

THE STATE OF NEW HAMPSHIRE  
JUDICIAL BRANCH  
NH CIRCUIT COURT

4th Circuit - District Division - Laconia  
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June 09, 2015

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Gilles Bissonnette, Esquire  
ACLU  
18 Low Avenue  
Concord, NH 03301

Case Name: **State v. Jeffrey Clay**  
Case Number: **450-2015-CR-00414**

Please find the enclosed Order issued by Justice Carroll on June 5, 2015.

Thank you.

Michelle D. Brown  
Clerk of Court

(0028)

C: Anthony P. Estee, ESQ; Jared Bedrick, ESQ; Gilles Bissonnette, Esquire

BELKNAP, SS.

4<sup>TH</sup> CIRCUIT COURT DIVISION  
LACONIA

IN THE MATTER OF:

STATE OF NEW HAMPSHIRE

V.

JEFFREY CLAY

DOCKET #2015-CR-414

ORDER

The Defendant is charged with Disorderly Conduct. The allegation concerns the Defendant's alleged actions in response to the alleged lawful order of the Chief of Police for the Town of Alton. The arrest was effectuated at meeting of the Town's board of Selectpersons.

The Defendant is specifically charged with a violation of RSA 644:2(e): "knowingly refused to comply with a lawful order given by Chief Heath, a uniformed police officer, to move from a public place, to wit the Alton Town Hall".

"Lawful order" is defined as "(1) A command issued to any person for the purpose of preventing said person from committing any offense set forth in this section, or in any section of Title LXII or Title XXI, when the officer has reasonable grounds to believe that said person is about to commit any such offense, or when said person is engaged in a course of conduct which makes his commission of such an offense imminent", as applicable to this allegation.

The Defendant has moved to dismiss the complaint. The State has objected to that motion.

The Court ordered a Hearing on the Motion to Dismiss.

"(since) the question is one of alleged trespass across 'the line between speech unconditionally guaranteed and speech which may legitimately be regulated. **Speiser v. Randall** 357 US 513,525. In cases where that line must be drawn, the rule is examine for ourselves the statements in issue and the circumstances under which they were made to see...whether they are of a character which the principle of 84 S.Ct. 729, the First Amendment as adopted by the Due Process Clause of the 14<sup>th</sup> Amendment." **Pennekamp v. Florida**, 328 US 331, 335". **New York Times v. Sullivan** 376 US 254, 285 (1964)

“A violation of the Free Speech Clause occurs only when the restricted speech is constitutionally protected and when the government’s justification for restriction is insufficient.” Scroggins v. City of Topeka, 2 F2nd 1362 (DKansas 1998).

The State presented Chief Heath to testify as to his actions on February 3, 2015. Chief Heath indicated that the Board had requested police presence the last several hearings. The Chief indicated that he had been present for the December 15, 2014 meeting and the charged February 3, 2015 meeting.

The Court had previously ordered that the State could introduce a video of the December 15, 2014 meeting. Chief Heath indicated that at the December 15, 2014 meeting, the Defendant appeared and addressed the Board. Chief Heath testified that the Defendant, in his address to the Board, cited concerns that he, the Defendant, suggested should result in the Board resigning.

Chief Heath indicated during the December 15, 2014 that the Defendant’s address to the Board digressed to addressing personal issues of the Board members as well as their family members. Heath approached the Defendant at the December meeting and requested that he leave the meeting place. Heath testified that the Defendant complied with the request and dismissed himself from the Town Hall.

The State introduced a report of the Chief, which was drafted on May 4, 2015, citing what the Chief remembered of a conversation that the Chief had with the Defendant as to the Defendant’s effort at noticing the Chief that he planned to confront the Selectpersons at their next meeting concerning, the February meeting, what the Defendant perceived, violations of the Right to Know Law.

