

County Court City and County of Denver, Colorado 1437 Bannock Street, Denver, Colorado 80202	▲ COURT USE ONLY ▲
People of the City and County of Denver, Colorado -vs- JEREMY JOSEPH BERNIER, Defendant	
Paula Greisen, #19784 Andrea E. Faley, #32025 MILLER, LANE, KILLMER & GREISEN, LLP 730 17 th Street, Suite 600 Denver, Colorado 80202 Telephone Number: 303-534-6400 FAX Number: (303) 534-0156 E-mail: pgreisen@mlkg-law.com or afaley@mlkg-law.com	Case Number: 01 GS 505590 Division: Ctrm: 151-P
MOTION TO DISMISS CRIMINAL COMPLAINT	

Defendant Jeremy Bernier, through his counsel, Paula Greisen and Andrea E. Faley, of MILLER, LANE, KILLMER & GREISEN, LLP, in cooperation with the ACLU Foundation of Colorado, respectfully moves this Court for an Order dismissing the criminal complaint against him. The grounds for this motion are set forth as follows:

INTRODUCTION

Jeremy Bernier is charged with violating Denver Municipal Ordinance Section 38-31 (no subsection specified), Interference with Police Authority. It is Mr. Bernier's contention that the charge against him must be dismissed because the police officers involved had no reasonable basis for stopping him or probable cause for arresting him. Rather, the officers stopped Mr. Bernier and ultimately arrested him due to his legitimate exercise of his First Amendment rights.

FACTS

In September of 2001, Denver police officers were directed by Division Chief of Patrol O'Hayre to conduct an investigatory stop of *any* persons participating in a public protest who were wearing black

hoods, masks, or bandanas over their faces. [See Ex. 1, After Action Report of Sept, 20, 2001 at 2; Ex. 2, Juvenile Case Summary, Case No. 200141190 at 2; Ex. 3, Offense Report, Case No. 200141190 at 2; Ex. 4, Statement of Officer Roundtree, Case No. 200141190 at 1; Ex. 5, Statement of Officer Sewald, Case No. 200141190 at 1.] Pursuant to this policy, Denver police officers stopped or arrested several individuals who were participating peacefully in a public protest on September 29, 2001. [*Id.*]

On October 6, 2001, Jeremy Bernier peacefully participated in the “Four Directions All Nations March” in downtown Denver. The purpose of the parade was to show public support for the transformation of Columbus Day and to promote ethnic and social unity. [See Ex. 6, “Four Directions All Nations March” Brochure.] Participants in the parade were assembled in different color groups, with each group donned in black, red, white, or yellow attire as a symbol of various ethnic and social groups. [*Id.*] To exemplify the unification of these different ethnic and social groups, each color group started out marching in different parts of the city and came together downtown. [*Id.*] Like his mother, his friends, and others in his color group of peaceful demonstrators, Mr. Bernier was attired in black and wore a black bandana over his nose and mouth.

When Mr. Bernier and others in his color group reached the corner of the intersection of Colfax and Broadway, Mr. Bernier informed his mother and friends that he needed to find a restroom and he left the parade. As he left the demonstration and approached the public sidewalk in search of a restroom, Mr. Bernier pulled his bandana down below his chin. A police officer with a video camera then tried to videotape Mr. Bernier. Since Mr. Bernier did not wish to be photographed, he pulled the bandana back up over his nose, whereupon the officer lowered his camera and pointed at Mr. Bernier. Mr. Bernier then removed his bandana from his face again and kept it off.

Moments later two police officers on motorcycles cut off Mr. Bernier as he was walking down the sidewalk, dismounted their motorcycles, approached Mr. Bernier, and asked him if they could speak with him. Mr. Bernier responded that they could do so after he used the bathroom. The officers refused to let Mr. Bernier find a restroom and told him they needed to search him for their safety. One of the

officers then touched Mr. Bernier in the area near his waist. Mr. Bernier reflexively pulled away from the groping hand of the officer, and the officer told him not to resist and twisted Mr. Bernier's arm behind his back and handcuffed him. Mr. Bernier shouted in pain and verbally protested the officers' conduct, telling the officers they had no cause to harass him and hurt him. The officers ignored Mr. Bernier's protests, searched him, and took him into custody, eventually charging him with interference with police under Denver Municipal Ordinance Section 38-31 (no subsection specified).

