

IN THE COURT OF COMMON PLEAS OF BLAIR COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA :
 :
 v. : CR 1272-2014
 :
 JOSHUA SHANE BRUBAKER :
 Defendant :
 :

HON. DANIEL J. MILLIRON PRESIDING JUDGE
RICHARD CONSIGLIO, ESQ. DISTRICT ATTORNEY
ANDREW SHUBIN, ESQ. COUNSEL FOR DEFENDANT
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OPINION AND ORDER

This matter comes before the Court as an Omnibus Pretrial Motion filed by Defendant, Joshuaa Shane Brubaker, on August 8, 2014. Defendant’s Motion sought to declare 18 Pa.C.S.A. § 2103 unconstitutional; quash Counts 1 and 2; grant *habeas corpus* relief on Counts 1 and 2; and suppress the flag seized by police. At the suppression hearing on December 9, 2014, both counsel submitted a joint proposal that no additional testimony was required and the Court would consider the testimony from the Preliminary Hearing. The Court provided counsel with additional time to provide any legal memorandum they wished the Court to consider. Defendant filed a Brief in Support whereas the Commonwealth did not.

The Court makes the following:

FINDINGS OF FACT

1. Defendant hung an upside down American flag on the side of his house (located directly across from the Allegheny Township Municipal) with the initials “A.I.M.” painted across it. A.I.M. stands for the American Indian Movement. Prelim. Hr’g. 12: 21-25; 16:10-14, 18-22, June 3, 2014.
2. Tonetta McFadden witnessed Defendant’s flag and made two complaints to the police station; she was not aware that A.I.M. was the abbreviation for the American Indian Movement. *Id.* at 8:19-22; 9:24-25; 12:21-25; 16:11-14.

3. Assistant Chief Leo John Berg, III took photographs of Defendant's American flag after Ms. McFadden's complaint. *Id.* at 16:19–22; 17:14–16. After the second complaint from Ms. McFadden, Assistant Chief Berg went to Defendant's residence and seized the flag that was screwed into Defendant's house; he did not leave a property receipt. *Id.* at 40:6–8; 44.
4. When Defendant came to the police station to report the stolen flag, he explained to Officer Berg that the American flag was hung upside down "as the country was in distress" and "A.I.M." is the abbreviation for the American Indian Movement. *Id.* at 19:16–18, 22–24; 46:1–9.
5. Defendant was charged on May 14, 2014 with Insults to National or Commonwealth Flag, 18 P.S. § 2103, a Misdemeanor of the Second Degree; and Desecration of flag, 18 P.S. § 2102(a)(4), a Misdemeanor of the Third Degree.

DISCUSSION

Pennsylvania courts have not ruled on the constitutionality of 18 Pa.C.S. § 2103, Insults to National or Commonwealth Flag. Although Defendant's first Motion seeks to declare § 2103 unconstitutional, the Court will initially address Defendant's second Motion seeking to quash Count 1.

I. MOTION TO QUASH COUNT 1: INSULTS TO NATIONAL OR COMMONWEALTH FLAG

18 Pa.C.S. § 2103 provides that "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 or the flag of the Commonwealth which is displayed anywhere." Defendant maintains that the police applied § 2103 to Defendant in a discriminatory manner in violation of his rights. Def.'s Mot. ¶¶ 21–22.

The Court begins its analysis by determining whether Defendant's actions were constitutionally protected conduct. In *Texas v. Johnson*, 491 U.S. 397 (1989), Johnson was convicted of desecration of a flag in violation of Texas law after Johnson publicly burned an American flag as a means of political protest. *Id.* at 399. In its analysis, the United States Supreme Court analyzed whether Johnson's burning of the flag constituted expressive conduct protected by the First Amendment. "In deciding

whether particular conduct possesses sufficient communicative elements to bring the First Amendment into play, we have asked whether “[a]n intent to convey a particularized message was present, and [whether] the likelihood was great that the message would be understood by those who viewed it.” *Id.* at 403–404. (internal citations omitted). The United States Supreme Court acknowledged the plethora of case law that recognized “the communicative nature of conduct relating to flags.” *Id.* at 404. Ultimately, the United States Supreme Court held that Johnson’s burning of the flag was protected expression under the First Amendment as his actions constituted expressive conduct that was political in nature.

