Massachusetts Lawyers Weekly

Karen Read protestors fail to invalidate witness intimidation statute

Federal judge finds law constitutional

Kris Olson//January 6, 2025

Protestors who claimed to be merely encouraging a witness in a pending criminal trial to testify truthfully could be prosecuted without interfering with their First Amendment rights, a federal judge has ruled, upholding the constitutionality of the state's witness intimidation statute.

The plaintiffs alleged that the Canton police chief and members of her department had retaliated against them for exercising their First Amendment rights by protesting across the street from a pizza shop owned by a potential witness in the case pending against Karen Read, who was charged in the death of her boyfriend, Boston Police Officer John O'Keefe.

The plaintiffs also sought a declaratory judgment and injunctive relief, arguing that G.L.c. 268, §§13A and 13B, are unconstitutional, both facially and as applied to them. The

plaintiffs contended that the statutory provisions "criminalize words" and not particular conduct and that the government has no compelling interest in "a demonstrator encouraging a witness to testify truthfully."

But U.S. District Court Judge Denise J. Casper rejected those arguments, noting that the state has compelling interests in the orderly administration of justice — one which "is not limited to the courthouse itself" — and in protecting witnesses from intimidation, harassment and threats of physical violence.

The judge also disagreed with the plaintiffs' contention that the statute is broader than necessary, applying to all types of speech and to "any building" where a witness may be found.

"The statute, however, is limited as it requires a connection to a witness, for which in each proceeding there would be a limited number, and there is nothing in the statute that does not allow for Plaintiffs to protest elsewhere," Casper wrote.

In their as-applied challenge, the plaintiffs noted that they were protesting in a traditional public forum, the "busiest intersection in Canton."

However, they also knew they were protesting across the street from the witness's business. Even in a public forum, the government may impose reasonable restrictions on the time, place or manner of protected speech, Casper noted.

Casper also rejected the plaintiffs' argument that the statute is void for vagueness because it does not proscribe what speech is deemed to violate the statute and could permit law enforcement to "shut down" unfavorable ideas.

It was not the "simple act" of holding up a sign that was the problem, according to the judge. Rather, it was engaging in conduct with the intent of directly or indirectly influencing a witness's testimony.

The 17-page decision is *O'Neil, et al. v. Canton Police Department, et al.*, Lawyers Weekly No. 02-596-24.

Sign of things to come

By specifically stating in their pleadings that their intent was to influence the testimony of a witness in a judicial proceeding, the plaintiffs placed their conduct squarely within the parameters of a statute that has never been found to be unconstitutional, even under the exacting strict scrutiny analysis, said the defendants' attorney, Douglas I. Louison of Boston.

Louison said he was particularly sympathetic to the individual police officers he represented, who had simply reminded the protesters about their responsibility under the witness intimidation law and got sued for their trouble.

"It was particularly difficult for these police officers who have never been advised that the statute was unconstitutional, suddenly facing personal liability for reminding a group of persons that the witness intimidation statute exists," he said.

Louison credited the police chief for appropriately handling the years of protests related to the Read case, going so far as to provide the protestors with parking and allowing them to use the police station's bathrooms.

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Counsel for the plaintiffs had not responded to requests for comment as of Lawyers Weekly's deadline.

Boston attorney Jeffrey J. Pyle, whose practice includes First Amendment litigation, said courts are generally disinclined to strike down statutes on their face, especially ones like the witness intimidation statute that have a long history of decisional law behind them.

Generally, courts should be skeptical of charges that are brought against people who are protesting in traditional public forums such as a public sidewalk, Pyle noted.

However, the location of the Read protest had been chosen purposefully.

"Courts are likely to continue to recognize that there is a compelling governmental interest in witness intimidation statutes generally, especially in an era when flash mobs and troll swarms can be summoned at a moment's notice in any cause célèbres that happens to get the attention of internet provocateurs," Pyle said. "That does pose a danger to the administration of justice. We shouldn't minimize it."

Pyle noted that, in their briefing, the plaintiffs argued that if the witness intimidation statute could be applied to them, it could also be applied to prevent any protest against the police

for fear that an officer would be influenced into altering his testimony in an upcoming proceeding.

But Casper aptly concluded that the slope was not quite that slippery, Pyle said.

"Courts should be alert, of course, to abuses of witness intimidation statutes like this, if they were applied in such a way as to shut down ordinary protests of police misconduct or the like, which isn't directed especially at a civilian witness," Pyle said. "That would be troubling."

Boston attorney Jeffrey S. Robbins said *O'Neil* is part of a "miasma" of new challenges to old First Amendment doctrine that the days ahead are likely to bring. For example, the decision by ABC to settle President-Elect Trump's defamation case based on statements made by host George Stephanopoulos is likely to embolden other public figures to bring defamation cases related to negative press coverage.

"It's a collateral aspect of the growth of what could fairly be called extremism in America; that is to say a desire and a willingness on the part of more people than ever before to engage in various forms of vitriol that at other periods of time would not be engaged in," Robbins said. "One of the forms of the vitriol we have seen is going to be people who think that they can engage with the judicial process."

