

FILED

STATE OF MINNESOTA

DISTRICT COURT

2009 MAY 15 PM 12:09
COUNTY OF RAMSEY

SECOND JUDICIAL DISTRICT

RAMSEY DISTRICT COURT

State of Minnesota,

District Court File No. 62-CR-08-10443

Plaintiff,

vs.

ORDER

Sean Patrick McCoy,

Defendant.

The above-entitled matter came on before the undersigned Judge of District Court on April 28, 2009 on defendant's motion for a new trial. Steven Christie, Esq., Assistant St. Paul City Attorney, appeared on behalf of the State of Minnesota, and Bruce Nestor, Esq., appeared on behalf of defendant who was excused from attending this hearing.

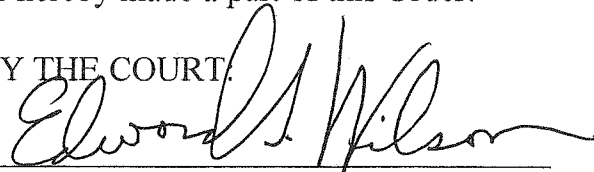
Based upon all the files, records, and proceedings herein, and the arguments of counsel, the court makes the following:

ORDER

1. The defendant's motion for a new trial is granted.
2. The attached Memorandum is hereby made a part of this Order.

Dated: May 15, 2009.

BY THE COURT:



EDWARD S. WILSON
Judge of District Court

MEMORANDUM

FACTS AND PROCEDURAL BACKGROUND

The defendant was involved in demonstrations and protests held in conjunction with the Republican National Convention in St. Paul in September 2008. As a result of his alleged unlawful activities during these protests and demonstrations on September 1, 2008, he was charged by the City of St. Paul with unlawful assembly, obstructing traffic, fleeing a police - not in a motor vehicle, and public assembly without a permit. The defendant moved for a judgment of acquittal at the conclusion of the State's case. The court granted the defendant's motion with respect to the charges of unlawful assembly and obstructing traffic, as it determined that the State had failed to present sufficient evidence from which a reasonable jury could find the defendant guilty of those charges. The court denied the motion with respect to the charges of public assembly without a permit and fleeing a police officer - not in a motor vehicle.

The jury found the defendant not guilty of the charge of fleeing a police officer – not in a motor vehicle and guilty of the charge of public assembly without a permit. This court imposed a fine of \$50 for that offense. In his instant motion, the defendant requests a new trial on the following grounds:

1. The jury instructions were erroneous as a matter of law because, as written, they violated the defendant's right to a unanimous verdict.
2. The jury instructions omitted an essential element of the offense.

3. St. Paul Leg. Code Chapter 366A is unconstitutional on its face.
4. St. Paul Leg. Code Chapter 366A is unconstitutional as applied to this defendant.
5. The verdict is contrary to the evidence.

DISCUSSION

A. THE DEFENDANT'S RIGHT TO A UNANIMOUS VERDICT

The defendant argues that the court's jury instructions for the offense of public assembly without a permit "combined four different substantive offenses into a single instruction." Defendant's memorandum, 2. The defendant maintains that the first element combined the separate offenses of "engaging in" or "conducting" when they constitute two very different types of behavior and not different ways of committing the same offense. *Ibid.* In addition, he argues that the definition of "parade" and "public assembly" have "fundamentally different" definitions. This, he maintains, was improper because the jury must unanimously agree on which acts the defendant committed if each act constitutes an element of the offense. The court does not agree with the defendant's analysis. This case is not analogous to State v. Stemph, 627 N.W. 2d 352 (Minn. App. 2001), one of the cases which the defendant cites in support of his motion. In Stemph, the court of appeals reversed the defendant's conviction for possession of methamphetamine when he was charged with one count of possession and the State included two different scenarios under which he might have possessed the drugs in that same count. The court of appeals found that this

violated the defendant's right to a unanimous verdict because some jurors could have believed the appellant possessed the methamphetamine found in one location while others could have believed that he possessed the methamphetamine found in a second location without necessarily agreeing unanimously on whether he possessed it at any one place. 627 N.W. 2d 358. That is not the situation here where the State neither argued nor presented evidence that the defendant engaged in separate and distinct acts, either of which would have violated the statute. More to the point, it does not matter whether the defendant engaged in or conducted a parade or public assembly, as long as the State presented sufficient evidence to persuade a jury beyond a reasonable doubt that he did one or the other at the date and place charged.

