

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

CODEPINK PITTSBURGH
WOMEN FOR PEACE, et al.,

Plaintiffs,

vs.

Civil Action

No. 09-1235

UNITED STATES SECRET SERVICE
OF THE DEPARTMENT OF HOMELAND
SECURITY, et al.,

Defendants.

Transcript of proceedings on September 17, 2009,
United States District Court, Pittsburgh, Pennsylvania,
before Gary L. Lancaster, District Judge

APPEARANCES:

For the Plaintiffs: Witold J. Walczak, Esq.
 Jules Lobel, Esq.

For USA Defendant: Albert W. Schollaert, Esq.
 Jennifer R. Andrade, Esq.
 Donovan Cocas, Esq.

For Pittsburgh Defendant: Michael E. Kennedy, Esq.
 John F. Doherty, Esq.

For Pennsylvania Defendant: Scott A. Bradley, Esq.

For Intervenor USW: Daniel M. Kovalik, Esq.

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Proceedings recorded by mechanical stenography; transcript
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1 (Proceedings held in open court; September 17, 2009).

2 THE COURT: Good morning. Ordinarily in a case
3 like this I would draft a written opinion with references to
4 citations and authority, but given the fact that time is
5 somewhat of the essence here, I think the parties would be
6 better served by simply having a ruling rather than a formally
7 crafted opinion. So I will simply read the decision into the
8 record and the certified copy of the transcript will serve as
9 the opinion of the Court.

10 I will assume that the parties are familiar with
11 the claims, defenses, and history of the case, as well as the
12 street layout and geography of the City of Pittsburgh. I need
13 only state that Plaintiffs are six groups that intend to hold
14 various protest events from September 20 through the 26th,
15 2009, in Pittsburgh during the Group of 20 Summit. However, I
16 would note that Plaintiffs Pittsburgh Outdoor Artists, Bail
17 Out The People, and G-6 Billion Journey and Witness have
18 received all the relief that they sought in this case and
19 pressed no issues at the hearing.

20 Defendants are Federal and Commonwealth agencies
21 and the City of Pittsburgh.

22 At that summit the heads of state of the world's 19
23 largest national economies and the European Union, their
24 spouses and staff, will conference at the David L. Lawrence
25 Convention Center.

1 Briefly stated, Plaintiffs allege that Defendants
2 violated their right to free speech guaranteed by the First
3 Amendment. Plaintiffs further allege that Defendants violated
4 the Equal Protection Clause of the Fourteenth Amendment, as
5 well as their constitutional right to travel.

6 Plaintiffs filed a motion for temporary restraining
7 order and/or preliminary injunction with their complaint. The
8 requests made in that motion have, as a result of the
9 interactive process between Plaintiffs and Defendants this
10 week, changed.

11 Plaintiffs now seek three things from this Court:
12 One, an order directing the city to allow Plaintiffs CodePink
13 to erect an exhibition and demonstrate in Point State Park
14 from Sunday, September 20, 2009, at 7 p.m., to Tuesday,
15 September 22, 2009, 7 p.m.

16 Two, an order directing the city to permit
17 Plaintiff Thomas Merton Center, and affiliated groups, to
18 march from the City-County Building to the Seventh Street
19 Bridge and then hold a rally on the Seventh Street Bridge.

20 Three, an order directing the city to issue permits
21 to allow Plaintiffs to camp overnight in Schenley Park during
22 the week of the summit.

23 Although we encourage and support the parties'
24 willingness to negotiate, even after the case was filed, in an
25 effort to reach a resolution to the issues raised in the

1 complaint, the fluid nature of what Plaintiffs ask of this
2 Court has complicated legal analysis. The Court has, however,
3 analyzed those claims that were presented at the hearing.

