NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
MATEEN IBN HALEEM	:	
Appellant	:	No. 1119 MDA 2022

Appeal from the Judgment of Sentence Entered July 11, 2022
In the Court of Common Pleas of York County Criminal Division at No(s): CP-67-CR-0005646-2020

BEFORE: BOWES, J., NICHOLS, J., and PELLEGRINI, J.*

CONCURRING AND DISSENTING MEMORANDUM BY NICHOLS, J.:

FILED: NOVEMBER 22, 2023

I agree with the Majority that the evidence is sufficient to sustain Appellant's conviction for resisting arrest. Therefore, I concur in the affirmance of that conviction. However, because I disagree with the Majority's conclusion that the evidence was insufficient to sustain Appellant's conviction for disorderly conduct,[1] I respectfully dissent from the decision to reverse that conviction.

I adopt the trial court's summary of the facts underlying this matter. ***See*** Trial Ct. Op., 10/13/22, at 2-5, 11-13. Briefly, Appellant, his wife, and

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* Retired Senior Judge assigned to the Superior Court.

[1] 18 Pa.C.S. § 5503(a)(4).

his adult son went to the Pennsylvania State Police (PSP) York Station[2] around 11 p.m. on October 28, 2020. While in the lobby of the York Station, Appellant's son began recording a video with his cell phone. Troopers instructed him to stop recording several times, explaining that video recording was not allowed in the lobby. Troopers asked Appellant's son to stay for an interview about his recording. Meanwhile, Corporal Krystal Dugan and Corporal Matthew Kabacinski repeatedly told Appellant to leave the York Station. Appellant refused to leave and assumed a fighting stance. Appellant pushed Corporal Kabacinski's hand away and then struggled with several troopers in both the vestibule and the lobby of the station as the troopers arrested Appellant. The vestibule and the lobby of the PSP York Station is open to the public twenty-four hours a day.

In reviewing a sufficiency claim, our standard of review is as follows:

> The standard we apply in reviewing the sufficiency of the evidence is whether viewing all the evidence admitted at trial in the light most favorable to the verdict winner, there is sufficient evidence to enable the fact-finder to find every element of the crime beyond a reasonable doubt. In applying the above test, we may not weigh the evidence and substitute our judgment for the fact-finder. In addition, we note that the facts and circumstances established by the Commonwealth need not preclude every possibility of innocence. Any doubts regarding a defendant's guilt may be resolved by the fact-finder unless the evidence is so weak and inconclusive that as a matter of law no probability of fact may be drawn from the combined circumstances. The Commonwealth may sustain its burden of proof of proving every element of the crime beyond a reasonable doubt by means of wholly

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[2] Also referred to as the "Loganville Barracks." ***See*** Trial Ct. Op., 10/13/22, at 2.

> circumstantial evidence. Moreover, in applying the above test, the entire record must be evaluated and all the evidence actually received must be considered. Finally, the trier of fact while passing on the credibility of witnesses and the weight of the evidence produced, is free to believe all, part[,] or none of the evidence.

Commonwealth v. Bragg, 133 A.3d 328, 330-31 (Pa. Super. 2016) (citation omitted). Because a sufficiency of the evidence challenge raises a question of law, our standard of review is *de novo*, and our scope of review is plenary. ***Commonwealth v. Mikitiuk***, 213 A.3d 290, 300 (Pa. Super. 2019).

The disorderly conduct statute provides, in relevant part:

> **(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:
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> * * *
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> (4) creates a hazardous or physically offensive condition by any act which serves no legitimate purpose of the actor.
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> * * *
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> **(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, transport facilities, schools, prisons, apartment houses, places of business or amusement, any neighborhood, or any premises which are open to the public.

18 Pa.C.S. § 5503(a)(4), (c).

Here, the Majority correctly observed that

> Section 5503 requires proof that the defendant had one of two alternative mental states: "intent to cause public inconvenience, annoyance or alarm, **or** recklessly creating a risk thereof." 18 Pa.C.S. § 5503 (emphasis added). The Commonwealth can thus sustain a disorderly conduct conviction with evidence that the

> defendant recklessly created a risk of public inconvenience, annoyance, or alarm, even if he lacked the intent to do so.

Commonwealth v. Coniker, 290 A.3d 725, 735 (Pa. Super. 2023) (some citations omitted).

