

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA : **No. 97-12,103**
:
:
:
vs. : **CRIMINAL DIVISION**
:
VICTOR BRACE-HARVEY, :
Defendant : **Summary Trial**

OPINION AND VERDICT

This matter came before the Court for trial on two (2) counts of disorderly conduct: Count 2 Disorderly Conduct- engage in fighting, 18 Pa.C.S.A. Section 5503(a)(1); and Count 3 Disorderly Conduct - creating hazardous conditions, 18 Pa.C.S.A. Section 5503 (a)(4). The Commonwealth concedes that Count 1 of the information, which charges the crime of Resisting Arrest, 18 Pa.C.S.A. Section 5104, be dismissed. The Court heard testimony on this matter on March 23 and March 24, 1999.

The facts of this case are as follows:

On October 11, 1997 at about 7:30 p.m., Kathy Rung, an employee of Ben O'Connell, was contacted by Mr. O'Connell via a two-way radio. Mr. O'Connell requested that she contact the Williamsport Police about a possible crime progress. Pursuant to Mr. O'Connell's instructions, she reported that two (2) men were accosting a lady at the Money Access Center (MAC) machine outside the Jersey Shore Bank at Market and Third Streets in Williamsport. The 911 tape of the call was played for the Court and the tape indicated that the men hit and shoved the woman and that it looked like they were trying to get her to take money out of the bank. The incident was reported as a possible robbery. The tape mentioned the three individuals as being white. There was no

mention of a black man.

Ben O'Connell, the originator of the 911 call also testified. Mr. O'Connell was driving his vehicle on Market Street past the Jersey Shore Bank. He observed two (2) white males, and a white female in a scuffle near the MAC machine. He thought they were coercing her to remove cash from the machine or that possibly this was a domestic dispute. He used his two-way radio to call his dispatcher, Ms. Rung, who then called 911 with Mr. O'Connell's information.

Mr. O'Connell testified that he pulled his vehicle to the side of road. Within seconds, the defendant pulled into the bank parking lot in his Jeep Cherokee. The defendant started to go to the MAC machine. At this time, in response to the 911 call, a number of Williamsport police officers swarmed into the parking lot. As the police officers came into the parking lot, they drew their weapons and Mr. O'Connell believed they yelled something like "freeze". The defendant, who is black, was several feet away from the white individuals who precipitated the call. When the officers approached, the defendant started to move away. The officers reacted to the defendant's effort to move away and had conversation with him. Mr. O'Connell then immediately started his car and went to the bank parking lot to tell the officers that the defendant was not involved in the reported incident. However, by the time Mr. O'Connell arrived in the lot, the police were restraining the defendant and had maced him. The witness then described the defendant as being on the ground, wrestling around with the officers until he was handcuffed and subdued. The witness described both the defendant and the officers as agitated. The witness did note that when the police initially arrived and yelled freeze, the other three individuals put their hands up, while the defendant walked away.

On cross-examination, Mr. O'Connell testified the first cruiser arrived immediately after his call and the second cruiser arrived just after the first. The witness testified that at the time he observed the incident, he wondered why the defendant did not freeze as ordered, but walked

away. The witness felt the officers acted appropriately. However, he went to the bank parking lot to tell the police officers that the defendant was not involved in the incident. Unfortunately, by the time Mr. O'Connell arrived a physical confrontation had occurred with the defendant. The defendant was on the ground with his chest pressed against the sidewalk and his hands handcuffed behind his back. The witness described the officers as restraining the defendant in a professional manner.

The next witness was Officer Jeffrey Vilello. Officer Vilello is no longer a Williamsport police officer; he is currently employed by the Office of Attorney General. Officer Vilello testified that he was dispatched to a possible robbery in progress. Officer Hoover arrived shortly before him. Officer Vilello observed two (2) white males and a white female near the MAC machine. When he arrived, Officer Vilello observed Officer Hoover giving verbal instructions to the white males, the white female, and the defendant to turn around and face the brick wall. Officer Hoover's weapon was drawn. Officer Vilello immediately took up a position to back up Officer Hoover.¹

Officer Vilello described the three (3) white individuals as complying with Officer Hoover's command. However, the defendant, who was ten (10) feet away from the others, did not turn around and face the wall. The defendant kept taking his hands in and out of his pockets. Officer Hoover ordered the defendant to stop doing this, but the defendant did not comply with this direction. The defendant then turned around and "slightly" faced the wall, although Officer Vilello described the defendant as not cooperating.

Officer Vilello testified that when the defendant faced the officer, he said several times, "just shoot me". The officers then ordered the defendant to turn around and lay on the ground.

