

1 IN THE COMMON PLEAS COURT OF PHILADELPHIA
2 FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
3 CRIMINAL COURT DIVISION

4 - - -
5 COMMONWEALTH : MOTION #03-000920
6 V. :
7 MICHAEL MARCAVGE :

8 - - -
9 February 25, 2003

10 Hearing

11 - - -
12 Courtroom 501

13 Criminal Justice Center

14 - - -
15 BEFORE: THE HONORABLE JOYCE S. KEAN

16 - - -
17 A P P E A R A N C E S :

18 MELISSA RIGNEY, ESQUIRE
19 Assistant District Attorney
20 For the Commonwealth

21 BRIAN FAHLING, ESQUIRE
22 Counsel for the Defendant,
23 Michael Marcavage
24 - - -

25 REPORTED BY: JULIE DAVIS, R.P.R.
OFFICIAL COURT REPORTER

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I N D E X

COMMONWEALTH EVIDENCE

WITNESS

DR. CR. RDR. RCR.

MELVIN BROOKS

By Ms. Rigney 4 16

By Mr. Fahling 8

- - -

1 THE COURT CRIER: Your Honor,
2 next, if we may, we'll call No. 38,
3 Michael Marcavage.

4 MR. HOPPE: Your Honor, Ted
5 Hoppe for Mr. Marcavage. We have
6 an outstanding motion for pro hac
7 vice with regard to allowing Mr.
8 Fahling to represent Mr. Marcavage
9 in this proceeding. That motion
10 had not been ruled on prior to
11 today, which is why I have
12 appeared. I just wanted to see if
13 the Court would approve that motion
14 so Mr. Fahling could handle Mr.
15 Marcavage's representation.

16 THE COURT: The Court will
17 allow it.

18 MR. HOPPE: Thank you, Your
19 Honor.

20 MR. FAHLING: Thank you, Your
21 Honor.

22 THE COURT REPORTER: Your
23 full name, sir.

24 MR. FAHLING: Brian Fahling,
25 F-A-H-L-I-N-G.

1 MS. RIGNEY: Melissa Rigney
2 for the Commonwealth, Your Honor.

3 The Commonwealth would call
4 Police Officer Brooks to the
5 stand.

6 THE COURT CRIER: Officer,
7 state your full name, spell your
8 last name, your badge number and
9 division, please.

10 THE WITNESS: My name is
11 Melvin Brooks, B-R-O-O-K-S, Badge
12 No. 2388, 3rd District.

13 - - -

14 OFFICER MELVIN BROOKS, sworn.

15 - - -

16 THE COURT CRIER: Thank you.

17 MS. RIGNEY: May I, Your
18 Honor?

19 - - -

20 DIRECT EXAMINATION

21 - - -

22 BY MS. RIGNEY:

23 Q. Officer Brooks, were you
24 employed as a Philadelphia police officer on
25 October 31, 2002, at approximately 11:45

1 a.m.?

2 A. 11:45 p.m. Yes, I was.

3 Q. I'm sorry. And did your tour
4 of duty take you to the area of 401 South
5 Street?

6 A. That's correct.

7 Q. Is that within the County of
8 Philadelphia?

9 A. That's correct.

10 Q. Do you recognize anyone in
11 court today from that date, time, and
12 location?

13 A. The gentleman sitting over
14 there.

15 Q. Could you indicate with point
16 of finger? There are several gentlemen
17 sitting over there.

18 A. The gentleman sitting right
19 there behind you (pointing).

20 MS. RIGNEY: Indicating the
21 defendant, Your Honor, Michael
22 Marcavage.

23 BY MS. RIGNEY:

24 Q. Could you please explain to Her
25 Honor the circumstances of your contact with

1 this defendant?

2 A. Yes. When I first came in
3 contact with the defendant, he was standing
4 at 4th and South. He was yelling -- you
5 know, he was reciting the Bible, but he was
6 yelling at the top of his voice like across
7 the street and at people walking by him.

8 I approached him. I said, I
9 don't mind if you're talking about, you know,
10 religion, but you've got to keep it down
11 because it's real late and people are trying
12 to sleep.

13 THE COURT: What time was it?

14 THE WITNESS: 11:45 p.m.

15 A. (Continued) The defendant
16 disagreed with me for a minute, and then
17 sometime after that he left.

18 He came back with a bull horn.
19 He then went to 5th and South and started
20 doing the same thing with the bull horn, real
21 loud. So my sergeant and some other
22 officers, you know, advised him he had to
23 stop.

