

CLYMER & MUSSER, P.C.

JAMES N. CLYMER  
ROBERT F. MUSSER  
JEFFREY D. MOHLER  
LEONARD G. BROWN, III\*  
RANDALL L. WENGER  
ANDREA L. SHAW

ATTORNEYS AT LAW  
23 NORTH LIME STREET  
POST OFFICE BOX 1766  
LANCASTER, PA 17608-1766

(717) 299-7101

FAX (717) 299-5115

www.clymerlaw.com

E-MAIL: law@clymer.net

DIRECT E-MAIL: len@clymer.net

210 NORTH STATE STREET  
EPHRATA, PA 17522  
(717) 733-7471

16 SOUTH HESS STREET  
QUARRYVILLE, PA 17566  
(717) 786-0500  
FAX (717) 786-2111

DIRECT ALL CORRESPONDENCE TO  
THE LANCASTER OFFICE

\*ALSO ADMITTED IN NORTH CAROLINA

January 20, 2004

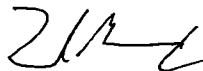
The Honorable Scott A. Evans  
Dauphin County Courthouse  
Front & Market Streets  
Harrisburg, PA 17101

RE: *Com. v. Garisto, et al.*, 8229-CD-2003, 8230-CD-2003, 8233-CD-2003, 8234-CD-2003,  
8231-CD-2003, 8232-CD-2003

Dear Judge Evans:

Enclosed please find a courtesy copy of defendants' Motion for Acquittal, proposed Findings of Fact and Conclusions of Law and transcript of the hearing. I have also emailed an electronic version of the Proposed Findings of Fact and Conclusions of law to your chambers.

Very truly yours,



Leonard G. Brown, III

cc: David McKenzie, Esq.

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January 20, 2004


David McKenzie, Esq.  
Office of the District Attorney  
Dauphin County Pennsylvania  
Front and Market Streets  
Harrisburg, PA 17101

RE: *Com. v. Garisto, et al.*

Dear Mr. McKenzie:

Enclosed for service upon you please find defendants' Motion for Judgment of Acquittal along with defendants' proposed findings of fact and conclusions of law filed this day with the Clerk of Court.

Very truly yours,



Leonard G. Brown, III

**CLYMER & MUSSER**

**By: Leonard G. Brown, III, Esquire**

I.D. No: 83207  
23 N. Lime Street  
Lancaster, PA 17602  
(717) 299-7101

Attorneys for Defendants

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IN THE COURT OF COMMON PLEAS OF DAUPHIN COUNTY  
CRIMINAL

COMMONWEALTH OF PENNSYLVANIA,	)	
	)	8229-CD-2003
	)	8230-CD-2003
v.	)	8233-CD-2003
	)	8234-CD-2003
STEPHEN G. GARISTO; JAMES GROVE;	)	8235-CD-2003
JAMES LYMAN and MICHAEL	)	8231-CD-2003
MARCAVAGE,	)	8232-CD-2003
Defendants.	)	

**RENEWED POST-TRIAL MOTION FOR JUDGMENT OF ACQUITTAL PURSUANT TO PA. RULE CRIM. P. 608 OF DEFENDANTS STEPHEN GARISTO, JAMES GROVE AND MICHAEL MARCAVAGE**


The Court heard the summary appeals of defendants on January 8, 2003. After the Commonwealth rested its case, the Court granted defendant James Lyman's Motion for Judgment of Acquittal. At the conclusion of the trial, the Court directed that the parties submit proposed findings of fact and conclusions of law. Defendants proposed Findings of Fact and Conclusions of Law, along with a transcript of the trial, are filed contemporaneously with this Renewed Motion for Judgment of Acquittal.

For the reasons stated in defendants' proposed Findings of Fact and Conclusions of Law demonstrating that the Commonwealth has failed to prove beyond a reasonable doubt the charges against defendants, and because the City of Harrisburg applied the disorderly conduct statute and

defiant trespass statute against defendants in an unconstitutional manner, defendants are entitled to judgment of acquittal.

