United States District Court, S.D. New York.
Augustine **BETANCOURT** and Lambert Watson, individually and on behalf of all persons similarly situated, Plaintiffs,
v.
Rudolph W. **GIULIANI**, in his official capacity as Mayor of the City of New York; Howard Safir, in his official capacity as Police Commissioner of the City of New York; and the City of New York, Defendants.
No. 97CIV6748 JSM.

Dec. 26, 2000.

Eric Twiste, Rachel Geman, Paul, Weiss, Rifkind, Wharton & Garrison, New York, New York, Douglas H. Lasdon, New York, New York, for Plaintiff.

Michael D. Hess, Ave Maria Brennan, Corporation Counsel of the City of New York, New York, New York, for Defendants.

MEMORANDUM OPINION AND ORDER

MARTIN, J.

***1** Augustine Betancourt [FN1] ("Plaintiff") brings this action against Rudolph Giuliani, in his official capacity as Mayor of the City of New York, Howard Safir, in his official capacity as Police Commissioner of the City of New York, and the City of New York (collectively "Defendants") challenging his arrest under Section 16-122(b) of the New York Administrative Code ("Section 16-122(b)"). Plaintiff brings numerous claims relating to his arrest including that it was without probable cause, under a statute that is unconstitutionally vague and overreaching as applied to his arrest, and resulted in an illegal strip-search in violation of the Fourth Amendment. Plaintiff seeks damages and a permanent injunction enjoining the application of Section 16-122(b) to conduct of the type for which he was arrested, and an injunction expunging his arrest records. Plaintiff also proposes that a class be certified, pursuant to Federal Rule of Civil Procedure 23, of all individuals "who, since January 1, 1994, have been arrested for violating Sections 16-122 [of the Administrative Code of the City of New York] and 1-04 [of the Department of Parks and Recreation Regulations] for nothing more than being present in a public space while in possession of modest amounts of personal belongings, if anything."(Pl.'s Mem. Supp. Class Cert. at 2).

FN1. Lambert Watson, originally named as a plaintiff in this action, has apparently disappeared and is no longer before this Court. Therefore, Mr. Watson's complaint is dismissed.

Presently before the Court are Plaintiff's motions for summary judgment and class certification, as well as Defendants' motion for partial summary judgment. For the reasons set forth below, Plaintiff's motions are denied, except as to the claim alleging an illegal strip search in violation of Plaintiff's Fourth Amendment rights, and Defendants' motion for partial summary judgment is granted.

BACKGROUND

In July 1994, Mayor Giuliani, in conjunction with then-Police Commissioner William Bratton, announced Police Strategy No. 5, the "Quality of Life Initiative," which included a series of initiatives to address street crimes such as prostitution, drug sales, and aggressive panhandling. The New York Police Department ("NYPD") issued a guide for law enforcement officers listing quality of life enforcement options, including one that quoted Section 16-122(b) of the New York City Administrative Code. Section 16-122(b) provides:

It shall be unlawful for any person, such person's agent or employee to leave, or to suffer or permit to be left, any box, barrel, bale of merchandise or other movable property whether or not owned by such person, upon any marginal or public street or any public place, or to erect or cause to be erected thereon any shed, building or other obstruction.

NYC Code § 16-122(b) (2000).

At approximately 10:00 p.m. on February 27, 1997, Plaintiff entered Collect Pond Park, located in lower Manhattan, with some personal possessions, three cardboard boxes, and a loose piece of cardboard. After using the cardboard to construct a "tube" large enough to accommodate his body, Plaintiff placed the tube on a park bench, inserted himself into it, and fell asleep.

***2** Later that evening, Plaintiff was arrested and charged with violating Section 16-122(b). Plaintiff was locked in a cell in the Fifth Precinct where he was photographed and fingerprinted. Several hours later, Plaintiff was transported to the holding cells in the basement of the Criminal Court building at 100 Centre Street where he was strip-searched. He was also interviewed and fingerprinted a second time. At approximately 5:00 a.m. on March 1, 1997, Plaintiff was given a Desk Appearance Ticket and released. The New York County District Attorney declined to prosecute Plaintiff.

