

VERMONT SUPERIOR COURT
CHITTENDEN UNIT
CIVIL DIVISION

JASON PLOOF,

Plaintiff,

v.

CITY OF BURLINGTON,

Defendant.

Civil Action No. _____

VERMONT SUPERIOR COURT
FILED

JUL 20 2018

Chittenden Unit

COMPLAINT

Jason Ploof, through his attorneys, the American Civil Liberties Union Foundation of Vermont and Dinse, Knapp & McAndrew, P.C., complains against the City of Burlington as follows:

NATURE OF THE CLAIM

1. Jason Ploof files this 42 U.S.C. § 1983 action for declaratory relief, injunctive relief, and damages to protect the rights of Vermonters not to be unlawfully excluded from public parks.

2. Since time immemorial, Vermonters have visited their central parks, greens, or town squares to meet each other, converse, purchase food, distribute information, display art, hold political demonstrations, and actively participate in their community. Such parks are the quintessential public fora: sacrosanct areas of public discourse, camaraderie, and individual enjoyment.

3. Jason Ploof, a born and bred Burlingtonian, has frequented Burlington's central park, City Hall Park, throughout his life, coming to visit the farmers' market, listen to musicians and speakers, view art installations, meet with friends, and generally enjoy the happenings at the heart of Burlington.

4. In July 2015, the City of Burlington stripped Mr. Ploof of his right to be present and participate in the public square for a substantial period of time. Acting pursuant to City policy, the City's police officers issued a no-trespass order prohibiting Mr. Ploof from entering City Hall Park for 90 days for allegedly twice possessing an open container in the park. No hearing rights were afforded Mr. Ploof to challenge the no-trespass order. The police subsequently arrested Mr. Ploof for being "near the fountain" in City Hall Park during the 90-day period.

5. Mr. Ploof brings this action to address the violation of his rights under the U.S. and Vermont constitutions and Vermont common law.

PARTIES

6. Plaintiff Jason Ploof is an individual residing in Shelburne, Vermont.

7. Defendant City of Burlington is a municipality located in Chittenden County, Vermont.

8. At all times relevant to this suit, Defendant did and does own, operate, manage, direct, and control the Burlington Police Department.

9. At all times relevant to this suit, Defendant and its departments employed Burlington Police Officers Michael P. Henry and Joseph Corrow.

10. At all times relevant to this suit, Defendant was and is a "person"

acting under color of law for purposes of 42 U.S.C. § 1983.

JURISDICTION AND VENUE

11. This Court has jurisdiction over the subject matter of this dispute by virtue of 4 V.S.A. § 31.

12. Venue is proper in this territorial unit of the Court under 12 V.S.A. § 402(a).

13. This Court has personal jurisdiction over Defendant because it is located in Chittenden County and the events that give rise to this action occurred within Chittenden County.

FACTS

A. Burlington's City Hall Park Trespass Ordinance

14. In November 2010, Defendant adopted Burlington City Ordinance No. 21-48 (the "Trespass Ordinance").

15. The Trespass Ordinance prohibits certain conduct in City Hall Park, including possession of "open or opened intoxicating liquor" (except as allowed by permit), making "unreasonable noise," and using "obscene language."

16. The Trespass Ordinance imposes a fine for first offenses ranging from a minimum of \$200 to a maximum of \$500, with increasing minimum penalties for subsequent violations by the same individual.

17. The Trespass Ordinance also provides for exclusion from City Hall Park of individuals cited for violation of the Ordinance.

18. The Ordinance requires that individuals ticketed for a first offense “not be permitted within the City Hall Park for the balance of the day.”

19. The Ordinance permits individuals ticketed for a second violation to “be issued an order of no trespass prohibiting the recipient from entering the City Hall Park for a period of up to 90 days.”

20. The Ordinance permits individuals ticketed for a third or subsequent violation to “be issued an order of no trespass prohibiting the recipient from entering the City Hall Park for a period of up to one (1) year.”

