

*Criminal Law - Resisting Arrest - Substantial Risk of Injury*

1. The sound of loud voices coming from a home and heard by police while on a public street constitutes unreasonable noise, an element of the offense of disorderly conduct.
2. When the resistance of a defendant is of such magnitude that it requires the best physical efforts of 2 police officers for 5 to 10 minutes and the use of mace, the defendant has employed means justifying substantial force.

*Frederic G. Antoun, Jr.*, Assistant District Attorney for the Commonwealth

*Deborah K. Hoff, Esq.*, Counsel for Defendant

OPINION AND ORDER

KELLER, J., September 17, 1982:

The defendant was charged with resisting arrest. On May 10, 1982 he waived trial by jury. Trial was held on May 17, 1982, and the defendant was found guilty of the crime charged. Motions for a new trial and in arrest of judgment were filed on May 27, 1982. Briefs were exchanged and arguments heard on September 7, 1982. The matter is now ripe for disposition.

Preliminarily, we note that the defendant's "Statement of Questions Involved" are limited to:

"1. Did the Honorable Court err in finding that the evidence was sufficient to establish beyond a reasonable doubt that defendant either 'created a substantial risk of bodily injury to the public servant' or 'employed means justifying or requiring substantial force to overcome the resistance?"

"2. Did the Honorable Court err in finding that the evidence was sufficient to establish beyond a reasonable doubt that the officers were effecting a lawful arrest?"

"3. Did the Honorable Court err in finding that the evidence was sufficient to establish beyond a reasonable doubt that the defendant intended to prevent a public servant from effecting a lawful arrest?"

All other post trial motions are deemed abandoned.

From our trial notes we make the following Findings of Fact:

1. At approximately 10:00 p.m. on February 1, 1982 Officer Russell C. Weikert of the Waynesboro Police Department proceeded to 210 Cleveland Avenue, Waynesboro, Pa. in response to a "disturbance in house complaint." Officer Edward C. Gebhart also of the Waynesboro Police Department responded to the call and arrived at the same address a few seconds after Officer Weikert, who was then approaching the entrance to 210 Cleveland Avenue.

2. Both Officers heard loud voices coming from 210 Cleveland Avenue, while they were in the public street and approaching the dwelling. Both officers were aware of the fact that a Protection from Abuse Act court order had been entered which inter alia ordered the defendant to "refrain from striking, grabbing, kicking, choking or otherwise physically abusing or harassing Patricia L. Greenawalt (defendant's wife) or threatening to do any of the above..."

3. Officer Weikert approached the door to the dwelling and observed the storm door was closed but the inner door was open so that he could view the interior of the premises. He saw the defendant and Mrs. Greenawalt in the kitchen. He observed that Mrs. Greenawalt was standing against the sink and the defendant was "hovering over her."

4. Officer Weikert rapped on the storm door and when he received no response he entered the premises. The defendant turned, observed the officer and went into a rage. He ran toward Officer Weikert screaming "You S.O.B., you ——— ——— cops can't come in my house."

5. When the defendant reached Officer Weikert, the officer grabbed him by the arm and told him he was under arrest for disorderly conduct. The defendant said he was not going to be arrested in his own home. By this time Officer Gebhart had also entered the premises.

6. The two officers and the defendant struggled and wrestled standing up and on the floor for between 5 and 10 minutes. The defendant tried to hit the officers and tore

Officer Gebhart's shirt. Only after mace was used on the defendant were the officers able to subdue him and successfully take him into their custody.

7. Neither officer suffered any injury in the affray. Officer Gebhart testified that he "felt no pain - just strain."

8. As a result of the extended struggle that was necessary in order to subdue the defendant and take him into custody, he was charged with resisting arrest.

The information in this case alleges inter alia:

"That on (or about) February 1, 1982, in said county, Charles R. Greenawalt, Jr. did unlawfully, with the intent of preventing a public servant from effecting a lawful arrest, create a substantial risk of bodily injury to the public servant, or did employ means justifying or requiring substantial force to overcome the resistance..."

Section 5104 of The Crimes Code defines the crime of resisting arrest as:

"A person commits a misdemeanor of the second degree if, with the intent of preventing a public servant from effecting a lawful arrest or discharging any other duty, the person creates a substantial risk of bodily injury to the public servant or any one else, or employs means justifying or requiring substantial force to overcome the resistance."

Therefore, the elements of the crime here under consideration would be:

1. That the defendant intended to prevent a public servant from making a lawful arrest or discharging any other duty.
2. That the public servant was making a lawful arrest or performing any other duty.
3. That the defendant created a substantial risk of bodily injury to the public servant or anyone else or employed means justifying or requiring substantial force to overcome the resistance.

