IN THE COURT OF COMMON PLEAS OF BLAIR COUNTY, PENNSYLVANIA
Criminal

COMMONWEALTH OF PENNSYLVANIA	)	
	)	
v.	)	**No. CP-07-CR-1272-2014**
	)	
JOSHUAA BRUBAKER	)	

Joshuaa Brubaker's Brief in Support of His Omnibus Pre-Trial Motion

"If there is a bedrock principle underlying the First Amendment, it is that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable . . . Punishing desecration of the flag dilutes the very freedom that makes this emblem so revered, and worth revering."

***United States v. Eichman*, 496 U. S. 310 (1990)**

1. Factual and Procedural History

In May of 2014, Joshuaa Brubaker purchased an American flag, spray painted the initials "A.I.M" (American Indian Movement) on its face, and hung it upside down on his front porch, directly across the street from and facing the Allegheny Township Municipal Building and its police headquarters. N.T. 6/3/14 at 16, 24. Brubaker hung the flag upside down to communicate his distress over a Pennsylvania Supreme Court decision dispensing with an automobile search warrant requirement and the United States government's proposed Keystone Pipeline routing through "Wounded Knee . . . Indian territory." N.T. 6/3/14 at 70-72. Brubaker, part Native American by birth, wanted people to "see [his flag]" and to "make them think" about how "our freedoms are taken away from us more and more every day." N.T. 6/3/14 at 72. Brubaker also wanted to

teach his children "that when you believe in something strongly, you have to take a stance, no matter whether it's popular on unpopular." N.T. 6/3/14 at 72.

On May 13, 2014, after receiving a citizen complaint, Assistant Allegheny Township Police Chief Leo Berg III, decided to file flag desecration charges against Brubaker because he found the flag display "very offensive" and "disgraceful"; the "A.I.M." initials were not written in a "neat, orderly way"; and the flag " wasn't . . .displayed . . .patriotically. . . or in an "honorable . . . decent way." N.T. 6/3/14 at 60. Berg also felt that Brubaker had not "earned [the] privilege" to "utilize a United States symbol for his personal use" because of political views he expressed months before the police chief. N.T. 6/3/14 at 56.

Assistant Chief Berg seized Brubaker's flag without a warrant or consent, and despite the fact that he did not know what the spray-painted "A.I.M" meant. N.T. 6/3/14 at 37. Brubaker, who was not home at the time of the seizure, went to the police headquarters to report that his flag had been stolen. N.T. 6/3/14 at 46, 51. Berg encouraged another officer to use Brubaker's stolen item report as a prosecutorial tactic to secure an admission of ownership. N.T. 6/3/14 at 46-48. Berg stopped Brubaker as he was leaving the station to tell him that he was being charged with flag desecration. N.T. 6/3/14 at 52. Brubaker apologized to Berg for upsetting him, and explained that "A.I.M." stood for the "American Indian Movement" and the upside-down flag was a long recognized symbol of distress. N.T. 6/3/14 at 52-53. Brubaker explained why he felt the country was in distress and provided Berg with copies of two Supreme Court cases, *Texas v. Johnson*, 491 U.S. 397 (1989) and *United States v. Eichman*, 496 U. S. 310

(1990), to help him understand why he felt that it was legal to use his flag to express his political views. N.T. 6/3/14 at 58-59.

After the encounter, Berg filed flag desecration charges under 18 Pa.C.S. §2102, Desecration of Flag, and 18 Pa.C.S. §2103, Insults to National or Commonwealth Flag. On June 3, 2014, District Magistrate Jackson bound the charges over after a preliminary hearing. On August 8, 2014, Brubaker filed an omnibus pretrial motion requesting that this Court:

- Declare that 18 Pa.C.S. §2103 is unconstitutional on its face.
- Quash Count 1 of the Information because 18 Pa.C.S. §2103 has been unconstitutionally applied to Mr. Brubaker.
- Grant *habeas corpus* relief on Count 1 of the Information because Mr. Brubaker did not engage in "malicious" conduct toward a "displayed" flag.
- Quash Count 2 of the Information because 18 Pa.C.S. §2102 has been unconstitutionally applied to Mr. Brubaker.
- Grant *habeas corpus* relief on Count 2 of the Information because it is uncontroverted that Mr. Brubaker's conduct fell within that statute's exception for "any patriotic or political demonstration or decorations, "18 Pa.C.S. §2102(b)(4), and in any event the District Attorney failed to prove a violation of 18 Pa.C.S. §2102(b)(1).

