Received 02/29/2016 Superior Court Eastern District

IN THE
SUPERIOR COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA, RESPONDENT,	:	No. 488 EDA 2016
v.	:	
WILLIAM H. COSBY, JR., PETITIONER.	:	

COMMONWEALTH'S ANSWER TO PETITIONER'S *EMERGENCY PETITION FOR A WRIT OF PROHIBITION ANCILLARY TO APPELLATE JURISDICTION*

TO THE HONORABLE JUDGES OF THE SUPERIOR COURT OF PENNSYLVANIA:

Respondent, the Commonwealth of Pennsylvania, by and through the Montgomery County District Attorney's Office, requests that this Court deny the *Emergency Petition for a Writ of Prohibition Ancillary to Appellate Jurisdiction* filed by petitioner William H. Cosby, Jr. ("defendant").

I. INTRODUCTION

This criminal defendant asks this Court to prohibit the lower court from going forward with his preliminary hearing while he seeks pretrial review of two claims. First, the alleged breach of a purported non-prosecution agreement, even though the

Commonwealth argued that it never existed, and the trial court denied the claim holding that a credibility determination was an essential part of its ruling. Second, an attempt to disqualify the Montgomery County District Attorney's Office, even though the claim has no support whatsoever in Pennsylvania law.

Defendant nevertheless insists that his criminal case should be put on hold for months, perhaps years, for pretrial review. He asserts that such review is justified under the collateral order doctrine. But the general rule that these claims must be raised, if necessary, at the conclusion of trial controls. He is not in a "now or never" situation, as required for a collateral order. Pennsylvania caselaw makes that abundantly clear. Nor do exceptional circumstances otherwise justify immediate review. Just like other criminal defendants, he may raise his issues on direct appeal following a judgment of sentence.

Because defendant's appeal is an improper attempt to seek review of unappealable interlocutory orders, the lower court retains authority to proceed further in the case. The Commonwealth respectfully requests that this Court deny defendant's petition for a writ of prohibition.

II. FACTUAL AND PROCEDURAL BACKGROUND

In December 2015, a criminal complaint was filed against defendant. It charged him with sexual crimes stemming from an incident that had occurred in 2005. A preliminary hearing was scheduled for January 14, 2016. Defendant later requested, and was granted, a continuance. It was re-scheduled for February 2, 2016.

Before the preliminary hearing could take place, however, defendant filed a self-styled *habeas corpus* petition. In it, he raised three claims: (1) he is allegedly immune from prosecution because a former district attorney, Bruce L. Castor, Esquire, entered into a "non-prosecution agreement" with him in 2005; (2) the charges against him should be dismissed because of pre-arrest delay; and (3) current District Attorney Kevin R. Steele and his entire office should be disqualified based on his campaign statements.

The Honorable Steven T. O'Neill, of the Court of Common Pleas, Montgomery County, Pennsylvania, ordered the Commonwealth to respond to the petition and scheduled a hearing and legal argument for February 2, 2016. In doing so, he continued the scheduled February 2nd preliminary hearing.

The Commonwealth filed a response to defendant's petition. It argued that defendant's bid to delay his preliminary hearing by having a common pleas judge prematurely review and rule upon his pretrial motions was improper. It relied primarily on *Commonwealth v. Cosgrove*, 680 A.2d 823, 826 (Pa. 1996) (holding that a criminal defendant may not challenge the authority of the Commonwealth to prosecute him until after formal arraignment). It also discussed the meritless nature of defendant's claims.

Judge O'Neill subsequently issued an order restricting the February 2nd hearing to defendant's claim involving the purported non-prosecution agreement.

