DISTRICT COURT, LARIMER COUNTY, COLORADO 201 Laporte Avenue, Suite 100 Fort Collins, Colorado 80521-2761 (970) 494-3800	DATE FILED: February 4, 2021 4:29 PM CASE NUMBER: 2019CV30889
PEOPLE OF THE STATE OF COLORADO, Plaintiff/Appellee, v. **ADAM WIEMOLD**, Defendant/Appellant.	**▲ COURT USE ONLY ▲** Case No. 19CV30889 Courtroom: 5A
ORDER ON APPEAL: REVERSED AND REMANDED WITH DIRECTIONS	

This matter comes before the Court on Defendant/Appellant Adam Wiemold's appeal of the Municipal Court's denial of his Motion to Dismiss and Motion to Vacate Conviction and Enjoin the Imposition of Any Sentence. The Court has considered the briefs, the transcript of the hearing, and the complete record in this matter. Being fully advised in the premises, the Court reverses the denial of the Motion to Dismiss.

I. BACKGROUND

On September 10, 2018 Mr. Wiemold ("Appellant") was homeless. Mr. Wiemold works full time as a supervisor of the Catholic Charities homeless shelter, one of the two homeless shelters in Fort Collins. Appellant makes $16.00 per hour. Appellant's job included managing daily operations at the shelter, ensuring clients followed the shelter's rules, suspending people from the shelter for rule violations, and enforcing such suspensions.

Appellant testified that he had been homeless for about two years because he was paying off credit card debt. The record indicates that on September 10, 2018 Appellant could not stay at either of the homeless shelters in Fort Collins available to

single men. Appellant was not able to stay at Catholic Charities because of shelter policies. Appellant could not stay at Fort Collins Rescue Mission (FCRM) because the shelter populations overlapped. Additionally, he could not stay at FCRM because of fraternization rules and to avoid potentially unsafe situations. Appellant testified that he did not ask his employer for an exception to this rule. Appellant testified that he did not go to either homeless shelter to request a bed, nor did he look for a room to rent. The record indicates that both shelters had reached bed capacity on the evening of September 10, 2020.

On the night of September 10, 2018 Mr. Wiemold parked in the parking lot at the Poudre rest area and slept in his vehicle. Appellant was asleep in his vehicle when the Fort Collins Police Services (FCPS) officers conducted an enforcement operation at the rest area. They did so at the request of Wesley Mansfield, a supervisor who worked for the rest area's owner, the Colorado Department of Transportation (CDOT). Mr. Mansfield texted FCPS officer Chip Avinger complaining about people who are homeless in the area and repeatedly asked officer Avinger to force the individuals who are homeless to leave the rest area. Mr. Mansfield alleged ongoing issues with homeless campers in the area causing damage, refuse and in violation of the City's prohibition of camping on public property.

Officer Avinger arranged a date and time to conduct an operation at the Poudre rest area. FCPS officers woke Appellant up around 6:00 am and cited him for sleeping in his vehicle. On September 11, 2018, Mr. Wiemold received a summons for an alleged violation of Fort Collins Municipal Ordinance § 17-181 "Camping on Public Property." After the enforcement operation, officer Avinger sent a text message to Mr. Mansfield informing him they had charged six people with Camping on Public Property.

Mr. Wiemold filed a Motion to Dismiss arguing the same issues argued in this

appeal. The municipal court held an evidentiary hearing and denied the motion. The court denied the claim for cruel and unusual punishment as an issue only properly brought after conviction. The court denied the claim for selective enforcement based on the evidence presented. The parties stipulated to a court trial. Appellant waived his right to a full trial, and the parties stipulated to the evidence previously presented at the motions hearing. The municipal court issued its Findings and Ruling and held that the evidence showed that Mr. Wiemold was found sleeping in the back of his car in 2-hour parking on public property, and that Mr. Wiemold admitted to being in his vehicle overnight. The municipal court held that the evidence was sufficient to prove the charge of Camping on Public Property against Appellant beyond a reasonable doubt.

