

STATE OF MINNESOTA
COUNTY OF HENNEPIN

DISTRICT COURT
FOURTH JUDICIAL DISTRICT

<p>State of Minnesota, Plaintiff, v. Kandace Montgomery, Defendant.</p>	<p>Chief Judge Peter A. Cahill Court File No. 27-CR-15-1304 DEFENDANT’S MEMORANDUM IN SUPPORT OF MOTION TO DISMISS FOR LACK OF PROBABLE CAUSE</p>
---	--

PLEASE TAKE NOTICE that on August 14, 2015 at 9:00 a.m., or as soon thereafter as counsel may be heard, at the Hennepin County Courthouse at 300 South Sixth Street. Minneapolis, MN 55487, before the Honorable Judge Peter Cahill, Judge of Hennepin County District Court, above-named Defendants, though undersigned counsel, will move the Court to Dismiss the Complaint for Lack of Probable Cause.

INTRODUCTION

This Motion is made pursuant to Rules 10 of the Minnesota Rules of Criminal Procedure; Article I, Section 6 and 7 of the Minnesota Constitution; and the 6th and 7th Amendments to the United States Constitution. Defendant seeks dismissal of charges based on the failure of the Complaint to allege sufficient facts to establish probable cause. In the event that, in response to this Motion to Dismiss, the State of Minnesota seeks to amend the Complaint or submit additional factual allegations to be considered with respect to probable cause. Defendant seeks an evidentiary hearing pursuant to *State v. Florence*, 239 N.W.2d 892, 904 (Minn. 1976).

PROCEDURAL AND FACTUAL BACKGROUND

An initial probable cause determination in this matter has not yet been made by the Court with respect to whether probable cause exists based solely on the allegations set forth in the Complaint.

Defendant moves to dismiss all eight misdemeanor counts as the allegations in the Complaint do not establish probable cause that Kandace Montgomery either aided and abetted, or committed the substantive offenses of: Trespass, in violation of Minn. Stat. § 609.605.1(b)(3); Unlawful Assembly, in violation of Minn. Stat. § 609.705; Disorderly Conduct, in violation of Minn. Stat. § 609.72.1(3); Public Nuisance, in violation of Minn. Stat. § 609.74(2).

The sole factual allegations in the Complaint pertaining specifically to Kandace Montgomery consist of the following:

- a. that police identified Montgomery as a “leader of the planned demonstration” at the MOA on December 20, 2014, and a “primary speaker” at the December 17, 2014, planning meeting;
- b. that Montgomery “ran” a meeting amongst members of BLM and encouraged people to “post[] messages on social media, remain[] in the public eye, chant[] and [make] sign[s]”;
- c. that Montgomery identified herself as the leader of a protest;
- d. that Montgomery trained 150-200 “in chanting”;
- e. that Montgomery participated in a protest by “situat[ing] herself in the middle of the protest” and engaged in “loud, boisterous shouting and chanting”;
- f. that Montgomery led a group of protesters out of the MOA; and

- g. that Montgomery spoke out on social media after the events described in the complaint.

TRESPASS

The elements of the offense of trespass, as charged by the State of Minnesota in this matter, are that Defendant: (a) trespassed on the premises of another; (b) was asked to depart from the premises by the lawful possessor; (c) failed to depart; and, (d) lacked a claim of right to remain on the premises after a demand to depart. Minn. Stat. § 609.605.1(b)(3).

Kandace Montgomery's identity and physical description was known to law enforcement and the Mall of America prior to December 20, 2014. The Complaint does not allege that Montgomery, or any other potential participants, were ever asked to not enter the premises of the MOA on December 20, 2014. While the Complaint alleges they were told that they could not hold a "protest" there, it does not allege that they were banned from the premises prior to arriving at the MOA.

The Complaint does not allege that after entering the premises of the MOA, that Montgomery was personally asked to leave the MOA or that Montgomery was aware of any audible or written request to leave the MOA.

