

**IN THE
SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT**

COMMONWEALTH	:	No. 63 MM 2016
OF PENNSYLVANIA,	:	
Respondent,	:	
	:	
v.	:	
	:	
WILLIAM HENRY COSBY,	:	
Petitioner.	:	

COMMONWEALTH’S ANSWER TO PETITION FOR REVIEW

Respondent, the Commonwealth of Pennsylvania, by the Montgomery County District Attorney’s Office, requests that this Court deny the *Petition for Review* 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 a sexual crime stemming from an incident that had occurred in 2005. A preliminary hearing was scheduled for mid-January. 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) the current District Attorney 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 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 that he decided that he 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

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).

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 Castor insisted that he did this to benefit the victim in her then-

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

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 commitment, he would not have allowed defendant to sit for the civil deposition (*id.* at 14).

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

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”). Judge O’Neill later denied the motion. Defendant filed a petition for review in the Pennsylvania Superior Court.

Defendant also filed a notice of appeal under Pa.R.A.P. 313 (“Collateral Orders”), in the Pennsylvania Superior Court. The Commonwealth filed a motion to quash the appeal as interlocutory.

On April 25, 2015, the Superior Court granted the Commonwealth’s motion to quash and denied defendant’s petition for review. Defendant has now filed another petition for review in this Court.

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.⁴ The trial court rejected the claim based

⁴ 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).

on credibility, however, and so there is no controlling question of law.

A. Defendant's petition for review is procedurally defective.

As an initial matter, defendant's petition for review is procedurally improper. He cites Pa.R.A.P. 1501 as a basis for jurisdiction. That chapter, however, does not apply to appeals from the Superior Court. Pa.R.A.P. 1501(b)(2). "Appellate review by the Supreme Court of decisions of ... intermediate appellate courts, whether as a matter of right or by allowance of appeal, is governed by Chapter Eleven of the Rules of Appellate Procedure." *West's Pennsylvania Practice*, Volume 20A at p. 15 (2008-2009 Edition); *see Commonwealth ex rel. Buchanan v. Verbonitz*, 581 A.2d 172, 173 (Pa. 1990) (suggesting that petition for allowance of appeal is correct procedure following Superior Court's denial of petition for review challenging judge's refusal to amend order). The Commonwealth therefore respectfully submits that the petition should be summarily dismissed.

B. The Superior Court properly determined that the trial court's refusal to certify was not egregious.

The Superior Court properly denied defendant's petition for review. 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) (emphasis added).

1. There is no controlling question of law because the trial court denied defendant's claim based on credibility.

Defendant cannot meet the standard recited above. 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). 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).

2. Even if there were a controlling question of law, there is no substantial ground for difference of opinion.

Even if the trial judge had not denied the claim based on credibility, there are no legal questions that can be considered “controlling” in this case, much less ones for which there are substantial grounds for difference of opinion.

There are two strictly legal questions involved in this case. First, Castor suggested he had the authority as a “sovereign” to unilaterally bestow transactional immunity on defendant. The law refutes such an assertion. *See Commonwealth v. Swinehart*, 642 A.2d 504 (Pa. Super. 1994), *aff’d*, 664 A.2d 957 (Pa. 1995) (“Our Supreme Court has determined that under Pennsylvania law only **use** immunity is available to a witness.”) (emphasis added); *Commonwealth v. Parker*, 611 A.2d 199, 200 n.1 (Pa. 1992) (an oral grant of use immunity by prosecutor is defective). Second, defendant insisted that the remedy for his claim was the dismissal of the prosecution. The law is the opposite, however. *See*

Commonwealth v. Stipetich, 652 A.2d 1294, 1296 (Pa. 1995) (providing that the “proper response” to detrimental reliance on a defective non-prosecution agreement is suppression, not dismissal of prosecution); *cf. Kastigar v. United States*, 406 U.S. 441, 453 (1972) (explaining that the protections of the Fifth Amendment are co-extensive with use immunity, not transactional). Even if these two issues could be considered “controlling,” accordingly, there would be no substantial ground for difference of opinion.

3. Defendant’s remaining issues are mixed, fact-intensive questions.

There are several mixed questions of law and fact in this case, but even those are heavily weighted toward fact. *See Commonwealth v. Crawley*, 924 A.2d 612, 615 (Pa. 2007) (“some mixed questions are more heavily weighted toward fact, while other are more heavily weighted towards law”). Defendant suggests that Castor entered a binding contract with him. Although the Commonwealth believes that there would have been inadequate consideration for any such contract, that mixed question does not have to be addressed. Castor himself readily admitted that there was no agreement—no “*quid pro*

quo” (N.T. 2/2/16, 99). As a factual matter, therefore, defendant’s contract theory fails.

The only remaining issue is estoppel. Whether defendant reasonably relied on anything purportedly said by Castor is a mixed question, but it lies on the fact-intensive end of the spectrum. That alone weighs against certification. But even considered on the merits, defendant’s alleged reliance on a supposedly informal, unwritten grant of immunity was unreasonable. He was then, and remains now, represented by a competent team of lawyers. Those attorneys had the professional responsibility to ensure that they accurately advised him regarding any adverse consequences of his deposition testimony. They should have known that Castor’s attempt to unilaterally confer transactional immunity—which was never even put down in writing—was defective. *See Swineheart, supra; Parker, supra*. They also should have known that a defective attempt to confer immunity did not strip their client of his 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). Perhaps his counsel failed in that duty and advised him to

rely on Castor's mistaken representation—but that failure, even it is occurred, has no bearing on the criminal case against him. At most, that would provide him grounds for a malpractice case against his attorneys for providing erroneous advice. His alleged reliance was unreasonable, and, therefore, his estoppel claim fails.

But this mixed question does not even have to be addressed because, as mentioned above, the trial judge seemingly ruled as a factual matter that defendant did not **actually** rely on any representation by Castor when deciding to testify at his civil deposition. This is another controlling question of **fact**, not law. Defendant did not testify at the deposition because of any purported agreement with Castor. He chose to testify for his own gain. Just because his calculated risk backfired on him years later does not give him license to rewrite history. He freely submitted himself to a police interview, while represented by counsel, during a criminal investigation that resulted in no charges. He thereafter submitted himself to the deposition, and he maintained his innocence just as he had done in his police statement. He thus had little need to invoke his Fifth Amendment rights: talking had worked well for him in the past, and he wanted to again insist he was innocent. At the

deposition, he even answered questions about other alleged victims who clearly would not have been covered by Castor's purported "sovereign edict." If defendant had invoked his rights, moreover, it would have been damaging to his then-far more positive public image, and it could have resulted in an adverse-inference instruction at a civil trial. *See Adkins v. Sogliuzzo*, 2015 U.S. App. LEXIS 13967, *15-16 (3d Cir. Aug. 10, 2015) (explaining that it is permissible to allow adverse inference in civil case from party's assertion of Fifth Amendment rights).

Because there is no controlling question of law about which there is substantial ground for difference of opinion, the trial court's refusal to amend its order was not egregious, and the Superior Court properly denied the petition for review.

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