Appellant filed a Motion to Vacate Conviction and Enjoin the Imposition of Any Sentence. Appellant argued that the municipal court should vacate his conviction and dismiss all charges against him because issuing him a camping citation was cruel and unusual punishment under the Eighth Amendment and the Colorado Constitution. The municipal court issued its Order denying Appellant's Motion to Vacate.

Mr. Wiemold filed this appeal and asserted that the municipal court erred when denying his Motion to Dismiss, and when it denied his Motion to Vacate Conviction. Appellant requests this Court reverse the ruling and remand with direction to the municipal court to vacate his conviction and dismiss the charge against him.

Appellant argues that because he was homeless and could not have stayed at either of the Fort Collins homeless shelters, prosecuting and convicting him of this charge violates the prohibition on cruel and unusual punishment under the Eighth Amendment and Colorado Constitution. Appellant further argues that because the FCPS officers went to the parking area with the plan of contacting and citing people

suspected of being homeless, his citation was selective enforcement by the FCPS in violation of the Fourteenth Amendment. Appellee asserts that this case does not fall under the reasoning of Appellant's argued case law, and that the courts should not be used to attempt to push policy changes as constitutional challenges. Appellee asserts that Mr. Wiemold's argument for cruel and unusual punishment is a facial challenge with broad implications, and his claims cannot succeed under the facial challenge standard. Appellee further argues that Mr. Wiemold cannot meet the requirements of a rational basis review for the equal protection selective enforcement claim.

II. STANDARD OF REVIEW

After the final judgment of a municipal court, a defendant may appeal to the district court within thirty-five (35) days. Crim. P. 37.1.; C.R.M.P. 237.

The trial court's order denying Appellant's Motion to Dismiss and Motion to Vacate may be dependent on factual findings. *People v. Mershon*, 874 P.2d 1025, 1034 (Colo. 1994) (*en banc*). On review, this Court gives deference to the trial court's factual findings if they are adequately supported by competent evidence in the record. *Id.; People v. Matheny*, 46 P.3d 453, 461 (Colo. 2002) (*en banc*). When reviewing questions of law, the appellate court need not defer to the trial court. *Id.* (citing *Evans v. Romer*, 854 P.2d 1270, 1274 (Colo. 1993). The appellate court's application of the legal standard to the facts, which resolves the "ultimate constitutional question," merits *de novo* review. *People v. Al-Yousif*, 49 P. 3d 1165, 1169 (Colo. 2002) (*en banc*) (citing *Matheny*, 46 P.3d at 462).

Whether a punishment is in violation of the Eighth Amendment and article II, § 20 of the Colorado Constitution is a question of law and does not require deference to the municipal court. *Wells-Yates v. People*, 454 P.3d 191, 204 (Colo. 2019); *Melton v. People*, 451 P.3d 415, 417 (Colo. 2019) (citing *Mershon*, 874 P.2d at 1035). When reviewing challenges to the Fourteenth Amendment any legal issues relating to the constitutionality of a city ordinance is decided *de novo*. *Joel v. City of Orlando*, 232 F.3d

1353, 1357 (11th Cir. 2000). Therefore, the Court's review of both issues presented is *de novo*.

III. DISCUSSION

a. Cruel and Unusual Punishment

The Eighth Amendment and article II, § 20 of the Colorado Constitution state: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. Amend. VIII; Colo. Const. art. II, § 20.

Here, Appellant challenges the municipal court's denial of his Motion to Dismiss and Motion to Vacate and argues that when he was cited for sleeping in his vehicle at the rest stop when he could not stay at a shelter. And, because he was sleeping outdoors involuntarily, it is cruel and unusual punishment to criminalize his sleeping outdoors.