ARGUMENT

I. THE OFFICERS' INVESTIGATORY STOP OF MR. BERNIER VIOLATED HIS CONSTITUTIONAL RIGHTS

A. The Officers' Stop of Mr. Bernier Was Motivated by His Valid Exercise of His First Amendment Rights

A "bedrock principle underlying the First Amendment . . . is that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Texas v. Johnson*, 491 U.S. 397, 414, 109 S.Ct. 2533, 2544, 105 L. Ed. 2d 342 (1989) (citations omitted). Even non-verbal conduct that is "sufficiently imbued with elements of communication" may be entitled to constitutional protection under the First and Fourteenth Amendments as "symbolic speech." *Spence v. Washington*, 418 U.S. 405, 409, 94 S.Ct. 2727, 2730, 41 L. Ed. 2d 842 (1974). *See Schacht v. United States*, 398 U.S. 58, 90 S.Ct. 1555, 26 L. Ed. 2d 44 (1970) (wearing American military uniforms in drama criticizing United States' involvement in Vietnam War was protected symbolic speech). *Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503, 89 S.Ct. 733, 21 L. Ed. 2d 731 (1969) (wearing black armbands as protest against United States' involvement in Vietnam War was protected First Amendment activity); *Church of the Am. KKK v. City of Erie*, 99 F. Supp. 2d 583, 588 (W.D. Pa. 2000) (holding anti-mask ordinance unconstitutional under First Amendment to the extent that it prohibited the wearing of masks which constituted symbolic speech); *Aryan v. Mackey*, 462 F. Supp. 90, 92 (N.D. Tex. 1978) (holding that demonstrators wearing of masks was entitled to protection under the First Amendment in order to secure the students' anonymity and because the masks

had become symbols of protest against the foreign government). Thus, wearing symbolic attire, including a mask, which is meant to convey a message during a peaceful public protest, is constitutionally protected activity. Hence, although police officers may find wearing symbolic black clothing and “masks” during a peaceful public protest offensive, they cannot use such constitutionally protected conduct as an allegedly “reasonable” basis for detaining peaceful protestors for questioning lest they violate the individuals’ First Amendment rights.

Nevertheless, this is just what happened here. Officers stopped Mr. Bernier pursuant to a departmental policy directing them to stop and identify persons who were peacefully participating in a public demonstration and wearing symbolic black clothing and masks. Indeed, Officer Dan O’Shea, the reporting officer, stated in the summons an complaint:

The defendant (John Doe) was observed walking north on Broadway in 1500 block. *Defendant had a black mask on his face and would not let a media member take his picture. Defendant was walking in front of Subway sandwich shop. Through training, education and experience officers know the parties with this behavior are know to cause damage of corporate establishments. Defendant was observed leave [sic] parade from “black bloc” group. Officers contacted Defendant and asked him his name. Defendant stated [unintelligible]. Defendant was visibly nervous and was confrontational. Officer tried to conduct a pat down search for officers safety because he also had baggy clothing to cashe/conceal a weapon. Defendant felt officer touch his waist band and Defendant pulled officer’s hand away. Defendant was told to calm down, we were just patting him down for weapons. Defendant stated “no, You will not pat me down.” Defendant tried to walk away and Defendant was placed into custody for officer’s safety. Defendant was asked his name and stated, “grass roots, that’s my name.” Interference charged by Sgt. O’Shea.*

[Summons and Complaint No. GD-505590.] Given the plain language of the complaint, Mr. Bernier was stopped solely because he was wearing of symbolic clothing and peacefully marching in the parade—clearly First Amendment protected activity. To then use that constitutionally protected activity against Mr. Bernier as purported justification for stopping and detaining him—though Mr. Bernier did *nothing* more than leave the parade route moments earlier—is to punish Mr. Bernier for his valid exercise of his First Amendment rights.

B. The Officers’ Stop also Violated His Fourth Amendment Rights.

Even putting aside, for the sake of argument, that Mr. Bernier was stopped because he was engaged in First Amendment activity, the officers had no other reasonable basis for conducting an investigatory stop.