Plaintiff claims that his arrest was an unconstitutional application of Section 16- 122(b) because the statute is both vague and overbroad as applied to his conduct. He also makes numerous claims regarding his arrest including that the arresting officers had no probable cause to believe that he was committing a crime, that his arrest constituted cruel and unusual punishment, that his arrest violated his fundamental right to travel, and that the resulting strip-search violated the Fourth Amendment. Before reaching the question of class certification, the merits of Plaintiff's claims must be evaluated.

DISCUSSION

Plaintiff asserts that Defendants' application of Section 16-122(b) to his conduct was unconstitutionally vague, and should be assessed using an "especially stringent" standard of vagueness because Section 16-122(b) imposes criminal penalties without an intent requirement and implicates the fundamental right to travel. While the enforcement of a criminal statute without an intent requirement warrants a fairly stringent standard of vagueness, *see* Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 498-99, 102 S.Ct. 1186, 1193 (1982), the "especially stringent" standard of vagueness is reserved for constitutionally protected conduct. Plaintiff's argument that this regulation inhibits the fundamental right to travel fails because the statute does not penalize people for "merely occupying any public space with a few of their personal belongings."(Pl.'s Mem. Supp. Mot. Summ. J. at 24). Rather, it penalizes people for creating obstructions in public spaces.

Thus, Plaintiff's reliance on *Streetwatch v. National Railroad Passenger Corp.*, 875 F.Supp. 1055 (S.D.N.Y.1995), in which the court found that Amtrak's enforcement of its Rules of Conduct implicated the constitutional right to travel, is misplaced. In that case, homeless people were ejected from Pennsylvania Station for hanging around too long. *See id.* at 1064.Although Plaintiff seeks to characterize the facts in this case in a similar way, Section 16-122(b) does not authorize the arrest of individuals for hanging around in public spaces. Because Section 16-122(b) does not implicate the fundamental right to travel, it must be assessed using a fairly stringent standard of vagueness.

The question of whether Section 16-122(b) is unconstitutionally vague as applied to Plaintiff's conduct involves a two-part test:

***3** a court must first determine whether the statute "give[s] the person of ordinary intelligence a reasonable opportunity to know what is prohibited and then consider whether the law provide[s] explicit standards for those who apply [it]." Because the statute is judged on an as applied basis, one whose conduct is clearly proscribed by the statute cannot successfully challenge it for vagueness.

United States v. Nadi, 996 F.2d 548, 550 (2d Cir.1993) (quoting *United States v. Schneiderman*, 968 F.2d 1564, 1568 (2d Cir.1992), *abrogated on other grounds by Posters 'N' Things, Ltd. v. United States*, 511 U.S. 513, 114 S.Ct. 1747 (1994) (internal quotations omitted)).

Section 16-122(b) must "be sufficiently clear to provide notice to potential wrongdoers that the conduct in which they are engaged has the potential for civil or criminal liability." *United States v. Spy Factory, Inc.*, 951 F.Supp. 450, 466 (S.D.N.Y.1997). The Court must begin its analysis by looking to the "plain meaning of the terms of the statute in order to discern whether those terms impart sufficient clarity to a person of ordinary intelligence." *Id.* at 467.

Section 16-122(b) makes it unlawful "to erect or cause to be erected ... any shed, building or other obstruction."Because Section 16-122(a) states: "[t]he purpose of this section is to punish those persons who abandon and/or remove component parts of motor vehicles in public streets," Plaintiff argues that this statement of purpose applies to Section 16-122(b) and therefore it must be read as only prohibiting the

abandonment of motor vehicle parts on public streets. However, the legislative history of Section 16-122 defeats this argument.

The predecessor to Section 16-122 was set forth at Section 755(4)-2.0 of the Administrative Code. That Section provided:

It shall be unlawful for any person, his agent or employee, to leave, or to suffer to permit to be left, any vehicle, box, barrel, bale of merchandise, or other movable property, owned by him, upon any public street, or to erect or cause to be erected thereon any shed, building or other obstruction. The owner or driver of a disabled vehicle shall be allowed a reasonable time, not exceeding three hours, in which to remove it.