Appellee argues that Mr. Wiemold never attempted to access shelter the night he was cited. Appellee asserts that Mr. Wiemold had a vehicle, so he could access a shelter in an alternative location, or that he had financial means to purchase shelter and chose not to. Appellee further asserts Mr. Wiemold's camping was therefore voluntary.

i. Case Law Standard

Both parties rely heavily upon *Martin v. City of Boise*, 902 F.3d 1031 (9th Cir. 2018), *cert. denied*, 920 F.3d 584 (2019); *Powell v. Texas*, 392 U.S. 514 (1968); *Robinson v. California*, 370 U.S. 660 (1962); *Jones v. City of Los Angeles*, 444 F.3d 1118 (9th Cir. 2006); and *Joel v. City of Orlando*, 232 F.3d 1353 (11th Cir. 2000). The parties also cite to various United States District Court opinions that are related to the issues in this case, but which are less persuasive. With no precedent in the Colorado courts, this

Court looks primarily to the federal cases from the U.S. Supreme Court and Courts of Appeals.[1]

Appellant argues that courts have held it unconstitutional to impose a criminal sanction on a person who is homeless for sleeping on public property when that person could not access shelter. Appellee asserts that the Court should decline to follow the case law supporting Appellant's position.

In *Martin*, the court held that the "Eighth Amendment prohibits the imposition of criminal penalties for sitting, sleeping, or lying outside on public property for homeless individuals who cannot obtain shelter." *Martin*, 902 F.3d at 1048. The *Martin* court held that the Cruel and Unusual Punishment Clause precludes enforcement of a statute prohibiting sleeping outside against individuals who are homeless with no access to shelter. *Id.* at 1046. The *Martin* decision pulls much of its analysis from the *Jones*, *Powell*, and *Robinson* opinions. *See id.* at 1046–49.

In *Robinson*, the defendant was convicted under a statute that made it a misdemeanor for a person to use narcotics or be addicted to the use of narcotics. *Robinson*, 370 U.S. at 662. The court distinguished between the use of narcotics being the act of using narcotics and the addiction to narcotics being based upon condition or status. *Id.* The court held that a statute that criminalizes status means a defendant "may be prosecuted at any time before he reforms" and was unfair to a defendant with that status. *Id.* at 666. The *Robinson* court determined that the State recognized narcotic addiction to be an illness, one which could be contracted innocently or involuntarily; thus, the statute at issue imposed cruel and unusual punishment by criminalizing status. *Id.* at 667.

[1] Rather than summarize all the numerous cases mentioned by the parties, the Court bases its findings on the most pertinent cases. The Court finds it unnecessary to discuss each individual case that was cited, particularly those peripheral to the analysis here.

The plurality opinion in *Powell* interpreted *Robinson* to prohibit only criminalization of status and not criminalization of "involuntary" conduct. *Powell*, 392 U.S. at 533; *Martin*, 902 F.3d at 1047; *Jones*, 444 F.3d at 1133. The *Powell* opinion held that *Robinson* did not deal with whether conduct can be constitutionally punished because it is "involuntary." *Powell*, 392 U.S. at 533. Justices Black and Harlan concurred with the decision and amplified the reasoning to include that "punishment for a status is particularly obnoxious, and in many instances can reasonably be called cruel and usual, because it involves punishment for a mere propensity, a desire to commit an offense." *Powell*, 392 U.S. at 543 (Black, J., concurring). But the concurrence agreed with the plurality opinion, as to the question of whether an act is "involuntary" as being elusive and the court's limitation of *Robinson* to pure status crimes was proper. *Id.* at 544.

Justice White concurred, but alternatively reasoned that some chronic alcoholics are also homeless and in those instances there may be no other place to drink or be drunk except on the streets. *Powell*, 392 U.S. at 551 (White, J., concurring); *Martin*, 902 F.3d at 1047. Justice White further explained that when the statute at issue is applied to individuals who are homeless, and who cannot avoid public places while intoxicated, then it was a violation of the Eighth Amendment to convict them of the act of getting drunk. *Powell*, 392 U.S. at 551 (White, J., concurring); *Martin*, 902 F.3d at 1047. The four dissenting Justices held a position similar to Justice White's, determining that "criminal penalties may not be inflicted upon a person for being in a condition he is powerless to change." *Powell*, 392 U.S. at 567 (Fortas, J. dissenting); *Martin*, 902 F.3d at 1048; *Jones*, 444 F.3d at 1133. The dissenting Justices further addressed the involuntariness of Powell's behavior and the obvious comparison to the facts in *Robinson*. *Powell*, 392 U.S. at 567 (Fortas, J. dissenting); *Martin*, 902 F.3d at 1048; *Jones*, 444 F.3d at 1133–34. Accordingly, in the 4-1-4 decision, five Justices in *Powell* understood that under *Robinson*, the Eighth Amendment prohibits the state

