

IN THE COURT OF COMMON PLEAS OF MONTGOMERY COUNTY,  
PENNSYLVANIA  
CRIMINAL DIVISION

2016 DEC -5 PM 3:23

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COMMONWEALTH OF PENNSYLVANIA : No. 3932-16  
: :  
v. : :  
: :  
WILLIAM H. COSBY, JR. :

**FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER SUR DEFENDANTS'  
MOTION TO SUPPRESS EVIDENCE PURSUANT TO PA. R. CRIM. P. 581 (I)**

**I. Findings of Fact**

1. The Defendant seeks to suppress the contents of his civil deposition testimony, and any evidence derived therefrom, on the basis that he expressly relied upon former District Attorney Bruce L. Castor, Jr.'s alleged promise not to prosecute him as the basis for not invoking his Fifth Amendment right against self-incrimination at his civil depositions in 2005 and 2006. (Defendant's Motion to Suppress the Contents of His Deposition Testimony and Any Evidence Derived Therefrom On the Basis that the District Attorney's Promise Not to Prosecute Him Induced Him to Waive his Fifth Amendment Right Against Self-Incrimination at 1.)
2. A hearing was held before the undersigned on November 1, 2016. No new evidence was presented at the hearing. Rather, the Notes of Testimony from the February 2 and 3, 2016 hearing on the Defendant's "Petition for Writ of Habeas Corpus and Motion to Disqualify the Montgomery County District Attorney's Office," (Commonwealth's Suppression Exhibit 1 (CS-1))<sup>1</sup> and a series of stipulations (CS-2) were admitted as evidence sufficient to dispose of the instant Motion to Suppress which was filed August 12, 2016. (N.T. 11/1/16 at 7-8). This Court considered no other evidence in making its findings and conclusions.
3. On January 24, 2005, then Montgomery County District Attorney Bruce L. Castor, Jr., Esq. issued a signed press release indicating that an investigation had commenced following the victim's January 13, 2005, report to authorities in Canada that she was allegedly sexually assaulted by the Defendant at his home in Pennsylvania. Ultimately, the case was referred to Cheltenham Township Police Department. (N.T. 2/3/16 at 65; C-17).
4. On January 26, 2005, the Defendant gave a written, question and answer statement to law enforcement. The Defendant was accompanied by counsel, both his criminal defense attorney Walter M. Phillips<sup>2</sup>, Esq., and his longtime

<sup>1</sup> All other exhibits referenced herein are cited by the exhibit number assigned at the February 2 and 3, 2016 hearing.

<sup>2</sup> Mr. Phillips passed away in early 2015.

- general counsel John P. Schmitt, Esq., when he provided his statement to police. (N.T. 2/3/16 at 19, 52-53).
5. At no time during the statement to police did the Defendant invoke his Fifth Amendment privilege. (Id. at 18).
  6. Mr. Schmitt testified that he interviewed the Defendant prior to both his statement to police and to his civil depositions and did not believe that he was going to incriminate himself. (N.T. 2/3/16 at 22-24).
  7. On February 17, 2005, then District Attorney, Bruce L. Castor, Jr., issued a signed press released stating that he had decided not to prosecute William H. Cosby, Jr. (N.T. 2/2/16 at 71-72, 89); Defendant's Exhibit 4 (D-4)).
  8. Mr. Castor testified that it was his intention to strip the Defendant of his Fifth Amendment right to force him to sit for a deposition in an unfiled civil case and that Mr. Phillips, the Defendant's criminal attorney, agreed with his legal assessment. (N.T. 2/2/16 at 63-68). He also testified that he relayed this intention to then First Assistant District Attorney Risa V. Ferman. (Id. at 67).
  9. The press release cautions that the decision could be reconsidered. (N.T. 2/2/16 at 215; D-4).
  10. There was no agreement not to prosecute and no "quid pro quo." (N.T. 2/2/16 at 99, 227).
  11. The decision not to prosecute was not the result of any agreement with, or request from, the victim's attorneys, Dolores Troiani, Esq. and Bebe Kivitz, Esq. (N.T. 2/3/16 at 175, 238, 247-248).
  12. In fact, Ms. Troiani had no contact with the District Attorney's Office during the investigation. (N.T. 2/3/16 at 139-140). Ms. Kivitz had limited contact with then-First Assistant Risa V. Ferman. (Id. at 236, 247).
  13. Further, Ms. Troiani had no discussions with anyone involved in the investigation regarding a possible civil case against the Defendant. (Id. at 140).
  14. Additionally, Ms. Troiani testified that if the Defendant had invoked the Fifth Amendment at his depositions, it would have benefitted their civil case in the event of a jury trial, because she would have requested an adverse inference jury instruction. (N.T. 2/3/16 at 176).
  15. At no time was the purported promise not to prosecute reduced to writing. (N.T. 2/3/16 at 26, 41). Likewise, there was no Court approval of any promise or agreement not to prosecute.
  16. Neither of the victim's attorneys was aware of the purported promise until 2015. (Id. at 184, 237-238).
  17. In fact, Ms. Troiani only learned of Mr. Castor's decision not to prosecute when a reporter came to her office to obtain a comment on the decision. (Id. at 141-142).
  18. During the 2005 criminal investigation, the Defendant's attorneys were negotiating, in writing, with the National Enquirer for the defendant to give an interview regarding the instant allegations, which he gave following the conclusion of the criminal investigation. (N.T. 2/3/16 at 33-34).
  19. On March 8, 2005, the victim filed a civil lawsuit against the Defendant in the Eastern District of Pennsylvania.
  20. On four dates, September 28-29, 2005 and March 28-29, 2006, the Defendant sat for depositions in the civil matter. (N.T. 2/3/16 at 36).

