NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA v. GREGORY B. BARTUCCI Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 1686 MDA 2015

Appeal from the Judgment of Sentence July 8, 2015
in the Court of Common Pleas of Lancaster County Criminal Division
at No(s): CP-36-CR-0001286-2014

BEFORE: MUNDY, STABILE, and FITZGERALD,* JJ.

MEMORANDUM BY FITZGERALD, J. **FILED SEPTEMBER 15, 2017**

Appellant, Gregory B. Bartucci, appeals *pro se* from the judgment of sentence entered in the Court of Common Pleas of Lancaster County, following his conviction by a jury of theft by unlawful taking,[1] theft by deception,[2] and forgery.[3] Appellant challenges (1) the denial of his right to self-representation; (2) his appearance before the jury in prison clothes; (3) the denial of his right to a speedy trial; (4) the preclusion of Hollinger Inc.'s insurance loss claim; and (5) the alleged denial of credit for time spent in New Jersey custody. We affirm.

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* Former Justice specially assigned to the Superior Court.

[1] 18 Pa.C.S. § 3921(a).

[2] 18 Pa.C.S. § 3922(a)(1).

[3] 18 Pa.C.S. § 4101(a)(2).

We adopt the facts and procedural history set forth by the trial court's opinion. ***See*** Trial Ct. Op., 6/22/17, at 1-4. This appeal followed.

Appellant raises the following issues for our review:[4]

> I. Was the core of the defendant's "Faretta" right to self-representation egregiously violated under the Federal Sixth Amendment guarantee which subsequently created the existence of a structural error requiring the automatic reversal of his conviction?
>
> II. Was the integrity of the defendant's trial structure under the Federal Fifth, Sixth, and Fourteenth Amendment guarantee's rendered so fundamentally unfair and undermined, when he was forced to appear before the venire and petit jury panel's wearing prison clothes and appeared dishevelled, creating the existence of plain error requiring the reversal of his conviction?
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> III. Was the defendant's speedy trial rights as guaranteed by the Sixth Amendment of the U.S. Constitution and its implementation under the Commonwealth's Rule 600 limits violated, requiring dismissal of the criminal information with prejudice?
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> IV. Was the trial court's preclusion of Hollinger Inc.'s insurance loss claim as inadmissible hearsay a violation of defendant's constitutional rights to due process, fundamental fairness and compulsory process under the Sixth Amendment and Fourteenth Amendment's of the U.S. Constitution?
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> V. Did the trial court abuse its discretion when it denied defendant credit for time spent in New Jersey custody pursuant to Pennsylvania's fugitive warrant?

Appellant's Brief at 5.[5]

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[4] We reproduce Appellant's issues as stated.

First "[A]ppellant contends that the trial court failed to comply with the dictates of ***Faretta v. California***, 422 U.S. 806 (1975), and that this automatically violated his right of self-representation since the right to appear pro se exists to affirm the accused's individual dignity and autonomy." ***Id.*** at 9. Appellant, who was permitted to represent himself at trial, claims "[t]he trial court disregarded [A]ppellant's dignity and autonomy, under the 'core' ***Faretta*** right when it excluded his [sic] from directly participating in the *voire* [sic] *dire* sidebar conferences." ***Id.*** at 12. Appellant concludes that his "conviction must be reversed in it's [sic] entirety." ***Id.*** at 9.

It is well-established that

> Potentially disruptive defendants, like all defendants, have the right to represent themselves if counsel is validly waived. Whenever a defendant seeks to represent himself, and particularly when he may be disruptive, standby counsel should be appointed. The court should explain to the defendant the standards of conduct he will be expected to observe. If the defendant misbehaves, he should be warned that he will be removed from the court . . . .

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[5] We note that Appellant raised two additional issues in his Pa.R.A.P. 1925(b) statement of errors complained of on appeal. ***See*** Pa.R.A.P. 2119(a) (stating that our Appellate Rules mandate that an appellant must develop an argument with citation to and analysis of relevant legal authority). ***See also Commonwealth v. Nelson***, 567 A.2d 673, 676 (Pa. Super. 1989) (stating that we must deem an issue abandoned, and therefore waived, where it has been identified on appeal but not properly developed in the appellant's brief). We find these issues abandoned and therefore waived. ***See id.***

Commonwealth v. Africa, 353 A.2d 855, 864 (Pa. 1976).

After a thorough review of the record, Appellant's brief, and the well-reasoned opinion of the Honorable Howard F. Knisley,[6] we conclude Appellant's first issue merits no relief. The trial court opinion comprehensively discusses and properly disposes of the first question presented. ***See*** Trial Court Op. at 6-10 (holding Appellant's conduct prior to trial required the court to take precautions and not permit Appellant to approach the bench for sidebar conferences in close proximity to four prospective jurors).

Second, Appellant avers that "[i]t is axiomatic, the fair trial right encompassed under the Federal Sixth Amendment, precludes the Commonwealth from requiring that a defendant appear at trial in distinctive prison garb, or appearing disheveled [sic]." ***Id.*** at 19.

Prior to trial, the following exchange took place between the court and Appellant:

> The Court: [to Appellant], I sent [Public Defender, Daniel M. Straszynski] out to see you two weeks ago to tell you to have your clothing ready to proceed to trial today. I notice you're still in your prison garb. Why is that and are you going to change or are you going to trial in a prison outfit?
>
> Sit. You don't stand.
>
> [Appellant]: Sorry. Sorry. I didn't know the rules and regulations.

[6] We note that the Commonwealth's brief incorporated the trial court's opinion as its own.

The Court: You better know them because that's what you're here for.

[Appellant]: We're going to start that? You're gonna shout? I can shout, too.

The Court: Guess what?

[Appellant]: How's that?

The Court: You shout; you'll be out of the courtroom.

[Appellant]: You wanna shout? You wanna disrespect me?

The Court: [to Appellant], answer my question.

[Appellant]: You're—you're not supposed to even be proceeding here, sir. You have a motion for recusal. You're not supposed to even be presiding over these proceedings, sir.

The Court: Oh, that's how we're going to be. Are you going to be dressed for trial or not?

I haven't ruled on anything yet.

[Appellant]: No. I don't run the goddamned jail. I filled out three slips to have my stuff approved.

The Court: Calm your voice down or—

[Appellant]: Those hillbilly rednecks down there don't give a shit about me complying with the law in your courtroom, Your Honor.

The Court: I asked—

[Appellant]: Now, do you hear that?

The Court: I didn't hear a thing you said except what's responsive to my question. Are you going to go to trial in that outfit, or would you like Mr. Straszynski to provide

you with some clothing before the jury's brought into the courtroom?

* * *

Let me just say for the record, the defendant continues to scream in the courtroom and be unresponsive to the judge's question.

[Appellant]: You're not no judge; you're a clown. That's what you are.

The Court: [to Appellant], do you wish to have clothing provided by Mr. Straszynski? That's what—

[Appellant]: I'm not proceeding in these proceedings, Your Honor, because I have none of my materials, which have been taken away from me, none of my materials.

The Court: You were told trial is today.

[Appellant]: Yeah. Well, guess what? You go down there and call them redneck hillbillies down there and ask them why they take my materials and why I'm being denied access to the—to the law library. And they know that I wrote request after request; I have a trial on this date, Your Honor.

The Court: You have been to the law library 125 separate occasions, more than anyone else in the history of Lancaster County Prison. You have had 22 prior appearances before Courts, predominantly in New Jersey, but also in the state of Louisiana, all of which indicate you have had opportunities to appear and understand what's happening in this court. This is the day for trial.

[Appellant]: Um-hum.

The Court: The answer to—my question is, do you wish to have clothing provided, or do you want to go to trial in your prison outfit?

[Appellant]: No. I'm objecting. I'm objecting to the proceedings . . . .

* * *

> The Court: [to Appellant] will be—
>
> [Appellant]: Now—
>
> The Court: —removed from the jury room—or the courtroom. The jurors will be brought here promptly at 1:30. Clothing will be prepared for him and given to him. If he chooses to wear them, fine. If he doesn't, then it's his prejudice that he's providing to the jurors, not the Court's, because the court has properly provided clothing for him to change into.

N.T., 4/13/15, at 5-11.

