IN THE

SUPERIOR COURT OF PENNSYLVANIA

WESTERN DISTRICT

No. 1136 WDA 2013

COMMONWEALTH OF PENNSYLVANIA,
Appellee,

V.

JAMAL KNOX,
Appellant.

BRIEF FOR APPELLANT

Appeal from the Order of Court dated February 6, 2014, at criminal informations 201206621 and 201303870, sentencing Appellant to an aggregate sentence of two to six years incarceration years incarceration followed by a period of probation entered by the Honorable Jeffrey A. Manning in the Criminal Division of the Court of Common Pleas of Allegheny County, Pennsylvania.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CONSTITUTIONS **Page(s)**

SECONDARY SOURCES **Page(s)**

OTHER SOURCES **Page(s)**

STATEMENT OF JURISDICTION

The Superior Court of Pennsylvania has jurisdiction over this matter pursuant to 42 Pa.C.S.A. §742 as an appeal from a final order of the Court of Common Pleas of Allegheny County. The Trial Court's sentence of twenty-three to forty-six years incarceration and subsequent denial of post-sentencing motions constitute a final order and within the terms of Pa.R.A.P. 341.

STATEMENT OF THE SCOPE AND THE STANDARD OF REVIEW

I. Motion to Suppress Traffic Stop

The standard and scope of review for a challenge to the denial of a suppression motion is whether the factual findings are supported by the record and whether the legal conclusions drawn from those facts are correct. When reviewing rulings of a suppression court, an appellate court must consider only the evidence of the prosecution and so much of the evidence for the defense as remains uncontradicted when read in the context of the record as a whole. Where the record supports findings of the suppression court, the appellate court is bound by those facts and may reverse only if the legal conclusions drawn therefrom are in error. *Commonwealth v. Beaman,* 846 A.2d 764 (Pa. Super. 2004).

II. Motion for Judgment of Acquittal – Sufficiency of Evidence

In reviewing the sufficiency of the evidence to support a conviction, the appellate court should consider whether, "viewing all the evidence in the light most favorable to the Commonwealth as the verdict winner, a jury could find every element of the crime beyond a reasonable doubt." *Commonwealth v. Williams,* 640 A.2d 1251 (Pa. 1994), *citing Commonwealth v. Bryant,* 574 A.2d 590 (Pa. 1990).

III. Discretion of Trial Court – Admission of Evidence

An appellate court may reverse a trial court's ruling regarding the admissibility of evidence only upon a showing that the trial court abused its discretion. If the trial court indicated the reason for its decision, the appellate scope of review is limited to an examination of the stated reason. *Commonwealth v. Sanchez,* 848 A.2d 977 (Pa. Super. 2004). An abuse of discretion is defined as "not merely an error of judgment, but if in reaching a conclusion the law is overridden or misapplied, or the judgment is manifestly unreasonable, as the result of partiality, prejudice, bias or ill-will, as shown by the evidence in the record, discretion is abused." *Commonwealth v. Goodyear,* 411 A.2d 550 (Pa. Super. 1979).

ORDER IN QUESTION

At 201303870

AND NOW, this 19th day of June 2014, it is ORDERED that the Defendant's Post-Sentence Motion is DENIED.

BY THE COURT:

/s/Manning_____, J.

At 201206621

AND NOW, this 19th day of June 2014, it is ORDERED that the Defendant's Post-Sentence Motion is DENIED.

BY THE COURT:

/s/Manning_____, J.

STATEMENT OF THE QUESTIONS INVOLVED

At 201206621

I. Did the Trial Court err when it denied Appellant's Motion to Suppress where evidence of record does not demonstrate either reasonable suspicion or probable cause to stop the motor vehicle that Appellant was operating?

Proposed Answer: Yes

At 201303870

II. Did the Commonwealth fail to present sufficient evidence that Appellant possessed the necessary *mens rea* to commit the offenses of Intimidation of Witnesses and Terroristic Threats?

Proposed Answer: Yes

III. Did the Trial Court abuse its discretion when it admitted constitutionally protected free speech as evidence that Appellant committed the offenses of Intimidation of Witnesses and Terroristic Threats?

Proposed Answer: Yes

STATEMENT OF THE CASE

Procedural History

On April 17, 2012, Appellant, Jamal Knox (hereafter Appellant) was arrested and charged with the offenses set forth at criminal information 201206621 which included Violation of the Uniform Firearms Act, Possession With Intent to Deliver and Fleeing and Eluding. During the pendency of criminal information 201206621 Appellant was charged with Intimidation of a Witness and Terroristic Threats relative to a music video that Appellant wrote and performed in that identified the arresting officers at 201206621 by name. This matter was docketed at criminal information 201303870.

Appellant's counsel Kenneth Haber filed and litigated a Motion to Suppress the April 12, 2012, traffic stop. No other pre-trial matters were litigated. Attorney Al Burke represented Appellant at trial at both criminal information 201206621 and 201303870. Appellant proceeded with a bench trial before the Hon. Jeffrey A. Manning. At 201206621 Appellant was convicted of Possession With Intent to Distribute, Fleeing and Eluding, False Statements to Law Enforcement and Possession of a Controlled Substance. At 201303870 Appellant was convicted of two counts of Intimidation of Witness, two counts of Terroristic Threats and one count of Criminal Conspiracy.

On March 6, 2014, Appellant was sentenced at criminal information 201206621 to one to three years incarceration to be followed by two years of probation. At 201303870 Appellant was sentenced to one to three years incarceration followed by two years probation to run consecutively to the sentence imposed at 201206621. Appellant's aggregate sentence was two to six years followed by 2 years of probation.

Factual History

On April 17, 2012, Appellant was operating a motor vehicle on Hays Street in the East Liberty section of the City of Pittsburgh. A City of Pittsburgh Police vehicle was behind Appellant and occupied by officers Derbish and Kosko. According to officer testimony Appellant pulled from Hays Street in to a parking space without signaling. The police vehicle pulled alongside Appellant and asked him why he pulled over. Appellant replied he was visiting his sister. Officers than asked if Appellant possessed a valid driver's license and Appellant replied no. The police vehicle then pulled over and Appellant fled. Appellant and his passenger were apprehended after a brief motor vehicle pursuit. A firearm and a quantity of heroin were recovered from the interior of the vehicle.

Some months later City of Pittsburgh police officer Aaron Spangler, utilizing a false online account, learned that a music video had been uploaded to YouTube. The video featured a song by Appellant and co-defendant Rashee

Beasley, which allegedly threatened Officer Kosko and Officer Zeltner, another City of Pittsburgh police officer involved in an arrest of co-defendant Beasley. The lyrics to "Fuck The Police" (hereafter the "Song") are as follows:

Introduction Refrain

If y'all want beef we can beef/ I got artillery to shake the motherfuckin streets (repeat x 2)

You dirty bitches won't keep knockin' my riches/ this Ghetto Superstar Committee ain't wit it/ Fuck the Police (repeat x 2)

Verse 1 – Mayhem Mal (Jamal Knox)

This first verse is for Officer Zeltner and all you fed force bitches/ and Mr. Kosko, you can suck my dick you keep on knocking my riches/ you want beef, well cracker I'm wit it/ that whole department can get it/ all these soldiers in my committee gone fuck over you bitches/ fuck the police, bitch I said it loud/ the fuckin city can't stop me, y'all gone need Jesus tryin to break me down/ and he ain't fuckin with you dirty devils/ we makin prank calls, as soon as you bitches come we bustin heavy metal/ they chase me through these streets/ and I'm a jam this rusty knife all in his guts and trust its beef/ you taking money away from Beaz and all my shit away from me/ well your shift over at three/ and I'm gone fuckup where you sleep/ Hello Breezos got you watching my moves and talkin 'bout me to your partner/ I'm watchin you too, bitch I see better when it's darker/ Highland Park gone be Jurassic Park keep fuckin wit me/ ayo Beaz call Dre and Sweet and get them 2 23's.