In the instant matter, 18 Pa.C.S. § 2103 criminalizes any person who “maliciously takes down, defiles, injures, removes or in any manner damages, insults, or destroys any American flag or the flag of the Commonwealth which is displayed anywhere.” The record demonstrates that Defendant hung an American flag upside down with A.I.M. spraypainted across the front which admittedly caused insult and offense to several who observed it. Prelim. Hr’g. 11:6–14; 18:5–9, June 3, 2014. Assistant Chief Leo John Berg, III of the Allegheny Township Police Department testified at the Preliminary Hearing that it did not matter what A.I.M. stood for, but that the insult stemmed from the manner in which A.I.M. was written and that the flag was displayed in an unpatriotic and dishonorable manner. *Id.* at 55:13–15. “[Defendant] changed the value of the flag for him, compared to the law aiding citizens of the United States.” *Id.* at 58:2–4; 60:4–8.

Regardless, it is evident that Defendant’s conduct was expressive conduct constituting political speech protected by the First Amendment. Defendant testified at the Preliminary Hearing as to why he flew the American flag in such a manner to

communicate his political views:

I hung the flag outside of my house on the outside and put "AIM" on it specifically so that people would see it and it would make them think, maybe have them Google what AIM is about, or what the upside down flag is about.

I believe that our country is in distress. Our freedoms are taken away from us more and more every day. And there's people – most of us just sit by and let it go and hope that it doesn't involve us by coming to our door.

Id. at 71:22–25; 72:1–6.

The Commonwealth has failed to prove that Defendant's conduct was not political speech protected by the First Amendment. Simply put, the prosecution of Defendant for his actions directly contravenes those protections in the First Amendment. Free Speech is among, if not the greatest, of our Protections.

Moreover, in a First Amendment case, the content of the message being challenged is less important than the concept being protected. While Defendant's views are certainly in the minority, it is that exact status which the First Amendment protects. The political views of the majority are rarely subject to a First Amendment challenge; therefore, the smaller the group, even a sole individual who espouses the minority view, the greater the need for First Amendment protection.

As such, Defendant's Motion is granted and Count 1 is quashed and dismissed.

II. MOTION TO DECLARE 18 Pa.C.S. § 2103 UNCONSTITUTIONAL

Defendant seeks to declare § 2103 as unconstitutional for being facially overbroad in violation of the First Amendment to the United States Constitution and Article 1, Section 7 of the Pennsylvania Constitution. Def.'s Mot. ¶¶ 14–17. The Court declines to address this argument based on its analysis above that Defendant's expressive conduct was political speech protected by the First Amendment and dismissal of Count 1.

III. MOTION FOR WRIT OF HABEAS CORPUS: COUNT 1: INSULTS TO NATIONAL OR COMMONWEALTH FLAG

Defendant seeks *habeas corpus* relief as the Commonwealth allegedly failed to prove at the Preliminary Hearing that Defendant maliciously used the flag pursuant to 18 Pa.C.S. § 2103. Def.'s Mot. ¶¶ 23, 27. This argument is moot based on the Court's analysis in Section I that Defendant's expressive conduct was political speech protected by the First Amendment and dismissal of Count 1.

IV. MOTION TO QUASH COUNT 2: DESECRATION OF FLAG

Defendant seeks to quash Count 2, Desecration of a flag, 18 Pa.C.S. § 2102. Section 2102 provides that

(a) A person is guilty of a misdemeanor of the third degree if, in any manner, he:

(1) for exhibition or display places any marks, writing or design of any nature or any advertisement upon any flag;

(2) exposes to public view any such marked or defiled flag;

(3) manufactures, sells, exposes for sale, gives away, or has in his possession for any of such purposes any article which uses the flag for the purposes of advertisement, sale or trade; or

(4) publicly or privately mutilates, defaces, defiles, or tramples upon, or casts contempt in any manner upon any flag.

(b) **Exception.**--Subsection (a) of this section does not apply:

(1) To any act permitted by the statutes of the United States, or by the regulations of the armed forces of the United States.

(2) In a case where the government of the United States has granted the use of such flag, standard, color, or ensign as a trademark.

(3) To any writing or instrument, or stationery for use in correspondence on any of which shall be printed, painted, or placed said flag, disconnected from any advertisement for the purpose of sale or trade.