21. For second, third, or subsequent violations of the Trespass Ordinance, Defendant provides its law enforcement officers with discretion to determine whether to issue an order of no trespass from City Hall Park and the length of time for which the order will be enforced within the provided parameters.

22. The Trespass Ordinance contains no temporal limitations for increasing minimum penalties or no-trespass terms after a subsequent alleged violation. Thus, a second citation or third citation that occurs months or years after the first may be subject to increased penalties and increased no-trespass terms under the Ordinance.

23. The Trespass Ordinance includes no exemptions for activity protected by the First Amendment, nor any process for challenging a no-trespass order.

24. In contrast, Burlington City Ordinance No. 21-49, which provides parallel authority to City police officers to issue no-trespass orders for prohibited conduct within the Church Street Marketplace, provides a notice and hearing

procedure to challenge no-trespass orders in a proceeding before a panel designated for that purpose. It also allows recipients to request a waiver for, among other things, “the exercise of constitutionally protected activities.”

B. Defendant’s Enforcement of the Trespass Ordinance

25. Defendant has had a policy and practice of banning individuals from City Hall Park through enforcement of the Trespass Ordinance.

26. On information and belief, since at least 2015, the Burlington Police Department has arrested or cited to criminal court no fewer than twenty people for unlawful trespass in City Hall Park under 13 V.S.A. § 3705.

27. These arrests were based on previously provided “trespass notices,” authorized by the Trespass Ordinance.

28. According to Burlington Police Officer affidavits of probable cause submitted with criminal charging documents, the conduct supporting these arrests was predominantly innocent and based on mere presence, such as:

- (a) Sitting on the West-facing steps of City Hall
- (b) Standing near the alley in City Hall Park
- (c) Sitting on a bench in the north west corner of City Hall Park
- (d) Being inside City Hall Park
- (e) Standing approximately twenty feet away from the steps located on the west side of City Hall
- (f) Sitting down in City Hall Park near the steps of City Hall
- (g) Standing near the fountain in City Hall Park

(h) Leaving City Hall Park

29. The statutory authority cited by Defendant for its arrests is Vermont's criminal trespass statute, 13 V.S.A. § 3705. Section 3705 provides that "[a] person shall be imprisoned for not more than three months . . . if, without legal authority or the consent of the person in lawful possession, he or she enters or remains on any land or in any place to which notice against trespass is given . . ."

C. Mr. Ploof's Unlawful Arrest

30. On July 10 and 12, 2015, Defendant's employee, Officer Joseph Corrow, issued municipal tickets to Jason Ploof for allegedly having an open container in City Hall Park in violation of Burlington Code of Ordinances 21-48.

31. On both occasions, Officer Corrow also issued no-trespass notices in accordance with the Trespass Ordinance and Defendant's policy.

32. On July 10, 2015, the no-trespass notice banned Mr. Ploof from City Hall Park for the remainder of the day.

33. On July 12, 2015, the no-trespass notice banned Mr. Ploof from the park for 90 days, and informed Mr. Ploof that a violation of the notice was punishable by imprisonment or a fine under 13 V.S.A. § 3705.

34. Neither the notices nor the ticketing officers provided Mr. Ploof an opportunity or means of challenging, mitigating, or seeking a variance from the trespass terms.

35. On July 22, 2015, Mr. Ploof was in Burlington's city center and saw friends standing near the fountain in City Hall Park. Forgetting about the trespass notice, he walked to them and began a conversation.

36. At approximately 3:42pm, Burlington Police Officer Michael P. Henry observed Mr. Ploof "standing inside City Hall Park near the fountain."

37. Officer Henry approached Mr. Ploof and informed him of the 90-day trespass notice.

38. According to Officer Henry's affidavit of probable cause, Mr. Ploof "did not recall receiving a copy of the trespass notice."

39. Officer Henry arrested and handcuffed Mr. Ploof.

40. Mr. Ploof was brought to the Burlington Police Department station and then jailed in Chittenden Regional Correctional Facility overnight.

