

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

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

**OPINION IN SUPPORT OF ORDER
IN COMPLIANCE WITH RULE 1925(A)
OF THE RULES OF APPELLATE PROCEDURE**

Defendant appeals this Court’s Order of August 9, 2004, wherein the Court, following a non-jury, case-stated trial, found the Defendant guilty on all charges contained in the information and sentenced the Defendant to a period of state incarceration of twenty-seven to fifty-four months. Defendant’s right to direct appeal was reinstated nunc pro tunc by Order dated July 29, 2005. A Notice of Appeal was timely filed and following an extension of time, Defendant’s Concise Statement of Matters Complained of on Appeal was filed on August 29, 2005.

The relevant facts are as follows. On June 12, 2003 Defendant was an inmate at the Lycoming County Prison, housed in the disciplinary block. (N.T. 8/9/04 p. 15). At approximately 6:00 a.m. on that day, Correctional Officer Aaron Geiser (Geiser) was passing out breakfast trays in that block. (Id., p. 16). The Defendant asked that Geiser pass his tray to another inmate in a different cell. (Id.). In accordance with prison regulations, Geiser refused this request, after which Defendant began yelling profanities at Geiser. (Id.). Geiser left the block, returning 15 to 20 minutes later to collect the breakfast trays. At that point, Defendant told Geiser to, “come here mother fucker, come get your poison.” (Id.).

Defendant then sprayed Geiser with the contents of a shampoo bottle. Geiser did not know the contents of the bottle, however he did know Defendant was HIV-positive and was fearful that the bottle contained bodily fluids. (Id.).

Defendant contends that the facts were insufficient to support his conviction of Aggravated Assault. Aggravated Assault as it is charged in the information is found at § 2702(a) 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.”

18 Pa.C.S. § 2702(a). The persons enumerated in subsection (c) of the statute include correctional officers. The term “physical menace” is defined by the Pennsylvania Standard Suggested Jury Instructions, Section 15.2701D as “some physical act which was menacing or frightening.” “Serious bodily injury” is defined as “[b]odily injury which creates a substantial risk of death or which causes serious, permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ.” 18 Pa.Cons.Stat. Ann. § 2301.

In the present case, Defendant was agitated and yelling obscenities at Geiser. He told Geiser to come and “get your poison.” When Geiser approached, Defendant sprayed him with an unknown substance. Both Defendant and Geiser were aware that Defendant was HIV-positive.

Defendant argues that the Commonwealth’s own tests show that that the contents of the bottle were water. He asserts that at no time was Geiser at risk for any injury and therefore no assault occurred. However, proof of aggravated assault requires only that the Commonwealth prove that Defendant did some physical act by which he intended to menace

or frighten Geiser into believing that he was at imminent risk of a serious bodily injury. *See, Commonwealth v. Reynolds*, 2003 PA Super 400, 835 A.2d 720 (Pa. Super. 2003); *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). 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 Defendant committed the physical act of spraying Geiser with the contents of the bottle, and intended for Geiser to fear that the liquid in the bottle would cause him imminent serious bodily injury. Therefore, the evidence is sufficient to support Defendant's conviction of Aggravated Assault.

By the Court,

Nancy L. Butts, Judge

Date

xc: DA (KO)
PD
William Burd, Prothonotary
Honorable Nancy L. Butts
Judges
Gary Weber, Esq.
William Becker, Law Clerk