

Office of Attorney General, Bureau of Narcotics Investigations and Drug Control, pursuant to the Controlled Substance, Drug, Device and Cosmetic Act of April 14, 1972, P.L. 233, No. 64, as amended, 35 P.S. 780 et seq. for use in accordance with law.

COMMONWEALTH v. POGUE, C.P., Cr.D., Franklin County Branch, No. 220 of 1988

Criminal Law - Defiant Trespass - Other Authorized Person - Borough Code

1. A police officer can fall into the category of "other person" under §3503 of the Crimes Code.
2. The language of the Borough Code and the act of 1980, July 11, P.L. 580, No. 122 provide statutory authority to borough policemen assigned to a fire scene to give the necessary notice to an individual charged with defiant trespass.
3. Section 3503 is not unconstitutionally vague due to lack of specificity as to who may give notice to leave a property.

Theodore E. Hinckley, Esquire, Asst. District Attorney for the Commonwealth

J. McDowell Sharpe, V, Esquire, Attorney for Defendant

OPINION AND ORDER

KELLER, P.J., September 1, 1988:

On February 22, 1988 Detective R.S. North of the Chambersburg Police Department filed a criminal complaint before District Justice J. William Stover charging Tommie Lynn Pogue with commission of the crime of defiant trespass on February 19, 1988 at approximately 10:45 p.m. The complaint alleged that the defendant did enter into the Wolfe Avenue Complex fire scene after being advised repeatedly by Chambersburg Police Department personnel that he was not permitted inside the chain link compound for the safety of fire personnel and himself. The matter was bound over for court. On June 1, 1988 the defendant waived arraignment and entered a plea of not guilty. A timely omnibus pre-trial motion in the nature of a motion to quash was filed. Hearing was scheduled on the motion for August 4, 1988. At the date and time scheduled for hearing counsel for the Commonwealth and the defendant stipulated that the Court should consider the allegations set forth in the affidavit of probable cause signed by Detective North and attached to the criminal complaints as all of

the evidence that would be presented in court, and the Court could dispose of the omnibus pre-trial motion on the basis of that evidence and the memorandum of law to be submitted by counsel on or before August 22, 1988. The memoranda have been submitted and the case is ripe for disposition.

We make the following Findings of Fact from the affidavit of probable cause.

FINDINGS OF FACT

1. On Friday, February 19, 1988 between the approximate hours of 7:30 p.m. and 8:45 p.m. there was a fire at the Wolfe Avenue Complex in the Borough of Chambersburg, Pennsylvania.
2. Detective North and Patrolman William Sheppard, II were assigned to control pedestrian traffic into the chain link compound around the Wolfe Avenue Complex, and the fire scene.
3. The defendant approached Detective North approximately 10 feet inside the compound and inquired what was taking place and the officer advised him that he would have to remain outside the chain link fence. Mr. Pogue proceeded to the exterior side of the fence.
4. Approximately three times after the Detective's first meeting with the defendant inside the fence, he was observed trying to walk past the perimeter guards and each time he was advised that he would have to stay outside the fence.
5. On the last occasion of being warned to stay outside the chain link fence, he was also advised by the officer that if he entered Wolfe Avenue Complex/the fire scene again, he would be charged with the misdemeanor charge of trespass.
6. At approximately 8:30 p.m. Detective North observed the defendant's companion, Phyllis Kemp, standing outside the compound with her daughter but the defendant was not in sight.
7. At 8:45 p.m. Detective North observed the defendant inside the compound walking from the direction of the fire scene toward the gate under the guard of Patrolman Sheppard.
8. Detective North approached the defendant and when he was within approximately ten feet of him said, "Tommie I told you, you would . . .", but his words were cut off as the defendant began to shout profanities at the officer claiming that he had a right to be inside the fence because "I work there", and "that's where I work and you can't keep me out!"
9. The defendant resisted as Detective North and Patrolman Sheppard escorted him toward the fence.

10. As the officers escorted the defendant toward the fence, his companion, Ms. Kemp, yelled that he would stay out if "you guys quit _____ing with him and leave him alone!"*

11. At the time of the defendant's tirade and abusive profanity while being escorted out of the compound, the area within twenty feet outside the fence was crowded with onlookers of all ages who had been told that they would also have to remain outside the compound.

