

STATE OF NEW JERSEY v STEPHEN F. SCHARF -- May 3, 2011

SHEET 1

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION, CRIMINAL PART
BERGEN COUNTY
INDICTMENT NO. 09-08-1485
APP. DIV. NO. A-1580-11T4

STATE OF NEW JERSEY,)
)
 Plaintiff,)
)
 v.) TRANSCRIPT
) of
) TRIAL
 STEPHEN F. SCHARF,)
)
 Defendant.)

Place: Bergen Co. Courthouse
10 Main Street
Hackensack, NJ 07601

Date: May 3, 2011

BEFORE:

HONORABLE PATRICK J. ROMA, J.S.C.

TRANSCRIPT ORDERED BY:

HELEN GODBY, ESQ. (Office of the Public Defender,
Appellate Section, 9th Floor, 31 Clinton Street,
P. O. Box 46003, Newark, New Jersey 07102)

APPEARANCES:

WAYNE MELLO, ESQ.
(Bergen County Prosecutor's Office)
Attorney for the State

EDWARD J. BILINKAS, ESQ. and
SARA SENCER MCARDLE, ESQ. (Bilinkas Law Office)
Attorneys for the Defendant

Transcriber Janet Slivka
ELITE TRANSCRIPTS, INC.
14 Boonton Avenue
Butler, NJ 07405
(973) 283-0196
Audio Recorded
Operator, _____

ELITE TRANSCRIPTS, INC.
14 Boonton Avenue, Butler, New Jersey 07405
973-283-0196 FAX 973-492-2927

I N D E X

WITNESSES	Direct	Cross	Redirect	Recross
FOR THE DEFENSE				

Stephen F. Scharf				
By the Court	10			

THE COURT

Decision	8, 14
----------	-------

Colloquy

1 THE COURT: All right. Let's go through this
2 most recent issue. Your appearances, please?
3 MR. MELLO: Good morning, Your Honor, Wayne
4 Mello, Assistant Prosecutor, on behalf of the state.
5 MR. BILINKAS: Edward Bilinkas appearing on
6 behalf of Mr. Scharf. Sara Sencer McArdle, co-counsel
7 at the table.
8 THE COURT: All right. Okay. Just to give
9 you an update, I -- I spoke with counsel in my chambers
10 and Juror Number 9 earlier this morning had called and
11 had indicated to my court clerk that she was feeling
12 under the weather, and that she was not going to be
13 here.
14 Obviously, I needed to have more information
15 so I called the juror at her home. I left one message
16 at about five to nine or nine o'clock, and then the
17 second message about 25 after 9. I also dispatched a
18 sheriff's officer to her home and he reported as of a
19 few moments ago that her car is not in the driveway,
20 and one of the next door neighbors indicated that she
21 is not home because the car is not there.
22 So this would seem to coincide with the
23 version that I was told by the juror that she was going
24 to the doctor. And I asked her specifically absent
25 some extraordinary reason I need to know you are going

Colloquy

4

1 to be here tomorrow because I have to send the jurors
2 home today. We literally lose a day of trial. And she
3 seemed -- I don't think she fully appreciated the fact
4 that with her being absent that that would have the
5 impact that it has had.

6 Anyway, I told her I wanted a note from the
7 doctor, and that I expected her to be here in the
8 morning, and that's how I left off. So I don't -- what
9 I want to do is explain to the jury and send them on
10 their way and then we can take care of a couple of
11 other matters. Is there anything else that I should
12 take care of that you can make note of?

13 MR. BILINKAS: Just -- just that we talked in
14 chambers about you impressing upon the -- the jurors
15 that are here today how important it is that they --

16 THE COURT: Yeah.

17 MR. BILINKAS: -- show up.

18 THE COURT: I think that's a good idea
19 because maybe some people have the idea that if one
20 person is out the rest of the people take care of it.
21 They don't understand that they have to be here for all
22 of the testimony. So I think that's a good idea.
23 Thank you. Bring the jury out.

24 THE COURT OFFICER: Jury entering.

25 (Jury enters the courtroom)

Colloquy

5

1 THE COURT: All right. Welcome back, ladies
2 and gentlemen of the jury. Please be seated. Madam
3 Clerk, roll call.

4 (Roll call of jurors taken. Juror No. 9 not present.)

