IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
CHARLOTTESVILLE DIVISION

JOHN PETER MISKA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Case No. 3:19-CV-00010**
	)	
THE CITY OF CHARLOTTESVILLE,	)	

Defendant.

PLAINTIFF'S RESPONSE IN OPPOSITION TO THE DEFENDANT'S MOTION TO DISMISS AND MEMORANDUM IN SUPPORT

NOW COMES the Plaintiff, JOHN PETER MISKA, by and through counsel, in opposition to the Defendant's Motion to Dismiss and submits this memorandum in support thereof.

ARGUMENT

I. City Code § 18-25 Violates The Fourteenth Amendment's Due Process Clause On Its Face And As Applied In This Case.

A. Section 18-25 Does Not Provide Fair Notice To Ordinary Citizens of What Conduct Is Forbidden or Permitted.

In its Brief in Support of its Motion to Dismiss, the Defendant argues that Mr. Miska's conduct was "squarely within the 'hard core' of the Ordinance" and therefore his claim is "frivolous" and cannot stand. Defendant's Brief In Support of Motion To Dismiss at 7 (hereinafter "Def. Brief"). The Defendant's argument relies on an outdated standard from *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489 (1982), that has been explicitly overturned by the Supreme Court and the Fourth Circuit and it cannot support its Motion to Dismiss.

Nearly forty years ago the Supreme Court stated, "[a] plaintiff who engages in some

conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others." *Village of Hoffman Estates*, 455 U.S. at 495. "However, the Supreme Court recently backed away from this pronouncement: '[O]ur holdings squarely contradict the theory that a vague provision is constitutional merely because there is some conduct that clearly falls within the provision's grasp.'" *Johnson* v. *Quattlebaum*, 664 Fed. Appx. 290, 294 n.5 (4th Cir. 2016) (citing *Johnson* v. *United States*, 135 S. Ct. 2551, 2560–61 (2015)). "Supreme Court precedent 'squarely contradict[s] the theory that a vague provision is constitutional merely because there is some conduct that clearly falls within the provision's grasp.'" *Doe* v. *Cooper*, 842 F.3d 833, 842–43 (4th Cir. 2016) (citing *Johnson*, 135 S. Ct. at 2560–61).

Even if, *arguendo*, Mr. Miska's conduct suggests he "understood exactly" what items were prohibited, the Supreme Court clarified in *Johnson* v. *United States,* 135 S. Ct. 2551 (2015), that the first requirement to satisfy a facial vagueness claim remains a showing that the statute does not define a criminal offense with sufficient definiteness so that ordinary people understand what conduct is prohibited. *Id.* at 2556. According to *Johnson*, the mere "existence of *some*" constitutional applications of the ordinance do not foreclose a facial challenge. *Id.* at 2561 (emphasis in original). When "applying the constitutional vagueness doctrine, the Supreme Court distinguishes between statutes that 'require[] a person to conform his conduct to an imprecise but comprehensible normative standard' and those that specify 'no standard of conduct.'" *Doe* v. Cooper, 842 F.3d 833, 842–43 (4th Cir. 2016) (citing *Coates* v. *City of Cincinnati*, 402 U.S. 611, 614 (1971)). Statutes falling into the former category have, as the Defendant terms it, a constitutional "core" in "the sense that they 'apply without question to certain activities,' even though

their application in marginal situations may be a close question." *Id.* (citing *Parker* v. *Levy*, 417 U.S. 733, 755–56 (1974)). Conversely, those statutes that "fall into the latter category are unconstitutionally vague." *Id.* "The distinction between these two types of statutes" "may be somewhat difficult to decipher." *Id.* An unconstitutionally vague statute "may still have some clearly constitutional applications." *Id.*; *see also Johnson*, 135 S. Ct. at 2560–61.

1. The Code Is Unclear As To What Conditions Are Required To Make The Restrictions Applicable.

City Code § 18-25(i) prohibits holding, carrying, displaying, or using any "prohibited item" within an area "where an event is taking place with a permit" while Code § 18-25(j) prohibits the same conduct within "a restricted area established by police officers" as a security measure for or in connection with any "event." The City did not issue a permit for any event on the Downtown Mall during the period when the restrictive measures were in effect. Complaint at ¶ 24. The Code defines "event" as either "a *demonstration* or a *special event*, or to demonstrations and special events, collectively." City Code § 18-22 (emphasis added). The terms "demonstration" and "special event" are further defined, with a "demonstration" consisting of:

> [A]n event involving non-commercial expression protected by the First Amendment of the United States Constitution (such as picketing, political marches, speechmaking, vigils, walks, etc.) conducted on public property, the conduct of which has the effect, intent or propensity to draw a crowd or onlookers. This term does not include casual activity by persons which does not have an intent or propensity to attract a crowd or onlookers . . . .

