

**IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY,
PENNSYLVANIA**

IN THE INTEREST OF:

VMS,

A Minor

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:
:

No. JV 262-2017

OPINION AND ORDER

And now this **31st** day of **January, 2018**, before the Court is a Petition Alleging Delinquency filed on October 3, 2017. A hearing was held on January 25, 2018, at which time VMS (“Juvenile”) was present and represented by Donald F. Martino, Esquire and Jeffrey Yates, Esquire was present on behalf of the Commonwealth.

On September 24, 2017, Officer Chris Herb of the Montoursville Police Department was dispatched to the Juvenile’s home for a report of a disturbance. Officer Herb testified that he attempted to speak with the Juvenile but she was uncooperative and would not give him any information. He testified that he asked the Juvenile’s mother, RB (“Mother”), to speak with the Juvenile in her bedroom. While the Juvenile was speaking with her Mother, Officer Herb overheard her state that she wanted to harm herself. Officer Herb and Trooper Adam Kirk of the Pennsylvania State Police, who had arrived as backup, determined that the Juvenile should be taken for a mental health evaluation and went upstairs to the Juvenile’s bedroom to request that she get dressed and ready to be transported. The Juvenile continued to be uncooperative and shouted obscenities at the officers. Additionally, she resisted when they attempted to restrain her in order to get her downstairs and in the patrol vehicle.

Once inside the vehicle, the Juvenile kicked the window and/or door, leading the officers to take her out and put additional restraints on her legs prior to being transported to the hospital.

As a result of the incident, the Juvenile was charged with Aggravated Assault¹, Endangering the Welfare of Children², Disorderly Conduct for engaging in fighting behavior³, Resisting Arrest⁴, and Disorderly Conduct for using obscene language⁵. A hearing was held on January 25, 2018, at which time the Commonwealth presented testimony from Officer Christopher Herb of the Montoursville Police Department and Trooper Adam Kirk of the Pennsylvania State Police, Montoursville Barracks. At the conclusion of the Commonwealth's case, counsel for the Juvenile requested a demurrer for each separate count. In response, counsel for the Commonwealth withdrew the charge of Endangering the Welfare of Children. This Court denied the Juvenile's demurrer on each of the remaining counts, and counsel for the Juvenile continued with his case in chief.

Count 1: Aggravated Assault

Officer Herb testified that when he initially went to the bedroom upstairs to speak to the Juvenile, she would not talk to him about the incident with her sister which led her mother to call the police. Instead, she shouted profanities at him. Officer Herb testified that he requested that the Juvenile's mother go upstairs and talk to her to calm her down. He testified that as he waited for them to talk, he overheard the Juvenile tell her

¹ 18 Pa.C.S. §2702(a)(3).

² 18 Pa.C.S. §4304(a).

³ 18 Pa.C.S. §5503(a)(1).

⁴ 18 Pa.C.S. §5104.

⁵ 18 Pa.C.S. §5503(a)(3).

mother that she wanted to harm herself. The Juvenile testified that when her mother asked her to talk to the police downstairs, she stated "I'd rather kill myself," but that she was not suicidal. The Juvenile's mother, RB, testified that she did not think the Juvenile's threat was credible. However, Officer Herb testified that he was aware that the Juvenile was pregnant, and due to her statements, he had a genuine concern for her safety and that of her unborn child. He further testified that he determined she should be taken to the hospital for a mental health evaluation. At that point Officer Herb and Trooper Kirk returned to the Juvenile's bedroom upstairs. Both Officer Herb and Trooper Kirk testified that the Juvenile was very uncooperative and disrespectful in response to their requests that she get out of bed and get dressed to be transported to the hospital. They testified that she was loud and shouting obscenities at them. The Juvenile testified that Officer Herb and Trooper Kirk were "being ignorant" when they told her to get up and get dressed and that she "just wanted to be left alone."

Officer Herb testified that after the Juvenile continued to be uncooperative with his request that she get dressed to be transported to the hospital for an evaluation, he attempted to place her in hand restraints. Trooper Kirk testified that the Juvenile began to lash out and as he attempted to restrain her legs she kicked him numerous times in the upper leg/groin area. He testified that it caused him pain and required him to step back momentarily but that he and Officer Herb were eventually successful in their attempts to restrain the Juvenile despite her attempts to avoid being cuffed. The Juvenile testified that she did not kick Trooper Kirk; she merely tried to pull her arms and legs away from the officers. She indicated that she did not intend to hurt anyone by doing so, she just did not want to be restrained.