24 He then proceeded to walk
25 eastbound toward 4th Street, where I came in

1 contact with him at 401 South Street. I
2 asked him to stop with the bull horn; stop
3 yelling. You know, he's drawing a large
4 crowd. The defendant ignored me. I made an
5 attempt to tell him again; he ignored me
6 again. He wouldn't acknowledge me.

7 Then I went to place him under
8 arrest. And as soon as I put my hands on
9 him, the defendant dropped to the ground.
10 And then we put him in handcuffs, and he
11 refused to stand. And then we carried him
12 over to the police vehicle, where we placed
13 him in.

14 Q. Do you recall what day of the
15 week October 31, 2002, was?

16 A. I believe it was a Thursday.

17 Q. Did the defendant drop to the
18 ground of his own free will, or did you force
19 him to the ground?

20 MR. FAHLING: Objection, Your
21 Honor, as to relevance.

22 THE COURT: Sustained.

23 MS. RIGNEY: I have nothing
24 further of this witness at this
25 time, Your Honor. I reserve the

1 right to redirect.

2 MR. FAHLING: Thank you.

3 - - -

4 CROSS-EXAMINATION

5 - - -

6 BY MR. FAHLING:

7 Q. Good morning, Officer Brooks.
8 How are you doing?

9 A. How are you?

10 Q. October 31 -- I'll state the
11 obvious -- is Halloween, isn't it?

12 A. That's correct.

13 Q. Is the area of South Street or
14 5th Street in South Philadelphia, is that a
15 pretty busy area normally?

16 A. It's busy mostly on Fridays and
17 Saturdays.

18 Q. What about on Halloween? It's
19 pretty busy then as well, isn't it?

20 MS. RIGNEY: Objection, Your
21 Honor. If counsel is directing him
22 to this specific Halloween, that
23 would be fine.

24 MR. FAHLING: I'll be more
25 specific. I'm sorry.

1 BY MR. FAHLING:

2 Q. Officer Brooks, on this
3 specific Halloween in question, October 31,
4 2002, it was busy in South Philly on 5th
5 Street, wasn't it?

6 A. It was the normal business day
7 on South Street.

8 Q. In fact, there was music
9 streaming out of some of the bars, wasn't
10 there?

11 MS. RIGNEY: Objection as to
12 relevance, Your Honor.

13 THE COURT: I'll allow it.

14 A. There may have been. I do not
15 recall.

16 Q. Okay. There were people
17 milling about, weren't there?

18 A. Excuse me?

19 Q. There were people walking up
20 and down the sidewalks?

21 A. Yes.

22 Q. And there was traffic going up
23 and down the roadways, wasn't there?

24 A. Yes.

25 Q. And you indicated you first saw

1 Mr. Marcavage about 11:35, correct, p.m.?

2 A. Excuse me?

3 Q. I believe you indicated you saw
4 Mr. Marcavage at approximately 11:35 p.m.; is
5 that correct?

6 A. Are you talking about when I
7 put him under arrest, or when I first came in
8 contact with him?

9 Q. When you first came in contact
10 with him.

11 A. I believe it was like maybe 20,
12 30 minutes prior to that.

13 Q. Would you describe what you saw
14 when you came into contact with Mr. Marcavage
15 at that point?

16 A. The defendant was screaming,
17 yelling, and reciting the Bible real loud;
18 screaming across the street; screaming, you
19 know, where he was standing at, at 4th and
20 South.

21 Q. Let me ask you: It's your
22 testimony that he was screaming at the top of
23 his lungs; is that correct?

24 A. That's correct.

25 Q. Did anybody come up to you and

1 complain about Mr. Marcavage?