from punishing an involuntary act or condition if it is the unavoidable consequence of one's status or being. *Martin*, 902 F.3d at 1048; *Jones*, 444 F.3d at 1135.

Appellee argues the Court should not look to *Powell* for guidance because *Marks v. U.S.*, 430 U.S. 188 (1977), applies to the fragmented decision. Appellee argues that *Powell* changes nothing and *Robinson* should be relied on to address these issues. However, Appellee's reasoning is flawed. The *Marks* court held when a fragmented court decides a case and no single rationale explaining the result has the agreement of five Justices, the holding may be viewed as the position taken by those Justices who concurred in the judgment on the narrowest grounds. *Marks*, 430 U.S. at 193 (citing *Gregg v. Georgia*, 428 U.S. 153, 169 n. 15 (1976)). The direct application of *Marks* would essentially render the *Powell* decision useless as precedent. However, a strict reading of *Marks* suggests the assent of five Justices supports the majority Justices' reasoning. Although Justice White's concurrence and the dissents did not share complete agreement, the reasoning they did agree upon should be considered a majority, and thus persuasive.

Both the Ninth and Fourth Circuits discussed *Powell* in detail and concluded that Justice White's concurring opinion was highly persuasive. *Martin*, 902 F.3d at 1047–48; *Jones*, 444 F.3d at 1133–36; *Manning v. Caldwell*, 930 F.3d 264, 281–84. The court in *Manning* determined it would not ignore the reasoning by Justice White, because his opinion was shared by four other Justices and provided important reasoning for cases related to individuals who are homeless. *Manning*, 390 F.3d at 282. Justice White made clear that although he voted to affirm Powell's conviction it was not because of the act-status theory in the plurality opinion, but solely because Powell failed to produce facts to establish involuntariness of his public alcoholism. *Id.* Similar to the mentioned cases, this Court does not simply set aside the *Powell* opinion, but adopts the interpretation of the five Justices in *Powell* as persuasive authority.

Appellee argues that *Joel* held that the ordinance at issue did not violate the Eighth Amendment because of the conduct/status distinction. *Joel v. City of Orlando*, 232 F.3d 1353 (2000). In *Joel*, the defendant argued that the ordinance at issue punished persons as a result of their status of being homeless. *Joel*, 232 F.3d at 1361. Joel argued that the *Robinson* case supported this argument, as does *Pottinger v. City of Miami*, 810 F.Supp. 1551 (S.D.Fla. 1992) and *Johnson v. City of Dallas*, 860 F.Supp. 344 (N.D.Tex. 1994). *Id.* at 1361–62. The court held that the reasoning in *Pottinger* and *Johnson* specifically relied on the lack of sufficient homeless shelter spaces, and those courts reasoned that sleeping in public was involuntary for those who could not get shelter. *Id.* at 1362. The court further determined that, if it followed the reasoning from *Pottinger* and *Johnson*, the *Joel* case is clearly distinguishable because the ordinance does not criminalize involuntary behavior; Joel had an opportunity to comply with the ordinance. In *Joel*, the court reasoned that the plurality opinion in *Powell* supported that the ordinance in *Joel* targeted conduct and did not punish based on status. *Id.* The *Joel* court's reasoning clearly recognized *Pottinger* and *Johnson* but held that these cases did not apply to Joel because the city demonstrated that the homeless shelter had never reached maximum capacity. Because of this difference in facts, the cases Joel presented in his argument were not particularly persuasive.

