

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA :  
 : CR-724-2015  
 v. :  
 : SUPERIOR COURT  
 PHILLIP A. SAILOR, : 970 MDA 2019  
 Defendant :

**OPINION AND ORDER**

Phillip Sailor (Defendant) was convicted on November 1, 2018 of Aggravated Assault by Vehicle While Driving under the Influence, Possession of a Small Amount of Marijuana, Possession of Drug Paraphernalia, Aggravated Assault by Vehicle, and Driving under the Influence of Alcohol or Controlled Substance. Defendant appealed his conviction based on *ex parte* communications between the trial court Judge and a member of the jury. The Superior Court remanded the matter and an evidentiary hearing was held November 12, 2020.

**Background**

On February 11, 2015, Defendant was charged with several drug-related and driving-related crimes including Aggravated Assault by Vehicle While DUI, Aggravated Assault by Vehicle, and multiple other misdemeanor and summary offenses. These charges arose out of an incident that occurred when the Defendant struck a minor female with his vehicle while she was crossing the road at dusk, causing serious bodily injury. Defendant was found to have marijuana metabolites in his system at the time of the incident. A jury trial was held from October 30, 2018 through November 1, 2018 with the Honorable Marc Lovecchio presiding.

Prior to the conclusion of the trial, the second alternate juror asked Judge Lovecchio off record when sentencing for the Defendant would take place. The parties were unaware of and were not informed of this conversation by Judge Lovecchio. This juror was eventually excused and did not participate in deliberations. Sentencing was scheduled for January 8, 2019.

At some point prior to sentencing but after the conclusion of the trial, the Commonwealth became aware of the conversation between Judge Lovecchio and at least one juror, although it is unclear when and how the Commonwealth obtained this information. The Commonwealth informed the Defendant of its knowledge of the conversation. On November 2, 2018, Judge Lovecchio sent an email to the parties explaining that he spoke to all jurors after lunch on the second day of trial about how long the trial may last. The second alternate juror asked when sentencing would take place and he told her that “jurors have no involvement in sentencing and that the issue of guilt first has to be decided.” The conversation ended at that point. *See Defendant’s Exhibit 1.*

After receiving this explanation, Defendant filed a motion asking Judge Lovecchio to recuse himself from all subsequent proceedings because he intended to call Judge Lovecchio and his legal intern, who was present during the conversation, as witnesses in support of his oral Motion for Extraordinary Relief, which would be made just prior to sentencing. Judge Lovecchio summarily denied the Motion for Recusal and stated that “the Court will repeat on the record what occurred.”

On January 8, 2019, Judge Lovecchio held a hearing on Defendant’s Oral Motion for Extraordinary Relief, which asserted that the verdict should be set aside due to the above referenced *ex parte* communication. At that time, after being called as a witness, Judge Lovecchio stepped down from the bench, unrobed, took the witness stand, and testified regarding the conversation between he and the juror prior to the conclusion of the trial. This all took place in the absence of any other judge presiding over the hearing. Judge Lovecchio then re-took the bench, denied Defendant’s oral Motion for Extraordinary Relief stating that “the

Court does not believe its conduct prejudiced either party,” and proceeded with sentencing. Defendant filed four Post-Sentence Motions, all of which were denied on May 14, 2019.

Defendant filed a timely appeal and the Superior Court issued its decision on September 18, 2020 holding that there is no record evidence of what was communicated between Judge Lovecchio and the juror because Judge Lovecchio was “incompetent to testify to factual issues germane to [Defendant’s] motion for extraordinary relief . . . .” Therefore, in order to create a proper record, the case was remanded to allow the parties to participate in a proper hearing. The undersigned Judge was appointed to preside over the matter because Judge Lovecchio and his legal intern at the time of this trial were called as witnesses.

