

**[J-95-2012] [MO: Eakin, J.]  
IN THE SUPREME COURT OF PENNSYLVANIA  
MIDDLE DISTRICT**

COMMONWEALTH OF PENNSYLVANIA,	:	No. 13 MAP 2012
	:	
Appellant	:	Appeal from the Superior Court, entered
	:	on 9/9/10, at No. 2460 EDA 2009, which
	:	reversed the judgment of sentence of the
	:	Court of Common Pleas of Monroe
v.	:	County, Criminal Division, entered on
	:	7/24/09, at No. CP-45-CR-56-2009, and
	:	remanded to that court for further
JACK W. FORTENBAUGH, II,	:	disposition
	:	
Appellee	:	SUBMITTED: September 7, 2012

**CONCURRING OPINION**

**MR. JUSTICE McCAFFERY**

**DECIDED: June 17, 2013**

I agree with the majority that Appellee has failed to demonstrate the prejudice necessary to warrant a new trial and that Commonwealth v. Watkins, 750 A.2d 308 (Pa.Super. 2000), relied upon by the Superior Court below, is readily distinguishable from the instant case. I therefore concur in the majority's reversal of the order of the Superior Court.

I would note with respect, however, that this case is a closer call than the majority opinion indicates because of the troubling behavior demonstrated by the Commonwealth. The question of whether a new trial should be ordered because of an in-court reference to a polygraph test is one heavily dependent on the relevant facts. Accordingly, a trial court may take into account the particular role a party had in

divulging the information at trial and the motivations for the disclosure.<sup>1</sup> Here, however, the trial court determined that there was “no showing of any intent by the Commonwealth to prejudice [Appellee] to the point of denial of a fair trial or any bad faith on the part of the Commonwealth in playing the CD [containing the references to the polygraph test].” Trial Court Opinion, dated 1/26/10, at 8. The trial court was in the best position to make this judgment, and, with no prejudice to Appellee, the trial court appropriately determined that Appellee was not entitled to a new trial.

However, although the trial court found that Appellee had failed to prove that the Commonwealth did intend to deprive Appellee of his rights, I respectfully do not believe that the record supports the majority’s assertion that the two references to the polygraph test were, in general, “not intentional,” indeed, “clear”[ly] not intentional. See Majority Opinion, slip op. at 4 and 7. The references to the polygraph test were contained in two separate places in a CD recording of a police interview of Appellee that the Commonwealth had in its possession and introduced into evidence. We must presume that the Commonwealth had actually listened to the CD before introducing it into evidence, and that the Commonwealth was cognizant of its potential impact upon the jury. The Commonwealth may have introduced the references to the polygraph test out of gross negligence – we do not know. However, I believe that it is simply unwarranted to unhesitatingly state, based on the record in this case, that the references to the polygraph test were “not intentional.”

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<sup>1</sup> As the majority indicates, Commonwealth v. Miller, 439 A.2d 1167, 1171 (Pa. 1982), did not set forth a formalized test to be applied in these cases; rather, the three enumerated “factors” expressed in Miller are simply a distillation of the matters discussed by the Court therein concerning whether a new trial was warranted under Miller’s particular set of facts. See Commonwealth v. Briggs, 12 A.3d 291, 339 (Pa. 2011) (citing and applying Miller without formalizing its analysis into a three-pronged test).

Nevertheless, because the trial court found that there was **no concrete evidence** that the Commonwealth intended to prejudice Appellee, and because no actual prejudice was shown for the reasons articulated by the majority opinion, I agree with the result arrived at by the majority opinion.