

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT FOR SUFFOLK COUNTY

SUFFOLK, SS.

No. SJ-2019-_____

COMMONWEALTH OF MASSACHUSETTS

v.

RODERICK WEBBER

**COMMONWEALTH'S EMERGENCY PETITION PURSUANT TO G.L. c. 211, § 3
FOR RELIEF FROM THE BOSTON MUNICIPAL COURT'S UNCONSTITUTIONAL
REFUSAL TO ACCEPT THE COMMONWEALTH'S *NOLLE PROSEQUI***

The Commonwealth respectfully requests that this Honorable Court exercise its extraordinary powers under G.L. c. 211, § 3, and order the Central Division of the Boston Municipal Court to accept the Commonwealth's *nolle prosequi* in the above-named case. In an unprecedented action, a justice of the Boston Municipal Court (Sinnott, J.) refused to accept and recognize the Commonwealth's "absolute power to enter a *nolle prosequi*" and terminate prosecution of a criminal complaint. *Attorney Gen. v. Tufts*, 239 Mass. 458, 537, 538 (1921); see *Commonwealth v. Brandano*, 359 Mass. 332, 335 (1971). In so doing, the judge ignored the clear and unambiguous constraints placed on the judiciary by the separation of powers enshrined in Article 30 of the Massachusetts Declaration of Rights, and ordered the Defendant's arraignment on a complaint the executive

chose not to prosecute. The Commonwealth's filing of a *nolle prosequi* is a constitutionally protected action that affords the prosecutor the right to exercise her judgment in the prosecution of cases and the allocation of limited prosecutorial resources to protect public safety. The Commonwealth asks this Court to: hold as unconstitutional the judge's refusal to accept and recognize a duly filed *nolle prosequi* in the instant case; exercise its extraordinary powers to vacate the lower court's order arraigning the Defendant; and remand to the Boston Municipal Court to allow the Commonwealth to exercise its constitutional right to file a *nolle prosequi* and end the prosecution of this case.¹

BACKGROUND

On September 3, 2019, a complaint issued from the Central Division of the Boston Municipal Court charging the Defendant, Roderick Webber, with one count of disorderly conduct, in violation of G.L. c. 272, § 53(b) (C.A. 1, 9; Docket No. 1901-CR-004769).²

¹ The Commonwealth also asks that the Court order expungement of the Defendant's criminal record created following his unlawful arraignment, pursuant to G.L. c. 276, § 100E (expungement permitted for those cases with a final disposition of dismissal by Commonwealth's *nolle prosequi*).

² The Commonwealth refers to its record appendix as (C.A. [page]). The criminal complaint lists the charge as

That same day, the Commonwealth provided the Honorable Richard J. Sinnott with a *nolle prosequi* for the complaint (C.A. 8). Over the Commonwealth's objection, the judge "denied" the *nolle prosequi* purportedly because of the Commonwealth's "failure to comply" with G.L. c. 258B, § 3 (R.A. 8-9).

The judge then proceeded to arraign the Defendant over the Commonwealth's objection.

Following arraignment, the judge set bail at \$750 (R.A. 9, 11). The maximum fine for disorderly conduct as a first-time offense is a fine of \$150. Prior to this arraignment, the Defendant had no criminal record in Massachusetts.

If the judge's refusal to recognize the *nolle prosequi* is not corrected and the case is allowed to proceed, the prosecutor's constitutionally-guaranteed discretionary determination not to prosecute will be thwarted. Moreover, Judge Sinnott's arraignment of the defendant over the Commonwealth's objection creates an entry in his CORI, a significant action particularly where, as here, the defendant does not have a criminal record in Massachusetts. The Commonwealth seeks relief through G.L. c. 211, § 3

G.L. c. 272, § 53F in error. The Commonwealth has provided the correct citation.

(R.A. 12), because the circumstances are extraordinary and there is no other adequate relief in law of Judge Sinnott's refusal to accept the *nolle prosequi* and subsequent arraignment of the Defendant over objection.

