

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss

SUPREME JUDICIAL COURT
FOR SUFFOLK COUNTY
No. SJ-2024-0122
No. SJ-2024-0123

NORFOLK SUPERIOR COURT
No. 2282CR0117

TRACEY ANN SPICUZZA & others¹

vs.

COMMONWEALTH & another.²

FREEDOM TO PROTEST COALITION & others³

vs.

COMMONWEALTH & another.⁴

MEMORANDUM OF DECISION AND JUDGMENT

I have before me two petitions pursuant to G. L. c. 211, § 3, seeking relief from an order of a Superior Court judge (Cannone, J.) establishing a buffer zone in which demonstrations are prohibited within 200 feet of the Norfolk County courthouse

¹ Lorena Jenkinson, Dana Stewart Leonard, and Paul Cristoforo.

² Karen Read.

³ Nicholas Rocco and Jon Silveria.

⁴ Karen Read.

complex during a particular criminal trial.⁵ As to one of the petitions, the petitioners also challenge an order denying their motion to intervene for the limited purpose of opposing the Commonwealth's motion to establish the buffer zone. For the following reasons, the petitions are DENIED.

Background. The petitions arise from the prosecution of Karen Read (defendant), who has been charged with murder and other offenses. The case has attracted considerable public interest, including demonstrations in the vicinity of the courthouse. According to the trial judge's findings, "protestors have shouted at witnesses and confronted family members of the victim. Individuals have also taken to displaying materials which may or may not be introduced into evidence during trial, and airing their opinions as to the guilt or innocence of the defendant on their clothing or on signage. Witness intimidation has also been a prevalent issue in this case."⁶ To prevent such demonstrations from jeopardizing the fairness of the trial proceedings, the Commonwealth moved for an order barring demonstrations within a buffer zone of 500 feet around the courthouse. A group of individuals wishing to

⁵ In the same ruling, the trial judge also prohibited the wearing or exhibiting of certain items in the courthouse during the trial. Neither petition challenges this prohibition.

⁶ The petitioners do not challenge these factual findings.

demonstrate outside the courthouse during the trial moved to intervene for the limited purpose of opposing the Commonwealth's motion. The trial judge denied the motion to intervene. As to the Commonwealth's motion, the trial judge ordered "that 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. . . Individuals are also prohibited from using audio enhancing devices while protesting" (buffer zone order). The would-be interveners filed a G. L. c. 211, § 3, petition challenging both the denial of intervention and the buffer zone order. Shortly thereafter, a second G. L. c. 211, § 3, petition was filed by an association of individuals who wish to demonstrate in the buffer zone during the trial and two members of the association.

Discussion. "[A] party seeking extraordinary relief [under G. L. c. 211, § 3, must demonstrate both "error that cannot be remedied under the ordinary review process" and a "substantial claim of violation of [his] substantive rights."'" Ardanaeh v. Commonwealth, 492 Mass. 1019, 1020 (2023), quoting Care & Protection of Zita, 455 Mass. 272, 277-278 (2009). See Planned Parenthood League of Mass., Inc. v. Operation Rescue, 406 Mass. 701, 706 (1990). "A single justice faced with a G. L. c. 211, § 3, petition [must perform] a two-step inquiry," first

assessing whether this court can properly become involved in the matter and second evaluating the merits of the petition.

Commonwealth v. Fontanez, 482 Mass. 22, 24 (2019).

The denial of the motion to intervene does not pass the first step of the inquiry. In my judgment, the decision whether to allow third parties to intervene in a criminal case is an ordinary procedural ruling that does not "present[] the type of exceptional matter that requires the court's extraordinary intervention." Id. at 25. Relief from that ruling is therefore denied.

The buffer zone order, in contrast, does pass the first step. The defendant's prosecution has attracted extraordinary public interest, and the creation of buffer zone around a courthouse is itself highly unusual. Moreover, where the buffer zone order was issued less than two weeks before trial, the ordinary appellate process is not adequate to remedy the harm, if any, to the petitioners' claimed First Amendment right to demonstrate near the courthouse during the trial.⁷ The trial would be over before any appeal could be heard. Accordingly, I turn to the merits of the buffer zone order.

⁷ On a related point, although I do not disturb the denial of the motion to intervene, I find that the petitioners have standing to challenge the buffer zone order pursuant to G. L. c. 211, § 3, where they allege that the buffer zone order infringes their First Amendment rights.