41. The following day, Mr. Ploof was arraigned and released from Chittenden Regional Correctional Facility.

42. Following his arrest and imprisonment, Mr. Ploof stayed away from City Hall Park until the 90-day no-trespass order expired because he feared being arrested again.

43. During this time, Defendant's policy and practice prevented Mr. Ploof from participating in or receiving information from the numerous events, community meetings, and farmers' markets held in City Hall Park.

44. The unlawful trespass charge was dismissed by the State's Attorney on October 13, 2015.

45. Mr. Ploof is still liable for a payment order of \$50 for his assigned public defender.

CLAIMS FOR RELIEF

COUNT I

(42 U.S.C. § 1983 and First Amendment, Article Thirteen)

Violation of Mr. Ploof's Freedom to Receive Information and Enter Traditional Public Forum

46. Paragraphs 1-45 are incorporated by reference as if set forth at length here.

47. City Hall Park is the venue for numerous community events. From meetings to concerts, events at City Hall Park facilitate free speech and distribution of information to the public.

48. Mr. Ploof has a constitutionally protected liberty interest to visit, travel through, meet with others in, and receive information in public parks such as City Hall Park under the First Amendment to the U.S. Constitution and Article 13 of the Vermont Constitution.

49. By prohibiting Mr. Ploof from accessing City Hall Park for 90 days, Defendant unlawfully restricted Mr. Ploof's freedom to receive information and enter a traditional public forum, violating his constitutional rights.

50. As a result of Defendant's violation of his rights, Mr. Ploof has suffered and will continue to suffer damages.

51. Because Mr. Ploof continues to frequent City Hall Park and has received prior tickets under the Trespass Ordinance, absent prospective injunctive

relief there is a substantial likelihood that he may be subject to future unlawful no-trespass orders and even longer trespass terms.

COUNT II

(42 U.S.C. § 1983 and Fourth Amendment, Article Eleven, Common Law of Torts)

Violation of Mr. Ploof's Right to Be Free from Unreasonable Seizures, False Arrest, and False Imprisonment

52. Paragraphs 1-45 are incorporated by reference as if set forth at length here.

53. Defendant's Trespass Ordinance and policy of enforcing its City Hall Park no-trespass orders under 13 V.S.A. § 3705 criminalizes the lawful and protected exercise of free movement, speech, and assembly within City Hall Park by authorizing the arrest and prosecution of citizens for criminal trespass.

54. By unlawfully arresting and jailing Mr. Ploof for his mere presence in City Hall Park during an unchallengeable ban, Defendant violated Mr. Ploof's rights to be free from unreasonable seizures, false arrest, and false imprisonment under the Fourth Amendment to the U.S. Constitution, Article Eleven of the Vermont Constitution, and the common law.

55. As a result of Defendant's violation of his rights, Mr. Ploof has suffered and will continue to suffer damages.

COUNT III

(42 U.S.C. § 1983 and Fourteenth Amendment-Procedural Due Process)

Violation of Mr. Ploof's Right to Receive Notice and an Opportunity to Challenge No-Trespass Order

56. Paragraphs 1-45 are incorporated by reference as if set forth at length

here.

57. Defendant has a longstanding practice of issuing no-trespass notices to people under the Trespass Ordinance and has regularly enforced these notices through arrest.

58. Defendant fails to provide any meaningful method for appealing these no-trespass notices.

59. The no-trespass notice takes effect immediately and automatically upon issuance, criminalizing otherwise lawful and constitutionally protected behavior. By providing citizens no opportunity to appeal or challenge a notice, the Ordinance presents a great risk for mistakes in its application and erroneous deprivations of constitutional rights.

60. Defendant has recognized the importance of affording citizens procedural due process protections and protecting First Amendment activities in the Church Street Marketplace Ordinance, which provides a hearing process and a waiver to access the marketplace “for purpose of work, residence, access to government services, the exercise of constitutionally protected activities and/or for any other good reason as determined by a hearing panel.” Burlington City Ordinance No. 21-49(d)(3)(b), (c).