A person is guilty of aggravated assault if he attempts to cause or intentionally or knowingly causes bodily injury to any of the officers, agents, employees or other persons enumerated in subsection (c), in the performance of duty. **18 Pa.C.S.**

§2702(a)(3). A police officer is specifically enumerated in 18 Pa.C.S. §2702(c). Counsel for the Juvenile argued that the Juvenile did not intentionally or knowingly cause bodily injury to the officer(s), and that subsection (3) differs from subsections (1) and (2) in the fact that the section under which the Juvenile was charged does not contain the word “recklessly.” Counsel for the Juvenile admits that the Juvenile most likely acted “recklessly,” when she kicked Trooper Kirk as he was trying to restrain her, but she did not intentionally or knowingly cause him bodily injury, and therefore the Commonwealth failed to meet its burden under the statute.

Counsel for the Juvenile further argued that Trooper Kirk did not testify that he was injured when he was kicked in the groin and leg area while attempting to restrain her. “In a prosecution for aggravated assault on a police officer the Commonwealth has no obligation to establish that the officer actually suffered a bodily injury; rather, the Commonwealth must establish only an *attempt* to inflict bodily injury, and this intent may be shown by circumstances which reasonably suggest that a defendant intended to cause injury.” **Commonwealth v. Brown, 23 A.3d 544, 560 (Pa. Super. 2011)**. (Emphasis added). Although the Juvenile testified that she did not intend to hurt Trooper Kirk, and that she was merely pulling her legs from him instead of actively kicking him, both Officer Herb and Trooper Kirk testified that the Juvenile kicked him in the groin and upper part of his leg. As discussed above, the Juvenile testified that she wanted to be left alone. She certainly did not want to be taken to the hospital for a mental health

evaluation. After hearing the testimony of all the parties, this Court finds that the Juvenile did in fact intentionally kick Trooper Kirk in an attempt to get him to leave her alone. The Court further finds that a kick done in anger and directed at a sensitive area of a Trooper's body was sufficient to prove that the Juvenile attempted to cause him bodily injury, regardless of whether he actually suffered what amounts to "bodily injury" under 18 Pa.C.S. §2702(a)(3). Therefore, this Court hereby **ADJUDICATES** the Juvenile on Count 1, Aggravated Assault.

Count 2: Endangering Welfare of Children

This Count was **WITHDRAWN** by the Commonwealth at the time of the hearing.

Count 3: Disorderly Conduct (Engaging in Fighting or Threatening Behavior)

Officer Herb testified that he could hear yelling inside the home as he approached the Juvenile's house from the outside. Neither Officer Herb nor Trooper Kirk testified as to whether or not they specifically heard the Juvenile yelling. By the time Officer Herb arrived, there was no longer any physical fighting taking place at the home, either inside or outside. While the Juvenile was being restrained, she shouted profanities at the officers, inside the home. While she was waiting in the police vehicle to be transported to the hospital for a mental health evaluation, she was observed kicking the door and/or window, which caused the officers to remove her from the vehicle to the ground, and place her in leg restraints. Counsel for the Juvenile presented a cell phone video taken by the Juvenile's mother. While the recording did not start until the Juvenile was already out of the police car, the Juvenile appears to neither be fighting nor threatening. Notably, the Juvenile's mother and/or sister can be heard yelling and using foul language, but the Juvenile is only observed crying as she is on the

ground and placed back in the patrol vehicle. The officers can be heard telling the Juvenile's mother that she is going to be taken to the hospital. From the video, it does not appear as though any neighbors or passers-by had gathered to watch or participate in the incident and traffic was not impacted.

A person is guilty of disorderly conduct if, with the intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof, he engages in fighting or threatening, or in violent or tumultuous behavior. **18 Pa.C.S. § 5503(a)(1)**. As used in this section, the word "public" means affecting or likely to affect persons in a place to which the public or a substantial group has access; among the places included are highways, transport facilities, schools, prisons, apartment houses, places of business or amusement, any neighborhood, or any premises which are open to the public. **18 Pa.C.S. §5503(c)**. Under the statute, whether a defendant's words or actions rise to the level of disorderly conduct hinges upon whether they cause or unjustifiably risk a public disturbance. "The cardinal feature of the crime of disorderly conduct is public unruliness which can or does lead to tumult and disorder." **Commonwealth v. Hock, 728 A.2d 943, 946 (Pa. 1999), citing Commonwealth v. Greene, 189 A.2d 141, 144 (Pa. 1963)**. In the present case, the Juvenile's words and actions outside of the home, in public, did not rise to the level of unruliness which could or did lead to tumult and disorder. The Commonwealth has failed to meet its burden under the statute. Therefore, this Court **DISMISSES** Count 3, Disorderly Conduct.