Following our review of the record, we find no merit to Appellant's claim and adopt the reasoning of the trial court. ***See*** Trial Ct. Op. at 10-13 (holding Appellant rejected the civilian clothes being offered to him, therefore, he "failed to show that any prejudice caused by his appearance was in any way the result of the actions, requirements or policy of this [c]ourt"). ***Id.*** at 13.

Third, Appellant argues, regarding his application for dismissal under Rule 600, that

> the cursory findings of the trial court cannot be considered binding where the decision was not supported by adequate, substantial and credible evidence and was in complete error.
>
> * * *
>
> The trial courts supercilious efforts to ensure the denial of [A]ppellant's Rule 600 motion was judgment exercised in a manifestly unreasonable manner, a misapplication of the law and was the result of partiality, prejudice, bias or

> ill-will as affirmatively shown by evidence appearing from the record. For these reasons, [A]ppellant's conviction must be vacate [sic] and reversed in its entirety, a writ of habeas corpus issued releasing him from confinement on nominal bail terms or dismiss the criminal information in its entirety with prejudice.

Id. at 35, 37 (citation omitted).

Our standard and scope of review in analyzing a Rule 600[7] claim is as follows:

> In evaluating Rule 600 issues, our standard of review of a trial court's decision is whether the trial court abused its discretion. Judicial discretion requires action in conformity with law, upon facts and circumstances judicially before the court, after hearing and due consideration. An abuse of discretion is not merely an error of judgment, but if in reaching a conclusion the law is overridden or misapplied or the judgment exercised is manifestly unreasonable, or the result of partiality, prejudice, bias, or ill will, as shown by the evidence or the record, discretion is abused.

Commonwealth v. Peterson, 19 A.3d 1131, 1134-35 (Pa. Super. 2011) (citations omitted) (*en banc*). Following our review of the record, we discern no abuse of discretion by the trial court. ***See id.*** We find the trial court opinion properly disposes of the issue and we rely upon it. ***See*** Trial Ct. Op. at 13-19 (noting periods of delay caused by Appellant).

Fourth, Appellant contends

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[7] We note that a new Rule 600 was adopted, effective July 1, 2013, "to reorganize and clarify the provisions of the rule in view of the long line of cases that have construed the rule." Pa.R.Crim.P. 600, Cmt. However, because the criminal complaint in this case was filed on April 9, 2013, prior to the new rule, we will apply the former version of Rule 600. The amendments to Rule 600 do not affect the result in this case.

> the trial court abused it's judicial discretion in refusing the admit into evidence, J.L. Hollinger Inc.'s insurance loss claim that irrefutably reimbursed the complainant in the amount of $60500. This insurance claim which exceeded the $42500 amount as charged in the Commonwealth's criminal information, would have shed light on this unexplained reason for this loss discrepancy, and further, these issues go to the weight of the evidence the trier-of-fact may have given to the insurance claim in reaching their verdict. Therefore, [A]ppellant was subjected to an erroneous denial of his constitutional rights to due process, fundamental fairness and compulsory process under the Sixth and Fourteenth Amendments to the U.S. Constitution. Accordingly, [A]ppellant's conviction must be vacated in it's [sic] entirety.

Appellant's Brief at 40.

Our review is governed by the following principles:

> The admission of evidence is solely within the discretion of the trial court, and a trial court's evidentiary rulings will be reversed on appeal only upon an abuse of that discretion. An abuse of discretion will not be found based on a mere error of judgment, but rather occurs where the court has reached a conclusion that overrides or misapplies the law, or where the judgment exercised is manifestly unreasonable, or the result of partiality, prejudice, bias or ill-will.

Commonwealth v. Woodard, 129 A.3d 480, 494 (Pa. 2015), (citations and quotation marks omitted), *cert. denied*, 137 S. Ct. 92 (2016).

> Whether a document should be admitted under the business records exception to the hearsay rule is within the discretion of the trier of fact provided that his or her discretion is exercised within the dictates of Section 6108.[8] This type of evidentiary ruling may only be

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[8] Section 6108 provides:

> reversed on appeal if an error of law was committed or there was a clear abuse of discretion. A document not prepared by the person testifying is not automatically rendered inadmissible, as long as the authenticating witness can provide sufficient information relating to the preparation and maintenance of the records to justify a presumption of reliability.

Toth v. W.C.A.B. (USX Corp.), 737 A.2d 838, 841 (Pa. Commw. 1999).[9]

At trial, Chad Michael Hollinger[10] testified, *inter alia*, as follows regarding a document *pro se* Appellant showed him:

> **(a) Short title of section.**—This section shall be known and may be cited as the "Uniform Business Records as Evidence Act."
>
> **(b) General rule.**—A record of an act, condition or event shall, insofar as relevant, be competent evidence **if the custodian or other qualified witness testifies to its identity and the mode of its preparation**, and if it was made in the regular course of business at or near the time of the act, condition or event, and if, in the opinion of the tribunal, the sources of information, method and time of preparation were such as to justify its admission.
>
> **(c) Definition.**—As used in this section "business" includes every kind of business, profession, occupation, calling, or operation of institutions whether carried on for profit or not.

42 Pa.C.S. § 6108(a)-(c) (emphasis added).

[9] We note that "[t]his Court is not bound by decisions of the Commonwealth Court. However, such decisions provide persuasive authority, and we may turn to our colleagues on the Commonwealth Court for guidance when appropriate." ***Maryland Cas. Co. v. Odyssey Contracting Corp.***, 894 A.2d 750, 756 n.2 (Pa. Super. 2006) (citations omitted).

[10] Mr. Hollinger testified that he was self-employed at J. L. Hollinger & Sons Equipment Sales. N.T., 4/14/15, at 65.

The Court: When you've had a chance to review it, please acknowledge.

The Witness: I remember this document. Yes.

The Court: You may ask a question.

[Appellant]: What is it that you remember about that document, sir?

A: I'm not a hundred-percent sure what—I'd have to look back into this but—this was in January of 2012. I know we put this in—and I'd have to look what this was for. It says, theft by deception.

Q: If—if—

A: But it says the amount of the loss was $60,000, but I wouldn't have turned in 60,000. The loss on your—the loss was 42,500. I'd need more paperwork to see what this was for.

* * *

Q: Mr. Hollinger, what—what I'd like you to do—directing your attention to that document, that's an insurance document, correct, sir?

A: Yes.

Q: And is that your insurance company?

A: Yes. Erie Insurance.

Q: Okay. And you, on the date of that—when—when did you put in that insurance claim to that insurance company, sir?

A: It says the loss date was 5/16/2011.

Q: Okay. And what date have we been talking about for the last—past 15 minutes for the loss?

A: 5/17/2011.

* * *

Q: If I'm not mistaken, from my brief examination of that document—**it's the first time I've seen it**—

A: Okay.

Q: —is there somewhere on there that talks about AMB Trading, LLC, contact us or contact—does it say contact us or something like that?

[The Commonwealth]: Your Honor, I'm going to object at this point. This is a hearsay document. The proper individuals who created this are not here to speak to it. This witness cannot speak to the out-of-court statement contained within it.

The Court: The hearsay objection is sustained.

* * *

Q: Have you seen this document before?

A: No. **I never seen this particular document**.

The Court: that ends the questioning then.

* * *

The Court: . . . Any further questions of this gentleman relative to any other issues, sir?

A: Not at this time, Your Honor.

* * *

[Appellant]: Your Honor, there's one evidentiary issue, sir. I had made an oversight. I'm asking, in the interest of justice, can we kindly approach so—if the Court feels it's

> necessary. I didn't ask the [c]ourt to enter that document, that insurance document into evidence, Judge.
>
> The Court: It will not be offered into evidence. It's a hearsay document. It's not going to be presented. If you have the witness and you have the writer of the document or you have someone from the insurance company to come and testify as to the document, you may certainly do that. The individual from the stand said he did not recognize the document. Therefore, it is hearsay and will not be admitted into evidence.

N.T., 4/14/15, at 93-5, 97, 102 (emphases added).

Following our review of the record, the applicable law, and the well-reasoned opinion of the trial court, we conclude this issue has no merit. We discern no abuse of discretion by the trial court in its evidentiary ruling. ***See Woodard***, 129 A.3d at 494; ***Toth***, 737 A.2d at 841. We rely upon the trial court opinion which properly addresses and disposes of the question presented. ***See*** Trial Ct. Op. at 19-21 (holding the witness did not have the required knowledge and was not qualified to testify concerning the document).

