

IN THE DISTRICT OF COLUMBIA
COURT OF APPEALS

No. 03-CT-680

ANDREW E. BLOCH,

Appellant,

v.

DISTRICT OF COLUMBIA,

Appellee.

Appeal from the Superior Court
Criminal Division - Traffic & D.C. Branch

BRIEF FOR THE DISTRICT OF COLUMBIA

ISSUES PRESENTED

1. Should the Court refuse to hear a First Amendment challenge, made for the first time on appeal?
2. Has appellant established that he has a First Amendment claim, where all he has claimed is that he refused to move after he crossed the police line and was ordered to move?
3. If the Court does hear the First Amendment arguments, did the action of the United States Park Police in protecting the north lawn of the White House comport with First Amendment requirements?
4. Was the trial court correct in finding that the police line itself was sufficiently definite enough to put appellant on notice that it was a police line, where it consisted of a

solid line of steel bicycle fences, 36 to 40 inches high, and police were dispersed on one side of them, telling people not to cross the line?

STATEMENT OF THE CASE

This is an appeal from a conviction of crossing a police line, in violation of 24 DCMR § 2100.3.

A. Procedural Background.

Appellant was arrested on March 19, 2003, along with eight other defendants and charged with crossing a police line. Record 3. Eight of them went to trial on June 4, 2003 before Hon. Stephen Milliken. Appellant, along with several others, was found guilty, and sentenced to a \$50 fine, all of which was suspended, and three months unsupervised probation. Record 7. A notice of appeal was filed on July 2, 2003.

B. Statement of Facts.

Officer Peter Ward testified that he had been a United States Park Police officer for 17 years. Supp. Tr. 17.¹ On March 19, 2003, at about 1:00 p.m., he was at the 1600 block of Pennsylvania Avenue, just south of Lafayette Park. Supp. Tr. 17-18. He was there, as he stated:

to provide security for the enhanced security zone which was there because of a threat assessment and through the decisions of the Secret Service and the Park Police to enhance that area and make it larger for crowd control operations, logistic support, giving our police officers a reason to move around, an area to move in stage to conduct operations should a large crowd arrive in the park.

Supp. Tr. 18. He also explained that this staging area was created by the Park Police and the Secret Service “because of their responsibility for the security and safety of the President and the White House.” Supp. Tr. 19. Sergeant Richard Dawson testified that

¹ A transcript was provided of the trial, consisting of 139 pages, which is referred to as “Tr. ____.” Subsequently, a supplemental transcript, of 36 pages, covering most of the first part of the trial was prepared. It is referred to as “Supp. Tr. ____.”

the staging area was created so that traffic, mostly police vehicles, could move freely about the area. Tr. 46.

Officer Ward described the demarcation of the staging area by saying that it was a bicycle fence, it's commonly referred to. It's about waist high which it is about 36 to 40 inches, I imagine. It's steel construction. And it encompassed the entire area from where the entrance gates are now at East and West Executive Drive. One is at Seventeenth and one is at Fifteenth Street. And blocked off the entire street and the White House sidewalk. [sic]

Supp. Tr. 18. Sergeant Dawson referred to it as a barricade, and said that the barricades make it clear that it is a police line. Tr. 55.

Officer Ward testified that a group gathered in the park, and about 20 of them, including the appellant, crossed over the fence. Supp. Tr. 20, 31-32. As they did so, he "yelled at them to stop and to not do it." Supp. Tr. 32. He was ordered to be the arresting officer for the whole group of by then 27 people, including appellant. Id. All of them had come over the fence. Id.

The government rested Tr. 56. A motion for judgment of acquittal was made, based on the argument that the line was not clear to the defendants. Tr. 57. It was denied. Id.

