THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
NH CIRCUIT COURT

8th Circuit - District Division - Keene
3 Washington St./PO Box 364
Keene NH 03431-0364

Telephone: 1-855-212-1234
TTY/TDD Relay: (800) 735-2964
http://www.courts.state.nh.us

March 01, 2013

H. JON MEYER, ESQ
BACKUS MEYER SOLOMAN & BRANCH LLP
PO BOX 516
MANCHESTER NH 03105-0516

Case Name: **State v. Ian H Bernard**
Case Number: **449-2012-CR-00535**

Please be advised that on February 26, 2013 the Court (Burke, J) issued the attached "Order On Defendant's Motions To Dismiss".

Larry S. Kane
Clerk of Court

(374)

C: Cheshire County Sheriff's Department; David Lauren, ESQ

THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
NH CIRCUIT COURT

8th Circuit - District Division - Keene
3 Washington St./PO Box 364
Keene NH 03431-0364

Telephone: 1-855-212-1234
TTY/TDD Relay: (800) 735-2964
http://www.courts.state.nh.us

March 01, 2013

H. JON MEYER, ESQ
BACKUS MEYER SOLOMAN & BRANCH LLP
PO BOX 516
MANCHESTER NH 03105-0516

Case Name: **State v. Lynne Sieradzki**
Case Number: **449-2012-CR-00536**

Please be advised that on February 26, 2013 the Court (Burke, J) issued the attached "Order On Defendant's Motions To Dismiss".

Larry S. Kane
Clerk of Court

(374)

C: Cheshire County Sheriff's Department; David Lauren, ESQ

THE STATE OF NEW HAMPSHIRE

CHESHIRE, SS.

Eighth Circuit Court
District Division-Keene

The State of New Hampshire

vs.

Ian Bernard (aka Freeman) (12-CR-535)

and

The State of New Hampshire

vs.

Lynne Sieradzki (12-CR-536)

ORDER ON DEFENDANTS' MOTIONS TO DISMISS

The defendats are charged with criminal trespass under RSA 635:2. The state alleges that the defendants violated a lawful order of the Cheshire County Sheriff, ordering them, subject to certain conditions, not to enter the Cheshire County Superior Court building (hereinafter "the courthouse") in Keene. The defendants moved to dismiss the charges, alleging that the Sheriff's order was violative of the defendants' constitutional right of free speech. The state objected, an evidentiary hearing on the motion was held, and the parties briefed the issues. The complaints allege Class B misdemeanors.[1]

---

[1] The defendants were originally charged with Class A misdemeanors. At their arraignment, the state argued for cash bail, which was imposed as to defendant Sieradzki. The Court ordered personal recognizance bail for defendant Bernard (Freeman). As trial approached, the state sought to reduce the charges to Class B misdemeanors, but the defendants objected under RSA 625:9, VII (c). The state thereupon *nolle prosequied* the charges and brought the complaints now before the Court

After considering the parties' arguments, the Court finds that the Sheriff's no trespass order, as applied to the defendants' desire to enter the Superior Court building for purposes common to the general public, is unconstitutional, but that a constitutionally sound order could be applied to other aspects of this case.

The factual backdrop to the cases is common to both defendants, and is relatively uncomplicated. The defendants are self-styled political activists who, in advocating their views, often appear in courtrooms and other public fora in this state, either as litigants or as observers and reporters on courthouse events. It is not uncommon for them to challenge the rules of the courts of this state, as well as the authority of court officials to impose them. Due primarily to concerns voiced by court support staff about aggressive behavior toward them by some activists as those employees were leaving the courthouse at the end of the workday, the Sheriff issued the following order, which was served on five activists, including the defendants:

> Due to your persistent harassment [sic] of court personnel, you are prohibited from entering or remaining on the county property at 12 Winter Street, Keene, NH (the Cheshire County Superior Court Building). This notice is provided to you in accordance with the statute governing Criminal Trespass; RSA 635:2.
>
> If you have any legitimate county business that requires you to enter and remain in the Cheshire County Superior Court Building, you are to contact me to make an appointment to conduct your county business.

The letter was dated December 30, 2011, and was served shortly thereafter. It was entered as Defendant's Exhibit 1 at the evidentariy hearing, and is referred to hereinafter as "the no trespass letter" or "the order." It is undisputed that the defendants had notice of the letter. In fact, the parties submitted a joint stipulation of facts through which the defendants agreed that on February 27, 2012, they enterd the the courthouse knowingly and without the Sheriff's authorization. They were arrested for doing so, and these consolidated prosecutions resulted.

