SUPERIOR COURT FOR THE DISTRICT OF COLUMBIA
Criminal Division – Misdemeanor Branch

UNITED STATES	*	
v.	*	2021 CMD 000187
EARL A. GLOSSER	*	Judge Neal Kravitz Trial Resumed: October 5, 2022

DEFENDANT'S MEMORANDUM IN SUPPORT OF
HIS MOTION FOR JUDGMENT OF ACQUITTAL

Comes now the Defendant, through undersigned counsel, and provides this memorandum in support of his motion for judgment of acquittal.

1. The question presented by Defendant's motion for judgment of acquittal is whether the Defendant can be found guilty of unlawful entry on the evidence presented. Mr. Glosser's conduct was protected and the test to eject him from the grounds was not met. Additionally, he was not provided with adequate notice that he was on the grounds of the US Capitol or that he was being directed to leave. He was also not provided with adequate information about how to leave or where he would have to stand to have left the grounds. He was also seized prior to being given a meaningful opportunity to leave.

2. Mr. Glosser is charged with one count of unlawful entry for refusing to leave the grounds of the US Capitol Building on January 6, 2021. He is not charged with curfew

violation or any other offense. No evidence was presented that Mr. Glosser was present when the public address system on the Capitol grounds broadcast a notice to leave. No evidence was presented that Mr. Glosser was ever present at the U.S. Capitol building itself or anywhere east of First Street NW.

3. Although officers Harris, Vazquez-Guitierrez, Fellin and Creech have testified that the warning given over the public address ("PA") system of a police car was clear to those officers when it was given, it was unclear on every body worn camera admitted into evidence that captured it, despite other background noise, including music and voices over a megaphone in the crowd being clear. Additionally, every officer to testify was standing near the public address system and the crowd that included Mr. Glosser was much further away. Multiple body cameras in evidence indicate that the crowd that included Mr. Glosser did not move when the announcement to leave was made. The crowd moved in response to police advancing on them. The only officers who testified who were arguably west of the crowd when the address was made over the police car's PA system did not testify about hearing it at all. Officer Quiles testified about hearing the earlier recording over the Capitol PA system at 5:48 and Sgt. Bonilla testified that she could not hear the warnings over the speaker.

4. No signs delineated where the grounds of the Capitol ended. Commander Kyle testified that he thought the crowd had been pushed off of Capitol grounds when they were west of First St. NW. All of the officers who testified as to a reason why the various defendants were arrested testified that it was because of the Mayor's curfew. No officer testified that the defendants were arrested because they remained on the grounds of the Capitol building.

5. Commander Kyle testified that MPD officers on scene could have pushed the group that included Mr. Glosser "to 16th Street" if they had chosen to, far past 3rd Street. Officer Tyrone Harris also testified that the group could have been pushed out to 3rd Street and he did not know why officers were ordered to arrest the group instead.

6. Every officer who has testified on this point has testified that he (or she) believed that MPD was enforcing the Mayor's curfew. Commander Kyle further testified that he believed Mr. Glosser and the rest of the group were off the Capitol grounds prior to being arrested[1]. No officer has testified that they arrested the Defendant for unlawful entry. All of the evidence submitted to this Court indicates that the warning given over the PA system was

1 Interestingly, First Street Northwest is described as the westernmost boundary of the Capitol grounds except for the grassy part between Pennsylvania Avenue and Constitution Avenue in *Feeley v. DC*, 387 F.2d 216, 217 (D.C. Cir 1967).

that he was violating the Mayor's curfew. No police officer testified that the basis for the arrest of this Defendant was unlawful entry or pursuant to a privilege relied upon by MPD.

7. No witness has testified that Mr. Glosser or any member of the group he was with after 6 p.m. assaulted or threatened officers, and, though harsh language may have been used, it was only after Mr. Glosser was seized within any reasonable interpretation of the law. No witness has testified that anyone in this small group attempted to jump any of the "bike rack" style barricades used by the police. To the contrary, the government's allegation is that members of the group didn't leave quickly enough while the police pulled the bike racks around them and encircled them.

8. Contrary to some earlier testimony from Officer Vazquez-Guitierrez that the north side of Pennsylvania Avenue might have been unobstructed, Sgt. Bonilla's testimony and body worn camera confirm that bike rack style obstacles were placed along the north side of the street and officers, upon being given an order to move in, had to separate the bike racks to enter Pennsylvania Avenue from the grassy area to the north.

9. The government has elicited testimony from several officers that people could have left via third street. Setting aside questions about notice, the relevant test is not whether people could have possibly left at a certain point, but whether a reasonable person would have felt

free to leave. The Court of Appeals has held that a person sitting in a lawn chair was seized and would not have felt free to leave "after a team of four armed, uniformed officers drove past him and then reversed to get back to his location; all four officers emerged from the car; all four officers crossed the sidewalk and walked up the concrete walkway, bounded by fencing on either side, directly to where [defendant] was sitting in his lawn chair; and the lead officer, without any explanation, commanded him to 'get up.'" *Hooks v. US*, 208 A.3d 741, 746 (D.C. 2019).