21. He was accompanied by counsel, including Mr. Schmitt. (N.T. 2/3/16 at 13, 36). Mr. Schmitt testified that Mr. Phillips had informed him of Mr. Castor's promise not to prosecute. (Id. at 11).
22. The Defendant did not invoke the Fifth Amendment during the depositions, however, counsel did advise him not to answer questions pertaining to the victim in the instant case and her attorneys had to file motions to compel his testimony. (N.T. 2/3/16 at 41-42, 181-184, 248-249).
23. The Defendant did not invoke the Fifth Amendment when asked about other alleged victims. (Id. at 58-59).
24. At no time during the civil litigation did any of the attorneys for the Defendant indicate on the record that the Defendant could not be prosecuted. (N.T. 2/3/16 at 177, 184, 247-248).
25. There was no attempt to confirm the purported promise before the depositions, even though Mr. Castor was still the District Attorney; it was never referenced in the stipulations at the outset of the civil depositions. (N.T. 2/3/16 at 71, 178-179, 247-248).
26. In the late summer of 2006, the victim and the Defendant settled the civil case. As part of the settlement agreement defendant's attorneys initially attempted to negotiate a provision whereby the victim would absolve the Defendant of criminal responsibility and not cooperate with law enforcement. Additionally, the defendant's attorney requested that Ms. Troiani agree to destroy her file. (N.T. 2/3/16 at 47-48, 190-193).
27. The settlement agreement contains a provision that Ms. Constand would not initiate a criminal complaint against the Defendant based on the instant allegations. (N.T. 2/3/16 at 48; C-22).
28. On July 6, 2015, in response to a request by the Associated Press, a federal judge unsealed previously sealed portions of the record in the civil case, which included portions of the defendant's 2005 depositions. (Defendant's Motion to Suppress The Contents Of His Deposition Testimony and Any Evidence Derived Therefrom on the Basis that the District Attorney's Promise Not to Prosecute Him Induced Him to Waive His Fifth Amendment Right Against Self-Incrimination at 4).
29. Around this time, the District Attorney's Office reopened the investigation. (C-19, C-20).
30. On September 22, 2015, at 10:30 am, Brian McMonagle, Esq. and Patrick O'Connor, Esq., met with then District Attorney Risa Vetri Ferman and then First Assistant District Attorney Kevin Steele at the Montgomery County District Attorney's Office for a discussion regarding William H. Cosby, Jr., who Mr. McMonagle and Mr. O'Connor represented. (Defendant's Motion to Suppress the Contents of His Deposition: Stipulations #1).
31. On September 23, 2015, at 1:30 pm, Bruce L. Castor, Jr., Esq. sent an email to then District Attorney Ferman. This email was marked and admitted as Defendant's Exhibit 5 at the February 2016 *Habeas Corpus* hearing held in this matter. (Defendant's Motion to Suppress the Contents of His Deposition: Stipulations #2).

32. On September 23, 2015, at 1:47 pm, Mr. Castor forwarded the email identified above as Defendant's Exhibit 5 to Mr. McMonagle. (Defendant's Motion to Suppress the Contents of His Deposition: Stipulations #3).
33. On September 25, 2015, then District Attorney Ferman sent a letter to Mr. Castor by way of hand delivery. This letter was marked and admitted as the Defendant's Exhibit 6 at the February 2016 Habeas Corpus hearing held in this matter. At 3:02 pm that same day, Mr. Castor's secretary forwarded a scanned copy of the letter to him by way of email. (Defendant's Motion to Suppress the Contents of His Deposition: Stipulations #4).
34. In her letter Ms. Ferman stated, "[t]he first I heard of such a binding agreement was your email sent this past Wednesday." (D-6)
35. On September 25, 2015, at 3:59 pm, Mr. Castor forwarded the letter identified above as Defendant's Exhibit 6 to Mr. McMonagle. (Defendant's Motion to Suppress the Contents of His Deposition: Stipulations #5).
36. On September 25, 2015, at 3:41 pm, Mr. Castor sent an email to then District Attorney Ferman. This email was marked and admitted as Defendant's Exhibit 7 at the February 2016 Habeas Corpus hearing in this matter. (Defendant's Motion to Suppress the Contents of His Deposition: Stipulations #6).
37. On September 25, 2015, at 4:19 pm, Mr. Castor forwarded the email identified above as Defendant's Exhibit 7 to Mr. McMonagle along with the message "Latest." (Defendant's Motion to Suppress the Contents of His Deposition: Stipulations #7).
38. On December 31, 2015, the instant charges were filed.
39. The Defendant principally relies on the testimony and writings of Mr. Castor to support his motion.
40. In that regard, the Court finds that there were numerous inconsistencies in the testimony and writings of Mr. Castor and has previously ruled that credibility determinations were an inherent part of this Court's denial of the Defendant's initial "Petition for Writ of Habeas Corpus." (Court Order 2/4/16).
41. There were multiple inconsistencies between Mr. Castor's communications with the District Attorney's Office in September of 2015 and with his testimony on February 2, 2016.
42. For example, in his September 23, 2015 email, he indicated that the decision not to prosecute was an attempt to force the Defendant to sit for depositions in an unfiled civil case and that the decision was made with the "agreement" of defense counsel and plaintiff's counsel. (D-5). However, in his testimony, he indicated that there was no agreement and no quid pro quo.
43. The correspondence further states, "I signed the press release for precisely this reason, at the request of the Plaintiff's counsel, and with the acquiescence of Cosby's counsel, with full and complete intent to bind the Commonwealth that anything Cosby said in the civil case would not be used against him, thereby forcing him to be deposed and perhaps testify in a civil trial without him having the ability to 'take the 5<sup>th</sup>.'" (D-5). "[B]ut one thing is fact: the Commonwealth, defense and civil plaintiff's lawyers were all in agreement that the attached decision [February 17, 2005 press release] from me stripped Cosby of his Fifth Amendment privilege, forcing him to be deposed." (N.T. 2/3/16 at 195; D-5).