On November 12, 2020, this Court held an evidentiary hearing at which point both Judge Lovecchio and his legal intern testified as to their recollections surrounding the *ex parte* communication. Judge Lovecchio adopted the statement contained in his email dated November 2, 2018, *supra*, as well as his testimony from the hearings held on January 8, 2019<sup>1</sup> and March 19, 2019.<sup>2</sup> Judge Lovecchio further testified that he goes to speak with the jurors at

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<sup>1</sup> Hearing on Defendant’s Motion for Extraordinary Relief and sentencing proceedings at which point Judge Lovecchio testified on the witness stand that on the day in question, he remembers saying “okay is everyone back in? Yeah everyone’s back. This is what you need to do, you need to – we have so many witnesses scheduled, and I just remember this one particular juror saying something about, and I can’t say – I can’t say whether it was the sentencing or a sentencing, the word sentencing just struck me. She said – asked the question about sentencing, and this was a juror who asked a lot of questions anyway . . . and I said right away, I kind of chucked and I said, the jury has nothing to do with sentencing . . . so it’s not an issue with respect to time, when you’d have to be here or anything like that, and plus, sentencing is isn’t decided until the jury’s decided, until the verdict is decided . . . . So another juror I remember said, yeah, after I said something, and I just went out. I just left after that . . . . I think it was the same day that the juror was actually excused.” See *January 8, 2019 transcript at page 28, lines 1-17 and page 28, line 24 through page 29, line 4.*

<sup>2</sup> Hearing on Defendant’s post-sentence motions at which point Judge Lovecchio stated on record that the jurors “were coming in from lunch, if I remember correctly. I have no idea. I know there was at least one, maybe two” and that “in this particular case, there was a discussion about when they [the jurors] could leave, how long they were going to be here, was it going to be a three day trial, was it going to be a four day trial, how much longer was it going to take? And at least I took it when she said that question of where—when is the sentencing, was like, holy smoke, now she wants to know when the sentencing is going to be. And then I said something along the line of you’re not part of it. And then it struck me that another interpretation might be to presuppose guilt. And I said plus you can’t sentence—the sentencing has nothing to do until you go through the process.” See *March 19, 2019 transcript at page 6, lines 19-21 and page 15, lines 2-15.*

some point in every trial about issues not related to the case. *See November 12, 2020 transcript at page 10, lines 9-13.* During this particular trial, one juror asked when sentencing would take place. *See November 12, 2020 transcript at page 10, lines 14-21.* There was at least one other juror present who “rolled her eyes” at the question. *See November 12, 2020 transcript at page 10, lines 21-22.* Judge Lovecchio explained to the juror that sentencing is not something the jury decides and ended the conversation by leaving the room. *See November 12, 2020 transcript at page 10, lines 22-25.*

Alecia Thaler, Judge Lovecchio’s prior legal intern, also testified at the November 12, 2020 hearing. Ms. Thaler’s recollections of the conversation were consistent with those of Judge Lovecchio. *See November 12, 2020 transcript at page 15, line 16 through page 15, line 3.* Upon further questioning from the Court, Ms. Thaler also explained that she and Judge Lovecchio would have lunch in the juror lounge area, Judge Lovecchio would go into the jury deliberation room where he would speak with the jurors with the door open, and then return to the lounge area to finish lunch. *See November 12, 2020 transcript at page 20, lines 14-25.* During this particular incident, though, the juror came from the jury deliberation room to the juror lounge where Judge Lovecchio was eating lunch and asked the question regarding sentencing. *See November 12, 2020 transcript at page 22, line 14 through page 23, line 2.*

### **Issue**

The issue to be decided is whether the *ex parte* communication that took place between Judge Lovecchio and the juror at the time of the trial in this matter was a harmless error. The Court will now answer that question in the affirmative.

## Discussion

There is a presumption that judges of this Commonwealth are “honorably, fair and competent,” *Lomas v. Kravitz*, 130 A.3d 107, 122 (Pa. Super. 2015), *aff’d*, 170 A.3d 380 (Pa. 2017), *citing In re Lokuta*, 11 A.3d at 453 (2011). Black’s Law Dictionary defines “ex parte” as:

On one side only; by or for one party; done for, in behalf of, or on the application of, one party only. A judicial proceeding, order, injunction, etc., is said to be ex parte when it is taken or granted at the instance and for the benefit of one party only, and without notice to, or contestation by any person adversely interested.

Black's Law Dictionary (p. 517, 5th Ed.1979).

