NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA, Appellee v. BRETT W. COTT, Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 1192 MDA 2010

Appeal from the Judgment of Sentence May 21, 2010
In the Court of Common Pleas of Dauphin County
Criminal Division at No(s): CP-22-CR-0004655-2008

BEFORE: BOWES, OTT, and STRASSBURGER,* JJ.

MEMORANDUM BY BOWES, J.: Filed: March 4, 2013

Brett W. Cott appeals from the judgment of sentence of twenty-one to sixty months incarceration that was imposed after he was convicted by a jury of one count each of conflict of interest, theft of services, and conspiracy to commit conflict of interest. We affirm.

Appellant, together with his co-defendants Michael Veon and Anna Marie Perretta-Rosepink, was convicted by the jury after a trial that spanned six weeks. The defendants were charged with participating in schemes involving the use of taxpayer money to fund political work performed to advance the campaigns of candidates of the Democratic Party at the local,

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* Retired Senior Judge assigned to the Superior Court.

state, and national levels. We briefly review the evidence adduced by the Commonwealth.

Michael Manzo, who pled guilty to various crimes and who agreed to testify on behalf of the prosecution, outlined the operational system of Pennsylvania's bi-cameral legislature. Each chamber, the House of Representatives and the Senate, has two caucuses. One caucus consists of Republicans and the other caucus is composed of Democrats. The members of the caucus are paid with taxpayer money because the purpose of each caucus is to obtain the passage of legislation in line with the goals of the respective parties. The members of the House of Representatives elect the people who comprise the caucus of their respective parties.

Each caucus has a leadership team, the head being the majority/minority leader of the House of Representatives and the second in command being the House of Representatives majority/minority whip. There is also an appropriations chairman, a secretary and an administrator. These five leadership caucus members control the flow of money allocated to the caucus. As noted, all four caucuses are funded from the state budget each year so that the caucuses can operate. The Democratic Party's caucus for the House of Representatives is appropriately named the House Democratic Caucus (the "Caucus").

In contrast, the House Democratic Campaign Committee is not funded by taxes; it runs political campaigns. The House Democratic Campaign Committee is funded through political donations and is supposed to operate

separately and outside of the Caucus to promote the election campaigns of its party members.

Manzo was hired in 1994 by a member of the House of Representatives. In 1999, he became press secretary for William DeWeese, a Democrat who was the minority leader of the House of Representatives at that time and thus, head of the Caucus. In 2001, Manzo was promoted to Chief of Staff for DeWeese, who later became the majority leader of the House of Representatives and thus remained head of the Caucus after the Democrats gained the majority in the House of Representatives. Manzo worked for DeWeese and the Caucus from 1999 until 2007, when Manzo was asked to resign. From 1999 to 2007, Manzo interacted with the Caucus leadership, primarily with Veon and DeWeese, nearly every day.

Manzo delineated that while DeWeese was nominally his supervisor, Veon, another member of the Caucus, was more active in the daily operations of that organization. Manzo explained that DeWeese preferred to give speeches and attend political events while Veon assumed the role of running the Caucus. When Manzo worked for the Caucus, Veon, with the assent of DeWeese, made "the decisions about the money" flowing through the Caucus. N.T. Jury Trial, 2/2/10, at 19. Specifically, requests would come in from members of the Caucus for money, including "expenditures on staffing or salaries or things of that nature." ***Id***. at 21. Manzo would receive the funding request and give it to Veon, Veon would offer an opinion on the matter, and Veon's view would be forwarded to DeWeese with the

funding request. Thus, DeWeese and Veon "had a power sharing agreement as far as the expenditure of resources" given to the Caucus in the state budget. ***Id***. Together, those two men "controlled the expenditure of the budget for the House Democratic Caucus during the years 2000 through 2006." ***Id***. at 23.

Manzo outlined that Appellant originally worked for the House Democratic Campaign Committee, started to work for Veon in the House of Representatives, and eventually joined DeWeese's staff. One of Appellant's co-defendants, Perretta-Rosepink, was in charge of Veon's district office.

