Received 3/26/2018 4:08:16 PM Superior Court Eastern District

Filed 3/26/2018 4:08:16 PM Superior Court Eastern District
26 EDM 2018

IN THE
SUPERIOR COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA, RESPONDENT,	:	No. 26 EDM 2018
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 DENYING MOTION TO AMEND ITS MARCH 15, 2018 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 Denying Motion To Amend Its March 15, 2018 Order Pursuant To Pa. R.A.P. 1311(b)* filed by petitioner William H. Cosby, Jr. ("defendant").

I. INTRODUCTION

Defendant is scheduled for retrial on April 2, 2018. He now seeks a trial-delaying interlocutory appeal based on the trial court's ruling that the Commonwealth may admit five prior bad act victims

at trial. The trial court's denial of certification, however, was not egregious for the reasons that follow.

There is no "controlling question of law," as required by statute. This is so for two reasons. First, there is no controlling question here. There are instead nine separate questions; that is, one question for each of the eight prior bad acts that the trial court held was potentially admissible. Second, these eight separate questions are not questions of law; they are instead mixed questions of law and fact. Further, the trial court did not specify the basis for its ruling and expressly stated that it was subject to change based on the context of trial. This Court is thus without guidance in determining whether a trial-delaying interlocutory appeal is warranted. Defendant also cannot meet the statutory "substantial ground for difference of opinion" standard; claims reviewable for an abuse of discretion should not be included in that category.

Finally, an immediate appeal will not materially advance the ultimate termination of this case. Defendant is going to retrial; an immediate appeal will not change this. He is either going to retrial sooner or later, regardless of how this petition is resolved.

II. STATEMENT OF THE CASE

On December 30, 2015, the Commonwealth charged defendant with three counts of aggravated indecent assault in connection with the drug-induced sexual assault he committed on Andrea Constand during the winter of 2004 in his Cheltenham home. During its investigation, the Commonwealth learned that more than fifty other women alleged that they suffered remarkably similar sexual assaults at the hands of defendant; he systematically engaged in a pattern of providing an intoxicant to his young female victim and sexually assaulting her once she became incapacitated.

Prior to defendant's first trial, the Commonwealth sought to introduce evidence of a mere sampling of this other act evidence at trial. It filed a motion to admit evidence regarding 13 of these alleged incidents to demonstrate an absence of mistake and to show defendant's common scheme, plan, or design. More specifically, it asserted that the evidence was relevant to establish that an individual who, over the course of decades, intentionally intoxicated women in a signature fashion and then sexually assaulted them while they were incapacitated could not have be mistaken about whether or not Ms. Constand was conscious enough to consent to

the sexual abuse.

Following defendant's response, oral argument, and the submission of post-hearing briefs by both parties, the Honorable Steven T. O'Neill granted the Commonwealth's motion with respect to the evidence pertaining to the victim designated by the Commonwealth as "Prior Victim Number Six," but denied the motion with respect to the remaining prior victims. *Order,* dated Feb. 24, 2017 (O'Neill, J.).

On June 5, 2017, a jury trial commenced.[1] The

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[1] This was only after defendant filed numerous pretrial interlocutory appeals, all of which were quashed or otherwise denied by both this Court and the Pennsylvania Supreme Court. *See Order,* No. 2330 EDA 2016, dated Oct. 12, 2016 (granting motion to quash defendant's pretrial interlocutory appeal); *Order,* No. 23 EDM 2016, dated Apr. 25, 2016 (denying defendant's petition for review of trial court order refusing to certify its order for immediate appeal); *Order,* No. 488 EDA 2016, dated Apr. 25, 2016 (granting motion to quash defendant's pretrial interlocutory appeal); *Order,* No. 58 MM 2016, dated May 23, 2016 (denying defendant's emergency application for stay); *Order,* No. 63 MM 2016, dated Jun. 20, 2016 (denying defendant's petition for review of the Superior Court order denying his petition for review); *Order,* No. 325 MAL 2016, dated Jun. 20, 2016 (denying defendant's petition for allowance of appeal); *Order,* No. 765 MAL 2016, dated Apr. 12, 2017 (denying defendant's petition for allowance of appeal).

