

IN THE IOWA DISTRICT COURT FOR POLK COUNTY

**STATE OF IOWA,
Plaintiff,
v.
WILLIAM TALEN,
FRANK CORDARO,
Defendant(s).**

Criminal No. SMAC364655, SMAC364645

**STATE’S MOTION IN LIMINE
AND/OR FOR 5.104(A) RULING**

COMES NOW the State of Iowa, pursuant to Iowa Rules of Evidence 5.104(a), 5.401, 5.402 and 5.403 and requests: that the Court preclude evidence or argument regarding “free speech rights,” “free expression,” “right to assemble,” and/or other First Amendment arguments and evidence that “free speech rights” can constitute “justification” under the Iowa’s criminal trespass statute, Iowa Code § 716.7 (2015).

FACTS AND BACKGROUND

On October 13, 2016, the defendants participated in a protest of the World Food Prize. Initially, the defendants were assembled on Finkbine Street across from the State Capitol Complex Property. There were approximately 25 people gathered. The World Food Prize Event (“WFPE”) was occurring at the same time as the defendants were attempting to enter onto the Capitol grounds. There were several Iowa State Patrol officers present because of a large private dinner event that was scheduled.

The defendants had been instructed by the Iowa State Troopers that they could remain on Finkbine Street without incident. The defendants stated they wanted to enter the Capitol. The defendants were informed they were not allowed access due to an after-hours private event. The defendants proceeded to come onto the Capitol grounds. The defendants were apprised there was a private dinner event, and the defendants were not invited guests. The Iowa State Troopers verbally ordered the defendants to vacate the property. The defendants refused to leave and

stated they were going inside. The defendants were advised they would be arrested for criminal trespass if they did not vacate the premises. The defendants stated they understood; however, they declared they were not going to leave. The defendants were arrested for criminal trespass pursuant to Iowa Code Section 716.7 which reads in pertinent part:

The term “trespass” shall mean. . . . remaining upon or in property without justification after being notified or requested to . . . remove or vacate therefrom by . . . any peace officer . . . whose duty it is to supervise the use or maintenance of the property.

ARGUMENT

I. The Constitutional issue raised should be decided by the court as a matter of law rather than presented to the trier of fact.

The State anticipates the defendants intend to raise a First Amendment argument and/or defense to their criminal trespass charge(s). Whether a Constitutional right exists is a legal issue and should be decided by the court as a matter of law rather than presented to the jury. *Junkins v. Branstad*, 448 N.W.2d 480, 482 (Iowa 1989). The Court and the Court alone has the authority to determine the law that applies to a matter and then to instruct the jury according to that legal determination. The jury should hear its legal directions from the Court, not from a witness who offers a personal opinion about the law. “The role of the jury is to decide facts, not legal issues.” *U.S. v. Fincher*, 538 F.3d 868, 872(8th Cir. 2008) (*citing United States v. Peck*, 161 F.3d 1171, 1174 (8th Cir.1998)).

A. First Amendment evidence and/or arguments are not relevant because they are not related to any element of trespass that the State must prove.

Evidence regarding free speech is irrelevant to the elements of criminal trespass. The primary issue for the Court is whether the defendant has produced sufficient evidence for an affirmative defense to go forward. The defendants are currently charged with Trespass in violation of Iowa Code Section 716.7(2)(b). That section specifically states: “[t]he term

‘trespass’ shall mean.... Entering or remaining upon or in property without justification after being notified or requested to abstain from entering or to remove or vacate therefrom by the owner, lessee, or person in lawful possession ... or by any peace officer....” Iowa Code §716.7(2), 716.7(2)(b).

According to the 2016 Iowa Criminal Jury Instructions, the State must prove (1) On or about the 13th of October, 2016, the defendants remained on the property of another. (2) The defendants did this after being notified or requested to leave. (3) An agent or employee of the owner, lessee, or person in lawful possession, or any peace officer or public employee whose duty it was to supervise the use of the property, notified and requested defendants to leave. Iowa Code § 716.7 (2)(b). Consequently, defendants opinions and views regarding any free speech argument, are irrelevant and inadmissible under Iowa Rule of Evidence 5.402. (2015). Therefore, the defendant’s argument and/or evidence of justification is not valid defense and should be excluded.

Assault, like trespass, is defined in the Iowa Code using the words “without justification.” The State argues that the language of “without justification” implies that there are certain situations in which a person could enter or remain upon the property of another without permission and it would not rise to the level of criminal trespass. In assault cases, justification instructions are not given unless there has been a sufficient factual presentation by the defense to warrant the instruction. This is because justification is an affirmative defense. *State v. Hines*, 780 N.W.2d 249 f.n. 1 (Iowa Ct. App 2010) (Table) (citing *State v. Delay*, 320 N.W.2d 831 (Iowa 1982)).

