

**THE STATE OF NEW HAMPSHIRE**  
**JUDICIAL BRANCH**  
**NH CIRCUIT COURT**

Hillsborough County

9<sup>th</sup> Circuit – District Division - Manchester

**The State of New Hampshire v. Peter Eyre**  
**456-2011-CR-3796 (498200C and 498201C)**

ORDER

On October 24, 2011, the Court held a trial in the above captioned matter. At the conclusion of all the testimony, the Court provided the parties to submit a memorandum of law as to the legal issues raised at trial.

In arriving at the verdict the Court must first find facts from the testimony. The Court then must apply the facts to the pending charges to determine if the prosecution has proven one or more of the charges that have been filed against the defendant. Finally, the Court must then assess whether the proven charge(s) is rendered unconstitutional based upon a violation of a constitutionally protected right.

Based upon the testimony addressed at trial, the Court finds the following facts: On June 4, 2011, a number of people were involved in a protest outside the Manchester Police Department headquarters on Chestnut Street in Manchester, NH. The protest apparently involved perceived misconduct by the police and a belief that the offenders had not been held accountable. Some of these people were marking the sidewalk and vertical surfaces that comprise part of the police headquarters building with chalk. The police placed some of the people under arrest for using chalk, and Sgt. John Patti directed police detectives to document the markings by taking photographs.

In the area where the sidewalk and vertical surfaces had been marked with chalk, Sgt. Patti saw several persons, including the defendant, standing in the chalk marked area. Sgt. Patti told these people that they had to move. There were two reasons for his order. First, there is a city ordinance that prohibited people from standing three abreast so as to block the sidewalk. Second, the area was a crime scene that needed to be photographed. There was a series of exchanges between the defendant and the others with Sgt. Patti. These exchanges were described as polite and courteous, but the defendant and the others did not move.

As Sgt. Patti began to move in the direction of the defendant and the others, each person moved back a short distance but remained within the area that had been marked with chalk. Again, Sgt. Patti directed the group to move from the crime scene. Again, there was a polite exchange, but the defendant did not move. Once again, Sgt. Patti began to move in the defendant's direction. The defendant and the others moved back a short distance but remained within the so-called crime scene. This process went on for a period of time that was estimated to be between 30 minutes and 45 minutes. During this process, Sgt. Patti was assisted by Sgt. Dana Langton and Officer Thomas Gonzales who issued an order similar to those issued by Sgt. Patti.

Eventually, the defendant and the others took a position on the sidewalk beyond the crime scene. There, the defendant and the others stood three abreast. Sgt. Patti then placed the defendant under arrest for violating a city ordinance. Prior to arresting the defendant, Sgt. Patti told the defendant that if he did not move he would be arrested.

Prior to the defendant's scheduled arraignment the prosecutor filed two class B misdemeanors for disorderly conduct in place of the city ordinance violation.

The first of the complaints is a disorderly conduct offense alleging that the defendant:

While in a public place, did knowingly engage in conduct that substantially interfered with a criminal investigation. To wit: Peter Eyre, while among the group, refused to comply with the lawful order of Officer Gonzales to move away from the area in front of 351 Chestnut Street, a crime scene, in which police detectives were conducting an investigation. Mr. Eyre continued to interfere with the police investigation by refusing to move.

In the second complaint, the prosecution alleges that the defendant committed disorderly conduct by:

knowingly refusing to comply with the lawful order of Officer Gonzales to move from a public place. To wit: Peter Eyre did, while among a group, refused to comply with repeated orders to move and to not block the sidewalk area in front of 351 Chestnut Street, which is the Manchester Police Department, a building open to the public.

The prosecution elected not to file a complaint for violation of a city ordinance.

A 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 an such offense, or when said person is engaged in a course of conduct which makes his commission of such and offense imminent;

(2) A command issued to any person to stop him from continuing to commit 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 presently engaged in conduct which constitutes any such offense; or

(3) A command not to enter or a command to leave an area closed pursuant to paragraph IV, provided that a person may not lawfully be ordered to leave his or her own home or business.

It is noteworthy that the New Hampshire Legislature elected not to include the violation of municipal ordinances as a basis for a police officer to issue a lawful order although there is clear and compelling evidence that the defendant violated a city ordinance and was at the moment of his arrest immaterial, to a determination of whether the order issued by Officer Gonzales constituted a lawful order within the meaning of RSA 644:2.

One basis for the issuance of a lawful order was that the defendant's presence on the sidewalk obstructed pedestrian traffic. There is some evidence that a specific identifiable individual did walk past Sgt. Patti headed in a northerly direction on the eastern side of the sidewalk, crossed to the western side of the street and continued to walk north on the sidewalk. The precise time of this and the orders to move are a bit amorphous based upon the testimony and the Court finds that the evidence is insufficient to prove the elements of this charge beyond a reasonable doubt. Consequently, the Court finds the defendant not guilty of this offense. (498201C).

