UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
OCALA DIVISION

PATRICK MCARDLE, COURTNEY RAMSEY and ANTHONY CUMMINGS,

Plaintiffs,

v. Case No: 5:19-cv-461-Oc-30PRL

CITY OF OCALA, FL,

Defendant.

ORDER

THIS CAUSE comes before the Court upon: (1) Plaintiffs' Motion to Exclude and/or Strike Body Camera Footage (Dkt. 36) and Defendant's Response in Opposition (Dkt. 42); and (2) Plaintiffs' Motion for Class Certification (Dkt. 16), Defendant's Response in Opposition (Dkt. 34), and Plaintiffs' Reply (Dkt. 60). The Court, having considered the motions, responses, arguments of counsel, and being otherwise advised in the premises, concludes that Plaintiffs' motion to exclude and/or strike body camera footage should be granted and Plaintiffs' motion for class certification should be denied.

BACKGROUND

Plaintiffs Patrick McArdle, Courtney Ramsey, and Anthony Cummings filed this class action lawsuit against the City of Ocala ("the City") alleging violations of the Eighth and Fourteenth Amendments of the United States Constitution and Article I, Section 9 of the Florida Constitution. Plaintiffs filed this action on behalf of themselves and other similarly situated homeless individuals in the City.

Plaintiffs allege that, because they do not have access to fixed, regular, and adequate housing, they have no choice but to sleep or rest in outdoor areas in the City. According to Plaintiffs, they have been illegally prosecuted and harmed by various City policies, which were allegedly implemented to drive homeless individuals out of the City. The crux of this action is Section 42-10 of the City's Code, which prohibits any person from trespassing or lodging on either public or private property without permission from the property owner. Other policies the City implemented to allegedly drive homeless individuals out of the City, include (1) the trespass policy, which authorizes the City's park rangers and the Ocala Police Department's ("OPD") officers to issue trespass warnings to people in public places, and (2) the "broken windows" policing policy, where the OPD officers actively identify and arrest homeless individuals for municipal ordinance violations.

Plaintiffs move to certify the following class:

> All persons who currently or during the pendency of this litigation (a) are homeless in that they are without fixed housing and lack the financial resources to provide for their own housing; (b) live within the City of Ocala including individuals who sometimes sleep outside the City to avoid arrest; and (c) have been convicted under the City of Ocala ordinance, codified at Sec. 42-10 of the Ocala City Code, that prohibits "lodging in the open" ("open lodging").

(Dkt. 16, p. 2). The open lodging ordinance provides as follows:

> **Sec. 42-10. - Trespass and unlawful lodging.**
>
> (a) *Definitions.*
>
> (1) *"Lodge"* means to rest while awake or sleep on property described in subsection (b) of this section when one is:

> a. Inside, on, or near a tent or sleeping bag, or asleep atop or covered by materials (i.e., bedroll, cardboard, newspapers) or inside some form of temporary shelter; and/or
>
> b. Near a campfire he or she has built; and/or
>
> c. When awakened relates that he or she is otherwise homeless.
>
> (2) *"Person without authority"* means one who has not received authorization, license, or invitation by any owner or lessee, or his or her agent.
>
> (b) *Prohibitions.*
>
> (1) It shall be unlawful for any person without authority to trespass upon, enter, or remain in any church building or other public building, swimming pool, or enclosure surrounding any swimming pool, public building or athletic field in the city, except during the hours and at such times when such premises or building may be lawfully open for use by the public.
>
> (2) It shall be unlawful for any person at any time to lodge in the open on private property, in vacant lots, in or under any bridge or structure, in any railroad car, without owning the same or without permission of the owner or person entitled to possession of same.
>
> (3) It shall be unlawful for any person at any time to lodge in the open on public property, to include, but not limited to, government buildings, parks, sidewalks, public benches or government owned right-of-way.
>
> (c) *Evidence.* Merely sleeping in a place listed in subsection (b) of this section shall not be enough for a citation or arrest under this section. There must be one or more indicia of lodging, including but not limited to those listed in subsection (a)(1).

§ 42-10, Ocala City Code. The ordinance prohibits a person from resting on both public and private property if there is one or more indicia of lodging, unless the person has authorization to lodge there.

DISCUSSION

I. Motion to Exclude and/or Strike Body Camera Footage

Preliminarily, the Court will address Plaintiffs' motion to exclude certain body camera footage the City relies upon in its opposition to Plaintiffs' motion for class certification.