2 MS. RIGNEY: Objection as to
3 relevance, Your Honor.

4 THE COURT: I'll allow it.

5 A. No.

6 Q. Do you recall specifically the
7 direction that Mr. Marcavage was addressing
8 when he was speaking?

9 A. There was no, you know,
10 specific -- he was just screaming at
11 everyone.

12 Q. And you indicated, I believe,
13 that some people stopped to observe him; is
14 that correct?

15 A. That's correct.

16 Q. And did those people eventually
17 move on?

18 A. The first time; yes.

19 Q. And the second time is when he
20 was arrested; isn't that true?

21 A. That's correct.

22 Q. Was anybody else with you when
23 you first approached Mr. Marcavage the first
24 time?

25 A. No.

1 Q. Was there anybody with you when
2 you approached Mr. Marcavage the second time,
3 at 11:35 roughly?

4 A. That's correct.

5 Q. And who all came with you?

6 A. There was another police
7 officer with me. And then my sergeant came
8 there shortly afterwards.

9 Q. And what was the name of the
10 police officer who was with you?

11 A. I believe Police Officer Crosby
12 and Sergeant Grier.

13 Q. Officer Crosby and Sergeant
14 Grier?

15 A. Right.

16 Q. And did they observe the
17 behaviors that you've described for the court
18 today?

19 MS. RIGNEY: Objection.

20 THE COURT: Sustained.

21 BY MR. FAHLING:

22 Q. Officer Brooks, you indicated
23 they were with you when you approached Mr.
24 Marcavage?

25 A. The second time; yes.

1 Q. The second time. Okay. And
2 did either one of them speak with Mr.
3 Marcavage?

4 A. No. I initiated the
5 conversation.

6 Q. Now, Mr. Marcavage, was he ever
7 asked by yourself or one of the other
8 officers to turn the megaphone down?

9 A. That's correct; myself and
10 Sergeant Grier.

11 Q. And did he comply with that?

12 A. No.

13 Q. Are you positive about that?

14 A. When I asked him, he did not
15 turn it down.

16 Q. What specifically did you ask
17 Mr. Marcavage?

18 A. I told him to stop yelling on
19 the bull horn, stop yelling, and he just
20 completely ignored me.

21 Q. Had you had a conversation
22 earlier where Mr. Marcavage had asked you
23 specifically what ordinance he might be in
24 violation of?

25 MS. RIGNEY: Objection.

1 THE COURT: Sustained.

2 BY MR. FAHLING:

3 Q. Did you tell Mr. Marcavage what
4 ordinance he was in violation of, Officer?

5 MS. RIGNEY: Objection.

6 MR. FAHLING: Your Honor,
7 it's a question of due process,
8 whether or not Mr. Marcavage
9 complied.

10 MS. RIGNEY: At what point,
11 Your Honor?

12 MR. FAHLING: At 11:35 p.m.
13 I'm sorry.

14 THE COURT: I'll allow the
15 question.

16 BY MR. FAHLING:

17 Q. Officer, did you ever identify
18 for Mr. Marcavage what law he was in
19 violation of?

20 A. I informed him that he was
21 speaking loud and people were trying to
22 sleep.

23 THE COURT: He was what?

24 THE WITNESS: He was yelling
25 on the bull horn, and that people

1 were trying to sleep. He was
2 yelling right below people's
3 apartments.

4 BY MR. FAHLING:

5 Q. Would these be apartments that
6 are in the area of the bars?

7 MS. RIGNEY: Objection.

8 THE COURT: I'll allow it.

9 A. Yes.

10 Q. In the area where the traffic
11 is passing by underneath?

12 MS. RIGNEY: Objection, Your
13 Honor.

14 THE COURT: I'll allow it.

15 BY MR. FAHLING:

16 Q. In the area where the people
17 are walking and talking about on the
18 sidewalk?

19 A. Yes.

20 Q. Do you know how long Mr.
21 Marcavage spent in jail?

22 MS. RIGNEY: Objection.

23 THE COURT: Sustained.

24 BY MR. FAHLING:

25 Q. Officer Brooks, how many

1 officers assisted you in the arrest of Mr.
2 Marcavage?

3 THE COURT: Sustained.

4 MR. FAHLING: Your Honor, I'm
5 just attempting to find out if
6 there were more present; more than
7 the three.

8 THE COURT: Not relevant.

9 MR. FAHLING: All right.
10 Just one second, Your Honor.
11 (Brief pause.)

12 MR. FAHLING: Your Honor, I
13 have no further questions of
14 Officer Brooks at this time.

15 Thank you.

16 MS. RIGNEY: Your Honor, just
17 brief redirect.

18 THE COURT: That's fine.

19 - - -

20 REDIRECT EXAMINATION

21 - - -

22 BY MS. RIGNEY:

23 Q. In the area where you saw the
24 defendant and where you heard the defendant
25 yelling, what was the loudest noise that you

1 heard?

2 A. It was the defendant speaking
3 on the bull horn.

4 MS. RIGNEY: Nothing further,
5 Your Honor.

6 THE COURT: You may step down.

7 THE WITNESS: Thank you, Your
8 Honor.

9 MR. FAHLING: Your Honor, at
10 this point I would move to
11 dismiss. I don't believe that the
12 Commonwealth has made a prima facie
13 case, especially under the law of
14 the State of Pennsylvania which
15 pertains to the disorderly conduct
16 statute.

17 And I might also move to
18 dismiss on the basis that the -- my
19 recollection is that the officer
20 never identified indeed what it was
21 that Mr. Marcavage was ultimately
22 arrested for.

23 In the State of Pennsylvania,
24 under Commonwealth versus Gowan,
25 the Supreme Court construed the

1 disorderly conduct statute. In
2 that particular case a woman had
3 used the "F" word against an
4 officer and -- that was Hawk. I'm
5 sorry, Your Honor. I'm jumping
6 ahead of myself.

