

COMMONWEALTH OF PENNSYLVANIA

v.

MADDOX HALE



Supplemental Memorandum of the Court

(as referenced in pp. 6-9 of the [Case Materials](#))

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Dear Mock Trial Participants,

In writing a mock trial problem such as this one, there are hundreds of editing decisions that must be made. Of these, the hardest involve how to make the case as realistic as possible within the limits of three affidavits and fifty-five minutes per side and/or how to balance the case between prosecution and defense. In drafting this problem, one of the most difficult decisions we faced was whether Maddox Hale should be charged with criminal conspiracy. On the one hand, we felt that almost any prosecutor would bring that charge. On the other, we concluded that allowing conviction on conspiracy alone could badly distort the balance of the case. Moreover, we recognized that conspiracy charges based on the actions of a political organization implicated serious constitutional issues that merited equally serious consideration, consideration that would be impossible under the tight time limits of a mock trial case.

As we examined the issue in depth, we also found that the intersection of the first amendment and criminal conspiracy law is a deeply complex and conflicted product of social, historical, and legal inputs. We realized that we could not do it justice, or even accurately express it, in a paragraph or two in the pre-trial memorandum. However, when explained in detail, it occupied a space wildly out of proportion to its ultimate importance in this case. Nonetheless, we believe that it would do you and the problem itself a disservice either to ignore this issue or to address it without appropriate attention. Accordingly, rather than including an inaccurate recitation of the law in the problem or allowing the explication of this thorny area to swallow the problem itself, we decided to include the Court's Memorandum on this question here, as a supplemental document instead of as a part of the actual case materials.

The opinion that follows represents a single effort by a single court to decide the complex issue before it. Although we have made every effort to accurately recite the governing law, our research was not exhaustive, and there is nothing sacred about the Court's reasoning or inescapable about its conclusions. Indeed, it is entirely possible – perhaps even likely – that another court on another day would have allowed Count 3 to proceed.

This opinion is included here solely for your consideration and edification. This opinion is not part of the formal case materials, and it may not be used in any way during the trial of Commonwealth v. Hale. Nonetheless, we sincerely hope that your team will read it and will use it to spur discussion and debate over the constitutional dimensions of this problem and the difficult balancing that the First Amendment both protects and requires.

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<p>COMMONWEALTH OF PENNSYLVANIA</p> <p style="text-align: center;">v.</p> <p>MADDOX HALE,</p> <p style="text-align: center;">Defendant</p>	<p>: COURT OF COMMON PLEAS</p> <p>: PHILADELPHIA COUNTY, PENNSYLVANIA</p> <p>:</p> <p>: Docket No.: CP-51-CR-011230-2009</p> <p>:</p> <p>: Charges</p> <p>: Aggravated Assault</p> <p>: Criminal Solicitation (Aggravated Assault)</p> <p>: Criminal Conspiracy (Aggravated Assault)</p>
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Supplemental Memorandum of the Court

AND NOW, this 18th day of August, 2009, upon consideration of Defendant's Omnibus Pre-Trial Motion and the Commonwealth's Response in opposition thereto, the Court enters the following Supplemental Memorandum.

Defendant moves to dismiss Count 3 of the Information on the grounds that (1) the alleged affirmative acts are wholly duplicative of the acts charged in Counts 1 and 2; and (2) mere membership in the Children of Liberty organization cannot constitute criminal conspiracy because imposing such liability would chill Defendant's right to freedom of association under the First Amendment to the United States Constitution. This Court writes separately to address these linked claims in greater depth.

In Count 3, the Commonwealth alleges that Defendant joined the Children of Liberty, a loose organization of students at a local high school, by subscribing to the group's website, www.Jitter.com/COLiberty. The Commonwealth further alleges that the Defendant participated in one or more Children of Liberty activities. Finally, the Commonwealth alleges that Defendant did not withdraw from the Children of Liberty after Defendant became aware that one or more members of the Children of Liberty intended to throw snowballs filled with rocks and stones at school security personnel. Accordingly, the Commonwealth alleges that Defendant is criminally liable for conspiring with the other members of the Children of Liberty to commit that crime.

"It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of

the Fourteenth Amendment, which embraces freedom of speech.” NAACP v. Alabama, 357 U.S. 449, 460 (1958). Accordingly, although the First Amendment by its own terms only applies to acts of Congress, the Fourteenth Amendment “incorporates” it against the states, and it thereby forbids state governments from abridging the right of the people peaceably to assemble.¹ See id. This means, among other things, that the First Amendment limits the power of both the federal Congress and this Commonwealth’s legislature to make membership in organizations criminal. See Scales v. United States, 367 U.S. 203 (1961). It also limits both governments’ power to prosecute members of organizations for conspiracy based on acts committed by other members. See Brandenburg v. Ohio, 395 U.S. 444, 447-48 (1969). Scales, Brandenburg and their progeny define these limits, but their interaction has generated a thicket of dense, problematic precedent.

As a nation, we now look with revulsion on those times in our history when one political party jailed members of another or when the government prosecuted dissenting views as “disloyalty,” “subversion,” or even treason. See, e.g. New York Times Co. v. Sullivan, 376 U.S. 254, 276 (1964) (“Although the Sedition Act was never tested in this Court, the attack upon its validity has carried the day in the court of history.”). Consistent with Justice Brennan’s observation, in this Court’s experience, most Americans believe that the First Amendment protects organizational membership nearly absolutely and that their freedom of association is functionally unlimited.

Nonetheless, the Supreme Court has made it clear that under some circumstances, the First Amendment permits the government to prosecute membership in a political organization. In Scales, the Supreme Court held (over vigorous dissent) that the government may ban *active* membership in a subversive organization, although the Court left open the question of whether the government could prosecute nominal members or those who merely “assent” or “encourage” the organization, but who do not participate in its active efforts. See Scales, 367 U.S. at 227-28. However, even Scales contained an important limitation: the Supreme Court stated that mere membership in an organization cannot be made illegal if that organization has some legal aims.

¹ Article I, Section 20 of the Pennsylvania Constitution likewise provides that “The citizens have a right in a peaceable manner to assemble together for their common good, and to apply to those invested with the powers of government for redress of grievances or other proper purposes by petition, address or remonstrance.” Because the Court finds that the United States Constitution requires that Count 3 of the Information be stricken, the Court need not determine whether Article I, Section 20 creates an independent right to the same remedy.

Scales, 367 U.S. at 229. Indeed, the five members of the Supreme Court majority in Scales saved the statute from constitutional challenge only by construing it to apply *only* to those members of the organization who joined in the organization’s illegal aims, thus limiting its scope to that which they would in the following pages conclude was constitutional. Id. at 229-30.

Here, the Commonwealth charges that the Children of Liberty were a criminal conspiracy, one whose shared criminal intent is particularly manifested by several internet postings, including:

- A posting dated February 27, 2009 – “When Hale says, ‘I have not yet begun to fight,’ throw snow at the guards who gather. Snowballs filled with rocks & stones will take down the tyrant on the thrown!”
- A posting dated February 26, 2009 - “What signify a few lives lost in a century or two? The tree of liberty must be refreshed from time to time with the blood of patriots and tyrants. It is its natural manure.”
- A posting dated December 16, 2008 – “These stains of paint are our stains of blood. COL – BG understands the plan.”²
- A posting dated Dec. 2, 2008 - “Guard with jealous attention the public liberty. Suspect every one who approaches that jewel. Unfortunately, nothing will preserve it but downright force.”

While the Commonwealth’s contention that these posts demonstrate that the Children of Liberty were dedicated to criminality is not wholly without merit, “the mere abstract teaching of the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action.” Brandenburg, 395 U.S. at 448, quoting Noto v. United States, 367 U.S. 290, 297-298 (1961). Brandenburg counsels that only the latter may constitutionally be banned.

The Court therefore comes to the crux of the matter – whether the Commonwealth can prosecute membership in an organization when some, or even many, members of that organization turn from legal means of protest or abstract advocacy of violence into more concrete incitement. In reaching its decision, the Court is cautioned that “effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced

² The Commonwealth contends that this demonstrates that an earlier posting on December 13, 2008 was intended to lead to “mark[ing]” school property with graffiti. Such ‘tagging’ would be a violation of 18 Pa.C.S. §3307(a)(3) (Institutional Vandalism of a school or educational facility).

by group association...” NAACP v. Alabama, 357 U.S. at 460. Thus, even though their history includes acts of violence, and even though their core philosophies are regarded by the vast majority of Americans as antithetical to our national values, groups like the Ku Klux Klan have been allowed to exist, to engage in wide-scale political demonstrations, and to actively recruit new members. The First Amendment protects such organizations and those of their members who do not engage in criminal behavior from criminal prosecution, even when their beliefs are odious. Indeed, the First Amendment extends further still, limiting the state’s power to ban certain acts precisely because those acts have an expressive content, even if both the acts themselves and the message that they are intended to convey are reprehensible. See Virginia v. Black, 538 U.S. 343 (2003) (holding that cross burning is constitutionally protected unless intended to threaten and further holding that intent to threaten could not be implied from act itself).

Thus, the First Amendment presents us with one of the great challenges of our republic: to vigorously confront and condemn pernicious ideas while equally vigorously defending the right to express them. Accordingly, the same law that protects the NAACP’s right to march also protects the Klan’s right to do so. Compare Edwards v. South Carolina, 372 U.S. 229 (1963) (overturning convictions of African-American civil rights protestors for breach of the peace on First Amendment grounds) with National Socialist Party v. Skokie, 432 U.S. 43 (1977) (holding unconstitutional the State of Illinois’s efforts to prevent the American Nazi party from marching through a community with a high concentration of holocaust survivors). Likewise, the price of the right to protest a war by wearing black armbands is accepting that others may do so by burning a flag. Compare Tinker v. Des Moines Independent School District, 393 U.S. 503 (1969) with Texas v. Johnson, 491 U.S. 197 (1989); United States v. Eichman, 496 U.S. 310 (1990).

In sum, just as the state is not permitted to choose between “good” speech and “bad” speech, United States v. O'Brien, 391 U.S. 367 (1968), if the right of free association is to mean anything, it must mean that the state may not choose between “good” organizations and “bad” ones.

It is clear, then, that Defendant cannot be held liable for conspiracy based on mere membership in the Children of Liberty, or for failing to withdraw once s/he became aware of the criminal plans of some of its members. Despite some hesitation, at oral argument, the Commonwealth conceded that at least some of the activities undertaken by the Children of

Liberty were lawful. But criminal conspiracy is and must remain a specific intent crime requiring proof of a “shared criminal intent.” Commonwealth v. Weimer, 977 A.2d 1103, 1111 (Pa. 2009). Merely desiring to share in an organization’s political activities is insufficient proof of a specific intent to join in criminality. Cf. United States v. Robel, 389 U.S. 258, 266 n.16 (1967) (“a number of complex motivations may impel an individual to align himself with a particular organization”). It is precisely this protection on which members of the NAACP relied throughout the civil rights movement; were the fact that some members intended and acted to break (unjust) laws as a form of civil disobedience sufficient to deem the entire organization and all of its members criminals, American history would have been indelibly altered and the Supreme Court would have reached a very different decision in NAACP v. Alabama. That members of other, more pernicious organizations have sought cover beneath the same tent does not change the compelling reasons to require specific, conspiratorial criminal intent. Thus, this Court is compelled to conclude that mere membership in the Children of Liberty, without more, is and must be permitted.

Likewise, given the hesitancy of the Supreme Court in Scales and the limiting gloss placed on the Scales decision by Brandenburg and Edwards, this Court also concludes that the Commonwealth cannot oblige a less active member of an organization to withdraw from that organization and forfeit the “undeniable enhancement” of his or her “effective advocacy of public and private points of view,” simply because s/he becomes aware that other members of the organization intend illegal activity. To reach a contrary decision would hold organizations hostage to their most extreme members and hold individuals liable for the actions of the most radical individuals to share some of their views. Such a rule would render the right to freely associate a mere formality.

But the fact that defendant was allegedly a member of a political or quasi-political organization does not end this Court’s analysis. To the contrary, the Supreme Court has made clear – in Scales and elsewhere – that the mere fact that an organization seeks to obtain political goals does not permit its members to engage in criminal activity to accomplish those ends. This is true even if the alleged criminal activity is almost entirely expressive. See, e.g. Schenck v. United States, 249 U.S. 47, 52 (1919) (upholding conviction of Socialist Party leader Baer for being on Executive Committee when Socialist Party published leaflets urging individuals not to comply with military service obligations); Black, 538 U.S. 343; O’Brien, 391 U.S. 367. This point is all the more salient here because the Commonwealth is charging

Defendant with common law conspiracy, not with being a member of a criminal organization, as was the case in Scales (Smith Act, 18 U.S.C. § 2385) and Brandenburg (Ohio's Criminal Syndicalism statute).

Accordingly, the Commonwealth argues in the alternative that the Information does not attempt to criminalize passive membership, but rather identifies two potential acts that demonstrate the required intent and agreement: (a) Defendant allegedly inciting lawless action by posting the Jitter message encouraging others to imminently attack the school guards and/or (b) Defendant joining the lawless action by personally throwing a rock filled snowball. The Commonwealth is correct that these alleged actions, standing alone, are not constitutionally protected. However broadly the First Amendment may sweep, it does not permit individuals to solicit or actively encourage imminent lawless action. See Brandenburg, 395 U.S. at 449 (government may only ban "incitement to imminent lawless action"). Without question, the constitution would not protect the throwing of a rock filled snowball, even if intended to produce political change, any more than it protects burning draft cards or assaulting government officials. Nor would it protect an individual who incited others imminently to do so.

But the First Amendment limits more than just those actions that ban speech; it also forbids actions which deter speech. See, e.g. Lamont v. Postmaster General of the United States, 381 U.S. 301, 306-07 (1965) (holding unconstitutional law requiring acknowledgement of Communist Party materials sent through the mails). The Court therefore must be wary not only of the direct effect that allowing the conspiracy charge in this case to proceed would have, but also of the impact of conspiracy prosecutions like this one on free association generally. This Court is well aware that "education is perhaps the most important function of state and local governments," Brown v. Board of Ed. of Topeka, Kan., 347 U.S. 483, 493 (1954), but even the most important of government interests are constrained by the First Amendment, see, e.g. Familias Unidas v. Briscoe, 619 F.2d 391 (5th Cir. 1980).

The Court also notes with concern that the acts that the Commonwealth claims demonstrate that the Defendant was an "active" member sharing the Children of Liberty's criminal intent are the same acts that it uses as the basis for Counts 1 and 2. If the Defendant threw a rock filled snowball, s/he would already be guilty of violating 18 Pa. C.S.A. § 2702(a)(1) as either a principal or an accomplice to the aggravated assault, as charged in Count 1. Likewise, if the Defendant solicited others to throw rock filled snowballs, s/he would be liable for

a violation of 18 Pa. C.S.A. § 902, as charged in Count 2. If the Defendant did neither, s/he would be a mere nominal or assenting member of the Children of Liberty, and the First Amendment would protect her/him from being charged with criminal conspiracy.

Accordingly, in order constitutionally to convict Defendant *as a conspirator*, the Commonwealth would have to show that Defendant committed one or more crimes *as a principal*. Moreover, because those who conspire to commit crimes or solicit them are punished under Pennsylvania law as though they committed the crimes themselves, see 18 Pa. C.S.A. § 905(a), the Defendant's punishment would not change regardless of whether s/he is convicted of Count 3 in addition to Count 1, Count 2, or both.

Those members of the Children of Liberty who merely sought peaceably to assemble and to petition for the redress of grievances committed no crime. The Court therefore concludes that Counts 1 and 2 suffice to prosecute Defendant for those allegedly illegal activities in which s/he purportedly participated. Count 3 adds nothing to this case other than the possibility that the jury would confuse the criminal aims of some members of the Children of Liberty with the lawful aims of others and/or would punish Defendant for illegal acts s/he did not personally conspire to bring about. This Court is unwilling to risk that outcome for the ephemeral and ultimately meaningless benefit of providing the Commonwealth with another possible count of conviction.

Count 3 must therefore be dismissed.

BY THE COURT:

Marion Gebhart

Marion Gebhart, Judge