Any audible or written warning provided during the course of the event on December 20, 2014, consisted of the following text either being read over the public announcing system or being displayed on a large video monitor:

This demonstration is not authorized and is a clear violation of Mall of America Policy. We expect all participants to disperse at this time. Those who continue to demonstrate will be subject to arrest.

Stating demonstration participants must disperse fails to specifically identify any particular individual or group of individuals. The use of the term “participants” leaves individuals to self-identify as participants. It is unclear who qualifies as a protest participant, as it would be reasonable for the instruction to apply to the individuals in the rotunda, onlookers standing in the nearby vicinity of the demonstration, or even shoppers caught in the crowd. The visual message and audio announcement told demonstration participants to “disperse,” which according to Merriam-Webster’s dictionary definition means “to go or move in different directions; to spread apart.” This does not suffice as a sufficient instruction to leave the premises as defined by the statute. Though the demonstration was identified as “violating mall policy,” the announcements does not tell any individual or group to vacate the premises in their entirety. Rather, the warning vaguely indicates that those people demonstrating must spread out from rotunda area rather than explicitly depart from the Mall of America premises.

The Complaint fails to establish probable cause for the element of Trespass under Minn. Stat. § 609.605.1(b)(3), that the lawful possessor of the property made a demand to Montgomery that he depart the premises of the Mall of America.

UNLAWFUL ASSEMBLY

The Complaint charges Montgomery with Unlawful Assembly under the portion of the statute which prohibits the assembly of three or more persons, without unlawful purpose, who then conduct themselves in a disorderly manner so as to disturb or threaten the public peace. Minn. Stat. § 609.705(3).

The Complaint does not allege that Montgomery herself acted in a disorderly manner or engaged in any conduct which disturbed or threatened the public peace.

Minnesota's unlawful assembly statute is written so that the "language and intent of the statute are directed at regulating conduct and not pure speech." *State v. Hipp*, 213 N.W.2d 610, 615 (Minn. 1973). The only speech regulated by the statute are "fighting words having an immediate tendency to provoke retaliatory or tumultuous conduct by those to whom such words are addressed." *Id.* Montgomery cannot be charged and convicted of unlawful assembly for pure acts of speech.

Because probable cause for the charge of Unlawful Assembly may not be found based on speech which falls short of "fighting words," and because the Complaint does not allege any conduct by Montgomery which falls under the Unlawful Assembly statute, the charge under Minn. Stat. § 609.605 should be dismissed for a lack of probable cause.

DISORDERLY CONDUCT

Montgomery is charged under Minn. Stat. § 609.72.1(3), which prohibits engaging in "offensive, obscene, abusive, boisterous, or noisy conduct, or in offensive, obscene, or abusive language, tending reasonably to arouse alarm, anger, or resentment in others."

The Complaint does not allege that Montgomery engaged in any "offensive, obscene, abusive, boisterous, or noisy conduct" (emphasis added).

The First Amendment limits the scope of Minn. Stat. § 609.72.1(3) with respect to punishing speech, to only that speech which constitutes "fighting words." *In re Welfare of S.L.J.*, 263 N.W.2d 412 (Minn. 1978). "Fighting words" are words that constitute personally offensive epithets that, when spoken to the ordinary person, under the particular circumstances of the case, are, as a matter of common knowledge, inherently likely to provoke a violent reaction or incite an immediate breach of the peace by those to whom such words are addressed. The offense may be based upon the utterance of fighting words alone, without resulting in actual violence. The

focus is upon the nature of the words and the circumstances in which they were spoken, rather than upon the actual response.

The Complaint does not allege that Montgomery engaged in any “offensive, obscene, or abusive *language* tending reasonably to arouse alarm, anger, or resentment in others” (emphasis added). The mere acting chanting or leading chants does not constitute the use of “fighting words.”

