

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA
COMMONWEALTH : No. CP-41-CR-0001924-2016
: vs. : CRIMINAL DIVISION
: :
: :
: :
: :
JEROME KENNEDY, :
Appellant : Supplemental 1925(a) Opinion

**OPINION IN SUPPORT OF ORDER IN
COMPLIANCE WITH RULE 1925(a) OF
THE RULES OF APPELLATE PROCEDURE**

The Pennsylvania Superior Court remanded this matter to the court to determine, in accordance with Rule 587 of the Pennsylvania Rules of Criminal Procedure, whether Defendant’s double jeopardy motion was frivolous. If the motion was not frivolous, the order is appealable as a collateral order. If the motion was frivolous, Defendant must file a petition for review under Rule 1573 of the Pennsylvania Rules of Appellate Procedure.

“A frivolous claim is a claim clearly and palpably without merit; it is a claim which presents no debatable question. Such futile claims, presumably interposed for the mere purposes of delay or disruption, are to be identified by the trial court through a written finding.” *Commonwealth v. Gains*, 556 A.2d 870, 874-875 (Pa. Super. 1989)(en banc); see also *Commonwealth v. Orié*, 33 A.3d 17, 21 (Pa. Super. 2011).

The court does not believe Defendant appealed the denial of his double jeopardy motion for purposes of delay or disruption. While the court certainly stands by its decision that the elevator incident created a manifest necessity to declare a mistrial, the court cannot state that Defendant’s motion was frivolous.

Much to the court’s surprise, the Commonwealth objected to the grant of the

mistrial, and defense counsel neither requested nor objected to the mistrial at the time it was entered. It is unclear whether the parties' positions (or lack thereof) were due to a belief by both that the incident was somehow helpful to their case or, in the case of the Commonwealth's objection, a concern that the record was inadequately developed such that a manifest necessity was a debatable question. In hindsight, the court probably should have created a better record with the jurors who experienced the elevator incident, including identifying each juror by, at a minimum, their juror number, and questioning each juror separately. Perhaps the court also should have expressly informed the parties that the court could not take a "wait and see" approach; if either party wanted to request a mistrial they had to do so at that time or they would be barred from doing so later by principles of waiver. Nevertheless, the court found that continuing with the trial under the circumstances would offend principles of justice. Neither the Commonwealth nor Defendant should have wanted their cause to be determined by a jury panel consisting of several jurors who were concerned about the mere presence of one of Defendant's supporters, who also was a potential witness. In the court's view, neither party should have wanted to continue with jurors who were impacted by an outside influence, as all cases should be tried without any semblance of intimidation by or on behalf of any party or witness, or any sympathy for or prejudice against any party or witness.

DATE: _____

By The Court,

Marc F. Lovecchio, Judge

cc: Nicole Ippolito, Esquire (ADA)
Nicole Spring, Esquire (PD)
Work file
Gary Weber, Esquire (Lycoming Reporter)
Superior Court (original & 1)