According to the City, contrary to the allegations of hostility in the Complaint, the body camera footage provides context for the manner in which the OPD and the City interacted with Plaintiffs. The City further asserts that the videos show how the police department treats homeless individuals with compassion when providing emergency care and assistance.

Plaintiffs move to exclude or strike three videos of body camera footage from the record because the videos are irrelevant to the Court's consideration of Plaintiffs' motion for class certification. The videos are: (1) a video of Mr. Cummings receiving emergency medical services; (2) a video of Ms. Ramsey's domestic violence incident; and (3) a video interviewing Jo Anne Knight regarding Mr. McArdle's alleged conduct towards her.

The Court agrees with Plaintiffs. As Plaintiffs note, they have not alleged that the OPD fails to provide emergency care and assistance to homeless individuals or that the officers lack compassion. This is not a case about police misconduct. This case is about the alleged unconstitutional treatment of homeless individuals in the City with respect to the open lodging ordinance. The City relies upon body camera footage from the OPD for a limited purpose unrelated to the merits of Plaintiffs' motion for class certification. Notably, the City does not rely upon the videos in its opposition to any of the requirements

for class certification. The Court concludes that the above-referenced body camera videos are not relevant to the Court's consideration at this stage and accordingly grants Plaintiffs' motion to strike.

II. Motion for Class Certification

A. Legal Standard

A district court is vested with broad discretion in determining whether to certify a class. *Washington v. Brown & Williamson Tobacco Corp*., 959 F.2d 1566, 1569 (11th Cir. 1992). The party seeking class certification has the burden of proof and must affirmatively demonstrate compliance with Federal Rule of Civil Procedure 23. *Brown v. Electrolux Home Products, Inc.*, 817 F.3d 1225, 1233 (11th Cir. 2016).

First, the party must demonstrate the prerequisites articulated in Rule 23(a), which include establishing the following:

> (1) the class is so numerous that joinder of all members is impracticable;
>
> (2) there are questions of law or fact common to the class;
>
> (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
>
> (4) the representative parties will fairly and adequately protect the interests of the class.

Generally, these requirements are referred to as "numerosity, commonality, typicality, and adequacy of representation." *Valley Drug Co. v. Geneva Pharm., Inc.*, 350 F.3d 1181, 1188 (11th Cir. 2003) (internal quotation marks omitted). The party must be prepared to prove that there are "*in fact* sufficiently numerous parties, common questions of law or

fact, typicality of claims or defenses, and adequacy of representation as required by Rule 23(a)." *Comcast Corp. v. Behrend*, 133 S.Ct. 1426, 1432 (2013).

Once the party seeking class certification meets all of Rule 23(a)'s requirements, the party must then satisfy one of Rule 23(b)'s requirements. *Id.* Here, Plaintiffs seek certification pursuant to Rule 23(b)(2), which provides for class certification if "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2).

Only after a "rigorous analysis" may the court determine that the movant has satisfied Rule 23's prerequisites and properly certify the class. *Id*. at 1234. "Although the trial court should not determine the merits of the plaintiffs' claim at the class certification stage, the trial court can and should consider the merits of the case to the degree necessary to determine whether the requirements of Rule 23 will be satisfied." *Valley Drug Co.*, 350 F.3d at 1188, n. 15. The Court also notes that "the presumption is against class certification because class actions are an exception to our constitutional tradition of individual litigation." *Brown*, 817 F.3d at 1233. "A district court that has doubts about whether 'the requirements of Rule 23 have been met should refuse certification until they have been met.'" *Id*. at 1234.

There are two major problems with treating this case as a class action as the class is defined in the Complaint: (1) it only attacks Section 42-10(a)(1)c.,[1] not a. or b., but

[1] Plaintiffs allege in their Complaint that the open lodging ordinance authorizes criminal punishment of Plaintiffs and class members "experiencing homelessness . . . for sleeping or resting

includes those that fit under a. and b. in the class;[2] and (2) it includes a claim or claims that cannot be addressed without considering a necessary fact (whether the class members are "involuntarily unsheltered").[3]

In respect to the prerequisites of Rule 23(a), Plaintiffs have not sufficiently shown that there are claims common to the putative class and that their claims are typical of the claims of the putative class.[4]

B. Requirements under Rule 23(a)

a. Commonality

"Commonality requires the plaintiff to demonstrate that the class members 'have suffered the same injury.'" *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011). "This does not mean merely that they have all suffered a violation of the same provision of law." *Id.* The claims must depend upon a common contention and "be of such a nature that it is capable of classwide resolution—which means that determination of its truth or

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while awake because they are homeless." (Dkt. 1, ¶ 19.e). Plaintiffs further allege that the ordinance "discriminates on its face and as-applied against Named Plaintiffs and class members by punishing only homeless individuals who have no alternative places to sleep or rest while allowing others to engage in the same conduct if they have access to housing and an ability to conform their conduct." (Dkt. 1, ¶ 19.h).