FACTS

I. The Straight Pride Parade & the Defendant's Arrest

On Saturday, August 30th, Super Happy Fun America, an advocacy group on behalf of "straight people"³ held a "Straight Pride Parade" in the streets of downtown Boston with approximately 200 participants.⁴ The Defendant, Roderick Webber, was one of approximately two thousand counter-protesters (R.A. 6). Outnumbered, the marchers were jeered and heckled during their mile-long procession from Copley Square to City Hall Plaza. At approximately 5:00 pm, as the "parade" wound down, the Boston Police Department redeployed its bicycle unit to Congress Street, behind

³ See <https://www.superhappyfunamerica.com/home/about> ("Super Happy Fun America advocates on behalf of the straight community in order to foster respect and awareness with people from all walks of life.")

⁴ See https://www.bostonglobe.com/metro/2019/08/31/counterprotesters-rally-across-city-from-straight-pride-parade-starting-point/qFStqXFpCWoOWAaxkDyDfI/story.html?_sp=53db5658-7afe-4f97-8b64-f49b749b7df2.1567566713727&p1=HP_Feed_ContentQuery&p1=Article_Inline_Text_Link

Boston City Hall, to guide the counter-protesters on to sidewalks and out of the way of traffic (R.A. 6).

After a counter-protester wearing a black rubber boot on his head used a megaphone to lead the counter-protesters' chants, the bicycle unit "encircled the crowd" to arrest them for being "Disorderly Persons" (R.A. 6). The Defendant used his megaphone to repeatedly call out "The cow goes moo."⁵ He asked the police, again through his megaphone, if they had an order to disperse and "kettle us." When the police started to approach the counter-protesters, the Defendant said, "Oh shit, shit."

As the Defendant ran away on the sidewalk at the intersection of Congress and State streets, a police officer grabbed the back of the Defendant's t-shirt, reached over the Defendant's right shoulder, and pulled him back (R.A. 6). According to the police report, the Defendant "continued to resist and [the officer] took him to the ground. While on the ground [the Defendant] continued to resisted [sic] by trying to stand up. . . "

⁵ The Commonwealth has reviewed a Facebook "Live" video posted by the Defendant to supplement the facts. The Defendant's arrest begins at approximately minute-mark 8:10 of the video. See https://www.facebook.com/rod.webber.50/videos/vb.842570122/10162243450680123/?type=2&video_source=user_video_tab

(R.A. 6). Police officers placed the Defendant under arrest (R.A. 2).

II. The Judge's Refusal to Accept the Commonwealth's *Nolle Prosequi*

On September 3rd, prior to the calling of the case for the defendant's arraignment in the Boston Municipal Court the Commonwealth had filed a *nolle prosequi* on the case (R.A. 8). Judge Sinnott refused to recognize that *nolle prosequi* and "denied" it, explaining that the Commonwealth failed to comply with G.L. c. 258B, § 3, known colloquially as the "Victim Bill of Rights" (R.A. 8). The judge contended that the Commonwealth could not file a *nolle prosequi* without notifying the parade organizers because they, essentially, could be considered "victims" whose First Amendment right to free speech had been impeded by the Defendant's protest. The Assistant District Attorney objected to the judge's interpretation of the "Super Happy Fun America" parade participants as "victims."⁶ She also objected to the Court's refusal to recognize the Commonwealth's *nolle prosequi* (R.A. 9).

When the clerk called the case, the Defendant's attorney, Christopher Basso, replied that his client was in

⁶ Section 1 of c. 258B defines a "Victim" as "any natural person who suffers direct or threatened physical, emotional, or financial harm as the result of the commission or attempted commission of a crime. . . ."

the hall.⁷ Court officers had refused to allow the Defendant into the courtroom to answer on his case because he was wearing a baseball cap. Because the Defendant "made himself unavailable", Judge Sinnott then ordered a default warrant to issue and court officers arrested the Defendant minutes later on the default warrant in the hallway outside of the courtroom.

The Defendant removed his cap and the case was then called again (C.A. 9). Having refused the Commonwealth's *nolle prosequi*, Judge Sinnott then arraigned the Defendant, again over the Commonwealth's objection.

Following arraignment, the judge cited the "defendant's financial resources" and "the nature and circumstances of the offense charged" in support of a bail order (R.A. 9, 11). Judge Sinnott hand-wrote on the form "Reasons For Ordering Bail" the following endorsement: "Refused to state where he lives. Defendant refuse [sic] to come into courtroom because he insisted on wearing his hat in exercise of his 1st amendment rights" (R.A. 11).⁸ The Court ordered bail at \$750 (R.A. 9). The maximum fine for

⁷ The case was not called until approximately 2:32 pm, although the Defendant had been summoned in for 9:00 am (R.A. 9, 1).

