

VERMONT SUPERIOR COURT
ORLEANS UNIT



State of Vermont,

v.

David Martorana and Trevor Ring
Defendants

CRIMINAL DIVISION

Docket No. 758-11-11 and 761.11-11 Oscr

Decision and Order on Defendants' Motions to Dismiss

These matters came forward for hearing on the Defendants' Motions to Dismiss under V.R.Cr.P. 12(d). The Defendants were both present with their attorney Kristina I. Michelsen, Esq. The State of Vermont was represented by Orleans County Deputy State's Attorney Sarah A. Baker, Esq.

The standard that the Court must apply to a motion to dismiss under Rule 12(d) is: "whether, taking the evidence in the light most favorable to the state and excluding modifying evidence, the state has produced evidence fairly and reasonably tending to show the defendant guilty beyond a reasonable doubt." *State v. Vanger*, 164 Vt. 48, 51, 665 A.2d. 36, 37 (1995). The State must show that there is "substantial, admissible evidence as to the elements of the offense challenged by the defendant's motion." V.R.Cr.P. 12(d)(2).

The Defendant's are charged with criminal contempt of a Preliminary Injunction entered on November 1, 2011. The charge is as follows:

"David Martorana, in this Territorial Unit, in the County of Orleans, at Lowell, on or about November 16, 2011, violated an Order of the Superior Court of Vermont, Civil Division, Orleans County, having been given notice, as outlined in said order, by failing to move outside the 1000 foot area during the time proscribed by said order, in violation of V.R.Cr.P. 42(b).

The charge in *State v. Trevor Ring* is identical to the charge in *State v. Martorana* with the exception of the name of the defendant.

The Defendants have raised three issues in their Motions to Dismiss: 1. Whether there is evidence that the Defendants are within the group of individuals subject to the Preliminary

Injunction; 2. Whether the Defendants were given notice of the time that blasting was scheduled to occur such that the Defendant's could conform their conduct to the terms of the Preliminary Injunction; and 3. Whether the Preliminary Injunction is Impermissibly Vague and Incapable of Compliance.

The Preliminary Injunction was received in evidence as State's Exhibit 1. The Preliminary Injunction enjoins certain persons from:

"1. Being present within 1,000 feet of the northwesterly boundary of Donald and Shirley Nelson's Lowell, Vermont property and adjoining GMP's land for two hours before blasting until the all clear whistle is sounded."

The Preliminary Injunction does not apply to all persons. Rather, the Preliminary Injunction applies only to:

"...Donald and Shirley Nelson, and any and all of their agents, employees, attorneys, invitees, licensees, permittees and all and any other persons acting in concert or in participation with Defendant's Donald and Shirley Nelson..."

Also, the Preliminary Injunction states:

"GMP shall delineate the 1,000-foot safety zone for each blast and shall properly post the 1,000 foot safety zone to warn the public of any blasting. GMP shall provide law enforcement with notice of blasting sufficient to allow for execution of this order," (emphasis added).

The Court must take the evidence in a light most favorable to the State when ruling on the Defendants' Motions to Dismiss. Applying that standard the evidence received shows that the Defendants were located in the 1000 foot zone defined in the Preliminary Injunction during the time frame set forth in the Preliminary Injunction. Also, the evidence shows that the Defendant's were among a group of protestors gathered on property owned by Donald and Shirley Nelson adjoining the property of Green Mountain Power Corporation where the blasting activity that gave rise to the Preliminary Injunction was ongoing. The evidence shows that at some time before they were discovered in the 1000 foot zone and arrested, the Defendants were made aware of all the material provisions of the Preliminary Injunction.

However, there was no evidence received tending to show that the Defendants were notified of the time that blasting would begin on the day they were arrested. There was no evidence from which a reasonable person could infer that the Defendant's knew the time that blasting would begin on the day they were arrested.

The Court will address the second of the issues raised by the Defendants first because it is dispositive of the issue before the Court. The terms of the Preliminary Injunction are clear that the persons described in the Order are enjoined from being present in the 1000 foot area during a specific time frame starting two hours before blasting activity is scheduled to begin and ending when the all clear whistle is sounded. Accordingly, one essential element of any prosecution for contempt of the Preliminary Injunction is that the individuals involved are notified of the time that blasting is scheduled to begin. In the absence of such notice the individuals involved lack the information necessary to conform their conduct to the requirements of the Order. In this case there was no evidence introduced supporting this essential element that the Defendants were informed, or otherwise on notice, of the time that blasting was scheduled to begin on the day in question. Accordingly, the Defendants' Motions to Dismiss must be granted.

The Court observes that under the Preliminary Injunction Green Mountain Power Corporation was ordered to "...warn the public of any blasting." Also, Green Mountain Power was ordered to "...provide law enforcement with notice of blasting sufficient to allow for execution of this order. There was no evidence presented at the hearing from which the Court is able to find that Green Mountain Power Corporation complied with these Orders. In fact, the evidence received on this topic was that Green Mountain Power did not provide law enforcement with notice of the time that blasting would begin.

The Court will not address the other issues raised by the Motions to Dismiss at this time because the Court's decision on the second of the three issues raised by the Motions to Dismiss is dispositive.

Order

1. The Informations are DISMISSED WITHOUT PREJUDICE.
2. The Defendants are discharged.

Dated at St. Johnsbury, Vermont this 1st day of February, 2011.



Robert P. Gerety, Jr.
Vermont Superior Court Judge