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January 20, 2004

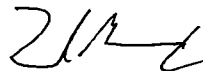
The Honorable Scott A. Evans  
Dauphin County Courthouse  
Front & Market Streets  
Harrisburg, PA 17101

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  
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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  
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(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  
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(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 way 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;

(iii) fencing or other enclosure manifestly designed to exclude intruders;

The Commonwealth testified generally that groups of protesters were informed not to be on the grass of the Comfort Inn's property. However, the Commonwealth failed to produce evidence that anyone actually communicated to defendants that they could not be on the grass. One cannot be found guilty of a crime by association with those who may have committed the crime. *See e.g. Com. v. Collins*, 420 Pa. Super. 358, 366, 616 A.2d 1012, 1016 (1992).

The video introduced by the Commonwealth shows Officer Barrelet telling a group of protestors to move from the entire area. She never differentiates between the public sidewalk and the grass of the Comfort Inn. Moreover, nothing depicted in the video taken by Ms. Ellis at behest of the City, show defendants trespassing on Comfort Inn property. As discussed more fully below, the Commonwealth cannot arrest an individual for trespassing on a public sidewalk. Furthermore, defendants who testified on their own behalf, along with Jennifer Ellis, Tina Manoogian King and Pearl Grove all testified that they never saw defendants on the grass of the hotel. While Corporal Carter and Officer Barrelet testified that defendants did trespass, they could not specify when the trespass occurred, where defendants were standing on the grass or when defendants were warned. Such vague allegations cannot prove defendants guilty beyond a reasonable doubt with respect to defiant trespass.

The Commonwealth faces the same problem with respect to the disorderly conduct charges. A person is guilty of disorderly conduct pursuant to 18 Pa.C.S.A. § 5503 if "with the intent to cause public inconvenience, annoyance or alarm, or recklessly creating the risk thereof, he":

- (1) engages in fighting or threatening, or in violent or tumultuous behavior;
- (2) makes unreasonable noise;
- (3) uses obscene language, or makes an obscene gesture; or
- (4) creates a hazardous or physically offensive condition by any act which serves no legitimate purpose of the actor.

Because defendants were charged with violating subsection (4), the Commonwealth must prove beyond a reasonable doubt that each defendant created a hazardous or physically offensive condition that served no legitimate purpose.

Ms. Ellis, while not recording the entire Event, was asked by the City to record instances where anything was occurring between the protesters and the police. She testified that she never observed the defendants stand in the middle of the road, block traffic or pedestrians or trespass on Comfort Inn property. Corporal Carter, Officer Barlette's supervisor, and Tina Manoogian-King testified consistently with Ms. Ellis. None of them observed behavior by the defendants that was hazardous or physically offensive or was done for no legitimate purpose warranting the charges of disorderly conduct or defiant trespass. The only evidence presented as to defendants' guilt was vague recollections by Officer Barrelet that defendants trespassed and "lingered" in the streets throughout the day. These statements are inconsistent with the testimony of Jennifer Ellis, Corporal Carter and Tina Manoogian-King as well as the video evidence.

Additionally, Pear Grove and defendants testified consistently with Ms. Ellis, Ms. Manoogian-King and Corporal Carter that they were not disorderly and did not trespass. While Corporal Carter testified that defendants attempted to converse with people and hand them literature,

the disorderly conduct statute cannot be applied to deny defendants their constitutional rights to free speech, freedom of assembly and exercise of religion.

The Commonwealth has failed to establish beyond a reasonable doubt that defendants are guilty of defiant trespass or that they are guilty of disorderly conduct.

## **II. ONE CANNOT TRESPASS ON PUBLIC STREETS AND SIDEWALKS**

The Commonwealth presented evidence that Corporal Carter was directed to enforce a 50' buffer zone and that all arrests of defendants occurred within this zone. The buffer zone was not a permitted area of the event. To the extent that the arrests of defendants rests on violating the buffer zone, the arrests cannot stand.

A person commits the offense of defiant trespass 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 . . ." Citizens are "licensed and privileged" to be on the public streets and sidewalks. Moreover, part (c)(1) of § 5303 provides as a defense to trespass, that the area was open "to members of the public." Streets and sidewalks, for which no private organization has a permit for exclusive use, are by definition "public property" and therefore open "to members of the public." *See e.g. Com. v. Tate*, 495 Pa. 158 (1981) (Defiant trespass charges overturned as private college opened to public cannot arrest protestors without violating Article I sections 7 and 20 of Pennsylvania Constitution.) Officer Barrelet testified that hundreds of people were walking on the street on the day defendants were arrested and Ms. Manoogian-King testified that thousands of people were in the Event. These people entered the Event through one of two entrances and because no sidewalk exists along the Event-side

of Paxton Street, everyone entering from the South Gate walked on the street. On July 26, 2003, the street was an area in which defendants were licensed and privileged to be.

As to “trespassing” on public property, the United States Supreme Court has held that “[w]herever title of streets and parks may rest, they have immemorially been held in trust for the use of the public.” *Hauge v. CIO*, 307 U.S. 496, 515 (1939). Moreover, “all public streets are held in the public trust and are properly considered traditional public fora.” *Frisby v. Schultz*, 487 U.S. 474, 481 (1988). *See also, United States v. Grace*, 461 U.S. 171 (1983) (streets, sidewalks and parks are public fora). The trespassing statute, with which the City charged defendants, cannot be applied to stop them for speaking, talking and walking in traditional public fora that is open to the public.

