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SUPERIOR COURT OF STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SANTA CRUZ

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff, vs. GARRY ALLEN JOHNSON, Defendant.	Case No.: M64170 PEOPLE'S SUPPLEMENTAL MOTION IN OPPOSITION TO DEFENDANT'S DEMURRER Date: 02/17/2012 Time: 1:30 PM Dept: 2

I. THE DEFENSES REPLY MOTION THAT WAS FILED, AS A DEMURRER IN THIS CASE SHOULD NOT BE ACCEPTED.

A demurrer is a pleading entered at or before the time of arraignment, raising an issue of law as to the sufficiency of the accusatory pleading. (Pen. Code, §§ 1002-1004.) A demurrer tests only defects appearing on the face of the accusatory pleading. (*Shortridge v. Municipal Court* (1984) 151 Cal.App.3d 611, 616; *People v. Williams* (1979) 97 Cal.App.3d 382, 387-388.) A demurrer is not an appeal. A demurrer "must distinctly specify the grounds of objection to the accusatory pleading or it must be disregarded." (Pen. Code § 1005.)

In this case, the supplemental or reply motion that the defense filed in court is not a demurrer. It is an appeal from a conviction, involving the defendant in this case, Gary Johnson, and

the defendant in another case, Edwin Frey. It does not fulfill the requirements of a demurrer as stated in Penal Code section 1005 as it does not "distinctly specify the grounds of objection to the accusatory pleading." The defendant's motion does not even relate to the accusatory pleading in this case as it is appealing the convictions from the cases M55606 and M54857. Therefore under Penal Code section 1005 the defendant demurrer "must be disregarded" and denied.

II. THE DEFENSES REPLY MOTION DOES NOT COMPLY WITH THE CALIFORNIA RULES OF COURT.

Local Rule 5.1.03 requires that all pretrial motions filed with the Court comply with the California Rules of Court. California Rule of Court Rule 2.108 requires that all motions be on pleading paper. "all reply papers at least two (2) court days before the time appointed for hearing."

Additionally the motion does not comply with the rules of court, as it is not on pleading paper. In this case the reply was filed at the court hearing, without a motion for an order shortening time.

III. DE NOVO REVIEW IS NOT THE CORRECT STANDARD OF REVIEW FOR A DEMURRER.

There is no standard of review in a Demurrer since it is not being reviewed, as it is not on appeal.

IV. THERE IS NO NINTH AMENDMENT RIGHT TO SLEEP UNDER THE UNITED STATES CONSTITUTION.

There is no right to sleep, either enumerated or unenumerated, granted by the Ninth Amendment of the Constitution of the United States of America. Specifically, the right proposed by defense counsel "to sleep outdoors in public where it does not inconvenience anyone else" does not exist and it would be impractical if it did, as

there would be a constant disagreement about what "does not inconvenience anyone else" actually means. Additionally, while it appears that counsel is correct when he states that no court has ruled for or against such a right to sleep, several courts have dealt with the issue of camping bans similar to the one at issue here. Counsel does not address those cases while proposing this new right, citing only one case dealing with a camping ordinance and taking a proposition made by the court out of context. Instead, counsel chose to cite cases dealing with a woman's right to obtain an abortion that are not applicable to this case.

In *Joyce v. City and County of San Francisco*(1994) 846 F.Supp. 843, 862, there was a constitutional challenge to a city ordinance that prohibited camping. The plaintiffs in that case argued that due process had be violated based on the "punitive policing measures against the homeless for sleeping in public parks." (*Id.*) The court took note of claims by plaintiffs that police were citing and "moving along" people that were merely sitting in a park or lying on or under blankets. (*Id.*) The only discussion that the court entered into was that if true, the ordinance was being applied to conduct that did not fall under the ordinance and may be being applied unconstitutionally. (*Id.* [emphasis added].)

In *In re Eichorn* (1998) 69 Cal.App.4th 382, 385, the trial court ruled that a homeless defendant was not allowed to present a necessity defense to the charge. The trial court found that the offer

of proof was insufficient to show that the defendant acted to prevent a significant, imminent evil. (*Id.*) The Fourth District Court of Appeals heard the case on writ of habeas corpus and decided that the trial court erred and the defendant should have been allowed to present a necessity defense to the charge. (*Id.*, at p.388.) The court went on to state that [a]t a minimum, reasonable minds could differ whether defendant acted to prevent a 'significant evil'." (*Id.*, at p.389.) It was then that the court used the language about sleep cited by defense counsel (page 4), which in no way was directed towards the creation of a right by the court. Additionally, the court found "no other constitutional violations under the circumstances of this case." (*Id.*, at p.392.)