Manzo then described the salary structure of Caucus members and their employees. Essentially, everyone who worked for the Caucus was eligible, under the policy and procedures manual, to receive a raise or bonus on his or her anniversary date, which was the date of hire. On each anniversary date, Caucus employees were eligible for a raise of three to five percent, until they reached the top of their pay band, when they would receive a bonus of the noted percentage. Toward the end of his tenure, Veon instituted an executive bonus system that was designed to reward and retain higher-level talent in the Caucus. This year-end bonus was solely based upon merit and work on special projects outside a person's job description. That bonus was solely for legislative work.

When Manzo first started to work for the Caucus, the Democrats were in the minority in the House of Representatives, and this position made it difficult to pass legislation that was in line with Democratic party goals. In

2004, DeWeese, Veon, Appellant, and other Caucus employees implemented a bonus program that paid Caucus employees bonuses based upon non-legislative work. ***Id***. at 37. Specifically, that year, "folks who were going out on campaigns, people who were working hard on the campaign end, we began giving them payments when they returned from the campaigns." ***Id***. Historically, it had been difficult to obtain volunteers to work on campaigns. In 2004, the Democratic party wanted to gain the majority so it could obtain passage of legislation in line with party goals. In order to regain the majority and obtain volunteers, members of the Caucus started to financially reward people for "going out on campaigns." ***Id***. at 41. Manzo reported, "Once we started rewarding those people, the level of volunteerism [on political campaigns] went through the ceiling." ***Id***.

This bonus program, which used taxpayer money allocated to the Caucus, rewarded people solely for work on political campaigns. The first bonuses emanating from Caucus coffers, and thus, taxpayer funds, were paid in 2004. Eric Webb was in charge of tracking the amount of time people spent on campaign-related matters; he created a list of the people who were to receive compensation for campaign work, with the amount of money increasing with the amount of such work performed. ***Id***. at 43.

Webb gave the list to Manzo, who sent it to Veon for approval. Following Veon's approval, the list went to Scott Brubaker, who was in charge of financial administration. Brubaker cleared the bonuses with DeWeese. Manzo himself received a check for campaign work that year.

After the 2004 staff bonuses for campaign work were disseminated, the number of volunteers increased. The bonuses continued in 2005. Again, these bonus checks were sent to Caucus employees and reflected payment for campaign work tracked by Webb.

After the legislature voted themselves a pay raise in 2005, there was a public outcry, and members of the House of Representatives became vulnerable to losing their seats in the legislature. Accordingly, in 2006, the Caucus eagerly recruited State employees to campaign. Since there had been bonuses in 2004 and 2005 for campaign work, Manzo stated that "in 2006 we emptied the building." ***Id***. at 61. Even though Veon lost the election in 2006, he pushed through the list of people who were paid for campaign work before his tenure ended in the House of Representatives. ***Id***. at 67.

Manzo established that Appellant was part of the 2004-2006 scheme to pay Caucus employees with taxpayer money for campaign work. Webb was instructed to send to Appellant, who was the recipient of a plethora of emails regarding the arrangement, the list of people who were to receive bonuses and the amounts requested. Furthermore, Appellant "made recommendations about staff to [Manzo], because [Appellant] was – I mean, he was a very good judge of how hard someone was working. So, yeah, [Appellant] had sent me recommendations via e-mail" for people to be paid for doing an outstanding job on campaign work. ***Id***. at 69.

The Commonwealth introduced the long series of emails asking for Veon's approval of bonuses from Caucus money for state employees for campaign work. Appellant was copied on many of these emails, and, in one email introduced by the Commonwealth, asked that a certain state employee be compensated for campaign work. N.T. Jury Trial, 2/8/10, at 259-62. Commonwealth exhibit C-64 consisted of an email from Appellant to Webb with copies to Manzo and two other people. In that 2004 email, Appellant said, "Hey, team can you send me your final spreadsheets/lists of volunteers tomorrow? [Manzo] and I are working on consolidating for the project." N.T. Jury Trial, 2/3/10, at 15. Manzo explained that the project referenced in the email that he and Appellant "were working on was putting together the final list aggregating all of the people who campaigned on the [2004 election] cycle, putting them all on one place on one spreadsheet with all of the information necessary so we could set the amounts and send them to [Veon] and get the bonuses moving." ***Id***. at 15-16.