The Chief noted that he warned the Defendant of his previous demeanor. He encouraged the Defendant to be professional and that the Defendant could not threaten the select board’s members nor is he to speak of the selectperson’s family members- including their children.

Between the December 15, 2014 and the February 3, 2015 meeting, the Board adopted “Public Participation at Board Meetings” (Adopted January 14<sup>th</sup>, 2015). Both parties referenced the protocol. The purpose of the protocol is described as “to provide the Board with an opportunity to receive directly from citizens any concerns, desires, or hopes they may have for the community.”

The protocol established two occasions during the meeting for public input. The participation prohibited complaints about individual employees and others whose privacy may be infringed upon. The participation required that all speakers “to conduct themselves in a civil manner. Obscene, libelous, defamatory or violent statements will be considered out of order and will not be tolerated. The Board Chair may terminate the speaker’s privilege to address the board if the speaker

does not follow these rules of order.” Finally, “If the speaker does not follow these rules, after being warned to do so by the Board Chair, they may be removed from the meeting.”

On February 3, 2015, the meeting opened. After addressing the Community Television participation by the Board, the Board chair opened the meeting for public input.

The first person to address the Board was the Defendant. The Board meets with their membership at the head of a round table with seating. Those individuals, having business with the Board, sit across from the Board. He approached with what has been identified as his cellphone which he represented was set for 5 minutes which, pursuant to the protocols, is the allowed time for input to the Board.

The Defendant identified himself to the Board. He opened by requesting that he continued to be disappointed with their continued service as representatives of the township. Defendant continued in this vain. The Defendant spoke with clarity and with organization to his presentation.

Shortly, a member of the board requested a point of order, complaining, per the State's pleading, of character assassination, thereby requesting the Defendant be silenced. The Defendant was warned of his continued representations to the Board. The Chair requested the Defendant leave his seat and return to the gallery's seating. The Defendant continued to speak. The chair requested the Chief's intervention for the removal of the Defendant from the property.

“(a) privilege for criticism of official conduct is appropriately analogous to the protection accorded a public official...Analogous considerations support the privilege for the citizen-critic of government. It is as much his duty to criticize as it is the official's duty to administer. See *Whitney v. California* (concurring opinion of Mr. Justice Brandeis.) quoted supra. P. 270. As Madison said, see supra p. 275, the censorial power is in the people over the Government and not in the Government over the people. It would give public servants an unjustified preference over the public they serve if critics of officials did not have a fair equivalent of the immunity granted to the official.” *New York Times v. Sullivan* 376 US 254, 282 (1964).

For this Court, the actions of the Chief in formulating a ‘lawful order’, was, notwithstanding the Chief's representations to the contrary, a direct result of the action of the selectmen's directive. The Court draws that conclusion as the meeting seamlessly transitioned to the very next order of business- public input session. The next speaker spoke of his support for the job that they were doing and he wished them not to resign.

It is not coincidental to the Court that the Chief speaks, in his report of February 3, 2015, to the Defendant's words to the Board as "into his rant". The reference speaks to the State's next action in silencing the Defendant. The silencing is nothing less than censorship of the Defendant's criticisms given at a time and place designated by the Board itself for public input.

By the Chief's testimony, the Defendant had done nothing that was 'obscene, libelous, defamatory, or violent'.

The Defendant, according to Defendant's Exhibit #A, the Chief's most recent report memorializing a telephone conversation with the Defendant, the Defendant addressed to the Chief specific concerns about the Board violations of the right to know. There was allegedly more discussion about other subject matters that the Chief warned the Defendant not to raise because of the personal nature. The Chief directed the Defendant to be professional. There was discussion of areas which would fall outside the area of propriety. The Chief contends that the Defendant was not receptive to his suggestions. However, there is no evidence that the Defendant crossed that line.

The State's actions of arresting the Defendant, whether taken independently of, or in conjunction with the Board's action, were content-based censorship as the Defendant was acting within the very rules promulgated by the Board as well within his Constitutional rights under the US and NH Constitutions.