The remaining misdemeanor disorderly conduct charge alleges that the defendant failed to comply with a lawful order to move from the "crime scene". The defendant, in his memorandum, raises the issue of whether or not the area in question was an actual crime scene. The conduct of

marking the vertical surface of the police headquarters building may be addressed by a variety of statutes and ordinances, including criminal mischief and/or the Manchester city ordinance on graffiti. Whether or not the prosecution ultimately prevailed on this prosecution does not ipso facto mean that there was not a crime scene. Indeed, early in the implementation of the present criminal code the Supreme Court had to address this issue of the new division between crime felonies and misdemeanors. See RSA 625:11 and violations that are defined as civil infractions, resulting in limitation of investigative procedural rules concerning the gathering of evidence and arrest. The Supreme Court held that criminal procedural laws that predate the adoption of the present criminal code were not repealed by implication when the division of offenses was created. State v. Miller, 115 N.H. 662 (1975). Hence, following the Supreme Court direction to use words like criminal or crime in a procedural context as a term of description instead of limitation, Id at 664. The Court finds the area in question was indeed a crime scene.

In the instant case, the evidence is both unambiguous and consistent that these were orders to move away from the area that was marked with chalk. Moreover, there is no dispute that the defendant complied with the verbal orders and retreated only when the police officer advanced upon him. The process repeated itself several times and the defendant was ultimately arrested beyond the confines of the actual so-called crime scene. The failure to follow the lawful orders by moving prior to the advance of the police officer constituted a violation of the disorderly conduct statute as there is no statutory requirement that the police do any more than issued a verbal order.

There remains the issue of the level of this offense. The disorderly conduct statute enhances the level of offense from a violation level to a misdemeanor level when the conduct continues "after a request by any person to desist. Otherwise, it is a violation." RSA 644:2 VII. The difficult issue is how the Court is to apply this to lawful order provisions that have a special component of non compliance with the order as a reason for enhancement. The reported cases all seem to involve verbal conduct that continues after an order or request to desist, e.g. State v. Olivevia, 115 NH 559 (1975); State v. Dyer, 98 NH 59 (1953); and State v. Chaplinsky, 91 NH 310 (1941) aff'd 315 US 568 (1942). Here, there is some movement between the lawful orders. Under the prior disorderly conduct lawful order, the only reported case appeared to involve individual "standing has ground" and not responding at all to a lawful order. This was found to constitute a misdemeanor level offense. State v. Dominic, 117 NH 573, 576 (1977).

In the context of the proven facts of this particular case, the Court finds that the prosecution has proven only a violation level offense. The Court enters a find of guilty concerning this charge. (498200C).

The Court must now assess whether the proven charge violates a protected constitutional right of the defendant. After citing the first amendment and part 1, article 22 and 23, the defendant refers primarily upon State v. Nickerson, 120 NH 821 (1980). In finding the "lawful order" provision of the disorderly conduct statute unconstitutional, the crux of the Supreme Court's ruling was the lack of a definition of the term of lawful order within RSA 644:2. As the Supreme Court wrote:

"Calm and lengthy deliberations, however, are not often viable procedure for the policeman on the street who is faced with a perceived safety hazard. His immediate concern is the swift and safe resolution of the hazard according to the statutory powers available to him. For that reason, when constitutional rights of people are involved, a broadly drawn and vague statute provides as little guidance to the police officer as it does to the public."

Id at 825. After holding this portion of the statute unconstitutional, the New Hampshire Supreme Court observes:

“The State has the authority to pass statutes that vest a limited amount of discretion in police officers...”.

Id at 826. At the next legislative session, the General Court defined what constitutes a lawful order in what, at this time, is found in RSA 644:2 (V). In so doing, the legislature circumscribed the previously unfettered discretion of the police officers on the street and corrected the issue of “over breath.” Hence, the defendant’s reliance upon State v. Nickerson is misplaced; as the issue of due process notice was corrected by Legislative action..

The New Hampshire Supreme Court has assessed whether a lawful order under RSA 644:2 violates a defendant’s right to free speech under the U.S. Constitution and New Hampshire Constitution. In that case, the defendant failed to comply with a lawful order to move from the Belmont Town Hall during a selectman’s meeting. Dominic at p. 574. The Court held that a “lawful order” was a restriction under some circumstances as to the “time, place and manner” of speech. The Court opined that the law was “... a reasonable regulation of the manner in which one may speak, does not violate any right of freedom of expression.” State v. Albers, 113 NH 132, 139 (1973); State v. Derrickson, 97 NH 91, 93 (1951); Grayned v. City of Rockford, 408 US 104, 116 (1972); and Cox v. Louisiana, 379 US 536, 554(1965). Id at 579.

Hence, a conviction under this section of the disorderly conduct law is not a violation of the defendant’s state or federal constitutional right to free speech.

Because this is a violation level conviction, the Court imposes a \$200 fine and a \$48 penalty assessment; the fine and penalty assessment is to be paid within 45 days of this order.

So Ordered.

12/27/11

Date



Judge William H. Lyons

Cc: Peter Eyre  
Gregory Muller, Esquire  
Cpt. Robert Cunha