Manzo established that Appellant himself received $4,000 of Caucus funds in 2004 for performing campaign work, and $10,000 in 2006 for campaign work. Those bonuses, as noted, were unrelated to any work that Appellant did in furtherance of his duties as a state employee. The amounts were to pay Appellant solely for campaign-related activities.

Manzo outlined a significant amount of campaign work performed by Appellant. Manzo specified, "[Appellant] and I did a lot of campaign things together in the office." ***Id***. at 25. Appellant and Manzo labored on

campaign races at all levels for the Democratic party and worked together to "pursue ballot challenges. Ballot challenges to incumbent Republicans and Republican challengers. [Appellant] was part of that effort." ***Id***. at 26. Additionally, Appellant was involved in opposition research, which is research conducted on an opponent in a campaign. The research is designed to uncover negative items that could be used against the opposing party during campaigns. Opposition research essentially involved "anything that could potentially be used to damage [someone] as a candidate." ***Id***. at 69. Manzo delineated that Appellant performed opposition research on Caucus premises both during state work hours and after hours. ***Id***. at 72.

Another aspect of political campaign work performed by Caucus employees was challenging nominating petitions by checking each signature to ascertain that it was a real person with the correct address and that the person was registered to vote. Particularly, in 2004, Veon and his staff desired to have Ralph Nader removed from the Presidential ballot so that the candidate endorsed by the Democrats, John Kerry, had a better chance of winning Pennsylvania's electoral votes. Appellant worked directly on that initiative. ***Id***. at 77. Nader needed 45,000 signatures of registered voters, and his nominating petition had to be reviewed in a two-week window. All the work was performed on state time, and no one was required to take leave. ***Id***. at 78-79.

Appellant was also involved in an arrangement whereby Eric Buxton was paid from Caucus funds for email activity devoted solely to

campaigning. ***Id***. at 86-94, 201-02, 208. Finally, Appellant used state postage for campaign-related mailings. ***Id***. at 103-04. Once Veon lost his election, it became public that people had been given taxpayer-funded bonuses for campaign work.

Commonwealth witness Jeff Foreman, who worked for the Caucus from 1980 through 1994 and then from 2003 until 2008, confirmed that Appellant was actively involved in the conspiracy to pay people, including himself, Caucus funds for campaign work. Foreman, who supervised Veon's staff, stated that Veon told him that he had reviewed the 2004 list of people and the amount of their bonuses with Appellant. N.T. Trial, 2/9/10, at 17. Foreman also confirmed Manzo's representation that the "bonuses were being given as a result of extraordinary political work," which meant "[w]ork on campaigns." ***Id***. at 16. Foreman discussed the 2005 list of people and bonuses directly with Appellant. ***Id***. at 21. During the conversations, it was acknowledged that the bonuses were being paid solely for political work performed on campaigns. Foreman also discussed with Appellant the 2006 list compiled after the general election. ***Id***. at 34.

Finally, Foreman established that Appellant was in charge of Veon's political campaign operations. Even though Foreman was Veon's Chief of Staff in 2003, Appellant directed Foreman when Foreman was involved in campaign activities. ***Id***. at 45. Foreman specifically delineated that he "often got direction from [Appellant] who was [Veon's] primary political

person." ***Id***. at 45. "[W]hen it came to political matters, [Appellant] was far more involved in putting things together and directing things than [Foreman] was, when it came to campaign activities." ***Id***. at 45-46. Appellant told Foreman that everyone in the district office staff was to be involved in campaign work. Foreman also indicated that no leave records were being kept for professional staff by Veon's office. ***Id***. at 58. Thus, people such as Appellant were being credited with working for the state and accrued sick and vacation time while working on campaigns.

The Commonwealth introduced numerous additional witnesses, including Eric Webb, to confirm the existence of political work on myriad campaigns being performed by state employees during working hours, the use of Caucus funds as bonuses for campaign work and for other campaign-related expenses, and to establish Appellant's involvement in these activities.

