

THE STATE OF NEW HAMPSHIRE
8th CIRCUIT COURT

CHESHIRE COUNTY

DISTRICT DIVISION AT KEENE

STATE OF NEW HAMPSHIRE

v.

GRAHAM COLSON

Docket No. 449-2013-CR-00953

MEMORANDUM OF LAW IN SUPPORT OF COLSON'S MOTION TO DISMISS

Now comes the defendant Graham Colson ("Colson"), by and through his Attorney Jon Meyer at Backus, Meyer & Branch, LLP, and submits this memorandum of law in support of the Motion to Dismiss.

INTRODUCTION

To establish a claim for criminal trespass, the State of New Hampshire ("State") must establish, beyond a reasonable doubt, that the defendant "knowing that he is not licensed or privileged to do so, enters or remains in any place." N.H. RSA 635:2. The State cannot establish a cause of action for criminal trespass because the State cannot show that Colson was not "licensed or privileged" to be in Keene Central Square. The police order, issued in May 2012, prohibiting Colson from entering Keene Central Square is not authorized by law and is unconstitutional for the reasons asserted in this memorandum of law.

ARGUMENT

I. The Keene police are not authorized by city or state statute or ordinance to order Colson to stay away from Keene Central Square as a penalty for illegal skateboarding.

Section 94-466 of the City of Keene municipal code prohibits skateboarding in Keene Central Square. *Keene Municipal Code* § 94-466. New Hampshire Law establishes a maximum penalty that the City of Keene may impose for violations of city ordinances. New Hampshire RSA § 31:39 authorizes the City of Keene to establish bylaws for the “care, protection, preservation and use of public... commons.” N.H. RSA § 31:39(I)(a). This same statute provides that “towns may enforce the observance of the bylaws by suitable penalties *not exceeding* \$1,000 for each offense to ensure to such uses as the town may direct.” N.H. RSA § 31:39(II).

The City of Keene police issued an order prohibiting Colson from entering Keene Central Square after he violated Section 94-466 of the Keene Municipal Code by skateboarding on Keene Central Square. New Hampshire RSA § 31:39(II) does not authorize the police to issue an order prohibiting a citizen from entering the Keene Central Square. The *maximum* penalty under N.H. RSA § 31:39(II) is \$1,000. New Hampshire law does not permit the City of Keene police to issue an order forcing Colson to refrain from entering Keene Central Square. For this reason, the police order is not authorized by law and is invalid. Given the invalidity of the police order, the State of New Hampshire cannot establish that Colson was “not licensed or privileged” to be in Keene Central Square and cannot establish a claim for criminal trespass.

II. The police order prohibiting Colson from entering Keene Central Square violates Colson’s Due Process Rights guaranteed by the United States Constitution.

The Due Process Clause of the Fourteenth Amendment states that no individual “shall be deprived of life, liberty or property without due process of law.” U.S. Const. amend. XIV. The

Fourteenth Amendment incorporates and applies this guarantee to the states. The Supreme Court has recognized “the freedom to loiter for innocent purposes is part of the “liberty” protected by the Due Process Clause of the Fourteenth Amendment.” *City of Chicago v. Morales*, 527 U.S. 41, 54 (1999). The Supreme Court has established that statutes or ordinances that are “vague” therefore failing to provide “adequate notice” to the public and guidelines for law enforcement are unconstitutional under the Due Process Clause of the United States Constitution. *Id.* at 64.

In *City of Chicago v. Morales*, the City of Chicago established an ordinance that prohibited “criminal street gang members from loitering with one another or with other persons in a public place.” *City of Chicago v. Morales*, 527 U.S. 41, 45-46. The Chicago ordinance defined “loitering” as: “remaining in any one place with no apparent purpose” and did not include what “standards of conduct” constituted a violation. *Id.* at 47, 60. The court applied the “vagueness” standard asserting “even if the enactment does not reach a substantial amount of constitutionally protected conduct, it may be impermissibly vague because it fails to establish standards for the police and public that are sufficient to guard against the arbitrary deprivation of liberty interests.” *Id.* The Court held that the Chicago ordinance violated the Due Process Clause because it did not provide adequate notice to the public regarding what type of behavior was impermissible and it “encouraged arbitrary and discriminatory enforcement.” *Id.* at 64.

Similarly, in *State v. Chong*, defendants in Keene Central Square were arrested for handing out leaflets in violation of a city ordinance that required a permit. *State v. Chong*, 121 N.H. 860, 861 (1981). The ordinance specifically allowed the police to impose “reasonable limits and conditions” on the use of such permits. *Id.* The court held that this ordinance was unconstitutional because it violated the defendant’s constitutional right of free speech and assembly. *Id.* at 861-62. Further, the court stated the following with respect to the vagueness of

the ordinance... “The ordinance is particularly offensive because it gives one governmental official unfettered discretion to determine who may distribute handbills in the City of Keene.... The United States Supreme Court has consistently held statutes placing unlimited discretion in one government official unconstitutional.” *Id.* at 862.

The absence of a statute or ordinance prohibiting certain individuals from entering Keene Central Square makes the police order even more egregious than *City of Chicago v. Morales* and *State v. Chong*. If Colson had carefully studied city and state law, he would have no notice that skateboarding on Keene Central Square would result in a police order banning him from the square. Applying the principles of the vagueness doctrine, as in *City of Chicago v. Morales*, the act of prohibiting Colson from Keene Central Square violates the Due Process Clause because Colson did not have any notice that skateboarding in the Keene Central Square would result in a police order prohibiting him from entering the square. Additionally, like in *City of Chicago v. Morales*, the Keene police’s actions were “arbitrary and discriminatory.” As stated in *State v. Chong*, by writing this order, the police exercised unlimited and unfettered discretion, in violation of the United States Constitution.