On December 9, 2014, the Court granted the parties' request to use the June 4, 2014, preliminary hearing notes of testimony as the record and to file legal memorandum within thirty days.

2. Pennsylvania's Flag Desecration Statute

Pennsylvnaia's flag desecration statutes, among the nation's first, date back to 1898, and were last amended in 1972. The current statutes provide, in relevant part:

18 Pa.C.S. § 2103, Insults to national or Commonwealth flag, states:

> A person is guilty of a misdemeanor of the second degree if he maliciously takes down, defiles, injures, removes or in any manner damages, insults, or destroys any American flag ... which is displayed anywhere.

18 Pa.C.S. § 2102, Desecration of flag, states in part:

> (a) A person is guilty of a misdemeanor of the third degree if, in any manner, he:
>
> (4) publicly or privately mutilates, defaces, defiles, or tramples upon, or casts contempt in any manner upon any flag
>
> (b) Exception.
>
> (4) to any patriotic or political demonstration or decorations.

Today's statute is virtually identical to the law as amended in 1939, and despite the United States Supreme Court's crystal clear decisions in *Texas v. Johnson* and *United States v. Eichman* invalidating criminal flag desecration statutes under the First Amendment.

Pennsylvania courts have not ruled on the constitutionality of § 2103. The Pennsylvania Supreme Court, however, has ruled on the constitutionality of § 2102 in *Commonwealth v. Bricker*, 666 A.2d 257 (Pa. 1995). Bricker was charged with desecrating the flag under 18 Pa.C.S. § 2102(a) after a police officer observed the national flag on the floor of defendant's home with several pairs of shoes on top. *Id.* The court held that § 2102(a) was unconstitutional as applied because the First Amendment protects Bickler's expressive admittedly nonpolitical conduct and should have been afforded safe harbor under an expansive reading of § 2102(b)(4)'s "patriotic or

political demonstration or decorations" exemption. The court pointed to this exemnption in support of its decision against finding § 2102 unconstitutional on its face.

3. Constitutional Principles

a. The Court Must Quash the Information Because Pennsylvania's Flag Desecration Statutes Are Unconstitutional As Applied

"If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Texas v. Johnson,* 491 U.S. 397, 414 (1989). It has long been recognized that the American flag is a symbol "[p]regnant with expressive content" protected by the First Amendment. *See, e.g.,Texas v. Johnson,* 491 U.S. 397 (1989) (burning the flag); *Spence v. Washington,* 418 U.S. 405 (1974) (attaching a peace sign to the flag). In *Texas v. Johnson,* 491 U.S. 397 (1989), the seminal flag desecration decision, the Supreme Court held that a Texas flag desecration statute violated the First Amendment and was unconstitutionally applied to a protester who burned an American flag outside of a national political convention. One year later, the Supreme Court invalidated the federal Flag Protection Act as applied to defendants who were prosecuted for setting fire to American flags on the steps of the United States Capitol. *United States v. Eichman,* 496 U.S. 310 (1990).

Brubaker flew his flag upside down with A.I.M. written on it to communicate his political views -- core First Amendment protected expression. Berg charged Brubaker because he was offended by the manner of expression and had received a single citizen complaint. Specifically, Berg explained that the initials were not written in a neat, orderly, patriotic, honorable or decent manner. The Commonwealth also targeted Brubaker because of his beliefs. Berg explained that Brubaker had not "earned [the]

privilege" to "utilize a United States symbol for his personal use" because of political views he had expressed months before. N.T. 6/3/14 at 56.