Before addressing the constitutional issues that are dispositive of this case, the Court needs to address two threshold arguments made by the state in its opposition to the motions to dismiss. The state argues first of all that a challenge to the validity of the no trespass letter is, essentially, a "red herring." It argues that under RSA 635:2, all this court needs to determine is that the order was properly served on the defendants and that the defendants subsequently defied it. The statute, in pertinent part, reads as follows:

I. A person is guilty of criminal trespass if, knowing that he is not licensed or privileged to do so, he enters or remains in any place.

...

II. Criminal trespass is a misdemeanor if:

...

(b) The person knowingly enters or remains:

...

(2) In any place in defiance of an order to leave or not to enter which was personally communicated to him by the owner or other authorized person.

RSA 635:2. The evidence, along with the parties' stipulation, supports a finding that, the constitutional issues notwithstanding, the elements of the offense are made out. The state argues that the defendants, rather than violating the order, should have brought a claim for injunctive or civil relief on First Amendment grounds. State v. Small, 150 N.H. 457 (2004) is cited as support for the state's argument that the defendants are barred from bringing their constitutional challenge in this Court. However, Small, and the principles cited therein regarding collateral bar, applies to cases where the decisions of one *tribunal* are being challenged in a different *tribunal or different proceeding.* Here, the sheriff's no trespass letter is not the product of a legal contest between litigants. Indeed, one of the defendants' arguments is that they had no opportunity to contest the issuance of the letter in the first place. [Both parties point to a prior ruling from a superior court judge addressing the validity of the no trespass letter pursuant to a challenge by another of the five people served with it. This Court finds that action to be irrelevant to this one, as the defendants at bar were not parties to it, nor were they in privity with the challenger.]

The defendants' pleadings contend that RSA 635:2 requires the existence of a "valid" order from a property owner or authorized person to support a prosecution. The state argues that because the word "valid" does not appear in the statute [it does not], once the elements of the offense are established the Court need inquire no further. The Court declines to accept the state's position. The validity of an order under RSA 635:2 may be implicit, e.g. in a case where a person had some authority to act for a property owner, but that authority might not extend to the issuance of a no trespass letter in the owner's name. In such a case, the issue of the scope of the owner's representative's authority would be at issue. But the question of whether the actions of a public official in depriving a citizen of his or her presumptive right of access to a courthouse does not rest on such distinctions. In analyzing the defendants' arguments, the word "valid" assumes an entirely different context.

Thus, the state's preliminary arguments are rejected.

The defendants argue that the no trespass letter deprives them of their state constitutional rights under Part 1, Articles 8 and 22, which provide:

> **[Art.] 8. [Accountability of Magistrates and Officers; Public's Right to Know.]** 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 times accountable to them. Government, therefore, should be open, accessible, accountable and responsive. To that end, the public's right of access to governmental proceedings and records shall not be unreasonably restricted.
>
> **[Art.] 22. [Free Speech; Liberty of the Press.]** Free speech and liberty of the press are essential to the security of freedom in a state: They ought, therefore, to be inviolably preserved.

New Hampshire Constitution Part 1, Articles 8 and 22.

"The right to open courtrooms and access to court records related to court proceedings is firmly supported by New Hampshire practice and common law principles, Part I, Articles 8 and 22 of our State Constitution and our guidelines for public access." Petition of Union Leader Corp., 147 N.H. 603, at 604 (2002). "Such access is critical to ensure that court proceedings are conducted fairly and impartially [Citations omitted] and that the judicial process is open and accountable." *Id.*

"[T]he rights accorded by the First Amendment provide quintessential protection for the individual. In fashioning principles of access rights to the courts under the First Amendment, the Supreme Court has therefore apparently assumed that such rights are personal and may be asserted by an identified excluded individual." Huminski v. Corsones, 397 F.3d 116, at 146 (2nd Cir. 2004).

There seems to be precious little in the way of legal precedents addressing facts similar to those of the cases at bar. The ones that the Court has been referred to by both parties have tended to focus on access to specific proceedings, such as those involving the appellate litigants as parties, or media agencies seeking to report on courtroom activities. For constitutional purposes, this Court sees no difference between the defendant seeking access to the courthouse for personal reasons, or to observe and report on traditional courthouse activities.