Under the above analysis, the state cannot criminalize the consequence of one's status of being homeless. This Court must therefore consider the distinction between an involuntary act or condition and a voluntary one.

ii. Involuntary

The Eighth Amendment prohibits the state from punishing an involuntary act if it is the unavoidable consequence of one's status or being. *Jones*, 444 F.3d at 1135. The consensus among the Fourth, Ninth and Eleventh Circuits is that the Eighth Amendment prohibits criminal penalties for sleeping outside on public property for those individuals who are homeless who cannot obtain shelter. *Manning*, 930 F.3d 264;

Jones, 444 F.3d 1118; *Martin*, 902 F.3d 1031; *Joel*, 232 F.3d 1353. Additionally, a multitude of Federal District Courts have utilized *Robinson*, *Powell*, and *Jones* to determine that, without available shelter space, criminalizing camping is criminalizing involuntary conduct. *Pottinger*, 810 F.Supp. at 1564 (holding that arresting the homeless for involuntary acts such as sleeping in public is cruel and unusual); *Johnson*, 860 F.Supp. at 350 ("as long as the homeless have no other place to be, they may not be prevented from sleeping in public . . . but as long as homeless persons must live in public, their sleeping may not be constitutionally criminalized"); *Cobine v. City of Eureka*, 250 F.Supp.3d 423, 432 (N.D. Tex. 2017) (holding that the factual record must establish that there was no available or adequate homeless shelter space for the camping ordinance to be criminalizing involuntary conduct as a result of homelessness); *Anderson v. City of Portland*, Civ. No. 08–1447–AA, 2009 WL 2386056, at *7 (D. Or. July 31, 2009) (holding that people who are homeless cannot access shelters for various factors and to enforce anti-camping ordinances criminalizes them for being homeless). Courts have held that when individuals who are homeless cannot obtain shelter, criminalizing sleeping violates the Cruel and Unusual Punishment Clause. *Jones*, 444 F.3d 1136.

The *Jones* court held that involuntary conduct and status are inseparable, specifically as it relates to humans who are biologically compelled to rest, whether that be sitting, lying, or sleeping. *Id.* The *Martin* court held that a municipality cannot criminalize behavior consistently with the Eighth Amendment when no space is available in any shelter. *Martin*, 902 F.3d at 1048. Involuntary behavior cannot be criminalized under the Eighth Amendment; this Court must therefore determine whether Appellant's inability to stay at a shelter on September 11, 2018 was involuntary.

Appellant argues that he had no choice except to sleep outdoors on the morning he was cited. Appellant asserts because of his employment at Catholic

Charities he could not stay at either homeless shelter in Fort Collins that accepts adult men. Appellant further asserts that both Fort Collins shelters were full that night.

Appellee argues that Mr. Wiemold's camping was voluntary. Appellee asserts that Mr. Wiemold was employed full time with a working vehicle and was camping to get out of debt, therefore was voluntarily camping. Appellee asserts that Mr. Wiemold chose an employer who prohibits him from accessing the Fort Collins shelters. Appellee asserts Mr. Wiemold had choices he chose to ignore, for example, he could drive to Loveland and say at a shelter there or drive a mile or two outside of Fort Collins and legally camp there. Appellee asserts that Appellant had a variety of options and instead voluntarily chose to camp illegally.

Appellant is a shelter supervisor at Catholic Charities. Appellant's supervisor, Joe Domko, the regional director of Catholic Charities of Larimer County, confirmed that many people who stay at Catholic Charities also stay at the other shelter in Fort Collins. Mr. Domko confirmed that all employees, including Appellant, are given a copy of the Employee Handbook. He testified that the fraternization policy was in effect at Catholic Charities when Appellant was cited for camping. Policy 3.24 in the employee handbook, "Fraternization with Clients/Boundaries," states, "Staff may only interact with clients at the Agency itself or at the Agency-sponsored activities, only during the staff person's assigned working hours, and only within the scope of the employee's job description." Ex. 8, Catholic Charities Employee Handbook pg. 28.