Citing to this Court's decision in ***Commonwealth v. Adeniran***, 2463 EDA 2018, 2019 WL 2578601 (Pa. Super. filed June 24, 2019) (unpublished mem.),[3] the Majority concluded that because there were no members of the public present in the lobby and the vestibule of the PSP York Station, the Commonwealth did not prove beyond a reasonable doubt that Appellant intended to cause, or recklessly created a risk of, public inconvenience, annoyance, or alarm. ***See*** Majority Mem. at 12-15. I disagree.

The police arrested the defendant in ***Adeniran*** in the vestibule of the Darby Borough Police Department Headquarters at a time of day where the main portion of the police station was not open to the public. ***Adeniran***, 2019 WL 2578601, at *3. This Court noted that there was "no testimony that any civilians were either directly outside the station or in the vestibule area" at the time the police arrested the defendant. ***Id.*** After the police arrested the defendant and placed her in a holding cell, she became combative. ***Id.*** at *2-3. Ultimately, the ***Adeniran*** Court concluded that there was "no evidence to show that [the defendant's] actions occurred in public or in front of anyone

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[3] We may cite to non-precedential memorandum decisions filed by this Court after May 1, 2019 for their persuasive value. ***See*** Pa.R.A.P. 126(b).

but police officers in private rooms inside the station," and it vacated the defendant's conviction for that offense. ***Id.*** at *3.

In ***Commonwealth v. Whritenour***, 751 A.2d 687 (Pa. Super. 2000), the police arrested and charged the defendant with disorderly conduct and public drunkenness after the police found the defendant staggering on a street in a gated community with his truck in a ditch. ***Whritenour***, 751 A.2d at 687. The arrest occurred during a snowstorm at night in late December. ***Id.*** There was no mention that anyone other than the police officers were present to witness the defendant's behavior at the time of his arrest. ***Id.*** On appeal, the defendant argued that because that street where he was arrested was located in a private, gated community, his conduct did not occur in "public." ***Id.*** at 688. This Court concluded that the gated community's residents, along with their invitees and licensees, constituted the "public" which had access to that street, and affirmed the defendant's conviction for disorderly conduct. ***Id.*** at 688-89.

Here, the Majority noted that Appellant's encounter with the troopers began "in a strikingly similar fashion to that in ***Adeniran***." ***See*** Majority Mem. at 14. The Majority concluded that the evidence was insufficient to sustain Appellant's conviction for disorderly conduct under Section 5503(a)(4), because there were no members of the public present in or immediately outside PSP York station, none were likely to enter "given the late hour," and "the only individuals exposed to Appellant's conduct were the troopers and Appellant's wife and son." ***See id.***

I disagree with the Majority's reading of Section 5503(a)(4). My interpretation of the relevant law is that the Commonwealth can sustain a conviction for disorderly conduct under Section 5503(a)(4) if it has proven beyond a reasonable doubt that the defendant's behavior occurred in a location to which the public has access, even if no member of the public was present at that time.[4] ***Compare Whritenour***, 751 A.2d at 687-89 ***with*** Majority Mem. at 12-15. Viewing all the evidence in the light most favorable to the Commonwealth as the verdict winner, I conclude that the evidence established beyond a reasonable doubt that Appellant recklessly created a risk of public inconvenience, annoyance, or alarm because the public had access to the lobby of PSP York Station at the time of the offense. ***See Whritenour***, 751 A.2d at 688-89; ***see also Coniker***, 290 A.3d at 735. Accordingly, I would affirm Appellant's conviction for disorderly conduct.

For these reasons, I respectfully concur in part and dissent in part.

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[4] The Majority also cited ***Forrey*** for the principle that "being in public is merely necessary, but not alone sufficient" to sustain a conviction for disorderly conduct." ***See*** Majority Mem. at 11 (quoting ***Commonwealth v. Forrey***, 108 A.3d 895, 899 (Pa. Super. 2015)). However, because ***Forrey*** involved a disorderly conduct conviction under Section 5503(a)(2), rather than Section 5503(a)(4), I would conclude that ***Forrey*** is distinguishable. ***See Forrey***, 108 A.3d at 899 (holding that the Commonwealth failed to prove the unreasonable noise element of disorderly conduct under Section 5503(a)(2) where there was no evidence that any passing drivers heard the defendant's loud shouts at the side of a rural highway near midnight, and observing that "[l]ike the proverbial tree falling in a forest, noise is not unreasonable if nobody hears it, because noise that is heard by no member of the public cannot be inconsistent with community or neighborhood standards").