

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA  
Wheeling**

**MERVIN B. STURGEON,**  
on behalf of himself and others  
similarly situated,

Plaintiff,

v.

**Civil Action No. 5:20-CV-192**  
Judge Bailey

**CITY MANAGER ROBERT HERRON,**  
individually and in his official capacity,  
**THE CITY OF WHEELING,** its division,  
**THE WHEELING POLICE DEPARTMENT,**  
and **THE WEST VIRGINIA DIVISION OF**  
**HIGHWAYS,** an agency of the West Virginia  
Department of Transportation,

Defendants.

**ORDER GRANTING IN PART AND DENYING IN PART  
EMERGENCY MOTION FOR A TEMPORARY  
RESTRAINING ORDER AND PRELIMINARY INJUNCTION**

Pending before this Court is plaintiff's Emergency Motion for a Temporary Restraining Order and Preliminary Injunction [Doc. 2]. This Court previously denied the request for a temporary restraining order inasmuch as the City of Wheeling agreed to postpone any action pending a hearing on the preliminary injunction [Doc. 4].

As an initial matter, this Court pointed out to the parties that the Wheeling Police Department and the West Virginia Division of Highways are not appropriate defendants in an action under 42 U.S.C. § 1983. With the agreement of the parties, this Court will dismiss the Wheeling Police Department and substitute The State of West Virginia as a

defendant in the place and stead of the West Virginia Division of Highways.

This putative class action surrounds the stated intention of the City of Wheeling and the State of West Virginia to dismantle four homeless encampments located in the City of Wheeling on the property of the State of West Virginia.

On September 15, 2020, this Court held a hearing on the preliminary injunction motion. Testimony was presented from Wheeling Chief of Police Shawn Schwertfeger, Wheeling City Manager Robert Herron, Homeless Advocate Kate Marshall, and the plaintiff Mervin Sturgeon. Having heard the testimony of the witnesses and having considered the submissions and arguments of the parties, this Court is prepared to rule on the Motion.

1. Plaintiff seeks preliminary injunction on the basis that:

Seizure and destruction of homeless persons' property violates the Fourth Amendment; and

Disbanding encampments violates substantive due process by increasing risk of creating danger.

2. A preliminary injunction is "an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief" and may never be awarded "as of right." *Mountain Valley Pipeline v. W. Pochahontas Props. Ltd. P'ship.*, 918 F.3d 353, 366 (4th Cir. 2019).

3. The factors which must be proven to demonstrate entitlement to a preliminary injunction are that the party seeking an injunction:

- A. Is likely to succeed on the merits;
- B. Is likely to suffer irreparable harm absent relief;
- C. That the balance of the equities tips in its favor; and

D. That the injunction is in the public interest.

*Winter v. Nat. Res. Dep't. Council, Inc.*, 555 U.S. 7, 22, 24 (2008); See also *Mountain Valley Pipeline v. W. Pochahontas Props. Ltd. P'ship.*, 918 F.3d 353, 366 (4th Cir. 2019).

4. "The Court acknowledges the profoundly sad plight of the homeless. Homelessness is a sensitive and emotionally-charged issue, and one that inspires passionate and often vituperative debate. The destitution of the homeless is sobering, and clearly is a societal problem demanding attention. The image of homeless men and women huddled on steam grates or under highway bridges is not easily forgotten. Moreover, the threat of irreparable injury to plaintiffs in the instant case is haunting and undeniable. The specter of losing one's domicile, however primitive, is deeply troubling.

It is not, however, the role of the Court to pass on the wisdom or humaneness of the defendants' planned action. The Court's limited role in this litigation, rather, is to determine only whether defendants have exceeded the limitations on their power imposed by the federal constitution. A bedrock principle of the American system of justice is that the Constitution is not trumped by sympathy or bias. The Court is not at liberty to ignore or rewrite the Constitution, nor engraft upon it rights that it does not afford. Although careful and searching, the Court's review of the constitutionality of defendants' action must be dispassionate." *Davison v. City of Tucson*, 924 F.Supp. 989, 992 (D. Ariz. 1996).

5. "Homelessness is an exceptionally complex phenomenon even when it is not exacerbated by a global pandemic. The Court admires all entities that work to address the scourge of homelessness . . . . The Court does not doubt the depth or sincerity of [these

entities'] concern for the individuals who reside in the encampments that are at the heart of this case. Nor does the Court express an opinion about the merits of either's approach to addressing those individuals' needs. This Court's role is not to evaluate competing policy prescriptions." *Frank v. City of St. Louis*, 2020 WL 2116392, \*1 (E.D. Mo. May 2, 2020).

6. The facts which are pertinent to the injunction issue in this case include the following.

7. The plaintiff is a homeless person who resides in one of the encampments which the City of Wheeling intends to remove.

8. Defendant Robert Herron is the City Manager of the City of Wheeling, and is the chief executive and administrative officer of the City.