4 In order to obtain a preliminary injunction
5 Plaintiffs must demonstrate four things:

6 A reasonable likelihood of ultimate success on the
7 merits.

8 Two, that irreparable harm will result if the
9 relief is not granted.

10 Three, that the issuance of the injunctive relief
11 will not result in greater harm to the non-moving party.

12 And, four, that the public interest will be best
13 served by granting the relief.

14 A preliminary injunction is not a matter of right
15 and a District Court's decision to issue a preliminary
16 injunction is committed to the Court's sound discretion.

17 I will first address the Thomas Merton Center's
18 request. Specifically, the Center is seeking a permit to
19 march on Friday, September 25, from the Oakland section of
20 Pittsburgh to downtown where a rally will be held in front of
21 the City-County Building on Grant Street.

22 The Center's original permit application then
23 requested permission to march to the area of the Federal
24 Building and Convention Center for the final rally. The
25 Center estimates that between 5 and 7,000 protesters will

1 participate in this march.

2 The city, in consultation with the United States
3 Secret Service, has approved the first two phases of the
4 Center's march: The rally in Oakland to begin at noon, and a
5 march from Oakland to the City-County Building for the second
6 rally.

7 The city, again in consultation with the Secret
8 Service, denied the Center's request to continue marching to
9 the Federal Building and Convention Center area because the
10 route would compromise the security perimeter established by
11 the Secret Service.

12 The Center, in an effort to fulfill its stated
13 desire to rally somewhere in the downtown area within sight
14 and sound of the Convention Center, then sought permission to
15 walk from the City-County Building to the Seventh Street
16 Bridge, at which point the center's 5,000 to 7,000 protesters,
17 joined by third party groups, would stop and hold a rally on
18 the bridge itself. The city has denied this request as well
19 citing public safety concerns.

20 Instead, the city has identified a park on the
21 North Shore directly across from the Convention Center and a
22 parking lot in the Strip District immediately adjacent to the
23 Convention Center for the final rally location.

24 Plaintiff concedes that both locations are within
25 sight and sound of the Convention Center. However, Plaintiffs

1 contend that neither is suitable for its purposes. The North
2 Shore location being dangerous to its participants due to its
3 size and proximity to the river, and the Strip District
4 location being either too far or too hilly of a walk for its
5 participants.

6 Plaintiffs contend that Defendants' refusal to
7 allow them to march through the security perimeter or to a
8 rally on the Seventh Street Bridge substantially burdens more
9 speech than is necessary to further the Government's
10 legitimate interests.

11 The rights conferred by the First Amendment are
12 important. They are not, however, absolute. Even in a
13 traditional public forum, the Government may impose reasonable
14 restrictions on the time, place, and manner of protected
15 speech. Such restrictions are constitutional if they, one,
16 are imposed without regard to the content of the speech; two,
17 they are narrowly tailored to serve a significant governmental
18 interest; and, three, there are viable alternative channels
19 for communication of the desired message.

20 Plaintiffs do not contend that Defendants'
21 restrictions on the route of the march or the location of the
22 third rally are content based. I would, therefore, analyze
23 them as content neutral restrictions. Content neutral
24 restriction on speech must be narrowly tailored to serve a
25 significant governmental interest. As a general matter, the

1 Government's interest in protecting the safety and convenience
2 of persons using a public forum is a valid governmental
3 objective.

4 In addition, the Government's interest in
5 protecting visiting foreign leaders is of the highest order.
6 Both interests are implicated in this case.

7 Plaintiffs do not and could not seriously contend
8 that Defendants have no significant interest in establishing a
9 security perimeter around the Convention Center during the
10 summit. Defendants have submitted uncontradicted evidence
11 that such a secure buffer zone is needed and regularly used in
12 order to keep weapons and explosives outside the area in which
13 they could do harm to summit participants and to allow for
14 ingress and egress from the event site.

15 Accordingly, I find Defendants have a significant
16 interest in enforcing the security perimeter in order to
17 protect the G-20 participants as well as to ensure public
18 safety and order before and during the summit.

