COMMONWEALTH OF MASSACHUSETTS

SINGLE JUSTICE OF THE APPEALS COURT

Single Justice Docket No. _____
Superior Court Docket No. 2282CR0117

COMMONWEALTH,
PLAINTIFF/APPELLEE,

v.

TRACEY ANNE SPICUZZA, LORENA JENKINSON, DANA STEWART LEONARD, and PAUL CRISTOFORO,
INTERVENORS/APPELLANTS

ON APPEAL FROM AN INTERLOCUTORY ORDER OF
THE NORFOLK SUPERIOR COURT, NORFOLK COUNTY

Memorandum of Law in Support of Petition for Relief Under G.L. c. 231, § 118 by Intervenors/Appellants Tracey Anne Spicuzza, et al.

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Memorandum of Law

Intervenors Tracey Anne Spicuzza, Lorena Jenkinson, Dana Stewart Leonard, and Paul Cristoforo herein petition the Single Justice under G.L. c. 211 § 3 for relief from interlocutory orders of the Superior Court.

The Issue

"The principal purpose of the First Amendment's guaranty is to prevent prior restraints." In re Providence Journal Co., 820 F.2d 1342, 1348 (1st Cir. 1986). The Norfolk County Superior Court created a "Prior Restraint Zone" prohibiting all demonstrations (without defining that term) in a vaguely-defined area, but clearly encompassing a broad swath of traditional public forums. It did so without considering arguments that could have helped tailor the relief when it declined to hear to those who would be directly impacted by the creation of the Prior Restraint Zone.

The Superior Court had no power to legislate such a zone. The Superior Court refused to even consider narrow tailoring. The Superior Court made no findings to

support its actions.[1] The Superior Court refused to consider less restrictive means to address the Commonwealth's ill-defined concerns. The Superior Court declined to so much as *hear* these dissenting voices.

When, as here, a prior restraint impinges upon the right of the public to speak, and forbids pure speech, not speech connected to any conduct, "the presumption of unconstitutionality is virtually insurmountable." In re Providence Journal Co., 820 F.2d 1342, 1348 (1st Cir. 1986). If a court wishes to take away the right to protest, it may not do so without at least entertaining protesters' arguments to the contrary.

"The knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power." In re Oliver, 333 U.S. 257, 271 (1948). "Without publicity, all other checks are insufficient: in comparison of publicity, all other checks are of small account." Id. In this case, the media (aside from one outlet) has been largely absent from performing its

[1] In Richmond Newspapers v. Virginia, 448 U.S. 555, 558 (1980) closure of a courtroom required findings to justify its actions. Closure of a traditional public forum must require the same.

Fourth Estate function, but demonstrators have taken up that slack. The lower court's actions, especially the way its order was crafted, create at least the impression to the public that it was not done for the stated reasons, but rather to insulate itself from publicity and meaningful criticism. This Court should revise the lower court's Order to one that is constitutionally firm.

Procedural History and Relevant Facts

Commonwealth v. Read has been a subject of intense public attention, and there have been regular peaceful demonstrations around the courthouse throughout pretrial proceedings. Demonstrators appear to have exclusively been in support of the Defendant, Karen Read.

On March 26 the Commonwealth asked for a 500-foot buffer zone around the Norfolk County Superior Courthouse during the *Read* trial, banning a broad range of constitutionally protected speech. RA 023-026. The Commonwealth asked for this Prior Restraint Zone because it claimed that the *Commonwealth* had a right to a fair trial, and that the Commonwealth felt that it could not get a fair trial without banning protest.

On April 2 Intervenors filed a Motion to Intervene

for the Limited Purpose of opposing the request to close the outside to assembly and protest (the "Motion to Intervene"). RA 027-047.

The Superior Court denied the Motion to Intervene without a hearing, stating only that the motion was denied "for reasons stated on the record." RA 051. The Superior Court orally stated that Intervention is never permitted in criminal cases, which is false.