12. Detective North concluded that because defendant had been repeatedly told to stay outside the fence and because of the nature of the danger he was causing for himself and the firemen, there was sufficient probable cause to request a summons for his arrest for defiant trespass, a misdemeanor of the third degree.

Preliminarily, we are constrained to observe that we have grave doubt as to whether the cause of justice is served by counsel stipulating that the Court may consider acts such as those set forth in the affidavit of probable cause without offering additional evidence. We recognize that such a procedure conserves the precious time of counsel, witnesses and the Court, and we certainly do not discount the importance of such economies. However, in the case at bar, we have no evidence as to the size of the Wolfe Avenue Complex; whether the chain link fence surrounds the entire compound; the type of entryway through the chain link fence the officer was guarding; the extent of the fire and danger presented by it; the nature of the danger to which the defendant was exposing himself and firemen; the estimated number of onlookers outside the fence; and whether there was any reaction from the onlookers as a result of the defendant's tirade, abusive profanities and eviction. While we must assume that Detective North and Patrolman Sheppard were assigned to their duties at the fire scene by someone in authority, we do not know whether it was a superior officer in the Chambersburg Police Department, an officer of the Chambersburg Fire Department, or party with an interest in the property in the complex. There was also no evidence as to whether the defendant did work at the Wolfe Avenue Complex as he claimed, and whether the nature of that work was such as to justify him in believing that he could not be kept out. In the light of the stipulation, we must for the purpose of this proceeding accept all statements of fact by Detective North in his affidavit of probable cause as true.

DISCUSSION

After counsel stipulated to the Court using the affidavit of

*Editor's Note: Underline indicates material omitted in original opinion.

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LEGAL NOTICES, cont.

name of THE TRAVEL PLACE, with its principal place of business at 21 South Carlisle Street, Greencastle, PA 17225. The name and address of the person owning or interested in said business is Violet Z. Schmid, 6719 Iron Bridge Road, Waynesboro, PA 17268.

William S. Dick
Maxwell, Maxwell, Dick & Walsh
11 North Carlisle Street
Greencastle, PA 17225

1/6/89

IN THE COURT OF COMMON PLEAS OF THE 39TH JUDICIAL DISTRICT OF FRANKLIN COUNTY, PENNSYLVANIA ORPHANS' COURT DIVISION

The following list of Executors, Administrators and Guardian Accounts, Proposed Schedules of Distribution and Notice to Creditors and Reasons Why Distribution cannot be Proposed will be presented to the Court of Common Pleas of Franklin County, Pennsylvania, Orphans' Court Division for CONFIRMATION: February 2, 1989.

STITT: First and final account, statement of proposed distribution and notice to the creditors of Farmers and Merchants Trust Company of Chambersburg, Executor of the Estate of Edna M. Stitt, late of the Borough of Chambersburg, Franklin County, Pennsylvania, deceased.

YEAGER: First and final account, statement of proposed distribution and notice to the creditors of Kenneth W. Yeager, Executor of the Estate of Grace L. Yeager, late of Guilford Township, Franklin County, Pennsylvania, deceased.

Robert J. Woods
Clerk of Orphans' Court
Franklin County, Pennsylvania

1/6, 1/13, 1/20, 1/27/89

LEGAL NOTICES, cont.

probable cause and the information as the evidence in the case upon which to base its disposition, counsel agreed that the issues to be resolved were:

1. Whether notice given by law-enforcement officers at a fire to the defendant not to come inside the chain link fence which surrounds the area of the fire scene, constituted the requisite notice by "other authorized person".
2. If Section 3503(b) can be interpreted to include law-enforcement officers at a fire scene as other authorized persons, is that section of the Crimes Code violative of the defendant's due process rights under the Commonwealth and Federal Constitutions due to being unconstitutionally vague and failing to give the defendant adequate notice of the acts which is proscribed.