The hearing took two days. The first day, Mr. Castor, who was the district attorney in 2005, testified for the defense. He specifically denied that there was an agreement, explaining that there was no "*quid pro quo*" (N.T. 2/2/16, 99). Instead, he testified that he decided that did not want to go forward with what he believed would be a difficult criminal prosecution, even though he believed the victim (*id.* at 63, 113, 115). He said he still "wanted some measure of justice," however (*id.* at 63). He thus made what he called "a final determination as the sovereign" not to prosecute

defendant (*id.*). He testified that he told defendant's criminal defense attorney at the time, Walter Phillips, Esquire, that he believed that his decision and press release announcing that no charges would be filed would strip defendant of his Fifth Amendment rights in any future civil lawsuit (*id.* at 64-65). Castor testified that Phillips agreed with this "legal assessment" (*id.* at 65).[1] Castor insisted that he did this to benefit the victim in her then-unfiled civil action against defendant and that he did so with the agreement of the victim's civil attorneys (*id.* at 98). Castor was

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[1] Castor unveiled this latest version of events for the first time at the hearing. It was not only different from what he had repeatedly said in the past, but also legally confused and baseless. Though a district attorney may enter into a contractual agreement not to prosecute a defendant, he may not *unilaterally* confer what amounts to transactional immunity. "Our Supreme Court has determined that under Pennsylvania law only use immunity is available to a witness." *Commonwealth v. Swinehart*, 642 A.2d 504, 506 (Pa. Super. 1994), *aff'd,* 664 A.2d 957 (Pa. 1995). Use immunity is available only through a court order. *Commonwealth v. Parker*, 611 A.2d 199, 200 n.1 (Pa. 1992). Of course, there was no court order here. Further, a defective attempt to confer immunity does not strip an individual of his or her Fifth Amendment rights. *See United States v. Doe*, 465 U.S. 605, 616-617 (1984)(holding that a government promise of immunity without court order does not strip an individual of his Fifth Amendment rights).

extensively cross-examined by the Commonwealth (*id.* at 111-239). His testimony was inconsistent with, among other things, the 2005 press release that stated his decision was open to reconsideration, his statements to journalists over the years, and his September 2015 emails to then-District Attorney Risa Vetri Ferman in which he described in detail the purported arrangement.[2]

The second day, the defense concluded its case by presenting John Schmitt, Esquire, a civil attorney who had represented defendant in various matter since 1983 (N.T. 2/3/16, 7). He testified that he never spoke with Castor, but Phillips had told him that Castor had made "an irrevocable commitment" not to prosecute defendant (*id.* at 11). Schmitt testified that, but for this alleged commitment, he would not have allowed defendant to sit for the civil deposition (*id.* at 14).

Schmitt's testimony about the alleged "irrevocable commitment" was dubious. His failure to obtain such an important agreement in writing, or even to make it a part of the record at any time during the civil lawsuit, is remarkable given his experience and

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[2] Ms. Ferman is now a judge of the Court of Common Pleas, Montgomery County, Pennsylvania.

past practice (*id.* at 16-17, 25-26, 33-34). If there really had been any such agreement, surely he would have taken such basic steps to protect his client's interests. Further, as part of the settlement of the civil suit, he had negotiated a confidentiality agreement that precluded the victim from contacting the police—something that would have been unnecessary if there really were an "irrevocable commitment" (*id.* at 47-48).

Schmitt's testimony that he would have advised defendant to invoke his Fifth Amendment rights at the depositions but for the "irrevocable commitment" was also dubious. Defendant frequently spoke about the incident without invoking his right to remain silent. Schmitt had permitted defendant to be interviewed by detectives during the criminal investigation, and at no time did he invoke his Fifth Amendment rights (*id.* at 18). During the criminal investigation, Schmitt also negotiated an agreement for defendant to give an interview about the case to the National Enquirer, and defendant did so after the investigation was concluded (*id.* at 33, 176). Finally, at the civil depositions, defendant did not invoke his Fifth Amendment rights when questioned about other potential

victims, who clearly would not have been covered by any arrangement with Castor (*id.* at 58-59).

At the close of defendant's case, the Commonwealth sought to dismiss the petition, arguing that even considering the evidence in the light most favorable to defendant, he had failed to establish a claim for relief. Judge O'Neill deferred ruling.