[2] For example, an unemployed adult living with his or her parents, but prefers to sleep in the park rather than abide by the parents' rules, would be a member of the class if convicted for pitching a tent and building a campfire. It would also include individuals who could stay in available homeless shelters or camps.

[3] Plaintiffs' challenge the constitutionality of the ordinance under the Eighth Amendment. Under *Joel v. City of Orlando*, the municipal ordinance did not violate the Eighth Amendment because it only applied when there were other available places to sleep. 232 F.3d 1353 11th Cir. 2000).

[4] Because the Court concludes that the commonality and typicality prerequisites are not satisfied, the Court need not address the other requirements under Rule 23.

falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Id.*

Plaintiffs contend the following nine issues are common to them and the proposed class members:

a. Named Plaintiffs and class members experiencing homelessness are involuntarily unsheltered in that the number of available shelter beds is exceeded by the number of homeless people in the City of Ocala;

b. Defendant's policies, practices, and customs of enforcing the City's "open lodging" ordinance resulting in criminal punishment (incarceration and imposition of fines, fees, and costs) of class members for sleeping or resting while awake on property in City (public or private), when there is no available alternative shelter, is cruel or unusual punishment in violation of the Eighth Amendment, U.S. Constitution;

c. Defendant's "open lodging" ordinance and the manner in which it is being applied to Named Plaintiffs and class members fails to provide constitutionally sufficient notice prior to depriving class members of their liberty interests in resting, sleeping, and seeking shelter from the elements, such that a reasonable homeless person in Ocala would understand what conduct is prohibited in violation of the vagueness doctrine under the due process clause of the Fourteenth Amendment to the U.S. Constitution;

d. Defendant's "open lodging" ordinance and the manner in which it is being applied authorizes and constitutes arbitrary and discriminatory enforcement by casting a wide net of virtually limitless innocent human behavior that is criminalized and leaving it up to the whim of individual police officers to determine who to criminally punish and who to set free in violation of the vagueness doctrine under the due process clause of the Fourteenth Amendment to the U.S. Constitution;

e. Defendant's "open lodging" ordinance authorizes criminal punishment of Named Plaintiffs and class members experiencing homelessness in the form of incarceration and imposition of fines, fees, and costs for sleeping or resting while awake because they are homeless in violation of the substantive due process clause of the Fourteenth Amendment to the U.S. Constitution;

f. Defendant's policies, practices and customs of issuing trespass warnings to exclude Named Plaintiffs and class members from being physically present in public parks or other public places generally open to the public deprives them of a constitutionally protected liberty interest to be in public places of their choosing without an opportunity for a hearing violates their right to procedural due process under the Fourteenth Amendment of the U.S. Constitution;

g. Defendant's policies, practices and customs of using "broken windows" policing and the manner in which it is being applied to Named Plaintiffs and class members who are experiencing homelessness (through police operations like "Operation Street Sweeper," "zero tolerance" action plans, and enforcement of the City's "open lodging" and trespass policies) is motivated by a discriminatory intent to harm and punish a politically unpopular group and lacks a rational basis in violation of the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution;

h. Defendant's "open lodging" ordinance discriminates on its face and as-applied against Named Plaintiffs and class members by punishing only homeless individuals who have no alternative places to sleep or rest while allowing others to engage in the same conduct if they have access to housing and an ability to conform their conduct in violation of the Equal Protection Clause to the Fourteenth Amendment of the U.S. Constitution;

i. Defendant's policies, practices and customs of using "broken windows" policing and the manner in which it is being applied to Named Plaintiffs and class members who are experiencing homelessness (through police operations like "Operation Street Sweeper," "zero tolerance" action plans, and enforcement of the City's "open lodging" and trespass policies) violate their fundamental right to freedom of movement and intrastate travel guaranteed by Article I, section 9 of the Florida Constitution by: preventing homeless people from coming into the City; expelling those already present from the City; and impeding their ability to move freely and engage in harmless, life-sustaining activities such as resting, sleeping, and attempting to protect themselves from the elements.