⁸ The Defendant's address is listed on the police report, booking form, and the criminal complaint (R.A. 1-2, 4).

disorderly conduct as a first-time offense is a fine of \$150. See G.L. c. 272, § 53(b).⁹

On September 4, 2019, in an abundance of caution, the Commonwealth filed a notice of appeal of Judge Sinnott's refusal to accept the *nolle prosequi* and subsequent arraignment of the Defendant over objection.

ARGUMENT

I. EXERCISE OF THIS COURT'S SUPERINTENDENCE POWERS UNDER G.L. C. 211, § 3 IS APPROPRIATE BECAUSE THE COMMONWEALTH HAS NO OTHER AVENUE OF APPELLATE REVIEW.

A petition pursuant to G.L. c. 211, § 3 is the appropriate avenue for review of Judge Sinnott's refusal to accept the Commonwealth's *nolle prosequi* and arraignment of the defendant over the Commonwealth's objection. See *Commonwealth v. Beal*, 429 Mass. 530, 530 (1999) (Commonwealth's petition for relief pursuant to G.L. c. 211, § 3 from an order requiring Commonwealth to question complainant on behalf the defendant reserved and reported); see also *Carroll*, 453 Mass. 1006, 1006 (2009) (The Commonwealth "has the authority to *nol pros* a criminal complaint once process has issued.").

G.L. c. 211, § 3, in part, grants to the Supreme Judicial Court "general superintendence of all courts of

⁹ The Commonwealth understands that in the early evening of September 3rd, the Defendant posted bail and he is no longer incarcerated.

inferior jurisdiction to correct and prevent errors and abuses therein if no other remedy is expressly provided." G.L. c. 211, § 3. As a general rule in criminal cases, the Court's superintendence powers are exercised upon petition by the Commonwealth where: (1) there are substantial errors or abuses of substantive rights in a lower court and (2) the Commonwealth has no other appellate remedy. *Commonwealth v. Gordon*, 410 Mass. 498, 499 (1991); *Commonwealth v. Babb*, 389 Mass. 275, 282-283 (1983).

Here, the judge's refusal to accept the Commonwealth's *nolle prosequi* is not reviewable under any other established procedure. See *Commonwealth v. Bing Sial Liang*, 434 Mass. 131, 133 (2001). Not only will the Commonwealth be forced to proceed on a criminal case it deemed inappropriate for prosecution in violation of the separation of powers under Article 30 of the Massachusetts Declaration of Rights, but the Defendant will now suffer from a criminal record created as a result of the judge's unconstitutional decision to step out from behind the bench and step into the shoes of the prosecutor.¹⁰ The

¹⁰ The following day, the judge's behavior escalated. As the Commonwealth attempted to *nolle prosequi* a complaint charging Antoinette L. Lilley with disorderly conduct and resisting arrest, her attorney (Susan Church) attempted to place on the record her objection to the judge's refusal to accept the *nolle prosequi* and she cited case authority that

Commonwealth has a substantial interest in checking unconstitutional overstepping by the judiciary into valid exercises of prosecutorial discretion in direct contravention of the Massachusetts Declaration of Rights and this Court's precedent.

II. BECAUSE THE COMMONWEALTH'S RIGHT TO FILE A *NOLLE PROSEQUI* IS "UNQUESTIONED" AND "FINAL", IN THE INTERESTS OF JUSTICE, THE SINGLE JUSTICE MUST ORDER THE TRIAL COURT TO RECOGNIZE THE COMMONWEALTH'S *NOLLE PROSEQUI*, VACATE THE DEFENDANT'S ARRAIGNMENT, AND EXPUNGE THE RECORD OF THAT ARRAIGNMENT.