¹The Commonwealth did not call Officer Hoover as a witness at the hearing. This failure to call Officer Hoover hurt the strength of the Commonwealth's case since Officer Hoover was the first officer to respond and therefore, potentially the most significant police witness.

The defendant went down to his knees. At this point, Officer Villello approached the defendant to handcuff him. The officer testified he did this to secure the safety of himself and the others. At one point in his testimony the officer also claimed he did this because the defendant was disorderly. Officer Villello noted it was his goal to secure all four (4) individuals so they could determine what had happened. Officer Villello tried to handcuff the defendant who was on his knees, but the defendant, who is a large and strong man, immediately stood up. The officer had difficulty controlling the defendant as he tried to contain situation. Although he testified the defendant still actively resisted and he couldn't handcuff him, Officer Villello was able to get the defendant back onto the ground. At about this time, other officers arrived at the scene and Officer Villello sprayed a burst of OC spray (mace) into the defendant's eyes. The mace soon took effect and, with assistance of the other officers, the defendant was quickly handcuffed and removed to a cruiser. On cross-examination, Officer Villello testified that while he was aware the female was the purported victim, he considered all four individuals in the bank parking lot, including the defendant, as being possibly involved in the incident until he could determine otherwise. The officer testified he wanted to secure the scene, then pat everyone down, and ask them questions about what happened. The officer acknowledged the defendant was about twelve (12) feet away from the other three (3) and he described the defendant as being 6' 3" tall and about 250 pounds. The officer testified that the defendant was the only one of the four (4) individuals who did not immediately comply with the police commands. In a response to a question from the Court, Officer Villello testified that he did not have information that the perpetrators of the initial incident were Caucasian.²

²This does present a troubling and difficult question. The 911 tape does indicate that the parties involved in the possible robbery were Caucasian. The Court does not know what was described to the police units in the radio dispatch to respond to a possible in progress at the MAC machine.

The final piece of the Commonwealth's evidence was an audio tape of Officer Hoover's conversation with the defendant at City Hall made shortly after the arrest of the Defendant. The Court listened to the tape at the trial and the Court also privately reviewed the tape by using our own recorder with headphones which aided the Court in understanding the content of the tape. Based on the Court's review of the tape we offer the following summary.³

Officer Hoover asked the defendant why he turned around and put his hands in his pockets when ordered to face the wall. The defendant indicated he was reaching for his identification. The officer asked the defendant why he told the police to shoot him. The defendant responded that he was an innocent bystander and he knew they wouldn't shoot him because he was innocent. The officer then followed up the defendant's comment noting that the defendant didn't say that to them, rather the defendant turned around and kept repeating "shoot me, shoot me". The officer noted that when they told the defendant to get down on his knees, the defendant didn't do this. The defendant explained that he had had a bad day, he thought the police were messing with him, and he was only going to the MAC machine to get some money. The officer explained that he was just trying to ascertain what happened in the parking lot and that the defendant started to give the police grief. The officer told the defendant that they would have let him go once they got to the bottom of what had previously occurred in the bank parking lot. The defendant responded to this by saying, "all right man, get me home now". At this point, the conversation ended and the defendant was given water for his eyes which were obviously bothering him because of the mace which had been sprayed into his face.

³The tape is particularly helpful evidence. It was made shortly after the events in question. Also, the tape is not so much an interrogation of the defendant by the officer, but rather, a conversation between the Officer Hoover and the defendant.

However, the conversation picked up again when Officer Hoover said, "I want you to understand the reason why..." The defendant immediately responded that he understood what the officer was saying - that he could have been involved (to the officers' perception) in the incident to which they were responding. The defendant then said that he thought the lady (the white female) had called the police and told them what happened. Again, this seemed to end the conversation between the parties. The defendant apparently began talking to himself and said, "They (the police) beat me down. I'm an innocent bystander and they beat me down. That ain't right. They know me. They know me. Innocent bystander. Beat me down like that. That ain't right. Might as well go home now. Otherwise, I'll get a late charge on my movies." The officer came into the room again, and some further conversation with the defendant ensued. The defendant indicated to the officer that he (the officer) knows him on the street. Then, apparently referring to the totality of the occurrence, the officer said, "This is the age we live in". Finally, the officer asked the defendant if there was anything he wanted to say before the tape was turned off. The defendant responded by saying that he was an innocent bystander.

The defense presented two (2) witnesses, Allen Beck and the defendant. Mr. Beck's testimony was presented by a video deposition because he entered the armed forces.

