

IN THE APPELLATE DIVISION OF THE STATE OF NEW JERSEY

No. A-003621-21

STATE OF NEW JERSEY,

Plaintiffs-Respondents

v.

ALBERT FRENCH,
Defendant-Appellant,

On appeal from the Superior Court of Hunterdon County, Criminal Division
Appeal from Order of Judge Angela Borkowski

APPELLANT'S REPLY BRIEF IN SUPPORT OF DISMISSING
CONVICTIONS FOR ALLEGEDLY VIOLATING EXECUTIVE ORDER 107
AND WALKING WITH TRAFFIC

Submitted January 17, 2023

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PRELIMINARY STATEMENT

Mr. French stands convicted of violating EO 107 and/or the Disaster Control Act. The summons say both. Neither the government, nor either of the courts that tried this matter, have ever stated what the elements of the alleged offense is. The municipal court judge, Judge Perkins, concluded that Mr. French violated EO 107 by being outside his house with “no good reason cited for him being there.” 1T77:1-5. At the trial *de novo*, Judge Borkowski held that Mr. French had violated EO 107 by being out of his home and violated EO 107 and the Disaster Control Act by being “uncooperative” with police officers when they detained him. Judge Borkowski’s conviction drew on a different sets of facts from Judge Perkins and found Mr. French guilty in a different way, which is why some of the issues raised in this appeal could not have been raised below. If the *state* had argued that Mr. French’s statements during his detention could be the basis of a conviction, Mr. French would have raised the First Amendment argument. However, the state did not make that argument. Indeed, the Disaster Control Act was not even mentioned by the state in its briefing. Judge Borkowski’s judgment was the first time the law was applied in this way and it would result in unjustness if Mr. French were deprived of asserting his constitutional rights when a court applied a novel interpretation of the facts to the law.

This case is clouded by confusion over the elements of the alleged offense and what facts needed to be proven to prove those elements beyond a reasonable doubt. This, in turn, clouds the issues of probable cause because if it is not clear what the crime is, it cannot be clear what constitutes probable cause to stop and detain someone for suspicion of that crime.¹ In addition, the structure of the EO, a ban on leaving the house unless for a recognized exception, invites burden shifting and is necessarily unconstitutional because it requires an innocent person to prove their innocence. Someone could fall within one of the exceptions, but they could not prove so without waiving their right to remain silent. Essentially, EO 107, as it is applied here (and perhaps inherent in its structure), creates an unconstitutional presumption that someone is guilty of violating EO 107 just by being outside their house.² To prove their innocence, the person must show they fall within an exception.

¹ Contrary to the State's assertion, Mr. French did raise the issue of probable cause below, and Judge Borkowski specifically ruled on this issue. *See* T11:13-21 (Defendant raises lack of probable cause). The state also represented that Mr. French did not raise the argument below that his protesting was protected under the First Amendment, but he did, several times. *See* Brief at pg. 1 ("the evidence shows that Mr. French was engaged in political activity, which is exempted from EO 107 and also protected by the First Amendment."); 3T8:8-10 (3T refers to transcript of the trial *de novo* (_____)).

² As discussed in Mr. French's opening brief, this interpretation of EO 107 would infringe the fundamental right to travel.

In short, EO 107 raises a number of constitutional issues, both facially and its application to Mr. French including unconstitutional vagueness under the due process clause, unconstitutional shifting of burdens under the Fifth Amendment, lack of probable cause under the Fourth Amendment, the right to travel under the substantive due process clause of the Fourteenth Amendment, and freedom of expression under the First Amendment. Different applications yield different unconstitutional results and highlight different constitutional infirmities.³

I. THE STATE’S OPPOSITION HIGHLIGHTS THE BURDEN SHIFTING

The State accuses Mr. French of engaging in “inconsistent pleading” because he argues, on the one hand, that his constitutional rights were violated by detaining him and, on the other hand, that to convict him under EO 107, the police officers “had the responsibility to ascertain that defendant’s behavior did not fall into an enumerated exception.” This false juxtaposition leaves out the most obvious alternative: the police could have just left him alone. However, having detained and charged Mr. French with violating EO 107, it was then incumbent upon the state to prove every element, which required the state to prove that he was not engaged in one of the enumerated exceptions. Otherwise, there is a burden on Mr. French to

³ *State v. Congdon* is not applicable because Mr. French is not challenging the DCA as void for vagueness; he is challenging EO 107.

prove his innocence by proving he falls within an exception, which is unconstitutional. As the State notes in its brief (**pg. 30**), the Model Jury Charges state that “[t]he defendant in a criminal case has no obligation or duty to prove his/her innocence or offer any proof relating to his/her innocence.” However, the effect of EO 107 is that Mr. French would have been required to prove that he fell within an exception. This was impermissible burden shifting.

I. IT IS UNCONSTITUTIONAL TO CONVICT MR. FRENCH OF A CRIME BASED ON SPEECH

Judge Borkowski’s conviction of Mr. French under EO 107 on the theory that he was insufficiently cooperative with the police officers is *based* on Mr. French’s speech and other constitutionally protected behavior, which is unconstitutional.⁴ *St. v. New York*, 394 U.S. 576, 586–87 (1969) (stating that Defendant’s “conviction must be set aside if we find that it could have been based solely upon his words and that a conviction resting on such a basis would be unconstitutional”).