Refrain

If y'all want beef we can beef/ I got artillery to shake the motherfuckin streets (repeat x 2)

You dirty bitches won't keep knockin' my riches/ this Ghetto Superstar Committee ain't wit it/

Fuck the Police (repeat x 2)

Verse 2 – Beaz Mooga (Rashee Beasley)

The cops be on my dick like a rubber when I'm fuckin/ so them bitches better run and duck for cover when I'm buckin/ Ghetto Superstar Committee, bitch we ain't scared a nothing/ I keep a 40 on my waist that'll wet you like a mop nigga/ clip filled to the tippy top wit some cop killas/ fuck the police, they bring us no peace/ that's why I keep my heat when I'm roamin through these streets/ cuz if you jump out, it's gone be a dump out/ I got my glock and best believe that bark will pull that pump out/ and I'm hittin ya chest, don't tell me stop cuz I'm resistin arrest/ I ain't really a rapper, dog but I can spit wit the best/ I ain't carry no 38 nigga, I spit wit tha tech/

that's like 50 shots nigga, that's enough to hit one cop on fifty blocks nigga/ they caught me sitting in a cell watchin my life just pass/ I ain't wit that shit, like Poplawski I'm strapped naste.

Refrain

If y'all want beef we can beef/ I got artillery to shake the motherfuckin streets (repeat x 2)

You dirty bitches won't keep knockin' my riches/ this Ghetto Superstar Committee ain't wit it/

Fuck the Police (repeat x 2)

Verse 3 –Mayhem Mal (Jamal Knox)

They killed Ryan, and ever since then I been muggin you bitches/ my Northview niggas they don't fuck wit you bitches/ I hate y'all fuckin guts/ my mamma told me not to put this on CD/ but I'm gone make this fuckin city believe me, so nigga turn me up/ if Dre was here they wouldn't fuck wit this here/ Los in the army, when he come back it's real/ nigga is you bootin up/ fuck the police, I said it loud well repeat that/ fuck the police I'm blowin loud wit my seat back/ they tunin in, well Mr. Fed if you can hear me bitch/ got tell you daddy that we boomin bricks/ and them informants that you got finna be layin in a box/ and I know exactly who workin, I'm gone kill him wit a glock/ quote that, cuz when you find that pussy layin in the street/ look at the shells and put my shit on repeat/ and that's on Jesus' blood/ fuck the police cuz they don't do us no good/ pullin ya glock out cuz I live in the hood, you dirty bitches.

Refrain

If y'all want beef we can beef/ I got artillery to shake the motherfuckin streets (repeat x 2)

You dirty bitches won't keep knockin' my riches/ this Ghetto Superstar Committee ain't wit it/

Fuck the Police (repeat x 2)

The YouTube video was removed shortly after it was viewed by Officer Spangler and shared with other officers. A short time later a video surfaced on social media in which Appellant admitted writing and performing the Song.

SUMMARY OF THE ARGUMENT

Police were required to demonstrate articulable facts to believe that Appellant was committing a traffic violation before initiating a traffic stop for Appellant's act of pulling in to a parking space without signaling. Further, police are required to demonstrate an independent basis for reasonable suspicion to continue to detain an individual after the basis for the initial traffic stop has been resolved. In the instant matter police clearly effectuated a traffic stop of Appellant's vehicle when they first pulled alongside it. Police lacked reasonable suspicion for said traffic stop. Further, police resolved the initial basis for the traffic stop when Appellant told them, to their satisfaction, that he was visiting his sister who lived nearby. Police lacked reasonable suspicion to continue to detain Appellant and continue to interrogate him. Accordingly, all evidence recovered from Appellant's illegal traffic stop must be suppressed.

The Commonwealth failed to demonstrate that Appellant possessed the *mens rea* to intimidate and/or threaten officers Kosko and Zeltner. The Trial Court in its Opinion concluded that the mere making of The Song was sufficient to impose criminal liability on Appellant despite clear statutory requirements of proving Appellant's mental state beyond a reasonable doubt. Inasmuch as the evidence of record herein demonstrates that Appellant possessed no such intent to intimidate or threaten Appellant's Judgment of Sentence must be vacated.

The Trial Court abused its discretion when it permitted the Commonwealth to introduce constitutionally protected speech in support of its case-in-chief against Appellant for the crimes of Intimidation of a Witness and Terroristic Threats. The Commonwealth's entire case was predicated on the notion that the Song was not protected by the First Amendment and that the lyrics of the Song were therefore criminal in their very nature. They incorrectly deemed the lyrics of the Song to be a "True Threat" despite considerable evidence to the contrary. Because the Trial Court permitted the admission of constitutionally protected speech Appellant's Judgment of Sentence must be vacated.

ARGUMENT

I. Did the Trial Court err when it denied Appellant's Motion to Suppress where evidence of record does not demonstrate either reasonable suspicion or probable cause to stop the motor vehicle that Appellant was operating?

The standard and scope of review for a challenge to the denial of a suppression motion is whether the factual findings are supported by the record and whether the legal conclusions drawn from those facts are correct. When reviewing rulings of a suppression court, an appellate court must consider only the evidence of the prosecution and so much of the evidence for the defense as remains uncontradicted when read in the context of the record as a whole. Where the record supports findings of the suppression court, the appellate court is bound by those facts and may reverse only if the legal conclusions drawn therefrom are in error. *Commonwealth v. Beaman,* 846 A.2d 764 (Pa. Super. 2004).

It is a fundamental principle of search and seizure jurisprudence that police officers may not detain and search an individual unless the officer possesses either probable cause to believe the individual committed a crime, or reasonable suspicion that the individual may be involved in criminal activity. The test for whether an officer possessed probable cause that an individual committed a crime is a "totality of the circumstances" test. *See Illinois v. Gates***,** 462 U.S. 213 (1983). As set forth in *Terry v. Ohio,* an investigatory stop, or *Terry* stop, is improper unless the police officer can articulate specific facts which would lead a reasonably

prudent man to believe that the individual was engaged in criminal activity. *See also United States v. Cortez,* 499 U.S. 411 (1981) (holding that reasonable suspicion requires a "particularized and objective basis for suspecting the particular person stopped of criminal activity").

In the instant matter the suppression hearing established that Officers Kosko and Derbish effectuated a traffic stop when they pulled alongside Appellant's vehicle, which Kosko described as having pulled from the roadway in to a parking space without signaling. The salient inquiry, therefore, is, whether the police were permitted to initiate a traffic stop when they observed Appellant allegedly pull from the lane of travel in to a curbside parking space without signaling. Further, was the basis for the traffic stop concluded when Appellant advised officers he was visiting his sister and officers otherwise were not going to cite Appellant for failing to signal?

Turning to the first part of the analysis, Officer Kosko lacked either probable cause or reasonable suspicion to effectuate the initial traffic stop.[1] Pursuant to well-established Pennsylvania case law, Officer Kosko is required at the very least to articulate facts sufficient to justify he belief that a traffic violation occurred. At the Suppression Hearing in this matter Officer Derbish testified that Appellant was

[1] According to evidence of record Officer Kosko pulled alongside Appellant who had just parked at a curb. Appellant was "boxed in" and a reasonable person would not have believed themselves free to leave. Therefore, at the very least, a *Terry* stop has occurred. *Terry v. Ohio,* 392 U.S. 1 (1968).

travelling normally and lawfully on Hays Street. (See Suppression Hearing Transcript, hereafter SHT, at p. 26.) He testified that they were unable to pull behind Appellant to effectuate a traffic stop so they pulled alongside him and began to ask him questions. (SHT at p. 18.) Appellant advised officers that he was going to his sister's house "across the street." (SHT at p. 27, 28.) Specifically, Officer Derbish testified during the Suppression Hearing that he would *not* have cited Appellant for pulling over without signaling, and that he was otherwise driving safely and lawfully. (SHT at p. 27.)

Was the stop a "mere encounter" or an "investigatory detention?"

The Trial Court characterized the initial traffic stop as a "mere encounter" between Appellant and the police. This is clearly a mischaracterization as Officer Derbish testified at the Suppression Hearing that they intended to effectuate a traffic stop to investigate the failure to signal violation. (SHT at p. 17, 18). It is clear from the evidence presented that Appellant was not free to leave when the police vehicle pulled alongside him.

> BY MR. HABER: So if the vehicle is parked at the curb, you were in the same line of travel that the vehicle had been in before it parked. Is that fair to say?
> OFFICER DERBISH : Yes.
> Q: I assume it was clear you and your partner were police officers?
> A. Yes.

