

<p>DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO 1437 Bannock Street, Denver, CO 80202</p> <hr/> <p>Plaintiff-Appellant: The City and County of Denver</p> <p>v.</p> <p>Defendant-Appellee: Troy Daniel Holm</p>	<p>DATE FILED: October 25, 2017 CASE NUMBER: 2017CV31066</p> <p>▲ COURT USE ONLY ▲</p> <hr/> <p>Case Number: 17CV31066 Courtroom: 5H</p>
<p align="center">ORDER RE: Appeal of County Court’s Dismissal</p>	

This matter comes before the Court on Plaintiff’s appeal of the County Court’s Order re: Defendant’s Motion to Dismiss of case number 16GS013978, dated February 22, 2017. The Court, having reviewed the Plaintiff’s Opening Brief, Defendant’s Answer Brief, Plaintiff’s Reply Brief, and Plaintiff’s Supplemental Reply Brief, the file, and being otherwise sufficiently advised, finds and orders as follows.

FACTS

On September 1, 2016 the Executive Director or Manager of Parks and Recreation for the City and County of Denver (“Director”) issued Denver Parks and Recreation Temporary Directive 2016-1 (“Directive”). Denver Parks and Recreation Temporary Directive 2016-1 (Sept. 1, 2106). The Directive was valid from September 1, 2016 to February 26, 2017. Id. The Directive authorized the Denver Police Department (“DPD”) to suspend entry to city parks and the Cherry Creek Greenway for up to ninety days for those accused of illegal drug-related activity in the park. Id. An appeal process within the directive required that any appellant file an appeal within ten days of the suspension and provide a valid mail or email address. Id. The

Directive required DPD to set a hearing within twelve days of the filing of the appeal. Id. DPD had four days from filing of the date of the appeal to send notice of the hearing to an appellant. Id. Once a hearing was set, either DPD or appellant could request a continuance of up to ten days. After the hearing, an administrative hearing officer had five days to issue a written decision. Failure of the appellant to attend the hearing would result in immediate dismissal of the suspension appeal. Id.

On October 14, 2016, a DPD officer observed appellee Troy Holm smoking marijuana in Commons Park and issued a citation pursuant to Denver Revised Municipal Code (“DRMC”) § 39-10(c) Marijuana Prohibited in Parks (civil infraction number 16GS013872), which is not at issue in this case. City’s Resp. to Def.’s Mot. to Dismiss, App. B, Dec. 23, 2016 . In addition, the DPD officer issued a ninety day suspension pursuant to the Directive. Id. On October 17, 2016, a DPD officer observed the Defendant in Commons Park in violation of the suspension order and issued a citation pursuant to DRMC § 39-4 (criminal case 16GS013978). The City Attorney added a charge of Trespass DRMC § 39-115 on November 22, 2016. Holm filed a motion to dismiss all charges against him on December 23, 2016. Motion to Dismiss. The City responded to the motion to dismiss on January 13, 2017. City’s Resp. to Def.’s Mot. to Dismiss, Jan. 13, 2017. Holm replied on January 19, 2017. The City filed a sur-reply on January 30, 2017. City Reply Regarding Jurisdiction. On February 22, 2017, the county court issued its written order on the motion to dismiss and found that the City’s Directive violated Defendant’s constitutional Due Process rights and granted Defendant’s Motion to Dismiss in the criminal matter. Order re: Def.’s Mot. To Dismiss, Feb. 22, 2017. The county court did not respond to the City’s Motion for Additional Findings, filed February 24, 2017. The city now appeals the order granting the motion to dismiss.

ANALYSIS

I. Did the County Court have jurisdiction over the Constitutionality of the Directive?

Before any ruling may issue on the city's appeal from the dismissal, the District Court must determine whether the county court had jurisdiction to adjudicate the relevant issues. A court's subject matter jurisdiction is a question of law reviewed *de novo*. People v. Wunder, 371 P.3d 785, 788 (Colo.App. 2016). The parties disagree whether the county court properly exercised jurisdiction over the Directive.

Plain meaning is given to a statutory or charter provision when their language is clear. N. Ave. Ctr., L.L.C. v. City of Grand Junction, 140 P.3d 308, 311 (Colo. App. 2006). However, the court will not blindly follow technicalities. The court is “not bound by the form in which the plaintiff asserts its claim, but rather it is the facts alleged and the relief requested that decide the substance of a claim, which in turn is determinative of the existence of subject matter jurisdiction.” Trans Shuttle, Inc. v. Pub. Utilities Comm'n of State, 58 P.3d 47, 50 (Colo. 2002). When the context of a statutory provision is at issue, “immaterial technicalities would serve no purpose and would worship form over substance.” Wainscott v. Centura Health Corp., 351 P.3d 513, 523 (Colo. App. 2014).

