed issues of material fact.

As a preliminary matter, it is important to clarify the arguments being addressed in this motion. For instance, Mr. Yaghtin argues that the police action of denying him entry into the library constituted an unlawful prior restraint of his First Amendment rights. However, as noted in this Court's first order, whether Mr. Yaghtin was arrested for attempting to enter the library is a disputed issue of fact that cannot be answered in a pre-trial motion. In other words, even if Mr. Yaghtin was unlawfully denied access to the library, if his attempt to enter the library was not the basis for his arrest, then the denied-access is not relevant to this criminal case.

Mr. Yaghtin is also arguing that his arrest for obstructing lacked probable cause because he has no duty to obey an unlawful command by law enforcement that substantially interferes with his constitutional rights. This issue was not well-presented and the court struggled with how to address it. Generally, when an arrest is not supported by probable cause, the remedy is to suppress evidence gathered as a result of the unlawful arrest. *State v. D.E.D.*, 200 Wn. App. 484, 491, 402 P.3d 851, 855 (2017). However, even though Mr. Yaghtin's motion is titled "Motion to Suppress" under CrRLJ 3.6, Mr. Yaghtin is not seeking suppression; he is seeking dismissal of the charge.

Procedurally, the best way to raise the legality of his arrest before a trial is by a *Knapstad* motion[1]. *Id*. at 492 n.6. While Mr. Yaghtin does not cite *Knapstad*, his arguments raise the legal issue. The City argues that any *Knapstad* issue was already denied in Mr. Yaghtin's first motion. This is incorrect. Mr. Yaghtin's first motion was denied because he failed to consider the facts in a light most favorable to the City. For purposes of this motion, defense counsel argues that even if Mr. Yaghtin was arrested for refusing the officer's command to move to a protest zone, the order was unlawful and cannot support an arrest for obstructing. Since the City responded to this argument, the Court will view this as a *Knapstad* motion and address the substantive issues.

II. FACTS

Mr. Yaghtin argues that the command by law enforcement – that Mr. Yaghtin move to a designated protest zone – was unlawful because it violated his First

[1] State v. Knapstad, 107 Wash.2d 346, 729 P.2d 48 (1986).

Amendment rights and therefore cannot support a conviction of obstructing a law enforcement officer. Because this is a pre-trial motion, the facts and inferences are set forth in a light most favorable to the City. CrRLJ 8.3.

The City alleges that Mr. Yaghtin was present for an event titled the "Drag Queen Story Hour" at a Spokane Public Library. Prior to the event, law enforcement had received information suggesting that there would be significant protests with the possibility of violence at the event. In order to keep peace and avoid any violence, police pre-determined that the protesters and supporters would be physically separated into equal protest areas on either side of the street.

Although most people followed the direction of law enforcement, and positioned themselves on one side of the street or the other, a small group began to congregate on a strip of grass in the library parking lot. Mr. Yaghtin was part of this group. Several people in this group were openly protesting the event. Mr. Yaghtin seemed to be familiar with the people around him, but he was not carrying a sign, or wearing any apparel, or directing a message toward others. At one point, Mr. Yaghtin did make statements to police indicating that he disagreed with the sponsored event.

Law enforcement officers approached the group and asked them several times to move to the designated protest zone on the east side of Perry Street. Despite these requests the group of individuals, including Mr. Yaghtin, remained. Eventually, the group was given a final warning to move or they would be arrested. When Mr. Yaghtin indicated he was not moving, he was arrested for obstructing an officer.

III. ANALYSIS

Mr. Yaghtin was arrested for obstructing a law enforcement officer in violation of Spokane Municipal Code (SMC) 10.07.032. Under this code, a person is guilty if "the person willfully hinders, delays or obstructs any law enforcement officer in the discharge of his official powers or duties." The City alleges that Mr. Yaghtin was arrested for refusing an order by law enforcement to move to a particular protest zone. Mr. Yaghtin argues that this order was unconstitutional and cannot form the basis for an obstructing charge.

While generally speaking, the refusal to obey the order of a police officer will constitute obstructing, the Supreme Court has made it clear that the obstructing statute must be narrowly construed so as to avoid infringing on constitutionally protected activity. *State v. E.J.J.*, 183 Wn.2d 497, 501-02, 354 P.3d 815, 817 (2015). In the context of this case, if Mr. Yaghtin's presence in the library parking lot was constitutionally protected, and if the order to move from this spot was not lawful, then Mr. Yaghtin's refusal to obey the order cannot form the basis for an obstructing charge. *Id.*

The First Amendment provides that "Congress shall make no law ... abridging the freedom of speech ... or the right of the people to peacefully assemble." U.S. Const. amend. I. These rights are not confined to verbal expressions. *Brown v. Louisiana*, 383 U.S. 131, 141-42, 86 S. Ct. 719, 15 L. Ed. 2d 637 (1966). They include the right to protest in a peaceful orderly manner by having a silent and reproachful presence in a place where the protester has every right to be, such as a public library. *Id.* The

government has the burden of justifying any regulation of speech. *Collier v. City of Tacoma*, 121 Wash. 2d 737, 759, 854 P.2d 1046, 1054 (1993).