(SHT at p. 29). Officer Derbish testified that they were: (a) Investigating a motor vehicle violation; (b) clearly identifiable as police officers; and (c) positioned in such a manner that blocked Appellant's line of travel. A reasonable person in Appellant's position would not have believed he was free to leave. Therefore, pursuant to *Terry*, *supra,* an investigative detention requiring reasonable suspicion had occurred.

Did police possess reasonable suspicion to initially detain Appellant?

Pursuant to section 6308 of Title 75:

> **(a) Duty of operator or pedestrian. --** The operator of any vehicle or any pedestrian reasonably believed to have violated any provision of this title shall stop upon request or signal of any police officer and shall, upon request, exhibit a registration card, driver's license and information relating to financial responsibility, or other means of identification if a pedestrian or driver of a pedalcycle, and shall write their name in the presence of the police officer if so required for the purpose of establishing identity.

75 Pa.C.S.A. §6308(a). *See also Commonwealth v. Satler,* 121 A.2d 897 (Pa. Super. 2015). Pennsylvania law clearly sets the threshold for a traffic stop at "reasonable suspicion" and not "probable cause." The police, therefore, are required to demonstrate a "particularized and objective basis for suspecting the particular person stopped of criminal activity." *Cortez,* 499 U.S. 411.[2]

[2] The stopping of a vehicle and detention of its occupants constitutes a "seizure" under the Fourth Amendment. The United States Supreme Court has treated routine traffic stops, whether

Pursuant to 75 Pa.C.S.A. §3334:

> **(a) General rule.** -- Upon a roadway no person shall turn a vehicle or move from one traffic lane to another or enter the traffic stream from a parked position unless and until the movement can be made with reasonable safety nor without giving an appropriate signal in the manner provided in this section.

Appellant's act of moving safely from the lane of travel to a parking spot simply did not justify a traffic stop or present articulable facts whereby the police could have concluded that Appellant had violated 75 Pa.C.S.A. §3334. Appellant's driving was more akin to the "minor and momentary" nature of an infraction as discussed by the Superior Court in *Commonwealth v. Garcia,* 859 A.2d 820 (Pa. Super. 2004). Appellant acknowledges that *Garcia* was analyzed within the framework of *Commonwealth v. Gleason,* 785 A.2d 983 (Pa. 2001) which called for "probable cause" and not "reasonable suspicion" for a traffic stop. In *Garcia* the defendant straddled the center-line before being stopped by a police officer. The Court's analysis, however, is instructive:

> Applying this " momentary and minor" standard to the facts of this case, we find that probable cause is lacking. Officer DeHoff observed appellant drive over the right berm line of the road just two times. Each time the maneuver was in response to another car coming toward appellant in the opposite lane of traffic. The conduct took place within a very short time period; Officer DeHoff observed appellant for only two blocks before making the stop.

Id.

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justified by probable cause or a reasonable suspicion of a violation, as *Terry* stops. *See Berkemer v. McCarty,* 468 U.S. 420, 439 (1984); *Pennsylvania v. Mimms*, 434 U.S.106, 109 (1977) (per curiam).

Appellant's act of pulling to the curb parking spot from his lane of travel, in which he was otherwise lawfully travelling, was insufficient to form reasonable suspicion to justify the initial traffic stop. Accordingly, any evidence recovered thereafter must be suppressed.

Did police possess reasonable suspicion to continue to detain Appellant after the basis for the initial traffic stop had been fully resolved?

The Superior Court of Pennsylvania addressed this issue in *Commonwealth v. Reppert,* 814 A.2d 1196 (Pa. Super. 2002). In *Reppert,* defendant was a passenger in a motor vehicle that was stopped for having an expired inspection sticker. The officer did not cite the driver and told him he was free to leave. Thereafter, however, the officer asked that defendant step from the vehicle and consent to a *Terry* frisk. The Superior Court held that the officer was required to demonstrate reasonable suspicion to continue to detain defendant because the initial basis for the traffic stop, the initial basis for the seizure of the driver, was concluded.

In *Karnes v. Skrutski,* 62 F.3d 485 (3d. Cir. 1995) the United States Court of Appeals for the Third Circuit addressed the issue of whether police officers possessed reasonable suspicion to detain Karnes beyond the time needed to issue a traffic citation. The Third Circuit stated that police officers were required to

demonstrate reasonable suspicion or probable cause to continue to detain a motorist who was stopped for a traffic violation once the original basis for the stop was concluded. *Id.* at 491 (citing *Berkemer v. McCarty,* 468 U.S. 420, 439 (1984).

Appellant distinguishes *Commonwealth v. Rojas*, 875 A.2d. 341 (Pa. Super. 2005) which sets forth that a police officer may request proof of insurance, registration and operator's license when performing a valid traffic stop. In the instant matter Officer Derbish testified that the basis for the traffic stop was over and that he did not intend to issue Appellant a motor vehicle violation. (SHT at p. 27, 28.)

Officer Derbish testified that he did not intend to cite Appellant for any turn signal violation. Simply stated, the initial basis for the traffic stop was therefore concluded. There was absolutely no basis to continue to detain and interrogate Appellant relative to his license status. Pursuant to *Reppert* and *Karnes*, the initial basis for the traffic stop having been concluded the police are required to demonstrate an independent basis for a continued detention. Once Officer Derbish decided not to cite Appellant for any motor vehicle violation the police were required to demonstrate an independent basis to continue the detention. They failed to do so. All evidence seized pursuant to the illegal traffic stop must be suppressed and this matter must be vacated or remanded for a new trial.

II. Did the Commonwealth fail to present sufficient evidence that Appellant possessed the necessary *mens rea* to commit the offenses of Intimidation of Witnesses and Terroristic Threats?

In reviewing the sufficiency of the evidence to support a conviction, the appellate court should consider whether, "viewing all the evidence in the light most favorable to the Commonwealth as the verdict winner, a jury could find every element of the crime beyond a reasonable doubt." *Commonwealth v. Williams,* 640 A.2d 1251 (Pa. 1994), *citing Commonwealth v. Bryant,* 574 A.2d 590 (Pa. 1990).

In its Opinion the Trial Court merely dismisses the *mens rea* issue in its sufficiency of the evidence analysis. It correctly sets forth that "actual intimidation of a witness" is not required to sustain a conviction pursuant to 18 Pa.C.S.A. §4952. *Collington,* 615 A.2d at 770. Relative to 18 Pa.C.S.A. §2706, the Trial Court correctly sets forth that a defendant need not be able to actually carry out the threat nor does the victim need to believe that the threat will be carried out in order to sustain a conviction for Terroristic Threats. *See Commonwealth v. Sinnott,* 976 A.2d 1184 (Pa. Super. 2009); *In re: B.R.*, 732 A.2d 633 (Pa. Super. 1999). At no point, however, does the Trial Court address the *mens rea* required for either Intimidation of a Witness or Terroristic Threats. Rather, pursuant to the Trial Court's analysis, both offenses are treated as strict liability offenses. According to the Trial Court, the crimes of Intimidation of a Witness and Terroristic Threats

were committed as soon as Appellant wrote "Fuck the Police" regardless of what he intended to do with the Song.

In the context of the offense of Intimidation of Witnesses, a defendant must intimidate or attempt to intimidate a witness or victim "*with the intent to or with the knowledge that* his conduct will obstruct, impede, impair, prevent or interfere with the administration of criminal justice." *Commonwealth v. Collington*, 615 A.2d 769, 770 (Pa. Super 1992) (emphasis added), *see also* 18 Pa. C.S.A. § 4952).

In the context of the offense of Terroristic Threats, a defendant must: (a) make a threat to commit violent crime; and (b) directly or indirectly communicate said threat *with the intent to* terrorize another or with reckless disregard for the risk of causing terror. *See Commonwealth v. Cancilla*, 649 A.2d 991, 992 (Pa. Super. 1994), 18 Pa. C.S.A. § 2706(a). Section 2706 defines "communicates" as "conveys in person or by written or electronic means, including telephone, electronic mail, Internet, facsimile, telex and similar *transmissions*." 18 Pa. C.S.A. § 2706(e) (emphasis added). Courts have interpreted the requisite *mens rea* of Section 2706 as scienter or "knowing." *See Commonwealth v. Ferrer*, 423 A.2d 423, 425, n. 2 (Pa. Super. 1980) (citing *Commonwealth v. Holguin*, 385 A.2d 1346, 1351, n. 11 (Pa. 1978) and noting the scienter requirement of Section 2706), *see also Commonwealth v. Hanson*, 82 A.3d 1023, 1036 (Pa. 2013) (acknowledging that the scienter requirement is the equivalent of "knowing").