Under the Fourth Amendment and the laws of Colorado, a police officer may lawfully detain an individual for questioning, i.e., conduct an investigatory stop, only if: (1) the officer has a reasonable suspicion that the individual has committed, or is about to commit, a crime; (2) the purpose of the detention is reasonable; and (3) the scope and character of the detention is reasonable when considered in light of the purpose. *See* U.S. Const. amend. IV; Colo. Rev. Stat. § 16-1-103(1); *Terry v. Ohio*, 392 U.S. 1, 20, 20 L. Ed. 2d 889, 88 S. Ct. 1868 (1968); *People v. Greer*, 860 P.2d 528 (Colo. 1993); *Stone v. People*, 174 Colo. 504, 509, 485 P.2d 495, 497 (1971). When, the purpose for which the investigatory stop was initiated has been accomplished and no other reasonable suspicion exists to support further investigation, there is no justification for further detention and interrogation of an individual. *People v. Redinger*, 906 P.2d at 85-86.

The summons and complaint of the arresting officer, Sgt. Dan O'Shea, notes that Mr. Bernier did not want his picture taken in the parade, that Mr. Bernier was walking in front of a Subway sandwich shop, and that Mr. Bernier had been observed leaving the parade from the "black bloc" group. According to Sgt O'Shea's complaint, it was this paucity of facts that "through training, education, and experience, [gives] officers [cause to] know that parties with this behavior are known to cause damage of [sic] corporate establishments." Thus, the officers apparently thought that these circumstances gave them a reasonable suspicion that Mr. Bernier was about to vandalize or otherwise damage the Subway sandwich shop. However, a close scrutiny of the totality of these circumstances reveals that the officer's stop was unreasonable and therefore unconstitutional under the Fourth Amendment of the Constitution.

First, not wanting to be photographed while in a protest march does not constitute unusual or suspicious behavior indicating that one may have committed or be about to commit a crime—many public protestors are justly concerned about retribution for engaging in constitutionally protected

activity. *See Aryan v. Mackey*, 462 F. Supp. at 92 (determining that “[s]erious First Amendment questions arise . . . when there is such a nexus between anonymity and speech that a bar on the first is tantamount to a prohibition on the second”); *cf. NAACP v. Alabama*, 357 U.S. 449, 462-63, 78 S. Ct. 1163, 1172, 2 L. Ed. 2d 1488 (1958) (concluding that legitimate fear of retribution if association membership was forced to be made public would inhibit NAACP membership).

Second, walking on a public sidewalk in front of a sandwich shop in broad daylight cannot, by any stretch of the imagination, be construed as suspicious behavior indicative of criminal intent. Further, Mr. Bernier never made any move to enter the sandwich shop; he was already past it when the officers intercepted him on the sidewalk. Importantly, most cases *rejecting* an officer’s allegation of reasonable suspicion for an investigatory stop concern far more unusual or suspicious behavior than that involved here. *See People v. Greer*, 860 P.2d 528 (Colo. 1993) (holding stop unlawful where officer’s observation of defendant’s encounter with man in parking lot of tavern infamous for drug dealing and saw defendant bending her arm and man putting currency in his pocket); *People v. Raming*, 795 P.2d 1338 (Colo. 1990) (holding that defendant’s gang attire, his presence outside a building in which gang leaders lived, and the flight of his companions upon noticing officer’s car nearby did not constitute reasonable suspicion for investigatory stop); *People v. Coca*, 829 P.2d 385 (Colo. 1992) (determining stop unreasonable where informants had alerted officer that a similar kind of truck had been observed driving slowly with its lights on in the vicinity of area where shots were fired); *People v. Trujillo*, 773 P.2d 1086 (Colo. 1989) (concluding no reasonable suspicion for stop where defendant passed a box off to a companion as they walked down the street).

Moreover, even assuming, hypothetically, that the officers had reasonable cause for initially stopping Mr. Bernier because they believed he might intend to vandalize the Subway shop, their suspicions should have been alleviated by Mr. Bernier’s explanation of his activity. That is, when he explained to the officers that he had left the parade to find a restroom, the officers’ suspicions should have been allayed. To continue to detain Mr. Bernier and search him after that was to extend the

intrusion beyond its reasonable scope and character. This, too, makes the stop violative of Mr. Bernier's Fourth Amendment rights..

II. THERE WAS NO PROBABLE CAUSE FOR ARRESTING MR. BERNIER

A. Municipal Ordinances

Section 38-31(a) of the Revised Municipal Code of the City and County of Denver makes it unlawful for “any person, in any way, to interfere with or hinder any police officer, any member of the police department, or any person duly empowered with police authority, while such officer, member, or person duly empowered with police authority is discharging or apparently discharging their duties.”