Mr. Domko further testified that the night of September 10, 2018, Catholic Charities' shelter was full. The report shows the shelter was at one hundred percent capacity, and that same report indicates that FCRM was also full but had not yet turned away any clients. Mr. Domko testified that when people are turned away from Catholic Charities, they are directed to FCRM if FCRM has capacity.

Appellant testified that when he was cited, he had been working for Catholic Charities for four years. He testified that he could not stay at either Fort Collins shelter on the night he was cited because of the fraternization policy. Appellant indicated that staying at either shelter would implicate safety concerns. Appellant testified that, as a shelter supervisor he had to ensure rules were being followed and suspend people who failed to follow the rules. Appellant testified he has suspended between one to two people per week during his time as a shelter supervisor. Because on these suspensions, Appellant testified that staying at FCRM could be unsafe if he were to encounter a person he had suspended from Catholic Charities.

On cross examination, Appellant testified that when he was cited, he had continuous employment and no dependents to support. Appellant testified that he had excessive debt and could not afford to both pay his credit card bills and pay for housing. Appellant testified that he had too much pride to declare bankruptcy and he didn't want to stop paying his credit card bills and risk going into collections. Appellant testified that if he stopped paying his credit card bills, he could afford an apartment or room to rent. Mr. Wiemold testified that he was able to pay off $10,000 over two years by camping. Appellant testified that he did not seek low income housing and he did not try to go to a nearby shelter in Loveland or another nearby city. Appellant testified that he searched for a room on Craigslist and could not find an affordable option, and that he had stopped looking for a room by September 2018. Mr. Wiemold testified that he could only afford to stay in a hotel or motel about twice a week or twice a month. Further, Appellant testified that he did not look for a different job, and he did not ask his boss for an exception to the fraternization rule to allow him to sleep at one of the Fort Collins shelters.

Appellee asks the Court to make a subjective decision as to whether Appellant could afford shelter. The *Martin* court held that its decision did not apply to people who choose not to use temporary shelter they can pay for or shelter available for free.

Martin, 920 F.3d at 617. Appellee provides no case law to support an in-depth analysis of the factors a court should apply to determine voluntary homelessness. With no case law to support a decision about consideration of individual personal factors that attribute to homelessness, the Court will not consider whether Mr. Wiemold made valid choices here.

Appellee asks the court to consider Appellant's choices under the dictionary definition of "involuntary." The Court looks to the case law to determine what is "involuntary" as it relates to individuals who are homeless under the Eighth Amendment. The holding in *Martin* is clear if there is no access to shelter, people who are homeless cannot be presumed to have a choice in the decision to sleep outdoors. *Martin*, 902 F.3d at 1048. In *Jones*, the court held that an individual may become homeless based on factors both within and beyond his immediate control. However, just because Appellant may be able to obtain shelter on some nights or eventually escape homelessness altogether does not render his status at the time of citation to be any less worthy of protection. *Jones*, 444 F.3d at 1137.

There is no dispute that the Catholic Charities shelter and FCRM shelter were both at capacity on the night Appellant was cited. Further, the record shows that, due to Mr. Wiemold's employment, it would not have been practicable, realistic, or safe for Appellant to stay at one of the Fort Collins shelters. The Court declines to impose subjective determinations about whether Mr. Wiemold's personal factors led to a volition to remain homeless. The case law is clear that shelter availability determines the standard of voluntary or involuntary homelessness. The Court concludes that shelter was unavailable to Appellant on the night he was cited, and thus his homelessness was involuntary.

iii. As-applied vs. Facial Challenge

Appellee argues that Appellant's Eight Amendment claim is a facial challenge, not an as-applied challenge. Appellee argues that Mr. Wiemold has brought his appeal under his individual circumstances but seeks relief that is much broader. Appellee argues that Mr. Wiemold seeks a decision that would determine that camping for people who are homeless is always involuntary, so anytime the Fort Collins shelters are full the camping prohibition is unenforceable. Appellee argues that Appellant's constitutional challenge specifically asks the Court for a decision that will carry legal effects beyond only Mr. Wiemold which makes this a facial challenge.