Lastly, Appellant contends the "trial court abused it's [sic] discretion when it denied [him] credit for time spent in custody in New Jersey pursuant to Pennsylvania's fugitive warrant." Appellant's Brief at 49. Appellant avers

> [o]n July 15, 2013, [he] was arrested by detectives at his New Jersey residence pursuant to a "fugitive arrest warrant" for being wanted for theft out of Lancaster County, Pennsylvania.
>
> * * *

> [A]ppellant must be resentenced and awarded credit for time spent in official custody in another sovereign while waiting to be extradited to the Commonwealth.

Id. at 52, 54.[11]

"[W]here an appellant challenges the trial court's failure to award credit for time served prior to sentencing, the claim involves the legality of sentence." ***Commonwealth v. Miller***, 655 A.2d 1000, 1001 n. 1 (Pa. Super. 1995) (citation and quotation marks omitted). "Issues relating to the legality of a sentence are questions of law, as are claims raising a court's interpretation of a statute. Our standard of review over such questions is *de novo* and our scope of review is plenary." ***Commonwealth v. Hawkins***, 45 A.3d 1123, 1130 (Pa. Super. 2012) (citation omitted).

Section 9760 provides, in pertinent part:

> (1) Credit against the maximum term and any minimum term shall be given to the defendant for all time spent in custody as a result of **the criminal charge for which a prison sentence is imposed or as a result of the**

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[11] We note that a status conference in the instant case was held on September 30, 2014. The court stated:

> Just to review a brief history, [Appellant], February 14th of 2013, pled guilty to charges in Union County. Charges here were filed on April 9th of 2013. He was also facing charges, at that point, in Mammoth [sic] County and Union County.
>
> On February 25th of 2014, he was transported from New Jersey, I believe it was a county jail there, by the Sheriff's office to us.

N.T., 9/30/14, at 3-4.

> **conduct on which such a charge is based.** Credit shall include credit for time spent in custody prior to trial, during trial, pending sentence, and pending the resolution of an appeal.

42 Pa.C.S. § 9760(1) (emphasis added). It is well established that

> "a defendant shall be given credit for any days spent in custody prior to the imposition of sentence, but only if such commitment is on the offense for which sentence is imposed." ***Commonwealth v. Clark***, 885 A.2d 1030, 1034 (Pa. Super. 2005) (quoting [***Miller***, 655 A.2d at 1002] (internal quotation marks omitted).

Commonwealth v. Infante, 63 A.3d 358, 367 (Pa. Super. 2013).

Appellant filed a petition for time credit in which he averred, in pertinent part, as follows:

> According to the Records Department at the Monmouth County Correctional Institution, [Appellant] was detained in Monmouth County Correctional Institution in New Jersey on July 5, 2013, on charges of contempt, and he was held on those charges until February 17, 2014, when he posted bail.
>
> From February 17, 2014 through February 25, 2014, when he was transferred to Lancaster County Prison, [Appellant] was detained in New Jersey solely because of the instant charges.

Pet. for Time Credit Correction to DC-300B, 4/14/16, at 1-2.

Appellant requested the court to "[o]rder the Lancaster County Clerk of Courts to correct his DC-300B[12] to reflect that he is entitled to time

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[12] In ***Commonwealth v. Heredia***, 97 A.3d 392 (Pa. Super. 2014), this Court noted that

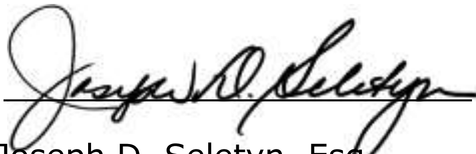
credit from February 17, 2014 on his sentences of incarceration . . . and to transmit the corrected document to the SCI where he is currently incarcerated." ***Id.*** at 2. The trial court granted the petition. ***See*** Order, 4/18/16. Appellant was granted credit for time served on the instant offenses. ***See Infante***, 63 A.3d 358, 367. We discern no error of law by the trial court. ***See Hawkins***, 45 A.3d at 1130.

For all of the foregoing reasons, we affirm the judgment of sentence.

Judgment of sentence affirmed.

Justice Mundy did not participate in the consideration or decision of this case.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 9/15/2017

> Form DC–300B is a commitment document generated by the Common Pleas Criminal Court Case Management System. ***See*** 37 Pa.Code § 96.4; 42 Pa.C.S.A. § 9764. Section 9764 of the Judicial Code sets forth the procedure associated with transfer of an inmate into DOC custody and provides that, on commitment of an inmate, the transporting official must provide the DOC with a copy of the trial court's sentencing order and a copy of the DC–300B commitment form. ***See*** 42 Pa.C.S.A. § 9764(a)(8).

Id. at 394 n.3.

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IN THE COURT OF COMMON PLEAS OF LANCASTER COUNTY, PENNSYLVANIA

CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA	:	
	:	
vs.	:	No. 1286-2014
	:	
GREGORY BYRON BARTUCCI	:	

OPINION

BY: KNISELY, J. June 22, 2017

Appellant/Defendant, Gregory Byron Bartucci, appeals from the judgment of sentence imposed on July 8, 2015, as modified by Order dated September 1, 2105. Defendant's false allegations and misrepresentations are completely contrary to the record and lack any merit. Therefore, the July 8, 2015 judgment of sentence, as modified by Order dated September 1, 2105, should not be disturbed.

BACKGROUND

On April 15, 2015, a jury found Defendant guilty of theft by unlawful taking,[1] theft by deception[2] and forgery.[3] The facts underlying Defendant's convictions are that in or about May 2011, Defendant stole forty-two thousand, five hundred dollars ($42,500.00) from J.L. Hollinger & Sons by falsely representing that he owned and

[1] 18 Pa.C.S.A. § 3921(a).
[2] 18 Pa.C.S.A. § 3922(a)(1).
[3] 18 Pa.C.S.A. § 4101(a)(2).

had the authority to sell two (2) pieces of farming and/or construction equipment and by forging a false name on a contract for the sale of the equipment.[4] Following the preparation of a pre-sentence investigation report, the Defendant was sentenced on July 8, 2015 within the standard range to twenty-seven (27) months to seven (7) years of incarceration on the theft charges[5] and twelve (12) months to seven (7) years on the forgery charge.[6] Defendant's sentences were ordered to be served concurrently.[7] A *Grazier*[8] hearing was held following sentencing and it was determined that due to Defendant's depressive mental state, that he would not be able to proceed *pro se* post-sentence and that counsel would be appointed to represent Defendant per his request.[9]

Defendant, through counsel, filed a post-sentence motion on July 20, 2015, which was granted in part and denied in part by Order dated September 1, 2015. Subsequently, Defendant, through counsel, filed a notice of appeal on September 30, 2015. Pursuant to Pennsylvania Rule of Appellate Procedure ("Pa.R.A.P.") 1925(b), this Court entered an Order on October 1, 2015 directing Defendant to file a concise statement of errors complained of on appeal. On October 29, 2015, Defendant's

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[4] N.T. Jury Trial, Vol. II, 04/14/15, pp. 65-86.
[5] Following a post-sentence motion filed by Defendant on July 20, 2015, through appointed counsel, the sentence on the charge of theft by deception was vacated pursuant to the merging of the two (2) theft charges. *See*, September 1, 2105 Order.
[6] Sentencing Order, July 8, 2015.
[7] Sentencing Order, July 8, 2015.
[8] *Com. v. Grazier*, 713 A.2d 81 (Pa. 1998).
[9] N.T. Sentencing, 07/08/15, pp. 17-23.

counsel filed a Statement of Intent to File *Anders*[10]/*McClendon*[11] Brief in Lieu of a Statement of Errors Complained of on Appeal. A Memorandum was filed by this Court on November 30, 2015 noting that Defendant had not presented the Court with any issues to be addressed by a Pa.R.A.P. 1925(a) Opinion.