Commonwealth presented numerous witnesses, including Andrea Constand. She recalled how she developed what she thought was a friendship with the married defendant through her employment with Temple University. He acted as a mentor, and he discussed career aspirations with her. In January 2004, when she was 30-years-old and defendant was 66-years-old, defendant invited her to his Cheltenham home to discuss her career path. There, defendant sexually assaulted her, after providing her with an intoxicant (N.T. Trial by Jury, 6/6/1 7, 142, 145-146, 169-107).

The Commonwealth also presented testimony from Kelley Johnson, who, as noted, was designated as "Prior Victim Number Six" in the Commonwealth's original prior bad act motion. In testimony eerily similar to that of Ms. Constand, Ms. Johnson testified that defendant sexually assaulted her while she was incapacitated, as a result of intoxicants he had provided her (N.T. Trial by Jury, 6/5/17, 125-141).

The Commonwealth also introduced into evidence defendant's admissions that he had access to, and knowledge of, prescription drugs that induce unconsciousness, consistent with the Court's April 28, 2017, order granting the *Commonwealth's Motion to*

Introduce Admissions by Defendant as it pertained to defendant's prior sworn testimony concerning Quaaludes. Specifically, it introduced defendant's admission that he obtained numerous prescriptions for Quaaludes, even though he did not intend to ingest the pills himself because they made him "sleepy," but instead intended to use the pills "for young women ... [he] wanted to have sex with" (N.T. Trial by Jury, 6/9/17, 172-175, 178-183). The Commonwealth also introduced his admission that he gave "Theresa"[2] Quaaludes and afterwards, she became "high" and was "walking like [she] had too much to drink" (*id.* at 167-169). Finally, the Commonwealth introduced defendant's admission that he gave Quaaludes to other women, in addition to "Theresa" (*id.* at 183-186).

In total, the jury heard from more than a dozen witnesses over the course of six days. After six days of deliberation, the jury informed the Court that it was unable to reach a verdict; the trial court thus declared a mistrial. The court scheduled defendant's retrial for April 2, 2018. *Order,* Dated Dec. 15, 2017 (O'Neill, J.)

[2] "Theresa" was one of the prior bad acts victims proffered by the Commonwealth in both its original prior bad act motion and its current motion.

In anticipation of defendant's retrial, the Commonwealth filed a motion to admit evidence of 19 prior bad acts of defendant. The motion sought to introduce evidence of the 13 victims that were proffered by the Commonwealth in its original prior bad acts motion, as well as six additional victims who have come forward with harrowing accounts of sexual assault by defendant, blindingly similar to the tactics he employed with Andrea Constand. *See Commonwealth's Motion to Introduce Evidence of 19 Prior Bad Acts of Defendant.*

Following defendant's response, a lengthy oral argument, and post-arguments briefs by both parties, Judge O'Neill granted in part and denied in part the Commonwealth's motion. *Order,* Dated Mar. 15, 2018 (O'Neill, J.). Specifically, the court permitted the Commonwealth to permit evidence "regarding ***five*** prior bad acts of its choosing" from the prior bad acts victims designated in the Commonwealth's motion as prior victim numbers 12 through 19. *Id.* at 1 (emphasis in original).[3]

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[3] The trial court's order also directed the Commonwealth to identify which witnesses it intended to call at trial by March 19, 2018. The Commonwealth complied.

The following day, defendant sought certification of the order for immediate appeal. Judge O'Neill denied his request for certification and his request for modification. *Order,* Dated Mar. 19, 2018 (O'Neill, J.).[4]

Defendant has now filed a *Petition for Review from the Order of the Court of Common Pleas of Montgomery County Denying Motion to Amend its March 15, 2018 Order Pursuant to Pa. R.A.P. 1311(d).*

III. THE LOWER COURT'S REFUSAL TO AMEND ITS ORDER PRESCRIBED BY 42 Pa.C.S. § 702(b) WAS NOT EGREGIOUS.

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. He is incorrect. There is no "controlling question of law" because he presents no single, dispositive question; and, moreover, the questions he does present are not questions of law, but rather mixed law and fact.