Respectfully Submitted  
CLYMER & MUSSER, P.C.  
ALLIES OF THE ALLIANCE DEFENSE FUND

By:



Leonard G. Brown III, Esquire  
Attorney for Defendants  
ID # 83207  
23 North Lime Street  
Lancaster, PA 17602-2912  
(717) 299-7101

Date: 1-20-04

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am this day serving upon all persons listed below a true and correct copy of defendants' Renewed Motion for Judgment of Acquittal in the above captioned case.

Service by facsimile and first class mail, postage prepaid and addressed as follows:

David McKenzie, Esq.  
Office of the District Attorney  
Dauphin County Pennsylvania  
Front and Market Streets  
Harrisburg, PA 17101

CLYMER & MUSSER, P.C.  
ALLIES OF THE ALLIANCE DEFENSE FUND



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Leonard G. Brown, III  
Attorney for Defendants  
ID # 83207  
23 North Lime Street  
Lancaster, PA 17602  
(717) 299-7101

Dated: 1-20-04

IN THE COURT OF COMMON PLEAS OF DAUPHIN COUNTY  
CRIMINAL

COMMONWEALTH OF PENNSYLVANIA, )  
)  
) 8229-CD-2003  
)  
) 8230-CD-2003  
v. )  
) 8233-CD-2003  
)  
) 8234-CD-2003  
STEPHEN G. GARISTO; JAMES GROVE; )  
) 8231-CD-2003  
and MICHAEL MARCAVAGE, )  
) 8232-CD-2003  
)  
Defendants. )

**INTRODUCTION**

Defendants were tried on January 8, 2004, on the summary charges of disorderly conduct and defiant trespass.<sup>1</sup> The Commonwealth presented four witnesses, Jennifer Ellis who testified as to a video she recorded, Corporal Thomas Carter, Tina Manoogian-King and Officer Stephanie Barrelet.<sup>2</sup> Pear Grove, as well as defendants, testified that that defendants did not commit the acts of which they were accused.

Because the circumstances surrounding the arrests of defendants raise serious constitutional concerns, the Court directed that the Commonwealth and defendants submit arguments in writing on their respective positions. After trial and consideration of the parties' arguments, the Court enters the following findings of fact, conclusions of law and order acquitting defendants of the charges against them.

**FINDING OF FACT AND CONCLUSIONS OF LAW**

1. Defendants were present in Harrisburg, Pennsylvania on July 26, 2003, to protest a "Gay Pride Festival" ("the Event"). (Tr. 77, 82-83).

<sup>1</sup> After the Commonwealth rested its case, the Court granted defense counsel's motion for judgment of acquittal as to James Lyman.

<sup>2</sup> Defendants filed an affidavit with the Court raising questions regarding sequestration violations by witnesses for the Commonwealth. Because the Court is acquitting defendants of the charges against them, there is no need to address the sequestration concern.

2. The Event was attended by thousands of individuals. (Tr. 4).
3. The Event was held at River Front Park and the permit issued for the event was bounded on the West by the Susquehanna River, on the East by the curb of Front Street, on the North by the curb of Market Street and on the South by the curb of Paxton Street. (Tr. 4).
4. Defendants' presence at the Event was motivated by their sincerely held religious beliefs. (Tr. 4).
5. While protesting at the Event, defendants, along with others, expressed their objections to the homosexual lifestyle through banners and preaching, and quoted verses out of the Bible. (Tr. 4).
6. Defendants also attempted to engage people in conversation and explain their objections to the homosexual lifestyle. (Tr. 35).
7. Defendants attempted to hand out religious literature to others attending the Event. (Tr. 35).
8. The sidewalk and intersection of Paxton Street and South Front Street in Harrisburg, Pennsylvania, were public, non-permitted property on July 26, 2003. (Tr. 3).
9. The arrests of defendants occurred in the vicinity of the southern entrance to the Event otherwise known as South Gate. (Tr. 64-67).
10. Thousands of people entered the park through either the North or South Gate and in doing so walked on and across the same street on which defendants were arrested. (Tr. 4, 50).
11. Corporal Carter, the supervising police officer on duty at the South Gate, was instructed by the Director of Parks and Recreation for the City of Harrisburg, Tina Manoogian-King, to enforce a 50 foot buffer zone around the event. (Tr. 34).
12. The arrests of defendants occurred within this buffer zone. (Tr. 38).
13. Corporal Carter, although present for the arrests of defendants, could not identify any act by defendants Garisto, Marcavage or Grove that served no legitimate purpose. Every act identified by Corporal Carter related to defendants' free speech and free exercise rights under the First

