

COUNTY COURT, EL PASO COUNTY, COLORADO		DATE FILED: May 12, 2021 1:57 PM CASE NUMBER: 2020M5253
Court Address: 270 S. TEJON P.O. BOX 2980, COLORADO SPRINGS, CO, 80903		
The People of the State of Colorado v. MOLLY NICOLE AVION		<p style="text-align: center;">△ COURT USE ONLY △</p> <p>Case Number: 2020M 5253 Division: F Courtroom:</p>
Dismissal due to Unconstitutional Statute as applied to Defendant		

This Order is entered by Senior Judge Stephen J. Sletta by assignment of the Colorado Judicial Department.

The Defendant's constitutional motions to dismiss were heard by the Court on April 15, 2021. The Court took the matter under advisement and now issues its findings and conclusions. The Defendant provided notice to the Attorney General of Colorado. The Attorney General has not made an appearance. The Defendant was charged with a violation of Obstructing a Highway in violation of CRS 18-9-107(1)(a).

The elements of the charge are:

- a. that the defendant,
- b. in the State of Colorado,
- c. on or about the date and place charged,
- d. intentionally, knowingly, or recklessly,
- e. without legal privilege,
- f. obstructed a highway, street, sidewalk, railway, waterway, building entrance, elevator, aisle, stairway, or hallway to which the public or a substantial group of the public had access, or any other place used for the passage of persons, vehicles, or conveyances,
- g. and the obstruction arose from the defendant's acts alone, or the acts of the defendant and the acts of others.

"Obstruct" means to render impassable or to render passage unreasonably inconvenient or hazardous. (COJI F:247.)

This case arose from an incident on or about June 30, 2020 in El Paso County when the defendant allegedly participated in a civil protest on Interstate 25 at Bijou Street in Colorado Springs, Colorado. According to the testimony at the motions hearing, several individuals and automobiles were stopped in the traveled portions of the northbound interstate to express their support for the Black Lives Matter movement and other issues surrounding the death of George Floyd and others earlier in the year. The stopped automobiles and pedestrians caused law enforcement to divert traffic around the assembly area. In the days following the protest, law enforcement agencies reviewed broadcast news video and social media video footage and identified several persons were engaged in the incident. The Defendant was cited with the above statute on July 17, 2020.

The Defendant has filed the motion to dismiss relying upon several arguments that the statute is unconstitutional both on its face and as applied to the Defendant. CRS 18-9-107 has its origin from the 1960's and 1970's which was a time of earlier protests over the United States involvement in the Vietnam War and Civil Rights Movement. Amendments have coincided with other social issues such as demonstrations at funerals in the early 2000's. The Right to Rest in Peace Act" was adopted in May 2006 which caused such activity to be restricted by the statute. (CRS 18-9-125) Colorado has several laws related to

the management and safety of traffic and pedestrians on its streets and highways (Chapter 4 of Title 43 of the Colorado Revised Statutes) and with the obstruction of highways by things (CRS 43-3-301). The statute in this case is directed toward persons who individually or with other individuals intentionally, knowingly or recklessly impair the passage of persons, vehicles, or conveyances. The Court must determine if the statute is unconstitutionally vague and overbroad as applied to the Defendant by being a deterrent or chilling effect on the exercise of conduct, assembly and speech protected by the First Amendment to the United States Constitution. *Langford v City of St. Louis*. Missouri 443 F. Supp. 3d 962 (2020).

The Court must first determine the level of scrutiny of an overbroad challenge. The court must classify the choice of the forum used for speech and assembly. Three forums exist in the analysis, traditional public forum, public forum created by government designation and non public forum, . *Langford v City of St. Louis*. Missouri 443 F. Supp. 3d 962 (2020) *Frisby v Schultz* 487 U.S. 474, 108 S. CT. 2495, 101 L. ED. 2d 420 (1988) Public streets and highways as used in this case are traditional public forums. Highways provide significant opportunity for public expression, whether by signs on the roadsides, assembly of people and signs on overpasses and pedestrian walkways. The placement of bumper stickers on automobiles in view of other drivers on highways is a common form of expression. In such public forums the ability of the government to limit expressive activity is to be sharply examined. *Hague v. Committee for Indus. Org.*, 307 U.S. 496, 59 S. CT. 954, 83 L. ED 1423 (1939) The government may not prohibit all communicative activity but may enforce regulations of the time, place and manner of expression that are content-neutral and narrowly tailored to serve a significant government and leave open alternative channels of communications. *Perry Educ, Ass'n v. Perry Local Educators' Ass'n* 460 U.S. 37, 103 S. CT. 948, 74 L. ED. 2d. 794 (19830) *Langford v City of St. Louis*. Missouri 443 F. Supp. 3d 962 (2020)