Counsel for Defendant filed an Ander's Brief and an Application to Withdraw as Counsel with the Superior Court of Pennsylvania on docket number 1686 MDA 2015 on March 31, 2016. Counsel for Defendant was directed by the Superior Court to comply with *Santiago* by Order dated July 15, 2016 and a new briefing schedule was issued. Counsel for Defendant filed a Brief on September 23, 2016. On October 13, 2016, Defendant filed a *pro se* response to Counsel's prior *Ander's* Brief and an Application for Relief seeking to proceed with his appeal *pro se*.[12] The Superior Court remanded the case for the purposes of a new *Grazier* hearing. Defendant's second *Grazier* hearing was held on December 8, 2016 and this Court submitted an Opinion that same day finding that Defendant had knowingly, intelligently and voluntarily waived his right to counsel on appeal. On January 12, 2017, the

[10] *Anders v. State of Cal.*, 386 U.S. 738 (1967).
[11] *Com. v. McClendon*, 434 A.2d 1185 (Pa. 1981), abrogated by *Com. v. Santiago*, 978 A.2d 349 (Pa. 2009).
[12] The Superior Court found Defendant's request to proceed *pro se* timely pursuant to the mailbox rule despite the extreme delay in filing and despite Defendant's acknowledgment on the record at the December 8, 2016 *Grazier* hearing that he had exploited the mailbox rule by first mailing his application for relief to his wife in New Jersey for copying, as he had done numerous times in the past, who then mailed the application for relief to the Superior Court. See, N.T. *Grazier* Hearing, 12/08/16, pp. 6-7.

undersigned Judged personally received through the mail a Concise Statement of Errors Complained of on Appeal *Nunc Pro Tunc* from Defendant dated December 20, 2016.[13] On May 16, 2017 the Superior Court entered an Order remanding the matter and directing this Court to file an opinion pursuant to Pa.R.A.P. 1925(a).

Statement of Errors Complained of on Appeal

Defendant raises the following issues in his Concise Statement of Errors Complained of on Appeal:

1. Defendant's exclusion from four (4) sidebars with prospective jurors during *voir dire* where Defendant's prior misconduct caused concern for courtroom security and proper decorum, Defendant's standby counsel was present at the sidebar discussions and Defendant did not object to proceeding in such a manner;
2. Defendant's appearance at trial in prison clothes and unshaven where Defendant rejected the civilian clothes procured and offered to him, failed to make any clear and proper objection concerning his facial hair and refused to utilize the shaving equipment provided;
3. The denial of Defendant's motion pursuant to Pennsylvania Rule of Criminal Procedure ("Pa.R.Crim.P.") 600(B)(1) where all continuances during the pendency of the matter were properly placed on the record

[13] *See*, Ex. A, attached hereto.

as attributed to Defendant's repeated failure to file his desired pretrial motions and his repeated complaints that he did not have adequate time to prepare, where Defendant contemporaneously filed a separate motion seeking yet another continuance of trial to file additional late pretrial motions and where Defendant failed to allege any facts that would establish his right to request and obtain relief;

4. The exclusion at trial of correspondence from an insurance company to the Pennsylvania State Police as hearsay where Defendant failed to present a qualified witness to lay a proper foundation for its admission as a business record and where the witness testifying about the document had no knowledge concerning its preparation or contents and was not the recipient of the correspondence;

5. The failure to grant Defendant credit for the entire length of time Defendant was incarcerated in New Jersey where Defendant failed to ever request credit for the time served, where Defendant, through counsel, acknowledged that he was incarcerated during that time for unrelated charges within that jurisdiction and where Defendant failed to allege any facts that would entitle him to credit for the time served in another jurisdiction on unrelated charges;

6. The holding in abeyance of Defendant's motion for recusal until immediately prior to the start of trial despite any factual allegations that would warrant recusal and where any perceived delay did not cause Defendant any prejudice; and

7. Defendant's false allegations of impartiality that are completely contradicted by the record and by the considerable and often unwarranted concessions granted to Defendant despite his dilatory, obdurate and vexatious conduct.

DISCUSSION

I. Sidebars during *Voir dire*

A trial court has broad discretion in controlling the general conduct of a trial, especially where it concerns the trial court's duty to assure an orderly and impartial trial and the implementation of proper security measures. *Com. v. Thomas*, 498 A.2d 1345, 1349-50 (Pa.Super. 1985). Courts may properly act to defend themselves, the process and the system when individuals that come before them deliberately act to disrupt the judicial process because such disruptions threaten the ability of the courts to act justly. *Com. v. Africa*, 353 A.2d 855, 862–63 (Pa. 1976). Although potentially disruptive defendants maintain the right to represent themselves, it is within the discretion of a trial court to appoint and utilize standby counsel, especially when a defendant has demonstrated the potential to be disruptive. *Id.* at 864.

Defendants that act disruptively despite proper warnings, may be removed from the courtroom during the proceedings with standby counsel acting on their behalf until they can assure the trial court that they act appropriately. *Id.* It is the duty of the trial court to control those appearing before it. *Id.* at 865. A defendant can waive his right to represent himself through misconduct and the decision in *Faretta v. California*, 422 U.S. 806 (1975) in no way limits a trial court's duty and power to control a disruptive defendant. *Id.* at 864, n. 22. No relief is warranted where a defendant is removed from the proceedings due to his own conduct, especially where there can be shown no prejudice to the defendant. *See*, *Com. v. Abu-Jamal*, 720 A.2d 79, 110 (Pa. 1998).

In the instant case, Defendant's conduct prior to the start of trial caused serious concern about the ability to proceed in an orderly, impartial and safe fashion with Defendant present. Defendant had persisted in verbal attacks on the undersigned Judge, prison officials, the Deputy Sheriffs and the jury panel.[14] His conduct also

[14] N.T. Status Conference, 08/8/14, pp. 3-4 (When asked about why he would not be ready to file his pretrial motion by a certain deadline, Defendant became argumentative and made false representations about the undersigned Judge's conduct towards Defendant at the previous conference on July 15, 2014); N.T. Status Conference, 09/19/14, p. 3 (Defendant again falsely stated that he had been abused by this Court for simply having been told to be quiet when the undersigned Judge was speaking); N.T. Jury Trial Vol. I, Pretrial Matters, 04/13/15, pp. 6-11 (Defendant referred to prison officials as "hillbilly rednecks," falsely accused the undersigned Judge of forcing him to go before the jury in prison clothes in order to obtain a "simple verdict," exclaimed that the undersigned Judge was not a judge, but a clown, accused the jury panel of being a "bunch of hillbilly Republicans," referred to the jury wheel list as "that redneck list" and shouted several vulgarities at the Deputy Sheriffs that were attempting to restrain him).

included an instances where Defendant physically resisted Deputy Sheriffs while they were attempting to remove him from the courtroom[15] and an instance where Defendant attempted to exit the courtroom without permission of the Deputy Sheriffs or this Court in the middle of a proceeding.[16] Defendant's conduct persisted despite having been warned repeatedly that his conduct could result in him being removed from the courtroom and the proceedings.[17] Therefore, it was necessary to take certain precautions to maintain the security and decorum of the courtroom and the proceedings.

The four (4) sidebars that Defendant complains of on appeal[18] took place with prospective jurors present at the bench to discuss personal issues those individuals had relating to their ability to serve as an impartial juror.[19] These are the same individuals, members of the community of Lancaster County and members of the prospective jury panel, that Defendant had just a day earlier referred to in a forty-five (45) minute uncontrolled outburst as a "bunch of hillbilly Republicans."[20] Given Defendant's prior conduct, both physical and verbal, this Court was completely within its discretion to determine that it was in the best interest of both Defendant

[15] N.T. Jury Trial Vol. I, Pretrial Matters, 04/13/15, p. 11.
[16] N.T. Pretrial Conference, 07/15/14, p. 8; Def.'s Verified Pet. in Support of Recusal Mot. to Assign Def.'s Criminal Matter to the President J., 12/22/15, p.3, ¶ 5.
[17] N.T. Jury Trial Vol. I, Pretrial Matters, 04/13/15, pp. 6, 8, 11-12.
[18] *See*, Def. – Appellant's Reply Br. In Opp'n to *Anders/McClendon* Br., pp. 12-13.
[19] N.T. Excerpts from Jury Trial Voir Dire and Opening Statements, 04/14/15, pp. 13, 15-16, 23.
[20] N.T. Jury Trial Vol. I, Pretrial Matters, 04/13/15, pp. 10-11.

and those present in the courtroom, particularly the prospective jurors, that Defendant not be permitted to approach the bench for sidebars and be within close proximity to the prospective jurors. Defendant, despite his misrepresentation that he did so, never objected to proceeding in this manner. Standby counsel was utilized to keep Defendant informed as to the content of the discussions at sidebar and Defendant has never claimed that standby counsel failed to represent Defendant's interests during the sidebars or that standby counsel failed to properly inform Defendant as to the content of the discussions at sidebar.