19 In addition, there is no dispute that Defendants
20 have an interest in ensuring that the Seventh Street Bridge
21 remains passable and not overcrowded or dangerous either to
22 the protesters or to the general public. Defendants have
23 presented credible evidence that the police presence needed to
24 secure this additional protest location would burden the
25 already strained public safety resources and create unique

1 concerns given the fact that the location is suspended over a
2 river with only two points of ingress and egress, other than
3 jumping into the river.

4 As to whether restrictions are narrowly tailored,
5 the requirement is satisfied so long as the regulation
6 promotes a substantial government interest that would be
7 achieved less effectively absent the regulation.

8 This requirement does not require that the
9 Government select the least restrictive or least intrusive
10 means of achieving this legitimate interest. Nevertheless, a
11 restriction is unconstitutional if a substantial portion of
12 the burden on speech does not serve to advance the
13 Government's goals.

14 Defendants have demonstrated that their
15 restrictions directly serve the legitimate safety and security
16 issues just identified. The security perimeter is not overly
17 broad and is limited to those areas that pose security threats
18 unique to the areas immediately surrounding the location of
19 the summit. In addition, the refusal to allow a group of
20 7,000 protesters to stop on a bridge and rally is narrowly
21 drawn. The city has not restricted the Center's access to
22 that bridge for purposes of crossing the river and accessing
23 the North Shore location or ultimately the Strip District
24 location.

25 It is the Defendants' burden to demonstrate that

1 the recited harms are real and that the regulation will in
2 fact alleviate those harms in a direct and material way. It
3 is important to note that the requirement of narrow tailoring
4 does not limit the government officials to the development of
5 security measures only in response to specific known threats,
6 nor require that they lay bare their intelligence and
7 assumptions when security measures are challenged. At its
8 heart, the task of devising a security scheme is inherently a
9 predictive process, requiring planners to make assumptions as
10 to what threats exist, how likely they are to occur, and what
11 harm might result if they do.

12 Here Defendants have presented evidence justifying
13 the security perimeter and the proscription against allowing a
14 group of 7,000 individuals on the Seventh Street Bridge for a
15 protest. These restrictions are directly related to
16 Defendants' concerns about public safety.

17 Finally, Defendants have provided ample alternative
18 channels for communication. Plaintiffs are permitted to rally
19 at the two designated demonstration zones, one which is
20 located in the shadow of the Convention Center.

21 Plaintiffs object to these sites because of the
22 reasons stated before. At its heart, Plaintiffs' argue it
23 would simply be more convenient for participants if they could
24 march through the security perimeter and rally on the bridge.
25 However, Government is not required to select the least

1 restrictive or intrusive means or most convenient means of
2 maintaining security and public order. The restriction need
3 only address the Government's interest in a direct and
4 material way. I find that the Government has met that burden
5 in this case.

6 In addition, just as modern information technology
7 has made it easier for the protesters' message to reach their
8 intended audience, that technology also makes being in close
9 proximity to the intended audience much less critical.

10 Organizers expect that more than 3,000 journalists from around
11 the world will be in Pittsburgh for the summit. Media
12 attention the summit -- and media attending the summit will be
13 able to easily access the demonstration zones from the
14 Convention Center site as both zones are within easy walking
15 distance of the Convention Center.

16 Aside from the conventional media outlets,
17 protesters themselves will also be able to communicate
18 messages, images, and video from the protests through popular
19 websites such as YouTube, Twitter, Facebook, and the like.

20 Accordingly, I find that Plaintiffs' First
21 Amendment rights will not be violated by Defendants' denial of
22 a permit to either march through the security perimeter to the
23 Strip District location or to rally on the Seventh Street
24 Bridge. As such, Plaintiffs have not established a likelihood
25 of success on the merits for this claim.

