COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPREME JUDICIAL COURT
FOR SUFFOLK COUNTY
DOCKET NO. SJ-2018-119

MATTER OF C. DOE & others.[1]

JUDGMENT

This matter came before the Court, Cypher, J., presiding, and in accordance with the Memorandum of Decision of this date:

It is ORDERED and ADJUDGED that the Petition for Writ of Protection pursuant to G.L. c. 211, § 3, be and hereby is, DENIED.

By the Court, (Cypher, J.)

Maura S. Doyle, Clerk

Entered: September 18, 2018

[1] D. Doe, F. Doe, K. Doe, O. Doe, T. Doe, Y. Doe, and J. Doe.

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MEMORANDUM OF DECISION

The petitioners in this case are seven adult individuals – six undocumented immigrants and one lawful permanent resident – who are subject to removal from the United States under Federal immigration laws, and one juvenile who is a lawful permanent resident facing juvenile delinquency charges in the Middlesex Juvenile Court. They have filed what they refer to as a "Petition for Writ of Protection Pursuant to G. L. c. 211, § 3." Their goal, ultimately, is to curb the practice of Immigration and Customs Enforcement (ICE) of making civil immigration arrests in and around the Commonwealth's courthouses. They seek a writ of protection from this court, claiming that the Massachusetts privilege against civil arrest protects them and "all other similarly situated persons" who have current or future business in Massachusetts courts from Federal civil immigration arrests while they are "within the confines of a [Massachusetts] courthouse and its environs" and "while coming to and leaving court proceedings." The

[1] D. Doe, F. Doe, K. Doe, O. Doe, T. Doe, Y. Doe, and J. Doe. In a typical case, petitioners who wish to proceed using pseudonyms file a motion seeking permission to do so in which they identify themselves and state their reasons for requesting anonymity in the public record. The motion is impounded and, if it is allowed, the identities of the petitioners are thus shielded from public view. Here, the petitioners have refused to identify themselves, even in an impounded filing, out of concern that at some point their identifying information could be revealed.

petitioners argue that this court's general superintendence authority under G. L. c. 211, § 3 is a proper basis for issuing such a writ. After a hearing, and after careful review of the petition and the record submitted by counsel, I decline to report this matter to the full court as the petitioners have requested and I decline to issue the writ.[2]

Background[3]

The petition was filed on March 15, 2018. Each of the eight unnamed petitioners alleges that he or she has (or potentially has) business in the Massachusetts courts. Seven of them claim that they are afraid to go to court because they have heard of ICE's practice of conducting immigration arrests in our courthouses; the eighth claims that a witness in his case is too fearful to appear in court to testify in his behalf. Each petitioner submitted an affidavit explaining his or her general circumstances.[4] The petitioners also cited a variety of news articles and other

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[2] As I read the petition and as represented to me at the hearing, the petitioners seek only a reservation and report to the full court. There does not appear to be a mechanism for asking the Single Justice to reserve and report a broad superintendence issue such as this without also seeking some other action by the Single Justice.

[3] I draw the facts from the allegations in the petition and from the documents attached to the petition. I also take judicial notice of Executive Order 13768 ("Enhancing Public Safety in the Interior of the United States"), signed by the President in January, 2017, which directs that all individuals subject to removal under Federal law are immigration enforcement priorities.

[4] Specifically, the petitioners represent that they are: a mother who alleges that she would like to go to court to seek a guardianship of her disabled daughter; a tenant who alleges that she was illegally evicted from her apartment who would like to seek redress against her former landlord; an alleged victim of an assault who would like to attend proceedings in the criminal case against his assailant; a mother of a minor child who alleges that she is owed child support and would like to seek contempt and modification orders against the father; an alleged victim of domestic violence who would like to renew a restraining order against her former husband; an individual facing a criminal charge; a woman who alleges she was wrongfully fired from her job and would like to pursue a claim against her former employer; and a juvenile charged in a delinquency case who claims that a witness is too fearful to appear in court to testify in his behalf. All of the affidavits were signed using pseudonyms. See note 1, supra. With respect to the petitioners who claim to have actual pending cases, no specific case information was supplied.

publications, and furnished affidavits from attorneys (including their own counsel), as well as other publicly available documents, to establish that ICE does, in fact, make arrests in and around courthouses in Massachusetts and elsewhere.

Notably, the petitioners have not named a respondent in their petition. Consequently, when I held a hearing on this matter on May 18, 2018, I heard from the petitioners' counsel only. Counsel acknowledged that the relief is being sought ex parte.