Several of the defendants testified, among them the appellant, Mr. Bloch. He stated: "I've been to several other protests. . . . [In] all the other protests I've been to, there's been a police line that's been very clearly marked. It's either been yellow tape on a fence, there's been a line of police officers right along the fence or there's been announcements, very clear announcements several times warning people not to cross over, over the fence." Tr. 61. He testified that two days earlier he had been at a protest, and the police line there was clearer than the one in this case. Tr. 63.

He testified that his intent was not to commit a crime. Tr. 70. He stated: “In fact, it was my intention to help prevent, to prevent a crime from happening.” Id. In answer to questions from the court, he stated of the police line “Well, obviously . . . , it’s meant for some form of crowd control.” Tr. 73.

In his final argument, appellant argued that the police line was not set up for any of the five reasons listed in the regulation, and that it was a pretext for abridging freedom of speech. Tr. 103. He also stated that others had been allowed to protest on that spot.

Id. He stated:

I do not believe that the zone was, in fact, justified by any of those five reasons [in the regulation]. In fact, I think that the zone was merely, whatever reason that they, that the prosecution has put forth was merely a pretext for abridging the freedom of speech [at] a very important moment at the, in the, in the war with Iraq, in fact, on the eve of the war with Iraq and we have also, the defense has also introduced evidence showing that others have been allowed to protest in the very exact same spot where we were arrested a week or two earlier.

Id.

C. Trial Court’s Ruling.

The trial court stated that the question was whether the police had “established a police line and was it noticed by [the defendants] and did [they] then cross that line intentionally.” Tr. 109. He stated that the police had established a police line, and “it’s not before me . . . to say today whether or not that’s an illegal time, place, and manner restriction.” Tr. 113.

He found that the barricade was all along 1600 Pennsylvania Avenue, and it “plainly notified [the defendants] that they were not to traduce it, jump it, cross it, be within it.” Tr. 111. He found that “[t]he police, in establishing a staging area, had the lawful authority to establish a line.” Tr. 112.

He stated: “[I]t really comes down to whether a person of common intelligence would appreciate that the police sought to keep the public out of the area in which [the defendants] were arrested.” Tr. 113. The court noted that the desire to serve a higher moral purpose suggests a powerful motive to violate the regulation, and pointed out that one defendant had said that obviously the fence was meant for crowd control. Tr. 114.

He concluded:

Any person of ordinary intelligence in these circumstances on that day would have known that the police did not want any of [the defendants] and, indeed, had, by the establishment of the fence, prohibited any of you from being[,] in that particular roadway, the 1600 block of Pennsylvania Avenue south of the north meeting of the roadway and the curb on the sidewalk of Lafayette Park so I find that you did knowingly and intentionally, and that is by proof beyond a reasonable doubt, violate a police line regulation as charged and a verdict of guilty.

Tr. 114.

REGULATIONS INVOLVED

The police line regulation is found in 24 DCMR §§ 2100 et seq., pertinent parts of which are:

2100.1 When fires, accidents, wrecks, explosions, parades, or other occasions cause or may cause persons to collect on the public streets, alleys, highways or parkings, the Chief of Police, an inspector or captain of the police, or an officer acting for him or her may establish an area or zone that he or she considers necessary for the purpose of affording a clearing for the following:

- (a) The operation of policemen or firemen;
- (b) The passage of a parade;
- (c) The movement of traffic;
- (d) The exclusion of the public from the vicinity of a riot, disorderly gathering, accident, wreck, explosion, or other emergency; and
- (e) The protection of persons and property.

* * *

2100.3 No person shall enter the emergency area of zone unless duly authorized by the person in command of the emergency occasion, . . .

* * *

100.6 Any person violating any provision of this title [Title 24] for which a specific penalty is not provided shall, upon conviction, be punished by a fine of not more than three hundred dollars (\$300).

ARGUMENT

I. THE COURT SHOULD NOT HEAR A CONSTITUTIONAL CHALLENGE TO A REGULATION WHEN THE ARGUMENT WAS NOT RAISED IN THE TRIAL COURT.