In 1969, the City Council amended the Section to create the current structure of Section 16-122 by adding subsections (a), (c), (e), and (f), which explicitly refer to motor vehicles. At the same time, the reference to disabled vehicles was removed from the above paragraph and it became subsection (b). The new attention to the problem of abandoned vehicles on the streets of New York was apparent in the addition of the four new subsections, especially the statement of purpose in subsection (a). However, the prohibition against leaving boxes, barrels, bales of merchandise, and erecting sheds or obstructions in public spaces remained in subsection (b). While subsection (a) explained the purpose of the new subsections regarding motor vehicles, no such explanation was needed to explain the purpose of the prohibition against leaving other things in public spaces. Moreover, the plain meaning of subsection (b), which unlike the other subsections contains no reference to vehicles, requires that it be read as prohibiting leaving boxes and erecting obstructions in public spaces.

***4** Plaintiff also contends that "[n]o reasonable person would read the text of Section 16-122(b) and conclude that it prohibited individuals from occupying public benches or other public spaces while in possession of small amounts of personal property."(Pl.'s Mem. Supp. Mot. Summ. J. at 25). While this contention may be accurate, it is inapplicable to Plaintiff's case because he had erected a human-sized cardboard structure, housing a human inside, in a public space. He was not simply occupying a park bench with a few personal items. Rather, he had erected an obstruction in a public space.

The fact that the statute could be read to extend to innocent, unoffending conduct is of no significance. "Embedded in the traditional rules governing constitutional adjudication is the principle that a person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before the Court." *Broadrick v. Oklahoma,* 413 U.S. 601, 610, 93 S.Ct. 2908, 2915 (1973). In addition, "particularly where conduct and not merely speech is involved ... the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." *Id.* at 615, 93 S.Ct. at 2918. Creating an obstruction in a public space does not constitute innocent and unoffending conduct under Section 16-122(b). Thus, the experiences of other people arrested in the same park that night under Section 16-122(b) and the differing interpretations of that subsection by certain police officers is not relevant to Plaintiff's as applied challenge. Because Plaintiff had sufficient notice that his conduct was prohibited by Section 16-122(b), the statute passes the first prong of the vague as applied test.

The second prong of the vague as applied test requires that a legislature establish minimal guidelines to guide law enforcement. *Kolender v. Lawson,* 461 U.S. 352, 358, 103 S.Ct. 1855, 1858 (1983). However, as the Second Circuit Court of Appeals has recognized, "[e]ffective law enforcement often 'requires the exercise of some degree of police judgment' but this alone does not render a statute unconstitutional." *Schneiderman,* 968 F.2d at 1568 (quoting *Grayned v. City of Rockford,* 408 U.S. 104, 114, 92 S.Ct. 2294, 2302 (1972)). However, courts must also "scrutinize the statute to discern whether its language 'is so imprecise that discriminatory enforcement is a real possibility.' " *Spy Factory,* 951 F.Supp. at 467 (quoting *Gentile v. State Bar of Nevada,* 501 U.S. 1030, 1051, 111 S.Ct. 2720, 2732 (1991)).

Plaintiff argues that Section 16-122(b) provides nothing to assist law enforcement in fairly applying it to the conduct at issue here. Claiming that the

regulation vests virtually unlimited discretion in the hands of police, Plaintiff asserts that Section 16-122(b) is unconstitutionally vague under *City of Chicago v. Morales,* 527 U.S. 41, 119 S.Ct. 1849 (1999). In *Morales,* the Supreme Court held a city ordinance prohibiting gang members from loitering in public spaces to be unconstitutionally vague on its face because the ordinance did not contain minimal guidelines to govern law enforcement. *See id.* at 60, 119 S.Ct. at 1860. However, unlike the *Morales* ordinance, which did not offer guidance on what constituted loitering, the ordinance at issue in this case offers law enforcement personnel guidance in the form of a list of specific objects, including boxes, that should not be left in public spaces.

***5** Similarly, there is less uncertainty involved in a police determination of what constitutes an obstruction of a public space than in a police determination of what constitutes loitering in a public space. The fact that the police must exercise some discretion in the application of Section 16-122(b) does not render the regulation void. *See Schneiderman,* 968 F.2d at 1568. The text of Section 16-122(b) provides sufficient guidelines to limit police discretion in its application, and therefore it is not void in its application to Plaintiff's conduct. Plaintiff's constitutional challenge to Section 16-122(b) therefore fails.