(Dkt. 16, pp. 3-5).

With regard to paragraphs a, b, and e, the Court reiterates its concerns about whether those issues are common to the class, as defined. Paragraphs a, b, and e pertain to

Plaintiffs and class members being "involuntarily unsheltered" and the criminal punishment of those when there is no alternative place to sleep or rest. As the Court previously noted, the class, as defined, could include members with an alternative place to stay. Thus, these issues are not common to the entire class.

With regard to paragraphs f, g, and i, Plaintiffs attempt to include discrete claims pertaining to the trespass and "broken windows" policies into Plaintiffs' claim concerning Section 42-10. But, as the City points out, there is no way to discern whether the class members convicted of violating the open lodging ordinance were also impacted by the trespass and "broken windows" policies. While public records may show the number of people arrested and charged for violating Section 42-10, there is no showing of commonality as to how these policies affected the class members.

With regard to paragraphs c, d, and h, the City argues that the factual issues necessary to determine whether the open lodging ordinance is unconstitutional, as applied, have to be considered on an individual, as opposed to a class-wide, basis. For example, the City points out that two of Mr. McArdle's arrests for "open lodging" had nothing to do with lodging or being homeless. One was because he was intoxicated and passed out and another was because he was panhandling.[5] Obviously not every arrest has to do with violating the open lodging ordinance by being homeless. To determine how the ordinance was applied, it is necessary to examine the underlying facts of the arrest.

[5] (Dkts. 34, p. 14; 80: 54-55).

Having considered all of the issues Plaintiffs identified, the Court concludes that Plaintiffs have not met their burden in establishing that there is a common contention that is capable of class-wide resolution.

b. Typicality

Typicality requires that the class representative have the same injury as other class members. *Busby v. JRHBW Realty, Inc.*, 513 F.3d 1314, 1322 (11th Cir. 2008). "[T]ypicality measures whether a sufficient nexus exists between the claims of the named representatives and those of the class at large." *Id.*; s*ee Vega*, 564 F.3d at 1275. Similar to commonality, typicality may be satisfied even if there are some factual differences between the claims of the named representatives and the claims of the putative class members. *See Prado*, 221 F.3d at 1279 n. 14. Although typicality and commonality may be related, the Eleventh Circuit has distinguished the two by noting that, "commonality refers to the group of characteristics of the class as a whole, while typicality refers to the individual characteristics of the named plaintiff in relation to the class." *Piazza v. Ebsco Indus., Inc*., 273 F.3d 1341, 1346 (11th Cir. 2001).

The City challenges this requirement because Plaintiffs are not typical of the putative class. Plaintiffs claim that being trespassed or otherwise excluded from the Salvation Army is typical of the class and illustrates that the open lodging ordinance is being enforced against individuals with no alternatives. But, as the Court previously noted, the class as defined could include those both with and without alternative places to sleep.

The Complaint and motion for class certification allege that Plaintiffs and the putative class members are involuntarily homeless because the number of homeless people in the City exceeds the number of available shelter beds. According to the City, even if the shelter beds were available, Plaintiffs would not be eligible for them because of their criminal background or for being previously trespassed for drugs or alcohol. It is common for homeless shelters to have rules for the safety and protection of those who stay there, including children. The rules ordinarily prohibit fighting, threatening behavior, and the use of alcohol or drugs. Plaintiffs argue that if there were more shelter beds than the number of homeless individuals, those who are "trespassed" (excluded) for previous infractions still would not have a bed "available."

All three named Plaintiffs have been "trespassed" from local homeless shelters. Plaintiffs contend that this qualifies as having no alternative place to stay. Assuming *arguendo* this to be true, the named Plaintiffs are not typical of the class as defined because the class is not limited to just those members.

Because of the foregoing reasons and because of the presumption against class certification, the Court declines to grant Plaintiff's motion.

It is therefore ORDERED AND ADJUDGED that:

1. Plaintiffs' Motion to Exclude and/or Strike Body Camera Footage (Dkt. 36) is granted.

2. Plaintiffs' Motion for Class Certification (Dkt. 16) is denied.

DONE and **ORDERED** in Tampa, Florida, this 23rd day of November, 2020.

JAMES S. MOODY, JR.
UNITED STATES DISTRICT JUDGE

Copies furnished to:
Counsel/Parties of Record