Brubaker was not, therefore, "prosecuted for the expression of just any idea; he was prosecuted for his expression of dissatisfaction with the policies of this country, expression situated at the core of our First Amendment values." *Texas v. Johnson,* 491 U.S. 397 (1989) at 411. The court must Quash the Information because the Commonwealth's use of § 2102 and § 2103 to prosecute Brubaker because of his political views and the manner of his expression violates the First Amendment and Article 1 of the Pennsylvania Constitution.

b. 18 Pa.C.S. § 2103 Is Unconstitutional on its Face

Imprecise laws can be attacked on their face as either overbroad or vague. The overbreadth doctrine permits the facial invalidation of laws which inhibit the exercise of First Amendment rights if the impermissible applications of the law are substantial when judged in relation to the statute's plainly legitimate sweep. *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973). Even if an enactment does not reach a substantial amount of constitutionally protected conduct, it may be impermissibly vague if it fails to establish standards for the police and public that are sufficient to guard against the arbitrary deprivation of liberty interests. *City of Chicago v. Morales*, 527 U.S. 41, 53 (1999).

1. Section 2103 is Overbroad and Violates The First Amendment and Article 1 of the Pennsylvania Constitution

The Constitution provides "significant protection from overbroad laws that chill speech within the First Amendment's vast and privileged sphere." *Ashcroft v. Free Speech Coalition,* 535 U.S. 234, 244, 122 S.Ct. 1389, 1399, 152 L.Ed.2d 403 (2002). The overbreadth doctrine permits the facial invalidation of laws that inhibit the exercise

of First Amendment rights 'if the impermissible applications of the law are substantial when judged in relation to the statute's plainly legitimate sweep.'" *Depaul v. Commonwealth*, 969 A.2d 536, 553 (Pa. 2009), quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 622 (1973). "The first step in overbreadth analysis is to construe the challenged statute; it is impossible to determine whether a statute reaches too far without first knowing what the statute covers." *United States v. Williams*, 553 U.S. 285, 293 (2008). After construing the statute, the second step is to examine whether the statute criminalizes a "substantial amount" of expressive activity. *Id.* at 292. The showing that a law punishes a "substantial" amount of protected free speech, "judged in relation to the statute's plainly legitimate sweep," *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973), suffices to invalidate all enforcement of that law, "until and unless a limiting construction or partial invalidation so narrows it as to remove the seeming threat or deterrence to constitutionally protected expression." *Id.* at 613. See also *Virginia v. Black*, 538 U.S. 343, 367 (2003).

In 2010, the United States Supreme Court considered whether a federal statute, 18 U.S.C.S. §48, criminalizing the commercial creation, sale, or possession of certain depictions of animal cruelty was unconstitutionally overbroad. *United States v. Stevens*, 559 U.S. 460 (2010). The statute defines depictions of animal cruelty as "one in which a living animal is intentionally maimed, mutilated, tortured, wounded, or killed." *Id.* at 464-65. The government prosecuted Stevens for selling videos depicting pit bulls engaging in dogfights and attacking other animals. *Id.* at 466. The Court found that the statute's plain language criminalized protected conduct, such as videos depicting hunting, and therefore unconstitutionally overbroad because a "substantial number of its

applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *Id.*

The Pennsylvania Supreme Court similarly struck the Trademark Counterfeiting Statute 18 Pa.C.S. § 4119 as unconstitutionally overbroad. *Commonwealth of Pennsylvania v. Omar*, 981 A.2d 179. *Omar* consists of two consolidated cases: Appellee Omar was charged with violating the statute after a police officer stopped his vehicle and saw a number of boxes of "what appeared to be counterfeit Nike sneakers." *Id.* at 182. Appellee O'Connor was arrested and charged for selling hats bearing the Penn State logo outside a stadium on the Penn State Campus. *Id.* Appellees argued that the statute "is easily applied to a broad array of constitutionally protected activity," including the use of the word "Nike" on a protest sign or even "Penn State" in their reply brief to the court. *Omar*, 981 A.2d at 184. Although the Court concedes that "the likely legislative intent behind the [statute] was to prohibit the deceptive, unauthorized use of a trademark for profit, ... the plain language of the statute as written prohibits a much broader range of uses of trademarks, many of which involve constitutionally protected speech." *Id.* at 186. As written, "the statute criminalizes not only the use of the trademark, which would include the stylized logo or name but also the mere word, without regard to font or color." *Id.* at 187. Thus, the statute clearly "prohibits a substantial amount of protected speech." *Id.*