61. Defendant’s issuance of a no-trespass order to and arrest of Mr. Ploof violated his rights to procedural due process under the Fourteenth Amendment to the U.S. Constitution.

62. As a result of Defendant’s violation of his rights, Mr. Ploof has suffered

and will continue to suffer damages.

63. Because Mr. Ploof continues to frequent City Hall Park and has received prior tickets under the Trespass Ordinance, absent prospective injunctive relief there is a substantial likelihood that he may be subject to future unlawful no-trespass orders and even longer trespass terms.

COUNT IV

(42 U.S.C. § 1983 and Fourteenth Amendment-Substantive Due Process)

Violation of Mr. Ploof's Fundamental Right to Access Public Parks and Areas

64. Paragraphs 1-45 are incorporated by reference as if set forth at length here.

65. Mr. Ploof has a constitutionally protected liberty interest to travel through and be present in a public city park under the Fourteenth Amendment.

66. While Defendant has a legitimate interest in maintaining lawful behavior in City Hall Park, it has failed to tailor its Trespass Ordinance to reflect this interest. Instead, the Trespass Ordinance places an absolute ban on a citizen's presence in City Hall Park, without regard to the individual's behavior or reasons for being there.

67. Defendant's enforcement of its Trespass Ordinance to categorically ban Mr. Ploof from City Hall Park violated his substantive due process rights under the Fourteenth Amendment.

68. As a result of Defendant's violation of his rights, Mr. Ploof has suffered and will continue to suffer damages.

69. Because Mr. Ploof continues to frequent City Hall Park and has

received prior tickets under the Trespass Ordinance, absent prospective relief there is a substantial likelihood that he may be subject to future unlawful no-trespass orders and even longer trespass terms.

COUNT V
Declaratory Judgment

70. Paragraphs 1-45 are incorporated by reference as if set forth at length here.

71. There exists an actual controversy between the parties as to the legality of Defendant's Trespass Ordinance and Defendant's practice of issuing no-trespass orders.

72. All Vermont municipal authority must be granted by the State of Vermont.

73. The Trespass Ordinance is not authorized by any Vermont statute or grant of authority.

74. Defendant may not provide notice of trespass to individuals for a public park except through a specific grant of statutory authority from the State of Vermont.

75. Mr. Ploof is entitled to a judgment declaring:

- a. Defendant's policy and practice of arresting individuals for trespass in a traditional public forum violates the U.S. and Vermont Constitutions;

- b. Defendant's Trespass Ordinance, as it pertains to the mandatory and authorized orders against trespass for City Hall Park, violates the U.S. and Vermont Constitutions;
- c. Defendant's policy, practice, and actions, authorized and defined by the Trespass Ordinance, exceed Defendant's limited powers provided by the State of Vermont and thereby violate the laws of the State of Vermont;
- d. The Trespass Ordinance's lack of procedural due process protections render it facially invalid;
- e. Defendant's issuance of a no-trespass order to Mr. Ploof without providing him an opportunity to challenge the order violated the U.S. and Vermont Constitutions; and
- f. Defendant's arrest of Mr. Ploof for merely being present in City Hall Park during an unchallengeable ban constituted an unreasonable seizure under the Fourth Amendment and/or Article 11 of the Vermont Constitution.

REQUEST FOR RELIEF

Mr. Ploof requests that this Court issue the following relief:

- 1. A declaration as set forth in Paragraph 75 above;
- 2. Injunctive relief;
- 3. Compensatory and consequential damages;

4. The costs and expenses of this action, including reasonable attorneys' fees pursuant to 42 U.S.C. § 1988(b); and
5. Any further relief that the Court determines to be just and equitable.

JURY DEMAND

Plaintiff Jason Ploof demands a jury trial on all counts so triable.

Dated at Burlington, Vermont this 20th day of July 2018.

ACLU FOUNDATION OF VERMONT

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