The level of scrutiny applied to a government restriction on constitutionally protected speech depends on the forum in which the expressive activity occurred. *United States v. Marcavage*, 609 F.3d 264, 274 (3d Cir. 2010). In this case, the City acknowledges that the public library and adjoining streets and sidewalks are traditional public forums. (Plaintiff's Response to Defendant's Motion to Dismiss, pg. 6, filed August 22, 2019.) As a traditional public forum, the government's ability to limit expressive activity is sharply circumscribed. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45, 103 S. Ct. 948, 954, 74 L. Ed. 2d 794 (1983).

The parties dispute the applicable test to be applied under this standard. Mr. Yaghtin argues that the government cannot interfere with protests unless there is clear and present danger of riot, disorder, or interference with traffic; he mis-cites "Papineau v. Parmely, 454 F.3d 46, 57 (2d Cir. 2006)" which is actually *Jones v. Parmely*, 465 F.3d 46 (2d Cir. 2006). The clear and present danger test establishes that speakers cannot be silenced on account of a listener's hostile reaction. When clear and present danger of riot, disorder, interference with traffic upon the public streets, or other immediate threat to public safety, peace, or order, appears, the power of the state to prevent or punish is obvious. *Cantwell v. State of Connecticut*, 310 U.S. 296, 308, 60 S. Ct. 900, 905, 84 L. Ed. 1213 (1940). Nevertheless, a state may not use this test to unduly suppress free communication of ideas. *Id.*

Assuming facts in a light most favorable to the City, Mr. Yaghtin was not arrested for the content of his speech. He was arrested for refusing to obey an officer's order to

move to a protest zone. The protest zones were not established to silence the protesters, but to give them a safe place to express their opinions. Since the protest zones were not a complete ban on speech, but rather a regulation of speech, the appropriate standard is whether the regulation was a valid time, place, and manner restriction under the First Amendment. *Collier*, 121 Wash. 2d at 747. If the protest zones, as applied, were a valid time, place, manner restriction, then Mr. Yaghtin's arrest for refusing an order to move to one of those zones was valid.

Under a time, place, and manner analysis, the first step is to determine if the restriction was content-neutral or content-based. Whether a regulation is content-neutral or content-based is a question of law. *City v. Willis*, 186 Wn.2d 210, 218, 375 P.3d 1056, 1060 (2016). Content-neutral restrictions do not reference the content of the regulated speech. *United States v. Marcavage*, 609 F.3d 264, 279 (3d Cir. 2010) (citing *City of Renton v. Playtime Theatres*, 475 U.S. 41, 48, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986)). Whereas content-based regulations are motivated by the subject matter or content of the message. *Id.*

A regulation may be viewpoint-neutral, but subject matter-based. *Collier*, 121 Wn.2d at 752-53. The *Collier* case addressed a municipal ordinance that limited the posting of political yard signs to 60 days prior to and seven days following an election. The municipality argued that the principal inquiry in determining if a regulation was neutral, was whether the regulation was adopted because the government disagreed with the content of the message. The City went on to argue that since the sign ordinance did not regulate the message, but only the method in which the message was conveyed, the ordinance was content-neutral. The Supreme Court disagreed, noting

that the ordinance was viewpoint-neutral, but subject matter-based. *Id*. While the ordinance did not distinguish between the political messages, it only applied to political signs. *Id.*

In this case, the City argues that the police regulations were content-neutral because police treated both sides of the debate equally and the police did not agree or disagree with either message. While the police regulation may have been viewpoint-neutral, it was subject matter-based, i.e., the regulation only applied to those who were there to protest or counter protest the event. When asked at oral argument whether neutral persons standing on the grassy strip would be moved into a protest zone, the City conceded they would not be told to move. In other words, the police decided that anyone present at the event, who had an opinion about the event, would be cordoned off to one of the two protest zones. Anyone else was free to move around on the public property.

Under the Washington Constitution, "time, place, and manner restrictions on speech that are viewpoint-neutral, but subject-matter based, are valid so long as they are narrowly tailored to serve a compelling state interest and leave open ample alternative channels of communication." *Collier*, 121 Wn.2d at 753. In this case, the City's stated interest in dividing the protesters was to provide security and maintain public safety. Mr. Yaghtin does not dispute that this is a compelling government interest. (See Motion to Suppress 3.6, p. 9.)

Since Mr. Yaghtin concedes the City's interest was compelling, the next step is to determine if the policy of separating people into "zones" was narrowly tailored. "To meet the requirement of narrow tailoring, the government must demonstrate that

alternative measures that burden substantially less speech would fail to achieve the government's interests, not simply that the chosen route is easier." *McCullen v. Coakley*, 573 U.S. 464, 495, 134 S. Ct. 2518, 2540, 189 L. Ed. 2d 502 (2014). Put another way, the restriction "must not 'burden substantially more speech than is necessary to further the government's asserted interests.'" *Id.* at 486 (*quoting Ward v. Rock Against Racism*, 491 U.S. 781, 799, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989)).