Section 2103 is overbroad and facially unconstitutional because it criminalizes the spectrum of core First Amendment expressive communication – political, artistic, commercial – when deigned by the government to be, as suggested by the statute's title, injurious to flag. Unlike Section 2102, 2103 contains no exemption for political speech

or expressive conduct. The statute's "malicious" requirement demonstrates the legislature's intent to target disfavored expressive communication by only excluding unintended desecration or expression that does not "injure." Indeed, it is hard to image any scenario where the statute would be applied to non expressive conduct.

"The hallmark of the protection of free speech is to allow 'free trade in ideas'—even ideas that the overwhelming majority of people might find distasteful or discomforting." *Virginia v. Black*, 538 U.S. 343, 358 (2003). As Justice Scalia explained when asked about his decision to invalidate Texas' desecration statute: "[I]f I were king, I -- I would not allow people to go about burning the American flag. However, we have a First Amendment, which says that the right of free speech shall not be abridged. And it is addressed, in particular, to speech critical of the government. I mean, that was the main kind of speech that tyrants would seek to suppress." Scalia, Antonin. Interview by Piers Morgan. Piers Morgan Tonight. CNN, July 18, 2012. This Court must declare § 2103 unconstitutional because enforcement, or the threat of enforcement, against *anyone*, would deter and chill constitutionally protected expression. *Broadrick v. Oklahoma*, 413 U.S. 601, 629 (1973) . That threat harms not only Brubaker but society as a whole and compels this court to invalidate the statue. *Id*

2. **Section 2103 Violates the Void-for-Vagueness Due Process Doctrine Under the Fourteenth Amendment and Article 1 of the Pennsylvania Constitution.**

The void-for-vagueness doctrine prevents arbitrary and discriminatory enforcement of the law by requiring legislatures to set reasonably clear guidelines for law enforcement officials and triers of fact. *Smith v. Goguen (Goguen II)*, 415 U.S. 566 (1974). Otherwise, a "vague law impermissibly delegates basic policy matters to

policemen, judges, and juries for resolution on an ad hoc and subjective basis..." *Stephenson v. Davenport Community School District,* 110 F.3d at 1308, quoting *Grayned v. City of Rockford,* 408 U.S. 104, 108-09, (1972); *see also United States v. Reese,* 92 U.S. 214, 221, (1875). Especially where a statute's literal scope, as here, "is capable of reaching expression sheltered by the First Amendment, the [void-for-vagueness] doctrine demands a greater degree of specificity than in other contexts." *Goguen II,* 415 U.S. 566 at 573. "Flag contempt statutes have been characterized as void for lack of notice on the theory that what is contemptuous to one man may be a work of art to another." *Id.* at 573.

The United States District Court for the Southern District of Iowa's decision in *Roe v. Milligan* invalidating Iowa's flag desecration and flag misuse statutes as void-for-vagueness are instructive. *Roe v. Milligan*, 479 F. Supp. 2d 995 (2007)

The court held that the flag misuse statutes failed to specifically define vital terms necessary to put a person of reasonable intelligence of notice of what conduct is prohibited. *Id* at 1011. The court invalidated the statute as void-for-vagueness because: vague and subjective terms such as "cast contempt" and "show disrespect" were too subjective and subject to widely varying attitudes and tastes, and allowed local law enforcement authorities' unfettered discretion to decide what represents "contempt" and "disrespect." *Goguen II,* 415 U.S. at 573-74.