Analysis

As stated, the petitioners seek a writ of protection based on the common law privilege against civil arrest, for themselves and all other similarly situated individuals, for all proceedings in current and future court cases, and they claim that the general superintendence authority of the Supreme Judicial Court under G. L. c. 211, § 3, is an appropriate avenue for seeking such relief. Their petition thus calls into play three distinct legal concepts: this court's general superintendence authority; the common law privilege against civil arrest; and writs of protection.

General Laws c. 211, § 3, codifies the court's general superintendence authority. It contains two paragraphs, each referring to a distinct aspect of that authority. The first paragraph states that "the supreme judicial court shall have general superintendence of all courts of inferior jurisdiction to correct and prevent errors and abuses therein if no other remedy is expressly provided, and it may issue all writs and processes to such courts . . . and individuals which may be necessary to the furtherance of justice and to the regular execution of the laws." The first paragraph refers generally to our ability to review rulings of lower courts on a case-by-case

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Some of the petitioners averred that they have not gone to court. Others averred that they have gone to court but are fearful when they do.

basis. Because the instant petition does not seek review of a lower court ruling, it does not fall under this paragraph.

The second paragraph of the statute provides that "the justices of the supreme judicial court shall also have general superintendence of the administration of all courts of inferior jurisdiction . . . and . . . may issue such writs, summonses and other processes and such orders, directions and rules as may be necessary or desirable for the furtherance of justice, the regular execution of the laws, the improvement of the administration of such courts, and the securing of their proper and efficient administration. . . ." Unlike the first paragraph, which enables the court to deal with lower court rulings on a case-by-case basis, the second paragraph allows us to superintend the judicial branch generally by dealing with broader issues, typically administrative and procedural matters that occur in more than one court or in more than one case. We have exercised our authority under this paragraph to resolve "important issues with implications for the effective administration of justice" and "matter[s] of public interest that may cause uncertainty within the courts." First Justice of the Bristol Div. of the Juvenile Court Dep't v. Clerk-Magistrate of the Bristol Div. of the Juvenile Court Dep't, 438 Mass. 387, 391 (2003). I will assume for the sake of discussion, without deciding, that the subject of this petition, generally speaking, comes within the second paragraph.

The petitioners have also satisfied me that this is an issue of systemic concern. It is fairly well-documented that ICE makes arrests in and around courthouses in Massachusetts and in other jurisdictions. Courthouses are not currently among the "sensitive locations" defined by ICE for which immigration enforcement actions are sharply circumscribed. Rather, immigration enforcement actions in courthouses are governed by an ICE directive that regards courthouses as

appropriate locations for the routine enforcement of civil immigration matters.[5] I understand, and am not unsympathetic to, the petitioners' predicament. They have pending court cases, or potential business in the courts that they would like to pursue, but they are concerned that if they go to court they will be civilly arrested by ICE and, perhaps, deported. I agree with them that the administration of justice in the Commonwealth suffers when litigants, witnesses, and others with business before the courts are afraid to come near a Massachusetts courthouse because they fear being arrested by immigration authorities.

Nevertheless, I decline to report this matter to the full court, and I decline to grant the single, unprecedented form of relief that the petitioners seek – a free-floating, ex parte writ of protection for themselves and all other similarly situated individuals, covering all of their current and future court cases and other court-related business in Massachusetts, with some type of explicit or implicit assurance that the writ applies specifically to civil immigration arrests by ICE – for at least the following reasons.

1. First, the petitioners have cited no authority, and I have found none, for the proposition that a writ of protection as broad as they seek can be issued under either the common law or under G. L. c. 211, § 3. Nor have they provided any examples of writs quite like this ever having been granted.[6]

Under the common law, a writ of protection can be issued to a specifically named individual for purposes of facilitating his or her appearance for a specified court event, free from

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[5] The directive, which is included in the appendix to the petition, see A. 52, has provisions that attempt to make enforcement actions within courthouses orderly, safe, and nondisruptive.