Finally, *Roe v. Wade*, 410 U.S. 113, and *People v. Belous*, 71 Cal.2d 954, do not offer any insight into the analysis that this Court should enter into. These cases dealt with whether the state could criminalize the act of obtaining or performing an abortion at every stage of pregnancy and when there was no known danger to the mother. The court was dealing with "repeated acknowledgment of a 'right of privacy' or 'liberty' in matters related to marriage, family, and sex. [citations omitted]" (*Belous* at 963.) The *Belous* court then noted that the "critical issue is not whether such rights exist ..." As such, the situation facing those courts is not analogous to the situation facing this Court.

As the cases above demonstrate, there is no "right to sleep outdoors where it does not inconvenience anyone else." No court has ever found such a right. Additionally, the cases above demonstrate that courts have addressed constitutional challenges to similar statutes and found no constitutional violations. There is no basis for the Court to find a constitutional right to sleep, especially one that is so vague as the right proposed by counsel.

V. THE CALIFORNIA CONSTITUTION DOES NOT GRANT A RIGHT TO SLEEP.

There is no enumerated right to sleep that is granted by the California Constitution. Counsel has not identified which of the ten protections granted actually confers that right and renders Penal Code § 647(e) invalid. Additionally, counsel has not cited any case law dealing with the California Constitution that supports this view. In fact, the only cases cited are decisions from the United States Supreme Court that do not deal with the California Constitution.

VI. PENAL CODE § 647(e) DOES NOT VIOLATE THE DEFENDANTS' FIRST AMENDMENT RIGHTS.

Simply because a person does an act for an expressive or symbolic purpose does not make it constitutionally protected conduct. In this case, the fact that the defendant violated Penal Code section 647(e) as part of a demonstration does not make the statute unconstitutional. As such, the defendant's First Amendment rights have not been violated.

The United States Supreme Court was faced with a similar circumstance in *Clark v. Community For Creative Non-Violence* (1998)

468 U.S. 288. In *Clark*, the National Park Service allowed a demonstration in Lafayette Park and the Mall in Washington D.C., however, they would not allow the demonstrators to sleep in the park, which was prohibited by regulation. (*Id.*, at p.290.) The Court assumed that sleeping was expressive conduct protected by the First Amendment, however, they did not make a specific finding about sleeping during a demonstration. (*Id.*, at 293.) Being expressive conduct, it was still "subject to reasonable time, place, or manner restrictions." (*Id.*)

The court also noted that restrictions of this kind are "valid provided they 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." (*Id.*) The Court found that clearly the regulation was content neutral, it was narrowly tailored to a substantial governmental interest in maintaining parks, and left plenty of other ways to communicate the message meant to be delivered. (*Id.*, at p.295.)

The Court also found that there was a significant governmental interest in maintaining parks. (*Id.*, at p. 296)In overturning the Court of Appeals, the Supreme Court concluding with an agreement with an observation of Judge Edwards' that "[t]o insist upon a judicial resolution of this case, given the facts and record at hand, arguably

suggests a lack of common sense [citation omitted]." (*Id.*, at p.299 fn 9.)

In *Stone v. Agnos* (1992) 960 F.2d 893, the court was faced with a constitutional challenge to Penal Code section 647(i) based on a claimed First Amendment violation. In *Stone*, the plaintiff was arrested for violating Penal Code section 647(i) when he refused to leave the Civic Center Plaza in San Francisco after the sleeping people in the plaza were told to leave or be arrested. (*Id.* at p.894.) The court found that the city did have an interest in maintaining its parks and enforcing the statute. (*Id.* at p.895.) The court then denied any constitutional violations. (*Id.*)

In this case, there are simply limits placed on lodging where a person does not have permission. This is a reasonable limitation on conduct that may impact the First Amendment, as it is content neutral, is aimed at a significant governmental interest, and leaves open plenty of other ways in which to protest. There is a significant government interest to protect property owner's rights in not allowing people to lodge without their permission. Similar to *Clark* and *Stone*, the government has a significant interest in maintaining public and private areas and preventing people from lodging there without permission. Additionally, this seems more like a claim of a violation of defendants' First Amendment rights **as applied**, which the Court is not faced with here.

Perhaps Justice Burger said it best in his concurring opinion.

> It trivializes the First Amendment to seek to use it as a shield in the manner asserted here. And it tells us something about why many people must wait for their "day in court" when the time of the courts is pre-empted by frivolous proceedings that delay the causes of litigants who have legitimate, nonfrivolous claims.

(*Id.* at 301, Justice Burger concurring.)

VII. PENAL CODE § 647(e) DOES NOT VIOLATE DUE PROCESS BECAUSE IT IS NOT UNCONSTITUTIONALLY VAGUE.

The statute that the defendant is charged with violating is not unconstitutionally vague, and therefore is not a violation of due process. The statute does not implicate constitutionally protected conduct. Also it is not vague in all of its applications, therefore, it is not unconstitutionally vague.