Because probable cause for the charge of Disorderly Conduct may not be found based on speech which falls short of “fighting words,” and because the Complaint does not allege any conduct by Montgomery which falls under the Disorderly Conduct statute, the charge under Minn. Stat. § 609.72.1(3) should be dismissed for a lack of probable cause.

PUBLIC NUISANCE

The prosecution has also charged Defendants Levy-Pounds and Montgomery with Public Nuisance in violation of Minn. Stat. § 609.74, and aiding and abetting that offense. It appears from the language of the Complaints that the charge is based on subsection (2) which covers a person who intentionally “(2) interferes with, obstructs, or renders dangerous for passage, any public highway or right-of-way, or waters used by the public.” The Complaint alleges that the Defendants were part of a group of protesters who blocked traffic on “MOA’s internal ring road.” There is no allegation that this ring road is a public highway or right-of-way — either public, or a highway or right-of-way. There are also no allegations supporting a conclusion that either Defendant obstructed the road intentionally as is required under the statute.

The allegations set forth in the Complaint indicate that a large group of protesters had left the mall, and continued to engage in expressions that were part of the demonstration such as shouting, chanting, fist pumping and waving banners. There are no specific allegations stating or

suggesting that Defendants were intentionally interfering with or obstructing traffic. Since the actions alleged in the Complaint were part of a political demonstration, and constitute solely speech and expression, they are protected free speech under the United States and Minnesota Constitutions for reasons addressed in Arguments II-III, supra. The charges of public nuisance and aiding and abetting public nuisance must therefore be dismissed.

AIDING AND ABETTING

In Counts II, IV and VI, the State of Minnesota also seeks to charge Montgomery with each of the above offenses under an “aiding and abetting” theory.

Aiding and abetting is a specific intent crime. Minn. Stat. § 609.02.9; *State v. Charlton*, 338 N.W. 2d 26, 30 (Minn. 1983). In order to be guilty under an aiding and abetting theory, the State of Minnesota would have to prove beyond a reasonable doubt that Montgomery had the specific intent to personally commit or to aid another in committing each element of the offense charged.

It is not clear from the Complaint whether the State seeks to prosecute Montgomery based on her speech prior to the event of December 20, 2014, or based on her speech and/or conduct during the event of December 20, 2014, or based on her speech and conduct both prior to and during the event.

With respect to aiding and abetting both the Unlawful Assembly and Disorderly Conduct charges, Montgomery can only be prosecuted on the basis of speech if her speech rose to the level of “fighting words.” Nothing in the Complaint evidences that Montgomery engaged in speech which constitutes “fighting words” either prior to or during the event of December 20, 2014. Any speech by Montgomery prior to December 20, 2014, was remote temporally and spatially from the actual event within the Mall of America on December 20, 2014.

Mere advocacy of potential unlawful activity is protected by the First Amendment. *Brandenburg v. Ohio*, 395 U.S. 444 (1969). Speech advocating unlawful activity which is remote in time and place from that activity cannot be considered to “incite imminent lawless action.” Mere advocacy for persons to assemble on property which may be considered private property, and from which the lawful possessor may then request that persons so assembled depart, is speech protected by the First Amendment.

Prosecution of persons based on their speech as organizers of a planned, non-violent assembly, has a strong chilling effect on protected First Amendment activity. This Court should apply a particularly rigorous standard to evaluate such a prosecution for purposes of finding probable cause based solely on speech, in order to minimize any such chilling effect on constitutionally protected activity.

The Complaint does not establish probable cause that Montgomery counseled or advised any person to engage in disorderly conduct or acts which disturb or threaten the public peace. Instructing persons “to stop and lay on the floor” is not speech or conduct which carries within the threat of violence or a breach of the public peace.

The Complaint does not allege that Montgomery acted with the specific intent to cause others to engage in disorderly conduct or acts which disturb or threaten the public peace.

