



The Commonwealth of Massachusetts

Committee for Public Counsel Services

44 Bromfield Street, Boston, MA 02108-4909

ANTHONY J. BENEDETTI
CHIEF COUNSEL

TEL (617) 482-6212
FAX (617) 986-8485

RECEIVED

SEP 09 2019

MAURA S. DOYLE CLERK
OF THE SUPREME JUDICIAL COURT
FOR SUFFOLK COUNTY

Hon. Frank M. Gaziano
Massachusetts Supreme Judicial Court
John Adams Courthouse
One Pemberton Square
Boston, MA 02108

September 9, 2019

Re: *Commonwealth v. Roderick Webber*, No. SJ-2019-0366
CPCS Amicus Letter

Dear Justice Gaziano:

Pursuant to Mass. R. App. P. 17, the Committee for Public Counsel Services ("CPCS") requests leave to file this letter as amicus curiae in support of the Commonwealth's petition for relief from the ostensible denial by a justice of the Boston Municipal Court (R. Sinnott, J.) of the Commonwealth's *nolle prosequi*.

CPCS, Massachusetts's public defender agency, is statutorily mandated to provide counsel to indigent defendants in criminal proceedings. G.L. c. 211D, §§ 1 *et seq.* This case directly implicates CPCS and its potential clients. If judges were permitted to require prosecution of indigent defendants even where the district attorney does not desire to do so, CPCS would be required to provide counsel to those defendants. Moreover, our clients would be harmed in two ways if a judge could insist that a statutory right of a purported victim requires arraignment even where the prosecuting agency has determined that the charges are not in the interests of justice: their due process rights would be violated, and they would face the harmful collateral consequences of prosecution and a criminal record, which can be significant even when no conviction results. I therefore write on behalf of CPCS to urge the Court to afford the Commonwealth the relief it seeks.

Judge Sinnott purported to deny the *nolle prosequi* on the ground that the Commonwealth had allegedly failed to comply with G.L. c. 258B, §3(g), which affords victims of crimes the right "to confer with the prosecutor before . . . the filing of a *nolle prosequi*" (and before several other events, including trial and sentencing) (R.A. 8). This interpretation of c. 258B, §3(g) is erroneous for two reasons.

First, c. 258B, §3(g) cannot be held to apply to a charge of disorderly conduct, which is a victimless crime. The gravamen of disorderly conduct is the disruption of public order. See, e.g., *Commonwealth v. Feigenbaum*, 404 Mass. 471, 474 (1989) (disorderly conduct requires proof of “purpose to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof”). The statute is found in c. 272 of the General Laws, which is titled “Crimes Against Chastity, Morality, Decency, and Good Order.” Contrast G.L. c. 265 (“Crimes Against the Person”). No victim is named on the complaint (R.A. 1), and the police report lists “Commonwealth, Massachusetts” as the victim (R.A. 5).

Second, even if there was a victim in this case, c. 258B, §3(g) cannot be read to permit a judge to “deny” a *nolle prosequi* and order arraignment. Section 3(g) grants victims certain rights, including the right to confer with the prosecutor before specific events, but it provides no enforcement mechanism, let alone one that would come at the cost of the due process rights of criminal defendants (see *infra* at 3). It therefore should be read as hortatory, not mandatory. Section 3(g) specifically notes that the “right to confer with the prosecutor does not include the authority to direct the prosecution of the case.” See also *Matter of Chapman*, 482 Mass. 1012, 1014 (2019) (“Private individuals, including the victims of the crimes being prosecuted, have no standing in our system of justice to prosecute criminal cases and no authority to compel district attorneys or the Attorney General to do so.”). The language of the statute also suggests that there is no requirement that the prosecutor establish compliance with §3(g) prior to the filing of a *nolle prosequi*. While the statute requires prosecutors to “inform the court of the victim’s position, if known, regarding the prosecutor’s sentence recommendation,” it contains no such language as to the filing of a *nolle prosequi*.

It is not surprising that the statute contains no such requirement, because “the decision to *nol pros* a criminal case is within the discretion of the executive branch of government, free from judicial intervention.” *Commonwealth v. Gordon*, 410 Mass. 498, 500 (1991). Indeed, although Judge Sinnott purported here to deny the *nolle prosequi*, he lacked jurisdiction to do so: the “entry of a *nolle prosequi* is the equivalent of a dismissal,” which “extinguish[es]” the complaint. *Commonwealth v. Mogelinski*, 473 Mass. 164, 170 (2015). The filing of a *nolle prosequi* requires no judicial action; the case ended when the *nolle prosequi* was filed.

Interpreting the statute to encourage consultation with victims, but not require it as a precondition to a *nolle prosequi*, is thus necessary to avoid a constitutional separation of powers problem under art. 30 of the Declaration of Rights. See, e.g., *Commonwealth v. McGhee*, 472 Mass. 405, 413 (2015) (citations omitted) (“Doubts as to a statute’s constitutionality should be avoided if principles of interpretation permit doing so”).

Moreover, such an interpretation is necessary to protect the due process rights, enshrined in the Fourteenth Amendment and art. 12, of Mr. Webber and others similarly situated. Given that the filing of the *nolle prosequi* extinguished the complaint, there was no charge before the trial court on which to arraign Mr. Webber. See *Commonwealth v. Hart*, 149 Mass. 7, 8 (1889) (“after the termination of a prosecution there would be nothing before the court upon which a verdict could be rendered, and that the court could do nothing except to discharge the defendant”). The purported arraignment in this case violated Mr. Webber’s substantive and procedural due process rights. It is black letter law that “a conviction on an indictment that charges no crime would be sheer denial of due process.” *Commonwealth v. Palladino*, 358 Mass. 28, 31 (1970), citing *Thompson v. City of Louisville*, 362 U.S. 199, 206 (1960). An arraignment in the absence of a complaint or indictment is equally a substantive due process violation.