Count 4: Resisting Arrest

Both Officer Herb and Trooper Kirk testified that at the time they were attempting to restrain the Juvenile, she was not under arrest; they were merely trying to restrain her

due to genuine safety concerns regarding her mental health, based upon the Juvenile's own statements. Counsel for the Juvenile argued that because she was not under arrest at the time, the Commonwealth could not meet its burden under the statute. A person commits a misdemeanor of the second degree if, with the intent of preventing a public servant from effecting a lawful arrest *or discharging any other duty*, the person creates a substantial risk of bodily injury to the public servant or anyone else, or employs means justifying or requiring substantial force to overcome the resistance. **18 Pa.C.S. §5104** (emphasis added).

The provisions of 18 Pa.C.S. §5104 are clearly disjointed. "To be convicted under the first provision of §5104, it is essential that there be a lawful arrest." **Commonwealth v. Karl, 476 A.2d 908, 911 (Pa. Super. 1984)**. In the present case, both Officer Herb and Trooper Kirk testified that, at the time they were attempting to restrain the Juvenile, she was not under arrest. Therefore, the charge cannot be supported on that basis. "To be convicted under the latter provision of §5104, it is essential that there be a 'discharge of any other duty' within the meaning of the statute." **Id.** In order to determine what was contemplated by 'discharge of any other duty,' the Courts have looked to Section 242.2 of the Model Penal Code, which §5104 was modeled after. The Model Penal Code §242.2 comment 5 (Official Draft and Revised Comments 1980), which deals with the physical obstruction of discharge of public duty, states:

Section 242.2 covers physical interference in a host of circumstances in which public servants *discharge legal duties other than arrest*. These include, for example, a policeman executing a search warrant, a fireman putting out a blaze, a forest or agricultural official making required inspections, an election official charged with monitoring balloting, and the like. (Emphasis added).

Officer Herb testified that he heard the Juvenile make a statement about harming herself when asked to speak with the officers. Although she did not have any visible weapons in her possession, because the Juvenile was pregnant and had just been involved in a physical and verbal altercation with her sister, Officer Herb and Trooper Kirk took her statements seriously. They testified that they had a genuine concern for her safety and thought it best at that time that the Juvenile be taken for a mental health evaluation. In attempting to protect the Juvenile and her unborn child from self-harm, and safely transport the Juvenile to a hospital for a mental health evaluation, the officers were discharging a legal duty, other than an arrest. The Juvenile's actions, which included flailing her arms and kicking her legs, created a substantial risk of bodily injury to the officers. The Commonwealth presented sufficient evidence to establish that the Juvenile "with the intent of preventing a public servant from . . . discharging any other duty, " created a "substantial risk of bodily injury to the public servant" and "employed means justifying or requiring substantial force to overcome the resistance." **18 Pa.C.S. §5104**. Therefore, this Court hereby **ADJUDICATES** the Juvenile on Count 4, Resisting Arrest.

Count 5: Disorderly Conduct (Obscene Language)

A person is guilty of disorderly conduct if, with the intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof, he uses obscene language, or makes an obscene gesture. **18 Pa.C.S. § 5503(a)(3)**. At the conclusion of all the testimony and after argument by counsel for the Juvenile, the Commonwealth conceded that it would not be able to meet its burden of proving that the Juvenile, with the intent to cause inconvenience, annoyance or alarm, or recklessly

creating a risk thereof, used obscene language. Therefore, this Court hereby **DISMISSES** Count 5, Disorderly Conduct.

ORDER

AND NOW, this 31st day of **January, 2018**, following a hearing and argument, the Juvenile is hereby **ADJUDICATED** on Count 1, Aggravated Assault pursuant to 18 Pa.C.S. §2702(a)(3), and Count 4, Resisting Arrest, pursuant to 18 Pa.C.S. §5104. Count 3, Disorderly Conduct pursuant to 18 Pa.C.S. §5503(a)(1), and Count 5, Disorderly Conduct pursuant to 18 Pa.C.S. §5503(a)(3), are hereby **DISMISSED**. Count 2, Endangering the Welfare of Children pursuant to 18 Pa.C.S. §4304, is marked as **WITHDRAWN**.

By The Court,

Joy Reynolds McCoy, Judge