The significance of the distinction between an element and an affirmative defense is that with regard to an element, the State has the burden of going forward with the evidence as well as the ultimate burden of persuasion. *State v. Moorhead*, 308 N.W.2d 60, 62 (Iowa 1981). By contrast, it is the defendant who has the burden of going forward with

evidence of an affirmative defense. There is no burden on the State to negate an affirmative defense unless the defendant meets his initial burden by producing sufficient evidence that the defense applies. *Id.* at 62-63. *State v. Delay*, 320 N.W.2d 831, 834 (Iowa 1982).

It is the State's position that the situation the defendants placed themselves in and their reasons for such behavior was neither contemplated by the statute nor applicable to a justification defense. According to the findings in *Planned Parenthood of Mid-Iowa v. Maki*, 478 N.W.2d 637 (Iowa 1991), and *Iowa v. Nelson*, 329 N.W.2d 643, 646 (Iowa 1983), together with the Restatement (Second) of Torts §§ 196, 262, the following elements must all be satisfied before a defendant may present a defense of necessity or justification to excuse criminal trespass. The following are situations where justification may be used as a defense to trespass:

- 1) A person may violate the law by trespass, he or she must be responding to an emergency situation, where the threatened harm is clear and imminent.
- 2) The individual engaging in the trespass must reasonably expect that the action he or she is taking will be effective to prevent the harm.
- 3) The individual must have no other legal option to prevent the harm before resorting to the criminal conduct.
- 4) An individual may assert a necessity defense only if the harm that the individual seeks to prevent was occurring in his or her presence.

These strict requirements for the assertion of the necessity defense are intended to ensure that resorting to illegal conduct is reserved for the rare situation in which an imminent threat of serious harm can be reasonably averted. None of the four situations exist in the case before the court. The defendants were not acting in an emergency capacity, and the defendants are unable to articulate that their actions were to prevent a harm in or outside of their presence. Lastly, the defendants had legal options to redress their grievances. In our free society guided by a rule of law, citizens are expected to undertake political action through democratic means. These requirements preclude abusive invocation of the justification argument by those like the defendants who engage in criminal misconduct as a means of political protest.

Further, as emphasized by the Iowa Supreme Court: “[t]he necessity defense is generally not available to excuse criminal activity by those who disagree with the policies of the government.” *Planned Parenthood of Mid-Iowa v. Maki*, 478 N.W.2d 637, 640 (Iowa 1991), citing *United States v. Kabat*, 797 F.2d 580, 591 (8th Cir. 1986). The defendants’ conduct in this case is nothing more than another example of “criminal activity by those who disagree with the policies of the government.”

Given that a justification/necessity defense cannot be argued on the facts of this case under the standards set out by Iowa law, the defendant’s argument and/or evidence of justification is not a valid defense and should be excluded.

B. Criminal Trespass relates to conduct and is not a violation of the defendants First Amendment rights.

Based on caselaw, Restatement (Second) of Torts, and the statutory language set out in Iowa Code 716.7(3), the First Amendment does not apply to the justification defense. If, however the court determines it needs to make its own independent analysis, the reasonableness of the restriction will establish that the defendants First Amendment rights were not violated. The Iowa Supreme Court has recognized that free speech rights are not a free pass to violate reasonable regulations:

[T]he right of peaceful [sic] protest does not mean that everyone with opinions or beliefs to express may do so at any time and at any place. There is a proper time and place for even the most peaceful protest and a plain duty and responsibility on the part of all citizens to obey all valid laws and regulations. [*State v. Elliston*, 159 N.W.2d 503, 508 (Iowa 1968); see also *In re Adoption of S.J.D.*, 641 N.W.2d 794, 802 (Iowa 2002) (quoting *State v. Milner*, 571 N.W.2d 7, 12 (Iowa 1997)) (holding the Iowa Constitution imposes the “same restrictions on the regulation of speech as [] the Federal Constitution.”)]

Iowa’s criminal trespass statute does not directly regulate speech, only conduct. *See State v. Williams*, 238 N.W.2d 302, 308 (Iowa 1976) (holding “Iowa’s trespass enactment . . .

regulates conduct” rather than speech); *Foods, Inc. v. Leffler*, 240 N.W.2d 914, 925–26 (Iowa 1976) (McCormick, J., dissenting in part) (recognizing Williams held the Iowa trespass statute “regulates only conduct and not speech”). Thus, if enforcement of the law had an incidental effect on speech, the effect was the result of content-neutral, time, place, and manner restrictions. Whether those restrictions were reasonable is a question of law for the court. If they were reasonable, then, it cannot be the case that violating the statute in the name of free speech is also reasonable.