The well articulated position of the defendant is that the "other authorized person" referred to in Section 3503(b)(2) must refer to a person authorized by the owner to enforce the property owner's private property rights because this subsection of the Crimes Code is designed to protect property rights, and the owner of the property is the only potential victim and, therefore, only the owner or those authorized by the owner may issue an order to leave the premises. If the language of the subsection include within the term "other authorized person" those having no connection with the owner such as law-enforcement officer, then the subsection is unconstitutionally vague because it does not adequately warn the defendant and others in his position whose orders to leave must be obeyed.

Section 3503 of the Crimes Code provides inter alia:

(b) Defiant trespasser. --

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

(2) An offense under this subsection constitutes a misdemeanor of the third degree if the offender defies an order to leave personally communicated to him by the owner of the premises or other authorized person. Otherwise it is a summary offense.

The elements of the crime of defiant trespass which would have to be proven beyond a reasonable doubt in a trial of this case area:

1. That the defendant entered the chain link fence compound of the Wolfe Avenue Complex.
2. That notice against his trespass in that place (i.e. inside the chain link fence) was given by actual communication to the defendant.
3. That the defendant knew he was not licensed or privileged by the owner or owners of the Wolfe Avenue Complex to be inside the chain link fence at the times here relevant.
4. That the defendant defied an order to leave personally communicated to him by the owner of the premises or other authorized person.

For the purpose of considering the defendant's motion to quash, we conclude that the evidence stipuated to by counsel for the defendant and the Commonwealth establishes that Tommie Lynn Pogue did enter the Wolfe Avenue Complex surrounded by a chain link fence on five occasions; that on the first four occasions of entry he was ordered to walk back outside the fence and on the fourth occasion was advised that if he entered again he would be charged with a misdemeanor charge of trespass; and he did in defiance of the four orders and last warning again enter the fenced-in compound area which he had been warned to stay out of. While the defendant did claim on the fifth and final entry that he had a right to be inside by saying, "I work there" and "that's where I work and you can't keep me out!" We conclude for the purposes of this proceeding that he did, indeed, know he was not licensed or privileged by the owner to be in the compound while an active fire was in progress because the defendant introduced no evidence at the hearing as to the fact that he did, indeed, work in the complex, the identity of his employer, his responsibilities as an employee which would have required him to be present on a Friday evening between the hours of 7:30 p.m. and 8:45 p.m. while a fire was in progress.

While it is not seriously questioned that the defendant did defy a personally communicated order to leave, the question here for a decision is whether that order was communicated "by the owner of the premises or an authorized person". There is no evidence as to the identity of the owner that any communication was made by such a person thus the question here for decision is whether Detective North and/or Patrolman Sheppard qualified as an

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authorized person to order the defendant to leave and remain outside the premises.

The defendant correctly contends that Section 3503 is designed to protect rights of property. From this correct basic premise he springs to the conclusion that only the owner of the property or a person authorized by the owner may order another to leave or not to remain on the premises. He buttresses this conclusion by noting the juxtaposition of the words "authorized person" with "owner of the premises" in the applicable subsection, and urges "the words 'owner of the premises' breath meaning into the general word 'authorized person'".

With this ultimate conclusion so vigorously pressed by the defendant, we do not agree. For if it were correct it would mean that in the absence of the property owner or a person specifically authorized to act on behalf of the owner (assuming the property owners had the foresight to give such authorization), no law-enforcement officer, no member of a fire department or special fire police, would have the authority to order persons without any claim of right to be on the premises to leave the premises and remain away from them during a fire or other emergency. Such a situation readily gives rise to the unacceptable scenario of fire buffs and those with criminal motives interfering with fire and emergency personnel at the scene of a fire, accident or other catastrophe natural or man made endangering themselves, others, fire and emergency personnel, interfering with trained personnel on the scene attempting to cope with problems then and there in existence; and giving the opportunities for looting.