It is axiomatic that "the Pennsylvania Crimes Code does not impose liability on a person for an involuntary act." *Commonwealth v. Fierst*, 620 A.2d 1196, 1202 (Pa. Super 1992) (citing 18 Pa. C.S.A. § 301), *see also Morissette v. United States*, 342 U.S. 246, 250 (1952) ("wrongdoing must be conscious to be criminal"). It follows that "the mere presence of an individual at the scene of a crime is not sufficient circumstances upon which guilt may be predicated." *Commonwealth v. Keller*, 378 A.2d 347, 349 (Pa. Super 1977). Similarly, the mere making of a threatening song that names certain individuals does not rise to the level of criminal conduct absent some additional voluntary act by the maker of the song such as his or her sending or making the song available to the individuals who are named in the song.

The Trial Court states that all that is required to commit Intimidation of a Witness is the attempt to intimidate, regardless of whether a threat is actually communicated. Section 302 of Title 18 sets forth the various mental states required to be proved in order to sustain a criminal conviction:

> § 302. General requirements of culpability.
> (a) Minimum requirements of culpability.--Except as provided in section 305 of this title (relating to limitations on scope of culpability requirements), a person is not guilty of an offense unless he acted intentionally, knowingly, recklessly or negligently, as the law may require, with respect to each material element of the offense.
> (b) Kinds of culpability defined.--
> (1) A person acts intentionally with respect to a material element of an offense when:

(i) if the element involves the nature of his conduct or a result thereof, it is his conscious object to engage in conduct of that nature or to cause such a result; and
(ii) if the element involves the attendant circumstances, he is aware of the existence of such circumstances or he believes or hopes that they exist.
(2) A person acts knowingly with respect to a material element of an offense when:
(i) if the element involves the nature of his conduct or the attendant circumstances, he is aware that his conduct is of that nature or that such circumstances exist; and
(ii) if the element involves a result of his conduct, he is aware that it is practically certain that his conduct will cause such a result.

18 Pa.C.S.A. §302(a).

Section 901 of Title 18 sets forth the *mens rea* requirements for Criminal Attempt. It states:

(a) Definition of attempt. -- A person commits an attempt when, with intent to commit a specific crime, he does any act which constitutes a substantial step toward the commission of that crime.

18 Pa.C.S.A. §901. Pennsylvania Suggested Standard Jury Instruction 12901(A) sets forth the elements that a jury must find in order to sustain a conviction for an Attempt. It sets forth:

(1) For purposes of this case the crime of ____, the crime which the defendant is charged with having attempted, may be defined as follows: (A person who ____ is guilty of the crime of ____) (____).
(2) In order to find the defendant guilty of attempted ____ you must be satisfied that the following three elements have been proven beyond a reasonable doubt:
First, that the defendant did a certain act (that is, he ____);
Second, that the defendant did the act with intent to commit the crime of ____; and
Third, that the act constituted a substantial step toward the commission of that crime.

(3) A person "intends" to commit the crime of ____ if ____. (A person cannot be guilty of an attempt to commit a crime unless he has a firm intent to commit that crime. If he has not definitely made up his mind--if his purpose is uncertain or wavering--he lacks the kind of intent which is required for an attempt.)
[(4) A person cannot be guilty of an attempt to commit a crime unless he does an act which constitutes a "substantial step" toward the commission of that crime. An act is a "substantial step" if it is a major step toward commission of the crime and also strongly corroborates the jury's belief that the person, at the time he did the act, had a firm intent to commit that crime. (An act can be a "substantial step" even though other steps would have to be taken before the crime could be carried out.)]
(5) If you are satisfied that the three elements of attempted ____ have been proven beyond a reasonable doubt you should find the defendant guilty. Otherwise you must find the defendant not guilty of this crime.

Pennsylvania Standard Suggested Jury Instruction 12901(A).

Clearly, the Commonwealth is required to prove that Appellant possessed the *mens rea* to commit the offenses of Intimidation of a Witness and Terroristic Threats. And, equally as clear, the *mens rea* for Criminal Attempt is specific intent – the Commonwealth was required to prove beyond a reasonable doubt that Appellant specifically intended to intimidate and threaten Officers Kosko and Zeltner.

Moreover, the offenses described under Section 2706 and 18 U.S.C. § 875(c) are substantially similar, which makes the recent holding in the United States Supreme Court case of *Elonis v. United States* particularly relevant to the within matter. The offenses described under these sections are substantially similar because: (a) both offenses relate to criminal threats; (b) Section 2706 utilizes the term "communicates" and Section 875(c) utilizes the term "transmits," but Section

2706 equates these terms where uses to the term "transmissions" to define "communicates"; and (c) the requisite *mens rea* for both offenses is scienter. *See Elonis v. United States*, 135 S.Ct. 2001 (2015) [hereinafter *Elonis*] (reading a scienter requirement into section 875(c)).

In *Elonis*, the defendant ("Elonis") was convicted of violating Section 875(c) based on the premise that he could be guilty *even without knowing* that others would perceive his Facebook posts as threats. *Elonis* at 2007. According to the trial court, Elonis merely had to publish via some channel of interstate commerce [i.e. the Internet] material that a "reasonable person" would perceive as threatening. *Id*. Whether or not Mr. Elonis *knew* that others would perceive his Facebook posts as threatening was irrelevant to the trial court and to the appellate court that initially upheld Elonis's conviction. The Supreme Court disagreed 8 to 1. Chief Justice Roberts wrote in the Majority Opinion:

> Having liability turn on whether a 'reasonable person' regards the communication as a threat - regardless of what the defendant thinks – 'reduces culpability on the all-important element of the crime to negligence,' […] and we 'have long been reluctant to infer that a negligence standard was intended in criminal statutes[.]

Id. at 2011 (internal citations omitted). The Court further reasoned that, "the mental state requirement in Section 875(c) is satisfied if the defendant transmits a communication for the purpose of issuing a threat, or with knowledge that the communication will be viewed as a threat." Thus, just as with Section 875(c), in

order to show that Appellant violated Section 2706, the Commonwealth must prove that Appellant transmitted the Song for the purpose of issuing a threat, or with knowledge that the Song would be viewed as a threat.

Appellant recognizes that a criminal conviction may rest on circumstantial evidence alone, but a criminal conviction may not be the result of strong suspicion, conjecture or supposition. *Commonwealth v. Wilson,* 312 A.2d 430 (Pa. Super. 1973. In *Commonwealth v. Robinson,* 817 A.2d 1153 (Pa. Super. 2003), the Superior Court of Pennsylvania addressed the issue of whether the Court's verdict, which convicted the defendant on a theory of accomplice liability, was the result of conjecture or speculation. Citing *Commonwealth v. Scott,* 597 A.2d 1220, 1221 (Pa. Super. 1991), the Court said:

> While reasonable inferences must be drawn in the Commonwealth's favor, the inferences must flow from facts and circumstances proven in the record, and must be of 'such volume and quality as to overcome the presumption of innocence and satisfy the jury of the accused's guilt beyond a reasonable doubt.' *Commonwealth v. Clinton,* 391 Pa. 212, 219, 137 A.2d 463, 466 (1958). The trier of fact cannot base a conviction on conjecture and speculation and a verdict which is premised on suspicion will fall even under the limited scrutiny of appellate review.

Robinson, 817 A.2d at 1158.