The State may regulate speech in public forums if: (1) the regulations are content-neutral, (2) the regulations are reasonable time, place, and manner restrictions narrowly tailored to serve an important government interest; and (3) the regulations leave open adequate alternative places for speech but need not be the least restrictive or intrusive means.”

State v. Hill, 868 N.W.2d 201, * 2 (Iowa Ct. App 2015) (Table); *See Thomas v. Chicago Park Dist.*, 534 U.S. 316, 122 S. Ct. 755, 151 L. ed. 2d 783 (2002). (holding it is constitutional for a city to enact an ordinance requiring people to obtain a permit to use a public park for large gatherings); *Cox v. New Hampshire*, 312 U.S. 569, 61 S. Ct. 762, 85 L. Ed. 2d 1049 (1941) (holding it is constitutional for a state to enact a statute prohibiting parades and processions on public streets without a license); *see also Heffron v. Int’l Soc. for Krishna Consciousness, Inc.*, 452 U.S. 640, 647, 101 S. Ct. 2559, 2564, 69 L. Ed. 2d 298 (1981) (collecting cases) (holding reasonable time, place, and manner restrictions do not violate free speech because “the First Amendment does not guarantee the right to communicate one’s views at all times and places or in any manner that may be desired.”).

The question of whether the State was within their police power and the restriction was reasonable is a question of law for the Court. The defendants, without incident, were assembled across from the Capitol complex on Finkbine. Their presence was not an issue until the defendants came onto the Capitol grounds. The defendants had been instructed to vacate the

Capitol. The defendants were not instructed to limit their message or to disperse their group. The defendants were instructed that their conduct of entering onto and remaining on the Capitol grounds was the issue. If the defendants wanted to enter onto the Capitol grounds, the defendants could have made a reservation through the administrative process. The defendants conduct was the issue, not the message they were delivering. The States position is that the defendant's First Amendment's rights were not violated and that the restriction was reasonable.

II. A jury should not engage in Constitutional analysis, that is a matter of law.

The issue of constitutional analysis which presents a question of law is within the authority and jurisdiction of the court and should not be determined by the trier of fact. *Junkins v. Branstad*, 448 N.W.2d 480, 482 (Iowa 1989).

A. *Allowing juries to determine legal questions of constitutional reasonableness renders Iowa's criminal trespass statute unpredictable, unenforceable and invites jury nullification.*

There are practical problems inherent in allowing a jury of laypeople to determine the legal reasonableness of a constitutional justification. Legal scholars, attorneys, and judges spend years researching the Constitution in an attempt to interpret the applicability of the law. Jurors do not have the underlying legal knowledge necessary to determine the legal applicability of a free speech justification to a criminal trespass statute. This could also easily lead to jury nullification if the jurors believe constitutional rights should always supersede a state statute. Allowing jury instructions which characterize the defendant's actions as an exercise of constitutional rights effectively wraps the defendant in the flag and dictates the outcome of the trial. By delegating a constitutional analysis to jurors, characterizing the defendant's actions in constitutional terms, and providing only rudimentary instructions on constitutional law, the issues become confused leading to inconsistency across trespass trials.

The mere potential for the jury nullification discussed above is the exact reason why it is the court's role—not the jury's—to determine questions of constitutional law. Because a justification based on constitutional reasonableness of a defendant's free speech is a legal question, it is not for the jury to decide.

B. Requiring the jury to determine the Constitutional application confuses the issue.

The only issue that should be presented to the jury, is whether the defendants remained on the property once asked to leave. The defendants' opinions regarding their constitutional rights are not relevant to whether defendants remained on the property once asked to leave.

Conclusion

WHEREFORE, the State of Iowa respectfully requests the Court find, as a matter of law, that the First Amendment is not a justification defense for criminal trespass, or in the alternative, that a First Amendment justification is a legal question for prior determination by the court, not for argument to a jury. Further, the State respectfully requests the Court grant this Motion in Limine prohibiting evidence or argument regarding the First Amendment and evidence or argument that the First Amendment can constitute “justification” under the Iowa’s criminal trespass statute, Iowa Code Section 716.7

Respectfully Submitted,

/s/ Jessica L. Henry

JESSICA L. HENRY AT0012547

Assistant Polk County Attorney

222 5th Avenue

Des Moines, Iowa 50309

Telephone: (515) 286-3737

jessica.henry@polkcountyiowa.gov