United States District Court
District of Connecticut

Keith Massimino,
Plaintiff

v.

Matthew Benoit and **Frank Laone**,
Defendants.

No. 21-cv-1132

July 22, 2022

Keith Massimino's Reply in Further Support of his Motion for Summary Judgment

The legal issues in this First and Fourth Amendment litigation have been thoroughly briefed in plaintiff Keith Massimino's motion for summary judgment [ECF # 38], and his opposition to the defendants' cross-motion for the same. ECF # 44. The defendants' opposition [ECF # 43] to his motion raises three new points to which he briefly replies here.

1. The defendants wrongly conflate regulation of expression's contents with regulation of expression's location.

In their opposition, defendants Matthew Benoit and Frank Laone tender a First Amendment argument improperly conflating two distinct analyses: regulation based on the contents of expression, and regulation of the place where expression happens. According to them, it was okay to stop Massimino from recording because they were merely restricting his access to the exterior features of the Waterbury police station, even though he was standing on a sidewalk.[1] Their conflation of the two separate

[1] Defs.' Opp. 8-13.

subjects is wrong, and would at any event be unworkable because basing speech rights upon locations referred to in the speech would itself be content-based.

First, the underbrush: the defendants' decision to halt Massimino's recording was content-based, because the decision was based on what the defendants believed was being captured on Massimino's camera. The defendants cite *City of Austin v. Reagan National Advertising of Austin* to argue otherwise, but the case is unhelpful to them. It merely reiterates the First Amendment truism that regulations based purely on the location of expression are not content-based: a location-only regulation does not "single out any topic or subject matter for differential treatment," and therefore has nothing to do with the content of the expression. 142 S. Ct. 1464, 1472 (2022). Thus, to take the easiest example, if the sidewalks surrounding the Waterbury police department had not been open to the public (as they undisputedly were), and the city government promulgated an ordinance forbidding all speech on those sidewalks, *Reagan National Advertising* would simply require the ordinance to be viewed as content-neutral, because it would apply equally to all speech on that specific sidewalk.

By contrast, the restriction inflicted upon Massimino was purely content-based, as it was levied because of what Massimino's recording contained. After surveilling Massimino making his recording, the defendants confronted him on the sidewalk and told him that his recording created "a security issue," because he was "videotaping a police station,"[2] and people are "not allowed to videotape a police station."[3] They did not tell him that people are "not allowed to videotape a police station *from this*

[2] Pl.'s Undisputed Fact # 47; *see* Defs.' Response [ECF No. 43-1] # 47 (admitting).
[3] Pl.'s Undisputed Fact # 52; *see* Defs.' Response # 52 (admitting).

sidewalk," or other similar location-based objection; their beef was with the images on Massimino's camera.

Perhaps sensing the problem with hitching their wagon to a purely location-based theory, Benoit and Laone attempt to cast the 'location' they policed as being "the building not the sidewalk," since the building "was the subject of his videotaping." Defs.' Opp. 11. The recursion of the defendants' formulation—alone—renders it impossible. If forum analysis worked that way, it would comprise content-based discrimination, because one would have to examine the substance of the expression (the location mentioned within it) to determine whether a geographic restriction applied to the expression. Any restriction that varies with the contents of the restricted material itself is a content-based one. *Reed v. Town of Gilbert*, 576 U.S. 155, 163-64 (2015).

Additionally, there is no support in the law of forum analysis for the defendants' leap from the *place* of the expression to a place described or contained *within* the expression. When speech restrictions are viewed through forum analysis, the question is whether the government possesses the authority to restrict expression based on "the circumstances under which those communications and the receipt of those communications occur," *Kass v. City of New York*, 864 F.3d 200, 208 (2d Cir. 2017), not on the ideas expressed in those communications. "*In* places which . . . have been devoted to assembly and debate, the rights of the state to limit expressive activity are sharply circumscribed . . . *in* these quintessential public forums, the government may not prohibit all communicative activity." *Perry Educ. Ass'n v. Perry Loc. Educators' Ass'n*, 460 U.S. 37, 45-6 (1983) (analyzing speech restrictions within "school mail facilities") (emphases added). The focus is therefore solely on the attributes of the place in which expression is restricted. *See, e.g., Make the Road by Walking v. Turner*, 378

F.3d 133, 145 (2d Cir. 2004) (analyzing welfare office waiting rooms and explaining that "the physical characteristics of a forum can help determine whether it is public or nonpublic," as can "[t]he location of a forum."). It is not about whether the expression itself invokes the place. Were the rule otherwise, forum analysis would disappear as governments became free to restrict speech in public fora so long as the speech was about locations in which no speech was allowed, or to which the First Amendment did not apply. The defendants' position is untenable.

2. The defendants' imagined concerns over what Massimino's videorecording said about his criminal intentions were unreasonable, and their validity is very much in dispute. .

Next, the defendants' opposition represents that the legitimacy of their reasons for seizing Massimino on the sidewalk outside the police station are not in dispute.[4] That is untrue. The validity of those imagined concerns lies at the heart of the legal dispute over Count Two, and Massimino has set forth at length why the defendants' notions about what he might have been up to were unreasonable, unsupported by rational inferences, and insufficient to justify his detention. *See* Massimino Mot. for Summ. J. 21-28; Massimino Opp. to Defs.' Mot. for Summ. J. 19-31. Moreover, the defendants' admission that their sole factual basis for suspicion prior to speaking with Massimino "was his videorecording"[5] squarely requires them to demonstrate that it would be a permissible outcome for this Court to deem videorecording an automatic basis for seizure. They have not done so.

[4] *See* Defs.' Opp. 9 (claiming "it is undisputed that [they] had legitimate safety and peace concerns" over Massimino's presence outside the police station); *id.* 14 (claiming that the defendants' affidavits establish "undisputed facts relating to their safety concerns"); *id.* 16 (describing Massimino as ignoring "undisputed facts upon which . . . reasonable suspicions were based").
[5] Pl.'s Undisputed Fact # 37; *see* Defs.' Response # 37 (admitting).

3. The defendants did not suspect that Massimino had a weapon because they admitted as much.

Finally, the defendants' opposition attempts to spring the possibility that they detained Massimino because they suspected he had a weapon, citing their affidavits in support of their cross-motion.[6] The record forecloses the suggestion, because the defendants admitted as much in their response to Massimino's statement of undisputed fact and supporting citations to evidence establishing that they had no such suspicion. *See* Pl.'s Undisputed Fact # 38 ("The defendants did not suspect that Mr. Massimino had a weapon."); Defs.' Response # 38 ("Admitted").

Indeed, Defendants had no choice to admit this. As those supporting citations showed, at deposition, each defendant readily testified that if they had suspected Massimino had a weapon, they would have pat-frisked him—but they didn't. Benoit 17:13-18:2 (testifying that if he had been suspicious of a weapon, he would have patted Massimino down), Laone 20:15-18 (same); Video 06:39-10:56 (showing that no pat-down occurred). *See also* Laone 20:5-7 ("I did not pat him down initially.").

4. Conclusion

For the reasons set forth here, and elsewhere in Massimino's extensive briefing in support of his motion for summary judgment and in opposition to the defendants', judgment must enter in his favor on all counts.

[6] Defs.' Opp. 15. *See* Benoit Aff. [ECF # 40-5] ¶ 11 ("Mr. Massimino was wearing a jacket and I was unable to determine whether he may be in possession of a concealed weapon."); Laone Aff. [ECF # 40-6] ¶ 13 (verbatim).

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