

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

COMMONWEALTH	:	No. 488 EDA 2016
OF PENNSYLVANIA,	:	
APPELLEE,	:	
	:	
v.	:	
	:	
WILLIAM H. COSBY, JR.,	:	
APPELLANT.	:	

**COMMONWEALTH’S MOTION TO QUASH APPELLANT’S
PRETRIAL INTERLOCUTORY APPEAL**

TO THE HONORABLE JUDGES OF THE SUPERIOR COURT
OF PENNSYLVANIA:

Appellee, the Commonwealth of Pennsylvania, by and
through the Montgomery County District Attorney’s Office,
requests that this Court quash the appeal of appellant William
H. Cosby, Jr., (“defendant”) pursuant to Pa. R.A.P. 123(a) and
Pa. R.A.P. 1972(a)(7):

1. Defendant is seeking to pursue an interlocutory
appeal in his criminal case, even though a preliminary hearing
has not yet occurred. He relies on the collateral order doctrine.
His claims, however, will not be irreparably lost if review is

deferred until after final judgment. As such, his premature appeal should be quashed.

2. On December 30, 2015, a criminal complaint was filed against defendant before Magisterial District Judge Elizabeth McHugh, in Montgomery County, Pennsylvania. It charged defendant with sexual crimes stemming from an incident that had occurred in 2005.

3. The same day, a preliminary arraignment was held before Judge McHugh, who set bail. Defendant posted security and was released. Judge McHugh scheduled the preliminary hearing for January 14, 2016.

4. Defendant requested a continuance of the preliminary hearing. Judge McHugh granted that request and rescheduled it for February 2, 2016.

5. On January 11, 2016, 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.

6. On January 13, 2016, 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 for February 2, 2016. In doing so, it continued the preliminary hearing.

7. On January 20, 2016, 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 on 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.

8. On January 22, 2016, Judge O'Neill issued an order restricting the February 2nd hearing to defendant's claim involving the purported non-prosecution agreement.

9. Judge O'Neill later held a two-day hearing. The first day, Mr. Castor, who was the district attorney in 2005, testified for the defense. He was extensively cross-examined by the Commonwealth. The second day, the defense concluded its case by presenting John Schmitt, Esquire, one of the civil attorneys who represented defendant in 2005.

10. 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 on the motion. The Commonwealth thereafter presented the two civil attorneys who had represented the victim in 2005.

11. During closing arguments, the Commonwealth's primary argument was factual—the supposed 2005 agreement never existed, but instead was revisionist history manufactured a decade later—and it specifically requested

that Judge O'Neill render a credibility determination on that issue.

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

13. Judge O'Neill informed the parties that he was willing to hear argument on the disqualification claim. After hearing argument, Judge O'Neill denied the claim from the bench.

14. On February 12, 2016, defendant filed a notice of appeal invoking the collateral order doctrine under Pa. R.A.P. 313.

15. The instant appeal should be quashed. "The jurisdiction of this court is limited to appeals from final orders of the court of common pleas. An order is not a final order unless it serves to put the litigant out of court either by ending the litigation or disposing of the case entirely. *Generally, a criminal defendant may appeal only from the judgment of sentence.* This rule prevents undue delay and avoids the

disruption of criminal cases by piecemeal appellate review.”

Commonwealth v. Swartz, 579 A.2d 978, 980 (Pa. Super. 1990)

(emphasis added) (citations omitted).

16. The trial court’s orders denying defendant’s two pretrial claims are not “final orders” as defined in Pa. R.A.P. 341(b). The orders did not “dispose of all claims and of all parties,” Pa. R.A.P. 341(b)(1), because they did not dispose of the criminal charges filed against defendant. The orders are not “expressly defined as a final order by statute,” Pa. R.A.P. 341(b)(2), nor does defendant argue that they are.

17. Defendant instead contends that the two orders are “collateral orders” under Pa. R.A.P. 313. That rule permits a “narrow exception to the general rule that only final orders are appealable.” *Commonwealth v. Wells*, 719 A.2d 729, 730 (Pa. 1998). It is construed “narrowly” to avoid “piecemeal determinations and the consequent protraction of litigation.” *Commonwealth v. Sabula*, 46 A.3d 1287, 1291 (Pa. Super. 2012) (quoting *Rae v. Funeral Directors Ass’n*, 977 A.2d 1121, 1129 (Pa. 2009)).

18. Under the collateral order doctrine, an immediate appeal of an otherwise unappealable interlocutory order is permissible if it meets the following three requirements:

(1) the order must be separable from, and collateral to, the main cause of action; (2) the right involved must be too important to be denied review; and (3) the question presented must be such that if review is postponed until after final judgment, the claim will be irreparably lost.