Similarly, the court is not persuaded that the defendant was deprived of his right to a unanimous verdict because the jury instructions provided that one of the elements of public assembly without a permit is that the defendant engaged in or conducted a parade or public assembly. The defendant makes the same argument that he did with respect to the terms "engaged in" or "conducted" in that he maintains some of the jurors could have concluded that he engaged in a parade while others could have concluded that he engaged in a public assembly. Defendant's memorandum, 3. The distinction between a parade and public assembly is not of great significance with respect to the question of whether or not the defendant was denied a right to a unanimous verdict in this case. While the term "public assembly" has a more specific definition in that it requires "more than twenty-five (25) persons

for a common purpose...” the activity regulated – that is to say, meetings, marches, demonstrations, processions, motorcades, picket lines, rallies, or gatherings *upon the streets, sidewalks or other public grounds*, is so similar that this distinction is insignificant for the purposes of this analysis. St. Paul Leg. Code sec. 366A.02 (c), (f). (emphasis added) It is clear that the city adopted this ordinance for the purpose or regulating the wide variety of demonstrations listed, and the State did not charge the defendant nor argue to the jury that defendant’s violation consisted of separate and distinct acts.

B. AN ESSENTIAL ELEMENT OF THE OFFENSE WAS OMITTED FROM THE INSTRUCTIONS

The defendant’s most compelling argument is that the jury instructions omitted an essential element of the offense of participating in a public assembly or parade without a permit. The court’s instructions for this charge, in relevant part, were “whoever engages in or conducts any parade or public assembly without a permit issued by the chief of police is guilty of a crime.” The court crafted its instructions from the St. Paul Leg. Code sec. 366A.01 (a) which, the State points out, is the section of the ordinance under which the defendant was charged. The defendant argues, however, that this instruction was in error because it failed to include the knowledge requirement that is set forth in St. Paul Leg. Code sec. 366A.14 (b) which provides “it shall be unlawful for any person to participate in a parade, race, or public assembly *for which the person knows* a permit has not been granted....” (emphasis

added) The ordinance states that this prohibition “shall apply to all parades, races and public assemblies. *Ibid.* The State maintains that this section of the ordinance does not apply to the defendant because he was not charged under that section. The court does not agree with the State’s interpretation as the ordinance clearly states that the prohibitions listed apply to all parades and public assemblies. In other words, while the State may have charged the defendant under sec. 366A.01, it is still bound by the requirements of sec. 366A.14 of the ordinance. The court does not believe that this was harmless error as it relieved the State of any responsibility of proving knowledge of whether or not a permit had been granted for the demonstration. Under the circumstances, the court finds that it erred when it failed to give an intent instruction for this charge. Further, this error was plain and affected substantial rights of the defendant. State v. Vance, 734 N.W. 2d 650 (Minn. 2007). Accordingly, the court must grant the defendant’s motion for a new trial.

Because the court has granted the defendant’s motion for a new trial, it will not comment upon his claim that the verdict is not supported by the evidence other than to say that it believes that the jury’s verdict was reasonable given the evidence and the instructions that it received.

C. DEFENDANT’S CLAIM THAT CHAPTER 366 OF THE ST. PAUL LEG. CODE IS UNCONSTITUTIONAL ON ITS FACE

The defendant argues that Chapter 366A of the St. Paul Leg. Code is unconstitutional because it “explicitly regulates expressive conduct based on the

viewpoint of the regulated actor and because it imposes a permit requirement on groups too small to create a significant governmental interest to outweigh the burden on protected activity.” Defendant’s memorandum, 7. As the defendant himself points out, “ordinances, like statutes, are presumed valid and may not be found unconstitutional unless clearly invalid or shown beyond a reasonable doubt to violate the constitution.” Press v. City of Minneapolis, 553 N.W. 2d 80, 84 (Minn. App. 1996) (citations omitted). The party challenging the ordinance’s constitutionality has the burden of proof. *Ibid.*