There is also no "controlling question of law" because the

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[4] Two days after Judge O'Neill denied defendant's request to certify its prior bad act ruling for an immediate appeal, defendant filed a motion for recusal, alleging an "appearance of impropriety" stemming from the work of the trial judge's spouse, who counsels victims recovering from the trauma of sexual assault. *See Motion for Recusal of the Honorable Steven T. O'Neill and Request for Reassignment.*

precise nature of the lower court's *in limine* ruling is unknown and subject to change. Defendant's claim, moreover, falls outside of the "substantial ground for difference of opinion" category because it is subject to an abuse of discretion standard. Lastly, an immediate appeal will not materially advance the ultimate termination of the matter; defendant is going to retrial regardless of the outcome.

A. Legal standards

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).

Importantly, the purpose of this interlocutory appeal procedure "is not designed to encourage or authorize the wholesale

appeal of difficult issues when appellate review would be better served by having all issues that are raised in a trial initially reviewed by the trial court and then subject to one review if necessary." *Kensey v. Kensey*, 877 A.2d 1284, 1289 (Pa. Super. 2005).

B. *There is no "controlling question of law" because defendant presents no single, dispositive question and, moreover, the questions he does present are not questions of law, but rather mixed law and fact.*

Defendant cannot meet this standard. There is no "controlling question of law" here. 42 Pa. C.S 42 § 702(b).

Defendant's problems begin with the requirement that there is a "controlling" question. For there to be a controlling question of law, "the appeal must raise some question of law which governs at least a claim, if not the whole case or defense." 4 AM. JUR. 2D APPELLATE REVIEW § 120 (2013). That is not present in this case. Instead, there are at least eight separate questions concerning each prior bad act and possibly additional questions, such as defendant's alleged inability to defend against the older allegations. The absence of a question of law that governs the whole claim defeats defendant's bid for immediate review.

Defendant's problem continues with the requirement that there be a "controlling question of ***law***." A question of law is subject to a *de novo* standard of review. *Commonwealth v. Crawley*, 924 A.2d 612, 614 Pa. 2007). The claim defendant wants this Court to review concerns the admissibility of prior bad acts. That is not a question of law. It is a mixed question of law and fact, and it is subject to an abuse of discretion standard, *Commonwealth v. Patterson*, 91 A.3d 55, 68 (Pa. 2014) ("The admission of evidence of prior bad acts is solely within the discretion of the trial court, and the court's decision will not be disturbed absent an abuse of discretion."). As such, defendant cannot meet the requirement that there is a "controlling question of law." 42 Pa. C.S. 42 § 702(b).

The trial court's denial of certification, therefore, was not so egregious as to justify immediate correction by this Court.

C. *There is no "controlling question of law" because the precise nature of the lower court's in limine ruling is unknown and subject to change.*

The trial court did not specify the basis for its ruling, and so pretrial intervention cannot be justified. This Court has held that where the question for interlocutory appeal is not clear, the best option is to let the case proceed, and the questions to properly

develop, at the trial level. *Miller v. Krug*, 386 A.2d 124, 127-128 (Pa. Super. 1978). In *Miller*, this Court determined that there was no "controlling question of law as to which there was substantial ground for difference of opinion." *Id.* at 127. It did so, in part, because it was not "quite sure what the 'question' is." *Id.* This was due to an ambiguity in the lower court's order. Because this Court could not be sure the nature of the question for appeal, it concluded that "the case will proceed in a more informed, orderly, and expeditious manner" if it proceeded, without appellate intervention, at the trial level. *Id.* at 128.

The same lack of clarity exists here. The trial court granted the Commonwealth's motion in part, stating that eight of the prior bad act victims were admissible, but the Commonwealth could only present five of them at trial. It did not identify its rationale. For example, it did not explain why it permitted eight prior bad acts but excluded eleven. It did not identify the exception or exceptions under which it was permitting each of the eight prior bad acts. Much less did the trial court state that it was using the "doctrine of chances," which is one of the issues defendant argues justifies appellate intervention. And because defendant challenges eight

rulings (one for each prior bad act), the trial court had eight different analyses, which may or may not overlap. This Court thus has to guess what the many questions are to determine whether the trial court's denial of certification was egregious. Because this Court cannot identify the precise questions here, as in *Miller*, it should let the case "proceed in a more informed, orderly, and expeditious manner" at the trial level. *Id.* at 128.