By creating an area where the petitioners may not demonstrate during the trial, the buffer zone order does impose some restrictions on the petitioners' speech.⁸ However, not every government action that restricts speech violates the First Amendment. In particular, "even in a public forum the government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions 'are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.'" Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989), quoting Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293 (1984). The buffer zone order passes muster under these standards.

⁸ Contrary to the petitioners' argument, however, the buffer zone order is not a prior restraint on speech. See Madsen v. Women's Health Center, Inc., 512 U.S. 753, 763 n.2 (1994) (injunction creating buffer zone around abortion clinic did not constitute prior restraint: "petitioners are not prevented from expressing their message in any one of several different ways; they are simply prohibited from expressing it within the 36-foot buffer zone"). Similarly, the petitioners' reliance on cases concerning courtroom closure is misplaced. No one is prevented from entering or remaining in the buffer zone, much less the courtroom; only demonstrations are prohibited in the buffer zone.

First, the buffer zone order is content neutral. The "principal inquiry in determining content neutrality is whether the government has adopted a regulation of speech 'without reference to the content of the regulated speech.'" Madsen v. Women's Health Center, Inc., 512 U.S. 753, 763 (1994), quoting Ward, supra. The buffer zone order prohibits all demonstrations within the buffer zone without respect to their content. Moreover, even if the "petitioners all share the same viewpoint regarding" the defendant's trial, this "does not in itself demonstrate that some invidious content- or viewpoint-based purpose motivated the issuance of the order." Madsen, supra.

Second, the buffer zone order is narrowly tailored to serve a significant government interest, namely, the integrity and fairness of the defendant's trial.⁹ Demonstrations near the courthouse threaten this interest by exposing witnesses and jurors to intimidation and harassment, undermining their ability

⁹ Indeed, if I were to apply strict scrutiny to the buffer zone order, I would find that the government has a compelling interest in preserving the integrity and fairness of the trial. Cf. Lyons v. Secretary of the Commonwealth, 490 Mass. 560, 587 (2022), quoting Burson v. Freeman, 504 U.S. 191, 199 (1992) (upholding buffer zone prohibiting electioneering near polling places: "each State 'indisputably has a compelling interest in preserving the integrity of its election processes'"). Surely, jurors selected to determine the defendant's guilt or innocence, no less than voters, "are entitled to peace while they undertake this most 'weighty civic act.'" Lyons, supra at 591.

to testify or to serve without fear of reprisal.¹⁰ In addition, demonstrations may expose jurors to extraneous material beyond the evidence presented at trial, improperly influencing their decision. As to narrow tailoring, the First Amendment does not require that a content-neutral time, place, or manner regulation "be the least restrictive or least intrusive means" of serving the government's interest. Ward, supra at 798. Rather, in the case of an injunction, the question is "whether the challenged provisions . . . burden no more speech than necessary to serve a significant government interest." Madsen, supra at 765. In considering this question, I give deference to the trial judge's "familiarity with the facts and background of the dispute," id. at 770, as well as her knowledge of the physical layout of the courthouse complex and its environs. The buffer zone order only minimally burdens the petitioners' speech. It merely moves demonstrations 200 feet from the courthouse, a modest distance that can be traversed in less than a minute. Cf. Lyons v. Secretary of the Commonwealth, 490 Mass. 560, 589 (2022) (upholding content-based ban on electioneering within 150 of

¹⁰ And it is not only the witnesses and jurors in the defendant's case who might face harassment and intimidation if they must pass a gauntlet of demonstrators on their way into or out of the courthouse. Many people might come to the courthouse for reasons having nothing to do with the defendant's case, such as attorneys, parties, witnesses, and jurors involved in other matters, as well as court personnel.

polling places). Indeed, recognizing the need to balance the right to demonstrate against the defendant's right to a fair trial, the judge thoughtfully rejected the much broader 500-foot buffer zone proposed by the Commonwealth. I find that the 200-foot buffer zone burdens no more speech than necessary to protect the integrity and fairness of the defendant's trial.

Third, the buffer zone order leaves the petitioners with ample alternative channels for expressing their views. They remain entitled to demonstrate outside the buffer zone. The buffer zone order also contains no restriction whatsoever on other channels of communication, such as private conversations, letters to the editor, and social media, by which they may express their views about the defendant's case.

I conclude that the buffer zone order is content-neutral and does not violate the First Amendment. The petitions are denied.

/s/Serge Georges, Jr.

Serge Georges, Jr.
Associate Justice

Entered: April 12, 2024