The Superior Court then established a 200-foot zone where, *inter alia*, "no individual may demonstrate in any manner, including carrying signs or placards, within 200 feet of the courthouse complex during trial of this case, unless otherwise ordered by this Court." RA 049. The Superior Court, however, claimed that this was to protect the *Defendant's* rights. This is clearly not the case. Defendant Read did not seek this relief—she took no position on the Commonwealth's motion. Rather, it is clear the Superior Court acted to protect the Commonwealth from protest, or to protect the Court itself from embarrassment. It strains belief that the Superior Court entered an order banning demonstrations in favor of Karen Read to protect Karen Read.

Argument

1.0 Standard of Law

Under G.L. c. 231 § 118, a party "aggrieved by an interlocutory order of a trial court justice in the superior court department . . . may file within thirty days of the entry of such order, a petition in the appropriate appellate court seeking relief from such order." The denial of a Motion to Intervene is reviewed *de novo*. Beacon Residential Mgmt., LP v. R.P., 477 Mass. 749, 753 (2017); accord CP 200 State, LLC v. CIEE, Inc., 488 Mass. 847, 848 (2022)(questions of law are considered de novo).

2.0 Interlocutory Review of Motions to Intervene

The Superior Court entered an order which harms the general public, but nobody in the case itself was in a position to advocate for those affected.

In civil cases, denial of intervention is immediately appealable. Reznik v. Garaffo, 466 Mas. 1034, 1035 (2013). There is no identical rule in criminal cases, the SJC recognizes that the media may intervene in criminal cases to challenge orders that close courtrooms. See Globe Newspaper Co. v. Superior Court, 379 Mass. 846 (1980) (deciding newspaper's attempt to

intervene to challenge order closing criminal trial to the public)[2] Protesters have no lesser First Amendment rights than the press. "From the outset, the right of assembly was regarded not only as an independent right but also as a catalyst to augment the free exercise of the other First Amendment rights with which it was deliberately linked by the draftsmen." Richmond Newspapers v. Virginia, 448 U.S. 555, 577-578 (1980). "The right of peaceable assembly is a right cognate to those of free speech and free press and is equally fundamental." Id. (quoting De Jonge v. Oregon, 299 U.S. 353, 364 (1937)). The Commonwealth should be at the forefront of protecting civil liberties, not the first place to try to de-link the importance of all five of the First Amendment's freedoms.

3.0 Denial of Intervention Was Improper

When a trial court tries to take away First Amendment rights *in its very realm*, the Supreme Court requires that it make specific findings justifying

[2] Vacated and remanded in No. 79-1862, 1980 U.S. LEXIS (Oct. 14, 1980) in light of Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980); see also Commonwealth v. Clark, 730 N.E.2d 872, 880 (2000) (trial court granted media entities' motion to intervene regarding order barring electronic media from trial).

closure. Richmond Newspapers v. Virginia, 448 U.S. 555, 558 (1980) Here, it failed to do that and failed to make findings denying intervention. Meanwhile, when Courts seek to close *courtrooms* (where they have greater powers than they have over traditional public forums) intervention is preferred. See, e.g., United Nuclear v. Cranford Ins., 905 F.2d 1424, 1427 (10th Cir. 1990)("the correct procedure for a non-party to challenge a protective order is through intervention") See also, Pub. Citizen v. Liggett, 858 F.2d 775, 783 (1st Cir. 1988); In re Assoc. Press, 162 F.3d 503, 507 (7th Cir. 1998) (intervention is the "most appropriate procedural mechanism" to challenge closure).

Where the government seeks to shut down traditional public forums, in the absence of statutory authority upon which it could be based, the case law is not as rich with cases on point. This may be because it has been obvious that a judge lacks authority to issue such an order. This appears to be a case of first impression, where a court seeks to extend its tentacles outside of its realm (the courthouse) and ensnare *all demonstrations* on property it does not control including

traditional public forums and even private property.[3]

There are cases discussing *legislative* authority over such areas, such as Cox v. Louisiana, 379 U.S. 536 (1965). But despite a good faith effort to find one, Intervenors' counsel is unable to find a single case where a Court purported to command contempt authority over demonstrators outside the courthouse grounds. However, there are analogous cases to consider. When courts seek to close their own courtrooms,[4] third parties (usually media entities) are nearly always permitted to intervene.

