

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

COMMONWEALTH OF PENNSYLVANIA	: NO. 02-11,382
	:
	:
vs.	: CRIMINAL DIVISION
	: Petition for Writ of Habeas Corpus
RICHARD MITCHELL,	:
Defendant	:

OPINION AND ORDER

Defendant has been charged with terroristic threats, simple assault, and recklessly endangering another person in connection with an incident on July 27, 2002, wherein Defendant was apparently engaged in an argument with a third person and during which he waved an unloaded gun at the victim in this case, a bystander. In the instant Petition for Writ of Habeas Corpus, filed September 4, 2002, argument on which was heard November 25, 2002, Defendant contends the evidence was insufficient to support the charge of recklessly endangering another person. The Court agrees.

In In re: Maloney, 636 A.2d 671 (Pa. Super. 1994), the Superior Court held to sustain a conviction of recklessly endangering, the Commonwealth must prove that the defendant had an actual present ability to inflict harm and not merely the apparent ability to do so. The Court further held that absent evidence a gun held by the defendant was loaded, there was insufficient evidence to sustain a conviction for recklessly endangering. According to the Court, the Commonwealth must prove either that the gun was loaded or the surrounding circumstances were inherently dangerous. The Court in Maloney dismissed the charge of recklessly endangering as the Commonwealth failed to prove the gun involved in that case was loaded.

In the instant matter, the testimony at the preliminary hearing indicated that the gun was not loaded. The Commonwealth has thus failed to meet its burden of proof and this charge will be dismissed.

ORDER

AND NOW, this 26<sup>th</sup> day of November, 2002, for the foregoing reasons, the Petition for Writ of Habeas Corpus is hereby granted and the charge of recklessly endangering another person is hereby dismissed.

By the Court,

Dudley N. Anderson, Judge

cc: DA  
PD  
Gary Weber, Esq.  
Hon. Dudley N. Anderson