The Trial Court found that Appellant possessed the necessary *mens rea* to commit the crime of Intimidation of Witnesses because: (a) the Song constituted a threatening communication; (b) Kosko and Zeltner were the arresting officers in an active case against Beasely; and (c) Kosko and Zeltner were identified by name in

the Song. *See* Trial Court Opinion at 15. Predicated on indistinguishable factual grounds the Trial Court found that Appellant possessed the necessary *mens rea* to commit the crime of Terroristic Threats. *Id*. at 16. Thus, according to its Opinion the Trial Court found that Appellant demonstrated the requisite *mens rea* simply by making a threatening rap song that identified Kosko and Zeltner by name; just as in *Elonis*, the Trial Court considered Appellant's state of mind inconsequential as to his guilt or innocence. The Trial Court articulated this finding when it announced Appellant's convictions as well:

> BY THE COURT: Here the Court is satisfied that… [Appellant] did, in fact, attempt to intimidate and communicated a threat. *The rap video is by its very nature a publication, and a publication is what becomes communicated*. The Court is satisfied that the Commonwealth proved beyond a reasonable doubt that the defendants with the intent to obstruct, impede or impair, prevent the administration of justice, attempted at least to intimidate Officer Kosko in Count 1 and Officer Zeltner in Count 2… [Similarly] I am satisfied that the Commonwealth has proven that [Appellant] communicated a threat, either directly or indirectly, to commit a crime of violence.

Trial Transcript (TT) at 462-63 (emphasis added). However, as described above the law requires that Appellant do more than simply author a threatening Song in order to demonstrate the requisite *mens rea* to commit the crimes of Intimidation of Witnesses and/or Terroristic Threats.

It should be noted that the Commonwealth's theory regarding Appellant's intent or why he made the Song is as fantastical as the Song itself; it was

myopically concocted by the Commonwealth without any consideration of the complex social history, ethics and values of Hip Hop culture,[3] and without any consideration of the creative process for a rap artist, which necessarily involves the creation of dozens of songs which are essentially drafts that the artist never intends to publicize or communicate/transmit.[4] As such, the Commonwealth's theory regarding why Appellant made the Song likely rests upon the racially prejudiced assumption that art produced within the context of a culture of poor young people of color is not really art at all.[5]

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[3] *See* KRS-One, RUMINATIONS 201 (2003) (noting that rap is an "element" of Hip Hop culture, and that Hip Hop culture is the culture of "Oppressed urban youth [of color] living in the ghettos of America"), *see also* Tricia Rose, BLACK NOISE 2 (1994) ("Rap music brings together a tangle of some of the most complex social, cultural, and political issues in contemporary American society. Rap's contradictory articulations are not signs of absent intellectual clarity; they are a common feature of community and popular cultural dialogues that always offer more than one cultural, social, or political viewpoint… Rap is a black cultural expression that prioritizes black voices from the margins of urban America").

[4] Trial Counsel for Defendant elaborates on this point during closing argument: "[Defendant] is in the business of promoting himself, and when he does that, he would do that in a specific way through a producer in a way that things are released to the public and in a way that would be beneficial to his business. But having some 14-year-old-kid in an unauthorized manner released a work that wasn't ready for publication, wasn't even provided to the kid in an authorized way… has nothing to do with my client… so while the lyrics are alleged to be offensive to the police officers, my client is arguing that he didn't intended to publish it like that, and he didn't intend to intimidate anyone like that, but he wrote down his rap song… something that's kept in his personal diary." TT 437-38.

[5] "[A]cross the country, the overwhelming majority of rap artists targeted for prosecution are black or Latino. Using rap lyrics as evidence, then, is not just a matter of art being sacrificed for the sake of an easy conviction. Rather, the practice also constitutes a pernicious tactic that prays upon and perpetuates enduring stereotypes about the inherent criminality of young men of color; the lyrics must be true because what is written 'fits' what we 'know' about criminals, where they come from, and what they look like." Charis Kubrin & Erik Neilson, *Rap on Trial*, Race and Justice, 17 (March 7, 2014) http://raj.sagepub.com/content/4/3/185 [hereinafter *Rap on Trial*].

Contrary to the Commonwealth's theory, Appellant participated in the making of the Song with lawful, constitutionally protected intent that is consistent with the creative motives of other Hip Hop artists generally: (a) to engage in anger management therapy;[6] (b) to protest against social injustice through political speech;[7] (c) to exercise journalistic freedom or disseminate news to the community;[8] and (d) to advance his artistic career by entertaining his substantial local fan-base through violent metaphors that are popular among said fan-base.[9] An objective reading of the Song's multi layered texts[10] supports this view.[11]

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[6] Defendant delivered an eloquent statement before the Trial Court at the time of his sentencing, during which he described that his evolution as a rap artist began when he was an elementary school student and his mother signed him up for anger management classes. Defendant described how his anger management instructor introduced him to a stress ball, how he later fell in love with the poetry of Maya Angelou, Langston Hughes and Tupac Shakur, and how writing poetry eventually replaced his use of the stress ball as a means of managing his anger. Finally, Defendant described how his best friend Leon Ford, a music producer and the subject of a well-known local civil rights matter, eventually convinced him to convert his poetry into rap music. *See* Sentencing Transcript (SC) at 22-6.

[7] *See* Kelly L. Carter, *How 'Fuck Tha Police' Started a Revolution*, BUZZFEED (August 13, 2015 at 7:06 p.m.) http://www.buzzfeed.com/kelleylcarter/how-fuck-tha-police-started-a-revolution#.byNkyNNO, Rich Goldstein, *A Brief History of the Phrase 'F*ck the Police'*, THE DAILY BEAST (August 23, 2014 at 6:45 a.m. ET) http://www.thedailybeast.com/articles/2014/08/23/a-brief-history-of-the-phrase-f-ck-the-police.html, *See also* sources cited *infra* p. 37 (citing sources which persuasively describe rap music as social and political discourse entitled to heighted scrutiny under the First Amendment of the Constitution of the United States).

[8] *See* Stereo Williams, *Is Hip Hop Still 'CNN for Black People?'*, THE DAILY BEAST (March 24, 2015 at 5:15 a.m. ET) http://www.thedailybeast.com/articles/2015/03/24/is-hip-hop-still-cnn-for-black-people.html.

[9] *See* Lily E. Hirsch, *Rap as Threat? The Violent Translation of Music in American Law*, Law Culture, and the Humanities, 8 (November 6, 2014) http://lch.sagepub.com/content/early/2014/11/05/1743872114556858 [hereinafter Hirsch] (citing a 2004 study which revealed that increasing sales of rap music corresponded to increasingly violent lyrics), *cf*. Sara Sun Beale, *The News Media's Influence on Criminal Justice Policy: How Market-Driven News Promotes*

The nature of the Song as a work of art and the circumstances surrounding its creation demonstrate that Appellant did not make the Song or make the Song available on the Internet for the purpose of intimidating or threatening Kosko and/or Zeltner. The record does not show or suggest that Appellant knew Spangler was monitoring Beasley's Internet-presence in an unauthorized undercover capacity. Nor does the record show or suggest that Appellant believed Kosko, Zeltner, or other members of the Pittsburgh Police were members of his rap group's fan-base. Appellant never intended for Kosko and/or Zeltner to hear the Song, let alone perceive the Song as a threat. The Commonwealth failed to prove and the Trial Court did not find otherwise. The Commonwealth proved only that Appellant conspired with Beasley to express himself artistically, politically, and journalistically, all within the bounds of Appellant's well-established First Amendment rights.

Event when viewing the evidence in a light most favorable to the Commonwealth, it is clear that the Commonwealth failed to prove beyond a

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Punitiveness, 48 Wm. & Mary L. Rev. 397, 430 (2006) (further emphasizing the marketability of violence beyond Hip Hop culture specifically and in popular American culture generally by citing James Hamilton's seminal study of "16,000 local news stories from fifty-seven stations in nineteen different markets [which] found that the emphasis on crime in the local news depends not on actual crime in the area, but on viewer interest in violent programming").

[10] *See* Hirsch, 10 (describing "Rap as Music" from the perspective of a music scholar and noting at length rap music's multi-layered complexities).

[11] *See* Hirsch, 13-19 (providing a detailed, objective analysis of the Song and its meaning).

reasonable doubt that Appellant acted with the specific intent to Intimidate and/or Terrorize Officers Zeltner and Kosko. One needs to look no further than the portion of the record where Officer Spangler described his efforts to locate the YouTube video. Specifically, he testified that he utilized a false Facebook profile to friend co-defendant Beasley in an effort to monitor Beasley's Facebook page for potential references to criminal activity. (See Notes of Transcript, hereafter N.T., at p. 179). As soon as news of the video was made public by the police it was immediately removed. Officer Vendilli was required to make a video capture of the video which was removed shortly afterwards on the same day it was discovered and news of it leaked. (N.T. at p. 135, 136.)