It is an affront to due process that a court can deprive hundreds of people of their First Amendment rights without an opportunity to be heard. See Eisai, Inc. v. Hous. Appeals Comm., 89 Mass. Ct. App. 6045, 607 (2016) (non-parties may intervene where they would otherwise suffer 'a substantial injury to a direct and

[3] The Court failed to precisely define where this "First Amendment Exclusionary Zone" is, stating that it is "200 feet of the court complex[.]" The Court *seemed* to mean 200 feet from the outer edge of all court buildings and parking areas, but the Court's imprecision leaves citizens to guess where the zone begins and ends). As it stands, the Order includes the insides and grounds of the library, churches, houses, and businesses, as well as streets and sidewalks.

[4] something they certainly have the authority to do under proper conditions.

certain violation of' their rights").

4.0 The Superior Court's Prior Restraint Order Should be struck down in its entirety, or narrowed by this Court

Courtrooms were long open to the public at the time of the founding. Thus, the First Amendment prohibits the government from summarily closing *courtrooms*. Richmond Newspapers v. Virginia, 448 U.S. 555, 576 (1980).

Sidewalks and streets and parks outside a courthouse are given even greater First Amendment deference than the inside of the courtroom. "For the First Amendment does not speak equivocally. . . . It must be taken as a command of the broadest scope that explicit language, read in the context of a liberty-loving society, will allow." Bridges v. California, 314 U.S. 252, 263 (1941). Sidewalks around courthouses are traditional public forums. United States v. Grace, 461 US 171, 177 (1983), quoting Perry Education Assn. v. Perry Local Educator's Assn., 460 US 37, 45 (1983).

The Court's Prior Restraint Zone, substantially and directly violates the First Amendment. The Superior Court did not even *consider*, much less correctly

analyze, its obligations to narrowly tailor the Zone,[5] nor did it consider, much less implement, any less restrictive means. The Superior Court simply napalmed the entire First Amendment in a vaguely-defined area.

The Court did not define "demonstrate," yet it could encompass a broad swath of constitutionally protected conduct that would have no possible effect on the purported purpose for the Zone. Given the ill-defined term, citizens are left to guess what they can and cannot do. Can they march in a single column? Not if "demonstrate" prevents that. Can they hold a candlelight vigil? Probably not. When they are left to define "demonstrate" on their own, and the penalty for guessing wrong is contempt, this does not even meet rational basis review, much less strict scrutiny.

Temporally, when does this restriction apply? The Superior Court said it was "during trial." Is that the six week period of trial, or is it the technical interpretation of "gavel to gavel?" If the former, that

[5] That the Commonwealth sought an even broader zone does not mean the Court did its narrow tailoring duty. In fact, the Commonwealth asked for 500' from the courthouse, but the Court implemented what seems to be a *larger* area of 200' from the "*courthouse complex*." Even the Commonwealth, therefore, seems to have asked for narrower tailoring than the Court implemented.

would mean even at midnight on a Saturday, there can be no demonstrations. If the latter, then what purpose does it serve, since the jury will not be outside, but will be in the courthouse? The Superior Court's Order is so unbalanced that it does not stand even slightly-rational analysis.

The Court's lack of analysis is made worse by the fact that the order is not limited to anti-government demonstrations, when that is clearly the viewpoint aimed at. Presumably to evade strict scrutiny, the Court created a restriction so broad that it could not even pass rational basis review. Nobody can demonstrate outside even the District Court, down the street, nor the Registry of Deeds, nor at a major intersection. A boisterous complaint to management about poor service in the coffee shop or pilates studio within the Zone violate the Order. Even demonstrating to protest the fact that the Superior Court declared a Constitution-free-zone would be contempt.