This is all the more true because the claim this Court would review in a pretrial interlocutory appeal might bear little resemblance to the claim it would address if defendant were convicted and appealed in the normal course of litigation. The challenged order was an *in limine* ruling that the trial court expressly stated was subject to reexamination during trial. *Order*, Dated Mar. 15, 2018 (O'Neill, J.) (explaining that ruling is "subject to further examination and evidentiary rulings in the context of trial"). As the order makes clear, even the trial court is not sure whether the *in limine* ruling will ultimately reflect how it handles the issue at trial, when it has the benefit of more context and information.

This flexible approach is shrewd. "[A] court is almost always better situated during the actual trial to assess the value and utility of evidence." *States v. Cline,* 188 F.Supp.2d 1287, 1291 (D.Kan. 2002) (stating that, although pretrial "rulings can work a savings in time, cost, effort and preparation, a court is almost always better situated during the actual trial to assess the value and utility of evidence"). The trial court's ruling now, therefore, may develop, and the facts on which defendant's claim is currently based may develop differently at trial. *See State v. Dopp,* 930 P.2d 1039, 1045-46 (Idaho Ct. App.1996) ("Because a motion *in limine* is based on an alleged or anticipated factual scenario, ... the trial judge will not always be able to make an informed decision regarding the admissibility of the evidence prior to the time the evidence is actually presented at trial.") (citations omitted); *Dawson v. State,* 581 A.2d 1078, 1087 (Del. 1990) (explaining that deferred rulings are "designed to prevent unnecessary and unwarranted advisory opinions[, because, i]f no advance ruling is made, the parties may decide to abandon their positions for reasons unrelated to the anticipated ruling of the court [and a] refusal to rule [prior to trial]

may thus promote judicial economy") (citation omitted), *vacated on other grounds*, 503 U.S. 159 (1992).

A similar approach should be adopted toward defendant's bid to seek premature review. This Court could more easily and effectively review the question of the admissibility of the prior bad acts once the full contours of the claim are known, and it has the benefit of a full record developed at trial. *See Kaiser v. Meinzer*, 414 A.2d 1080, 1087 (Pa. Super. 1979) (dismissing interlocutory appeal because "judicial economy and the proper roles of trial and appellate courts would be best served by delaying our review pending the completion of all phases of the case in the court of common pleas").

D. Defendant's claim falls outside of the "substantial ground for difference of opinion" category because it is subject to an abuse of discretion standard.

Defendant insists that "[t]he extensive argument by the parties, and the trial court's own comments noting the weightiness of the issue [and] uniqueness of this case, reflect the substantial room for difference of opinion" (*Petition for Review* at 10).

It is "unlikely that any question of an abuse of discretion would fall within" the category of a question involving a substantial

ground for difference of opinion. *Miller*, 386 A.2d at 127. That is so because "appellate courts find abuse of discretion only in flagrant cases; almost by definition, a flagrant case is one where there is ***not*** 'a substantial ground for difference of opinion.'" *Miller*, 386 A.2d at 127.

Defendant does not allege that this is a flagrant case and that the trial court's ruling is so extreme that there is no substantial ground for difference of opinion. Consequently, this is not a case that should be considered for pretrial intervention.

E. An immediate appeal will not materially advance the ultimate termination of the matter.

Finally, defendant fails to establish that an immediate appeal will materially advance the ultimate termination of the matter. He is going to retrial regardless of the outcome of this appeal.

In *Miller*, this Court held that the appellant had failed to show that the appeal would materially advance the ultimate termination of the matter because he was going to go to trial no matter what the outcome of the appeal. It also pointed out that the proposed question—whether the appellate could present an expert witness—

was no different than other routine rulings on pretrial matters and the admissibility of evidence:

> We disagree that deciding the certified question now will "materially advance the ultimate termination of the matter." If we affirmed the order, appellant would go to trial without her expert witness—exactly the situation if she had not taken this appeal. If we reversed the order, appellant would go to trial with her expert witness—exactly the situation if appellant had waited until trial without her expert was over and then (assuming she lost) on direct appeal we reversed and ordered a new trial with her expert. To be sure, some time would be saved in the second situation if we were to decide now whether the expert should be allowed to testify, but that may be said of any interlocutory ruling that may potentially be reversed on direct appeal. We cannot see a distinction between the particular order here, barring the expert, and many other pretrial orders on discovery, or rulings during trial on the admissibility of evidence.

Miller, 386 A.2d at 127.

The same is true in this case. If this Court took the appeal and affirmed the order, defendant would go to trial, and the Commonwealth would present five prior bad act victims—exactly the situation if he had not taken the appeal. If this Court took the appeal and reversed the order, defendant would go to trial, and the Commonwealth would not present the five prior bad act victims—exactly the situation if defendant had waited until trial with the prior bad act victims was over and then (assuming he was

convicted) on direct appeal this Court reversed and ordered a new trial. As in *Miller*, a pretrial interlocutory appeal will not materially advance the termination of the case; it will just delay the inevitable trial.[5]

IV. DEFENDANT IS NOT ENTITLED TO A STAY.

Defendant is not entitled to a stay for all the reasons discussed above. He is also not entitled to a stay because he has ignored the legal requirements for such interim relief.

A grant of a stay is warranted if: (1) the petitioner makes a strong showing that he is likely to prevail on the merits; (2) he has shown that without the requested relief, he will suffer irreparable injury; (3) the issuance of a stay will not substantially harm other interested parties in the proceeding; and (4) the issuance of a stay will not adversely affect the public interest. *Pennsylvania Public Utility Commission v. Process Gas Consumers Group*, 467 A.2d 805, 808-809 (Pa. 1983) (adopting standard from *Virginia Petroleum Jobbers Association v. Federal Power Commission*, 259 F.2d 921 (D.C. Cir. 1958)).

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[5] Perhaps that is all defendant really seeks to do. The trial court denied his most recent continuance request.

Defendant advances zero argument in support of these requirements. A stay is thus inappropriate for that reason as well as those discussed above.

V. CONCLUSION

Defendant has failed to cite one criminal case in this Commonwealth in which this Court has intervened for a pretrial ruling on the admissibility of prior bad acts. This celebrity defendant is not entitled to unprecedented special treatment. To do so risks encouraging a flood of similar trial-delaying appeals by other criminal defendants: no one likes to face trial and practically every one (especially those that are guilty) have incentive to delay. If such extraordinary treatment is given to this high-profile case, it will no doubt inspire many others—facing the unpleasant prospect of a trial, a jury of their peers, and possible conviction—to do the same. That is not in the interest of the public, and it is certainly not in the interest of this Court.

WHEREFORE, for all the foregoing reasons, the Commonwealth respectfully requests that the Court deny defendant's petition for review and his request for a stay.

RESPECTFULLY SUBMITTED:

KEVIN R. STEELE
DISTRICT ATTORNEY

ROBERT M. FALIN
DEPUTY DISTRICT ATTORNEY

VERIFICATION

I, Kevin R. Steele, District Attorney of Montgomery County, declare under penalty of perjury that the statements herein are true and correct. I understand that false statements herein are made subject to the penalties of 18 Pa. C.S. § 4904, relating to unsworn falsification to authorities

KEVIN R. STEELE
DISTRICT ATTORNEY

ROBERT M. FALIN
DEPUTY DISTRICT ATTORNEY

PUBLIC ACCESS POLICY CERTIFICATON

I certify that this filing complies with the provisions of the *Public Access Policy of the Uniform Judicial Systems of Pennsylvania: Case Records of the Appellate and Trial Courts* that require filing confidential information and documents differently than non-confidential information and documents.

KEVIN R. STEELE
DISTRICT ATTORNEY

ROBERT M. FALIN
DEPUTY DISTRICT ATTORNEY