Denver argues that, as a home rule municipality, its charter defines the extent of county court jurisdiction. The city cites Charter of the City and County of Denver § 4.2.6 – Jurisdiction; state laws, as limiting county court jurisdiction to those cases “in accordance with the procedure established by ordinance.” Denver argues that the procedure established by ordinance limited jurisdiction to only those cases arising under the Denver Revised Municipal Code (“DRMC”). The city argues that the Directive drew on city powers outside the purview of the DRMC, and

therefore, the county court did not have jurisdiction to hear a challenge to the constitutionality of the Directive.

The city claims that section § 4.2.6 – “Jurisdiction; state laws” limits jurisdiction of the county court to that delegated in the charter. The City argues that the charter explicitly limits jurisdiction for a suspension under the Directive to the Parks and Recreation appeal process. The City makes this argument despite § 4.2.5 – “Jurisdiction; city laws” of the charter which grants “sweeping” jurisdiction to the county court. That section states “[the county court] shall have such civil, criminal, and appellate jurisdiction as now or hereafter may be provided by the constitution or general laws of the State of Colorado.” A suspension of the right to enter Denver parks falls under the general laws of Colorado. In addition, the City ignores § 1-4 of the Charter, which states: “the headings and catchlines are intended as mere catch words to indicate the contents of the sections, and shall not be deemed or taken to be a part of the sections in any substantive sense whatever.” When considering substance over form as required by § 1-4, and reading the Charter in its entirety, § 4.2.5 of the Charter grants general jurisdiction to its County Courts, and § 4.2.6 is inapposite as no explicit jurisdictional limitation was created by the Charter for the county court. General jurisdiction in the state of Colorado includes jurisdiction over constitutional violations. Colo. Const. art. VI, § 1; People v. Ellison, 14 P.3d 1034, 1035 (Colo. 2000) (concluding that Colorado's driving under restraint statute language violated Due Process of law). Holm alleged that the Directive violated his constitutional rights. Therefore, when considering the substance of the jurisdictional issue, the county court had jurisdiction to hear Holm’s motion to dismiss the criminal action.

Crim.P. Rule 37 allows a party to appeal a judgment of the county court in a criminal action under simplified procedure to the district court of the county. Rule 37 allows the

prosecution to appeal “any decision of the trial court in a criminal case upon any question of law.” Colo. Crim. P. 37. Before jurisdiction may be exercised pursuant to this section, there must be a final judgment. Ellsworth v. People, 987 P.2d 264, 266 (Colo. 1999). Substantial compliance with non-jurisdictional requirements is all that is required by the rule. Peterson v. People, 113 P.3d 706, 713 (Colo. 2005).

Despite the City’s insistence otherwise, C.R.C.P. Rule 106 is inapplicable here because it provides relief only where no other remedy is available. Rule 37 provides a remedy here. The lower court action was criminal in nature and the county court gave a final judgment (Order re: Defendant’s Motion to Dismiss, dated February 22, 2017). Therefore, Rule 37 is the appropriate path for resolution of this matter.

II. The Directive failed to adequately protect the Due Process right of notice and fails the Matthews balancing test

A. Due Process was violated by the Directive’s failure to give proper notice

The “right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society.” Mathews v. Eldridge, 424 U.S. 319, 333 (1976). Due Process requires adequate advance notice and an opportunity to be heard prior to state action resulting in deprivation of a significant interest. Mountain States Tel. & Tel. Co. v. Dep’t of Labor & Employment, 520 P.2d 586, 588 (1974). Although the Supreme Court has recognized the existence of exceptions to the notice requirement, those exceptions require extraordinary situations. See Eason v. Bd. of Cty. Comm’rs of Cty. of Boulder, 70 P.3d 600, 608 (Colo. App. 2003) (citing Gilbert v. Homar, 520 U.S. 924 (1997)).