The Commonwealth thereafter presented Dolores Troiani, Esquire, and Bebe Kivitz, Esquire, the two civil attorneys who had represented the victim in 2005. They testified that Castor never mentioned any understanding with Phillips that defendant could not invoke his Fifth Amendment rights in a civil lawsuit, and neither defendant nor his several civil attorneys ever mentioned this supposed arrangement at any time throughout the civil litigation (*id.* at 184, 236-237). Troiani also testified that if defendant had invoked his Fifth Amendment rights at the deposition, it would have ***benefited*** their civil case (*id.* at 176). Specifically, it could have resulted in an adverse-inference instruction at trial, and "the only testimony in our case would have been [the victim's] version of the facts" (*id.*).

During closing statements, the Commonwealth's primary arguments were factual: (1) the supposed "sovereign edict" never existed, but instead was revisionist history manufactured a decade later; and (2) even if Castor shared his "sovereign edict" theory with defense counsel in 2005, defendant did not actually rely on it when he decided to testify at the deposition. The Commonwealth specifically requested that Judge O'Neill render a credibility determination on those issues (*id.* at 289).

After a recess, Judge O'Neill denied defendant's "non-prosecution agreement" claim, explaining that "a credibility determination" was "an inherent part" of its ruling (*id.* at 307; *Order*, dated Feb. 4, 2016 (O'Neill, J.)).

Judge O'Neill earlier in the day had informed the parties that he would be willing to hear argument on the disqualification claim. After hearing argument, he denied the claim from the bench. After conferring with the parties, he scheduled the preliminary hearing for March 8, 2016.

On February 12, 2016, defendant filed a motion asking Judge O'Neill to amend his orders to include the certification language specified in 42 Pa. C.S. § 702(b) ("Interlocutory appeals by

permission"). On the same day, defendant filed a notice of appeal under Pa.R.A.P. 313 ("Collateral Orders").

Four days later, Judge O'Neill denied defendant's motion to amend the orders.

Once defendant's appeal was docketed in this Court, the Commonwealth filed a motion to quash the pretrial interlocutory appeal. Judge O'Neill subsequently filed an opinion.

Defendant thereafter filed his *Emergency Petition for a Writ of Prohibition Ancillary to Appellate Jurisdiction* ("Petition").[3]

III. DISCUSSION

Defendant argues that a writ of prohibition is appropriate because, according to him, the lower court lacks jurisdiction to proceed further in the case. He maintains that his notice of appeal divested the lower court of jurisdiction. Not so. A trial court has the authority to determine in the first instance whether an interlocutory order is non-appealable; if it determines that it is, it may proceed further in the matter. The orders defendant is attempting to appeal

[3] Defendant has never asked the lower court for a stay of proceedings. But, as discussed below, he is not entitled to one.

are indeed non-appealable, and the lower court here is appropriately proceeding with the preliminary hearing.

A writ of prohibition is "a common law writ of extremely ancient origin[.]" *Capital Cities Media, Inc. v. Toole*, 483 A.2d 1339, 1341 (Pa. 1984) (quoting *Carpentertown Coal & Coke Co. v. Laird*, 61 A.2d 426 (Pa. 1948)). The appellate courts will seldom issue the writ, and even then "only with great caution and forbearance and as an extraordinary remedy in cases of extreme necessity, to secure order and regularity in judicial proceedings if none of the ordinary remedies provided by law is applicable or adequate to afford relief." *Id.* at 1341-42. The writ is properly issued as "an extraordinary remedy . . . to restrain courts . . . from usurping jurisdiction which they do not possess or exceeding the established limits in the exercise of their jurisdiction." *Id.* at 1343.

A. The trial court has the authority to determine in the first instance whether an interlocutory order is appealable.

Defendant argues that the lower court lacks jurisdiction to proceed with a preliminary hearing. He believes that his notice of appeal divested the trial court of jurisdiction. He is wrong.

After an appeal is taken, the general rule is that "the trial court or other government unit may no longer proceed further in the matter." Pa. R.A.P. 1701(a). There is an exception, however, for litigants who attempt to appeal non-appealable interlocutory orders. That exception provides that a trial court may "[p]roceed further in any matter in which a non-appealable interlocutory order has been entered, notwithstanding the filing of a notice of appeal or a petition for review of the order." Pa. R.A.P. 1701(b)(6). The trial court thus has, in the "first instance," the authority "to determine the appealability of its own order." *Pennsylvania Appellate Practice* § 1701:39, at pp. 265-266 (West's Pa. Prac. Ser. 2015).