In *Joyce*, the United States District Court was faced with a similar challenge to then Penal Code section 647(i) that provides:

> Every person who commits any of the following acts is guilty of disorderly conduct ... Who lodges in any building, structure, vehicle, or place, whether public or private, without the permission of the owner or person entitled to the possession or in control thereof.

This section is virtually identical to the current Penal Code section 647(e). The court was presented with a request for a preliminary injunction against the enforcement of Penal Code section 647(i) and San Francisco Park Code section 3.12. (*Joyce, supra*, at p.846-7.) The court denied the requested injunction finding that both claims were unlikely to succeed. (*Id.* at 862.) Specifically, the court stated that "the challenged Penal Code section cannot be

concluded by the Court at this time to be unconstitutionally vague." (*Id.*) In making that finding, the court noted that "it seems readily apparent the measure is not 'impermissibly vague in all of its applications...'[citation omited]" (*Id.*)

In *People v. Scott* (1993)(20 Cal.App.4th Supp. 5.), the court was faced with a similar city ordinance that banned camping in the parks. The Appellate Department of the Superior Court, in deciding the case pointed out the two basic requirements for a statute to survive a facial vagueness challenge. "First, a statute must be sufficiently definite to provide adequate notice of the conduct proscribed ... [¶] Second, a statute must provide sufficiently definite guidelines for the police in order to prevent arbitrary and discriminatory enforcement." (*Id.* at p.11, citing *People v. Superior Court (Caswell)*(1988) 46 Cal.3d 381, 389-390.) The court found that the definition provided in the statute made defeated the vagueness claim, but noted that even without the definition, "'[w]e all have a common-sense understanding of what camping is'[citations omitted]." (*Id.*) Of note was also the fact that each defendant had been warned prior to being cited. (*Id.* at p.12, fn 7.)

The term "lodge" is not impermissibly vague. According to Merriam-Webster online dictionary, to lodge (transitive verb) means "**a**(1): to provide temporary quarters for (2): to rent lodgings to; **b**: to establish or settle in a place."; to lodge (intransitive verb)

means "a: to occupy a place temporarily: sleep; b(1): to have a residence: dwell; (2): to be a lodger."

These common definitions provide adequate notice of what is prohibited from the statute. The defendant was provided with a verbal and written warning that he was in violation of the statute. The statute is also definite enough to prevent police officers from using it arbitrarily and discriminatory. This is further evidenced by the officers handing out notices to each person, warning them about the violation, and providing them an opportunity to leave without being cited.

VIII. THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS DOES NOT APPLY.

Although the United States ratified the International Covenant on Civil and Political Rights, the United States did so with several reservations, understandings, and declarations. The first declaration of the United States as part of the ratification was that "(1) That the United States declares that the provisions of articles 1 through 27 of the Covenant are not self-executing." (International Covenant on Civil and Political Rights: Declarations and Reservations: United States.) Non-self executing treaties do not becoming binding on domestic courts absent an act of congress.

> the Executive cannot unilaterally execute a non-self-executing treaty by giving it domestic effect. That is, the non-self-executing character of a treaty constrains the President's ability to comply with treaty commitments by unilaterally making the treaty binding on domestic courts. The President may comply with the treaty's obligations by some other means, so long as they are consistent with the Constitution. But he may not rely upon a non-self-executing treaty to

"establish binding rules of decision that preempt contrary state law."

(*Medellin v. Texas* (2008) 552 U.S. 491, 530.)

XI. CONCLUSION.

For the above reasons the people respectfully request that the defendant's demurrer be denied.

Dated: February 9, 2012

Respectfully Submitted,

BOB LEE,
DISTRICT ATTORNEY

By _____

JUDITH JANE STARK-MODLIN,
ASSISTANT DISTRICT ATTORNEY

(Proof of Service by Mail - 1013a, 2015.5 C.C.P.)

PROOF OF SERVICE

STATE OF CALIFORNIA)
) SS.
COUNTY OF SANTA CRUZ)

I am a citizen of the United States and a resident of the County aforesaid. I am over the age of eighteen years and not a party to the within-entitled action. My business address is 701 Ocean Street, Room 200, Santa Cruz County Governmental Center, Santa Cruz, California, 95060. On February 10, 2012, I served a copy of the within PEOPLE'S SUPPLEMENTAL MOTION IN OPPOSITION TO DEFENDANT'S DEMURRER on the interested party(ies) in said action by placing a true copy thereof fully prepaid in the United States mail at Santa Cruz, California and addressed as follows:

Ed Frey, Esq. VIA FAX 479-8174
4630 Soquel Dr., Ste 12
Soquel, CA 95073

I, Karen Adams, certify under penalty of perjury that the foregoing is true and correct.

Karen Adams
Karen Adams