Police were able to determine that the "Fuck The Police" video was uploaded to YouTube on November 12, 2012, by Terrance Hart, Jr., who admitted to them that he uploaded the video. (N.T. at p. 268). The video was removed on November 15, 2012. Det. Satler interviewed Master Hart but was never able to establish any connection between him and Appellant. (N.T. at p. 276 – 278). Det. DelCimmuto testified that he was a computer forensics expert for the City of Pittsburgh Police and that he was unable to establish any connection between the Hart computer and Appellant. (N.T. at p. 305, 307).

The Commonwealth wholly failed to prove that Appellant had any knowledge whatsoever that the video here in question was uploaded to the internet.

Appellant could not possibly have known that Officer Spangler was Facebook "friends" with Rashee Beasley by virtue of a fraudulent Facebook profile. The Commonwealth failed to establish any connection whatsoever between Appellant and Terrance Hart, Jr. The Commonwealth proved that Appellant and Beasley made the video and that someone uploaded it close in time to when Officer Zeltner was scheduled to testify at a preliminary hearing against Rashee Beasley. To conclude from these facts that Appellant specifically intended to intimidate Officers Kosko and Zeltner necessarily requires speculation and conjecture that is specifically prohibited by the appellate courts of the Commonwealth.

The Trial Court erred when it denied Appellant's Motion for Judgment of Acquittal. Therefore, Appellant respectfully requests that this Honorable Court vacate Appellant's convictions for Intimidation of Witnesses and Terroristic Threats.

III. Did the Trial Court abuse its discretion when it admitted constitutionally protected free speech as evidence that Appellant committed the offenses of Intimidation of Witnesses and Terroristic Threats?

The standard for reviewing the sufficiency of the evidence is set forth above and incorporated herein.

An appellate court may reverse a trial court's ruling regarding the admissibility of evidence only upon a showing that the trial court abused its

discretion. If the trial court indicated the reason for its decision, the appellate scope of review is limited to an examination of the stated reason. *Commonwealth v. Sanchez,* 848 A.2d 977 (Pa. Super. 2004). An abuse of discretion is defined as "not merely an error of judgment, but if in reaching a conclusion the law is overridden or misapplied, or the judgment is manifestly unreasonable, as the result of partiality, prejudice, bias or ill-will, as shown by the evidence in the record, discretion is abused." *Commonwealth v. Goodyear,* 411 A.2d 550 (Pa. Super. 1979).

The Song amounts to constitutionally protected free speech because it is political hyperbole and not a 'True Threat'

1. At trial the Trial Court admitted the Song under the "Clear and Present Danger" doctrine of *Schenck* but the Trial Court changed its position and wrote in its Opinion that the Song was admissible under the "True Threats" doctrine of *Watts*.

The Trial Court abused its discretion when it admitted the Song under the "Clear and Present Danger" doctrine of *Schenck v. United States*, 249 U.S. 47 (1919) The Trial Court also abused its discretion when it ruled in its Opinion that the Song was admissible under the "True Threats" doctrine of *Virginia v. Black*, 538 U.S. 343 (2003), and *Watts v. United States*, 394 U.S. 705, (1969).

It should be noted from the outset, that in light of its First Amendment[12] implications the instant matter (and other similar matters throughout the United States) has been the subject of substantial commentary by prominent national media outlets and scholars specializing in the areas of First Amendment law and the sociology of Hip Hop culture.[13] Yet while others have scrutinized the question of rap-lyrics-as-evidence in painstaking detail, the Trial Court summarily dismissed the issue at trial and in its Opinion.

Appellant's trial counsel argued persuasively and eloquently during closing argument, that the Song is entitled to protection under the First Amendment. *See* TT at 434 – 42. The exchange began with an odd question from the Trial Court:

> By Judge Manning: Which argument is it? Or are you making them both?

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[12] *See* U.S. Const. amend. I ("Congress shall make no law… abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances)

[13] *See* Lorne Manly, *Legal Debate on Using Boastful Rap Lyrics as a Smoking Gun*, N.Y. TIMES (March 26, 2014), http://www.nytimes.com/2014/03/27/arts/music/using-rap-lyrics-as-damning-evidence-stirs-legal-debate.html, Clay Calvert, *Supreme Court Should Decide Whether Rap Lyrics Are Free Speech*, HUFFPOST (updated June 3, 2014 at 5:59 a.m. ET), http://www.huffingtonpost.com/clay-calvert/supreme-court-should-deci_b_5086608.html, Maya Rhodan, *What the Supreme Court Didn't Say About Rap*, TIME (June 1, 2015 at 7:33 p.m.), http://time.com/3904221/supreme-court-facebook-threats-rap/, *supra* Hirsch, *supra Rap on Trial,* Clay Calvert, *Rap Music and the True Threats Quagmire: When Does One Man's Lyric Become Another Man's Crime*, 38 Colum. J.L. & Arts 1 (2014), *see also* Jeffrey B. Kahan, *Bach, Beethoven and the (Home)Boys: Censoring Violent Rap Music in America*, 66 S. Cal. L. Rev. 2583 (1993), Andrea Dennis, *Poetic (In)Justice? Rap Music as Art, Life, and Criminal Evidence*, 31 Colum. J.L. & Arts 1 (2007), Brief of *Amici Curiae* Erik Nielson, Charis E. Kubrin, Travis L. Gosa, Michael Render (AKA "Killer Mike") and Other Scholars and Artists in Support of Petitioner, *Bell v. Itawamba County School Board* (2015) (No. 15-666), http://www.nytimes.com/interactive/2015/12/18/us/politics/document-taylor-bell-amicus.html.

By Mr. Burke: I'm sorry?
Judge Manning: Are you making them both, that [the Song is] privileged by the First Amendment… or that he didn't intend to publish [the Song]?

TT at 440. This question is odd in that it illustrates the Trial Court's misapprehension of the First Amendment issue involved in the instant matter, because the question of whether Appellant intended to threaten Kosko and Zeltner and the question of whether the Song is protected under the First Amendment are one in the same.[14] However, the extent of the Trial Court's misapprehension did not end there:

> BY THE COURT: Seems to me we can deal pretty simply with the First Amendment issue. 1919, Justice Oliver Wendell Holmes, speaking for a unanimous court in S-C-H-E-N-C-K versus the United States, very famous case, you cannot shout fire in a crowded theatre. Exceeds the bounds of the First Amendment.
> BY MR. BURKE: Your Honor, I think that the Courts make a distinction in this case, and they argue whether the statement is a true threat, and they look at the context of the statement as essential to the inquiry. And I believe that the courts hold, at least from the case law that I've looked at, beginning with Virginia versus Black at 538 US 343 of 2003, that's what they are looking at. Within that context, Your Honor, they cite the case of Watts versus United States at 394 US 705, 1969, holding that to outlaw, punish or restrict speech as threatening, the government must first prove that the statement is a true threat that goes beyond mere hyperbole or contextually harmless words… Music as a form of expression and communication is protected under the First Amendment. Even rap music. Rap music does not lose its protection of the First Amendment, even though mention of the community may

[14] *See infra* p. 39-42 (analyzing *Black*).

> dislike rap music or the state believes that it's fraught with evil consequences. I do understand that there are certain forms of speech –
> BY THE COURT: I ain't carry no 38 dog. I spit with a tec. Meaning a tec 9. That's like 50 sots. That's enough to hit one cop on 50 blocks.
> BY MR. BURKE: Certainly. Nor have they ever found [Appellant] in possession of those kinds of firearms, Your Honor… It is a matter of speaking. It is a song, your honor. It's a song to promote certain ways that people might feel… Just because lyrics are in a song does not mean that the person writing them is living that for himself or experiencing that for himself… The mention of Poplawski, by the way, Your Honor is not a mention where it puts Mr. Poplawski on any kind of pedestal or praises him any form or shape of the word. It's akin to saying I'm tall like Abe Lincoln… Your Honor, this is not a song that's been cited as obscene…. I think the state then has to demonstrate that there was a danger that was presented by the song, an imminent danger presented by this song…
> BY THE COURT: All right. Let's move onto the next matter. I think I understand your position.