The Court finds that the statute is not content neutral. The statute is directed to protect the public interest and to protect the movement of pedestrians and automobiles from obstruction to render impassable or to render passage unreasonably inconvenient or hazardous in instances when the offender is not engaged in activity exercising a legal privilege. Legal privilege is not defined by the statute but apparently removes some persons based upon the content of their action or the manner of their action. Acting without legal privilege is an element of the offense. The presence or absence of a "legal privilege" is an element of the offense and not an affirmative defense.

The Court considers the unconstitutional application of the statute because it is content based and the criteria to determine the content is vague and without definition. The statute fails to provide fair notice to what conduct is prohibited or permitted. The criminal liability for intentionally, knowingly or recklessly obstructing automobile or pedestrian traffic depends upon the reason for the action. Furthermore, the vagueness of "legal privilege" makes the statute and the obstruction to be susceptible to arbitrary and selective enforcement, especially when a statute is not content neutral. The void for vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement. *Kolender v. Lawson*, 461 U.S. 352, 103 S. CT. 1855, 75 L.Ed.2d 355 (2010) *Langford v City of St. Louis*. Missouri 443 F. Supp. 3d 962 (2020). When the statute implicates First Amendment rights a "more stringent vagueness test applies. *Langford v City of St. Louis*. Missouri 443 F. Supp. 3d 962 (2020). Speech and assembly are activities that are particularly susceptible to being chilled.

The statute does not give individuals including the defendant fair notice of what conduct is prohibited. Obstruction of a passage way or highway is prohibited unless the participant has a legal privilege. Since the presence of a "legal privilege" or the absence of one depends on third parties such as law enforcement officers, prosecutors, juries or judges to make the determination at a later date.

The statute must provide at least minimal guidelines to law enforcement. *Kolender v. Lawson*, 461 U.S. 352, 103 S. CT. 1855, 75 L.Ed.2d 355 (2010) This statute provides no guidelines, minimal or otherwise. It allows law enforcement to make an ad hoc and subjective determination of whether a "legal privilege" does or does not exist. The statute does not provide and standards as a "legal privilege". Colorado Criminal Code does not define "legal privilege" and therefore the language does not provide the police officer with direction as to when the authority for arrest or citation of a violation is to be properly exercised. *Kolender v. Lawson*, 461 U.S. 352, 103 S. CT. 1855, 75 L.Ed.2d 355 (2010) *Langford v City of St. Louis*. Missouri 443 F. Supp. 3d 962 (2020)

In this action, the Defendant was apparently one of several individuals that stopped traffic on the I 25 Interstate highway to protest in favor of the Black Lives Matter (BLM) movement. The Defendant's presence was determined from the review of news and social media that identified her and a vehicle registered to her at the event. There was no evidence at the hearing that any law enforcement officer made contact with her at the scene. The defendant was cited 2 and half weeks following the event. There was no evidence that law enforcement made any attempt to later contact the defendant or otherwise determine that she had a "legal privilege" to engage in the event. The Court concludes that statute CRS 18-9-107 (1)(a) is unconstitutional as to this Defendant in that it is content based without definition as to the content and it is susceptible to discriminatory or arbitrary enforcement. A reasonable person would not be able to determine if actions to obstruct were legally privileged. There is no criteria for law enforcement to determine if or what a legal privilege would be that might apply.

Having concluded that the citation and prosecution of the Defendant in this action is unconstitutional, the Court dismisses the action. Other arguments made by the Defendant need not be addressed.

Issue Date: 5/12/2021

A handwritten signature in black ink, appearing to read "Stephen J. Sletta". The signature is written in a cursive style with a horizontal line extending from the end.

STEPHEN JAMES SLETTA
Senior Judge