And a defendant’s procedural due process rights are violated whenever a court’s conduct “offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.” *Medina v. California*, 505 U.S. 437, 445 (1992) (citations omitted). Arraigning a defendant over both parties’ objections offends perhaps the most deeply-rooted principle of our system of justice: its adversarial nature. Indeed, the judge below placed *himself* in a position adversarial to the defendant—taking it on himself to press a charge rather than adjudicating between two parties, in violation of art. 29 of the Declaration of Rights.¹ See *Hart*, 149 Mass. at 8 (“A court is not a prosecuting officer, and does not act as the attorney for the commonwealth. Its office is judicial, to hear and determine between the commonwealth and the defendant”).

While the decision to end a prosecution by filing a *nolle prosequi* is not reviewable by the judiciary, see *Attorney General v. Tufts*, 239 Mass. 458, 489 (1921), it is worth noting that the *nolle prosequi* in this case was particularly appropriate because there was no crime here. The defendant’s purported criminal conduct, which the police deemed “disorderly conduct,” was instead speech protected by the First Amendment.

The police report in this case is very spare, alleging that a group of counter-protestors blocked traffic and “agitat[ed] the crowd with speech” (R.A. 6). The only information specific to Mr. Webber claims that he “had a megaphone and had been inciting the crowd. He was in front of the crowd talking on the megaphone, he

¹ Even if this Court concludes that a judge does have authority to require that the prosecutor assert compliance with c. 258B, §3(g) prior to filing a *nolle prosequi* (in a case where there actually is a victim), it should hold that the proper course is for the judge to continue the arraignment to give the prosecutor an opportunity to do so, rather than proceeding to arraignment over the objection of both parties.

appeared to be a leader of the group.” (R.A. 6). This behavior cannot form the basis of a disorderly conduct charge; that crime requires evidence that “with purpose to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof,” a person either “engages in fighting or threatening, or in violent or tumultuous behavior” or “creates a hazardous or physically offensive condition by any act *which serves no legitimate purpose of the actor*.” *Feigenbaum*, 404 Mass. at 474 (emphasis original). There is no evidence that Mr. Webber engaged in fighting or tumultuous behavior. And even if Mr. Webber’s speech and conduct could be construed as creating a hazardous or physically offensive condition, he cannot face a charge of disorderly conduct on that basis because this Court has specifically held that participation in a political protest serves a legitimate purpose of the actor. *Id.*

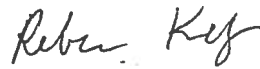
Mr. Webber was engaged in speech protected by the First Amendment and did not commit the crime of disorderly conduct. See *Commonwealth v. A Juvenile*, 368 Mass. 580, 597 (1975) (construing the disorderly person provision of §53 “to relate exclusively to activities which involve no lawful exercise of a First Amendment right”). He should not have been arrested, and the filing of a *nolle prosequi* was necessary to rectify that wrong.

Having been unconstitutionally arrested and charged with a crime for exercising his right to free speech, Mr. Webber was taken *back* into custody when the judge below ordered bail on a non-jailable offense in an amount five times in excess of the maximum fine for that offense. Mr. Webber was then remanded to custody, where he spent the next several hours. A judge should never be so casual with a person’s liberty. Even a brief prosecution and period of detention can have devastating direct and collateral consequences, and can also be counterproductive to any public safety purpose because brief periods of detention can be criminogenic.² See *Commonwealth v. Kennedy*, 435 Mass. 527, 530 (2001) (“confinement without legal justification is never innocuous”).

² See, e.g., Heaton et al., *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 Stan. L. Rev. 711, 713 (2017) (“a person detained for even a few days may lose her job, housing, or custody of her children”); Dobbie et al., *The Effects of Pretrial Detention on Conviction, Future Crime, and Employment: Evidence from Randomly Assigned Judges*, American Economic Review, 108(2): 201-240 (2018) (by reducing the defendant’s ties to the formal employment sector, detention dims future employment prospects and decreases the receipt of employment- and tax-related government benefits); Lowenkamp et al., Laura and John Arnold Foundation, *The Hidden Costs of Pretrial Detention*, at 3 (Nov. 2013) (detention of low and moderate risk defendants, for just a matter of days, is strongly correlated with higher rates of new criminal activity both during the pretrial period and for years after disposition).

Mr. Webber never should have been arrested or charged. But Judge Sinnott's unilateral decision to try to conduct an arraignment over the Commonwealth's objection has the additional punitive effect of creating a permanent criminal record of the unsupported charge. See *Commonwealth v. Humberto H.*, 466 Mass. 562, 572 (2013). Accordingly, this Court should exercise its supervisory authority to order that the Commonwealth's *nolle prosequi* be accepted prior to arraignment (as it was offered), and any record of the charge created by virtue of Judge Sinnott's ersatz arraignment be expunged.

Sincerely,



Rebecca Kiley

cc: Donna Patalano, Assistant District Attorney
Dan Sullivan, Esq., General Counsel for the Executive Office of the
Trial Court
Christopher Basso, Esq., Counsel for Mr. Webber