The defendant cites Knowles v. City of Waco, 462 F.3d 430 (5th Cir. 2006) in support of his argument that St. Paul’s ordinance is facially unconstitutional. In Knowles, the court of appeals found that Waco’s parade ordinance, which, like St. Paul’s ordinance exempted funerals and government agencies from its requirements, was unconstitutional. The court held that “Waco’s claims that the exceptions to the parade ordinance are consistent with the ordinance’s goal of promoting traffic safety are not justified...” 467 F.3d at 437. There are several problems with defendant’s argument. First, the city has not argued, and the ordinance does not state that it was promulgated solely for the purpose of promoting traffic safety, as was the case with the Waco ordinance. Next, one federal circuit court of appeals has determined that a funeral procession is a valid exemption from a parade permit requirement. In Stonewall Union v. City of Columbus, 931 F.2d 1130, the court of appeals held:

A funeral procession is not a parade because it does not require the closing off of streets but requires only that the cars involved will be

allowed to continue through red lights in order to keep the procession together. This procession does not interfere with the flow of traffic in the same way that a parade does, which requires the closing off of entire streets...

931 F.2d at 1138.

Finally, the defendant argues that he “stands convicted for being present with a group of people who are not favored by the elected officials of the City of St. Paul, not because his conduct is any different from the average Wild [hockey team] fan.” Defendant’s memorandum, 9. The defendant presented no evidence at trial, nor cited facts in his memorandum which support this allegation. Further, the court has found nothing in the ordinance which suggests that it was enacted to suppress the views of less “favored” people. Indeed, in three separate sections, the ordinance specifically counsels that the chief of police may neither discriminate based upon or consider the speech content of the event in determining whether to waive the minimum filing period, assess fees for police services, or grant or deny permits. See sec. 366A.04, 366A.05, 366A.07. Further, the evidence adduced at trial, including the defendant’s own testimony, was that the defendant engaged in a sanctioned march with other protesters earlier on the day of his arrest. Accordingly, the defendant’s argument is without merit.

D. DEFENDANT’S CLAIM THAT CHAPTER 366 IS OVERBROAD

The defendant argues that Chapter 366A “is not ‘narrowly tailored’ because it is overbroad and seeks to regulate groups too small to, on a *per se* basis, create a

significant enough governmental interest to justify imposition of a permit requirement.” Defendant’s memorandum, 10. St. Paul Leg. Code sec. 366A.02 defines a “public assembly” as “any meeting, demonstration, picket line, rally, or gathering of more than twenty-five (25) persons for a common purpose as a result of prior planning...” Defendant argues that twenty-five (25) people is an unreasonably low threshold and maintains that “requiring an advance permit for groups as small as twenty-six (26) people before they are allowed to protest in a public forum, sweeps too broadly and is not narrowly tailored to achieve the city’s safety interest.” Defendant’s memorandum, 11. In support of this argument, he cites Thomas v. Chicago Park District, 534 U.S. 316 (2002) in which the United States Supreme Court upheld a Chicago ordinance which required a permit for groups of 50 or more people. He urges that this court determine that 50 people is a “reasonable *per se* lower limit, in that such a group poses a reasonable risk of disruption to traffic that a group as small as twenty-six (26) does not.” Defendant’s memorandum, 12. The United States Supreme Court did not set the number 50 or any other number as a threshold to determine the validity of that or similar regulatory ordinances. Rather, it merely upheld the regulatory scheme in that case where the ordinance set forth a requirement that a permit be obtained for groups of larger than 50 people who wish to use the Chicago park facilities.

Some federal courts have held that certain city ordinances were not narrowly tailored because they were written in such a way because they would ban activity of

groups as small as two people walking on a public right of way with a common purpose or goal. See *e.g.*, American- Arab Anti-Discrimination Committee v. City of Dearborn, 418 F.3d 600, 608 C.A.6 (2005). That is not the case with this ordinance, which sets a threshold of 25 before a permit is required. The court does not find that this an unreasonably low threshold and, as such, finds that the defendant has failed to meet his burden on this issue as well.

ESW