In Section 2103, "maliciously, "defiles", "injures" and "insults" are similarly vague and subjective terms subject to widely varying attitudes and tastes, particularly in the context of expressive conduct. Assistant Chief Berg's testimony that he found Brubaker's writing style and manner of display offensive, unpatriotic and without honor

while not taking offense to a politician who "respectfully" affixed a political message on a flag vividly demonstrates this problem. N.T. 6/3/14 at 57. The Pennsylvania legislature placed Berg in the unenviable and unworkable position of predicating criminal charges on his subjective political and aesthetic assessments. The statute, therefore, violates due process by failing to provide meaningful notice to the public of what is prohibited conduct and by permitting law enforcement unfettered discretion in applying their subjective opinions and judgments as criteria for enforcement. Accordingly, the court must invalidate 18 Pa. C.S. § 2103 as unconstitutionally void-for-vagueness.

3. **Habeas Corpus**

a. **Count 1, 18 Pa. C.S. § 2103**

The District Attorney failed at the preliminary hearing to prove that Mr. Brubaker's use of the flag was "malicious" the meaning of 18 Pa.C.S. §2103. Instead, the record demonstrates that Brubaker's intent was to convey a political message with his flag on his property. Moreover, Section 2103 is designed by its terms, to punish conduct toward a flag that is in an existing condition of display. Thus, for example, the statute would criminalize the malicious "taking down" and destruction of a flag being displayed in front of a government building. The record makes it clear that anything Mr. Brubaker did to the flag *occurred before it was displayed.* It was, moreover, his own flag on his own property.

b. **Count 2, 18 Pa. C.S. § 2102**

The record is undisputed: Brubaker's use of the flag was political in purpose and intent. Section 2103(b)(4) of the Crimes Code excepts from prosecution any use of the flag associated with "any patriotic or political demonstration or decorations." The

exception contained in 18 Pa.C.S. §2103(b)(4) negates any asserted *prima facie* violation of 18 Pa.C.S. §2103(a). The District Attorney did not and cannot prove that Brubaker's use of his flag to communicate his political views amounts satisfied the Commonwealth's prima facie burden "publicly or privately mutilated, defaced, defiled, or trampled upon, or cast contempt in any manner upon any flag."

4. **Motion to Suppress**

The Police Unlawfully Seized Mr. Brubaker's Flag

It is undisputed that the police did not have a warrant to seize the flag hanging on the side of Mr. Brubaker's house. The Commonwealth will undoubtedly attempt to justify this warrantless seizure as an incident of the "plain view" doctrine:

> The plain view doctrine permits the warrantless seizure of evidence in plain view when: (1) an 'officer views [the] object from a lawful vantage point'; and (2) it is 'immediately apparent' to him that the object is incriminating....
>
> In determining 'whether the incriminating nature of an object [is] immediately apparent to the police officer,' we look to the 'totality of the circumstances.' Id. An officer can never be one hundred percent certain that a substance in plain view is incriminating, but his belief must be supported by probable cause. We note in passing that appellee does not claim that the police were not in a lawful vantage point. Thus, the issue revolves upon whether the incriminating nature of the letter was "immediately apparent."

Com. v. Johnson, 2007 PA Super 88, ¶ 6, 921 A.2d 1221, 1223 (2007) (citations omitted).

The record demonstrates that any asserted "incriminating nature" of the flag was not "immediately apparent." Indeed, even though he had seen the flag Chief Berg "did not immediately respond" to the situation. N.T. 6/3/14 at 17. Moreover-- and

as developed in greater detail above-- the display of the flag was clearly a political statement. It simply was not a criminal act; there was no incriminating quality to the flag.

Respectfully submitted :

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Date: 1/8/14

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CERTIFICATE OF SERVICE

I hereby certify that I am this day causing the foregoing document to be served upon the following person(s) in the manner indicated below, which service satisfies the requirements of Pa.R.Crim.P. 576:

Service by hand delivery:

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