Appellant never raised the issue of a deprivation of his First Amendment rights at trial. The trial court correctly stated that the issue of “whether or not that’s an illegal time, place, and manner restriction” was not before him. Tr. 113. The entire thrust of appellant’s testimony and closing argument was that the line was not clear so that he did not have the requisite intent, and also that the police had no authority to create a police line. His only reference to the First Amendment was a fleeting part-of-a-sentence allusion in his closing argument. He stated: “I do not believe that the zone was, in fact, justified by any of those five reasons [in the regulation]. In fact, I think that the zone was merely . . . a pretext for abridging the freedom of speech [at] a very important moment . . . in the war with Iraq. . . .” Tr. 103. This does not amount to a fair raising of an issue before the trial court.

This was explained in United States v. Robinson, 145 U.S. App. D.C. 46, 53, 447 F.2d 1215, 1222 (en banc 1971), reversed on other grounds, 414 U.S. 218 (1973), in which the court stated: “Our appellate function is best served when there is before us a record made under circumstances where trial counsel and trial court alike are, in the

taking of evidence, fixing their attention upon what is claimed to be the applicable principle of law.” Miller v. Avirom, 127 U.S. App. D.C. 367-69, 384 F.2d 319, 321 (1967) also stated: “Questions not raised and preserved during the proceedings under examination, and points not asserted with sufficient precision to indicate distinctly the party’s thesis, will ordinarily be spurned.”

This Court has held that “[l]itigants should not be permitted to keep some of their objections in their hip pockets and to disclose them only to the appellate tribunal.” Hunter v. United States, 606 A.2d 139, 144 (D.C.) cert. denied, 506 U.S. 991 (1992). Failure to raise an argument at trial has been held to result in a waiver of the argument. Nixon v. United States, 728 A.2d 582, 595 n. 27 (D.C. 1999), cert. denied, 528 U.S. 1098 (2000) citing In re J.A.H., 315 A.2d 825, 827 (D.C. 1974). See also Butler v. United States, 614 A.2d 875, 882 n.13 (D.C.), cert. denied, 506 U.S. 1009 (1992).

At the least, this Court should apply the standard of plain error because of the failure to argue this issue at the trial. Watts v. United States, 362 A.2d 706, 709 (D.C. 1976 (en banc)). This means that the Court will not reverse unless “the error complained of must be so clearly prejudicial to substantial rights as to jeopardize the very fairness and integrity of the trial.” Id., 362 A.2d at 709. This Court has also stated that it will only reverse for plain error on a showing of exceptional circumstances where a miscarriage of justice would result. Harris v. United States, 602 A.2d 154, 159 (D.C. 1992) (en banc). Appellant has not shown that anything in the conduct of the trial jeopardized its fairness or integrity, nor has he shown anything approaching a miscarriage of justice.

II. APPELLANT CANNOT CLAIM FIRST AMENDMENT PROTECTION BECAUSE HE WAS NOT ENGAGED IN SPEECH OR IN EXPRESSIVE CONDUCT.

Appellant's freedom of speech claim should be denied because he was not engaging in speech, or in communication of any kind. The evidence showed only that he and a group were on one side of the police barricade. Then they crossed it; the police yelled at them to cross back; and they refused, sitting down. There is no First Amendment case presented where the defendant is not engaging in speech. Boertje v. United States, 569 A.2d 586, 589 (D.C. 1989). Further, it is up to the person claiming the protection of the First Amendment to show that the Amendment applies at all. Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293 n. 5 (1984). Appellant has failed to make such a showing.

Boertje is very similar to the events in this case, and its holding should apply here. Boertje, who was on the White House tour, stopped on the pathway. A guard asked him to move on. He said that the only way they could make him move was to arrest him. He then kneeled down on the walkway. There was proof that he was acting on a belief that the United States's nuclear capability was an international crime of peace, but, like Mr. Bloch, made no statement of this belief. This Court held that Boertje was not engaging in expressive conduct or speech, and that the First Amendment did not apply. Id., 569 A.2d at 589. This Court should follow the same principle and come to the same conclusion in this case.