The excellent briefs presented by counsel for the defense and the Commonwealth disclose that their research had produced no specific case law or statutory law defining the words "authorized person" to include or exclude them from the category of "authorized persons" to give the actual communication to the trespasser. Our independent research has been equally unproductive in locating any statute or appellate court decision defining "authorized person". However, this does not mean that there is not ample legal authority for construing the words selected by the Legislature and identifying Detective North as an authorized person. We are more inclined to believe that the solution is so obvious that it has not required resolution in the past. Section 1121 of the Borough Code, 53 P.S. 46121 provides:

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BAR NEWS ITEM

FROM: The Prothonotary of Franklin County, Pennsylvania

NOTICE

Beginning January 10, 1989, the Prothonotary's Office will be charging \$50.50 for each divorce complaint. Beginning March 15, 1989 all divorce decrees will be \$15.00. The increase is due to the House Bill 19, which became Act 151. A copy of this bill is attached.*

The additional \$10.00 fee added to the divorce complaint is for the Plaintiff's divorce decree. Any plaintiff requesting more than one divorce decree will be charged \$15.00 for each one after the first decree.

If you have any questions, please feel free to contact the Prothonotary's Office.

*Editors Note: Quotation of the cited House Bill, included with original notice, omitted by editor, to save space.

"Borough Council may . . . appoint . . . one or more suitable persons, . . ., as borough policemen who . . . shall and may, within the borough, without warrant and upon view, arrest and commit for hearing any and all persons . . ., or who may be engaged in the commission of any unlawful act *tending to imperil the personal security or endanger the property of the citizens. . .*" (italics ours).

The Act of 1982 P.L. 512 No. 141 §4, 42 Pa. C.S.A. 952 provides inter alia:

Any duly employed municipal police officer shall have the power and authority to enforce the laws of this Commonwealth or otherwise perform the functions of that office anywhere within his primary jurisdiction as to:

(2) any other event that occurs within his primary jurisdiction and which reasonably requires action on the part of the police in *order to preserve, protect or defend persons or property* or to otherwise maintain the peace and dignity of this Commonwealth. (italics ours).

The Act of 1980, July 11, P.L. 580, No. 122, §2, 35 P.S. 1201 after providing for the nomination of special fire police provides:

"When so confirmed and sworn and displaying a badge of authority, they shall have full power to regulate traffic and keep crowds under control at or in the vicinity of any fire on which their companies are in attendance and to exercise such other police powers as are necessary in order to facilitate and prevent interference with the work of firemen in extinguishing fires . . ."

In our judgment the language of Section 1121 of the Borough Code authorizing borough policemen to arrest any and all persons engaged in the commission of any unlawful act tending to imperil the personal security or endanger the property of the citizens, and the language of Section 4 of Act 1982 authorizing municipal police officers to perform the functions of their office in their municipality to preserve, protect or defend persons or property clearly and unequivocally provides statutory authorization to borough policemen assigned to a fire scene to control curious and otherwise motivated onlookers from interfering with the function of the fire-fighting personnel, endangering themselves or others, as well as protecting their property at the fire scene. The fact that the Legislature felt it necessary to specifically grant authority to special fire police to regulate traffic and keep crowds under control at or in the vicinity of any fire, and to exercise such other police powers as are necessary in order to facilitate and prevent

interference of the work of firemen in extinguishing fires, confirms the implicit authority vested in full-time law-enforcement officers assigned to the fire scene.

“When the words of the statute are not explicit, the intention of the General Assembly may be ascertained by considering, among other matters: . . . (3) the mischief to be remedied; . . . (4) the object to be attained.” 1 Pa. C.S.A. 1921 (c).

“In ascertaining the intention of the General Assembly and the enactment of a statute to following presumptions, among others, may be used: (1) That the General Assembly does not intend a result that is absurd, impossible of execution or unreasonable; . . . (5) that the General Assembly intends to favor the public interest as against any private interest.” 1 Pa. C.S.A. 1922.

It would be absurd to conclude that the Legislature intended to limit the party’s authority to give a legally binding order to not enter upon or leave property to the owner or an individual specifically provided with such authority, for that would mean where the owner was unknown or unavailable and had not given such authorization that property would be unprotected by the criminal trespass section of the Crimes Code.