The Read case itself is likely to generate copycat conduct around the country, "where people sort of affix themselves to a position in a trial and decide that, for one reason or another, they are going to try to engage to affect the outcome," Robbins said.

As a result, it will likely continue to be a challenge for judges to balance the First Amendment with protecting witnesses and court personnel, Robbins said.

Pizza place protest

Plaintiffs Meredith O'Neil, Jessica Svedine, Deanna Corby and Roberto Silva are private citizens who believe that various Canton residents have framed Read for the death of O'Keefe.

By Aug. 8, 2023, protests related to the Read case had become so commonplace that Police Chief Helena Rafferty addressed the topic at a meeting of the Canton Select Board.

Rafferty said she respected people's right to protest but "cannot accept ... witnesses — these are residents who have not been charged with any crimes — being bullied in their homes, at their children's games, or on vacation, all under the guise of the First Amendment."

On Nov. 5, 2023, the plaintiffs protested across the street from D&E Pizza in Canton, owned by Chris Albert, a member of the Select Board, holding signs with slogans including "Free Karen Re[a]d" and "Justice."

Albert allegedly saw Read and O'Keefe the night of O'Keefe's death and is related to people Read's supporters believe were involved in covering up O'Keefe's murder and framing Read.

Four Canton police officers drove by the protest, stopping to inform the protestors they were not permitted to protest near the pizza shop because if Albert could see the protest, the officers would deem it to be "witness intimidation," which would lead to the plaintiffs' arrest.

O'Neil, et al. v. Canton Police Department, et al.

THE ISSUE: Are two sections of the Massachusetts witness intimidation statute, G.L.c. 268, §§13A and 13B, unconstitutional either on their face or as applied to people who staged a protest across from a business owned by a witness in a criminal case?

DECISION: No (U.S. District Court)

LAWYERS: Marc J. Randazza, Manuel D. Soza, Kylie Werk and Jay M. Wolman, of Randazza Legal Group, Las Vegas, Boston, Gloucester and Hartford, Connecticut (plaintiffs)

Douglas I. Louison and Joseph A. Mongiardo, of Louison, Costello, Condon & Pfaff, Boston (defense)

The officers handed the plaintiffs a copy of G.L.c. 268, § 13A, a provision of the state's witness intimidation statute.

The plaintiffs had planned to protest again a week later but say that they called it off due to the officers' actions.

Based on their Nov. 5 protest, three of the plaintiffs were charged on Nov. 22, 2023, with violating Sections 13A and 13B of the witness intimidation statute, though those charges were dismissed on Aug. 2 for lack of probable cause.

On Nov. 7, 2023, the plaintiffs filed suit in U.S. District Court alleging that the defendants violated their First Amendment rights by retaliating against them for protected speech. They also sought a declaration that §§13A and 13B of G.L.c. 268 are unconstitutional and injunctive relief to prohibit their enforcement.

The next day, the plaintiffs moved on an emergency basis for a temporary restraining order and preliminary injunction, which would have allowed them to hold their Nov. 12 protest

without fear of prosecution. Casper denied the injunction, and the defendants appealed that decision to the 1st U.S. Circuit Court of Appeals.

Albert testified during Read's April criminal trial, which ended in a mistrial. Read's new trial is scheduled to begin April 1.

On Sept. 19, the 1st Circuit denied the plaintiffs' appeal as moot, reasoning that the plaintiffs had not shown any likelihood of threatened prosecution because the Read trial had concluded, Albert had already testified, and the witness intimidation charges against them had been dismissed.

Meanwhile, back in the District Court, the defendants filed a motion for judgment on the pleadings on April 19. Casper heard arguments on Dec. 10.

Retaliation claims also fail

With respect to the plaintiffs' First Amendment retaliation claim, Casper found that they had failed to allege the existence of an official unconstitutional custom or policy by the town to deprive protesters of their First Amendment rights.

Beyond Rafferty's statements at the Aug. 8 Select Board meeting, the plaintiffs had cited the arrest and charging of another person for multiple counts of witness intimidation, but that was not enough to establish the existence of an unconstitutional custom or policy by the town, Casper concluded.

The plaintiffs' First Amendment retaliation claim against Rafferty individually also failed, given the "exceptionally stringent" criteria for establishing supervisor liability.

Specifically, there were no allegations that Rafferty encouraged, condoned or acquiesced in the officers' conduct, or was so grossly negligent that her conduct amounted to deliberate indifference, Casper said.

To assess whether the individually named police officer defendants were entitled to judgment on the pleadings based on qualified immunity, Casper focused on the second prong of the applicable test: whether the right the plaintiffs were asserting was "clearly established" at the time of their protest.

The plaintiffs' asserted right to protest with the intention of influencing a potential witness's testimony was not a "clearly established right," as the Massachusetts witness intimidation statute has never been held to be unconstitutional, Casper found.

The plaintiffs' clearly established right to petition the government was of no help to them because they were protesting Albert as a private citizen rather than as a member of the Select Board, she added.