At the time of the incident Mr. Beck was sitting on a bench near the bank parking lot. Mr. Beck was not a friend or acquaintance of the defendant. Mr. Beck first observed the individuals arguing in the bank parking lot near the MAC machine. He said this went on for about twenty (20) minutes. Mr. Beck saw the defendant's green Cherokee Jeep pull into the lot. The defendant stood near his vehicle and was not part of the argument. Within a couple of minutes the first police car arrived (Officer Hoover). Shortly thereafter the second cruiser arrive (Officer Villello). The first officer pulled his revolver and yelled to the individuals something to the effect of "get on the ground."

The defendant said he was not involved in the matter. The second officer arrived, pulled his weapon, and moved close to the area of the situation. The officers yelled instructions. The defendant seemed confused and not understanding what was happening. Mr. Beck didn't feel the defendant was hostile or aggressive. He didn't recall the defendant saying anything. The defendant was told to get on the ground to his knees. The second officer then handcuffed the defendant. The witness felt the officers had no difficulty in putting handcuffs on the defendant. Also, the witness did not observe anything by the defendant which would have caused him to be maced. At that time, the witness came into the parking lot to tell the police that the defendant did not do anything to participate the incident and that the defendant just came to use the MAC machine. The witness claimed the other three (3) individuals who started the incident just walked away, while the defendant was arrested. Mr. Beck denied that the defendant resisted arrest or that he engaged in fighting or violent behavior. The witness acknowledged he had some contacts with the police which led to a 1994 retail theft and DUI charge.

The defendant testified that he went to the MAC machine at the Jersey Shore State Bank to obtain some cash to pay some charges for rental movies. He noticed two (2) white males arguing or fooling around with a lady. There was some pushing between the parties. The defendant got out of his vehicle to approach the MAC machine. The individuals described were near the machine.

At this time, the police pulled into the parking lot. Officer Hoover pulled his revolver. The defendant was ten to fifteen (10-15) feet away from the three (3) other individuals. Officer Vilello then arrived. Officer Hoover ordered everyone to face the building. The defendant, unsure what was happening, pointed to himself. The officer demanded he also get against the building. The defendant had some prior familiarity with Officer Hoover. The defendant had a PP&L I.D.

(where he worked for ten (10) years) and a license in his hands. He tried to show these items to the officer. The officer demanded he get up against the building. The defendant claimed he then said "Don't shoot, don't shoot". Officer Hoover didn't explain what was going on. The defendant tried to tell the officers he was not involved in the incident to which the police were responding. He did not use any profanity. The police officers ordered the defendant to his knees. The defendant then claimed he was thrown to the cement by the officers. He was pepper maced. One officer put a knee into the defendant's back. The defendant was handcuffed with his hands behind his back. As a result of the incident, the defendant received some injuries to his face. The defendant was then arrested and taken to City Hall. The defendant claimed he was scared and nervous at City Hall because he was never in any trouble before. However, the Defendant acknowledged that the tape recorded statement offered into evidence by the Commonwealth was true and accurate.

With the above summary of the testimony in mind, the Court will first discuss the facts of the case. The Court accepts the basic progression of the facts offered by Officer Villello. Much of Officer Villello's testimony is corroborated by the statement of the defendant and the conversation with Officer Hoover contained on the audio tape, Commonwealth's Exhibit 3. The Court believes the evidence shows that the Defendant dropped down to his knees upon command of the officers. While the evidence does not indicate that the Defendant fought with the officer when they tried to handcuff him, the Court accepts Officer Villello's testimony that the defendant stood up when Officer Villello approached him. It is obvious that the defendant was immediately controlled by the officer who handled the situation quickly and professionally.

The Court has tried to evaluate the conduct of the police in a realistic manner. When the police are called to immediately respond to a potential robbery in progress, they must consider the worst scenario. If they do not approach an incident like this in such a fashion, they can endanger

their own lives as well as the lives of civilians. It is understandable that they would approach potential felony robbery suspects with guns drawn and may assume potential involvement of all individuals that are near the scene until they can sort out what really happened. While it is easy to second guess the police in a situation like this where the defendant was an innocent bystander, it must be remembered that the events of this case all happened within seconds or minutes at most. Although the other three individuals in the bank parking lot may be compared to a reckless motorist who drives off after creating a multi-vehicle collision, they were more compliant with the police commands than the defendant. Unfortunately, the defendant's actions at the MAC machine only served to heighten the police concern about the situation and focused the police attention on himself.

