

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA : NO. CR – 504 - 2009

vs. :

HAROLD McGRAW, :
Defendant :

OPINION IN SUPPORT OF ORDER OF DECEMBER 3, 2009,
IN COMPLIANCE WITH RULE 1925(A) OF
THE RULES OF APPELLATE PROCEDURE

Defendant appeals this Court’s¹ Order of December 3, 2009, whereby he was sentenced on one count of perjury to fourteen to thirty-six months incarceration, following his conviction of such charge by a jury. In his Concise Statement of Matters Complained of on Appeal, Defendant contends the Court erred in denying his request for a mistrial, which request was prompted by a witness’ reference to Defendant’s prior record.

The Court begins the analysis of the contention by first noting that it is to base its ruling on a determination of whether the complained of conduct was so prejudicial to Defendant as to affect the outcome of the trial. *See Commonwealth v. Savage*, 602 A.2d 309 (Pa. 1992). In the instant case, the charge of perjury was based on statements Defendant made at a guilty plea hearing² and statements he made at a hearing on his request to withdraw his plea. Evidence of those statements was introduced by the Commonwealth by having transcripts of those hearings read into the record. At issue here is the following statement, made by the judge who heard Defendant’s motion to withdraw his plea, and which was contained in the second transcript read into evidence: “If you make statements

1 Although the Order was entered by the Honorable Kenneth D. Brown, Judge Brown has since retired and the matter was therefore assigned to this judge for purposes of the instant appeal.

2 Defendant pled guilty to DUI and driving under suspension-DUI related.

that are contrary under oath to the statements that you made under oath in your transcript, I know of at least one person who has been charged with perjury and with your prior record—.”³ The assistant district attorney immediately interrupted the reader and asked her to begin reading at a place further down the page, but Defendant’s attorney at that time asked for a side-bar conference with the Court and moved for a mistrial. After that conference, the Court denied the motion but gave the jury a cautionary instruction, as follows:

Folks, I want to make an instruction to you that I think is pertinent based on what’s just been presented. There has been reference in the reading to prior record. That pertains to the suspension that was alluded to earlier in the transcript. I will ask you though whether there is a prior record or not is not relevant to the charge of perjury in this case. So you should disregard that, it has no relevance to the issue before you today and thus should not be considered.”⁴

Considering that the jury knew Defendant had pled guilty to driving under suspension, DUI related, they knew he had a prior DUI. Since the Court instructed them that the reference to prior record was a reference to that prior DUI, there could be no prejudicial effect beyond that of reference to the prior DUI in the first place, and such was part of the Commonwealth’s case and certainly admissible. For that reason, Defendant’s request for a mistrial was denied.

Dated: March 19, 2010

Respectfully Submitted,

cc: DA

James Protasio, Esq.

Gary Weber, Esq.

Dudley N. Anderson, Judge

³ N.T. October 26, 2009, at p. 31.

⁴ *Id.* at p. 34.

Hon. Dudley Anderson