9. The City of Wheeling is a municipal corporation situate in Ohio County, West Virginia, and within the Northern District of West Virginia.

10. The Wheeling Police Department is a subdivision of the City of Wheeling.

11. The Division of Highways is an agency of the State of West Virginia, within the West Virginia Department of Transportation.

12. There exist a number of encampment areas located within the City of Wheeling.

13. That the City of Wheeling has given two weeks notice to the residents of four of the encampments that it will close the same on September 18, 2020.

14. These encampments are located in the downtown and Centre Wheeling areas of Wheeling along the banks of Big Wheeling Creek.

15. There are approximately twenty homeless encampments which are not affected by these planned closings.

16. The Centers for Disease Control has advised that if individual housing options are not available, people who are living in encampments should be permitted to remain where they are and that closing encampments can cause people to disperse throughout the community and break connections to service providers, increasing the potential for infectious disease spread.

17. As a matter of fact, inhabitants of these encampments are very transient, moving freely throughout the community.

18. The encampments are located on property owned by the State of West Virginia and maintained by the West Virginia Division of Highways.

19. The notices posted by the City of Wheeling indicate that all property remaining on the site is subject to removal by the City of Wheeling.

20. The notice indicates that the City intends to destroy the property remaining at the encampment sites.

21. There is no provision for an appeal of the City's decision to dismantle the encampments.

22. The notices direct persons needing assistance with housing to contact the Greater Wheeling Coalition for the Homeless or Project Hope.

23. There was testimony indicating that the total number of "campers" in Wheeling was 78.

24. The encampments to be dismantled were selected by the City of Wheeling based upon data indicating that these encampments were the source of increased crime in the area.

25. Police records show that the encampments in question are connected to drug

addiction, drug overdoses, sexual assaults, domestic violence, property crimes, assaults and shots fired.

26. There was significant testimony concerning a female who was found in her tent, having been dead for three to four days.

27. Chief Schwertfeger described that certain campsites are surrounded by "booby traps" intended to injure unwelcome persons.

28. The encampments in question have no running water, no proper toilet facilities, and no sewer connections. There are often open fires within the encampments.

29. The encampment areas are very unsanitary and include trash and hypodermic needles strewn about.

30. There are no plans at present to dismantle any other encampments. Such a decision would be based upon crime statistics.

31. Originally, the City gave only 72 hours notice of its plan to dismantle the encampments. When this action was filed, the City agreed to delay the demolition and longer notice was given of the new date.

32. There can be no question that the personal effects of homeless persons, however humble, are entitled to the protection of the Fourth Amendment. See *Altman v. City of High Point, NC*, 330 F.3d 194 (4th Cir. 2003).

33. A Fourth Amendment "seizure" of personal property occurs when "there is some meaningful interference with an individual's possessory interests in that property." *Id.* (citing *United States v. Jacobsen*, 466 U.S. 109, 113 (1984)).

34. Destroying property meaningfully interferes with an individual's possessory

interest in that property by changing a temporary deprivation into a permanent deprivation. *Id.* (citing *Jacobsen*, 466 U.S. at 124–25).

35. Thus, if officers destroy personal effects of a homeless person, they “seize” those “effects.” *Id.* at 205.

36 In order for the officers' warrantless seizure of the plaintiff's effects to be constitutional, the seizure must have been “reasonable.” *Id.*

37. A seizure of personal property conducted without a warrant is presumptively unreasonable. *Id.* (citing *United States v. Place*, 462 U.S. 696, 701 (1983)).

38. Under the basic reasonableness calculus, a court must “balance the nature and quality of the intrusion on the individual's Fourth Amendment interest against the importance of the governmental interests alleged to justify the intrusion.” *Id.* (citing *Place*, 462 U.S. at 703).

39. The reasonableness calculus is objective in nature; it does not turn upon the subjective intent of the officer. *Id.*

40. However, the law is well established that a person who voluntarily abandons property loses any reasonable expectation of privacy in the property. *United States v. Ferebee*, 957 F.3d 406 (4th Cir. 2020), (citing *United States v. Leshuk*, 65 F.3d 1105, 1111 (4th Cir. 1995)); accord *United States v. Stevenson*, 396 F.3d 538, 546 (4th Cir. 2005).

41. “In determining whether a person has abandoned property, we can infer from words spoken, acts done, and other objective facts whether he voluntarily discarded, left behind, or otherwise relinquished his interest in the property in question.” *Id.* at 413.

42. Abandonment turns on the intent of the owner as revealed through his or her words or actions, and it can occur without the contemporaneous knowledge of any other person. For example, a defendant could abandon a backpack by choosing to leave it as he disembarks from a cross-town bus. The abandonment is complete when the defendant deliberately walks away without the bag. *Id.*

43. This Court finds that the 72 hour notice provided by the City of Wheeling to the persons staying at the encampments and to the Coalition for the Homeless was woefully insufficient. Rather, a period of a minimum of two weeks is necessary to constitute sufficient and proper notice to those in the encampments that they need to remove their property.