1 Plaintiffs have also requested that I order the
2 City of Pittsburgh to permit them to camp overnight in
3 Schenley Park. Plaintiffs contend that this permit is
4 necessary to not only safely accommodate out-of-town
5 protesters, but also because camping out and sleeping in a
6 city park is symbolic of expressive conduct.

7 Defendants counter that camping is prohibited in a
8 city park without the approval of the Director of Parks and
9 Recreation, that the scope of Plaintiffs' request is
10 unprecedented, and that the city will not be able to maintain
11 the cleanliness or safety of Schenley Park if they grant
12 Plaintiffs' request.

13 At the outset, I have serious doubts that sleeping
14 overnight in a city park is expressive conduct in the context
15 of this case. It is the Plaintiffs' burden to demonstrate
16 that sleeping overnight in a park is expressive conduct so
17 that First Amendment even applies, and I find Plaintiffs have
18 not met that burden.

19 Conduct is expressive if, considering the nature of
20 the activity and the factual context in which it was
21 undertaken, the activity was significantly imbued with
22 elements of communication to fall within the First Amendment.
23 This is a fact-sensitive, context-dependent inquiry.

24 To be clear, I do not hold that sleeping overnight
25 in a Tent City cannot be deemed expressive conduct as a matter

1 of law under all circumstances, but only that here I find by a
2 preponderance of the credible evidence presented indicates
3 that while permitting the protesters to set up camp and sleep
4 in Schenley Park would facilitate their protest efforts,
5 Plaintiffs' intent is not, as they proffered, expressive
6 conduct. Rather, the evidence establishes that their purpose
7 in making this request is to accommodate the hundreds of
8 people who are traveling to Pittsburgh for the purpose of
9 protesting the G-20 and have no other place to stay.

10 The duration and size of the proposed encampment
11 calls into question Plaintiffs' contention that it is
12 expressive speech. Were the proposed camps truly intended for
13 that purpose, Plaintiffs could deliver their message in less
14 than a week, and using less than all participants expected to
15 arrive in Pittsburgh. They could also deliver the message at
16 a state park in the area that allows camping on its grounds.

17 Finally, the message could be delivered during
18 normal park operating hours. I find no credible evidence to
19 conclude that Plaintiffs' presence between the hours of
20 11 p.m. and 6 a.m. would convey any message that cannot be
21 conveyed during normal park operating hours. Based on the
22 record before me, I find that permitting overnight camping in
23 the public parks in this case would serve a purely functional,
24 noncommunicative purpose, made in an effort to procure no-cost
25 accommodation for out-of-town protesters. As such, I need not

1 engage in any First Amendment analysis.

2 Nevertheless, even though I could stop here, even
3 if camping is expressive conduct in this case, I find that the
4 city's prohibition on camping as well as retaining the park's
5 normal operating hours are reasonable time, place, and manner
6 restrictions.

7 First, there is no indication that the prohibition
8 on camping in the parks is content based or that Plaintiffs'
9 request was denied because of the message that their camping
10 might convey.

11 The evidence presented at the hearing demonstrated
12 that the permits to camp were denied based on the city's only
13 other previous experience in permitting large groups to camp
14 in the city park. Specifically, the evidence presented
15 indicates that the cleanup that was required after one
16 experience came at great expense to the city and ultimately
17 led to the city's decision not to permit further groups to
18 camp.

19 I also note that in that instance approximately 200
20 campers were permitted to sleep in the park for one night.
21 Given that Plaintiffs are requesting that 3 to 500
22 participants will be permitted to camp for a period of six
23 days in Schenley Park, this will be an even greater burden on
24 city's resources than previous encampment.

25 Furthermore, I am not persuaded by Plaintiffs'

1 argument that the city's articulated interest is called into
2 question by evidence that it granted a permit to a group to
3 conduct an overnight vigil in April of 2009. First, the
4 testimony presented indicates that the permit was never
5 actually issued.

6 Second, an overnight vigil of approximately 300
7 people is in no way comparable to permitting 3 to 500 people
8 to live in Schenley Park for six days.