5 THE COURT: Okay. Good morning, ladies and
6 gentlemen.

7 JURORS: Good morning.

8 THE COURT: Let me go through this one item
9 at a time. I'll deal with the fact that I told you at
10 the beginning that there are so many different things
11 that happen during the course of the trial that I can't
12 even foresee what may or may not happen. Okay. The
13 reason why there was a delay this morning is that Juror
14 Number 9 had called for a medical reason. She'll be
15 here tomorrow, but apparently something had happened
16 and she called. You don't -- you don't foresee things
17 like that.

18 One of the reasons why we have a panel of 16
19 at the very, very end of this process 12 people will be
20 the jury, and 4 people will be selected at random. But
21 we tell you to listen to all of the testimony because
22 we don't know who those alternates are going to be.

23 But let me impress upon you, and I might be
24 talking to the choir by doing this because you've been
25 very dedicated and very cooperative. Each one of you

ELITE TRANSCRIPTS, INC.

14 Boonton Avenue, Butler, New Jersey 07405

973-283-0196 FAX 973-492-2927

Colloquy

6

1 is absolutely indispensable. You act as a group but
2 individually you are indispensable. We cannot proceed
3 this morning without the other juror. That's what it
4 comes down to.

5 Now I apologize for the inconvenience. I
6 have no way of knowing about these things, and I would
7 also ask that even though I'm having this explanation
8 with you, when Juror Number 9 comes in tomorrow I will
9 speak with her. But I would ask that you not discuss
10 this issue in any shape or form. I thought honesty
11 would be best policy in terms of telling you why we are
12 at this point and what we have to do. I -- I need to
13 basically recess until tomorrow to give her that
14 opportunity to rejoin us so that we can continue with
15 the testimony.

16 Now over the next several days we're also
17 going to have a view. We're going to over to the
18 Palisades Lookout. You'll be transported by the
19 sheriff's department. I'll give you further
20 instructions. I can tell you this, that a sheriff's
21 officer will be escorting you, you will go to the
22 lookout so that you could see the area that has been
23 described during the course of the testimony. I'll
24 give you those further instructions, but I just wanted
25 to give you an idea.

Colloquy

7

1 One of the things that we had to anticipate
2 was weather, you know, which day we would pick. So
3 we're looking at that, and we'll have a final answer
4 probably by tomorrow.

5 I don't know what else I can tell you that --
6 but one of the other things a trial that goes for seven
7 weeks, it's -- it's a lot of work, you know. It's not
8 physical work, but it's mental work. You're listening,
9 you can actually get tired by the end of the day.

10 So I'm going to suggest a couple of things,
11 and that's why I try to have those breaks in the
12 morning and the afternoon. If nothing else, we get up
13 and stretch, and just kind of like feel a little
14 better. So whatever you need to feel comfortable,
15 whether it's a seat cushion, or whatever you need to
16 do, you need to get up, you need to stretch, you need
17 you know you feel a certain way, I'm -- I will try to
18 accommodate you in any way possible.

19 If you feel yourself getting a little tired,
20 you know, and it might be late in the afternoon, we're
21 finishing up with a witness, you just need to stretch,
22 get up, I'm going to say that you know I want to make
23 you comfortable. So to that extent we'll do whatever
24 we can to assist you.

25 I told you at the beginning how important you

ELITE TRANSCRIPTS, INC.

14 Boonton Avenue, Butler, New Jersey 07405

973-283-0196 FAX 973-492-2927

1 are and the decision that you will be making. Now in
2 terms of life's experiences, sitting as a juror it's an
3 honor and it's a responsibility. As I said, I'm
4 talking to the choir because everyone is here.

5 Situations like this come up and we -- we
6 have to deal with them. And we don't know what to do
7 until it actually happens. And for any inconvenience
8 that has been caused, I would apologize to you. I know
9 how important your time is, and I'm sorry that you're
10 here and you're not able to proceed.