"A district attorney has the absolute power to enter a *nolle prosequi* on [her] official responsibility without the approval or intervention of the court. [She] alone is answerable for the exercise of [her] discretion in this particular [case]. [Her] action is final." *Attorney Gen. v. Tufts*, 239 Mass. at 537-538. By refusing to accept the *nolle prosequi* and terminate prosecution of this criminal complaint, the judge violated the separation of powers. Article 30 of the Massachusetts Declaration of Rights provides:

In the government of this Commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them: the executive shall never exercise the

supported her objection. Judge Sinnott held her in contempt of court. See Docket No. 1901CR004800. Several hours later, following the lunch break, the judge released counsel from the cell where he had ordered her held.

legislative and judicial powers, or either of them: the judicial shall never exercise the legislative and executive powers, or either of them: to the end it may be a government of laws and not of men.

Without intervention from this Court, the Boston Municipal Court will be allowed to become the "government of men" rejected by our founding fathers. "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." *Commonwealth v. Hart*, 149 Mass. 7, 8-9 (1889). This well-settled prosecutorial right is also codified in the Rules of Criminal Procedure: "A prosecuting attorney may enter a *nolle prosequi* of pending charges at any time prior to the pronouncement of sentence." Mass. R. Crim. P. 16(a); see *Commonwealth v. Dascalakis*, 246 Mass. 12, 18 (1977) (the power to enter a *nolle prosequi* "is absolute").

The District Attorney's absolute power was exercised here only after a reasoned calculus to forego prosecution that carefully balanced resource allocation with public safety concerns based upon the facts of the case. The judge's interference with the District Attorney's constitutional authority cannot stand.

The Commonwealth's request for relief today is unusual, in part, because the power of a *nolle prosequi* has

been unquestioned in the Commonwealth's jurisprudence. See *Commonwealth v. Wheeler*, 2 Mass. 172, 174 (1806). In the past though, this Court has had many opportunities to restrain judicial overreach created through the improper dismissal of complaints or indictments. See, e.g., *Commonwealth v. Cheney*, 440 Mass. 568, 574-75 (2003); see also *Commonwealth v. Brandano*, 359 Mass. 332, 335 (1971). Now, because the District Attorney has employed the *nolle prosequi* to focus her limited resources on the prosecution of serious and violent crimes and not in the pursuit of certain low-level offenses,¹¹ this Court must restrain the trial court from leaving the bench to engage in improper prosecution. See *Commonwealth v. Gordon*, 410 Mass. 498, 500 (1991) ("The district attorney is the people's elected advocate for a broad spectrum of societal interests -- from ensuring that criminals are punished for wrongdoing, to allocating limited resources to maximize public protection."). Simply put, the judge is only the referee.

The judge's reliance on the Victim Rights Act to "deny" the *nolle prosequi* is also in error. First, even were the Victim Rights Statute an impediment to termination of a prosecution by a *nolle prosequi*, a statute cannot

¹¹ See *The Rachael Rollins Policy Memo* (<https://www.suffolk-districtattorney.com/>, visited Sept. 4, 2019).

trump the constitutional authority vested in the executive branch. See, e.g., *Commonwealth v. Maxwell*, 441 Mass. 773, 779 (2004) (legislators creation of a privilege "cannot trump a defendant's constitutional right to a fair trial."); *Hagen v. Commonwealth*, 437 Mass. 374, 380 (2002) (statute does not wrest from the Commonwealth the authority to decide how to exercise its prosecutorial discretion). Second, this Court should reject the judge's tortured determination that the parade participants were somehow victims of the Defendant's exercise of his right to protest. This unconvincing interpretation is, quite frankly, an insult to actual victims. Even so, the Victim Rights Bill has no requirement to notify a "victim" of disorderly conduct as a prerequisite to the termination of a prosecution by a *nolle prosequi*. But see, *Bellin v. Kelley*, 435 Mass. 261, 267 (2001) (one who suffered direct financial harm can be a "victim" for purposes of c. 258B). For all these reasons, the judge's reliance on the Victim Bill of Rights here too must be set aside.

CONCLUSION

This judge's actions "short-circuited the adversary process by silencing the people's elected voice." *Gordon*, 410 Mass. at 501. For the foregoing reasons, the Commonwealth respectfully requests that this Court exercise its powers pursuant to G.L. c. 211, § 3, to order the trial court to recognize that Commonwealth's *nolle prosequi*, vacate the Defendant's arraignment, and expunge any criminal record created by the unlawful arraignment.

Respectfully submitted
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