Id.

"Special event" is defined as:

> [S]ports events, pageants, celebrations, historical reenactments, carnivals, music festivals and other entertainments, exhibitions, dramatic presentations, fairs, festivals, races (i.e., runs/walks), block parties,

> parades and other, similar activities, conducted on public property, which (i) are not demonstrations, and (ii) are engaged in by fifty (50) or more persons. The term "special event" shall be construed to include a community event or private organization celebration held in or on city-owned property and is attended by more than fifty (50) people . . . .

Id.

The Defendant argues that the wording provides "sufficient clarity" and is therefore constitutional, Def. Brief at 8, but it is not clear that the Code could even apply to place or circumstances at issue on August 11, 2018. No permitted event, "demonstration," or "special event," took place as defined by the Code and law enforcement does not have the unilateral authority to prohibit otherwise lawful items from public areas. Though there were signs denoting a list of prohibited items and security checkpoints with police presence, Code § 18-22 and § 18-25 could not apply without connection to some qualifying "event." At best, it is unclear what "event" existed in this case or if one took place at all.

In *Doe* v. *Cooper*, 842 F.3d 833 (4th Cir. 2016), the Fourth Circuit affirmed the district court's finding that a North Carolina state law was unconstitutionally vague because it also failed to adequately describe the conditions of application. Registered sex offenders challenged vague location restrictions that made it a felony to knowingly be at any of three enumerated locations. *Id.* The district court held that law did not provide adequate notice of when the restrictions would apply because "there is too wide a range of situations which would cause 'men of common intelligence…[to] necessarily guess at [the statute's] meaning or allow an essentially 'standardless sweep' by law enforcement'". *Doe* v. *Cooper*, 148 F. Supp. 3d 477, 496 (M.D.N.C. 2015). The City Code suffers from a similar lack of clarity in its application.

2. The Code Is Unclear As To What Items Are Prohibited And Where The Restrictions Apply Given The Defendant's Attempt To Apply It To A Large Commercial Area Where Otherwise Lawful Items Remained For Sale And In Open Use.

The Defendant attempts to distinguish the open and observable use of prohibited items on the Downtown Mall as being lawful in some instances by claiming that it took place within the confines of private commercial areas rather than in public space and therefore it was not a part of the "restricted area." The Complaint does not mention that these patrons were in private business areas, but insofar as some of the use may have been, nothing in the City Code limited the restrictions or prohibitions to "public" areas.

Even if such a distinction existed, nothing in the Code listed which, if any, of the otherwise prohibited items would have been permitted in these zones. According to the Defendant's theory, patrons were permitted to be in the observable possession and use of canned drinks and glass bottles (along with air rifles, catapults, or other prohibited items) with no physical barrier separating them from patrons in the public areas. "Ordinary people must understand what conduct is prohibited." *Johnson,* 135 S. Ct. at 2556. It is not clear that the Defendant itself knew what was permitted and what was not, but if the City's prohibitions were meant for security, any reasonable person would have noticed there was no material security or physical distinction between those who were in the two different zones. Nothing in the Code says this sort of private-area possession was permitted, and such an inference only advances Mr. Miska's claim that the ordinance itself is vague.

B. Section 18-25 Encourages Arbitrary And Discriminatory Enforcement

It is a basic principle of due process that "a vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective

basis, with the attendant dangers of arbitrary and discriminatory application." *Grayned v. City of Rockford*, 408 U.S. 104, 108–09 (1972). Sergeant Johnson of the Virginia State Police stated that he and other members of law enforcement noticed other patrons on the Downtown Mall using glass or canned bottles while eating outside, but took no action to cite them for violating the Code. Complaint at ¶ 42. In this case, "law enforcement personnel exercised their own discretion 'on an ad hoc and subjective basis.'" *See Boyd* v. *County of Henrico*, 41 Va. App. 1, 11–12 (2003) (finding local ordinance to be vague and subject to arbitrary, selective enforcement and considering officer's testimony—that several others were in violation of ordinance but went without citation at the same time he was issuing summonses to the plaintiffs—to be a material factor).

The Defendant argues that the wording of the Code instructs law enforcement officers that possession of certain items within public gathering spaces, such as "the pedestrian sidewalk areas of the Downtown Mall," are covered "but not open-air café or other private business areas." Def. Brief at 8. It also suggests that ordinances that draw distinctions between conduct that takes place in public areas versus private areas are easily administered by law enforcement. Def. Brief at 8. The Defendant's argument is erroneous for several reasons.