Colson has a liberty interest, protected by the Due Process Clause of the Fourteenth Amendment, to be in Keene Central Square. This liberty interest cannot be abridged by the unfettered, arbitrary actions of a single police officer acting with unlimited discretion. For these reasons, the police order prohibiting Colson from entering Keene Central Square is an unconstitutional violation of Colson’s Due Process rights. Therefore, the state cannot prove that Colson was not “licensed or privileged” to enter the Keene Central Square and cannot establish a claim for criminal trespass.

III. The police order is an unconstitutional violation of Colson's free speech rights under the First Amendment of the United States Constitution and Part 1, Article 22 of the New Hampshire Constitution because it is an indirect attempt to prevent Colson from asserting his political and social views.

The purpose of the police order requiring Colson to stay away from Keene Central Square is to usurp Colson's First Amendment and New Hampshire Constitution Part 1, Article 22 right of free speech by preventing Colson from speaking to parking enforcement officers and asserting his social and political views. Alan Givetz, a Keene City parking enforcement officer, complained about Colson's presence in Keene Central Square. *Email from Alan Givetz* (April 17, 2013). The email from Alan Givetz makes no mention of illegal skateboarding in Keene Central Square. *Id.* Additionally, a condition of Colson's bail orders Colson to "have no contact with Lynn and Alan." *Orders and Conditions of Bail for State v. Graham Colson* (April 18, 2013). Lynn and Alan are both Keene City parking enforcement officers. The bail condition has no relationship to illegal skateboarding and is not limited to Keene Central Square. These facts demonstrate that this is not a neutral prosecution, but rather an attempt to prevent Colson from speaking to parking enforcement officers and expressing his beliefs.

Colson is a member of a group called "Free Keene." Free Keene often participates in an activity called "Robinhooding" where members of the group ("Robinhooders") fill expired parking meters with coins to prevent car owners from receiving parking tickets. The City of Keene opposes this activity and has filed suit against six members of Free Keene, including Colson, to prohibit the six individuals from coming within 50 feet of parking attendants. The City of Keene has been vocal about trying to prevent these six Robinhooders from Robinhooding in Keene Central Square. The ability of these six individuals to continue Robinhooding is a separate issue to be litigated in a separately scheduled civil hearing. The true purpose of police order prohibiting Colson from being in Keene Central Square is to stop Colson from expressing

his social and political views through Robinhooding. For this reason, the police order violates Colson's First Amendment and New Hampshire Constitution Part 1, Article 22 right of free speech.

In *Flower v. United States*, the petitioner was arrested for quietly passing out flyers on a street located on a Texas military base. *Flower v. United States*, 407 U.S. 197, 197 (1972). The court overturned the petitioner's conviction because although the street was on the military base, it was a public street where cars and walkers constantly travel. *Id.* at 198. The court specifically stated: "the base commandant can no more order petitioner off this public street because he is distributing leaflets than could the city police order any leafletter off of any street." *Id.* Further, the court stated the following regarding an individual's First Amendment constitutional rights: "streets are natural and proper places for the dissemination of information and opinion" and "one who is rightly on a street which the state has left open to the public carries with him, there as elsewhere, the constitutional right to express his views in an orderly fashion." *Id.* at 198-99. Similarly, a New Hampshire case expresses the importance of public squares by stating the following, "traditional public forums are fundamental to the continuing vitality of our democracy, for "time out of mind, [they] have been used for the purposes of assembly, communicating thoughts between citizens, and discussing public questions.'" *Doyle v. Comm'r, N.H. Dep't. of Resources & Economic Dev.*, 163 N.H. 215, 223 (2012).

The police order prohibiting Colson from entering Keene Central Square is even more egregious than that in *Flower* because the police order prohibits Colson himself from entering Keene Central Square, rather than prohibiting Colson from engaging in a particular activity. As in *Flower*, the city police officer was not permitted to order Colson to stay away from a public street such as the Keene Central Square. Similarly, as in *Flower*, Colson has a constitutional right

to express his social and political views in an orderly fashion in the Keene Central Square. This constitutional right is consistent with the use of public squares, “for the purposes of assembly, communicating thoughts between citizens, and discussing public questions.” *Doyle*, 163 N.H. at 223.

For these reasons, the police order’s attempt to prevent Colson from entering the Keene Central Square and expressing his social and political views is unconstitutional under the First Amendment of the United States Constitution and Part 1, Article 22 of the New Hampshire Constitution. Therefore, the state cannot prove that Colson was not “licensed or privileged” to enter the Keene Central Square and cannot establish a claim for criminal trespass.

CONCLUSION

The police order preventing Colson from entering Keene Central Square is invalid for the following reasons: the order is not authorized by city or state law and is an unconstitutional violation of Colson’s Due Process rights, First Amendment rights guaranteed by the United States Constitution and Part 1, Article 22 rights guaranteed by the New Hampshire Constitution. For these reasons, the State cannot prove that Colson was not “licensed or privileged” to enter Keene Central Square. Therefore, the State’s claim for criminal trespass must be dismissed.

Respectfully Submitted,

GRAHAM COLSON

By His Attorneys,

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CERTIFICATE OF SERVICE

I hereby certify that on this 24 day of July, 2013, I mailed by U.S. Postal Service First Class Mail a copy of COLSON'S MOTION TO DISMISS to Jean M. Kilham, Esq., Keene Police Department Prosecutor.

Jon Meyer, Esq.