The government does not need to prove that the regulation was the least restrictive or the least intrusive means of serving its interest. *McCullen*, 573 U.S. at 486. But the government cannot regulate or suppress speech because it is more convenient than a less-restrictive alternative. Requiring the ends to be narrowly tailored to the means, prevents the government from "too readily sacrificing speech for efficiency.'" *Id.* (*quoting Riley v. National Federation of Blind of N. C., Inc.*, 487 U.S. 781, 795, (1988)).

In this case, the regulation of forcing anyone with an opinion about the event into a protest zone was not narrowly tailored. While the City's interest in protecting public safety is significant, there is no evidence that Mr. Yaghtin's mere presence on public property was in any way jeopardizing the City's interest. Mr. Yaghtin had every right to be standing on public property. He was not blocking traffic and was not conveying any kind of message that might incite a response. He was not being disorderly, disruptive, or aggressive. *See Berger v. City of Seattle*, 569 F.3d 1029, 1056 (9th Cir. 2009) (regulation was overbroad because it impermissibly applied to "passive and unthreatening acts" which did not interfere with park-goers.)

In support of its argument that the protest zones were valid regulations, the City cites *Hartman v. Thomson*, 931 F.3d 471 (6th Cir. 2019). In *Hartman*, a group called the Fairness Campaign intended to protest at a sponsored breakfast held at the state fair. The fairground operators created protest zones to prevent disruption to the event and informed members of the Fairness Campaign that they could protest within the zones, but could not disrupt the event. Despite the creation of these zones, several members of the Fairness Campaign attended the breakfast. When they stood up in the middle of the breakfast and refused to leave or sit down, they were arrested for disorderly conduct. The *Hartman* Court upheld the use of protest zones for protesters. *Id.*

Hartman does not support the City's position. In *Hartman*, the group members were told that if they wanted to protest, then they needed to do so from the protest zone. Despite creation of the zone, members of the group were still allowed to attend the event so long as they did not cause a disruption. In this case, police directed people into one zone or the other based upon the officer's perception of which side that person supported, not on whether the person was actually protesting or causing a disruption. Contrary to the City's position, *Hartman* demonstrates that a less intrusive restriction -- requiring people who were actually protesting to do so from designated zones -- could still meet the City's interest in protecting public safety. The City could have told Mr. Yaghtin that if he wanted to protest, he would need to do so from a protest zone.

The Washington State Supreme Court's recent opinion in *E.J.J.* also supports the conclusion that the regulation in this case was not narrowly tailored. In *E.J.J.*, the defendant was verbally critical of the way police were handling his sister. After repeated

demands by police, the defendant retreated to the threshold of his doorway and continued to observe and criticize police who were in his front yard with his sister. After the defendant refused commands to go inside and shut the door, he was arrested for obstructing an officer. *State v. E.J.J.*, 183 Wn.2d 497, 354 P.3d 815 (2015).

E.J.J. did not concern protest speech or content-neutral regulations, but it did address the intersection of free speech and the obstructing statute. The Court held that a careful review of the record was necessary to ensure that the defendant's conviction was not based on speech alone. *Id.* at 503-04. Inter alia, the Court rejected the argument that the defendant's presence at the scene and his refusal to retreat into the house and close the door constituted conduct beyond speech that would support a conviction for obstructing. "[M]ere presence at the scene cannot constitute conduct," and the defendant had every right to stand on his own property. *Id.* at 504. The Court went on to note that "[i]n the First Amendment context, we must be vigilant to distinguish between obstruction and inconvenience." *Id.* at 507.

In this case, Mr. Yaghtin's presence at the event cannot constitute conduct beyond speech, and since the command to move to a protest zone was not narrowly tailored to apply to only those who wished to protest, Mr. Yaghtin's refusal to follow the order cannot form the basis of an obstructing charge. The grass strip where Mr. Yaghtin was standing was not closed to the public in general. Instead, it was apparently closed to persons who manifested a certain belief regardless of whether that belief was being conveyed to the public. Thus, there is insufficient evidence to support a charge of obstructing under under *E.J.J.*

IV. CONCLUSION

The facts viewed in a light most favorable to the City indicate that police predetermined protest zones based on the legitimate government interests of promoting safety and providing peaceful areas to protest. Unfortunately, the scope of the protest zones was expanded to include anyone attending the event who had an opinion about the event, regardless of whether they were protesting or creating a disturbance. Although Mr. Yaghtin was not protesting, he made comments to police that suggested that he disagreed with the sponsored event. Based upon his expressed beliefs, Mr. Yaghtin was told he must move to a protest zone even though he was not otherwise protesting, causing a disruption, or creating a safety concern. When he refused to move, he was arrested for obstructing. Because the regulation, as applied in this case, was not narrowly tailored to serve the government's interest, and because the arrest for obstructing cannot be separated from Mr. Yaghtin's speech, the evidence is insufficient as a matter of law to support the charge of obstructing.

Defendant's motion to dismiss is granted.

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