It was also within this Court's discretion to determine that Defendant should not be able to leave his table without first seeking permission to do so.[21] It was Defendant that chose to utilize standby counsel on the one (1) occasion to seek permission to approach the bench.[22] Nothing prevented Defendant from himself seeking the sidebar and, in fact, Defendant did so on several occasions and he was permitted to approach the bench each time.[23] Defendant never raised any issue and never objected to proceedings in this manner. The only objection raised by Defendant came the day after *voir dire* and after the Commonwealth rested and concerned only Defendant's late objection that some of the sidebars were not placed

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[21] *See*, N.T. Jury Trial Vol. II, 04/14/15, pp. 19-20.
[22] N.T. Excerpts from Jury Trial Voir Dire and Opening Statements, 04/14/15, pp. 24-26,
[23] N.T. Jury Trial Vol. II, 04/14/15, pp. 91, 125; N.T. Jury Trial Vol. III, 04/15/15, pp. 174-175, 201. Defendant also attended sidebars initiated by this Court and the Commonwealth. See, N.T. Excerpts from Jury Trial Voir Dire and Opening Statements, 04/14/15, pp. 27-28; N.T. Jury Trial Vol. III, 04/15/15, p. 217.

on the record.[24] It was pointed out to Defendant that all sidebars were placed on the record when a request for such was made by him and that none of the unrecorded sidebars resulted in any rulings.[25] Therefore, Defendant waived any issues and, even if he did not, has failed to demonstrate any abuse of discretion or prejudice.

II. Defendant's Appearance at Trial

It is well settled that a court cannot require a defendant to appear before a jury wearing clothing that identifies him as a prisoner. *Com. v. Cox*, 983 A.2d 666, 691 (Pa. 2009); *Com. v. Keeler*, 264 A.2d 407, 410 (Pa.Super. 1970). An abuse of discretion has been previously found where a trial court did not either continue the case to allow the defendant an opportunity to obtain civilian clothing or did not itself procure civilian clothing for the defendant. *Keeler*, 264 A.2d at 410. However, in the instant case, Defendant was not compelled by this Court to appear before the jury in his prison attire. In fact, the undersigned Judge took the initiative to send standby counsel to Defendant prior to trial to advise him to obtain civilian attire, immediately questioned Defendant about his attire when he appeared for trial and procured civilian attire for Defendant to wear during trial.[26] In response to this assistance, Defendant proceeded to refuse to answer questions concerning his attire and whether he would wear the clothing offered, ultimately rejected the clothing that was offered

[24] N.T. Jury Trial Vol. III, 04/15/15, p. 208.
[25] N.T. Jury Trial Vol. III, 04/15/15, p. 208.
[26] N.T. Jury Trial Vol. I, Pretrial Matters, 04/13/15, pp. 5, 11, 13.

and engaged in an uncontrolled verbal and physical rant that resulted in Defendant having to be removed from the courtroom.[27]

It appears clear from Defendant's conduct and his own statements on the record that Defendant undertook to either use his lack of civilian clothing as a reason to procure yet another continuance or, as he put it on the record and in his brief to the Superior Court of Pennsylvania, as an attempt to create an issue for appeal without having to show prejudice.[28] There appears no other reason for rejecting the civilian clothes being offered to him. The undersigned Judge even warned Defendant that he would be prejudicing himself with the jurors if he did not wear the civilian clothing that would be provided to Defendant.[29] Despite Defendant's rejection of the clothing, it was procured and offered to Defendant and his rejection of it was noted on the record with Defendant present and he later acknowledged that rejection.[30] It was not an abuse of discretion to deny Defendant's request for a continuance when civilian clothes were readily available for Defendant's use, where trial had already been continued multiple times at the request of Defendant due to his failure to comply with deadlines for filing of pretrial motions and where, despite those requests for continuances, Defendant contemporaneously persisted in claiming that

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[27] *See*, N.T. Jury Trial Vol. I, Pretrial Matters, 04/13/15, pp. 6-11.
[28] *See*, N.T. Jury Trial Vol. I, Pretrial Matters, 04/13/15, pp. 7-8, 9.
[29] N.T. Jury Trial Vol. I, Pretrial Matters, 04/13/15, p. 11.
[30] N.T. Jury Trial Vol. I, Pretrial Matters, 04/13/15, pp. 11, 13; N.T. Jury Trial Vol. II, 04/14/15, pp. 18, 40.

his right to a speedy trial had been violated in his pursuit of release on nominal bail pursuant to Pa.R.Crim.P. 600(b)(1).

Instead of choosing to wear the civilian clothing offered, Defendant requested a curative instruction, which was granted and given to the jury and Defendant himself gave an explanation to the jury for his attire and asked them not to judge him by his appearance.[31] Contrary to the false allegations of Defendant, this Court did not threaten to improperly reveal Defendant's criminal past if Defendant raised the issue of his clothing to the jury.[32] The warning was given so that if Defendant attempted to misrepresent the reasons for his attire to the jury, he would know that it would open the door and that the jury would be informed that Defendant was not being forced against his will to appear in prison clothes. It is extremely disingenuous of Defendant to claim that he was forced by this Court to appear before the jury in his prison attire and even more disingenuous of Defendant to claim that it was done with malice, with indifference and under the guise of protecting Defendant's rights. The record clearly establishes otherwise.

As to Defendant's alleged "disheveled appearance" at trial, Defendant failed to make any clear or proper objection at the time of trial. Defendant made a vague statement in the middle of a verbal rant about not being provided a razor, but never

[31] N.T. Jury Trial Vol. II, 04/14/15, pp. 39, 62; N.T. Excerpts from Jury Trial Voir Dire and Opening Statements, 04/14/15, pp. 36, 41.
[32] N.T. Jury Trial Vol. II, 04/14/15, p. 101.

explained that he was objecting to proceeding unshaven and never made a request for a razor.[33] Instead, Defendant suddenly abandoned the vague reference to a razor and the discussion of his appearance and jumped into a verbal rant about jury charges, the socioeconomic makeup of the jury and the motives of the community of Lancaster County.[34] Defendant refused to answer any further questions about his physical appearance and failed to raise the issue of his facial hair again so that it could properly be addressed by this Court. Furthermore, though this Court was not made aware of the circumstances at the time of trial, it appears from the exhibits submitted by Defendant to the Superior Court of Pennsylvania that Defendant did have access to a razor, but rejected it as not being hygienically acceptable to him.[35] Because Defendant refused all assistance offered him, Defendant has failed to show that any prejudice caused by his appearance was in any way the result of the actions, requirements or policy of this Court.

III. Rule 600(B)

Pa.R.Crim.P. 600(B) states that "[e]xcept in cases in which the defendant is not entitled to release on bail as provided by law, no defendant shall be held in pretrial incarceration in excess of (1) 180 days from the date on which the complaint is filed..." Any period of delay caused by the defendant must be excluded from the

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[33] N.T. Jury Trial Vol. I, Pretrial Matters, 04/13/15, p. 9.
[34] N.T. Jury Trial Vol. I, Pretrial Matters, 04/13/15, pp. 9-11.
[35] See, Def. – Appellant's Reply Br. In Opp'n to Anders/McClendon Brief, Ex. DA 9, DA 13.

computation of the length of pretrial incarceration. Pa.R.Crim.P. 600(C)(2). Periods of delay that must be excluded as being caused by a defendant generally include the period of time between the filing of the complaint and the defendant's arrest, periods of delay for any continuance(s) granted at the request of the defendant or the defendant's attorney, periods of delay in which the defendant contests extradition or where the responding jurisdiction delays extradition and periods of delay caused from the filing and litigation of any pretrial motions where such delays the commencement of trial. Pa.R.Crim.P. 600 (Comments). If a defendant entitled to bail is subjected to pretrial incarceration beyond the limits provided, they may file a motion seeking to be released on nominal bail at any time prior to the start of trial. Pa.R.Crim.P. 600(D)(2).