If the Superior Court has the power to reach outside the courthouse, and the ban were limited to jury selection only, this might be rational. During trial, the jury can be brought in through the back entrance to

the courthouse, and demonstrators could be banned from that entrance. Any infringement on First Amendment rights from these narrowly tailored and limited remedies would be de minimis enough that more zealous parties might complain, but these Intervenors would not challenge them.[6]

Intervenors suggested the following narrow tailoring devices below:

1. Any restrictions on demonstrations should only be during jury selection, when prospective jurors will be entering through the main entrance and they cannot be instructed to enter through the alternate entrances.

2. Any concerns about tainting the jury or witnesses should be limited to actual contact with jurors or witnesses. Any concerns about demonstrators influencing them should be addressed by bringing jurors and witnesses in through alternate entrances, where there may be reasonable buffer zones enacted, however such buffer zones should be limited to 25 feet on either side of the rear entrance to the courthouse.

[6] Of course, this Court itself has a responsibility to show greater deference to the Constitution than even the Intervenors' arguments request. But, Intervenors have been willing to be reasonable, despite the Superior Court's unreasonable hostility.

3. If there is a specific finding that it is impossible for a juror or witness to enter the courthouse through the back entrance, perhaps then, law enforcement may be called to require that demonstrators face away from the courthouse for the few seconds it takes for that person to enter the courthouse, and then the demonstrators may continue un-restricted once that affected person has entered or exited the building. However, to prevent abuse of this narrowly tailored restriction, there should be a specific factual finding as to why it would be impossible to use the back door, rather than the public facing door to the courthouse.

Intervenors re-urge this narrowing. However the Superior Court would not even *consider* (much less adopt) these curtailments on her Prior Restraint Zone.

5.0 If the Court does not strike down the Order, it Should pronounce that the Order has no effect

What powers was the Superior Court entrusted with that gave her authority over the general public, or over the streets, sidewalks, and public property in her "First Amendment Exclusionary District" she legislated?

The Order *seems* so transparently invalid that demonstrators of extraordinary firmness *might* simply

ignore it, relying on In re Providence Journal Co., 820 F.2d 1342, 1347 (1st Cir. 1986):

> "An order entered by a court clearly without jurisdiction over the contemnors or the subject matter is not protected by the collateral bar rule. Were this not the case, a court could wield power over parties or matters obviously not within its authority -- a concept inconsistent with the notion that the judiciary may the judiciary may exercise only those powers entrusted to it by law."

However, in that landmark case, the Providence Journal did not face being thrown into a jail cell for ignoring a patently unconstitutional order. Intervenors certainly could. They should not be forced to violate the Order, get locked up, and *then* challenge the contempt. This Court should rein in the lower court.

Intervenors should not be left to guess whether this is the case.

Conclusion

In light of the foregoing, the Single Justice should vacate the order of April 4, 2024, denying Intervenors' Motion to Intervene and either vacate the creation of the Prior Restraint Zone or narrow it to a Constitutionally permissible degree.

Respectfully submitted,

TRACEY ANNE SPICUZZA, LORENA JENKINSON, DANA STEWART LEONARD, AND PAUL CRISTOFORO

By their attorneys,

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CERTIFICATE OF COMPLIANCE

I, Marc J. Randazza, hereby certify that the foregoing Memorandum complies with all of the rules of court that pertain to the filing. The Memorandum complies with the applicable length limit in Rule 20.0 because it contains 2,680 non-excluded words in 12-point Courier New font, as counted in Microsoft Word (version: Word for Mac 16.77.1).

/s/ Marc J. Randazza
Marc J. Randazza

CERTIFICATE OF SERVICE

I, Marc J. Randazza, hereby certify that a true and correct copy of the foregoing document was served upon all *pro se* parties and all attorneys of record via first-class mail, postage prepaid, and electronic mail, this 9th day of April 2024, as follows:

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And that a true and correct copy has also been served and filed in the office of the clerk of the trial court from which the matter arose, via first-class mail, postage prepaid, and electronic mail, this 9th day of April 2024, as follows:

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