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IN COUNTY COURT IN AND FOR HIGHLANDS COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff,

v. Case No: MM96-317A-XX

PRESTON COLBY,

Defendant.

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FILED

ORDER GRANTING MOTION TO DISMISS

On or about February 6, 1996 the Highlands County Board of County Commissioners passed a resolution authorizing the issuance and delivery of a trespass notice to Preston Colby. The resolution and trespass notice are attached as exhibits A and B to this order and are incorporated herein by reference. The resolution and trespass warning apply to Mr. Colby and no one else. Mr. Colby is excluded from areas that any other member of the public may enter during business hours. The resolution and trespass warning were personally delivered to Preston Colby on the 8th day of February, 1996 by Tom Portz, Assistant County Administrator. On March 4, 1996, Mr. Colby went into the Highlands County Commission board room (room 34) at a time when no meeting was being held and no one else was present. This conduct violates the trespass warning that had been given to Mr. Colby. Mr. Colby's entry into the room occurred during regular business hours at the County Commission building. As a result of his entry into the commission room Mr. Colby

was charged with the current offense of trespass. Any other citizen could have entered the commission room without fear of consequence or legal repercussion.

Mr. Colby filed what he has labeled two (2) Verified Motions To Dismiss. The motions are not in the appropriate legal format under Florida Rule of Criminal Procedure 3.190 (c) (4). The state filed no traverse nor did it challenge the form of the motions. For purposes of this order the court treats these motions as unsworn motions to dismiss under Florida Rule of Criminal Procedure 3.190 (b).

Considerable attention was given during the hearing of the motions regarding Mr. Colby being banned from non-noticed public meetings. As Mr. Colby has not been charged with violating the trespass notice by attending a non-noticed public meeting, said issue is irrelevant. As a matter of law a public meeting required to be noticed which is not noticed properly is unlawful. The court rejects the overbreadth per se argument. There is no factual predicate for application of an overbreadth as applied argument.

The defendant raises two challenges regarding the passage of the resolution in this case. First, he argues that the statute for passing a resolution was not properly followed. Secondly, he argues a due process violation in that he claims he was not given proper notice and opportunity to be heard. Frankly, the Florida Statutes are vague and unclear as to the specific procedure necessary to pass a general resolution. Taken in the best light for the state, the same procedure is necessary to pass a resolution as is an ordinance. Since the statutory procedure is vague, it is reasonably

debateable whether proper procedure was followed. However, the court agrees with the state's position that the issuance of a trespass notice is an executive rather than legislative action. If Mr. Colby could be excluded lawfully from the areas provided for in the trespass notice in the ways and manner prescribed, then passage of the resolution was legally unnecessary. The resolution, notice, and service thereof are merely mechanisms to put the defendant on notice that he cannot enter certain areas of county property, lawful notice against trespass being a condition precedent for prosecution under the trespass statute. However, for the reasons set forth below the notice and action of the county are lawfully defective.

The court finds that one argument made by Mr. Colby has merit. The court finds that the actions of the county in attempting to exclude Mr. Colby, and Mr. Colby only, from areas that the balance of the public may enter violate the equal protection provisions of the Florida Constitution (Article One, Section Two)and the United States Constitution (Bill of Rights, Article Fourteen). While the county certainly has a right to manage it's property, it has appropriate and adequate remedies for dealing with an individual who violates the law on it's property. Secondly, if the county does not want the citizenry in general from being in certain areas, it can designate hours, restrictions and guidelines (otherwise consistent with law) for use of its facilities, or parts thereof, and can designate certain areas of its public buildings for exclusive use for it's employees. See State v. Woods, 624 So 2nd 739 (Fla. App. 5 Dist., 1993) and Corn v. State, 332 So 2nd 4 (Fla., 1976). It cannot, however,

selectively limit the use of public facilities by Mr. Colby. While the state has presented authority for public or quasi public facilities to be regulated with reasonable, non discriminatory restrictions pertaining to use, it has provided no authority for the restrictions to be applied to single individuals.

The court recognizes that private land owners operating public or quasi public facilities where the public in general is invited can withdraw consent or invitation to enter to persons who violate the law or lawful regulations. For example, shoplifters can be given trespass warnings after committing theft. However, the public has broader rights to enter governmental property designated for public use for a number of reasons including, but not limited to, the right to redress grievances, the right to access to public records, access to public meetings, etcetera (See sections 5 and 24, Florida Constitution).

Mr. Colby concedes that often times he is very demanding of the county officials, especially when he perceives he is getting the run around. The evidence suggests that he is often rude and obnoxious. While the county has remedies should Mr. Colby violate the law or building regulations, the particular remedy chosen in this particular case is not "even handed" and is legally inappropriate. If Mr. Colby commits an assault, he can be charged with an assault. If he commits a battery, disorderly conduct, etcetera, he may be charged appropriately. However, as long as the citizens of this state desire and insist upon "open government" and liberal public records disclosure, as a cost of that freedom public officials have to put up with

demanding citizens even when they are obnoxious as long as they violate no laws. While there are limitations,free speech provisions under the Bill of Rights of the United States Constitution and the Florida Constitution often subject us to language we may not want to hear. (Section 4, Florida Constitution; Article 1 (Bill of Rights), U.S. Constitution).

In summary, the application of the trespass statute in this case violates the equal protection clause of the Florida and U.S. Constitution and therefore is unconstitutional as applied. It is therefore ORDERED and ADJUDGED that the trespass charge against the defendant is DISMISSED with prejudice.

DONE and ORDERED in Chambers at Sebring, Florida this 23rd day of May, 1996.

OLIN W. SHINHOLSER
County Judge

cc: Steve Houchin, Assistant State Attorney
Preston Colby, Defendant