[6] The petitioners' counsel acknowledged at the hearing that the kind of writ of protection they seek is the common law writ.

the threat of a civil arrest or other civil process on a different matter. See, e.g., American Velodur Metal, Inc. v. Schinabeck, 20 Mass. App. Ct. 460, 463, 464, 465-466 (1986) (writ of protection issued to husband, protecting him from service of process in divorce proceeding while attending deposition in Massachusetts in a case brought by husband's corporation against wife; writ specified the individual, event, and date). The writ is sought in, and issued by, the court where the individual is to appear. Id. at 463. See Parker v. Marco, 136 N.Y. 585, 589 (1893) ("At common law a writ of privilege or protection would be granted to the party or witness by the court in which the action was pending, which would be respected by all other courts."). The Massachusetts court rules that govern writs of protection also reflect that the writs are to be issued to specifically named individuals for specifically identified purposes by the courts in which they are to appear. See, e.g., Supreme Judicial Court Rule 2:14 ("A writ of protection shall issue only upon the application of the person for whom the writ of protection is to be issued . . . and then only in case it is made to appear to the court . . . that the application is made in good faith and for the purpose of enabling such person to attend this court as a party or witness in some specified case pending. . . ."); Superior Court Rule 16 (same); District and Municipal Courts Supplemental Rules of Civil Procedure Rule 112 (same); and Probate and Family Court Supplemental Rule 14 (same).[7] See also M.G. Perlin & S.H. Blum, Procedural Forms Annotated § 91.20 (6th ed. 2009).

[7] Counsel at the hearing acknowledged these court rules. She argued that the rules are "merely one mechanism of seeking the privilege," and that the petitioners here are asking instead for a writ "under the common law for this privilege," which they claim "is broader than" what the rules allow. I see no indication that the rules are meant to be anything other than a reflection of the common law. In other words, the rules, for the courts that have them, simply define the procedural mechanism for obtaining a common law writ. The petitioners cite nothing suggesting that the terms of the rules do not apply to common law writs. Even assuming for the sake of discussion that the writs envisioned by the rules are different from, and not coterminous with,

What the petitioners are seeking here is significantly different. They ask for a single, all-encompassing writ of protection from this court that can be used not only by themselves but also by all "similarly situated persons" – presumably all undocumented immigrants and others subject to removal who presently have, or in the future may have, business of any type in any of the courts of the Commonwealth – whenever they are "within the confines of a courthouse and its environs" or are "coming to and leaving court proceedings." The petitioners' counsel acknowledged at the hearing that she was not aware of any instance, anywhere, where a single writ has been issued as broad as this, in behalf of multiple persons for multiple cases. Indeed, it is difficult to envision how such a generic writ – for a virtually unlimited class of unnamed individuals and a virtually unlimited number of unspecified court appearances – would even be administered. To whom would it be addressed? To what activities precisely would it apply? How, and by whom, would it be distributed?[8] How could we ensure that only individuals who are the intended beneficiaries of the writ would obtain copies of it? See Commonwealth v. Huggeford, 9 Pick. 257, 262 (1830) (acknowledging potential abuse of writs of protection). This is a far cry from a common law writ, where an identified individual asks a court to issue a writ authorizing him or her to appear at a particular court-related event on a particular day.[9]

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what the common law allows, the petitioners, as stated, nevertheless have failed to point to anything in the common law that authorizes a writ as expansive as they seek.

[8] Counsel suggested at the hearing that there should be a single writ, photocopies of which would be "distributed."

[9] There would inevitably be many other questions about the validity of such a writ, and especially its applicability in innumerable individual circumstances, that would also need to be litigated. For example, would it cover every trip to a courthouse, such as to make an inquiry about the status of one's pending case, or maybe to inquire about someone else's case that might be relevant, or perhaps to inquire about the possibility of commencing a case in the future? For how long could a person carrying the writ remain in the safe haven of a courthouse after his or her court business has concluded? Would family members and friends of an individual holding a

2. Second, even if I thought that a writ as broad as what the petitioners seek could be issued, I would be reluctant to issue it on this record. As stated, there are no named respondents in this case and, hence, no facts or arguments to be considered other than what have been presented by the petitioners. This is a purely ex parte petition, not a contested matter. While that may be acceptable, indeed unremarkable, in a typical application for a single-person writ of protection, I do not think it would be wise to issue such a far-reaching writ as the plaintiffs seek, on such a controversial matter, based only on one side's version of the facts and issues, without hearing any countervailing facts and considerations. The petitioners' version of the facts has not been tested by trial or by any other adversarial process; the legal issues have not been joined in any responsive pleadings; and no one else – including the Attorney General, the Trial Court, or the Federal government – has intervened to indicate contrary views. The absence of the Federal government, which cannot be forced to litigate this issue in State courts, is especially concerning

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copy of the writ likewise be protected if they attended the proceeding to be supportive? Would it depend on whether they could possibly be witnesses in the case? What about a friend who accompanies a non-English speaker to a clerk's office to act as an interpreter? And for how long before or after a person's trip to the courthouse would the protection last (e.g., within a block of the courthouse, a half-mile, a half-hour, until the person reaches his or her next destination, or until they return home)?