Amendment to the United States Constitution. (Tr. 35, 38-39).

14. Directly across from South Gate and Paxton Street is a public sidewalk abutting the property of the Comfort Inn.
15. A grassy area exists between the sidewalk abutting Comfort Inn's property and Comfort Inn's buildings. (Tr. 4)
16. The arresting officer, Stephanie Barrelet and the Director of Parks and Recreation, Tina Manoogian-King, sought out Primal Patel, the manager of the Comfort Inn, at approximately 11:30 a.m. on July 26, 2003 and asked him about the event. He stated that, "I don't want anything on my property." (Tr. 3-4).
17. There were numerous interchanges between the police and Tina Manoogian-King and individuals protesting the Event. None of the witnesses for the Commonwealth identified any instances wherein they spoke with Mr. Marcavage or Mr. Grove at the South Gate Entrance.
18. Ms. Manoogian-King spoke with defendant Garisto at the South Gate and denied his request to stand on non-permitted public property near the entrance to hand out literature and engage in other expressive conduct without blocking the entrance. (Tr. 20, 25).
19. None of the interchanges with the protesters occurred in a situation where a riot or violence was imminent or expected. Defendants were peaceful in the manner in which they expressed their disagreement with the event. (Tr. 69).
20. Defendants were arrested by Officer Barrelet at approximately 3:00 p.m. for disorderly conduct and defiant trespass. (Tr. 4).
21. Officer Barrelet transported defendants to the Harrisburg Police Station and directed that they not be released until the Event was over. Defendants were not released until the Event had concluded, and were thereby denied any further opportunity to affectively protest the Event. (Tr. 4).
22. The City asked Jennifer Ellis to videotape the Event. (Tr. 6).

23. Whenever Ms. Ellis observed something going on between protesters and the police she would record it. (Tr. 13, 18).
24. The videotape recorded by Ms. Ellis was introduced by the Commonwealth at trial and showed the arrests of defendants.
25. Officer Barrelet and two other officers arrested defendant Grove while he was walking across Paxton Street and holding a video camera. At the time of his arrest, defendant Grove was not on the property of Comfort Inn, and was not blocking, or attempting to block, traffic or pedestrians. (Tr. 16, 22)
26. At the time defendants were arrested, a police car was parked the wrong direction on Front Street, a one way street, blocking a portion of the street. (Tr. 22).
27. At the time of his arrest, Mr. Grove was not engaging in any hazardous or physically offensive conduct. (Tr. 22, 37-39, 51-52, 56-57, 63-68).
28. At the time of his arrest, defendant Grove was neither engaging in disorderly conduct nor was he defiantly trespassing. (Tr. 22, 37-39, 51-52, 56-57, 63-68).
29. While defendant Grove was being arrested, defendant Stephen Garisto began taking pictures of the arrest while standing on the sidewalk abutting Paxton Street. (Tr. 22, 37-39, 51-52, 56-57, 63-68).
30. At the time of his arrest, defendant Garisto was not on the property of Comfort Inn, and was not blocking or attempting to block, traffic or pedestrians. (Tr. 22, 37-39, 51-52, 56-57, 63-68).
31. At the time of his arrest, Mr. Garisto was not engaging in any hazardous or physically offensive conduct. (Tr. 22, 37-39, 51-52, 56-57, 63-68).
32. At the time of his arrest, defendant Garisto was neither engaging in disorderly conduct nor was he defiantly trespassing. (Tr. 22, 37-39, 51-52, 56-57, 63-68).
33. While defendants Grove and Garisto were being directed to a police patty wagon parked at the South Gate, defendant Michael Marcavage crossed Paxton Street from a traffic island towards

