

THE STATE OF NEW HAMPSHIRE

CHESHIRE, SS

**8TH CIRCUIT COURT
DISTRICT DIVISION-KEENE**

DOCKET NO.: 449-2012-CR-00535

SEPTEMBER TERM, 2012

THE STATE OF NEW HAMPSHIRE

v.

IAN FREEMAN (a/k/a IAN BERNARD)

**REPLY MEMORANDUM TO STATE'S ANSWER AND OBJECTION TO
DEFENDANT'S MOTION TO DISMISS**

COLLATERAL BAR:

The State argues that Defendant was obligated to challenge the trespass order in civil court before he could challenge its validity upon this prosecution. This argument is inapplicable to this case for multiple reasons. First, the collateral challenge requirement relates to cases of criminal contempt in which the general rule is that an attempt must be made to dissolve an injunction prior to acting to violate it. The State has not cited any precedent in which this rule has been applied in a criminal trespass case. Such an application would be contrary to New Hampshire law. Since the existence of a valid order is a prerequisite claim to a conviction under RSA 635:2(III)(b)(2), the burden is upon the State to establish its validity.

Second, one of the other individuals subject to the same no trespass order has unsuccessfully challenged the order in Superior Court in the case of State v. Bo Davis, Docket No.: 2011-CR-271 (2/15/2012). Finally, it would be contrary to the underlying concept of access to government proceedings under Part I, Article VIII of New Hampshire Constitution to require a citizen of this State to bring legal proceedings in order to secure his or her constitutional right to access.

EVIDENTIARY HEARING:

The testimony at the hearing demonstrated that there was no significant government interest behind the issuance of the no trespass order. The only activity complained of by the State is the Defendant's participation in a small group activity in the court parking lot which included standing in a semi-circle outside the employee entrance to the parking lot, singing Christmas carols, asking questions to court employees and videotaping some of the cars in the court's parking lot.² What is most striking about the Sheriff's testimony is that there was no claim that the Defendant or any person associated with the Defendant violated any criminal law or did anything that would reasonably cause the court employees to be fearful for their physical safety. Sheriff Foote testified that it was his understanding that members of the group may have gotten within six inches of court employees and/or taken photographs from a close range. However, when the employees themselves testified it was clear that aside from the employees walking through a semi-circle of protesters, the closest any of the protesters got to the employees was five to six feet.

The court employees testified that they felt embarrassed by the protesters, intimidated by the questions they were being asked, and concerned about their cars being videotaped. These expressions of concerns appear to be genuine. However, public employees even lower level public employees, do not have the right to be protected from embarrassment or intimidating questions in the context of political activism because that activism, absent violation of the law, is constitutionally protected.

² None of the testimony by the Sheriff or by the superior court employees identified any specific actions taken by the Defendant. Instead the claim was that he was a member of a small group that engaged in these activities. This is not sufficient attribution upon which to base criminal liability. However it is unnecessary to reach this issue since all the asserted activities are constitutionally protected, and none of them are in violation of criminal law or disruptive of court proceedings.

The order itself is predicated upon the Defendant's alleged "persistent harassment of court personnel." It was clear from the hearing that the Sheriff had no basis for this claim aside from the Defendant's constitutionally protected conduct. Thus, by even the most deferential standard, the order is invalid because it lacked a legitimate purpose.

In terms of the scope of the order, the Sheriff presumably now cognizant of the legal weaknesses in his position, made every effort to reinterpret the actual language of the order from a no trespass declaration to a requirement of advance notice. A reasonable lay person would interpret this order much more broadly, and be intimidated against entering the courthouse which was likely the sheriff's motivation. Although it is true that the second paragraph of the order contains a proviso in which the person subject to it can enter the courthouse, it requires contact with the sheriff and "an appointment to conduct your county business." It is not clear whether the "appointment" is with the sheriff or at the courthouse, but nothing in the order suggests that approval is automatic or could be provided by any Deputy Sheriff which was the Sheriff's testimony at the hearing. Notwithstanding the Sheriff's dilution of the order, the requirement that a citizen of the State not enter the courthouse without making "an appointment to conduct your county business" violates Part I, Article VIII barring unreasonable restrictions on the public rights of access to governmental proceedings. This is particularly the case where no evidence has been presented that the Defendant violated any law or disrupted judicial proceedings.

Defendant is not contesting the Court's capability to adopt reasonable measures to protect the security of its proceedings. He is not complaining about security screening engaged in by bailiffs or other reasonable precautions before individuals are allowed to enter the court. However, those measures apply to all citizens equally. They do not single out a particular group of activists whose mission has included the enforcement of Part I, Article VIII of the

New Hampshire Constitution. By contrast, the “no trespass” order is only directed at a small group of political activists while other individuals, including those with serious criminal histories, are permitted to enter the courthouse without any notice requirement

The Sheriff’s dilution of the order on the witness stand further underlines the absence of a legitimate purpose. He claimed that it is just about advance notice, but bailiffs are already stationed to screen all persons entering the courthouse. If advance notice were necessary to provide security for parking lot demonstrations, then the order would have specified the minimum amount of notice to be provided. The fact that the amount of notice is not addressed in the order is further evidence that its real goal is to intimidate individuals from entering.

In cases involving constitutional rights, one of the key requirements is that the government demonstrates a close relationship between the restriction and the purported governmental purpose. For example in the case of Doyle v. Commissioner, 163 N.H. 215 (2012), the New Hampshire Supreme Court held that a permit requirement employed by the State Parks was invalid as applied to first amendment expression because it was not narrowly tailored to its stated purposed of managing competing uses. This was demonstrated by the fact that the permit requirement applied to all groups who were engaged in non-routine recreational activities regardless of size. Similarly in this case there is a lack of correlation between the stated reasons for the order and its actual scope as interpreted by the Sheriff. It was both over-broad and underinclusive. The only basis given for the order was the sheriff’s claim that court personnel were being harassed in the parking lot. On that basis, the order should have been limited to the parking lot not the whole Superior Court property. Further, the Sheriff made clear that the Defendant and others could continue to engage in the exact same parking lot activities notwithstanding the no trespass order so long as they notified the Sheriff’s Department in advance. Given the close physical proximity between the Sheriff’s Department

office and the parking lot, it is clear that any legitimate concerns about demonstrations at the beginning or end of the working day could have been addressed without a no trespass order.

The State primarily relies on the case of Gessner v. Plummer, 2011 U.S. District Lexis 75538 (S.D. Ohio 2011). The Gessner case is factually and legally distinguishable on multiple grounds. The Defendant in that case was not selected because of his political activism but because his behavior toward the court personnel handling his own case caused them apprehension. The applicable legal standards are also very different because Plaintiff in Gessner only raised a claim under the First Amendment whereas Defendant here is primarily basing his claim on Part I, Article VIII of the New Hampshire Constitution which has more specific application to court property and proceedings.

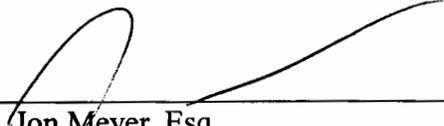
Respectfully Submitted,

Ian Freeman
By His Attorneys,

BACKUS, MEYER & BRANCH, LLP

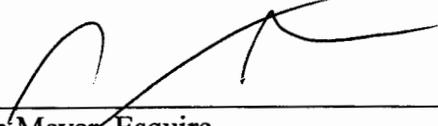
Dated: 12/10/2012

By: _____


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CERTIFICATE OF SERVICE

I hereby certify that on the 10th day of December, 2012, a copy of the Defendant's Reply Memorandum was mailed to County Attorney David Lauren.



Jon Meyer, Esquire