Plaintiff next argues that he was arrested without probable cause. Probable cause exists when the arresting officer has "knowledge or reasonably trustworthy information sufficient to warrant a person of reasonable caution in the belief that an offense has been committed by the person to be arrested." *Calamia v. City of New York,* 879 F.2d 1025, 1032 (2d Cir.1989). It is undisputed that Plaintiff used three boxes and a piece of cardboard to create a human-sized structure on a park bench. Because the arresting officers observed Plaintiff sleeping in that structure in a public space, they had ample probable cause to arrest him for a violation of Section 16-122(b). Thus, Plaintiff's motion for summary judgment on the grounds that he was arrested without probable cause is denied and Defendants' motion for summary judgment on this cause of action is granted.

Plaintiff also argues that his arrest was a violation of the Eighth Amendment's prohibition against cruel and unusual punishment because he was arrested for sleeping in a public space. This claim must fail because an Eighth Amendment violation can only occur where a convicted person is involved. *See Ingraham v. Wright,* 430 U.S. 651, 671, 97 S.Ct. 1401, 1412 (1977). The Second Circuit follows this rule of law: "[H]e was a pretrial detainee, not a person who had been convicted, and hence the Eighth Amendment did not apply." *Weyant v. Okst,* 101 F.3d 845, 856 (2d Cir.1996). Because Plaintiff was not convicted, his Eighth Amendment claim must fail and summary judgment is granted for Defendants on the Eighth Amendment claim.

Plaintiff also claims that his arrest violated his fundamental right to travel. The fundamental right to travel is protected by the United States Constitution and includes travel within a state. *See Streetwatch,* 875 F.Supp. at 1063-64 (citing *King v. New Rochelle Mun. Hous. Auth.,* 442 F.2d 646, 648 (2d Cir.1971)). Arguing that the scope of Section 16-122(b) could subject homeless persons to arrest for occupying public spaces with their belongings, Plaintiff contends that the regulation violates the right to travel. However, he was arrested for creating an obstruction in a public space. As noted above, the fact that a statute might be applied to others in an unconstitutional manner provides no defense to someone whose conduct is clearly prohibited. Plaintiff's motion for summary judgment on this claim is denied and Defendants' cross motion is granted.

***6** Plaintiff's eighth cause of action claims that his arrest violated the right to Equal Protection of the law because it was an arbitrary application of the law based on Plaintiff's status, perceived status, and/or appearance. The Equal Protection Clause of the Fourteenth Amendment directs that all persons similarly situated be treated alike. *See Diesel v. Town of Lewisboro,* 232 F.3d 92, 103 (2d Cir.2000) (quoting *City of Cleburne v. Cleburne Living Ctr.,* 473 U.S. 432, 439, 105 S.Ct. 3249, 3254 (1985)). Although Plaintiff failed to present an argument in support of this claim, it appears to rest on a theory of arbitrary or selective enforcement of the law. Such a claim "will succeed where a plaintiff proves that: (1) the [plaintiff], compared with others similarly situated, was selectively treated; and (2) that such selective treatment was based on impermissible considerations such as race, religion, intent to inhibit or punish the exercise of constitutional rights, or

malicious or bad faith intent to injure a person." *Diesel,* 232 F.3d at 103 (quoting *LeClair v. Saunders,* 627 F.2d 606, 609-10 (2d Cir.1980)). Here, there is no allegation that Defendants have failed to enforce this ordinance. Plaintiff has offered no evidence of other individuals engaged in similar conduct who were not arrested for a violation of Section 16-122(b). Thus, summary judgment on this cause of action is granted for Defendants.