The pleadings direct the Court to the analysis of the Second Circuit in Huminski, where a long-time critic of Vermont courts whose behavior was considered by court personnel to be potentially dangerous, was, in broad terms, prohibited from being in and around certain state courthouses. The Court of Appeals set forth a four-part test to determine if the presumptive constitutional right of free speech, such as that exercised here, could be overcome. These include: the reason for the ban; what interest the proponent of the restraint seeks to protect; alternatives to the restraint, and; the scope and duration of the ban. Huminski, *supra*, at 148-149. This analysis is echoed and endorsed in large part in Associated Press v. State of New Hampshire, 153 N.H. 120 (2005), which involved a press challenge

to a superior court rule prohibiting public access to financial affidavits in divorce proceedings. The defendants rely heavily on Associated Press in asking the Court to dismiss the trespass cases at bar. The approach taken by either case might be applied here, but the Court will proceed under Huminski .

First, as to the reasons for the ban, the only specific evidence the Court heard at the hearing on the motions to dismiss with respect to the reasons for the issuance of the no trespass letter had to deal with the concerns expressed by support staff when entering or leaving the building. There was only passing reference to other disturbances arising within the courthouse, but these defendants were not directly linked to them. The witnesses expressed varying levels of concern about the conduct of certain activists who met them outside the courthouse as the employees left from the private courthouse entrance. The employees were, at the very least, annoyed by the behavior, and, at the worst, frightened by it. The defendants were not, however, identified as participants. Even if they were, what is clear is that the facts engendering the issuance of the no trespass letter bear little or no relationship to the specific prohibitions contained in the letter itself. As will be made clear below, however, this is not to say that the Sheriff is lacking in authority to issue reasonable limitations on the conduct of persons using the facility over which he acts in a supervisory capacity, including as to security matters.

The state argues that the second prong of the Huminski analysis, consideration of what interest the proponent of the restraint seeks to protect, is met because the activities of the defendants interfered with the normal operations of the Court and negatively impacted the normal administration of justice. This is because the activities were directed at court staff and judges. Certainly, the orderly administration of justice is an interest worthy of protection. The Sheriff's no trespass letter, however, cannot be seen to accomplish it. The testimony barely even implied that the specific defendants now before the Court interfered with any judicial proceeding or ancillary judicial activity. Furthermore, the state's argument is entirely belied by the sheriff's own testimony, wherein he indicated that his letter was meant merely to be alerted as to the presence of the defendants in the courthouse, but that no one would be denied entry.

Third, there are alternatives to the ban imposed by the no trespass letter. Court security staff are presumably familiar with the defendants, are equipped with communications devices, and could easily pass on information throughout the courthouse that the defendants, whose movement in the building could be tracked and recorded with video surveillance, were present. Requiring the defendants to have to take the extra step of securing what is now known to be certain permission to enter a classically public building such as a courthouse is unnecessarily onerous.

Finally, the Court addresses the scope and duration of the ban. The ban is open-ended in its term, which alone would suffice in finding it unreasonable. The

defendants, at the time the letter was served on them, had no specific information as to what conduct led to the ban, nor how and under what circumstances it might be modified or lifted.[2] Based on the evidence the Court heard at the hearing, the scope of the ban, prohibiting on its face any access to the courthouse proper, goes far beyond the conduct triggering the letter's issuance: concerns of court personnel as they entered and left the building through a separate and secure entrance at the beginning and end of the work day.

Thus, the no trespass letter fails all four prongs of the Huminski analysis.

The state points to Gessner v. Plummer, 2011 U.S. Dist. LEXIS, 75538, a United States District Court case from Ohio's Southern District, in support of its position that the motions to dismiss should be denied. Gessner is relevant and applicable to the cases at bar in many respects, however the Court does not find the state's reliance on Gessner to be well placed on the issue of dismissal of the charges. It was a civil action brought by a citizen purporting to state claims under 42 U.S.C 1983, alleging federal First Amendment violations. The case at bar is decided under the New Hampshire Constitution Part 1, Articles 8, and 22, which, in these cases, provide greater and more explicit protection with respect to courthouse access than their federal counterpart. Furthermore, the plaintiff citizen in Gesner was found never to have been denied access to the courthouses in question, nor was he criminally prosecuted for entering one, unlike the defendants now before the Court.

This Court, therefore, finds that the no trespass letter, as applied to these defendants[3] and in the precise context of the evidence before the Court, is unconstitutional under the New Hampshire Constitution Part 1, Articles 8 and 22.