First, the Code does not distinguish between public and private spaces within a "restricted area." Instead, Code § 18-25(j) simply uses the phrase "within a restricted area established by police officers" and it is reasonably understood to include the entire Downtown Mall, including all outdoor commercial areas. The Defendant proceeds to compare this ordinance with the City's "open container laws." Def. Brief at 8 ("Many municipalities, including Charlottesville, have ordinances that prohibit individuals from

carrying open glass containers of alcohol on public sidewalks—even while such activity is lawful within a private café space operated adjacent to the public sidewalk area."). The open container law is clear in its area of application whereas the ordinance at issue is not. *Compare* City Code § 17-37 ("…in any city park or playground or in any public street (including the downtown pedestrian mall)….") *with* Code § 18-25(j) ("…within a restricted area established by police officers….").

Second, the Complaint does not allege that the other activity Officer Johnson noticed only took place within private business areas or was in those areas at all. The Defendant cannot read facts into the Complaint that are not alleged at this stage, especially if they are considered distinguishing. Finally, even if the other activity did take place in private commercial areas, the location of these open-air private spaces within the Downtown Mall inherently required patrons and staff to traverse the public areas with prohibited items. Unlike those state and local regulations governing the handling of alcoholic beverages, Code § 18-25 does not include a caveat permitting wait staff to transport prohibited items through public areas into private spaces. To read such an exception into the ordinance would only advance Mr. Miska's position that the Code is unclear and encourages selective enforcement.

II. The Complaint States A Plausible *Monell* Claim Against The City For A Violation Of The Fourth Amendment As Miska's Arrest Was Pursuant To City Policy And A Patently Unconstitutional Ordinance.

The Defendant argues that Mr. Miska fails to state a proper claim pursuant to *Monell v. Dept. of Social Services*, 436 U.S. 658 (1978) due to a *respondeat superior* theory. While *Monell* did hold that a municipality could not be held liable "*solely* because it employs a tortfeasor" a local government is liable if a constitutional injury occurs in the

course of the execution of its "policy or custom." *Id.* at 694 (stating that liability may be established "when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury."). In this case, those policies are City Code §§ 18-22, 18-25, and the enactment of a restricted area throughout the Downtown Mall with prohibited items, security checkpoints, and arresting law enforcement. The Defendant goes so far as to cite many of these express policies in its Motion to Dismiss. *See* Def. Brief at 12 (citing Def. Exhibit 4, City Public Safety Order #2).

The Fourth Circuit recognizes that to prevail on a *Monell* claim, a challenger must "(1) identify the specific policy or custom at issue; (2) fairly attribute the policy and fault for its creation to the municipality; and (3) prove the necessary affirmative link between the identified policy or custom and specific violation." *Spell* v. *McDaniel*, 824 F.2d 1380, 1389 (4th Cir. 1987)). Mr. Miska has alleged that the City via legislation and policy, including the City Code, proximately caused the deprivation of his rights. The standard for *Monell* suits is lenient. *See Leatherman* v. *Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168–69 (1993) (ruling that notice pleading is adequate for 42 U.S.C. § 1983 suits against municipalities); *Jordan by Jordan* v. *Jackson*, 15 F.3d 333, 340 (4th Cir. 1994) (holding that a *Monell* claim survives motion to dismiss as long as allegations provide the municipality with "notice of the nature of the claim against them and the grounds on which it rests").

The Defendant goes on to argue that because Officer Johnson had probable cause, a Fourth Amendment violation could not have taken place as alleged. In *Michigan* v. *DeFillippo*, 443 U.S. 31 (1979), the Supreme Court announced that probable cause may

exist under an unconstitutional statute, but with one caveat: "The enactment of a law forecloses speculation by enforcement officers concerning its constitutionality—*with the possible exception of a law so grossly and flagrantly unconstitutional that any person of reasonable prudence would be bound to see its flaws*." *Id*. (emphasis added). Stated simply, "police officers do not have probable cause to arrest individuals for engaging in conduct that the state clearly has no authority to prohibit." *See Leonard* v. *Robinson*, 477 F.3d 347, 359–61 (6th Cir. 2007) (finding arrest was not supported by probable cause because state clearly could not prohibit speaker from using expletives in political speech); *United States* v. *Marshall*, 747 Fed. Appx. 139, 154 (4th Cir. 2018) (Gregory, J., concurring) ("[T]he constitutional protections surrounding Marshall's use of expletives could not have been clearer."); *Brendle* v. *City of Houston, Miss.*, 177 F. Supp. 2d 553, 559 (N.D. Miss. 2001) (holding that arrest was unlawful because statute prohibiting profanity was clearly unconstitutional).