My concern is not simply that there would be many questions to be litigated. My concern, and the reason for identifying some of the possible questions here, is counsel's acknowledgement, in both the petition and at the hearing, that the real purpose of the writ is for it to be used in subsequent Federal court proceedings, as evidence that this court, in issuing the writ, would have determined as a matter of State law that persons holding the writ are protected by the common law privilege against arrest. No court, however, could possibly make that kind of determination in advance if it were to issue a sweeping writ with respect to multiple unnamed individuals in numerous varied circumstances. I discuss this in more detail in par. 3 below.

because a Federal law enforcement agency would be directly affected if I were to issue the writ as requested.[10]

Not only are there no respondents, but the court has not even been told who the petitioners are.[11] Counsel stated at the hearing that the identities of the petitioners is irrelevant for the court to answer the issue before it. That is incorrect. This court does not answer legal questions in the abstract. It is important for the court to have an actual controversy with actual (known) parties before it.

3. Third, it is questionable whether a writ of protection, even if the court were to issue one along the lines requested, would be an effective deterrent against courthouse arrests by ICE and thus would give the petitioners the protection and the peace of mind that they seek. Indeed, it may give them a false sense of security. The petitioners themselves have conceded that ICE may well ignore the writ and arrest them, in which case they concede that any challenge to the legality of the arrest, and any remedy for an illegal arrest, would need to be litigated in Federal, not State, court. They claim, however, that "a ruling from this court [by which they apparently

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[10] For essentially the same reason, I decline to reserve and report this petition to the full court. The full court would be faced with the same one-sided record as is before me and would be in no better position than I am to decide the matter. Counsel suggested at the hearing that the full court might invite amicus briefs from the Attorney General, the Federal government, and others. That is possible, but the presence of amici, even amici who take a position contrary to the petitioners, would not transform this into adversarial litigation.

[11] I invited the petitioners' counsel to identify the petitioners in an impounded document, but they declined. This leaves the court without any way of knowing who is actually before it asking for relief. It is one thing for a party's identity to be shielded from the public; it is another thing for a party's identity to be withheld from the court, as understandable as it may be.

mean the existence of a writ] would be conclusive as to the scope of the Massachusetts common law privilege before the Federal court." [12]

It appears to be well-settled, as the petitioners claim, that there is a privilege against civil arrest and civil service of process that may be available in Massachusetts in appropriate circumstances. "The rule has been stated generally that [parties] and witnesses from foreign jurisdictions are exempt from service on civil process while attending court and for such reasonable time before and after as may enable them to come from and return to their homes." Diamond v. Earle, 217 Mass. 499, 500 (1914). "The rule is an ancient one. . . . It is not merely a privilege of the person; it is a prerogative exerted by the sovereign power through the courts for the furtherance of the ends of justice. Every party has a right to testify in his own behalf. He cannot do this freely, if hampered by the hazard that he may become entangled in other litigation in foreign courts." Id. at 501. See Thompson's Case, 122 Mass. 428, 429 (1877) (applying privilege to witness who appeared before joint committee of Legislature to testify concerning claim made by him against the Commonwealth; "[p]arties and witnesses, attending in good faith any legal tribunal, whether a court of record or not, having power to pass upon the rights of the persons attending, are privileged from arrest on civil process during their attendance, and for a reasonable time in going and returning, whether they attend on summons or voluntarily, and whether they have or have not obtained a writ of protection"). See also Valley Bank & Trust Co. v. Marrewa, 354 Mass. 403 (1968); Wood v. Neale, 5 Gray 538 (1855); Ex Parte M'Neil, 6 Mass. 245 (1810). The rule is essentially the same in the Federal courts, see Stewart v. Ramsay, 242 U.S. 128 (1916), and, the Supreme Court has even held, as a matter of Federal law, that it

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[12] I asked counsel at the hearing if what the petitioners are seeking is more aptly characterized as a declaratory judgment. Counsel made clear that the petitioners are not seeking a declaration, which would require an adversarial proceeding, and that the petitioners are requesting only a writ of protection, which can be sought on an ex parte basis.

applies to an individual who has been served with Federal process while appearing in a State court in the same Federal judicial district. Page Co. v. Macdonald, 261 U.S. 446, 447-448 (1923).

