

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

COMMONWEALTH	:	
	:	
v.	:	No.: 03-11,618
	:	
OLIVER WALKER,	:	
Defendant	:	

OPINION AND ORDER

Before the Court is the Defendant’s Petition for Habeas Corpus, filed November 20, 2003. Defendant’s Petition was scheduled for a hearing on January 5, 2004, at which time the parties agreed that a transcript of the preliminary hearing held in this matter on October 31, 2003 would be submitted in lieu of testimony.

The facts of this case are as follows: On June 12, 2003, the Defendant was an inmate at the Lycoming County Prison, housed in the disciplinary block. (N.T. 1/5/04 p. 3) At approximately 6:00 a.m. on that day, Correctional Officer Aaron Geiser was passing out breakfast trays in that block. (Ibid.) The Defendant asked that C.O. Geiser give his tray to another inmate in a different cell. (Id. at pp. 3 – 4.) Per prison policy, C.O. Geiser refused this request, angering the Defendant, who “became agitated, began yelling disrespectful remarks towards (the C.O.)” (Id., at p. 4). The C.O. left the block, but returned 15 to 20 minutes later to collect the breakfast trays, at which time the Defendant told the C.O. to come over to him and “get you poison”. (Id. at p. 5.) He made that statement multiple times. (Ibid.) The Defendant then sprayed the C.O. with the contents of a shampoo bottle,

frightening the C.O. because he did not know what was in the shampoo bottle. (Id.) The contents of the bottle were later taken to the Williamsport Hospital laboratory, which determined that the specific gravity of the liquid remaining in the bottle was very low, consisting completely of water, and in fact if any infectious diseases had been present in the bottle, they would be diluted to the point that they were not harmful to the C.O. (Id. at p. 16). Defendant argues that the facts cannot support the charges of Simple Assault by Physical Menace and Aggravated Assault which are currently pending against him.

Simple Assault by Physical Menace is set forth under § 2701(a)(3) of the Pennsylvania Crimes Code. Specifically, “a person is guilty of assault if he . . . (3) attempts by physical menace to put another in fear of imminent serious bodily injury”. Aggravated Assault as it is charged in this information is found at § 2702 of the Crimes Code, which states that a person is guilty of aggravated assault if he . . . (6) attempts by physical menace to put any of the officers, agents, employees or other persons enumerated in subsection (c), while in the performance of duty, in fear of imminent serious bodily injury.” The persons enumerated in subsection (c) of the statute include correctional officers. The term “physical menace” is an element of both the crimes enumerated above. The Pennsylvania Standard Suggested Jury Instructions, Section 15.2701D defines physical menace as “some physical act which was menacing or frightening.”

The question raised by Defendant's Petition for Habeas Corpus is therefore whether the Commonwealth has made a prima facie showing that the Defendant committed some physical act which he intended to be menacing or frightening to Correctional Officer Geiser so that C.O. Geiser would be put in fear of imminent serious bodily injury.

In this case, the Defendant was agitated and yelling obscenities at C.O. Geiser. He yelled for the C.O. multiple times to "get you poison" (N.T., p. 5). When the C.O. approached, the Defendant sprayed him with an unknown liquid. Defendant argues that the Commonwealth's own tests show that that the only contents of the bottle was water, and therefore the Commonwealth cannot meet its burden in his case. He asserts that at no time was the Correctional Officer at risk for any injury and therefore no assault occurred. This position is not supported by prior case law. As noted above, proof of physical menace requires only that the Commonwealth prove that the Defendant did some physical act by which he intended to menace or frighten the C.O. into believing that he was at imminent risk of a serious bodily injury. See eg. Commonwealth v. Reynolds, 835 A.2d, 720 (Pa. Super. 2003); Commonwealth v. Repko, 817 A.2d 549 (Pa. Super. 2003). There is no requirement that the Commonwealth prove that the Defendant actually attempted to cause serious bodily injury or even that he had the capacity to do so.

The Court is satisfied that at the time Defendant committed the physical act of spraying C.O. Geiser with the contents of the bottle, the

Defendant intended for the C.O. to think that the liquid in the bottle would cause him serious bodily injury. Therefore, prima facie evidence exists on the charges of Simple Assault – Physical Menace and Aggravated Assault. .

ORDER

AND NOW, this _____ day of January, 2004, for the reasons set forth above, it is ORDERED and DIRECTED that the Defendant's Petition for Habeas Corpus is DISMISSED.

By the Court,

_____ J.

xc: PD (JP)
DA (CH)
Gary Weber, Esquire