9 I am also concerned about the practical
10 implications of ordering the city to grant Plaintiffs' camping
11 request. Specifically, although 3RCC's representative
12 testified that she expected 3 to 500 campers in Schenley Park,
13 it is highly unlikely the group would be able to limit campers
14 to that number, given that several thousand protesters are
15 expected for the summit.

16 Accordingly, the city is rightly concerned that it
17 may be required to provide security for thousands of campers
18 in Schenley Park while the majority of its resources will be
19 required to protect the downtown area.

20 Second, these regulations are narrowly tailored to
21 serve the governmental interests, namely, the city's interest
22 in limiting wear and tear on Schenley Park; keeping the park
23 safe and clean and in an attractive and useable condition; and
24 devoting public safety resources to the downtown area. To
25 permit people to use Schenley Park as temporary living

1 quarters will be detrimental to all these interests.

2 The city also has a legitimate interest in ensuring
3 its parks are adequately protected, and I find that the city's
4 parks will be exposed to more harm without camping and hours
5 of operation regulations than with them.

6 Furthermore, I need not limit my analysis in this
7 regard to Plaintiffs' immediate request, but I must also
8 consider future demonstrations. If the city were to permit
9 these groups to camp in Schenley Park on the basis that
10 camping is expressive protected conduct, other groups would
11 surely demand they also be permitted to do so, which would
12 present insurmountable problems for the City's Department of
13 Parks and Recreation.

14 Finally, again, for the reasons stated before,
15 Plaintiffs have alternative channels by which they can
16 communicate their message.

17 Accordingly, I find that the city's denial of
18 Plaintiffs' request for permits to camp overnight for the week
19 of the G-20 Conference in Schenley Park does not violate the
20 First Amendment.

21 Plaintiffs have also asserted that by preventing
22 these groups from camping in city parks, the city is
23 infringing on the Plaintiffs' right to travel. I am
24 unpersuaded by this argument. Quite simply, the city does not
25 have a constitutional duty to provide out-of-town protesters

1 with low cost living conditions -- living accommodations.
2 Accordingly, I find that the city's denial does not burden
3 Plaintiffs' right to travel.

4 Plaintiff CodePink has requested I order the
5 Commonwealth of Pennsylvania -- strike -- Commonwealth
6 Department of Conservation and Natural Resources and the City
7 of Pittsburgh to authorize its use of Point State Park on
8 Sunday, September 20, Monday, and Tuesday, September 22nd.

9 As an initial matter, it is clear that the DCNR is
10 generally the only entity that has the authority to issue
11 permits for the use of Point State Park. Plaintiff has not
12 requested a permit from the DCNR. However, in this case the
13 City of Pittsburgh holds a permit to use Point State Park from
14 September 20 to September 28 due to the Great Race, an annual
15 road race that attracts over 10,000 runners every year. On
16 September 20, the Junior Great Race for children is to take
17 place in Point State Park. The Great Race itself is scheduled
18 to end in Point State Park on September 27.

19 Citiparks was granted a week-long permit for this
20 event and was granted that permit prior to the announcement
21 that the G-20 Summit was to be held in Pittsburgh. Therefore,
22 although it is clear that generally the DCNR is the government
23 authority responsible for issuing permits for the use of Point
24 State Park, it is also clear that the City of Pittsburgh is
25 now in control of the use of the park for the dates indicated.

1 Accordingly, it is the city's actions that are properly
2 analyzed under traditional First Amendment principles.

3 Soon after the announcement that the G-20 will be
4 held in Pittsburgh, the Pittsburgh Bureau of Police applied
5 for and received permission from the city's Special Events
6 Committee to use Point State Park as a security staging area.
7 In addition, Plaintiff correctly notes that the City of
8 Pittsburgh has approved a request by the sponsors of the
9 Pittsburgh Free Speech Festival 2009, which is to be held in
10 Point State Park on Wednesday, September 23rd. Sponsors for
11 that event filed their request with the city on August 10.

