

**IN THE
SUPERIOR COURT OF PENNSYLVANIA
EASTERN DISTRICT**

COMMONWEALTH : No. 23 EDM 2016
OF PENNSYLVANIA, :
RESPONDENT, :
 :
V. :
 :
WILLIAM H. COSBY, JR., :
PETITIONER. :

**COMMONWEALTH’S ANSWER TO PETITION FOR REVIEW FROM
THE ORDER OF THE COURT OF COMMON PLEAS OF
MONTGOMERY COUNTY REFUSING TO AMEND ITS ORDER
PURSUANT TO PA. R.A.P. 1311(b)**

Respondent, the Commonwealth of Pennsylvania, by the Montgomery County District Attorney’s Office, requests that this Court deny the *Petition for Review from the Order of the Court of Common Pleas of Montgomery County Refusing to Amend its Order Pursuant To Pa. R.A.P. 1311(b)* filed by petitioner William H. Cosby, Jr. (“defendant”).

I. INTRODUCTION

Facts are stubborn things. And when a trial judge finds them against a litigant, there’s not much, if anything, that litigant can do on appeal. But that hasn’t discouraged defendant from seeking interlocutory review of a claim resolved against him on credibility

grounds. He wants this Court to review his claim that there was supposedly a non-prosecution agreement, and to do it now, even though he has not yet had a preliminary hearing. He insists such pretrial intervention is justified because there is allegedly “a controlling question of law as to which there is substantial ground for difference of opinion.” 42 Pa.C.S. § 702(b). According to him, the trial court’s decision otherwise was not merely incorrect but *egregious*. Yet defendant’s claim—more than anything else—was about facts. It came down to whether the trial court believed his evidence. It did not. And it said so. Defendant’s assertion that there is a “controlling question of law” ignores this hard and inconvenient truth.

II. FACTUAL AND PROCEDURAL BACKGROUND

In December 2015, a criminal complaint was filed against defendant. It charged him with sexual crime stemming from an incident that had occurred in 2005. A preliminary hearing was scheduled for January 14, 2016. Defendant later obtained 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, scheduled a hearing and for February 2, 2016.¹ In doing so, he continued the scheduled February 2nd preliminary hearing.

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

¹ The Commonwealth unsuccessfully objected under *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).

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).²

² Castor unveiled this 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

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 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.³

The second day, the defense concluded its case by presenting John Schmitt, Esquire, a civil attorney who had represented defendant in various matters 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

a government promise of immunity without court order does not strip an individual of his Fifth Amendment rights).

³ Ms. Ferman is now a judge of the Court of Common Pleas, Montgomery County, Pennsylvania.

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 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). That worked out well

for him, since no charges were filed at that time. 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 maintained his innocence, as he did in the police interview. Significantly, he 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 purported “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.)).

On February 12, 2016, defendant filed a motion asking Judge O'Neill to amend his order to include the certification language specified in 42 Pa. C.S. § 702(b) ("Interlocutory appeals by permission").⁴ Four days later, Judge O'Neill denied defendant's motion to amend. Defendant later filed this petition for review.

III. DISCUSSION

Defendant argues that the trial court's decision not to amend its order to include the language specified in 42 Pa.C.S. § 702(b) was so egregious that this Court must intervene. Specifically, he believes that his claim involving the purported non-prosecution agreement involves a controlling question of law about which there is substantial disagreement and that he is accordingly entitled to pretrial appellate review.⁵ The trial court rejected the claim based on credibility, however, and so there is no controlling question of law.

⁴ On the same day, defendant filed a notice of appeal under Pa.R.A.P. 313 ("Collateral Orders"). That appeal remains pending, but the Commonwealth has filed a motion to quash.

⁵ Defendant, puzzlingly, seeks appellate review of his pre-arrest delay claim. The trial court, however, did not review that issue. It instead deferred it for "more appropriate times according to the Rules of Criminal Procedure" (N.T. 2/2/16, 5-6).

An interlocutory appeal by permission may be allowed when a trial court certifies in an order that the appeal “involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the matter.” 42 Pa.C.S. § 702(b). If the trial court refuses to include such language in an order, a party may file a petition for review. Importantly, the party must demonstrate that the trial court’s refusal to certify the appeal is “so egregious as to justify prerogative appellate correction of the exercise of discretion by the lower tribunal.” Pa.R.A.P. 1311 (Official Note).

Defendant cannot meet this standard. There is a no “controlling question of law” here. 42 Pa. C.S. § 702(b). A question of law is subject to a *de novo* standard of review, and the scope of review is plenary. *Commonwealth v. Crawley*, 924 A.2d 612, 614 (Pa. 2007). In contrast, factual findings are due deference on appeal as long as they have support in the record, and credibility determinations are binding on appeal. *Commonwealth v. Myers*, 722 A.2d 649, 651-652 (Pa. 1998).

Here, the trial court denied defendant's claim based on credibility. As mentioned above, the Commonwealth's primary arguments were factual: (1) the supposed "sovereign edict" never existed, but instead was revisionist history manufactured a decade later; and that (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 asked the trial court for a credibility determination of these issues (N.T. 2/3/16, 289). The trial court, in denying the claim, explained that "a credibility determination" was "an inherent part" of its ruling (N.T. 2/3/16, 307; *Order*, dated Feb. 4, 2016 (O'Neill, J.)). The trial court thus resolved at least one—if not both—of those factual issues against defendant. As such, there is no "controlling question of law." 42 Pa. C.S. § 702(b) (emphasis added). The trial court's decision not to certify the appeal, therefore, is not so egregious as to justify immediate correction from this Court. There would be little to review, after all, on appeal. *See Myers*, 722 A.2d at 651-652 (restricting appellate review of fact-findings and credibility determinations).

IV. CONCLUSION

For these reasons, the Commonwealth respectfully requests that the Court deny defendant's petition for review.

RESPECTFULLY SUBMITTED:



KEVIN R. STEELE
DISTRICT ATTORNEY