Defendant nevertheless attempts to muddy the waters. He cites *Gordon v. Gordon*, 439 A.2d 683 (Pa. Super. 1981), for the proposition that "a trial court has no jurisdiction to proceed in a case while a motion to quash is pending, even if it 'believe[s] that its order denying appellant's application was an interlocutory order from which no appeal could be taken'" (*Petition* at 8-9, quoting *Gordon*, 439 A.2d at 686). *Gordon*, however, pre-dated the amendment to Rule 1701 adding the (b)(6) exception. *See Elderkin, Martin, Kelly, Messina & Zamboldi v. Sedney*, 511 A.2d 858, 860

(Pa. Super. 1986) (stating that Rule 1701 was amended in 1983 to include subsection (b)(6)). Defendant's quotation is thus misleading.

Defendant next asserts that a trial court may proceed under Rule 1701(b)(6) only if the appeal is "frivolous" (*Petition* at 9). He relies solely on *First Union Mortg. Corp. v. Frempong*, 744 A.2d 327, 336 (Pa. Super. 1999). That case did not graft into Rule 1701(b)(6) a "frivolous" requirement. There, the appellant argued that the lower court lacked jurisdiction because his appeal was allegedly still pending when it took action. This Court rejected the claim, explaining that it had quashed the appeal a month before the lower court had proceeded. It also stated that, in any event, the lower court had authority to go forward under Rule 1701(b)(6) because the appellant had appealed an interlocutory order. It concluded that appellant's argument—for both these reasons—was not only meritless, but frivolous. It did not read a frivolousness limitation into Rule 1701(b)(6).

Regardless, even if an appeal has to be frivolous, defendant's appeal would ably meet that requirement for the reasons discussed below, as well as in the *Commonwealth's Motion to Quash*

Defendant's Pretrial Interlocutory Appeal and the trial court's *Opinion*, dated Feb. 24, 2016 (O'Neill, J.).

Defendant also maintains that the lower court lacks jurisdiction under *Jones v. Trojak*, 586 A.2d 397 (Pa. Super. 1990). He suggests that under *Jones* it is improper for a trial judge to conclude "on its own" that an order is a non-appealable interlocutory order (*Petition* at 9). This is again misleading.

In *Jones*, the appellant filed a notice of appeal. The appellee filed a motion to quash it as interlocutory. This Court denied the motion to quash, but the trial court proceeded anyway. On appeal, this Court acknowledged that a trial court may proceed under Rule 1701(b)(6) where a party has filed an appeal from a non-appealable interlocutory order. It explained, however, that the subsection did not apply because it had denied the appellee's motion to quash. *Id.* at 402. As a result, jurisdiction had vested in this Court, and the trial court no longer had the authority under Rule 1701(b)(6) to adjudicate the case.

In discussing *Jones*, defendant skims over the most critical point: it was not the filing of the appeal that divested jurisdiction, but the denial of the appellee's motion to quash. That has not

happened here, so the lower court's "first instance" determination that these are non-appealable interlocutory orders remains valid. *Pennsylvania Appellate Practice* § 1701:39, at pp. 265-266 (West's Pa. Prac. Ser. 2015).

B. Defendant's appeal fails under the collateral order doctrine.

Contrary to defendant's assertions, the lower court retains jurisdiction under Rule 1701(b)(6). The two orders he is attempting to appeal are non-appealable interlocutory orders, and they do not meet the requirements of the collateral order doctrine, as discussed in the Commonwealth's motion to quash and the trial judge's opinion. The Commonwealth will not repeat those arguments here, but will make some additional points in response.