12 Plaintiff argues that the city's approval of the
13 Free Speech Festival '09 establishes that the city's denial of
14 this request to use Point State Park was content based, in
15 violation of the First Amendment.

16 Plaintiffs also argue that the city acted in
17 violation of the Equal Protection Clause in approving that
18 use.

19 These legal arguments are not likely to succeed on
20 the merits. The city presented credible evidence that the
21 sponsors of the Pittsburgh Free Speech Festival '09 requested
22 use of Point State Park on August 10, prior to the date
23 CodePink applied for its permit. Furthermore, after the city
24 decided that it would open Point State Park up to groups on
25 September 23rd, there was no evidence that the city continued

1 to deny CodePink's permit because of a disagreement with the
2 message its members sought to convey.

3 Rather, the evidence presented indicates that the
4 city denied the Plaintiff's permits because, unlike the
5 organizers of the Free Speech Festival, Plaintiff was
6 requesting that it be permitted to camp out in Point State
7 Park.

8 Furthermore, the city has issued a permit to
9 organizers of the Free Speech Festival on condition that they
10 provide space in Point State Park and time in their program
11 for other groups, including the Plaintiffs. Thus, I find that
12 the city acted in a content neutral manner.

13 Notwithstanding this analysis, I find that the city
14 has failed to articulate how its restrictions on CodePink's
15 use of Point State Park are narrowly tailored to serve a
16 significant government interest. The evidence presented
17 indicates that the only interest advanced by the city is to
18 allow ample time to break down the structures used for the
19 Junior Great Race. However, the evidence presented also
20 indicates that this task has been completed every year the
21 Junior Great Race has been run by Sunday evening of the event
22 and no later than 5 p.m.

23 Thus, I find that the city's refusal to grant
24 CodePink a permit to demonstrate in Point State Park on
25 Sunday, September 20, at 7 p.m., and continuing to Tuesday,

1 September 22 at 7 p.m., during normal park operating hours, is
2 not narrowly tailored to serve a significant government
3 interest. As such, CodePink is likely to succeed on the
4 merits of this claim.

5 I also find that the city's restrictions on the use
6 of Point State Park during this time period would result in
7 the loss of CodePink's First Amendment freedoms, thus
8 constituting an irreparable injury. In addition, the grant of
9 injunctive relief to CodePink would not result in harm to the
10 city, as the testimony presented indicated that the Great Race
11 organizers only concern with allowing CodePink to use the park
12 during this time was its need to break down the Junior Great
13 Race, a concern I have previously addressed.

14 Finally, I find that the public interest would be
15 best served by granting the relief to CodePink as it is in the
16 interest of Pittsburgh's residents to prevent the city from
17 imposing unnecessary restrictions on speech.

18 Accordingly, I am ordering the city to permit
19 CodePink to use an area of Point State Park beginning from the
20 time Citiparks completes the breakdown of the Junior Great
21 Race structures, but no later than Sunday, September 20, at
22 7 p.m., until Tuesday, September 22, at 7 p.m., during normal
23 park operating hours.

24 In conclusion, I grant CodePink's motion for a
25 temporary restraining order and preliminary injunction to

1 allow CodePink to use an area of Point State Park from Sunday,
2 September 20, 7 p.m., until Tuesday, September 22, 7 p.m.

3 I find that Plaintiffs have failed to establish a
4 likelihood of success on the merits of their other claims, and
5 their motions for temporary restraining order and preliminary
6 injunction are denied or otherwise made moot by the agreement
7 of the parties.

8 I will file a written order with the Clerk of Court
9 in due course. We will adjourn.

10 (Record closed).

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14 C E R T I F I C A T E

15 I, Richard T. Ford, certify that the foregoing
16 is a correct transcript from the record of proceedings in the
17 above-titled matter.

18 S/Richard T. Ford _____
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