Section 38-31(c) of the Revised Municipal Code of the City and County of Denver makes it unlawful for “any person to fail to obey a lawful order of a police officer if such failure interferes with or hinders such police officer in the discharge of his official duties. It is an affirmative defense to this subsection that the failure to obey did not interfere with or hinder the police officers.”

B. Mr. Bernier's Conduct Does Not Fit the Elements of the Crime of Interference.

A warrantless arrest is presumed to have been unconstitutional, and the People have the burden of rebutting that presumption by showing both that the arrest was supported by probable cause and that it fell within a recognized exception to the warrant requirement. *See People v. Burns*, 615 P.2d 686 (Colo. 1980); *People v. Burns*, 615 P.2d 686 (Colo. 1980); *DeLaCruz v. People*, 177 Colo. 46, 494 P.2d 627 (1972); *People v. Felch*, 174 Colo. 383, 483 P.2d 1335 (1971); *People v. Valdez* 173 Colo. 410, 480 P.2d 574 (1971). “[A] warrantless arrest is authorized [i.e., supported by probable cause] if the information possessed by the arresting officer is sufficient to warrant a reasonably cautious and prudent police officer in believing, in light of his training and experience, that an offense has been committed and that the person arrested committed it.” *People v. Vigil*, 597 P.2d 567 (Colo. 1979).

Here, it is unclear whether Sgt. O'Shea intended to charge Mr. Bernier under Denver Municipal Ordinance Section 38-31(a) or 38-31(c). However, under either section, Mr. Bernier cannot have committed the crime of interference. Section 38-31(a) of the interference ordinance requires two

elements: (1) the accused must have actually interfered or hindered the officer's execution of his or her duties; and (2) the accused must have *knowingly* interfered with the officer's execution of his or her duties. See Denver Municipal Ordinance Section 38-31(a); *City of Englewood v. Hammes*, 671 P.2d 947, 952 (Colo. 1983) (construing substantially similar ordinance to require *mens rea* of "knowing"). Section 38-31(c) requires the same elements as 38-31(a) but imposes the additional element that the accused also fail to obey a *lawful* order of the police officer. See Denver Municipal Ordinance Section 38-31(c). In addition, this subsection explicitly includes language requiring actual interference or hindrance with the officer's execution of his or her duties—indeed, the lack of actual interference or hindrance is an affirmative defense. *Id.* It is also important that both subsections of Denver Municipal Ordinance Section 38-31 require that the accused interfere with the *duties* of the police officer.

Here, the only conceivable manner in which Mr. Bernier could have allegedly interfered with the officers was in his protest to their investigatory stop—there was nothing more going on in the area that he could have allegedly interfered with. Since Mr. Bernier has already established above that the stop was unreasonable and unlawful, the officers were not acting within the scope of their duties when they stopped him. Thus, as a matter of course, no reasonably prudent police officer would have believed in this situation that Mr. Bernier interfered with the officers' execution of their duties. Second, even assuming, hypothetically, that the officers were acting within the scope of their duties, Mr. Bernier's verbal protests and reflexive pushing away of the officer's hand when the officer reached for his waist cannot possibly be construed as *knowing* interference with the stop. Indeed, Mr. Bernier's actions did not hinder the officers in their stop at all because they immediately twisted his arm behind his back and handcuffed him. Further, the only police order that could have applied under subsection 38-31(c), was the one officer's order not to resist when Mr. Bernier reflexively tried to keep the officer from grabbing him in his waist area. Since the officer immediately followed this order by physically subduing Mr. Bernier by twisting his arm behind his back and handcuffing him, Mr. Bernier cannot have actually hindered the officer's search. Given these circumstances, no reasonably prudent police officer could

have believed that Mr. Bernier's action constituted the crime of interference. Thus, the officers lacked probable cause for the arrest. Since the arrest was unlawful, the charge against Mr. Bernier must be dismissed.

CONCLUSION

For all the foregoing reasons, the charge against Mr. Bernier must be dismissed because the officers' investigatory stop and consequent arrest were unlawful under the Constitution and other applicable laws of the United States and/or the state of Colorado.

WHEREFORE, Mr. Bernier respectfully requests that this Court grant his motion to dismiss.