(4) To any patriotic or political demonstration or decorations.

(c) **Definition.**--As used in this section the word "flag" shall include any flag, standard, color, ensign or any picture or representation of any thereof, made of any substance or represented on any substance and of

any size, purporting to be a flag, standard, color or ensign of the United States or of the Commonwealth, or a picture or a representation of any thereof, upon which shall be shown the colors or any color, or any combination of colors, or either the stars or the stripes, or the stars and the stripes, in any number of either thereof, or anything which the person seeing the same, may reasonably believe the same to represent the flag, colors, standard or ensign of the United States or of the Commonwealth.

Defendant alleges that the police applied § 2102 in a discriminatory manner as Defendant's political/personal expression rights under the First Amendment were violated. Def.'s Mot. ¶¶ 29-30. Although the Court concluded in Section I that Defendant's expressive conduct was political speech protected by the First Amendment, § 2102(b)(4) further protects Defendant's conduct. Section 2102(b)(4) specifically exempts "any patriotic or political demonstration or decorations" from prosecution for desecration of the flag. The record demonstrates that the American flag was secured to the side of Defendant's home by four screws and this display was in plain view of a high traffic area of Allegheny Township. Prelim. Hr'g. 24:16-23; 39:25, 40:1-8, June 3, 2014. Defendant testified at the Preliminary Hearing that he hung the American flag in such a manner to communicate his political views that "our country is in distress" and "our freedoms are taken away from us more and more every day." *Id.* at 72:2-4.

The Court finds that Defendant's conduct was a political demonstration comprising First Amendment protected expression that was expressly exempted from prosecution by the statute's clear language. As such, Defendant's Motion is granted and Count 2 is quashed and dismissed.

V. MOTION FOR WRIT OF HABEAS CORPUS: COUNT 2

Defendant seeks *habeas corpus* relief as the Commonwealth allegedly failed to prove at the Preliminary Hearing that Defendant publicly or privately mutilated that flag in violation of 18 Pa.C.S. § 2102. Def.'s Mot. ¶ 35. This argument is moot based on the

Court's analysis in Section IV that Defendant's conduct was a political demonstration comprising First Amendment protected expression that was expressly exempted from prosecution by the statute's clear language and dismissal of Count 2.

VI. MOTION TO SUPPRESS

Defendant seeks to suppress the Defendant's American flag that the police allegedly seized in violation of Defendant's Fourth Amendment rights. Def.'s Mot. ¶ 38. However, Defendant's argument is moot as the Court quashed and dismissed Counts 1 and 2 in Sections I and IV above.

CONCLUSION

The Court grants Defendant's Motions to Quash Counts 1 and 2 as Defendant's expressive conduct was political speech protected by the First Amendment that was further exempted from prosecution by 18 Pa.C.S. § 2102(b)(4). Counts 1 and 2 are hereby dismissed.

BY THE COURT,



DANIEL J. MILLIRON,
JUDGE

Dated: 4/28/15

IN THE COURT OF COMMON PLEAS OF BLAIR COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA

v.

JOSHUA SHANE BRUBAKER
Defendant

CR 1272-2014

HON. DANIEL J. MILLIRON

PRESIDING JUDGE

RICHARD CONSIGLIO, ESQ.

DISTRICT ATTORNEY

ANDREW SHUBIN, ESQ.

COUNSEL FOR DEFENDANT

ORDER

AND NOW, this 28th day of April, 2015, upon consideration of Defendant's Omnibus Pretrial Motion, it is hereby **ORDERED, DIRECTED, AND DECREED:**

1. Defendant's Motion to Quash Count 1 is granted. Count 1 is dismissed.
2. The Court did not address Defendant's Motion to Declare 18 Pa.C.S. § 2103 unconstitutional as Defendant's conduct was protected by the First Amendment and the Court dismissed Count 1.
3. Defendant's Motion for Writ of *Habeas Corpus* as to Count 1 is moot.
4. Defendant's Motion to Quash Count 2 is granted. Count 2 is dismissed.
5. Defendant's Motion for Writ of *Habeas Corpus* as to Count 2 is moot.
6. Defendant's Motion to Suppress is moot.

BY THE COURT,



DANIEL J. MILLIRON,
JUDGE