Appellant asserts that he is not arguing that the ordinance is always unconstitutional, only that it is unconstitutional as applied to his circumstances. Mr. Wiemold asserts that under his particular circumstances there was no shelter available to him in Fort Collins, so it would be unconstitutional to impose a criminal sanction against him for camping at the rest area. Appellant asserts there is likely no other employee at the shelter who is also homeless, so the Court's decision would be confined to only his circumstances.

The difference between a facial challenge to the constitutionality of a statute and an as-applied challenge is that an as-applied challenge asserts that the statute would be unconstitutional under the circumstances specific to an individual. *Sanger v. Dennis*, 148 P.3d 404, 410 (Colo. App. 2006). When a statute is held unconstitutional as-applied, that statute may be applied to the specific challenge but is otherwise enforceable and could be applied in the future in a similar context. *Id.*; *Minnesota Majority v. Mansky*, 708 F.3d 1051, 1059 (8th Cir. 2013). A facial challenge alleges that there are no circumstances when the statute can be applied constitutionally. *People v. Trujillo*, 369 P.3d 693, 697 (Colo. App. 2015).

Appellee argues this case provides a gray area between a facial challenge and an as-applied challenge. The Court disagrees. Appellant has brought this case alleging that based on his unique circumstances, the citation of public camping is unconstitutional as applied to him. The facts here would likely not apply to other individuals who are homeless in Fort Collins who would have access to either shelter in Fort Collins. Appellant does not argue that this statute is unconstitutional as to all individuals who are homeless each time they do not have access to shelter in Fort Collins. Based on the facts specific to this case and Mr. Wiemold's inability to stay at the shelters because of his job, the Court finds his claim to be a constitutional challenge as-applied to the Appellant specifically.

b. Selective Enforcement in Violation of the Fourteenth Amendment

Appellant argues that when he received his citation, the officers intentionally targeted and enforced the camping ordinance against only individuals who are homeless. Appellant argues this was selective enforcement and violates the Fourteenth Amendment. Appellant argues the evidence shows that the officers' enforcement at the rest area was intentionally aimed at the individuals who are homeless parked at the rest stop and not the vehicles parked in the truck parking lot. Appellant argues there is no rational basis for the officers to selectively target him or the people who are homeless inside their vehicles while not enforcing the ordinance against the truck drivers who engaged in the same activity.

Appellee argues that Mr. Wiemold has failed to show there is a discriminatory effect. Appellee asserts that the evidence does not establish that all of the other individuals cited were homeless, and there is no evidence to establish that there were similarly situated individuals who were not cited. Appellee notes that Mr. Wiemold testified that he could not be sure whether any trucks were present in the truck lot when he went to sleep and still there when he woke up. Appellee further argues the

parking lots are separate with different regulations, hence the trucks parked in the truck lot were not similarly situated. Appellee asserts there is an obvious rational basis to enforce in the car lot because the increase of problems and damage in the car parking lot and conditions of the rest area. Appellee argues because the record does not establish these facts, Mr. Wiemold cannot prove a claim for selective enforcement under the Fourteenth Amendment.

Given the Court's decision on the Eighth Amendment above, the Court need not address the Fourteenth Amendment argument.

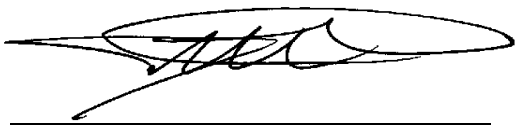
IV. CONCLUSION

The Court finds that the hearing officer's decision was erroneous. On appeal the Court REVERSES the decision of the Fort Collins Municipal Court. The Court REMANDS the matter to the municipal court and directs that Appellant's Motion to Vacate be granted and Mr. Wiemold's charges be dismissed.

SO ORDERED.

Dated: February 4, 2021.

BY THE COURT:



Julie Kunce Field
District Court Judge