11 At this time what I'm going to do, there is
12 nothing further that the attorneys think that I should
13 impart to the jury, I'm going to recess until tomorrow
14 at 9 a.m. at which time we will pick up where we left
15 off. Once again, I'm going to ask you not to read, or
16 listen to, or watch any news accounts, not to watch any
17 law-related programs, not to Google or do any type of
18 research. I told you before that your mind is like a
19 slate, we want to keep it open, we want you to hear the
20 testimony, we want you to not be influenced by any
21 friends, or family, or anyone else.

22 I also told you and I -- and I think I can
23 tell you now that there will be increased news coverage
24 by more media outlets, and you need to understand that
25 whatever that type of news is with those family members

1 that want to talk to you about the case, and they will
2 want to, you have to tell them I've been instructed not
3 to have any discussions concerning the case, take the
4 news articles, put them on the side, and I'll read them
5 at the end of the case.

6 We don't want anything to intrude upon your
7 thinking. All right. You have not arrived at that
8 stage where you go into the jury room and you start
9 deliberating. You're still taking in testimony and
10 information, and that process is not complete. We have
11 not heard from the attorneys in their closing
12 statements, and you haven't received instructions on
13 the law. So we still have some work to cover.

14 But with those instructions and admonition, I
15 am going to excuse you at this time and you will report
16 back to the jury room at 9 a.m. Thank you for your
17 cooperation and understanding.

18 (Jury exits the courtroom)

19 THE COURT: I'm sorry?

20 JUROR: (Indiscernible) -- it's not going to
21 -- (Indiscernible).

22 THE COURT: No.

23 JUROR: Okay.

24 THE COURT: Just to -- one of the jurors
25 passed by. It's amazing some of the questions you get.

ELITE TRANSCRIPTS, INC.

14 Boonton Avenue, Butler, New Jersey 07405

973-283-0196 FAX 973-492-2927

Scharf - By the Court

10

1 But they're -- they're really well thought out. She
2 said this doesn't mean we're going to go to Friday,
3 thinking that we're not here today so we're making it
4 up on Friday. I said no, you don't have to be here on
5 Friday. But it -- it shows that they're -- they're
6 thinking.

7 MR. MELLO: There's a certain focus.

8 MR. BILINKAS: Judge, if you want to --

9 THE COURT: Okay.

10 MR. BILINKAS: -- talk to my client --

11 THE COURT: Let's cover something. For a
12 limited purpose, place Mr. -- place Mr. Scharf under
13 oath.

14 THE COURT CLERK: Raise your right hand.

15 S T E P H E N S C H A R F, DEFENDANT, SWORN

16 THE COURT CLERK: State your name.

17 THE DEFENDANT: Stephen F. Scharf.

18 THE COURT: Okay. You can put your hand
19 down.

20 DIRECT EXAMINATION BY THE COURT:

21 Q Mr. Scharf, the purpose of my questioning you
22 under oath is to make sure that the record is complete.
23 In the next few days we're going to have a view at the
24 Rockefeller Lookout. The jury will be transported to
25 the lookout area, and I am of the opinion that a

Scharf - By the Court

11

1 defendant in a criminal case has a right to be present
2 at each and every critical stage.

3 Now in this particular case, no testimony is
4 taken at the lookout. There is no evidence introduced.
5 However, aside from that, I think the better practice
6 is to give the -- the defendant the opportunity if he
7 or she wants to to be present. And I want you to
8 understand that it's your absolute right.

9 However, it's also my responsibility to
10 explain to you that if you for whatever your reason,
11 there may be some tactical reasons, some strategical
12 reason after speaking with your attorney that you
13 decide that you do not want to be there. It is your
14 decision after consulting with your attorney.

15 I spoke to you about this briefly before, and
16 I spoke to Mr. Bilinkas. We went through this. And I
17 think it would be appropriate at this time if you have
18 reached a decision to speak with your attorney and let
19 me know what you intend to do.

20 A Decline, Your Honor.

21 Q I'm sorry?

22 A Decline, Your Honor.

23 Q Okay. So you will not be there when we go
24 over to view the lookout area. And you are making this
25 decision voluntarily, intelligently, and knowingly?

ELITE TRANSCRIPTS, INC.

14 Boonton Avenue, Butler, New Jersey 07405

973-283-0196 FAX 973-492-2927

1 A Yes, Your Honor.

2 Q You have consulted with counsel over the last
3 several days and weeks, this is not a new issue, and
4 basically in consultation with Mr. Bilinkas, you have
5 made the decision as part of your strate-- your trial
6 strategy, tactically not to be present at the view. Is
7 that correct?