It was patently unreasonable and unconstitutional for the City to criminalize the possession of everyday items, such as canned sweet tea, for the claimed purpose of security when the open and concealed carrying of objects such as firearms remained available, especially when those prohibited items remained for sale and in open use throughout the restricted area and the Downtown Mall. The City had no authority to prohibit the conduct at issue here and it fostered an environment of arbitrary and selective enforcement. The Complaint sufficiently states a claim for a Fourth and Fourteenth Amendment violation and the exception referenced in *DeFillippo* applies.

III. The Defendant's Policy of Stopping Individuals And Searching Their Person And Belongings At The Security Checkpoints Was In Violation of The Fourth Amendment.

In his Complaint, Mr. Miska states that he and others were stopped and checked in their person and their belongings in order to enter the Downtown Mall pursuant to the Defendant's enhanced security measures. Complaint at ¶¶26, 30. In its Motion to Dismiss, the Defendant argues that these policies were reasonable and therefore constitutional. Def. Brief at 12–15. It proceeds to cite the fact that entrants such as Mr. Miska were free to walk away from the security checkpoints and that these measures were not for "general crime control purposes." *Id.* at 14. None of the factors cited by the Defendant are dispositive in this claim.

In *Norwood* v. *Bain*, the Fourth Circuit considered a very similar fact pattern and found the searches of the persons and their belongings in such a context came in violation of the Fourth Amendment. 143 F.3d 843 (1998) (involving the City's blanket search of entrants' persons and belongings as they entered a motorcycle festival) (*vacated in part*, *aff'd in part,* 166 F.3d 243 (4th Cir. 1999) (en banc)); *see also Wilkinson* v. *Forst*, 832 F.2d 1330, 1339–40 (holding airport/courthouse search exception not applicable to justify first-instance pat-down frisk of all persons seeking entry to violence-threatened KKK rally); *Wheaton* v. *Hagan*, 435 F. Supp. 1134 (M.D.N.C. 1977) (holding search exception not applicable to random drug and weapons searches of rock-concert patrons); *Collier* v. *Miller*, 414 F. Supp. 1357 (S.D. Tex. 1976) (holding exception not applicable to random searches of persons attending events at public stadium); *Gaioni* v. *Folmar*, 460 F. Supp. 10 (N.D. Ala. 1978); *Stroeber* v. *Commission Veteran's Auditorium*, 453 F. Supp. 926 (S.D. Iowa 1977) (holding random searches of persons attending concert at public auditorium not justified on *Terry* analogy: no individualized suspicion established before physical search conducted).

The physical searches here were not justified. *Norwood*, 143 F.3d at 853 ("The locally-confined, episodic violence threatened here, hence the public interest in its prevention, was nowhere near the widespread, ongoing violence and commensurate public interest [required to justify a blanket search]."). The reality and imminence of any threat of violence in this case was not a matter of documented public record, *see id.*, but was based only on anecdotal, necessarily speculative information. *See id*. (weighing locality's claim of anticipated violence and finding it insufficient to justify blanket, warrantless searches and seizures). Merely declaring a State of Emergency does not render the Fourth Amendment's protections suspended or null and void.

The Complaint indicates that a relatively large police presence was on site and therefore it is reasonable to infer that alternative, less-intrusive means of security were available and must be factored when considering the totality of the circumstances. *See id*. at 854 ("The record indicates that a not inconsiderable police force had been assembled and was available for patrolling and monitoring" the area). Furthermore, the "procedure was not, as conceived, a practically efficacious one for preventing the introduction" of prohibited items in light of their open use and sale within the restricted area. *See id*. (considering the efficacy of a blanket search procedure to be lacking and therefore contributing to its unreasonableness). The Complaint sufficiently states a claim that the policy of stopping patrons to search their person and their belongings before entry onto the Downtown Mall violated Mr. Miska's Fourth Amendment rights.

CONCLUSION

WHEREFORE, Mr. Miska respectfully requests for this court to DENY the Defendant's Motion to Dismiss and insofar as the court deems any particular claim or

claims to lack the sufficiency necessary to survive the Defendant's Motion, Mr. Miska respectfully requests for leave to file an amended Complaint.

Respectfully submitted,

/s/ Elliott M. Harding

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CERTIFICATE OF SERVICE

I hereby certify that on the 2nd day of April, 2019, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all counsel of record.

Respectfully submitted,

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