The case of *Commonwealth vs. Tate*, 495 Pa. 158, 432 A.2d 1382 (1981) involves an appeal by individuals convicted of the summary offense of defiant trespass for peacefully passing out leaflets on the campus of Mullenburg College while F.B.I. Director Kelly was making a speech and the defendants had been ordered to leave. The Supreme Court of Pennsylvania reversed the conviction on the constitutional grounds of freedom of speech as well as the fact that they had complied with all “lawful conditions” for access to the premises. The facts in *Tate* are totally unlike the case at bar. However, it is instructive to observe that the Supreme Court did note that on the day in question the campus was open to the public, and the college had no policy about off-campus visitors. This is precisely the converse of the situation here under consideration. Our highest court also observed:

The defendant trespass statute under which appellants were convicted is clearly designed to protect the rights of property, but it by no means permits every private landowner in every instance to invoke the power of the state to protect that right. Rather, by providing an affirmative defense to prosecution when property is ‘open to members of the public’ and an alleged trespasser has complied with

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CLERK OF THE COURTS OF FRANKLIN COUNTY
CHAMBERSBURG, PENNSYLVANIA 17201

LAST DAY FOR FILING	DAYS TO BE ADVERTISED	DATE TO BE CONFIRMED
January 26, 1989	February 2, 9, 16 and 23, 1989	March 2, 1989
March 2, 1989	March 9, 16, 23 and 30, 1989	April 6, 1989
March 30, 1989	April 6, 13, 20, and 27, 1989	May 4, 1989
April 27, 1989	May 4, 11, 18 and 25, 1989	June 1, 1989
June 1, 1989	June 8, 15, 22 and 29, 1989	July 6, 1989
June 29, 1989	July 6, 13, 20 and 27, 1989	August 3, 1989
August 3, 1989	August 10, 17, 24 and 31, 1989	September 7, 1989
August 31, 1989	September 7, 14, 21 and 28, 1989	October 5, 1989
September 28, 1989	October 5, 12, 19 and 26, 1989	November 2, 1989
November 2, 1989	November 9, 16, 23 and 30, 1989	December 7, 1989
November 30, 1989	December 7, 14, 21 and 28, 1989	January 4, 1990
December 28, 1989	January 4, 11, 18 and 25, 1990	February 1, 1990

The above schedule is taken from the printed Court Calendar for 1989 and it has been developed merely as a convenience for individuals involved with estate, guardian and trustee accounts. If any discrepancies exist between the above schedule and the printed Court Calendar, the printed Court Calendar would be the schedule to follow.

BAR NEWS ITEM

The Journal takes this opportunity to congratulate Lynn Y. MacBride, Esquire, upon her admission on December 1, 1988, to the roll of attorneys who regularly practice Law before the Bar of the 39th Judicial District, Pennsylvania, Franklin County Branch. She will have her office for the practice of Law as an Associate, with the law firm of David C. Cleaver, P.C., in Chambersburg.

all 'lawful conditions' for access, the statue reflects a proper and necessary accommodate by the legislature of the right to freedom of expression. 18 Pa. C.S. §3503 (c)(2). This accommodation is premised on the established principle that government may, when necessary, protect personal liberties even when that protection, to a limited extent, subordinates the constitutional interest of others. *Tate* at page 172.

In *Commonwealth vs. Goldsborough, Jr.*, 284 Pa. Super. 435, 426 A.2d 126 (1981) the defendant was convicted of criminal trespass, a felony of the second degree. A fire in a shed and home had been brought under control at 4:30 a.m. The fire chief was the last fireman to leave the premises, and before leaving he instructed the property owner and a next door neighbor to keep everyone away from the building until the cause of the fire could be investigated. At 9:30 p.m. the defendant was observed in the area where the shed had been located, and the neighbor informed him that the fire chief did not want the area disturbed until the fire marshal had the opportunity to inspect it. Subsequent to that warning the defendant entered an apartment in the fire-damaged building. He was charged and convicted of the felony criminal trespass. On appeal the defendant contended that the evidence produced was sufficient for his conviction. The Superior Court affirmed the judgment of sentence and inter alia held that the Commonwealth had sustained its burden of proving the element of scienter because the neighbor had informed the defendant of the fire chief's orders forbidding persons to enter the premises.