7 In the Gowan case -- and let
8 me restate, 1990, out of Superior
9 Court of Pennsylvania, located in
10 Pittsburgh -- there were a couple
11 of preachers who were preaching in
12 Central Park in Pittsburgh, and
13 they indeed were screaming at the
14 top of their voice -- that was an
15 uncontested fact apparently -- and
16 a crowd gathered and, in some
17 cases, became a little bit unruly
18 and objected apparently to some of
19 the assertions made by these
20 preachers who were offering
21 religious speech in the direction
22 of the listeners.

23 In fact, it was so loud that
24 a business owner from approximately
25 150 to 200 feet away complained to

1 the police. And so the police went
2 and attempted to get the preachers
3 to quiet down a bit, and apparently
4 the preachers didn't comply. And
5 so they were cited with disorderly
6 conduct and were found guilty in
7 the lower courts.

8 Then on appeal the Superior
9 Court stated -- citing the
10 Mastrangelo case. And I'll get the
11 cite for you in a moment on that.
12 In that case the Supreme Court said
13 explicitly that the disorderly
14 conduct statute does not apply to
15 First Amendment speech.

16 In other words, there's a
17 scienter requirement that says,
18 loud is not enough. The fact that
19 somebody may take offense is not
20 enough. The question is, was there
21 an intent on the part of the
22 individuals concerned to disturb
23 the public peace? Was there
24 evidence to say that these people
25 were not proclaiming their message

1 to individuals, but were doing it
2 simply to create a public
3 disturbance? And you can't ignore
4 the scienter requirement.

5 Now, that does afford First
6 Amendment speech somewhat more
7 protection than we might otherwise
8 get in the normal course of our
9 daily activities, and it does
10 subject us, all of us, to speech at
11 a level that perhaps we don't want
12 to hear. Walking down the street,
13 you may hear a street preacher or
14 somebody of some other faith
15 yelling at the top of their voices
16 on some issue, or an antiwar
17 protestor.

18 But our nation is founded on
19 principles that say, well,
20 notwithstanding what we might
21 characterize as obnoxious delivery,
22 nevertheless this is the First
23 Amendment. We are forced, as the
24 court says, or compelled to endure
25 it. And those are the principles

1 that have been sustained by the
2 Supreme Court of Pennsylvania and
3 the Superior Courts in this state.

4 The officer's testimony was
5 that Mr. Marcavage was loud. And
6 thus far that's uncontested. He
7 said he yelled, but he also
8 acknowledged that it was a public
9 street in South Philly. And I
10 would expect the Court can take
11 judicial notice -- I've been down
12 there. That's a crazy street. And
13 on Halloween the bars were in
14 operation. And he admitted that
15 there were people milling about and
16 cars driving back and forth.

17 So the context of Mr.
18 Marcavage's speech is in the midst
19 of 5th Street in South Philly,
20 which is a dynamic, vibrant area
21 even at 11:30 at night.

22 And the question then
23 becomes, did the Commonwealth
24 demonstrate to this Court that Mr.
25 Marcavage's intent, his intent, was

1 not to preach the gospel of Jesus
2 Christ, but rather was to speak so
3 loudly that he wanted to create a
4 ruckus or a public disturbance?

5 I would submit to the Court
6 that that was not in evidence at
7 all.

8 Now, I understand the
9 police officer -- sometimes it's
10 difficult. You know, you hear a
11 loud noise and you think, I need to
12 deal with this. But there is the
13 notion of due process and the idea
14 that you can't simply allow police
15 officers, on the basis of what they
16 think is simply loud, to arrest
17 people or even to force them to
18 turn down their volume, if you
19 will.

20 There was no complaining
21 witness, unlike the Gowan case
22 where we did have a complaining
23 witness. But the Court said, you
24 know, you only have one complaining
25 witness, in addition to the

1 officer. Here we have no
2 complaining witnesses. We simply
3 have the testimony of Officer
4 Brooks, who appears to be a nice
5 man and an honest police officer.
6 And I would concede that he's
7 attempting to do his job, but would
8 also submit to the Court that he
9 was wrong on this occasion.

10 And the Court has said
11 clearly that the disorderly conduct
12 statute must not be used as a
13 dragnet in which to ensnare all
14 sorts of activity with which we
15 disagree or don't like or can't
16 find a particular statute to apply.

17 And so I would move at this
18 time, Your Honor, to dismiss the
19 Commonwealth's case; again, on the
20 basis that they have not made a
21 prima facie case. There was no
22 evidence with respect to the intent
23 by Mr. Marcavage. And not only
24 that, but in light of the law of
25 the matter in this state on First