44. In addition, on the day upon which crews show up to dismantle an encampment, the crews must, upon request, give any inhabitants present a period of two hours in which to remove their personal property.

45. In addition, at least two weeks written notice must be provided to the Greater Wheeling Coalition for the Homeless, Project Hope, and any other group or agency which requests to be included in such notification.

46. If at least two weeks notice is given to the inhabitants of the encampment and at least two hours provided on the day of demolition to remove their personal property, any personal effects remaining in the encampment may be deemed abandoned and not subject to Fourth Amendment protection.

47. As described in *Kohr v. City of Houston*, 2017 WL 6619336, \*5 (S.D. Tex. December 28, 2017) (Hoyt, J.), "[t]he City emphasizes that enforcement of the ordinances is driven by legitimate government interests of public safety and sanitation, as it is



undisputed that the encampments have no running water, no restroom facilities and contain numerous personal items that have, in most instances, been infested with fecal matter, pests and other potentially harmful substances.”

48. This Court sees no basis for putting the employees of the City of Wheeling or Division of Highways at risk by requiring them to sift through, inventory and store whatever items may be left at the encampment site.

49. The plaintiff also raises the issue of substantive due process, conceding that it is violated only when the action in question can properly be characterized as arbitrary, or conscience shocking in a constitutional sense, citing *Collins v. City of Harker Heights*, 503 U.S. 115, 128 (1992).

50. The plaintiff cites one case, where the municipality’s sweep of an encampment in winter was found to violate substantive due process – *Sanchez v. City of Fresno*, 914 F.Supp.2d 1079, 1101 (E.D. Cal. 2012) (O’Neill, J.). Other courts have rejected the doctrine in connection with homeless encampments. See *Blake v. City of Grants Pass*, 2020 WL 4209227, \*15 (D. Ore. July 22, 2020) (Clarke, M.J.); *Cobine v. City of Eureka*, 250 F.Supp.3d 423, 433 (N.D. Cal. 2017) (White, J.).

51. It is important to note that homelessness has not been found to be a suspect class. *Joel v. City of Orlando*, 232 F.3d 1353 (11th Cir. 2000); *Davison v. City of Tucson*, 924 F.Supp. 989 (D. Ariz. 1996) (Browning, J.). In addition, there is no fundamental right to sleep outdoors on property owned by others. *Id.*

52. With regard to the CDC guidance, the inhabitants of the encampments are not quarantined and currently move freely through the City. Whether these encampments

should be disbanded during the COVID-19 pandemic is a policy issue - not a constitutional one.

53. The plaintiff has failed to demonstrate that he is likely to succeed on the merits, except as to the notice to be provided.

54. The plaintiff has demonstrated that he and other homeless persons are likely to suffer injury absent injunctive relief, although it is questionable whether that injury is irreparable.

55. While the plaintiff has demonstrated injury, this Court finds that the needs of the public safety and sanitation tip the balance of equities in favor of the City of Wheeling.

56. The public interest clearly supports denial of the requested injunction, if the procedural requirements are met.

57. Inasmuch as the plaintiff has failed to satisfy each of the four requirements, the requested injunction must be denied in part. *Mountain Valley Pipeline v. W. Pochahontas Props. Ltd. P'ship.*, 918 F.3d 353, 366 (4th Cir. 2019).

For the reasons stated above, it is hereby **ORDERED** that the City of Wheeling be enjoined from conducting any cleaning of homeless encampments unless and until the following procedural requirements are met:

A. The City of Wheeling shall post notices of its intended action at any encampment to be removed in such places as are most likely to be seen and read by the inhabitants thereof;

B. Such notices must be posted at least two (2) weeks prior to the intended action;

C. The City of Wheeling must provide at least two (2) weeks written notice to the Greater Wheeling Coalition for the Homeless, Project Hope, and any other group or agency which requests to be included in such notifications.

D. On the day upon which crews show up to dismantle an encampment, the crews must, upon request, give any inhabitants present a period of two hours in which to remove their personal property.


Inasmuch as the pendency of this action has created uncertainty as to whether the encampment removals would take place and due to the short period remaining between this day and the intended day of removal, it is hereby **ORDERED** that the City must select a new date and provide proper notice as described above.

Finally, it is hereby **ORDERED** that the Wheeling Police Department is **DISMISSED** from this action and that The State of West Virginia be substituted as a defendant in the place and stead of the West Virginia Division of Highways.

It is so **ORDERED**.

The Clerk is directed to transmit copies of this Order to all counsel of record herein.

**DATED:** September 16, 2020.

  
**JOHN PRESTON BAILEY**  
**UNITED STATES DISTRICT JUDGE**