While the Supreme and Superior Court cases above noted are certainly not controlling in the case at bar, they do establish that the defiant trespass section is designed to protect property rights, and a notice not to enter promulgated by a fire chief and relayed by a neighbor to a defendant is sufficient to establish that the defendant knew he had not permission to enter.

Here, we have an emergency situation of unknown magnitude in which Detective North and Patrolman Sheppard were assigned to do whatever was necessary which we conclude must have included traffic and crowd control for the protection of all persons in the area and property.

Therefore, we conclude that Detective North was a person authorized to give notice to the defendant not to enter into the fire scene area inside the chain link fence. Therefore, we find that

the Commonwealth did establish a prima facie case of defiant trespass.

Lawfully-enacted legislation is presumed to be constitutional. An Act of Assembly will not be declared unconstitutional unless it clearly, palpably and plainly violates the Constitution. The burden rests upon the party seeking to upset legislative action on constitutional grounds. All doubt is to be resolved in favor of sustaining the legislation. See *Singer v. Sheppard*, 464 Pa. 387, 346 A.2d 897 (1975). (*Commonwealth v. Jones, Pa. Super.*, 543 A.2d 548, 551 (1988).)

We find no merit in defendant's contention that Section 3503(b) is unconstitutionally vague.

ORDER OF COURT

NOW, this 1st day of September, 1988 the Omnibus Pre-Trial Motion of Tommie Lynn Pogue in the nature of a Motion to Quash is dismissed.

Exceptions are granted to the defendant.

FIRST NATIONAL BANK AND TRUST COMPANY V. CORNETT, ET AL., C.P. Franklin County Branch, No. D.S.B. 1987-822

Confession of Judgement - Promissory Note - Guarantee - Motion to Strike - Attorney Fee

1. For a contract authorizing confession of judgement to be enforceable, it must be free from doubt.
2. Where a guarantee agreement does not state that attorney fees for collection costs are recoverable, a reasonable doubt is raised where plaintiff argues such costs are included in the general term "costs of suit."
3. If a confessed judgement includes an item not authorized by the warrant of attorney, the judgement is void in its entirety and must be stricken.

Timothy W. Misner, Esq., Attorney for Plaintiff
Stephen E. Patterson, Esq., Attorney for Defendant Cornett

KAYE, J., October 11, 1988:

OPINION

This matter comes before this Court on the petition of William L. Cornett and A. Arlene Cornett, his wife, ("Petitioners") to strike or open a judgment entered by confession pursuant to the cognovit clause contained in a guaranty agreement executed by petitioners on a promissory note. Initially we will set forth the facts alleged in the petition, and which are matters of record, admitted in the pleadings, or which were conceded at the evidentiary hearing held on the petition.

On October 24, 1986, Automotive Multi-List Service, Inc. ("AMS") made and delivered to First National Bank and Trust Company, Waynesboro, Pennsylvania, ("the bank"), a promissory note in the principal amount of \$198,000. William L. Cornett, in his capacity as President of AMS, was one of the makers of the note:

Waynesboro, Pa., October 24, 1986. \$198,000.00. On Demand days AFTER DATE, I, WE, OR EITHER OF US, PROMISE TO PAY TO THE ORDER OF First National Bank and Trust Company AT FIRST NATIONAL BANK & TRUST COMPANY, WAYNESBORO, PENNA. One Hundred Ninety-Eight Thousand and no/100 ----- DOLLARS WITHOUT SETOFF OR COUNTERCLAIM, FOR VALUE RECEIVED WITH INTEREST. And further _____ do hereby authorize and empower the Prothonotary or any Attorney of any Court of Record of Pennsylvania, or elsewhere, to appear for and to enter judgment against _____ for the above sum at any time before or after maturity, with cost of suit, release of errors, without stay of execution and with 15 per cent added for collection fees; and _____ do hereby waive and release all relief from any and all appraisal, stay or exemption laws of any state, or any bankruptcy laws of the United States, now in force, or hereafter to be passed.

Automotive Multi-List Service, Inc.
/s/ William L. Cornett (seal)
President (seal)
/s/ W. Kenneth Haugh (seal)
Secretary/Treasurer

Witness /s/ Dale R. Kinley

Also on October 24, 1986, the following writing ("the guaranty") was executed: