Received 1/23/2020 3:57:02 PM Supreme Court Middle District

Filed 1/23/2020 3:57:00 PM Supreme Court Middle District
9 MAL 2020

IN THE
SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

No. 9 MAL 2020

COMMONWEALTH OF PENNSYLVANIA,
RESPONDENT,
v.

WILLIAM HENRY COSBY, JR.,
PETITIONER.

ANSWER TO PETITION FOR ALLOWANCE OF APPEAL

Answer to the Petition for Allowance of Appeal from the Order of the Superior Court entered on December 10, 2019, at Docket No. 3314 EDA 2018, affirming the Judgment of Sentence entered on September 25, 2018, with post-sentence motions denied on October 23, 2018, by the Honorable Steven T. O'Neill, Judge, Court of Common Pleas, Montgomery County, at CP-46-CR-3932-2016.

ROBERT M. FALIN
Deputy District Attorney

ADRIENNE D. JAPPE
Assistant District Attorney

EDWARD F. McCANN, JR.
First Assistant District Attorney

KEVIN R. STEELE
District Attorney

OFFICE OF THE DISTRICT ATTORNEY
Montgomery County Courthouse
Norristown, Pa 19404
(610) 278-3102

TABLE OF CONTENTS

TABLE OF CITATIONS

Cases

Statutes

Rules

COUNTER-STATEMENT OF THE CASE

A jury convicted defendant William H. Cosby, Jr., of three counts of aggravated indecent assault in connection with the drug-induced sexual assault he committed against Andrea Constand in 2004. The trial court sentenced him to three to ten years' incarceration. It also deemed him a sexually violent predator ("SVP"), and ordered him to register for life. The Superior Court of Pennsylvania affirmed his judgment of sentence. *Commonwealth v. Cosby*, No. 3314 EDA 2018, 2019 WL 6711477 (Pa. Super. Dec. 10, 2019). Defendant has now filed a Petition for Allowance of Appeal ("PAA").

The Commonwealth relies on the factual and procedural history set forth in the Superior Court Opinion, which it incorporates by reference herein. There are, however, some misstatements made by defendant in his petition that must be corrected.

First, defendant incorrectly states—twice—that the trial court permitted the Commonwealth to introduce testimony from "any five" of the nineteen proffered prior bad act witnesses. PAA at 6, 21. This is not true. To the contrary, the court allowed the

Commonwealth to present evidence relating to five of the eight prior bad acts that occurred closest in time to defendant's assault on Andrea Constand. (*Order,* dated Mar. 15, 2018 (O'Neill, J.); R. 1672a-R. 1673a). As aptly noted by the Superior Court, "[t]he trial court did not permit the Commonwealth to introduce the testimony of the remaining 14 PBA witnesses proffered by the Commonwealth." *Cosby, supra* at *15.

Second, defendant clings to a false, revisionist narrative about the so-called non-prosecution agreement. Specifically, he alleges that in 2005 there was a non-prosecution agreement between him and the then-District Attorney Bruce L. Castor, Esquire (PAA at 8-9). He further alleges that he relied on this agreement when he decided to sit for depositions during a 2006 civil suit filed against him by the victim in this case (*id.*). What defendant fails to inform the Court is that the trial court made credibility determinations and factual findings that no such agreement existed and that there was no actual reliance on it; and, moreover, that the Panel found support in the record for these rulings. *Cosby*, 2019 WL 6711477 at *27, *29-30.

REASONS FOR DENYING DEFENDANT'S PETITION FOR ALLOWANCE OF APPEAL

Defendant hopes this Court will grant review based on his grandiose assertion that the Panel's decision "has far-reaching consequences for all future criminal proceedings." PAA at 5. As his lengthy petition and 6,664 page reproduced record reveal, however, he is really asking the Court to go on a fact-intensive, error-seeking misadventure into areas purposely left to the discretion of trial judges tasked with managing cases, balancing competing interests, and resolving these issues in real time. Those claims are as follows: (1) prior bad acts; (2) a supposed "non-prosecution agreement"; (3) Juror Number 11's alleged partiality; and (4) his waived challenge to the constitutionality of Pennsylvania's current sex offender registration law.

I. THERE ARE NO SPECIAL AND IMPORTANT REASONS FOR DISCRETIONARY REVIEW OF DEFENDANT'S FACT-SPECIFIC PRIOR BAD ACTS CLAIM.

Defendant first contends that this Court should grant review of his prior bad acts claim because, supposedly, the Superior Court Panel's decision conflicts with decisions of both this Court and the Superior Court, involves an abuse of discretion, and raises

questions of "such substantial public importance" as to require prompt and definitive resolution by this Court. PAA at 15. *Allocatur* is not appropriate here. There are no "special and important reasons" warranting discretionary review. Pa. R.A.P. 1114(a). The Panel correctly applied long-standing prior bad act principles to defendant's run-of-the-mill evidentiary claim and concluded, based on the specific facts of this case, that the trial court properly exercised its discretion in permitting the evidence. There is no reason to revisit the Panel decision.

A. The Panel Decision is Consistent with Prior Supreme and Superior Court Decisions.

Defendant claims that the Panel decision is in direct conflict with prior decisions of the Pennsylvania Supreme and Superior Courts. PAA at 15. Notably, however, he fails to identify a single case with which his case supposedly conflicts. Instead, he cites snippets of law from various appellate court decisions with materially distinguishable facts and baldly alleges that the cited law was not followed here. Contrary to defendant's assertion, the Panel decision is consistent with his proffered authority.

It is well-settled that the admissibility of prior bad act evidence is determined "on a case by case basis in accordance with the unique facts and circumstances of each case." *Commonwealth v. Frank,* 577 A.2d 609, 614 (Pa. Super. 1990). In conducting this fact-sensitive and fact-intensive inquiry in this case, the Panel applied well-settled principles of law. It first acknowledged that prior bad act evidence is not admissible "to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character." *Cosby, supra* at *16 (quoting Pa. R.E. 404(b)(1)). It then correctly noted that, pursuant to Rule 404(b)(2), prior bad act evidence may be admissible for another purpose—as relevant here, to prove absence of mistake or a common scheme, plan, or design—as long as "the probative value of the evidence outweighs its potential for unfair prejudice." *Cosby, supra* at *id.*

In conducting its analysis, the Panel employed no new principles of law. In the context of the common scheme, plan, or design exception, it correctly examined the circumstances of each prior act to determine whether the evidence revealed conduct "so distinctive and so nearly identical as to become the signature of the

same perpetrator," as opposed to conduct demonstrating crimes "of the same general class." *Cosby, supra* at *16-17 (citing *Frank*, 577 A.2d at 614, and *Commonwealth v. Tyson,* 119 A.3d 353, 361 (Pa. Super. 2015), *alloc. denied*, 128 A.3d 220 (Pa. 2015) (table)). Thus, contrary to defendant's assertion, the Panel did not disregard the authority holding that "much more is demanded than the mere repeated commission of crimes of the same class, such as repeated burglaries or thefts. The device used must be so unusual and distinctive as to be like a signature." PAA at 17 (quoting *Commonwealth v. Roney,* 79 A.3d 595, 606 (Pa. 2013)) (additional citation omitted). Instead, it expressly recognized the stringent similarity requirements under the common scheme, plan or design exception.

Similarly, in the context of the absence of mistake exception, the Panel correctly applied well-settled Pennsylvania law. It properly noted that the exception is typically applicable to prove that an injury was not accidental or, in the case of a sexual assault where identity is not at issue, to defeat an anticipated defense of consent. *Cosby, supra* at *18 (citing *Commonwealth v. Boczkowski,* 846 A.2d 75 (Pa. 2004), and *Tyson,* 119 A.3d at 362-363). It then,

consistent with the established authority in this Commonwealth, weighed the probative value of the evidence against its potential for unfair prejudice, *see* Pa. R.E. 404(b)(2), and concluded that the trial court properly exercised its discretion in allowing the prior bad act evidence. *Cosby, supra* at *23.

In reaching its decision, the Panel took into consideration, *inter alia,* the following similarities between the prior bad acts and the current crime: each victim was substantially younger than defendant; each woman met him through her employment or career; most of the women believed that he truly wanted to mentor them; he was legitimately in each victim's presence because she had accepted an invitation to get together with him socially; each incident occurred in a setting controlled by him, where he would not be interrupted or discovered by a third party; he had the opportunity to perpetrate each crime because he instilled trust in his victims due to his position of authority, his status in the entertainment industry, and his social and communication skills; he administered intoxicants to each victim; the intoxicant incapacitated each victim; he was aware of each victim's compromised state because he was the one who put each of them

into that compromised state; he had access to sedating drugs and knew their effects on his victims; he sexually assaulted each victim—or in the case of one of his victims, engaged in, at minimum, untoward sexual advances —while she was not fully conscious and, thus, unable to resist his unwelcomed sexual contact; and, none of his victims consented to any sexual contact with him. *Id.*

Based on these abundant similarities, the Panel properly concluded that defendant's conduct was more than just conduct of the same general class—or, as defendant puts it, "simplified likenesses"—but instead constituted a signature pattern establishing defendant's "unique sexual assault playbook." *Id.* at *17-20.

Contrary to defendant contention, the Panel's conclusion is not inconsistent with precedent holding that "[s]imilarities cannot be confined to insignificant details that would likely be common elements regardless of the individual committing the crime." PAA at 17 (quoting *Commonwealth v. Bidwell,* 195 A.3d 610, 618-619 (Pa. Super. 2018)). The Panel expressly found, based on the specific facts in this case, that the above-referenced similarities were not

"confined to insignificant details that would likely be common elements regardless of who had committed the crimes." *Cosby, supra* at *20 (quoting *Commonwealth v. Hughes*, 555 A.2d 1264, 1283 (Pa. 1989)). The Panel did not, as defendant alleges, ignore allegedly "significant differences." PAA at 19. Rather, it carefully considered each of the alleged distinctions cited by defendant, but found that they were insufficient to undermine the abundant similarities that rendered defendant's conduct a "signature pattern." *Cosby, supra* at *19-20, *23. This was a proper application of well-established Pennsylvania law. *See, e.g., Tyson,* 119 A.3d at 360 n.3 (common plan or scheme exception "does not require that the two scenarios be identical in every respect); *Commonwealth v. Hicks,* 156 A.3d 1114, 1128 n.8 (Pa. 2017) (a "perfect match is not required"). Defendant simply disagrees with the way the Panel applied long-standing principles of law. His dissatisfaction with the Panel's decision, however, does not provide him with a basis for review in this Court.

Moreover, the Panel did not override existing law regarding remoteness. PAA at 25. To the contrary, it expressly acknowledged the relevant authority holding that "even if evidence of prior

criminal activity is [otherwise] admissible under [Rule 404(b)(2)], said evidence will be rendered inadmissible if it is too remote." *Cosby, supra* at *23 (quoting *Commonwealth v. Shively,* 424 A.2d 1257, 1259 (Pa. 1981)). It also acknowledged the equally well-established principle holding that "while remoteness is a factor to consider in determining the probative value of other crimes evidence, the time period is inversely proportional to the similarity of the crimes in question." *Cosby, supra* at *id.* (quoting *Commonwealth v. Aikens,* 990 A.2d 1181, 1185 (Pa. Super. 2019)). In balancing these two well-established principles, the Panel aptly concluded that the remoteness of the prior bad act evidence was not so substantial that it undermined its probative value. *Cosby, supra* at *id.* Again, this was a proper application of the law and, in fact, was consistent with Pennsylvania Supreme and Superior Court precedent. *See, e.g., Commonwealth v. Smith,* 635 A.2d 1086, 1089 (Pa. Super. 1993) (sex assault 10 years prior to current assault admissible where so strikingly similar that the significance of the lapse in time was "non-existent, or minimal at best"); *Commonwealth v. Luktisch,* 680 A.2d 877, 878-879 (Pa. 1996) (sex assault 19 years prior to current offense admissible);

Commonwealth v. Patskin, 93 A.2d 704 (Pa. 1953) (17-year-old prior assault admissible); *Aikens, supra* (15-year-old sex assault admissible); *Commonwealth v. Odum,* 584 A.2d 953, 955 (Pa. Super. 1990) (13-year-old sex assault admissible).

There is nothing novel about the Panel's decision on defendant's prior bad act claim that would warrant revisiting its holding. The Panel correctly applied controlling precedent, as it was tasked to do; discretionary review is unwarranted. *See* Pa. R.A.P. 1114(b)(1), (b)(2).

B. The Panel did not Abuse its Discretion.

Defendant also alleges that the Superior Court Panel abused its discretion. PAA at 15; *see* Pa. R.A.P. 1114(b)(4). Once again, however, he fails to advance a legitimate "special and important" reason for *allocatur.* There was no abuse of discretion.

As noted, defendant's claim is a fact-sensitive evidentiary issue involving no new principles of law. The trial court was in the best position to assess the claim. That is why the law dictates that appellate courts defer to the trial court unless there is an abuse of discretion. *Commonwealth v. Rivera,* 983 A.2d 1221, 1228 (Pa. 2009). Thus, it is not sufficient to simply persuade the appellate

court that it might have reached a different conclusion; a defendant must show an actual abuse of discretionary power. *Commonwealth v. Norton,* 201 A.3d 112, 120 (Pa. 2019). An abuse of discretion does not involve a mere error of judgment, but rather "the overriding or misapplication of the law, or the exercise of judgment that is manifestly unreasonable, or the result of bias, prejudice, ill-will or partiality, as shown by the evidence of record." *Commonwealth v. Antidormi,* 84 A.3d 736, 749 (Pa. Super. 2014). That is an extremely heavy burden for a defendant to carry. *Norton,* 201 A.3d at 120. Defendant did not do it here.

The Panel carefully considered the evidence related to this fact-intensive issue, thoroughly applied the established and controlling authority on this issue, and concluded that the trial court properly exercised its discretion in allowing the prior bad act evidence. There was no abuse of discretion. Defendant is simply unhappy that the Panel did not find in his favor. His dissatisfaction with the ruling, however, is not a proper basis for allowance of appeal. *See* Pa. R.A.P. 1114 (setting forth the standards governing allowance of appeal).

C. Defendant's Fact-Sensitive Evidentiary Claim is not of Such Substantial Public Importance as to Require Discretionary Review.

Defendant also claims that the Panel's decision "abolishes the bedrock principle of law" that prior bad act evidence may not be used for propensity. PAA at 15. Concomitantly, he contends that the Panel decision "strip[ped] him of the presumption of innocence by proving that he has committed other criminal acts." *Id.* at 15-16. He maintains that his claim is of such substantial public importance so as to require discretionary review with the Court. He is wrong.

Defendant's presumption of innocence remained intact. As the trial court instructed the jury numerous times, the prior bad act evidence was not offered for propensity purposes, but rather to show that defendant engaged in a common scheme, plan, or design, and to demonstrate and absence of mistake (N.T. 4/11/18, 44-46, 50-51; N.T. 4/12/18, 65-67, 69-70, 166-168; N.T. 4/25/18, 35-36). More specifically, the evidence was properly introduced to show that defendant, who for decades intentionally isolated and intoxicated young women in a signature fashion, then sexually assaulted them while they were unconscious or otherwise incapacitated, could not

have been mistaken about whether the victim in this case was conscious enough to consent to the sexual contact.

As discussed *supra,* moreover, the Panel decision is wholly consistent with Pennsylvania law, which allows prior bad act evidence when offered for a relevant purpose—such as to prove an absence of mistake or a common scheme, plan or design—other than to prove bad character or propensity, so long as the probative value outweighs its potential for unfair prejudice. *See* Pa. R.E. 404(b)(1),(2); *Commonwealth v. O'Brien,* 836 A.2d 966, 969 (Pa. Super. 2003). It is for these very purposes that the prior bad act evidence was properly admitted.

The Panel decision did not, as defendant would have this Court believe, craft a rule that allows for prior bad acts to be admissible regardless of: whether there are striking similarities; any remoteness in time; the probative value (or lack thereof) of the prior bad acts; and any prejudicial impact. PAA at 15. Rather, the Panel carefully considered defendant's claim pursuant to the well-settled prior bad act law in this Commonwealth and, in doing so, expressly took into consideration each of the factors defendant says it did not. *See supra* at I.A. Indeed, the majority of its prior bad act

analysis is dedicated to an examination of the probative value of the evidence. *See Cosby*, *supra* at *19-23. Moreover, the Panel did recognize the potential for unfair prejudice; like the trial court, however, it determined that the probative value outweighed the potential for unfair prejudice, especially in light of the numerous cautionary instructions given to the jury and the trial court limiting the number of testifying prior bad act victims. *Id.* at 23. The Panel did not, therefore, as defendant alleges, "[r]ewrite" and "abolish" the requirement of Rule 404(b)(2) that the probative value of the evidence outweigh its potential for unfair prejudice. PAA at 26.

Defendant has failed to demonstrate why his case, involving fact-specific and fact-intensive, run-of-the-mill prior bad act claim, is of such substantial public importance so as to require discretionary review.

II. THERE ARE NO SPECIAL AND IMPORTANT REASONS FOR DISCRETIONARY REVIEW OF DEFENDANT'S "NON-PROSECUTION AGREEMENT" CLAIM.

Defendant seeks discretionary review of a non-prosecution agreement claim. He alleges that in 2005 there was a non-prosecution agreement between him and former District Attorney Castor. Defendant further claims that he agreed to sit for a civil

deposition in 2006 because of the alleged non-prosecution agreement. He advances two supposed "special and important" reasons to justify discretionary review.

But, in crafting his arguments to this Court, defendant completely ignores dispositive findings of fact against him. After two days of hearings, the trial court found that there was no promise not to prosecute and that defendant did not rely on it to his detriment; the Panel found that these fact-findings were supported by the record. *Cosby*, *supra* at *27, *29-30. Defendant's fact-based claim would require this Court to reassess the credibility of witnesses. It is, therefore, wholly inappropriate for discretionary review. *See Commonwealth of Pennsylvania, Dep't of Transp., Bureau of Driver Licensing v. O'Connell,* 555 A.2d 873, 875 (Pa. 1989) ("Questions of credibility and conflicts in the evidence presented are for the trial court to resolve, not our appellate courts.").

In any event, defendant first proposes that a "special and important" reason for discretionary review is that the Panel's decision purportedly strips district attorneys of the authority to enter non-prosecution agreements "that will bind [their]

successor(s)." PAA at 31. This is incorrect. The Panel did not limit a district attorney's authority to enter into binding contracts in any way whatsoever. In addition to concluding that the trial court's fact-findings were supported by the record, the Panel first addressed defendant's argument that Castor had authority to unilaterally confer transactional immunity to him (this is Castor's "sovereign edict" theory). It correctly concluded that he did not. *Cosby*, *supra* at *28. This is consistent with well-established law. *Commonwealth v. Swinehart*, 642 A.2d 504, 506 (Pa. Super. 1994) ("Our Supreme Court has determined that under Pennsylvania law only use immunity is available to a witness."); *Commonwealth v. Parker*, 611 A.2d 199, 200 n.1 (Pa. 1992) (use immunity is available only through court order). Defendant's only other argument in the Superior Court was not based on contract theory, but promissory estoppel; he could not argue that a contract existed because Castor specifically denied that there was any *quid pro quo* (N.T. 2/2/16, 99). So nothing in the Panel's decision strips district attorneys of the authority to grant statutory immunity or to plea bargain with a defendant. If district attorneys do either of those things, their successors will be bound to honor those agreements. Defendant's

apparent concern for the independence and authority of district attorneys is therefore unnecessary.

Defendant next argues that the Panel's "reasonable reliance" requirement for promissory estoppel "undermines public confidence in the Judicial System." PAA at 32. He construes the Panel's decision as concluding that there is no caselaw to support the existence of promissory estoppel in criminal cases. He misunderstands the panel's holding. The Panel rejected defendant's unsupported assertion that promissory estoppel may bar prosecution. *Cosby*, *supra* at *29. But it accepted the assertion that promissory estoppel may result in the suppression of evidence obtained from a defendant's reasonable reliance on promises made by the Commonwealth. *Id.* at *31. This was a proper application of law. *Commonwealth v. Parker*, 611 A.2d 199, 201 (Pa. 1992) (explaining that the proper remedy for estoppel claims, if proven to be true, is not dismissal of charges, but rather the suppression of evidence obtained as a result of the defendant's reliance). The Panel thus correctly followed the law; it did not create some new principle of law, as defendant suggests, that needs resolution by this Court.

Defendant next complains that the Panel improperly required reasonable reliance as an element of promissory estoppel. But reasonable reliance is a long-established and integral component of promissory estoppel. *See Thatcher's Drug Store v. Consolidated Supermarkets*, 636 A.2d 156, 160 (Pa. 1994) (quoting *Restatement (Second) of Contracts* § 90, cmt. b) (determining whether the interests of justice require enforcement of a promise depends in part on the reasonableness of the promisee's reliance). And defendant fails to cite any case in support of his argument that this Court should jettison it now. Tellingly, defendant conceded that reasonable reliance was required in his brief to the Superior Court (*Brief for Appellant* at 128-129). He does not acknowledge or explain his change of position. But, as with defendant's other "special and important" reason, he ignores the fact-findings against him. The trial court not only found that there was no reasonable reliance, but there was no ***actual*** reliance, and the Panel found these findings were supported by the record. There is thus no "special and important" reason for granting *allocatur* on his "non-prosecution agreement" claim.

III. THERE ARE NO SPECIAL AND IMPORTANT REASONS FOR REVIEW OF DEFENDANT'S JUROR ISSUE.

Defendant further contends that the Superior Court's unanimous approval of the trial court's procedure for crediting four seated jurors, and discrediting a discharged juror, is at odds with one U.S. Supreme Court decision, and one of this Court's prior decisions. There is no conflict, and thus no special and important reason for this Court to grant *allocatur*.

Specifically, defendant relies on *Smith v. Phillips*, 455 U.S. 209 (1982), and *Commonwealth v. Horton*, 401 A.2d 320 (Pa. 1979), for his contention that the trial court's process of vetting the issue of potential bias, and the decision approving that process, conflict with prior caselaw. PAA at 35. Defendant's contentions are vague, so it is not entirely clear what holding in each case is supposedly at odds with the Superior Court decision here.

Defendant once again suggests that *Smith* stands for the proposition that he was entitled to a "full inquiry" concerning the accusation that Juror 11 proclaimed defendant's guilt before trial. PAA at 35. It is his definition of the phrase "full inquiry" that is actually at odds with *Smith*.

In that case, the Court simply held that "the remedy for allegations of juror partiality is a hearing in which the defendant has the opportunity to prove actual bias." *Id.* at 215. The Supreme Court flatly rejected the argument that defendant would like to make before this Court: "that a court cannot possibly ascertain the impartiality of a juror by relying solely upon the testimony of the juror in question." *Id.* *Smith* held that judges may properly make such determinations at a hearing like the one that took place in that case, where the only juror to testify about his impartiality is the juror in question. *Id.* at 217; *see also id.* at n.7.

Here, Juror 11 affirmed his ability to be impartial and clearly denied making the statement ascribed to him. Although his testimony did not need to be supported by any evidence beyond his own word according to *Smith*, three disinterested jurors corroborated his account. Thus, there is no conflict. In fact, the Superior Court makes no mention of *Smith*.

In reaching its conclusion that defendant provided no support for his argument that he was entitled to a more extensive hearing, the Superior Court did distinguish the present case (where "the trial court conducted a hearing, at which no less than five witnesses

testified") from the 1979 case of *Commonwealth v. Horton* (where the trial court refused to examine potentially biased jurors). *Cosby, supra* at *42-43. Defendant suggests that *Horton* stands for the proposition that it was error for the trial court not to examine everyone, including discharged jurors, who might have heard an alleged statement. *See* PAA at 34. His reliance is misplaced.

In *Horton*, this Court granted a new trial where a prospective juror told the trial court that he was unable to be impartial after hearing Horton admit his guilt. The court then refused a defense request to examine other jurors to see if they also heard the comment. In this case, in contrast, the trial court interviewed ***all*** seated jurors who were present for the alleged comment. So while it was possible that seated jurors in *Horton* heard a prejudicial statement, the judge here verified that seated jurors did not.

Moreover, in this case the trial court concluded that an effort to interview discharged jurors might have delayed the already extensive proceedings for days (N.T. 4/9/18, 150). Thus, the Superior Court properly recognized that what took place in *Horton* was factually "unlike" what happened here. There is no conflict,

and no special and important reason for a second review of this issue. *Cosby, supra* at *43.

IV. THERE ARE NO SPECIAL AND IMPORTANT REASONS TO GRANT DISCRETIONARY REVIEW OF DEFENDANT'S WAIVED CLAIM THAT PENNSYLVANIA'S CURRENT SEX OFFENDER REGISTRATION LAW IS UNCONSTITUTIONAL.

Finally, defendant urges this Court to grant review on the issue of whether Pennsylvania's current sex offender registration law, Act 29, Subchapter I, 42 Pa.C.S. 9799.51, *et seq.*, is constitutional. But defendant has not preserved this claim for review. In fact, as the Superior Court correctly found, he waived it both by failing to include a challenge to the non-SVP provisions of the statute in his 1925(b) Concise Statement, *Cosby, supra* at *45, and by failing to develop any meaningful argument in his brief on direct appeal, *id.* at *45-46. This Court should not review a waived claim. *See J.H. v. W.C.A.B. (Oley Twp.),* 854 A.2d 440 (Pa. 2004) (dismissing appeal as improvidently granted where issue was waived in intermediate appellate court).[1]

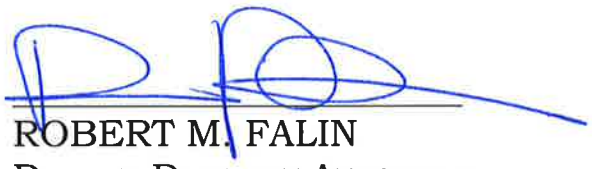
[1] To be clear, defendant does not seek review of the Superior Court's determination that the claim is waived. In fact, he ignores the waiver issue altogether and seeks review only of the underlying waived challenge to the constitutionality of the statute.

Nevertheless, defendant argues that review is warranted because the constitutionality of the statute is "of concern to numerous cases and parties across the Commonwealth." PAA at 38. While it is true that the issue of whether the statute is constitutional is of broad import, that exact issue is already pending before this Court in *Commonwealth v. LaCombe*, 35 MAP 2018, and *Commonwealth v. Witmayer*, 64 MAP 2018. There is no compelling reason—and defendant has not identified any—to review a waived claim presenting issues identical to those already before the Court.

CONCLUSION

For the foregoing reasons, the Commonwealth respectfully requests that this Court deny defendant's petition for allowance of appeal.

RESPECTFULLY SUBMITTED:



ROBERT M. FALIN
DEPUTY DISTRICT ATTORNEY
ADRIENNE D. JAPPE
ASSISTANT DISTRICT ATTORNEY
EDWARD F. McCANN, JR.
FIRST ASSISTANT DISTRICT ATTORNEY
KEVIN R. STEELE
DISTRICT ATTORNEY

IN THE
SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

COMMONWEALTH OF PENNSYLVANIA, *Respondent,*	:	NO. 9 MAL 2020
v.	:	
WILLIAM H. COSBY, JR., *Petitioner.*	:	

Certification of Word Count

I, Robert M. Falin, Montgomery County Deputy District Attorney, do hereby certify that the within answer contains 4,505 words.

Respectfully submitted,

ROBERT M. FALIN
DEPUTY DISTRICT ATTORNEY
EDWARD F. MCCANN, JR.
FIRST ASSISTANT DISTRICT ATTORNEY
KEVIN R. STEELE
DISTRICT ATTORNEY