

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

**COMMONWEALTH**

**v.**

**TIMOTHY MOSER,  
Defendant**

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**No.: 357-2005**

**OPINION AND ORDER**

Before the Court is the Defendant's Omnibus Pretrial Motion filed April 8, 2005, and argued before the Court on April 27, 2005. Defendant was charged in the above-captioned matter with Aggravated Assault, two counts of Simple Assault, Recklessly Endangering Another Person, Resisting Arrest, and Harassment, all stemming from an incident with Pennsylvania State Police (PSP) on January 18, 2005. Defendant's present Motion petitions for Habeas Corpus with regard to five of the counts. Defendant also submits a Motion to Suppress, which upon agreement of the parties will be continued based on decision of the Habeas Corpus petitions. Defendant also submits a Motion for Discovery. The relevant facts are as follows.

Trooper Matthew McDermott (McDermott) responded to a reported theft from the property of Defendant and his wife. McDermott spoke with Defendant's wife for approximately five minutes when Defendant approached from the garage and indicated that he would handle the matter with McDermott. McDermott noticed a firearm in Defendant's hand and advised Defendant to drop it. McDermott testified that Defendant became hostile in response to this request and indicated he would not put the gun down.

Defendant indicated to McDermott that he was on his own property and had a right to have the gun. According to McDermott, Defendant was waving the gun in a path that, at several points, caused the gun barrel's aim to cross the body of McDermott. Defendant then asked McDermott if he wanted to see footprints in the snow believed to be associated with the reported theft. McDermott told Defendant that he needed to retrieve a camera from his patrol car. McDermott approached and entered his patrol car and Defendant walked toward the front door of the residence to turn on a light to illuminate the footprints. McDermott testified that he was scared of Defendant and upon returning to his car backed it away from the scene and requested back-up. McDermott advised the station that Defendant displayed a firearm and would not put it down upon request. Additional Troopers arrived on the scene and advised Defendant, who had approached them with his hands in the air, to turn around. McDermott testified that Defendant made a back-stepping movement as if to run, at which point Cpl. Hunter (Hunter) attempted to grab Defendant. In response to this, Defendant "pushed at" Hunter and swung at Hunter's head. The Troopers struggled with Defendant to ultimately apprehend and subdue him. Upon request, Defendant's wife retrieved the firearm that Defendant had brandished during the original encounter. The firearm she brought to the Troopers had a round in the chamber and seven rounds in the magazine.

**Petition for Habeas Corpus: Aggravated Assault:**

To successfully establish a prima facie case, the Commonwealth must present sufficient evidence that a crime was committed and the probability the defendant could be connected with the crime. *Commonwealth v. Wodjak*, 502 Pa 359, 466 A.2d 991 (1983).

A person is guilty under 18 Pa.C.S. § 2702(a)(6) Aggravated Assault if he “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.” Police officers are specifically enumerated in subsection (c)(1).

The Superior Court analyzed § 2702(a)(6) in *Commonwealth v. Repko*, 2003 PA Super. 54, 817 A.2d 549 (2003) *overruled on other grounds by Commonwealth v. Matthews*, 2005 PA Super 92 (2005). The *Repko* Court reasoned, “While our research has revealed no decisional precedent construing section 2702(a)(6), this court has previously held that the pointing of a gun at a person constitutes simple assault by physical menace to put another in fear of imminent serious bodily injury under section 2701(a)(3).” The analysis further concludes that the relevant difference between simple assault by physical menace and aggravated assault under subsection (a)(6) is the occupation of the victim. It requires that the victim be one of the enumerated officers agents or employees. Therefore, intentionally placing another in fear of imminent serious bodily injury through the use of menacing or frightening activity establishes simple assault by physical menace and establishes aggravated assault under subsection (a)(6) if the victim is a police officer. Intent can be proven by circumstantial evidence and may be inferred from the defendant’s conduct under the attendant circumstances. *Repko*, 817 A.2d at 554, *see also Commonwealth v. Little*, 418 Pa. Super. 558, 614 A.2d 1146 (1992) (evidence sufficient to establish simple assault by physical menace to put another in fear of imminent serious bodily injury where appellant erratically emerged from home carrying a shotgun, shouting, and advancing from her porch).

The Court finds that the Commonwealth sufficiently established a prima facie case of Aggravated Assault. Defendant was told to put the gun down by a uniformed police officer and refused to do so. At that critical point, Defendant was aware of the loaded weapon in his hand and the officer's concern with regard to it. The Defendant made no attempt to allay the officer's fears; to the contrary he became belligerent and aggressive toward McDermott. The testimony indicates that the Defendant was not only waiving the weapon but that its trajectory crossed the path of McDermott's body. The conduct sufficiently establishes an inference of the requisite intent.