## **II. DISORDERLY CONDUCT STATUTES CANNOT BE USED TO SUPPRESS SPEECH**

The Commonwealth charged defendants Garisto, Grove and Marcavage with violating 18 Pa. C.S.A. § 5503 (a)(4), disorderly conduct, by creating a hazardous or physically offensive condition. The street that Grove and Marcavage traversed was used by hundreds of people on July 26, 2003. Garisto was arrested while standing on a public sidewalk taking pictures of Grove’s arrest. Garisto’s, Grove’s and Marcavage’s use of the street and sidewalk was not hazardous or physically offensive. Even though the Commonwealth contends that their protesting was hazardous and physically offensive, there is no evidence to support that contention. No act is listed on the citations constituting what type of conduct was considered to be disorderly. The only acts articulated by the Commonwealth’s witnesses were the defendants’ protected conduct, the acts associated with their sincerely held religious beliefs such as passing out religious literature, preaching, and attempting to engage Event attendees in conversation regarding defendants’ beliefs that homosexual conduct is

wrong.

The Pennsylvania Supreme Court has held that “the disorderly conduct statute *may not be used to punish anyone* exercising a protected First Amendment right.” *Commonwealth v. Mastrangelo*, 489 Pa. 254, 261 (1980) (emphasis added). Moreover, “Hazardous or physically offensive conditions” under subsection (a)(4) cannot include street preaching even if it is annoying, angering, or even alarming. Subsection (a)(4) only allows a conviction when a person was acting with “no legitimate purpose.” Engaging in fundamental rights, such as free exercise of religion, speech and assembly under the First Amendment, is always a legitimate purpose.

The United States Supreme Court has said that statutes, such as the one at issue here, can only be applied against First Amendment activities when the government wishes to protect against “a serious substantive evil” that “rises far above public inconvenience, annoyance, and unrest.” *Edward v. South Carolina*, 372 U.S. 229, 237 (1963). For example, in *Terminillo v. Chicago*, 337 U.S. 1, 93 L.Ed. 1131 (1949), the arresting officers believed picketers were guilty of breach of peace if their message fulfilled any one of the following: “if it stirs the public to anger, invites dispute, brings about a condition of unrest, or creates a disturbance, or if it molests the inhabitants in the enjoyment of peace and quite by arousing alarm.” *Id.* at 3. The Supreme Court disagreed, finding such content-based restrictions to be unconstitutional. The Court noted that the function of free speech under our system of government is to invite dispute . . . That is why freedom of speech . . . is . . . protected against censorship or punishment . . . There is no room under our Constitution for a more restrictive view.” *Id.* at 4-5. It is impossible to understand how defendants’ actions of walking across the street, handing out literature, engaging people in conversation or taking pictures “rises far above



public inconvenience, annoyance and unrest.”

Mr. Garisto’s challenge to Officer Barrelet by taking pictures and verbal questioning is constitutionally protected as well. *See e.g. Houston v. Hill*, 482 U.S. 451 (Arrest of a homosexual for telling officer, “Why don’t you pick on somebody your own size?” declared unconstitutional.) None of the actions by Grove, Garisto or Marcavage rise to a level justifying disorderly conduct. As the United States Supreme Court has recognized:

We are mindful that the preservation of liberty depends in part upon the maintenance of social order. But the First Amendment recognizes, wisely we think, that a certain amount of expressive disorder not only is inevitable in a society committed to individual freedom, but must itself be protected if that freedom would survive.

*Id.* at 471-71 (internal citations omitted).

Some Constitutionally protected conduct will not lead to perfect order, but will in fact result in “expressive disorder.” Defendants were on public property, engaged in the protected First Amendment activities of exercising their religion, speaking and assembling together. The Commonwealth has failed to establish that the actions of defendants violated Pennsylvania’s Disorderly Conduct Statute when constitutionally applied.

### CONCLUSIONS OF LAW

1. The Commonwealth has failed to prove beyond a reasonable doubt that defendants defiantly trespassed onto the property of the Comfort Inn.
2. The Commonwealth has failed to prove beyond a reasonable doubt that defendants created a hazardous or physically offensive condition that served no legitimate purpose.
3. To the extent that Corporal Carter, Officer Barrelet and Tina Manoogian-King attempted to enforce a 50’ buffer zone around the event, such actions were violative of the First

Amendment to the United States Constitution.

4. The City of Harrisburg applied the disorderly conduct statute to defendants in a manner inconsistent with the First Amendment to the United States Constitution to shut down their speech as evidenced by the direction of Corporal Carter to not release defendants until the conclusion of the Event.
5. Defendants' motion for judgment for acquittal on all charges is GRANTED.

**ORDER**

AND NOW this \_\_\_\_ day of \_\_\_\_\_, 2004, it is hereby ordered that the charges of against defendants of defiant trespass and disorderly conduct are dismissed.

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SCOTT A. EVANS, J