Boisterous and loud assemblies are protected by the First Amendment. Statutes which criminalize assemblies based upon disruption of the public peace must be narrowly construed so as to protect constitutional rights. *Cox v. Louisiana*, 379 U.S. 51 (1965)(overturning convictions for breach of the peace even though witnesses thought “violence was about to erupt” when student started cheering, clapping and singing); *Edwards v. S. Carolina*, 372 U.S. 229 (1963)(act

of assembly cannot be made criminal based on nothing but claims that the assembly stirred people to anger, invited public dispute, or brought about a condition of unrest).

To establish probable cause that Montgomery aided and abetted either unlawful assembly or disorderly conduct, the State must show he acted with the intent to cause a level of violence far above public inconvenience, annoyance or unrest. The Complaint fails to allege acts or conduct sufficient to support a finding of such intent, and the charges of aiding and abetting disorderly conduct and unlawful assembly should be dismissed.

FLORENCE HEARING

In order to establish probable cause, the State must present substantial evidence admissible under Rule 18.05, Subd.1, which would constitute evidence adequate to support denial of a motion for a directed verdict of acquittal. *State v. Florence*, 239 N.W.2d 982, 902 (Minn. 1976).

In the event that the State seeks to amend or supplement the Complaint, or that the Court finds probable cause on the fact of the existing Complaint, Montgomery makes the following offer of proof as to the evidence that will be introduced at a *Florence* hearing in this matter to negate probable cause and to require the State of Minnesota to meet its evidentiary burden with respect to establishing the existence of probable cause:

- a. the planning meeting held on the evening of December 17, 2014, included training in non-violence and all statements made by leaders and primary speakers at the meeting emphasized the need for non-violence and a peaceful event;

- b. the planners of the event created a marshals team to ensure an orderly event, provide for crowd control, and minimize the possibility that any force, violence, or physical acts would occur during the event;
- c. written planning materials prepared and distributed by the event organizers emphasize “keeping all people safe,” de-escalation of any conflict with the police or non-participant observers of the event, avoiding any physical contact or involvement with police or other persons, and avoiding sudden movements and moving slowly and calmly at all times.
- d. that all of Montgomery’s speech in connection with the events of December 20, 2014, did not constitute “fighting words” nor an incitement to imminent unlawful action involving the use of force or a threat to the public peace consistent with the limitations imposed by the First Amendment;
- e. that the organized event which occurred in the Rotunda at MOA on December 20, 2014, was peaceful, non-violent, and included hundreds of children, older people, clergy members, shoppers who spontaneously stopped to observe and/or join the protest, employees of various businesses at MOA, and other community members.

The above testimony and evidence would be introduced at a *Florence* hearing by the testimony of Kandace Montgomery, and/or law enforcement officers with the Bloomington Police Department, and/or through audio and video recordings made by the Bloomington Police Department and Mall of America.

WHEREFORE, Defendant Kandace Montgomery requests that this matter be dismissed for lack of probable cause upon the face of the Complaint. In the alternative, if the Court sustains probable cause based on the Complaint or any additional materials offered by the State of Minnesota, Defendant seeks a *Florence* hearing to provide him the opportunity to submit evidence negating the existence of probable cause.

Dated: July 1, 2015

BRIGGS AND MORGAN, P.A.

By: /s/ Michael M. Sawers
Scott M. Flaherty (#388354)
Michael M. Sawyers (#392437)
Cyrus M. Malek (#395223)
Jordan L. Weber (#396769)
Briggs and Morgan, P.A.
80 South Eighth Street, #2200
Minneapolis, Minnesota 55402-2157
(612) 977-8400

ACLU OF MINNESOTA

By: /s/ Teresa J. Nelson
Teresa J. Nelson (#269736)
2300 Myrtle Ave., Suite 180
Saint Paul, Minnesota 55114
Telephone: (651) 645-4097

**ATTORNEYS FOR
KANDACE MONTGOMERY**