Defendant contends that "[a] claim to be free from prosecution is irreparably lost for purposes of the collateral order doctrine even if a successful appeal would result in acquittal, because the substantial time, cost, and effort incurred in the interim cannot be recovered" (*Petition* at 16). This argument was rejected in *Commonwealth v. Sabula*, 46 A.3d 1287 (Pa. Super. 2012). In that case, this Court held an order denying a non-prosecution

agreement claim cannot meet the "irreparably lost" prong of the collateral order doctrine. It specifically rejected the appellant's argument that his right would be irreparably lost because "the bargained for benefit, in the form of the Commonwealth's promise not to prosecute, included being free from the expense and ordeal of trial not merely being free from conviction." *Id.* at 1292.

Defendant, in a superficially mesmerizing paragraph, attempts to distinguish *Sabula.* He argues that his agreement is different than the one in that case; he says that his agreement was supposedly "that he would never be prosecuted at all" (*Petition* at 18). This is no different than *Sabula.* The defendant there bargained for the Commonwealth's "promise not to prosecute." *Id.*, 46 A.3d at 1292. Defendant's attempted distinction is illusory.

The Commonwealth respectfully submits that whether defendant's non-prosecution claim will be irreparably lost is not a complicated issue requiring strained interpretations of cases involving federal aviation statutes or tariff agreements (*Petition* at 16, citing cases). This instead is an issue that is squarely—and easily—resolved by *Sabula.*

C. Defendant's appeal fails under the "extraordinary circumstances" doctrine.

Defendant relies on *Commonwealth v. Bolden,* 373 A.2d 90 (Pa. 1977), and a handful of other decades-old cases in arguing his appeal should be heard based on the "exceptional circumstances" doctrine (*Petition* at 19-20).[4] His reliance on those cases is misplaced. The "exceptional circumstances" doctrine—to the extent it even remains viable today in light of the adoption of Pa. R.A.P. 313—does not bestow jurisdiction for defendant's premature appeal.

As an initial matter, in almost half of these case relied upon by defendant, the court actually held that "exceptional circumstances" did ***not*** exist to warrant an appeal from an interlocutory order. *See, e.g., Swanson,* 225 A.2d at 232-233 (quashing appeal from an interlocutory order denying defendant's request for change of venue due to pre-trial publicity where no exceptional facts or circumstances existed to depart from the general rule that an

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[4] Specifically, defendant cites *Bolden, supra, Commonwealth v. Bruno,* 225 A.2d 241 (Pa. 1967), *Commonwealth v. Byrd,* 219 A.2d 293 (1966), *Commonwealth v. Leaming,* 275 A.2d 43 (Pa. 1971), *Commonwealth v. Bunter* 282 A.2d 705 (Pa 1971), *Commonwealth v. Kilgallen,* 103 A.2d 183 (Pa. 1954), and *Commonwealth v. Swanson,* 225 A.2d 231 (Pa. 1967).

appeal only lies from a final order); *Byrd,* 219 A.2d at 295 (quashing appeal from interlocutory order requiring defendant to submit to a neuropsychiatric examination where the appeal did not fall within the exceptional circumstances doctrine); *Bruno,* 225 A.2d at 242-243 (quashing appeal from an interlocutory order committing defendant to a mental health facility where appeal did not fall within the exceptional circumstances doctrine). These cases, consequently, fail to advance defendant's quest to have this Court exercise appellate jurisdiction.[5]

Moreover, in the decades since these cases were decided, Pa. R.A.P. 313 ("Collateral Orders") was adopted. *See Smitley v. Holiday Rambler Corp.,* 707 A.2d 520, 524 (Pa. Super. 1998) (noting that Rule 313 was adopted in 1992). This Rule codified the then-existing

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[5] While the Court in *Bolden* did find that "exceptional circumstances" existed to warrant an appeal from an interlocutory order, that decision was a plurality. *Commonwealth v. Brady,* 508 A.2d 286, 288 (Pa. 1986) (noting that *Bolden* is a "nondecisional opinion") (citing *Commonwealth v. Haefner,* 373 A.2d 1094, 1095 (Pa. 1977)). "It is axiomatic that a plurality opinion ... is without precedential authority, which means that no lower court is bound by its reasoning." *CRY, Inc., v. Mill Service, Inc.,* 640 A.2d 372, 276 n.3 (Pa. 1994). *Bolden,* too, fails to advance defendant's position.