III. THE POLICE ACTION HERE WAS REASONABLY NECESSARY TO ACHIEVE THE IMPORTANT GOVERNMENTAL AIM OF PROTECTING THE PRESIDENT AND WHITE HOUSE; THEREFORE, IT DID NOT VIOLATE APPELLANT'S FIRST AMENDMENT RIGHTS OF EXPRESSION.

The government is allowed to make and enforce regulations that limit First Amendment freedoms if they are reasonably necessary to furthering a significant or important governmental aim. Grayned v. City of Rockford, 408 U.S. 104, 115-17 (1972). The Supreme Court has rejected the idea that people who want to express their views “have a constitutional right to do so whenever and however and wherever they please.” Adderly v. Florida, 385 U.S. 39, 48 (1966), cited in Smith v. United States, 445 A.2d 961, 966 (1982) (en banc).

The police line regulation at issue here was held to be constitutional on its face and as applied in that case in Washington Mobilization Committee v. Cullinane, 184 U.S. App. D.C. 215, 225-27, 566 F.2d 107, 117-19 (1977). The court in that case held that the regulation limits police power to establishing lines for the purposes described in the regulation, and “it cannot reasonably be construed to authorize the police to issue orders infringing the peaceful exercise of First Amendment rights.” Id., at 227, 566 F.2d at 119.

In establishing this police line, the police were attempting to fulfill their job of protecting the President and the White House, including the White House staff. This Court held in Smith, supra: “The unique nature of the grounds of the Executive Mansion . . . justifies more stringent regulation of conduct within the White House complex than would be tolerated on most other government properties.” Id., 445 A.2d at 965. In Leiss v. United States, 364 A.2d 803 (D.C. 1976), cert. denied, 430 U.S. 970 (1977), this Court stated: “Unrestricted access to the White House obviously is incompatible with its character and functions.” Id., 364 A.2d at 808. It contains an office complex for the President and his staff, and a home for the President’s family, and as such requires “unfailing vigilance against the acts of potentially violent individuals.” Id.

Appellant cites Leonardson v. City of East Lansing, 896 F.2d 190 (6th Cir. 1990), cited by appellant, is distinguishable from this case and provides no support for appellant’s argument. There, an ordinance virtually copied from the regulation at issue here was found to be not violative of First Amendment rights. However, East Lansing had also adopted a second ordinance which gave the mayor the right to set up a police line in advance of a demonstration in such a way as to “prevent, suppress, or contain” the demonstration. The court stated that under this ordinance, “a police line may be established as a preventive, as well as a control device. Pursuant to this section, the city could establish a police line in order to prevent the occurrence of a political demonstration.” Id., 896 F.2d at 197. The court held that a police line used in this way “would function the same way as [a] permit requirement . . . , keeping the idea the demonstrators wished to advocate from entering the marketplace of ideas based on a fear of violence.” Id. at 198. These quotes indicate the difference between the East Lansing ordinance and the regulation here. First, the regulation here, as reenacted in East Lansing, was held constitutional. Second, the second East Lansing ordinance, empowering the mayor to use a police line for the purpose of preventing or suppressing a demonstration, went far beyond anything contemplated by the District of Columbia regulations. The police line regulation is used to enable the police to respond to situations involving crowds, and to make a passageway for police and other official vehicles responding to events. It is not used to shut down an entire gathering, as it was by the East Lansing police in that case. Therefore, nothing in the holding of Leonardson indicates that 24 DCMR § 2100 et seq. is unconstitutional.

Appellant attempts to cast doubt on the holding of Washington Mobilization by arguing that it was necessary for the District to show that an ongoing demonstration had

turned obstructive or violent. Appellant’s Brief, hereafter App. Br., at 12. However, this Court in Smith stated:

We cannot agree that the Secret Service must wait until a demonstration at the White House becomes violent or boisterous before steps are taken to curb it. Protests and politically motivated protests inherently involve some degree of controversy. When controversy is flaunted before a large captive audience, there is always a chance of violence or unrest, however slight.