A matter will only be reversed when an *ex parte* communication between the trial court and juror is prejudicial to a party. *Com. v. Bradley*, 459 A.2d 733, 734 (Pa. 1983). Prejudice, in the instance where an error was committed during the course of a criminal trial, is measured by “determining whether or not the error could be construed as harmless. If the error was harmless there obviously was no prejudice; if the error was not harmless to the defendant's right to a fair trial then prejudice was found to have attached.” *Com. v. Elmore*, 494 A.2d 1050, 1052 (Pa. 1985). An error is harmless when the appellate court determines that the error could not have contributed to the verdict. *Id.*, *citing Com. v. Story*, 383 A.2d 155, 164 (Pa. 1978). In other words, when there is a “reasonable possibility” that an error “might have contributed to the conviction,” the error is not harmless. *Id.* For example, a tipstaff's failure to report a juror’s request for a copy of records of the first day's testimony was inconsequential contact between the jury and a court officer and was therefore harmless and did not constitute grounds for new trial because it caused “absolutely no prejudice.” *Elmore*, 494 A.2d at 1053.

Here, Defendant argues that he is entitled to a new trial due to the lack of record regarding the *ex parte* communication because the parties were never informed of the communication at the time it occurred. The first on-record testimony about Judge Lovecchio's and his intern's recollections of the communication took place about two months after the communication. By that point, Defendant argues, they were unable to remember details such as which day of trial the conversation between Judge Lovecchio and the juror took place, which day of trial the juror was excused, the exact nature of the conversation, and how many jurors were present to hear the conversation. Additionally, the juror who asked the question was never identified and therefore, the effect the conversation had on the juror or other jurors is unknown.

The Commonwealth argues that the *ex parte* communication, assuming one existed, was harmless error and Defendant has failed to establish any prejudice. The Court agrees. First, the Court is not convinced that the communication that occurred between Judge Lovecchio and the juror can be considered *ex parte*. *Ex parte*, by definition, is for the benefit of one party only. While the juror's question to Judge Lovecchio could be considered presumptuous and favoring the Commonwealth, Judge Lovecchio's response was immediate, impartial, and unequivocal: that sentencing is not a concern for the jury and that the jury must first decide the Defendant's guilt or innocence prior to sentencing.

Even if the Court gives the Defendant the benefit of any doubt and assumes that an *ex parte* communication did occur, the Defendant has failed to establish that the communication was harmful and prejudicial to him. Despite Defendant's arguments, the fact that Judge Lovecchio and his intern were unable to recall every minute detail of the short conversation between Judge Lovecchio and the juror is inconsequential. In fact, both Judge Lovecchio and his intern were consistent in their testimony and never wavered from their original version of

events. Further, Judge Lovecchio testified that it is his practice to ensure the jury knows the “process” by which the trial will take place. The conversation that did occur was not about the facts of the case itself. Judge Lovecchio testified that he took the juror’s question as a question of procedure and made it extremely clear that the jury had nothing to do with sentencing. There is no evidence that Judge Lovecchio, for example, suggested even slightly that sentencing would take place. Even if the juror who asked the question took Judge Lovecchio’s response as substantive to the case, that juror never participated in deliberations.

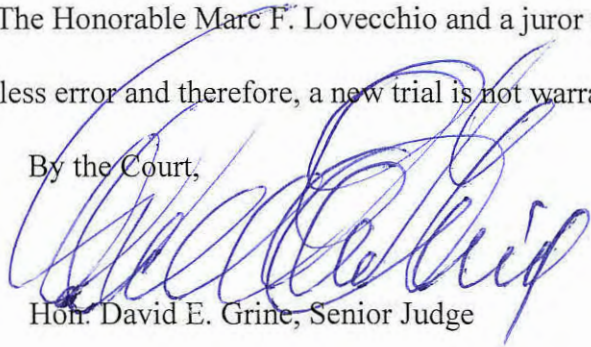
### **Conclusion**

In reviewing the circumstances in their totality, the communication that occurred between Judge Lovecchio and the juror was harmless error and the Court can find no reasonable explanation as to how the communication may have contributed to the Defendant’s conviction.

**ORDER**

**AND NOW**, this 7<sup>th</sup> day of **December, 2020**, for the foregoing reasons, the Court finds that any *ex parte* communication between The Honorable Marc F. Lovecchio and a juror during the trial held in the above matter was harmless error and therefore, a new trial is not warranted.

By the Court,



Hon. David E. Grine, Senior Judge

DEG/ads

cc: Superior Court (Original plus one)  
DA (MS)  
Karen Kuebler, Esquire  
Gary Weber, Esquire