The state represents that there was also “non-testimonial behavior” that served as the basis for conviction, but notably leaves out what this purported “behavior” was. In a conclusory manner, the state asserts that Mr. French “behaved in a manner proscribed by the Order,” but does not state what the behavior was. There was no

⁴ The State argues that Mr. French is challenging the “admission” of Mr. French’s statements, but that is not Mr. French’s argument. The issue is not that the statements were admitted, the issue is that the statements cannot be the basis for his conviction.

behavior at issue, only speech and expressive conduct. Moreover, much of the speech Judge Borkowski cited as uncooperative was actually Mr. French exercising *other* constitutional rights, for example demanding an attorney. In *St. v. New York*, the Supreme Court stated that when there is a question of whether a conviction was based on a mixture of constitutionally protected speech and behavior not protected by the constitution, “there is an unacceptable danger that the trier of fact will have regarded the two acts as intertwined and have rested the conviction on both together.” *Id.* at 588. The court found the conviction had to be vacated because “we find this record insufficient to eliminate the possibility either that appellant's words were the sole basis of his conviction or that appellant was convicted for both his words and his deed.” The same is true here with regard to Mr. French’s speech when he was being detained. It was protected expression and he cannot be convicted on the basis of that speech. To the extent there is “non-testimonial behavior,” it is intertwined with the speech so thoroughly it is impossible to say Mr. French was not convicted on the basis of his speech.

Now, for the first time, the state argues that its conviction of Mr. French under EO 107 is the result of a reasonable “time, place, and manner” restriction. The state assures that these were “very reasonable restrictions,” but never sets forth what the supposed restrictions are. How can the court even begin to analyze whether there

was a reasonable time/place/manner restriction in place when it is not even clear what the purported restriction was?

II. THERE WAS INSUFFICIENT EVIDENCE TO CONVICT MR. FRENCH OF WALKING THE WRONG WAY AND IT IS NOT EVEN CLEAR WHAT STATUTE HE IS CHARGED WITH VIOLATING

There is significant confusion over the state's conviction of Mr. French for "improper walking." As an initial matter, it does not appear that Mr. French was ever *charged* with a statute concerning "walking the wrong way." Moreover, as detailed in Mr. French's opening brief, the evidence shows that Mr. French was walking facing oncoming traffic. He accomplished this precise compliance with the statute by walking backwards. *See* State's brief ("SB") pg. 3 ("Defendant was walking north on the southbound side of Route 31 in the direction of oncoming traffic"). There is no video evidence that he ever turned around. 3T31 (Judge Borkowski stating "[t]he video recording of the encounter does not capture this moment, but the office was able to observe it while he was writing his report").

Judge Borkowski credited Sgt. Glennon's testimony over the video evidence because, she stated, the human eye is more sensitive than the camera. However, on the whole, this evidence is weak and it makes little sense that, after maintaining strict compliance with the law before and after his encounter with the police, Mr. French would suddenly abandon it at the end, off camera. This is especially true in light of

the fact that the time in which he allegedly faced the wrong way, he was going around a jug handle, so he had to turn to cross the road. There was insufficient evidence to convict Mr. French of violating this traffic law.

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DANA WEFER, ESQ.

Dated: January 17, 2022

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DEFENDANT'S REPLY APPENDIX

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PRELIMINARY STATEMENT

This appeal arises from two separate instances that began when Defendant Albert French (“Mr. French”) was detained by Clinton Township Police Officers for being out walking, allegedly in violation of Executive Order 107 (“EO 107”), which prohibited New Jersey residents from being outside of their homes during early spring 2020. However, EO 107 contained categorical exceptions that allowed people to be outside of their homes, three of which apply to Mr. French. First, residents were allowed to be outside walking, which is exactly what Mr. French was doing when detained by police. Second, residents were allowed to be out for “political reasons.” Mr. French was carrying signs and protesting when he was detained by the police. Finally, residents were allowed to be out to perform their jobs and commute to and from their jobs. Mr. French informed the police officers on both occasions that he was an essential employee, and in one of the instances the police officer actually called his job and confirmed that Mr. French had just left 20 minutes prior. It is indisputable that Mr. French was allowed to be out walking. Moreover, the evidence shows that Mr. French was engaged in political activity, which is exempted from EO 107 and also protected by the First Amendment. Finally, the evidence shows, or at least creates reasonable doubt, about whether Mr. French was commuting to and from his job when detained. Mr. French was not in violation of EO 107.

In addition to EO 107, Mr. French was convicted of disorderly conduct for allegedly touching his groin area and “shaking” it at a police officer. Even if this were true, it is not disorderly conduct as a matter of law because 1) the state adduced *no* evidence concerning Mr. French’s purpose or *mens rea*, as required under the disorderly conduct statute, 2) even if unbecoming conduct, it did not create a hazardous or physically dangerous condition as required under the