Significantly, as the petitioners concede, a writ of protection is not necessary in order to assert the common law privilege, and the existence of a writ, even when one is issued, does not guarantee that its holder will not be arrested. The writ is simply prima facie evidence of the common law privilege. In other words, it is the privilege, not the writ, that provides the actual protection; even without the writ, individuals are entitled to the protection afforded by the privilege. See Ginn v. Almy, 212 Mass. 486, 496 (1912) ("The privilege is not dependent upon the writ. It is only evidence by which the arresting officer is informed that the defendant is not subject to process"); Thompson's Case, supra (stating that privilege from arrest on civil process applies irrespective of "whether [persons] have or have not obtained a writ of protection"); M'Neil's Case, 3 Mass. 287, 287-288 (1807) ("A writ of protection will not protect one who is not lawfully entitled to it, and it is of no other use to one who is so entitled, but as prima facie evidence to the officer who is about the arrest him."). Thus, with or without a writ, a person arrested by ICE in a Massachusetts courthouse who wishes to challenge the arrest can do so only in Federal court, and, with or without a writ, the Federal court would need to determine whether the individual was covered by the Massachusetts common law privilege against civil arrest. The petitioners do not contend otherwise.[13]

[13] The petitioners do not contend that the existence of a writ will somehow prevent an arrest from being made, only that it will be useful to them in Federal court when they challenge the legality of any arrest. They do not suggest that Massachusetts court officers or other State actors should attempt to impede such an arrest. And they do not claim that a State court would be in a position to provide any remedy for an illegal Federal arrest. In short, they ask this court to issue a writ that it would have no means of enforcing. They frankly acknowledge that they

Moreover, it is not certain, as the petitioners argue, that the issuance of the writ they seek would in fact be conclusive of the privilege issue in the Federal courts. This court has the final say on matters of Massachusetts law. The court could say, for example, that there exists a common law privilege against civil arrest in Massachusetts and that the privilege, as a matter of State law, is broad enough to include arrests by Federal officers. Those are relatively unremarkable propositions; the Federal courts, even without a writ, should be able to deduce them from our case law.[14] But those propositions would not fully resolve the matter. Whether a Federal arrest in a Massachusetts courthouse is lawful would depend not only on the Massachusetts definition of the privilege and its scope, but also on Federal questions as to which this court does not have a final say. Must the Federal court honor the Massachusetts privilege? Is Massachusetts law on this point preempted by Federal immigration law? Is there a Tenth Amendment barrier to issuing such a writ?[15] As to those questions, any pronouncement by this court that there is a Massachusetts privilege, and as a matter of State law that it is broad enough to include Federal arrests, would not be dispositive. Our issuing a writ would thus not ensure

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request the writ solely so that they can use it to their advantage in the Federal court proceedings that will follow.

[14] If a Federal court were at all in doubt about the continued existence of the privilege in Massachusetts, or its applicability in given circumstances, it would of course be free to certify to this court any questions it has about the existence and the applicability of the privilege. And in that circumstance – i.e., on certification in a contested case from the Federal court, with a fully-developed record and legal arguments on both sides – this court would be in a better position than it is now to answer definitively any questions concerning the privilege and its applicability.

[15] The petitioners raise the Tenth Amendment and preemption issues in their petition and argue that they do not prevent this court from issuing the writ. They do not contend, nor could they, that anything this court decides as to those issues will be binding on the Federal courts.

that the petitioners would in fact get the benefit of the Massachusetts privilege in Federal proceedings, and, as stated, it may give them a false sense of security.

Conclusion

The petition seeks a single, unprecedented, and exceedingly broad remedy – a writ of protection covering all undocumented immigrants and others who are subject to possible immigration consequences, for all of their current and future business in the Massachusetts courts, based on an ex parte record. For the reasons stated, I decline to report this matter to the full court as requested, and I decline to issue the writ. The full court would be in no better position than I am to issue such a broad and impractical writ in these circumstances.

Accordingly, a judgment shall enter denying the petition.[16]

Elspeth B. Cypher
Associate Justice

Date: September 18, 2018

[16] To be clear, nothing in this decision should be understood to be a holding that the common law privilege against arrest while on court business does not apply to the petitioners. I am holding only that the single remedy sought by the petitioners – a writ of protection on the broad terms they have requested – is not a viable remedy for the full court's consideration.