Smith, 445 A.2d at 965; emphasis added.

The witnesses in this case explained that the Park Police and Secret Service had reason to think the crowds might be large, and that they might have a large job keeping order. They devised a staging area and police line that would enable them to fulfill their function, obviously an important one, of protecting the President and anyone else in the White House. The cases have described this task as “unique” and requiring “unfailing vigilance.” Smith, 445 A.2d at 965; Leiss, 364 A.2d at 808. Therefore, the action of the police in establishing and policing this line met constitutional standards.

IV. THE POLICE ACTION IN ESTABLISHING AND PATROLLING THE LINE MADE IT CLEAR TO APPELLANT WHAT WAS REQUIRED AND HOW HE COULD CONFORM WITH THE LAW; IT THEREFORE PROVIDED SUFFICIENT NOTICE TO ALLOW A CONVICTION.

Appellant argues that the police line was not clear enough to put him on notice that he was not to cross it and would be violating the law if he did so. App. Br. 17-18. He argues that the police could have used yellow tape, which he

believes would have been clearer. Id. What the police described was a barricade of bicycle fences, stretching for two blocks with no breaks, made out of steel. It was 36 to 42 inches high. A crowd of demonstrators was on one side of the barricade, and no one but police officers were on the other side. Police officers were spread out on their side along the line. This alone, as the court found, is enough to put any reasonable person on notice that he is not to cross the line. Even if it was not, the conclusion becomes inescapable when the police noticed appellant and others crossing, and yelled at them to stop and to not cross the line. Appellant and the others refused to move back to the park, sitting down on the ground within the police line. He can hardly claim with a straight face that by this time he was in complete ignorance of the fact that he was disobeying the law.

Further, the claim that he had no belief that he was violating the law must be a reasonable one to negate criminal intent. Leiss v. United States, 364 A.2d at 809; Morgan v. District of Columbia, 476 A.2d 1128, 1132-33 (D.C. 1984). Morgan is instructive. In that case, the defendant and others sat down in the driveway of a hotel at the entrance, where a police line had been placed, obstructing access to the driveway. He argued, as does Mr. Bloch, that he did not have the requisite intent. This Court first defined intent as the intent to do the prohibited act. Id., 476 A.2d at 1132. It then held, “Given the uncontradicted testimony that the police made several announcements asking them to leave, but that they failed to do so, the evidence amply supports the finding that they intended to remain in the driveway.” Id. Mr. Bloch and the others remained sitting down within the emergency area after being asked to leave by the police. His intent was to remain in an area prohibited by the police line, and, just as Mr. Morgan, had the requisite intent.

Carson v. United States, 419 A.2d 996, 998 (D.C. 1980), is also similar to this case. There, the police indicated a part of the White House grounds that was off-limits by stretching a chain, almost exactly as high as the barricade of bicycle fences here. The defendants claimed that there was no indication that they had no right to be on the lawn other than the order of the police officer.² The Court disagreed because there was “a chain suspended from stanchions at a height of from eighteen inches to three and one-half feet, over which appellants had to step or jump to reach the area where they were arrested. Here, there was a barricade three feet to three and one-half feet over which appellants had to step or jump to reach the area on the other side of the police line. The Court in Carson found that there was ample evidence on which the trier of fact could find that the defendants’ presence was unauthorized.

² The prosecution in Carson was for violation of the unlawful entry statute, D.C. Code § 22-3102 (1973), which requires an order to leave plus “some additional, specific factor establishing their lack of a legal right to be there.” Carson, 419 A.2d at 998.

CONCLUSION

The Court should affirm the conviction for crossing a police line.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was mailed this 14th day of
March, 2004, to:

Andrew E. Bloch

SIDNEY R. BIXLER