The defendant in his second question contends that the

evidence presented was insufficient to establish beyond a reasonable doubt that Officers Weikert and Gebhart were "effecting a lawful arrest."

Section 5503 of The Crimes Code defines the crime of disorderly conduct inter alia as:

"(a) Offense defined.—A person is guilty of disorderly conduct if, with intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof, he:

- (1) engages in fighting or threatening, or in violent or tumultuous behavior;
- (2) makes unreasonable noise...

"(c) Definition.—As used in this section the word 'public' means affecting or likely to affect persons in a place to which the public or a substantial group has access; among the places included are highways..."

While it may be reasonable to argue that the evidence did not establish fighting or threatening or violent or tumultuous behavior, we are satisfied that the sound of "loud voices" heard by both officers while on the public street constitute the making of unreasonable noise, and therefore the offense of disorderly conduct which in turn renders the arrest lawful.

Therefore, we find no merit to the defendant's Question No. 2.

Since Mr. Greenawalt announced to Officer Weikert that he was not going to be arrested in his home, it is clearly evident that the defendant intended to prevent the officers from making the lawful arrest.

The defendant's major contention is that the Court erred in finding that the conduct of the defendant created a substantial risk of bodily injury or did employ means justifying or requiring substantial force to overcome his resistance. In support of this contention the defendant cites *Commonwealth v. Rainey*, 285 Pa. Super. 75 (1981), and *Commonwealth v. Eberhardt* (No. 785 Pittsburgh, 1980) decided by the Superior Court on June 25, 1982. In *Rainey*, the Superior Court reversed the conviction of resisting arrest and the judgment of sentence on the grounds that the appellant had done nothing

more than "shake himself violently, to wiggle and squirm in an attempt to free himself of the officer's grasp." (At page 77) In *Eberhardt*, the Superior Court reversed the conviction of resisting arrest and judgment of sentence because there was no evidence of a substantial risk of bodily injury, and

"It also cannot be argued that appellant could be found guilty of the second part of Section 5104, namely, employing means justifying or requiring substantial force to overcome the resistance, since appellant was not charged with this part of Section 5104 in the information."

In the case at bar, the evidence clearly established that Mr. Greenawalt engaged in far more than shaking, wiggling and squirming. When the resistance of a defendant is of such magnitude that it requires the best physical efforts of two police officers for a period of between 5 and 10 minutes, and the application of mace to subdue the defendant, then in our judgment that defendant has employed "means justifying and requiring substantial force to overcome the resistance."

We, therefore, find no merit in the defendant's first and third questions. The motions for new trial and in arrest of judgment will be dismissed.

#### ORDER OF COURT

NOW, this 17th day of September, 1982, the motions of Charles R. Greenawalt, Jr. in arrest of judgment and for a new trial are dismissed.

Sentence is deferred until the Probation Department of Franklin County has prepared and filed a Pre-Sentence Investigation Report.

Upon the filing of the Pre-Sentence Investigation Report the defendant shall appear for sentencing at the call of the District Attorney.

Exceptions are granted the defendant.

COMMONWEALTH v. WEIKEL, C.P. Franklin County Branch,  
No. 254 of 1981

*Criminal Law - Guilty Plea - Withdrawal of Plea - Impeachment of Testimony - Guilty Plea Colloquy*

1. Where defendant denies on cross-examination that he made certain statements as part of a prior guilty plea colloquy on a redirect examination he testifies his prior guilty plea was involuntary, the defendant's testimony may be impeached by evidence of guilty plea colloquy presented by the Court Reporter.

2. The defendant opens himself up to cross-examination and rebuttal evidence based on a prior guilty plea colloquy by taking the stand and changing his story.

3. The question of whether a statement was voluntarily made is always a proper issue to present to a jury.

*David W. Rahausser, Assistant District Attorney, Attorney for the Commonwealth*

*E. Franklin Martin, Esq., Attorney for Defendant*

#### OPINION AND ORDER

KELLER, J., September 24, 1982:

On May 20, 1981, a criminal complaint was filed charging the defendant and others with the crimes of burglary, theft, receiving stolen property, and criminal conspiracy. A preliminary hearing was held before District Justice William Stover on August 31, 1981, and he was bound over for trial. On August 10, 1981, the appointment of the Public Defender as counsel for the defendant was revoked due to a conflict of interest, and E. Franklin Martin, Esq. was appointed counsel for Mr. Weikel. On October 7, 1981, he appeared before the undersigned Judge and waived arraignment. On November 16, 1981, on application of defendant's counsel the matter was re-scheduled for trial at the January Term of Court. On January 11, 1982, the matter was continued until March 8, 1982.

On March 8, 1982, the defendant with his counsel appeared before the Honorable George C. Eppinger, P.J., and pur-