TT at 440-42. This exchange provides four important insights. First, the Trial Court clearly references the lyrics of the Song in a sarcastic and demeaning manner. This suggests that the Trial Court's decision to admit the Song over defense Counsel's First Amendment-objection was the product of bias, prejudice, ill-will or partiality.

Second, counsel's reference to the lyrics of the Song shows that the song is clearly hyperbolic in nature. Third, the Trial Court relied on *Schenck* to support its position that the Song does not amount to privileged free speech under First Amendment. The Trial Court announced its reliance on *Schenck* as a bold assertion

devoid of any thoughtful analysis, particularly in comparison to the thoughtfulness with which Appellant's Counsel argued that *Virginia* and *Watts* were applicable. Fourth, the Trial Court did not address defense Counsel's argument regarding *Black* and *Watts* – that "True Threats" doctrine controlled, not "Clear and Present Danger" doctrine.

Similarly, when the Trial Court announced its verdict it reiterated its reliance on *Schenk* as controlling:

> BY THE COURT: As to the second case… It is abundantly clear to me that the conduct of the [Appellant] here is not protected by the First Amendment because it far exceeds the concept of what the First Amendment allows. The controlling case is S-C-H-E-N-C-K, *Schenck v. United Sates*, authored by Justice Oliver Wendell Holmes in 1919, dealing with the Espionage Act of 1917, where he used the phrase that one cannot shout fire in a crowded theatre. That is not protected speech because it presents a clear and present danger… Here the Court is satisfied that the First Amendment is not applicable to the conduct of the [Appellant] here.

TT at 462-63. Trial Court's reliance on *Schenck* in a case of Intimidation of Witnesses and Terroristic Threats was unprecedented, unsubstantiated, and a clear abuse of discretion. Appellant was not charged with a crime of riot or incitement as defined under 18 Pa. C.S.A. §§ 5501 *et seq*. He was charged with making unlawful threats under 18 Pa C.S.A. § 2706 and 18 Pa C.S.A. § 4952.

Even without the analysis provided below, it is made particularly clear that the Trial Court abused its discretion when it relied on *Schenck* to admit the Song

into evidence, where the Trial Court makes no mention of *Schenck* or "Clear and Present Danger" doctrine in its Opinion, and instead cites *Elonis*, *Black* and *Watts* to argue that the Song constitutes a True Threat. *See* Opinion of the Trial Court at 19-20. It should be noted that the Trial Court's Opinion did not offer any deliberative analysis in support of this proposition. Such an analysis clearly would show that the Song did not constitute a True Threat.

2. The Song amounted to constitutionally protected free Speech and not a True Threat.

There is no question that rap music is a form of artistic expression that is protected under the First Amendment. *See Ward v. Rock Against Racism,* 491 U.S. 781, 790 (1989) ("Music is one of the oldest forms of human expression. From Plato's discourse in the Republic to the totalitarian state in our own times, rulers have known its capacity to appeal to the intellect and to the emotions, and have censored musical compositions to serve the needs of the state… The Constitution prohibits any like attempts in our own legal order. Music, as a form of expression and communication, is protected under the First Amendment") (internal citations omitted), *Betts v. McCaughtry*, 827 F. Supp. 1400, 1406 (W.D. Wis. 1993) ("It is undisputed that rap music constitutes speech protected by the First Amendment."). Moreover, it has been persuasively argued that rap music is entitled to heightened scrutiny under the First Amendment because it constitutes political and social

discourse. *See* Brief of *Amicus Curiae* American Civil Liberties Union of New Jersey In Support of Defendant-Respondent at 11-15, *State v. Skinner*, 95 A.3d 236 (N.J. 2014) (No. A-57/58/12 (071764)). Nonetheless, (a) prosecutors use rap music as evidence at far greater rates than other forms of artistic expression, and (b) this likely is attributable to racial prejudice. Charis Kubrin, *The Threatening Nature of... Rap Music?*, TEDx TALKS (October 23, 2014), http://genius.com/Charis-e-kubrin-rap-on-trial-transcript-of-tedx-orange-coast-talk-annotated (describing the related Wisconsin case of Olutosin Oduwole and concluding with the following question: "Are these increases in rap trials just another example that racism in this country is alive an well? And how many more false convictions and acts of violence against our own people will it take before we say, *enough*?").

The Commonwealth argued at trial that the Song constituted an admissible True Threat because Kosko and Zeltner were identified by name in the Song. The Commonwealth's theory was that the communication at issue constituted a True Threat even though: (a) the communication was an artistic expression; (b) Appellant did not make the Song for the purpose of issuing a threat; (c) Appellant did not make the Song available on the Internet; (d) the Song was made available on the Internet through websites that Appellant and Beasley utilized to advance their artistic aspirations; and (e) Appellant could not have known that Spangler was monitoring said websites in an unauthorized undercover capacity. Thus, the

Commonwealth advanced the proposition that an artistic expression constitutes a True Threat if such a communication contains hyperbolic threats of violence and identifies an individual by name, even where the communication was not created for the purpose of issuing a threat and the author did not convey the communication to the identified individual. This proposition is dubious at best.

In the seminal 1969 case of *Watts*, the defendant was convicted of knowingly threatening to inflict bodily harm on the President of the United States, because of a statement that he made during an anti-police brutality protest on the Washington Monument grounds. *Watts*, 394 U.S. 705, 706 (1969). Specifically in the context of the protest the defendant identified the President by name and stated: "And now I have already received by draft classification as 1-A and I have got to report for my physical this Monday. I'm not going. If they ever make me carry a rifle the first man I want to get in my cites is L.B.J. [i.e. President Lyndon B. Johnson]." *Id*. The Supreme Court easily revered the defendant's opinion in a three-page Opinion, and thereby concluded that: "[W]hatver the 'willfullness' requirement implies, the statute initially requires that the Government prove a true 'threat.' We do not believe that the kind of political hyperbole indulged in by petitioner fits within that statutory term." *Id*. at 708. Thus, without reaching a determination regarding the defendant's *mens rea*, the Court found that the defendant's statement amounted to constitutionally protected free speech in the

form of political hyperbole and not a true threat, even though the defendant identified the President by name in his statement.

More recently in *Black*, the Supreme Court dealt with the constitutionality of a Virginia state criminal statute that prohibited the act of burning a cross with the intent to intimidate. *Black*, 538 U.S. 343, 348 (2003). One of the defendants ("Black") organized and participated in a Ku Klux Klan rally in Carroll County, Virginia. *Id*. The rally occurred on private property, was attended by approximately thirty individuals, and was observed by a number of onlookers including a neighbor named Rebecca Sechrist. *Id*. One of the rally's speakers stated that "he would love to take a .30/.30 and just random[ly] shoot the blacks." *Id*. At the end of the rally the participants burned a 30-foot cross while the song Amazing Grace played in the background. *Id*. Ms. Sechrist stated that the cross burning made her feel "awful" and "terrible." *Id*. At the conclusion of the rally Black was arrested and charged under the aforementioned criminal statute. *Id*. Black was subsequently convicted after the trial court instructed the jury that, "'the burning of a cross by itself is sufficient evidence from which you may infer the required intent.'" *Id*.

Just as the Commonwealth argued and the Trial Court found that Appellant's mere participation in the making of the Song was sufficient proof of his intent to intimidate and/or threaten, the trial court in *Black* found that Black's having

organized and participated in a rally where a flag burning occurred was sufficient proof of his intent to intimidate.[15]

The Court ultimately reversed Black's conviction, on the grounds that, "while a State, consistent with the First Amendment, may ban cross burning carried out with the intent to intimidate, the provision in the Virginia statute treating any cross burning as prima facie evidence of intent to intimidate renders the statute unconstitutional in its current form." *Id*. at 347-48. The Court undertook in an extraordinarily thoughtful and insightful analysis in reaching this conclusion. The Court began by analyzing the history of the Ku Klux Klan, and cross burning as a prominent symbol of the Klan's white supremacist ideology. *See Id*. at 353-57. This led the Court to reach the initial conclusion that, "regardless of whether the message is a political one or whether the message is also meant to intimidate, the burning of a cross is a 'symbol of hate.'" *Id*. at 357 (internal citation omitted). Nonetheless, reasoned the Court, "a burning cross does not invariably convey a message of intimidation." *Id*. Therefore, the burning of a cross is not invariably a True Threat, which the Court defined as "those statements where the speaker means to communicate a serious expression to commit an act of unlawful violence to a particular individual or group of individuals." *Id*. at 359 (citing *Watts* for the proposition that "political hyperbole" is not a true threat). It follows that even a

[15] *See supra* Part II.

symbol as hateful and fraught with evil consequences as a burning cross may be entitled to protection under the First Amendment. *See Texas v. Johnson*, 491 U.S. 397, 414 (1989) ("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").