The Directive does not provide for a pre-deprivation hearing, and provides that mail or email notice may be forfeited. The Directive’s appeal process would deter all but the most

insistent of appellants, and the time constraints imposed by the process make the process even more likely to be left incomplete. Denver has not made any assertion that extraordinary circumstances exist which would require forgoing normal due process rights, nor does the Court perceive any. As the county court found, there is no pre-deprivation due process afforded to persons subject to suspension notices, nor a compelling reason offered or found to deny that procedural due process.

B. The Directive fails the Matthews balancing test

Matthews is a three part test performed when a government action is alleged to have denied a party due process. It balances the governmental and private interests by asking (1), what private interest will be affected by the official action; (2), whether there is a risk of an erroneous deprivation of such interest through the procedures used, and finally (3), what the weight the Government's interest bears, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. Mathews v. Eldridge, 424 U.S. at 334–35.

i. The Directive's impact on Holm's private interest

Holm's private interest is curtailed by the directive's suspension of his right to enter a city park or the Cherry Creek Greenway. Denver argues that the right to intrastate travel is not a settled issue in Colorado. However, the Colorado Constitution holds the right to move about in public spaces to be one of the "natural, essential and inalienable rights." Colo. Const. art. II, sec. 3. The Colorado Supreme Court has labeled the use of public facilities, such as parks, as a "fundamental" right. People in Interest of J.M., 768 P.2d 219, 221 (Colo. 1989). Further, public parks are a resource to those who live in the city and their status as forums for the exercise of free speech and public activities weigh in favor of finding the Directive unconstitutional. See

Yeakle v. City of Portland, 322 F. Supp. 2d 1119, 1129–30 (D. Or. 2004) (finding a similar ordinance suspending park privileges for municipal infractions unconstitutional). Consequently, Holm’s private interest in the use of Denver’s parks and Cherry Creek Greenway is substantial and only compelling governmental interests can offset his private interest.

ii. The Directive procedure creates a high risk of an erroneous deprivation

The second prong of Matthews tests the risk of an erroneous deprivation of private interest through the procedures used in the Directive. The Yeakle ordinance was invalidated for failure to establish an evidentiary standard for police officers before issuing the exclusion, failure to provide witnesses to the alleged violation, or require that the reason for the exclusion be provided to the excluded individual. Yeakle, 322 F. Supp. 2d at 1130. The Yeakle court found that the risk of error was compounded by the immediate suspension of park privileges and the lack of pre-deprivation hearing. Id.

The Directive mirrors Yeakle’s ordinance in that the Directive provides no guidelines for DPD’s enforcement of the Directive, the suspension is enforced at the unilateral discretion of DPD, and there is no consideration of evidentiary requirements. Although a supervising DPD officer was present when the suspension was initiated, unilateral supervision is inadequate to protect Holm’s Due Process rights. Finally, the Directive’s immediate suspension and prolonged appeal process make correction of any error before the issue becomes moot exceedingly unlikely.

iii. The government's interest is outweighed by the private interest and risk of error

The city’s governmental interest is insufficient compared to the Directive’s deprivation of private interests. The city asserts that pre-deprivation hearings would require a significant “increase in administrative costs, decrease efficiency, and prevent the City from promptly removing the safety risk.” Opening Brief, p. 15. However, the city has failed to demonstrate that

a park suspension pre-deprivation hearing would be any more costly in financial or safety terms than hearings and processes afforded in other situations, such as those involving traffic violations. Further, governmental interest is weakened if alternative methods would accomplish the same purpose without Due Process concerns. For example, the city could stay the suspension pending the appeal, which would accomplish the same goal while ensuring Holm's due process rights. Consequently, Denver has provided insufficient governmental interest to counterbalance the private interests of Holm and the inherent risks of the Directive.

Holm's private interest and the substantial risk of erroneous deprivation outweigh the slight governmental interests asserted by Denver. Therefore, under the Matthews test, the Directive constitutes a Due Process violation.

CONCLUSION

The District Court reviews the present issue under Rule 37 and the questions of law *de novo*. Rule 106 is inapplicable because a remedy was available through the criminal case process. The county court had jurisdiction under the city charter and DRMC to determine the constitutionality of the Directive and, so, to rule on the motion to dismiss. In reviewing the issues *de novo*, the District Court agrees with the county court finding that the Directive failed to provide sufficient process. Consequently, the criminal charges could not be sustained, and the motion to dismiss was properly granted. The county court is AFFIRMED. The matter is remanded to the county court for proceedings consistent with this order.

This order dated October 25, 2017.

BY THE COURT:



William D. Robbins
District Court Judge