However, while understanding the police response, the Court still needs to determine whether the defendant is guilty of disorderly conduct, a summary offense. If the defendant is guilty of disorderly conduct, such would have to be predicated on his not turning to the wall as ordered by the police, his comment to the effect that the police should shoot him, and his standing up when Officer Vilello tried to handcuff him causing the officer difficulty in getting him handcuffed. Mitigating against conviction is the understandable confusion that the defendant experienced when confronted with this situation. The reason we say that his confusion is understandable is because the defendant was, as he testified, an innocent bystander. He committed no crime, nor did he break any law. He was then confronted with officers pointing revolvers at him. The Court also notes the short duration of the occurrence. Commonwealth witness, Ben O'Connell, testified that when he realized that the police were focusing on the wrong man, he immediately started his car, turned and drove into the bank parking lot to tell the officers the defendant had done nothing wrong. Despite Mr. O'Connell's very quick arrival at the parking lot, he was too late. When he arrived at the lot the

police had already handcuffed the defendant. Finally, the professionalism of the police response tends to mitigate against finding that the crime of disorderly conduct came to full fruition. While the defendant did start to become troublesome, he was immediately controlled and subdued. The testimony shows no effects or loss of control over the three (3) perpetrators of the initial incident while the police dealt with the defendant. Therefore, while the defendant's response to the situation appears to the Court to be problematic, we cannot find beyond a reasonable doubt that his response was so reckless as to involve a gross deviation from the standard of conduct that a reasonable person would observe in the actor's situation. See 18 Pa. C.S.A. Section 302(b)(3).

The Court has also reviewed relevant case law on this matter. There is some similarity between the case at bar and the case of Commonwealth v. DeLuca, 597 A.2d 1121 (Pa. 1991). In DeLuca, the police responded to a reported stabbing of a police officer in Upper Darby Township, Delaware County. When the police arrived they observed 30-50 persons. As they approached, they noticed an individual hurrying away from a small group which seemed to be focal point of the incident. The officers stopped this individual and instructed him to remain so they could assess the situation. The individual responded by saying he was leaving and he directed the officer to get out of his way. The officer responded that he was not to leave until the officers understood the situation. At this point, the individual shouted at the officer to "get out of my f_____ way." The officer then placed his hands on the individual's shoulders and repeated his instructions. The individual responded by pushing the officer's hands off his shoulders while loudly stating, "Yes I'm leaving. Get the f— out of my way." The individual was immediately arrested and charged with disorderly conduct pursuant to Section 5503(a) of the Crimes Code. The trial court found the defendant guilty of disorderly conduct and the defendant appealed. On appeal, the Commonwealth argued that the defendant's loud, obscene, and abusive language, coupled with the Defendant's

knocking away of the officers hands, all in the close proximity of the crowd, recklessly created a risk of public inconvenience, annoyance or alarm. The Pennsylvania Supreme Court in upholding the conviction noted:

Such a situation is, by its nature, fright with danger; danger not only to participants in whatever incident may have been the genesis of such a scene, but danger to bystanders, passerby and arriving police officers. Here, the officer made no illegal or unreasonable request of the appellee. The appellee's response was of the very type of spark the statute so plainly seeks to extinguish before it becomes a flame.

597 A.2d at p. 1123. The Court, however, finds DeLuca distinguishable from the case sub judice. Here, the defendant did not engage in loud language or the use of profanity; he did not try to leave the scene; and he did not perform an overt, physically aggressive act against the officers such as knocking the officer's hands away from his body as occurred in DeLuca. Further, the defendant in the DeLuca case was told twice that the police were only trying to assess the scene and that he could not leave until they understood what was happening. In the case at bar, the police did not have enough communication with the defendant to convey this type of information. Thus, although DeLuca appears analogous at first blush, the Court cannot say it controls the decision of this case.⁴

In conclusion, the Court finds this case to be a close one. The defendant's conduct can be criticized because he did not provide the full cooperation which would have eliminated the dangers inherent in this situation. However, the Court believes his conduct was in response to the confusion an innocent bystander may experience under the circumstances presented. Based on

⁴See also Commonwealth v. Weiss, 490 A.2d 853 (Pa.Super. 1985) a disorderly conduct case where the court looked at the particular circumstances a defendant found herself in and noted: "her conduct could be accurately described as an excited reaction to the traumatic events concerning the sudden invasion of her home." 490 A.2d at 857.

this legitimate confusion, as well as the short duration of the problem experienced between the police and the defendant and the lack of any loss of control by the police, the Court is not convinced that the crime of disorderly conduct has been proven beyond a reasonable doubt. Accordingly, the following verdict is entered:

VERDICT

AND NOW, this ____ day of April 1999, the defendant is found NOT GUILTY of two counts of Disorderly Conduct. Upon Motion of the Commonwealth, the Resisting Arrest charge is DISMISSED. Costs are placed on Lycoming County.

By The Court,

Kenneth D. Brown, J.

cc: Daniel Holmes, Esquire (ADA)
Eric Linhardt, Esquire
Judges
Cost Clerk
Gary Weber, Esquire (Lycoming Reporter)