Appellant's conviction for the offenses of Intimidation of Witnesses and Terroristic Threats must be reversed because, contrary to the contentions of the Commonwealth and the findings of the Trial Court, the making of a political hyperbole-laced rap song is not invariably with the intent to intimidate or threaten.

Most recently in *Elonis*, the Court was presented with a First Amendment question but ultimately ruled on statutory grounds as described above. However, the concurring Opinion of Justice Alito was particularly insightful as to whether the Appellant's Song constituted a True Threat: "[C]ontext matters… [L]yrics in songs that are performed for an audience or sold in recorded form are unlikely to be interpreted as a real threat to a real person… Statements on social media that are pointedly directed at their victims, by contrast, are much more likely to be taken seriously." Elonis, 135 S.Ct. 2001, 2016 (2015) (Justice Alito, *concurring part, diseenting in part*).

Elonis adopted the rap-persona of "Tone Dougie" immediately before he began posted the Facebook posts that were at issue in *Elonis*, *Id*. at 2004, whereas

Appellant had been an aspiring poet since his early teens and was established locally as an amateur rap artist long before he participated in making the Song. Elonis researched True Threats case law, expressed a clear understanding of the limits of First Amendment protections, and proactively sought to manipulate these protections by attempting to craft Facebook comments that were threatening to others but not self-incriminating. *Id*. at 2005-06. Appellant here undertook in no similar premeditation. There was clear evidence that Elonis made sure his Facebook posts were seen by the individuals that he identified therein, *Id*. at 2016 (Justice Alito, *concurring in part, dissenting in part*), whereas Appellant never intended to make the Song available publically, and did not make the Song available on the Internet. Moreover, when the Song was made available on the Internet, it was made available on websites that Appellant and Beasely utilized to advance their artistic aspirations – websites that Spangler was monitoring in an unauthorized undercover capacity without Appellant's knowledge.

Finally, in the true tradition of Hip Hop culture, Appellant's Song included an element of social protest[16] that was absent from the Facebook posts of Elonis. Appellant was a young person of color from a low-income urban neighborhood when he participated in making the Song. In light of the cases of, *inter alia*, Leon

[16] *See generally* Jeff Chang, CAN'T STOP WON'T STOP: A HISTORY OF THE HIP HOP GENERATION (2005) (discussing the emergency of Hip Hop culture in the Bronx, New York during the early 1970, whereby kids would "battle" each other through breakdancing, deejaying and emceeing (i.e. rapping), as alternatives to engaging in gang violence).

Ford, Michael Brown, Tamir Rice, Sandra Bland, and Freddie Gray, Appellant and other similarly situated individuals clearly have legitimate social and political grievances as to local law enforcement authorities. As described by Appellant at his sentencing hearing in the within matter, Appellant and Leon Ford were best friends during middle school. *See supra* note 4 (discussing Appellant's statement before the Trial Court at Appellant's sentencing hearing). Just as the Trial Court points out in its Opinion that the Song was made available on the Internet mere weeks before Kosko was scheduled to testify against Appellant, Appellant should point out that the Song was made available on the Internet mere weeks after Kosko was involved in the unjustified shooting of Appellant's friend Leon Ford.[17]

Like other rappers, Appellant's aspirations as a Hip Hop artist provided him with an individual emotional release,[18] an empowering political and social identity,[19] and one of only a handful of viable career options.[20] As described by the well known rap artist Busta Rhymes in the song "Music for Life":

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[17] Lexi Belculfine, *Leon Ford Will Not Face Second Trial, DA Decides*, PITTSBURGH POST-GAZETTE (January 24, 2015), http://www.post-gazette.com/local/city/2015/01/23/Allegheny-County-DA-s-office-won-t-retry-Leon-Ford/stories/201501230188.

[18] *See* Sentencing Transcript *supra* note 3.

[19] *See* KRS-One, RUMINATIONS 201 (2003) ("Hiphop is an empowering identity, a behavior, an attitude").

[20] The Notorious B.I.G., *Things Done Changed*, on READY TO DIE (Big Beat Records 1994) ("If I wasn't in the rap game [i.e. the business of rap music], I'd probably have a key [i.e. kilo of cocaine] knee deep in the crack game [i.e. the business of selling crack cocaine], because the

> It's like... music, for me man… it means everything… Get in the vocal booth and become whoever you wanna be. Express whatever you wanna feel. When you going through your most frustrating time in life… When you can't find nobody else to speak to, you can speak through the music. Help other people feel your pain, your struggle, your passion.

HI TEK, *Music for Life*, on HI-TEKNOLOGY 2: THE CHIP (Babygrande Records 2006). Appellant never intended to threaten Kosko and Zeltner. He was just expressing himself in the tradition of his generation and the generations of freedom fighters before him, who chose to employ the pen rather than the sword in waging their political struggles. For this, Appellant was charged, prosecuted and convicted without regard to his intent or whether the Song was a True Threat. Therefore, Appellant prays that this Honorable Court will reverse his convictions for the offenses of Intimidation of Witnesses and Terroristic Threats, on the grounds that the Trial Court abused its discretion by admitting the Song into evidence because the Song was clearly political hyperbole and not a True Threat.

CONCLUSION

Police were required to demonstrate articulable facts to believe that Appellant was committing a traffic violation before initiating a traffic stop for Appellant's act of pulling in to a parking space without signaling. Further, police

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streets are a shortstop, either you're slanging [i.e. selling] crack rock or you got a wicked [i.e. fantastic] jump shot").

are required to demonstrate an independent basis for reasonable suspicion to continue to detain an individual after the basis for the initial traffic stop has been resolved. In the instant matter police clearly effectuated a traffic stop of Appellant's vehicle when they first pulled alongside it. Police lacked reasonable suspicion for said traffic stop. Further, police resolved the initial basis for the traffic stop when Appellant told them, to their satisfaction, that he was visiting his sister who lived nearby. Police lacked reasonable suspicion to continue to detain Appellant and continue to interrogate him. Accordingly, all evidence recovered from Appellant's illegal traffic stop must be suppressed.

The Commonwealth failed to demonstrate that Appellant possessed the *mens rea* to either intimidate or threaten officers Kosko and Zeltner. The Trial Court in its Opinion concluded that the mere making of the Song was sufficient to impose criminal liability on Appellant despite clear statutory requirements of proving Appellant's mental state beyond a reasonable doubt. Inasmuch as the evidence of record herein demonstrates that Appellant possessed no such intent to intimidate or threaten Appellant's Judgment of Sentence must be vacated.

The Trial Court erred when it permitted the Commonwealth to introduce constitutionally protected speech in support of its case in chief against Appellant for the crimes of Intimidation of a Witness and Terroristic Threats. The Commonwealth's entire case was predicated on the notion that the Song was not

protected by the First Amendment and that the lyrics of the Song were therefore criminal in their very nature. The Trial Court incorrectly deemed the lyrics of the Song to be a "true threat" despite considerable evidence to the contrary. Because the Trial Court permitted the admission of constitutionally protected speech Appellant's Judgment of Sentence must be vacated.

Respectfully Submitted,

Patrick K. Nightingale, Esquire
Attorney for Appellant

Appendix A

Appendix B

IN THE

SUPERIOR COURT OF PENNSYLVANIA

WESTERN DISTRICT

No. 1136 WDA 2013

COMMONWEALTH OF PENNSYLVANIA,
Appellee,

V.

JAMAL KNOX,
Appellant.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the within Appellant's Brief was served via First Class Mail to The Office of the District Attorney of Allegheny County, 436 Grant Street, Pittsburgh, PA 15219 on the 4th day of January, 2015.

Patrick K. Nightingale, Esquire