The Defendant complied with the Board's own protocol, established by the Board for public input.

The State pointed to no offense having been committed by the Defendant, nor to any offense by the Defendant which was to be imminently committed by the Defendant.

Though the 1<sup>st</sup> Amendment's Right to Free Speech is not necessarily boundless, those limitations (Reasonable time, place, and manner restrictions) "are valid provided that they are justified without reference to the content of regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information. See Clark 468 US at 293." State v. Biondolillo 164 NH 370, 373 (2012).

The Court finds that the Defendant's speech, as cited above, is protected speech. This Court finds, consistent with Scroggins, "that the highly structured nature of (Select Board meeting) city council and city board meeting makes them fit more neatly into nonpublic forum niche. The fact remains that limitation on speech at those meetings must be reasonable and viewpoint neutral, but that is all they need to be." Scroggins v. City of Topeka 2<sup>nd</sup> F.Supp. 1362 (D.Kansas 1998)

The Court must employ a standard of strict scrutiny in assessing the intervention of the Chief in arresting the Defendant. "The restriction of speech is content neutral if it is 'justified without reference to the content of the regulated speech'. **Clark v. Community for Creative Non-Violence**, 468 US 288, 295 (1984). "The principal inquiry in determining content neutrality, in speech cases generally and in time, place, or manner cases in particular, is whether the government has adopted a regulation of speech because of disagreement with the message it conveys." **Ward v. Rock against Racism**, 491 US at 791. "A regulation that serves purposes unrelated to the content of the expression is deemed neutral, even if it has an incidental effect on some speakers or message but other. *Id.*" **Scroggins**, p. 1371. The State's action served only silencing of the Defendant.

Contrary to the State's argument, citing **Cox v. Louisiana (Cox II)** 379 US 536, 554-555 (1965), wherein, "(T)he constitutional guarantee of liberty implies the existence of an organized society maintaining public order, without which liberty itself would be lost in the excesses of anarchy.", the State chose to not prosecute the charge of creating a breach of the peace.

Distinguished from **Biondolillo**, in the present case, the Court can find no basis for the offense element of the Disorderly charge which is necessary for the 'lawful order'. Such offense element might have sustained a compelling interest of the government. However, the action taken against the Defendant, who was complying with the very protocols of the Board and not committing any of the prohibited indicators as defined in the protocols, was pure censorship. Again, the silencing of the Defendant by the actions must be judged in comparison with the immediate presence of the very next speaker expressing confidence in the Board's actions.

As an aside, the Defendant has not attacked the sufficiency of the complaint which the Court finds lacking in regards to the notice to the Defendant as to what 'offense' is being committed or what course of conduct that 'makes his commission of such an offense imminent'.

With that absence in the evidence as well as within the complaint and, taking all the evidence in a light most favorable to the State and all the reasonable implications therefrom, the Court cannot find that a reasonable trier of fact could find, beyond a reasonable doubt, that the Defendant is guilty of Disorderly Conduct.

In the present case, the limitations on the Defendant as affected by his arrest were content driven response by the State whether reviewed independently or in conjunction with the Board's actions. The arrest of the Defendant is found by the Court to be a violation of the Defendant's 1<sup>st</sup> Amendment right of Free Speech as attributable to this State of New Hampshire through the Due Process clause of

the 14<sup>th</sup> Amendment, as well as the Defendant's Rights under the New Hampshire Constitution, Part I Article 22, "Free Speech and liberty of the press are essential to the security of freedom in a state: They ought, therefore, to be inviolably preserved." And Part I, Article 8 "All power residing originally in, and being derived from, the people, all the magistrates and officers of government are their substitutes and agents, and at all-time accountable to them."

The Defendant's Motion to Dismiss is granted. The order by the State was not lawful. The case is dismissed.

Date: June 5, 2015

  
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Judge James M. Carroll