10. Mr. Glosser also directs the court to *Crews v. US*, 263 A.3d 128, 136 (D.C. 2021) (The "sudden appearance of an officer in full tactical gear emerging from a vehicle; the officers' outnumbering other persons; accusatory nature of an officer's questioning, either implicitly or explicitly; officers' tone of voice; repeated or persistent questioning that conveys that the officers were not satisfied with the answers the person gave; officers' request that the person expose his waistband for visual inspection; and inability of a person to leave the area" all described as "circumstances which generally can contribute to a conclusion that there was a nonconsensual encounter with law enforcement...") Mr. Glosser was seized when he was surrounded by numerous officers in tactical gear whether or not there was a conceivable way for him to leave.

11. As to the government's contention that the traffic regulation may serve as a basis for Mr. Glosser's arrest, Mr. Glosser points to the Court of Appeal's holding in *Abney v. US*, 451 A.2d 78, 83 (D.C. 1982) holding a traffic regulation unconstitutional where the government failed to establish "Appellant's presence had actually or potentially threatened the movement of traffic on the Capitol grounds..."

12. In order to preserve the constitutionality of the unlawful entry and capitol grounds statutes, Chief Judge Harold Greene ruled that the statutes' proscriptions must be limited "to the imposition of criminal punishment for acts or conduct which interferes with the orderly processes of the Congress, or with the safety of individual legislators, staff members, visitors, or tourists, or their right to be free from intimidation, undue pressure, noise, or inconvenience." *US v. Nicholson*, D.W.L.R., v.97, n.137, p. 1213, July 17, 1969. The Court of Appeals agreed in a brief opinion reported at 263 A.2d 56 (1970). Mr. Glosser's conduct did not violate this standard.

13. It's important to note that as to Mr. Glosser, there has been no evidence presented that he participated in any way in the activities at the Capitol building that give rise to the many criminal cases now pending in United State District Court. Applying the standard in *Nicholson* relying upon, *Cox v. Louisiana, 379 US 536* (1965). and *Edwards v. SC, 372 US 229*

(1963), Mr. Glosser's conduct prior to being seized by the Metropolitan Police cannot amount to unlawful entry because Mr. Glosser's conduct on January 6, 2021, was protected speech under the First Amendment. Mr. Glosser belonged to no group that committed the acts complained of at the Capitol.

14. However, assuming for argument that Mr. Glosser's actions on that day were not so protected, Mr. Glosser must still be acquitted because his mere presence on the Capitol grounds, without more, cannot be sufficient to sustain a conviction. In reviewing *Wheelock*, *Shiel*, *Abney*, *Nicholson*, *Hemmati* and *Hasty*, cited below, there appears to be no case in which the entire Capitol grounds was closed to the public for any length of time. Reviewing *Wheelock* in particular and the analysis of whether a demonstration is constitutionally protected or not, Mr. Glosser's conduct prior to being seized is closer to that of the tourists mentioned than the demonstrators. He was merely present until he was surrounded by riot police with helmets and shields.

15. Looking to elements 2. and 5. of the unlawful entry pattern jury instruction, 5.401B, to be convicted of the crime of unlawful entry, Mr. Glosser would need to have been directed to leave the property and to know (or should have known) that he remained on the property. Testimony of several of the officers, including Harris and Priebe, revealed that the crowd did

not move when a warning was given over a police car's PA system but did move when police approached them. Sgt Harris and Commander Kyle testified that the entire crowd could have been vacated from the Capitol Grounds. No one testified about any signs or any other signal that would lead a reasonable person to understand that the area of Pennsylvania Avenue between First and Third Streets NW was part of the Capitol grounds and not part of the Mall or the District of Columbia. Not only was the garbled, inaudible announcement given to Mr. Glosser inadequate to put him on notice to leave, he couldn't have possibly known where or how far he had to go. For those reasons, the government hasn't proven element 6., refusal to leave after being directed.

The Defendant, Mr. Glosser, adopts and incorporates any arguments made by the co-defendant, Ms. Malimon, to the extent they are applicable to him. For the foregoing reasons, the Defendant, Earl A. Glosser, moves this Court to enter a judgment of acquittal on his behalf pursuant to Super. Ct. Crim. R. 29.

MEMORANDUM OF POINTS AND AUTHORITIES

16. *Abney v. US, 451 A.2d 78, 83 (D.C. 1982);*

17. *Abney v. US*, 616 A.2d 856 (1992);

18. *Dellums v. Powell*, 566 F.2d 167 (D.C. Cir. 1977);

19. *Feeley v. DC*, 387 F.2d 216 (D.C. Cir. 1967);

20. *Glover v. US*, 250 A.2d 556 (1969);

21. *Hasty v. US*, 669 A.2d 127 (1995);

22. *Hemmati v. US*, 564 A.2d 739 (1989);

23. *O'Brien v. US*, 444 A.2d 946 (1982);

24. *Shiel v. US*, 515 A.2d 405 (1986);

25. *Wheelock v. US*, 552 A.2d 503 (D.C. 1988);

26. *US v. Nicholson*, 263 A.2d 56 (D.C. 1970);

27. *US v. Nicholson, D.W.L.R.*, v.97, n.137, p. 1213, July 17, 1969;

Respectfully Submitted,

/s/ Joseph W. Fay

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CERTIFICATE OF SERVICE

I hereby certify that on October 7, 2022, a copy of the foregoing was served upon the United States Attorney via the case file express file and serve function.

/s/ Joseph W. Fay

Joseph W. Fay