---

[2] The letter is also ambiguous. The precise language of a portion of the letter is worth repeating here, with supplied emphasis:

> "If you have any legitimate *county business* that requires you to enter and remain in the Cheshire County Superior Court Building, you are to contact me to make an appointment to conduct your *county business.*"

The Superior Court building houses two *state* courts (superior and probate), however, and a *private* nonprofit agency. A strict reading of the letter, then, would mean that the sheriff was only prohibiting the defendants from entering if they were to engage in *county* business, and the only *county* office in the superior courthouse is the county attorney's office.

[3] As indicated elsewhere in this Decision, there are three other individuals who were served with no trespass letters identical to the ones served on the defendants. The Court's Decision implies nothing as to the validity of the no trespass letters as to those others, whose circumstances may be meaningfully different.

Since issues similar to those raised in this case may recur, the Court wishes not to be misunderstood. Nothing in this Decision should be construed as supplanting the authority of the sheriff to issue orders designed to discharge his duties as the guarantor of security for the courthouse and its immediate county-controlled environs, so long as those orders withstand constitutional scrutiny. The issue in these cases is the exercise of the defendants' right of access to the historically direct and ancillary functions of a courthouse. This Court can imagine myriad circumstances that might have supported the Sheriff's order.

As such, the sheriff would certainly be acting within his authority, and in a constitutionally permissible way, were he to restrict public access to the areas around the secure entrance points where employees enter for and leave from work. These are not areas of traditional ancillary courthouse activities, and if employees are unnerved by the conduct of third parties, the sheriff can declare those areas, including areas of the parking lot, off limits.[4]

As indicated elsewhere, while the Court does not accept the Gessner case as controlling its ultimate ruling on the constitutional question, it is nevertheless instructive on the question of what is, and is not, within the scope of the exercise of protected first amendment rights within a courthouse. The Gessner court agreed with the plaintiff that individuals such as him enjoy the presumptive right of access to court proceedings. Gessner, *supra*, at 26. The Gessner court went on to qualify that right:

> "Without question, the *First Amendment* protects a litigant's right of access to the courts. *Bounds v. Smith*, 430 U.S.817, 97 S.Ct. 1491, 52 L.E. 2d 72 (1977). However, the *First Amendment* does not protect a particular method of access."

Gessner, *supra*, at 24.

In Gessner, the court also suggested that the plaintiff had no constitutional right to anything but necessary direct and ancillary services, and something as mundane as using a public bathroom would not be a guaranteed right. Gessner, at 25-26.

---

[4] One of the defendants testified that he feels that confrontations with employees such as the kind that led to the issuance of the no trespass letter are permissible, if not constitutionally protected, stating that those employees are always in the performance of their duties and are, thus, subject to being questioned about their jobs, videotaped and otherwise having their movements recorded. This defendant made reference to Glik v Cuniffe, *et al*, 655 F.3d 78 (1st Circuit 2011) as support for his statement. To be clear, the employees in question cannot be said to be acting in the performance of their duties when they are merely leaving work. Glik acknowledges that reasonable time, place and manner restrictions are permissible. The Court notes that the Glik court also considered it relevant that the arrest of an individual by Boston police officers was being filmed by Mr.Glik "at a comfortable remove" from the point of the arrest on Boston Common.

The New Hampshire Supreme Court has recently addressed the issue of permissible limitations on the right of free speech. In State v. Biondolillo, the defendant argued that his disorderly conduct conviction violated his right to free speech under Part 1, Article 22 of the New Hampshire Constitution and the First Amendment or its Federal counterpart. Although the case is distinguishable on various grounds from the ones at bar, our Supreme Court looked to earlier cases in reinforcing the principle that the right of free speech under the State Constitution "'may be subject to reasonable time, place and manner regulations that are content-neutral, narrowly serve a significant governmental interest, and allow other opportunities for expression.'" State v.Biondolillo, decided November 28, 2012, *citing* State v. Comley, 130 N.H. 688, at 691 (1988).

Finally, the courts themselves have inherent authority to establish rules of conduct, and to impose sanctions for misbehavior.

> "The power of the judiciary to control its own proceedings, the conduct of participants, the actions of officers of the court and the environment of the court is a power absolutely necessary for a court to function effectively and do its job of administering justice."

State v. LaFrance, 124 N.H. 171, at 179-80 (1983).

The motions to dismiss are granted.

February 26, 2013

SO ORDERED

Edward J. Burke, Justice