Commonwealth v. Harris, 32 A.3d 243, 248 (Pa. 2011)

(citations omitted). “All three prongs of Rule 313(b) must be met before an order may be subject to a collateral appeal; otherwise, the appellate court lacks jurisdiction over the appeal.” *Id.*

19. Importantly, the third prong “requires that the matter must effectively be unreviewable on appeal from final judgment.” *Wells*, 719 A.2d 730. In even stronger language, the Pennsylvania Supreme Court has explained that a collateral order appeal is permissible only if “denial of immediate review would render impossible any review whatsoever of [the] individual’s claim.” *Commonwealth v.*

Myers, 322 A.2d 131, 133 (Pa. 1974) (quoting *United States v. Ryan*, 402 U.S. 530, 533 (1971)).

20. Defendant's "non-prosecution agreement" claim does not meet the third prong of the collateral order doctrine; his claim will not be irreparably lost if postponed until after final judgment.

21. *Sabula* is instructive. There, the appellant alleged that the police had promised him that he would not be prosecuted for his crimes in exchange for his cooperation in another investigation. When the trial court denied the claim prior to trial, the appellant appealed to this Court, relying on the collateral order doctrine. He argued that an immediate appeal was justified 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.*, 46 A.3d at 1292.

22. This Court quashed the appeal, however. It rejected the appellant's theory that he met the third prong because his supposed "bargained for benefit" included "being free from the expense and ordeal of trial":

To satisfy this element, an issue must actually be lost if review is postponed. Orders that make a trial inconvenient for one party or introduce potential inefficiencies, including post-trial appeals of orders and subsequent retrials, are not considered as irreparably lost. An interest or issue must actually disappear due to the processes of trial.

Sabula, 46 A.3d at 1293 (citations omitted).

23. The *Sabula* Court ultimately concluded that this was not the case with regard to a claim involving an alleged “non-prosecution agreement”:

Instantly, in light of the foregoing, we conclude the issue raised by the trial court’s denial of Appellant’s pre-trial motion to enforce a nonprosecution agreement will not be irreparably lost if not reviewed as a collateral order. Here, any right Appellant has in the avoidance of criminal sanctions by virtue of his compliance with a nonprosecution agreement with the Commonwealth would be mooted in the event of an acquittal and would, in the event of conviction, be reviewable in an appeal from a final judgment of sentence.

Sabula, 46 A.3d at 1293.

24. Defendant’s case is controlled by *Sabula*. His claim that he entered into a “non-prosecution agreement” with the former district attorney would be rendered moot by an acquittal or, if he is convicted, reviewed by this Court in an

appeal following final judgment. He clearly is not in a “now or never” situation, as required by the third prong of the collateral order doctrine.

25. Defendant’s attempt to appeal the trial court’s denial of his claim that District Attorney Kevin R. Steele and his entire office should be disqualified from the prosecution is likewise premature. This issue will not “actually disappear due to the processes of trial.” *Sabula*, 46 A.3d at 1293. Further, this Court has specifically rejected the notion that analogous claims are subject to collateral order appeals. *Cf.*

Commonwealth v. Mitchell, 72 A.3d 715, 719 n.7 (Pa. Super. 2013) (order denying motion for change of venue based on allegedly biased county bench is not a collateral order);

Commonwealth v. Stevenson, 829 A.2d 701, 704 (Pa. Super. 2003) (“This Court has held that orders denying a motion for recusal are not collateral and, therefore, are not immediately appealable.”); *cf. also Commonwealth v. Wells*, 719 A.2d 729, 731 (Pa. 1998) (denial of defendant’s claim that he is entitled to “conflict free” defense counsel is not collateral order).

26. Defendant also asserts in his notice of appeal that he is appealing pursuant to “the exceptional circumstances doctrine applicable to appeals of orders denying petitions for writ of habeas corpus.” Such a doctrine, to the extent it even exists, is not applicable here. Defendant’s self-titled habeas petition was not a habeas petition at all. It did not challenge the Commonwealth’s ability to present a *prima facie* case against him. Rather, it raised claims properly brought in a pretrial motion. In any event, there are no exceptional circumstances here for the reasons discussed above in relation to the collateral order doctrine.

27. In sum, this criminal defendant has yet to be tried, convicted, and sentenced. In fact, remarkably, he has not even had a preliminary hearing, thanks to inventive lawyering that apparently seems intent on keeping his case from a jury for as long as possible. Under these circumstances, defendant’s appeal should be quashed to “avoid piecemeal determinations and the consequent protraction of litigation.” *Sabula*, 46 A.3d at 1291 (quoting *Rae*, 977 A.2d at 1129).

WHEREFORE, the Commonwealth respectfully requests that the Court quash defendant's improper interlocutory appeal.

RESPECTFULLY SUBMITTED:



KEVIN R. STEELE
DISTRICT ATTORNEY