The tenth cause of action in Plaintiff's complaint alleges a conspiracy among Defendants Giuliani and Safir to "oppress, threaten, and intimidate individuals within the City of New York who are or appear to be homeless, for the purpose of removing them from public spaces and deterring them from entering and/or remaining in the City."(Compl.¶ 127). Again, Plaintiff fails to offer any authority or argument in support of this claim. Defendants point out that the record indicates that there were less than 200 arrests under Section 16-122(b) and related Parks' Rules during the five-year period from 1993 until 1998. There is no evidence that these arrests were targeted at homeless individuals. Moreover, as Defendants argue, these numbers do not support a conspiracy. Summary judgment on the tenth cause of action is granted for Defendants.

Plaintiff also alleges that his detention for more than four hours after the District Attorney's Office had decided not to prosecute him constituted a violation of his civil rights. Once again, Plaintiff failed to offer any authority or argument in support of this claim. As discussed above, Plaintiff was properly arrested. Defendants admit that the officers on duty at the Manhattan Court were negligent in detaining Plaintiff for those four hours. However, there is no constitutional cause of action for negligent acts of an official that cause unintended injury. *See Daniels v. Williams,* 474 U.S. 327, 106 S.Ct. 662 (1986). Plaintiff offers no evidence of anything more than a negligent act, and therefore summary judgment on the civil rights claim is granted for Defendants.

***7** Plaintiff sets forth five state law claims in his complaint. The first three, false arrest, failure to arraign, and malicious prosecution, are barred by Plaintiff's failure to file a notice of claim against the City pursuant to New York General Municipal Law §§ 50-e and 50-i. *See,e.g., Shakur v. McGrath,* 517 F.2d 983, 984 (2d Cir.1975); *Piesco v. City of New York,* 650 F.Supp. 896, 899-901 (S.D.N.Y.1987). The remaining state law claims also fail. First, Plaintiff alleges that his arrest violated Article XVII, Section 3 of the Constitution of the State of New York. Plaintiff interprets this Section as directing the State and its subdivisions to provide aid, care, and support to the needy. Unfortunately, the referenced Section does not direct the State to care for its needy, but rather to protect and promote the health of all inhabitants of New York. The arrest of Plaintiff under a regulation that attempts to keep public spaces clear of clutter and obstructions is not a violation of the State Constitution. Plaintiff's final state law claim charges a violation of the State Administrative Act on the basis that Defendants "have implemented a policy of targeting plaintiffs based on their status ... without adopting relevant agency rules."(Compl.¶ 157.) This claim fails because the State Administrative Procedure Act only applies to agencies of the State government and is therefore inapplicable to Defendants who are all non-state agencies.

One cause of action remains. Plaintiff was strip-searched the night of his arrest for violating Section 16-122(b). The Second Circuit has held "clearly and unequivocally that the Fourth Amendment precludes prison officials from performing strip searches of arrestees charged with misdemeanor or minor offences absent a reasonable suspicion that the person being searched is concealing weapons or other contraband." *Shain v. Ellison,* 53 F.Supp.2d 564, 566 (E.D.N.Y.1999) (citing *Weber v. Dill,* 804 F.2d 796, 802 (2d Cir.1986)). Violations of Section 16-122(b) carry a maximum imprisonment of not more than ten days and thus do not even rise to the level of a misdemeanor. *See* NYC Code § 16-122(d) (2000); N.Y. Penal Law § 10.00-3 (1997). There is no evidence of a basis for reasonable suspicion that Plaintiff was carrying any weapons or contraband. The strip search therefore violated Plaintiff's Fourth Amendment rights. Summary judgment on Plaintiff's fifth cause of action for unreasonable strip-searches in violation of the Fourth Amendment is granted.

Because summary judgment is granted in favor of Defendants on all but the strip-search claim, Plaintiff's motion for class certification is denied. With respect to the dismissed claims, Plaintiff Betancourt would not be an appropriate representative of others who might have valid claims. As to the strip-search claim, a class action has

already been certified and there is no need for another one.

CONCLUSION

For the foregoing reasons, Plaintiff's motion for summary judgment is denied except as to the illegal strip search claim . Plaintiff's motion for class certification is also denied. Defendants' motion for partial summary judgment is granted with respect to all claims other than the strip-search claim.

***8** SO ORDERED.

S.D.N.Y.,2000.
Betancourt v. Giuliani
Not Reported in F.Supp.2d, 2000 W L 1877071 (S.D.N.Y.)

END OF DOCUMENT