44. This Court credits the testimony of Ms. Kivitz and Ms. Troiani, whose relevant testimony regarding such agreement is outlined in paragraphs 11-17 above.
45. Mr. Castor's testimony about who was in agreement with his decision, as well as what he purportedly promised, was equivocal. (N.T. 2/2/16 at 185-195).
46. In his final email to Ms. Ferman on the subject Mr. Castor states, "I never said we would not prosecute Cosby." (D-8)
47. Additionally, there were multiple inconsistencies between Mr. Castor's accounts to the press and his testimony on February 2, 2016. (E.g., N.T. 2/2/16 at 218-220, C-12).
48. There is no basis in the record to support the contention that there was ever an agreement or a promise not to prosecute the Defendant.
49. There is no basis in the record to support justifiable reliance on the part of the Defendant.

## II. Conclusions of law

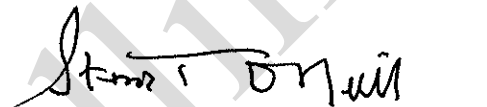
1. Instantly, this Court concludes that there was neither an agreement nor a promise not to prosecute, only an exercise of prosecutorial discretion, memorialized by the February 17, 2005 press release.
2. In the absence of an enforceable agreement, the Defendant relies on a theory of promissory estoppel and the principles of due process and fundamental fairness to support his motion to suppress.
3. Where there is no enforceable agreement between parties because the agreement lacked consideration, the agreement may still be enforceable on a theory of promissory estoppel to avoid injustice. Crouse v. Cyclops Indus., 745 A.2d 606 (Pa. 2000).
4. The party who asserts promissory estoppel must show (1) the promisor made a promise that he should have reasonably expected would induce action or forbearance on the part of the promisee; (2) the promisee actually took action or refrained from taking action in reliance on the promise; and (3) injustice can be avoided only by enforcing the promise. Id. (citing Restatement (Second) of Contracts § 90). Satisfaction of the third requirement may depend, *inter alia*, on the reasonableness of the promisee's reliance and the formality with which the promise was made. Thatcher's Drug Store of W. Goshen, Inc. v. Consol. Supermarkets, Inc., 636 A.2d 156, 160 (Pa. 1994) (citing Restatement (Second) of Contracts § 90, comment b).
5. Because there was no promise, there can be no reliance on the part of the Defendant and principles of fundamental fairness and due process have not been violated.
6. This Court finds that there is no Constitutional barrier to the use of the Defendant's civil deposition testimony.

Based on the foregoing, the Court issues the following:

**ORDER**

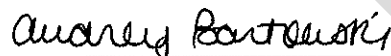
And now, this 5<sup>th</sup> day of December, 2016, upon consideration of the “Defendant's Motion to Suppress The Contents Of His Deposition Testimony and Any Evidence Derived Therefrom on the Basis that the District Attorney's Promise Not to Prosecute Him Induced Him to Waive His Fifth Amendment Right Against Self-Incrimination,” filed August 12, 2016, the Commonwealth’s Response thereto, filed September 2, 2016, and after hearing before the undersigned on November 1, 2016, based upon the arguments of counsel and the evidence adduced, the Defendant’s Motion to Suppress is hereby **DENIED** in its entirety.

**BY THE COURT:**



**STEVEN T. O'NEILL, J.**

Copy of the above Order  
mailed on 12/5/16 to the following:  
Kevin R. Steele, Esq. (District Attorney's Office)  
M. Stewart Ryan, Esq.  
Kristen Gibbons Feden, Esq.  
Brian J. McMonagle, Esq.  
Angela C. Agrusa, Esq.  
Court Administration

  
Secretary