8 A Yes, Your Honor.

9 THE COURT: Mr. Bilinkas, anything else that
10 you would like to add?

11 MR. BILINKAS: Judge, we have discussed this
12 issue and I believe Mr. Scharf has thought this through
13 and -- and he has made a specific decision as he
14 represented to the Court based on my advice.

15 THE COURT: Okay. Thank you. The second
16 area that I'm going to take up is an election not to
17 testify. And there is a charge to be given or not to
18 be given. I'm going to give this to you in advance of
19 when you would have to go -- well, you go over it the
20 entire trial, but you make the final decision when the
21 prosecution has rested, and now the defense has to
22 present it's case.

23 And, basically, the charge is a defendant's
24 election not to testify.

25 "It is the constitutional right of a

1 defendant to remain silent. The defendant in this case
2 chose not to be a witness and, therefore, elected to
3 exercise that right. I charge you that you are not to
4 consider for any purpose or in any manner in arriving
5 at your verdict the fact that the defendant did not
6 testify, nor should that fact enter into your
7 deliberations or discussions in any manner or at any
8 time.

9 "A defendant is entitled to have a jury
10 consider all of the evidence, and he is entitled to the
11 presumption of innocence whether or not he testifies as
12 a witness. Therefore, you may not draw any inferences
13 of guilt from the fact that the defendant did not
14 testify."

15 Then below that there are two paragraphs you
16 can indicate which one you prefer after speaking to Mr.
17 Bilinkas. "I, -- basically with a blank space for your
18 name, "understand that I have the right to have the
19 above charge given to the jury. I have elected to have
20 this charge given to the jury or I have waived my right
21 to have this charge given to the jury and elect that
22 this charge not be given." So you have two options.

23 Basically, if you decide not to testify and
24 that's basic-- that's another decision. You will speak
25 with your attorney, he'll advise you of the

1 possibilities. Obviously, if you're on the stand
2 you're subject to cross-examination, you're subject to
3 being asked various questions. But, once again, you
4 have a very competent attorney, but it's your decision.
5 You need to speak with your attorney, and you need to
6 decide whether or not you want to testify. That's the
7 threshold issue. And you make that decision
8 voluntarily, intelligently, and knowingly.
9 I'm doing this in advance because even though
10 we talk about it later, I -- I prefer letting you know
11 and giving you this information so you that you can
12 think about it as the state finishes its case, and you
13 are about to start your case. Okay. So you'll have to
14 make a decision as to whether you want to testify or
15 not, and then I'll question you in a similar manner as
16 we're doing right now.
17 And then you will make the secondary decision
18 in the event that you decide not to testify whether or
19 not you want this charge read to the jury or not read
20 to the jury. So here's the copy. I'll give it -- you
21 have a copy?
22 MR. BILINKAS: Yes, Judge --
23 THE COURT: All right.
24 MR. BILINKAS: -- we have a copy.
25 THE COURT: Mr. Bilinkas, you're instructed

1 to go over that with your client and when we get to the
2 appropriate time, then we'll cover that issue.
3 MR. BILINKAS: Understood.
4 THE DEFENDANT: Thank you, Your Honor.
5 THE COURT: Thank you. Is there anything
6 else that we can cover other than --
7 MR. MELLO: I think that covers it, Judge.
8 Thank you very much.
9 THE COURT: Okay. Thank you. Thank you for
10 your understanding.
11 (Proceedings concluded)

CERTIFICATION

I, Janet Slivka, the assigned transcriber, do hereby certify the foregoing transcript of proceedings in the Bergen County Superior Court on May 3, 2011, digitally recorded, Time Index from 10:17:28 to 10:21:02 and 10:23:23 to 10:38:59, is prepared in full compliance with the current Transcript Format of Judicial Proceedings and is a true and accurate compressed transcript of the proceedings as recorded to the best of my knowledge and ability.

/s/ Janet Slivka

Janet Slivka AOC #533
ELITE TRANSCRIPTS, INC.
Butler, New Jersey 07405

April 25, 2013