- the sidewalk in front of the Comfort Inn to observe why defendants Grove and Garisto were arrested. As he turned and headed back to the traffic island, police arrested him in the middle of Paxton Street. (Tr. 22, 37-39, 51-52, 56-57, 63-68).
34. At the time of his arrest, defendant Marcavage was neither engaging in disorderly conduct nor was he defiantly trespassing. (Tr. 22, 37-39, 51-52, 56-57, 63-68).
35. At the time of his arrest, Mr. Marcavage was not engaging in any hazardous or physically offensive conduct. (Tr. 22, 37-39, 51-52, 56-57, 63-68).
36. Jennifer Ellis, Corporal Carter and Tina Manoogian-King never saw defendants stand in the middle of a road, attempt to block traffic, physically attempt to prevent individuals from attending the Event or trespass on either Comfort Inn property or a permitted area. (Tr. 22, 37-39, 51-52, 56-57).
37. Officer Barrelet believes she observed people lingering in the middle of Paxton Street and trespassing on Comfort Inn's grass. She cannot recall when defendants "lingered" in the street or trespassed on the Comfort Inn's grass, (Tr. 62 "I don't recall specifically which one of the three were in the roadway . . ."), and she observed hundreds of people on the street that day going to and from the festival. (Tr. 63-64).
38. At the time of their arrests, defendants were not trespassing or engaging in disorderly conduct, and Officer Barrelet "could not say whether it was Mr. Grove, but as a collective, it was through various points of the day . . . these actors were all involved in impeding traffic . . ." (Tr. 65).
39. None of the witnesses for the Commonwealth were able to testify that defendants trespassed on the Comfort Inn's property after being warned not to do so. (Tr. 22, 37-39, 51-52, 56-57, 63-68).
40. Officer Barrelet's testimony is less credible than the testimony of defendants, Jennifer Ellis and Pearl Grove that defendants never lingered in the streets, stopped or attempted to stop traffic or

physically prevented or attempted to prevent individuals from attending the event.

41. Officer Barrelet's testimony is less credible than the testimony of defendants, Jennifer Ellis, Tina Manoogian-King and Pearl Grove that defendants never trespassed on the grass of the Comfort Inn.
42. Hundreds of people were walking on Paxton Street throughout the day as they entered the South Gate to the Event. (Tr. 63-64).
43. Jennifer Ellis stood in the middle of Paxton Street to video various events occurring with protesters at the Event. (Tr. 18).

## DISCUSSION

### **I. THE COMMONWEALTH HAS NOT MET ITS BURDEN**

The Commonwealth has the never-shifting burden of proving every essential element of the crime beyond a reasonable doubt. *See Com. v. Yeager*, 329 Pa. 81, 196 A.2d 827 (1938). Defendants must be acquitted if, from the evidence or any part of the evidence, there arises a reasonable doubt of their guilt. *See Com. v. Green*, 292 Pa. 579, 141 A. 624 (1928).

Title 18 Section 5303(b) of the Pennsylvania Consolidated Statutes, defiant trespass, provides in relevant part:

(1) A person commits an offense if, knowing that he is not licensed or privileged to do so, he enters or remains in any place as to which notice against trespass is given by:

- (i) actual communication to the actor;
- (ii) posting in a manner prescribed by law or reasonably likely to come to the attention of intruders;