In short, Defendant waived a loaded weapon in the direction of a police officer at a range of several feet. The Trooper expressed concern about the weapon to Defendant and requested it be put down. Defendant was exhibiting belligerent and erratic behavior. Accepting the evidence as true, the Commonwealth has established that Defendant intentionally placed an officer in fear of imminent serious bodily injury through the use of menacing or frightening activity.

**Simple Assault:**

The information contains two counts of simple assault. For the reasons set forth above, a prima facie case of Simple Assault by physical menace under 18 Pa.C.S. § 2701(a)(3) has been established by the Commonwealth. The remaining Simple Assault charge is pursuant to § 2701(a)(1) and stems from the altercation with Hunter. A person is guilty of Simple Assault under § 2701(a)(1) if he attempts to cause or intentionally, knowingly or recklessly causes bodily injury to another. McDermott testified that Defendant pushed Hunter and took a swing at Hunter's head. Taken as true, the

evidence establishes that Defendant intentionally attempted to cause bodily injury to another. Defendant raises an additional issue with regard to this count concerning unlawful arrest, which is discussed more fully below.

**Recklessly Endangering Another Person:**

A person is guilty of Recklessly Endangering Another Person under 18 Pa.C.S. § 2705 if he recklessly engages in conduct which places or may place another person in danger of death or serious bodily injury. To sustain a conviction under this statute, the Commonwealth must prove that the defendant had an actual present ability to inflict harm and not merely the apparent ability to do so. *Commonwealth v. Maloney*, 431, Pa.Super. 321, 328, 636 A.2d 671, 674 (1994). Thus, in *Commonwealth v. Smith*, 292 Pa.Super. 443, 447-448, 437 A.2d 757, 759 (1981), the Superior Court held that, absent evidence a gun held by the defendant was loaded, there was insufficient evidence to sustain a conviction for recklessly endangering another person. *Maloney*, 636 A.2d at 674-75.

In the present case, the evidence presented by the Commonwealth is sufficient to establish a prima facie case of Recklessly Endangering Another Person. The testimony established that Defendant waived the gun's trajectory across the path of McDermott. When asked to retrieve the gun in question, Defendant's wife handed to the Troopers a loaded weapon. The evidence is duly sufficient to form a prima facie case of Defendant recklessly engaged in conduct that placed another person in actual danger of death or serious bodily injury.

### **Resisting Arrest and Simple Assault:**

Defendant argues that the charge of Resisting Arrest cannot be held for court since the underlying arrest was unlawful. Were the underlying arrest found to be unlawful, it is argued, the Simple Assault charge involving Hunter would also properly be dismissed. However, for the reasons stated above, the Commonwealth has established prima facie evidence of the underlying crimes that led to the arrest. 18 Pa.C.S. § 5104 Resisting Arrest was subsequently and sufficiently established: that Defendant intended to prevent Troopers from effecting a lawful arrest and created a substantial risk of bodily injury when he pushed at and swung at Hunter and otherwise struggled against the Troopers.

### **ORDER**

AND NOW, this \_\_\_\_ day of May, 2005, after hearing on the Defendant's Omnibus Pretrial Motion, and for the reasons set forth above, it is hereby ORDERED and DIRECTED that:

1. Defendant's Petition for Habeas Corpus (Aggravated Assault, Simple Assault, Recklessly Endangering) is DENIED
2. The Defendant's Petition for Habeas Corpus (Resisting Arrest and Simple Assault) is DENIED
3. The Defendant's Motion to Suppress is continued until June 15, 2005 at 1:30 p.m. in Courtroom # 4.
4. With respect to Defendant's Motion to Compel Discovery; a) the Commonwealth is ORDERED and DIRECTED to obtain all police

reports generated in connection to this case and furnish to Defendant all discoverable information therein. In the event that no additional police reports exist, the Commonwealth shall notify defense counsel that an unsuccessful attempt was made to locate any additional reports. b) The Court finds that the requested reports of the Pennsylvania State Police Office of Internal Affairs need be acquired through that office and shall not require the Commonwealth to furnish said reports. Should defense counsel wish to pursue this information, a subpoena should be directed to Internal Affairs directly. c) It is further ORDERED and DIRECTED that the Pennsylvania State Police furnish to this Court original or copied tapes of all recorded radio and telephone conversations on both incidents for an in camera review. This Court will make a determination as to whether and to what extent the tapes contain discoverable information. d) The Court will not compel the Commonwealth to furnish the requested Affidavits of Probable Cause.

By the Court,

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Nancy L. Butts, Judge

xc: DA (KO)  
M. Lovecchio, Esq.

Judges  
Honorable Nancy L. Butts  
Law Clerk  
Gary Weber, Esq.  
PSP  
CST