caselaw regarding collateral orders. Pa. R.A.P. 313, *Note; see Smitley, supra* at 524-545. Indeed, as the *Note* to Rule 313 makes clear, the precise scenario set forth in *Bolden*—denying a pre-trial motion to dismiss based on double jeopardy grounds—is now considered a collateral order appeal. *See* Pa. R.A.P. 313, *Note* (citing *Commonwealth v. Brady,* 508 A.2d 286, 289-291 (Pa. 1986), for the proposition that the Court would "allow[] an immediate appeal from denial of double jeopardy claim under collateral order doctrine where trial court makes a finding that motion is not frivolous"). Thus, even if the *Bolden* decision were precedential, to the extent that it allowed for an appeal based on an "exceptional circumstance" that would allow for a departure from the general rule limiting an appeal to the review of a final judgment, based on the implementation of Rule 313, such a situation would now be encompassed by the collateral order rule.

Arguably, the same holds true for the remaining decades-old cases cited by defendant in his attempt to have this Court exercise appellate jurisdiction based on the "exceptional circumstances" doctrine. Indeed, each of these case was decided long before the

Rules of Appellate Procedure formally recognized the collateral order doctrine as an alternative bases for appellate jurisdiction.

In any event, to the extent that the exceptional circumstances doctrine continues to remains viable despite the enactment of Rule 313, defendant has unearthed but a single case invoking this doctrine in the more than two decades since Rule 313's adoption: *Commonwealth v. Ricker,* 120 A.3d 349, 354 (Pa. Super. 2015).

Ricker, however, is readily distinguishable from this case. There, this Court found that "exceptional circumstances" supported an interlocutory appeal from a pre-trial habeas corpus petition because, *inter alia,* the issue was capable of evading review. *Id.* at 354. To be sure, the Court found that if the defendant was acquitted or convicted, the issue of whether hearsay evidence alone may establish a *prima facie* case at a preliminary hearing would become moot. *See id.* at 353 (noting that "it is well-settled that errors at a preliminary hearing regarding the sufficiency of the evidence are considered harmless if the defendant is found guilty at trial") (quoting *Commonwealth v. Sanchez,* 82 A.3d 943, 984 (Pa. 2013). Simply put, the defendant in *Ricker* was in a "now or never" situation. This defendant is not. If he is ultimately convicted, he

may raise his challenge to the purported non-prosecution agreement and his request to disqualify the District Attorney's Office following his conviction.

One final note. Defendant cites to *Commonwealth v. Schultz,* 2016 Pa. Super. LEXIS 30 (Pa. Super. Jan. 22, 2016), for the proposition that the "exceptional circumstances" doctrine is "separate from, and independent of, the collateral order doctrine" (*Petition* at 18). *Schultz,* however, says no such thing. That case involved a collateral order appeal. This Court's discussion regarding its jurisdiction to hear the appeal focused on whether the defendant satisfied the three prerequisites to appeal from a collateral order. In conducting its analysis on the final prong—the "irreparably lost" requirement—the Court referenced *Ricker,* noting that the issue sought to be advanced by the defendant there, like in *Schultz,* was capable of evading review if delayed until after trial. *Id.*, 2016 Pa. Super. LEXIS, at *32 (citing *Ricker,* 120 A.3d at 353). Notably, however, this Court made no mention of "exceptional circumstances" whatsoever—let alone state that any such doctrine was separate and distinct from the collateral order doctrine—other than to simply mention that the *Ricker* court found that

"exceptional circumstances" warranted the exercise of jurisdiction. *Id.*

IV. CONCLUSION

For these reasons, as well as those set forth in the Commonwealth's motion to quash and the trial court's opinion, defendant has failed to demonstrate that the collateral order doctrine or that exceptional circumstances warrant an immediate pretrial appeal. The trial court thus properly retains jurisdiction under Rule 1701(b)(6). The Commonwealth, accordingly, respectfully requests that the Court deny defendant's request for the extraordinary remedy of a writ of prohibition.

RESPECTFULLY SUBMITTED:

KEVIN R. STEELE
DISTRICT ATTORNEY