In the instant case, the Criminal Complaint was filed against Defendant on April 9, 2013 and an Arrest Warrant was issued that same day. At the time, Defendant was also facing charges in Mammoth County and Union County New Jersey.[36] Defendant was not delivered from the custody of authorities in New Jersey until February 25, 2014.[37] At that time, the mechanical run date for purposes of Pa.R.Crim.P. 600(B)(1) was August 24, 2014.

[36] N.T. Status Conference 09/30/14, p. 3.
[37] *See*, Commitment, 02/25/14.

A preliminary hearing was held on March 14, 2014 and Defendant signed a Waiver of Arraignment on that date acknowledging that he had until April 11, 2014 to complete discovery and that he had thirty (30) days from April 11, 2014 to file any pretrial motions. Defendant's Waiver of Arraignment was filed on April 2, 2014. Defendant's counsel moved to withdraw on April 28, 2014 and Defendant's *Grazier* hearing was held on May 2, 2014 at which time Defendant was granted *pro se* status.[38] A second pretrial conference was held on May 27, 2014 at which time the matter was listed for trial and Defendant requested ample time to file certain pretrial motions.[39]

The matter was listed for the July 15, 2014 trial term, but was continued at the pretrial conference on that date to the August 25, 2014 trial term due to Defendant's failure to seek discovery he insisted was necessary and Defendant's failure to file the pretrial motions he previously stated he wished to file.[40] An Order was placed on the record attributing the continuance and delay to Defendant as well as stating the reasons for such.[41] Therefore, the period from July 15, 2014 to August 25, 2014 must be excluded from the calculation of Defendant's pretrial incarceration for purposes of Pa.R.Crim.P. 600(B)(1).

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[38] N.T. Pretrial Conference/Waiver of Counsel 05/02/14.
[39] N.T. Pretrial Conference 05/27/14, pp. 3-5.
[40] N.T. Pretrial Conference 07/15/14, pp. 2-9.
[41] N.T. Pretrial Conference 07/15/14, p. 9.

A status conference was held on August 8, 2014 in advance of the trial term set for August 25, 2014 and again Defendant sought additional time to seek additional discovery, though he had to date failed to make any request for such, and to file his pretrial motions.[42] Defendant stated on the record that he would not be ready for the scheduled trial date and would also not be able to file his motions by September 1, 2014.[43] Therefore, trial was continued to October 6, 2014 and Defendant was given a deadline of September 15, 2014 for filing his pretrial motions.[44]

When Defendant failed to file anything by September 15, 2014, a Status Conference was held on September 19, 2104 at which time Defendant stated that the motions had been drafted, had left the institution and were expected to arrive at the clerk's office no later than Wednesday, September 24, 2014.[45] Trial was not continued at that time, but it was noted that it would have to be determined once Defendant's motions were received, whether the litigation of the matters therein would require a delay in the start of trial.[46]

At the Status Conference on September 30, 2014, it was noted that Defendant's pretrial motions, though promised, had still not been filed.[47] Defendant

[42] N.T. Status Conference 08/08/14, pp. 2-3.
[43] N.T. Status Conference 08/08/14, p. 3.
[44] N.T. Status Conference 08/08/14, pp. 3, 4.
[45] N.T. Status Conference 09/19/14, p. 2.
[46] N.T. Status Conference 09/19/14, p. 5.
[47] N.T. Status Conference 09/30/14, p. 2.

then revealed that the motions he drafted were sent not to the clerk's offic
but to another location for typing, had arrived at that location[48] and would
at the clerk's office no later the end of the week.[49] Trial was continued to
3, 2014 and it was explained on the record that the delay would again be
to Defendant with the reason being Defendant's continued delay in filing l
motions.[50] Therefore the period from August 25, 2014 to November 3, 20
excluded from the calculation of Defendant's pretrial incarceration for p
Pa.R.Crim.P. 600(B)(1).

Despite Defendant's representations, he had still not filed his pretri
as of the Status Conference held on October 24, 2014.[51] Trial was,
scheduled for January 20, 2015 and Defendant represented at the time th
had finished typing the motions[52] and that they would be mailed once
collated.[53] The period of delay from the date of the conference to the ne
trial was attributed to Defendant for his continued delay in filing his desi

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[48] It should be noted that Defendant later alleged that he mailed his drafted motions to New Jersey on September 25, 2014, but that they mysteriously never arrived and wer destroyed. See, Def.'s Mot. to Preserve Time for Filing Additional Motions with the (Interest of Justice and Mem. in Support, 12/22/14, p. 2.

[49] N.T. Status Conference 09/30/14, pp. 2-3.

[50] N.T. Status Conference 09/30/14, pp. 3-5.

[51] N.T. Status Conference 10/24/14, p. 2.

[52] Again, this Court notes that in the Lawful Affidavit of Flora M. Bartucci, filed by De December 22, 2014, Mrs. Bartucci swears that Defendant first contacted her on Octob telling her to expect the documents, which he purportedly mailed on September 25, 201 she neither received nor typed those motions.

[53] N.T. Status Conference 10/24/14, p. 2.

motions.[54] A written Order was entered that same day confirming such and giving Defendant until November 21, 2014 to file his pretrial motions. Therefore, the period from October 24, 2014 to January 20, 2015 must be excluded from the calculation of Defendant's pretrial incarceration for purposes of Pa.R.Crim.P. 600(B)(1).

Despite the November 21, 2014 deadline imposed by the October 24, 2014 Order, Defendant failed to file his pretrial motions until December 22, 2014.[55] The hand-written material filed by Defendant on December 22, 2014 inexplicably included both a motion for release pursuant to Pa.R.Crim.P. 600(B)(1), claiming both that Defendant had been denied a speedy trial and that he had been subjected to unreasonably short deadlines for filing pretrial matters,[56] and a motion for an additional continuance, claiming that Defendant was not given adequate time to prepare his pretrial motions.[57] Defendant stated in another motion filed that same day, that this Court acted unreasonably in granting the Commonwealth's request to set a date certain for trial and had exhibited arbitrary "expeditiousness."[58] Furthermore, Defendant's motion for release on nominal bail contains clear

[54] N.T. Status Conference 10/24/14, p. 2.

[55] The motions and materials filed by Defendant contain signature dates ranging from October 27, 2014 to as late as December 15, 2014.

[56] Def.'s Mot. for Nominal Bail Pursuant to the Authority of the Pennsylvania Speedy Trial Rules and Mem. in Support Thereof, 12/22/15, pp. 9-10.

[57] Def.'s Mot. to Preserve Time for Filing Additional Motions with the Court in the Interests of Justice and Mem. in Support, 12/22/15, p. 2, ¶ 1.

[58] Def.'s Verified Pet. in Support of Recusal Mot. to Assign Def.'s Criminal Matter to the President J., 12/22/14, p. 4, ¶ 7.

misrepresentations of fact, including that no periods of delay were caused by Defendant.[59] Defendant's motion lacks all merit on its face and the record clearly demonstrates that Defendant was caused no prejudice whatsoever from the lack of a hearing.[60] Furthermore, the filing of a motion for release on nominal bail following all of Defendant's continuance requests and contemporaneous request for an additional continuance is a clear demonstration of Defendant's lack of credibility and bad faith conduct throughout these proceedings. Therefore, Defendant's motion was denied by Order dated January 15, 2015 with the appropriate finding that had already been previously placed on the record at prior hearings held for the specific purpose of determining whether Defendant, and Defendant alone, was finally prepared to proceed to trial.[61]

IV. Erie Insurance Correspondence

During Defendant's cross-examination of Chad M. Hollinger, a victim, Defendant attempted to introduce correspondence purportedly from Erie Insurance Company to the Pennsylvania State Police.[62] It appears that Defendant wanted to

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[59] Def.'s Mot. for Nominal Bail Pursuant to the Authority of the Pennsylvania Speedy Trial Rules and Mem. in Support Thereof, 12/22/15, p. 3.

[60] *See*, *Com. v. McGeth*, 622 A.2d 940, 945 (Pa.Super. 1993) (even if it was error to not hold a hearing upon motion, the defendant failed to demonstrate prejudice where the record was clear the defendant was not entitled to relief), *aff'd*, 535 Pa. 546, 636 A.2d 1117 (1994).

[61] It should be noted that Defendant initially attempted to appeal the January 15, 2015 denial of his motion for release, causing an additional delay of trial, which was later withdrawn by appointed appellate counsel. As previously noted, Defendant sought an additional stay claiming that he did not have proper attire and did not have certain material he required.

[62]

challenge the amount of reimbursement J.L. Hollinger & Sons received from their insurance company. The correspondence, which, again, is not addressed to the witness, states that the insurance company has settled with their insured concerning a loss that occurred on May 16, 2011 and that they, therefore, have an interest in the matter.[63] The correspondence does not state the amount given to the insured, but states a loss amount of sixty thousand, five hundred dollars ($60,500.00).[64] The correspondence does not state what party, whether it be the insured or the insurance company, sustained the loss, or what figures went into the loss amount, i.e., amount stolen, amount rendered to insured, counsel fees, etc.[65]

Furthermore, the witness had no knowledge concerning the circumstances of the content of the correspondence and viewing the correspondence did not recall his recollection as to the matter.[66] The witness did, however, state that he did not receive full reimbursement for his loss and did not receive the amount stated in the correspondence.[67] An objection to the admission of the document as hearsay was sustained over the argument of Defendant that the document was admissible as a business record.[68]

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[63] N.T. Jury Trial Vol. II, 04/14/15, pp. 93-97.
[64] The referenced exhibit was not marked at trial, but is attached to Def. – Appellant's Reply Br. in Opp'n to Anders/McClendon Br. at Ex. DA 14, which was filed with the Superior Court of Pennsylvania at docket number 1686 MDA 2015.
[65] *See*, footnote 63.
[66] N.T. Jury Trial Vol. II, 04/14/15, pp. 93-94, 95.
[67] N.T. Jury Trial Vol. II, 04/14/15, pp. 92-93.
[68] N.T. Jury Trial Vol. II, 04/14/15, pp. 94-95, 96-97.

It is true that a record of an act, condition or event may be admissible if it can be shown that it is a record of a regularly conducted activity. 42 Pa.C.S.A. § 6108(A); Pa.R.E. 803(6). However, the admission of such is permissible only where the record is relevant and only where the custodian or other qualified witness testifies to its identity and the mode of its preparation. 42 Pa.C.S.A. § 6108(A). The witness must be able to testify that: (A) the record was made at or near the time by--or from information transmitted by--someone with knowledge; (B) the record was kept in the course of a regularly conducted activity of a "business", which term includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit; (C) making the record was a regular practice of that activity. Pa.R.E. 803(6).

Here, the record is clear that the witness did not have the required knowledge and was not qualified to testify concerning the documents identify or its preparation. It was not drafted by him or at his direction, he was not the intended recipient of the document and he had no knowledge about the contents of the letter. Furthermore, the contents of the document were not relevant given its lack of detail concerning its contents and had no bearing on Defendant's guilt or innocence. Even if it was error to exclude the document, Defendant did not suffer any prejudice from its exclusion. In fact, its admission may have supported an increase in the amount of loss found to be sustained as a result of the crimes perpetrated by Defendant.

V. Credit for Time Served

Defendants must be given credit "for all time spent in custody as a result of the criminal charge for which a prison sentence is imposed or as a result of the conduct on which such a charge is based." 42 Pa.C.S.A. § 9760. In the instant case, Defendant claims that he should have received credit for the entire length of his incarceration in New Jersey. However, Defendant never requested that he be given credit for any time prior to February 17, 2014. On April 14, 2016, Defendant, through appointed counsel, filed a Petition for Time Credit Correction to DC-300B. In that petition, Defendant only sought credit for time served from February 17, 2014. In fact, Defendant acknowledged at the time that prior to February 17, 2014, he was incarcerated in Monmouth County, New Jersey on unrelated charges of contempt.[69] Defendant's petition was granted by Order dated April 18, 2016. Defendant cannot raise this issue for the first time on appeal and, even if he were permitted to do so, has not alleged facts that would entitle him to credit for the time served in another jurisdiction on unrelated charges.

[69] Pet. for Time Credit Correction to DC-300B, 04/14/16, ¶ 2.

VI. Delay in Denying Motion for Recusal[70]

On December 22, 2014, Defendant filed a motion for recusal of the undersigned Judge, which was denied on the record prior to the start of trial on April 13, 2015. Defendant claims in his Concise Statement of Errors Complained of on Appeal, that this perceived delay in denying Defendant's motion for recusal was unreasonable and caused him prejudice. First and foremost, Defendant's allegations that the undersigned Judge acted impartially and with malice towards Defendant are wholly false and, as explained below, are contrary to the record in this matter. Furthermore, Defendant's motion for recusal was immediately taken under consideration, as evidenced by the Order dated January 15, 2015. The matter was held in abeyance, not to prejudice Defendant, but as a courtesy to Defendant so that the matter could remain under consideration during the pendency of the matter without Defendant needing to file any additional motion if an actual issue with merit arose. Defendant first stated an intent to file a motion for recusal at a status conference on August 8, 2014,[71] but was unable to succeed in the filing of such until December 22, 2014. Requiring or permitting Defendant to file additional motions would have likely delayed the proceedings even further and would have been

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[70] The alleged delay in denying Defendant's motion for recusal was first raised in his Concise Statement of Errors Complained of on Appeal received by this Court on January 12, 2017, but was not raised in the brief filed with the Superior Court on October 13, 2016. The Superior Court granted Defendant's January 12, 2017 request to consider his October 13, 2016 brief his final brief on January 20, 2017. Therefore, it appears that Defendant is now waiving this issue on appeal.
[71] N.T. Status Conference, 08/08/14, p. 3.

prejudicial to both Defendant and the Commonwealth as well as a waste of judicial resources.

VII. Allegations of Impartiality[72]

The standard concerning recusal is well settled:

> If a party questions the impartiality of a judge, the proper recourse is a motion for recusal, requesting that the judge make an independent, self-analysis of the ability to be impartial. [*Com.*] *v. Travaglia*, 541 Pa. 108, 661 A.2d 352, 370 (1995). If content with that inner examination, the judge must then decide 'whether his or her continued involvement in the case creates an appearance of impropriety and/or would tend to undermine public confidence in the judiciary.' [*Com.*] *v. Tharp*, 574 Pa. 202, 830 A.2d 519, 534 (2003) [...] This assessment is a 'personal and unreviewable decision that only the jurist can make.' *Id.* 'Once the decision is made, it is final....' *Travaglia*, at 370 (quoting *Reilly v. SEPTA*, 507 Pa. 204, 489 A.2d 1291, 1300 (1985)). This Court presumes judges of this Commonwealth are 'honorable, fair and competent,' and, when confronted with a recusal demand, have the ability to determine whether they can rule impartially and without prejudice. [*Com.*] *v. White*, 557 Pa. 408, 734 A.2d 374, 384 (1999). The party who asserts a trial judge must be disqualified bears the burden of producing evidence establishing bias, prejudice, or unfairness necessitating recusal, and the 'decision by a judge against whom a plea of prejudice is made will not be disturbed except for an abuse of discretion.' [*Com. v. Darush*, 501 Pa. 15, 21, 459 A.2d 727, 731 (1983)].

Com. v. Druce, 848 A.2d 104, 108 (Pa. 2004).

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[72] While Defendant's brief, filed with the Superior Court of Pennsylvania on October 13, 2016, does not address this issue as a separate claim of error or in a separate section, allegations of impartiality and ill will by the judiciary appear through Defendant's brief and Defendant does make a separate claim of error in his Concise Statement of Errors Complained of on Appeal received by this Court on January 12, 2017.

The bulk of Defendant's allegations involve stern language he claims the undersigned Judge used towards him that he perceived as demonstrating bias. However, even if Defendant's allegations were true, which the record demonstrates is incorrect, it has been recognized that even ill-advised comments by a judge do not necessarily require the recusal. *Com. v. Druce*, 848 A.2d 104, 109 (Pa. 2004). Likewise, not every unwise or irrelevant remark by a judge requires a new trial. *Com. v. Phillips*, 132 A.2d 733, 736 (Pa.Super. 1957). It is only when remarks are prejudicial, that is, when it can be found that the remark deprived the defendant of a fair and impartial trial, that a new trial may be warranted. *Id.* Where the remarks have no effect or only "slight effect" on the jury, "it will not vitiate an otherwise fair trial." *Id.* Furthermore, it should be noted that a court has the authority and the duty to ensure that order and decorum remain the hallmark of all court proceedings and that a defendant cannot be tolerated to disregard proper standards of conduct. *Illinois v. Allen*, 397 U.S. 337, 343 (1970). To meet that duty, courts "must act instantly to suppress disturbance or violence or physical obstruction or disrespect to the court, when occurring in open court." *Com. v. Africa*, 353 A.2d 855, 865, n. 26 (Pa. 1976).

In the instant matter, Defendant claims that the undersigned Judge's bias and mistreatment of Defendant began at his Grazier hearing on May 2, 2014, when the

undersigned Judge allegedly told Defendant to "shut-up."[73] Defendant's incorrect quote lacks citation to the transcript of the proceeding and grossly misstates what occurred. When the proceeding opened, Defendant refused to stop talking to permit the Commonwealth to address the matter and the undersigned Judge appropriately directed Defendant to "be quiet."[74] Defendant apologized and the matter proceeded.[75] Shortly thereafter, in response to a simple yes or no question, Defendant attempted to launch into a legal argument.[76] For purposes of expediency and to maintain control of the proceeding, it was explained to Defendant that legal argument was not required and that he should simply answer the question.[77] The matter again proceeded with Defendant being granted *pro se* status and, furthermore, being reassured that no ill-will was harbored towards him, which Defendant accepted.[78] Defendant made no objection and expressed no concern when he was informed by a different judge at a hearing on May 27, 2014 that the matter would be assigned to the undersigned Judge.[79]

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[73] Def.'s Verified Pet. in Support of Recusal Mot. to Assign Def.'s Criminal Matter to the President J., 12/22/15, p. 2, ¶ 3.
[74] N.T. Pretrial Conference/Waiver of Counsel, 05/02/14, p. 2.
[75] N.T. Pretrial Conference/Waiver of Counsel, 05/02/14, p. 2.
[76] N.T. Pretrial Conference/Waiver of Counsel, 05/02/14, p. 2.
[77] N.T. Pretrial Conference/Waiver of Counsel, 05/02/14, pp. 2-3.
[78] N.T. Pretrial Conference/Waiver of Counsel, 05/02/14, p. 10.
[79] N.T. Pretrial Conference, 05/27/14, p. 4.

Defendant next asserts that the undersigned Judge acted maliciously towards him concerning his request for transcripts from his preliminary hearing[80] and for proof that the Commonwealth withdrew certain charges against him.[81] Contrary to Defendant's allegations, it was simply explained to Defendant that a transcript of his preliminary hearing does not exist because he failed to request that the proceedings be transcribed prior to or at the time of the preliminary hearing.[82] It was also explained to Defendant that the Commonwealth did not withdraw any charges against Defendant and so there was nothing to offer in discovery concerning any withdrawal.[83] Despite the explanations, Defendant became argumentative and persisted with the issues instead of answering the questions that were posed to him about his ability to proceed to trial.[84] Defendant was appropriately admonished for his conduct, but while the undersigned Judge was attempting to explain to Defendant that he needed to raise his issues by filing written requests, Defendant once again became argumentative and interrupted the explanation.[85] When admonished and told to "be quiet" when the undersigned Judge is speaking, Defendant attempted to physically leave the courtroom without permission and without the Deputy

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[80] Def.'s Verified Pet. in Support of Recusal Mot. to Assign Def.'s Criminal Matter to the President J., 12/22/15, p.3, ¶ 5.
[81] Def.'s Verified Pet. in Support of Recusal Mot. to Assign Def.'s Criminal Matter to the President J., 12/22/15, p.4.
[82] N.T. Pretrial Conference, 07/15/14, pp. 6-7.
[83] N.T. Pretrial Conference, 07/15/14, pp. 4-6.
[84] N.T. Pretrial Conference, 07/15/14, pp. 6, 7-8.
[85] N.T. Pretrial Conference, 07/15/14, p. 8.

Sheriffs.[86] Defendant was not in any way verbally abused or attacked by the undersigned Judge and his allegations of such are in extreme bad faith.

Defendant's next contention is that the undersigned Judge failed to take any action, *sua sponte*, to ensure that Defendant was granted adequate access to the law library during his incarceration[87] and that, despite an awareness of the trouble Defendant was having, he was subjected by this Court to an unreasonably expedited pretrial process.[88] As previously noted, Defendant was informed that he should raise any issues through the filing of motions and he failed to do so. Furthermore, it was noted on the record at the time of trial that the undersigned Judge did take the initiative to determine whether Defendant was being granted access to the library and discovered that Defendant was granted access to the library one hundred twenty-five (125) times during his pretrial incarceration, which was a record for the Lancaster County prison.[89] Despite this, Defendant was granted an unwarranted number of continuances even though he demonstrated a clear lack of credibility and a persistence in proceeding in a dilatory and obdurate manner. Defendant's claim

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[86] N.T. Pretrial Conference, 07/15/14, p. 8; Def.'s Verified Pet. in Support of Recusal Mot. to Assign Def.'s Criminal Matter to the President J., 12/22/15, p.3, ¶ 5.
[87] Def.'s Verified Pet. in Support of Recusal Mot. to Assign Def.'s Criminal Matter to the President J., 12/22/15, pp. 3-4.
[88] Def.'s Verified Pet. in Support of Recusal Mot. to Assign Def.'s Criminal Matter to the President J., 12/22/15, p. 4.
[89] N.T. Jury Trial Vol I. Pretrial Matters, 04/13/15, p. 9.

that the undersigned Judge failed to provide him adequate time to prepare for trial is extremely disingenuous and contrary to the extensive record in this matter.

As to Defendant's wholly unsupported allegation that the undersigned Judge engaged in *ex parte* communication and acted in concert with the Commonwealth,[90] those allegations are adamantly denied and contrary to the record in this matter. All correspondence with the Commonwealth in this matter, outside of scheduling matters, took place in the courtroom with Defendant present as he himself acknowledged when he stated that he overheard the communications. Furthermore, the September 19, 2014 conversation that he specifically addresses took place on the record and was simply a request that the Commonwealth provide case law on an issue and a discussion with both the Commonwealth and Defendant about the timing for addressing the issue.[91]

Defendant's remaining allegations lack any specificity or support and, as discussed above, are wholly contradicted by the record. The undersigned Judge's demeanor towards Defendant was in no way biased or malicious and was, at all times, a direct consequence of Defendant's own conduct. The undersigned Judge acted in accordance with his duty and authority to maintain proper order, decorum and control over the proceedings and Defendant was properly admonished each time

[90] Def.'s Verified Pet. in Support of Recusal Mot. to Assign Def.'s Criminal Matter to the President J., 12/22/15, pp. 5-6.
[91] N.T. Status Conference, 09/19/14, pp. 3-4.

his conduct because disrespectful, dilatory and obdurate. However, at no time was Defendant treated unfairly or impartially and, furthermore, Defendant was granted considerable concessions despite his disrespect and persistence in proceedings in a dilatory and obdurate manner. Additionally, Defendant was never admonished in the presence of the jury and Defendant has failed to demonstrate that any rulings were in error or caused him any prejudice whatsoever. In fact, the undersigned Judge exercised its discretion in sentencing Defendant to serve his sentences concurrently despite the Commonwealth's request otherwise and despite Defendant refusing to cooperate or take any part in the sentencing process.[92] Defendant has, therefore, failed to demonstrate that the undersigned Judge acted impartially or abused its discretion in determining that he could proceed impartially.

For all the foregoing reasons, the July 8, 2015 judgment of sentence, as modified by Order dated September 1, 2105, should not be disturbed.

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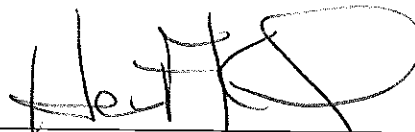
BY THE COURT:



HOWARD F. KNISELY
JUDGE

ATTEST:

Copies to:
Office of the District Attorney
Gregory Bartucci, MB6094, SCI Houtzdale, P.O. Box 1000, 209 Institution Drive, Houtzdale, PA 16698-1000

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[92] N.T. Sentencing, 07/08/15, pp. 2-24.