After hearing the evidence, the jury acquitted Appellant of nearly forty counts of conflict of interest, theft, and conspiracy, but it convicted him of one count each of theft of services, conflict of interest, and conspiracy to commit a conflict of interest. This appeal followed the denial of a post-sentence motion filed by Appellant after imposition of a twenty-one to sixty month term of incarceration. Appellant raises these issues on appeal:

> A. Did the trial court err when it failed to grant Appellant's motion for a mistrial or arrest of the judgment and verdict due to the unsanctioned visit to the state capitol by the jurors

during the trial, and subsequent posting of comments online, both of which resulted in juror misconduct?

B. Was the trial court's conditional dismissal of the alternate jurors in contravention of Pa.R.Crim.P. 645 and due process, and was the subsequent substitution of an alternate juror reversible error?

C. Should the Appellant's convictions for conflict of interest and conspiracy to commit conflict of interest be set aside because these statutes are unconstitutionally vague?

D. Did the trial court err when it failed to grant Appellant's motion for judgment of acquittal on the charges of theft by unlawful taking, theft by deception, and theft of services because the Commonwealth failed to present sufficient evidence to permit these charges to be considered by the jury?

Appellant's brief at 5.

If we were to grant Appellant relief as to his final two positions, he would be entitled to discharge rather than a new trial. Hence, we consider them first. In issue three, Appellant claims that his convictions of conflict of interest and conspiracy to commit that crime are infirm because the criminal statute defining the offense of conflict of interest is unconstitutionally vague. We first set forth the applicable scope and standard of review for this allegation. "Appellate review of constitutional challenges to statutes . . . involve[s] a plenary scope of review." ***Commonwealth v. Shawver***, 18 A.3d 1190, 1194 (Pa.Super. 2011). As a challenge to the constitutionality of a statute is a question of law, "the appellate standard of review is *de novo*." ***Id***. (citation omitted).

Certain precepts apply to proper analysis of a constitutional challenge to a legislative enactment. "All properly enacted statutes enjoy a strong presumption of constitutionality." ***Id***. at 1193. We will not strike a statute as unconstitutional "unless it clearly, palpably, and plainly violates the Constitution. All doubts are to be resolved in favor of finding that the legislative enactment passes constitutional muster. Thus, there is a very heavy burden of persuasion upon one who challenges the constitutionality of a statute." ***Id***. (citation omitted).

In the present case, Appellant challenges 65 Pa.C.S. § 1103(a), conflict of interest, which states: "No public official or public employee shall engage in conduct that constitutes a conflict of interest." The term conflict of interest is defined in pertinent part as follows: "Use by a public official or public employee of the authority of his office or employment or any confidential information received through his holding public office or employment for the private pecuniary benefit of himself[.]" 65 Pa.C.S. § 1102.

We begin an analysis of Appellant's position that the crime of conflict of interest is unconstitutionally vague by observing that we have previously rejected a void-for-vagueness challenge to 65 Pa.C.S. § 1103 in ***Commonwealth v. Habay***, 934 A.2d 732 (Pa.Super. 2007). Therein, the defendant was a member of the Pennsylvania House of Representatives who was convicted of conflict of interest after the Commonwealth established that

he "diverted services of employees in his legislative office for his own private benefit and/or pecuniary gain." ***Id***. at 734. Specifically, Habay, while acting in his capacity as a member of the state legislature, "directed several state employees to conduct political work, such as fundraising efforts, for him. ***Id***. at 736. He did so at times when the employees were being paid by the taxpayers to perform work for constituents" so that Habay did not have to personally pay for that labor. ***Id***.

In the ***Habay*** decision, we outlined the principles applicable to vagueness challenges:

> Due process demands that a statute not be vague. A statute is vague if it fails to give people of ordinary intelligence fair notice as to what conduct is forbidden, or if they cannot gauge their future, contemplated conduct, or if it encourages arbitrary or discriminatory enforcement. A vague law is one whose terms necessarily require people to guess at its meaning. If a law is deficient—vague—in any of these ways, then it violates due process and is constitutionally void.

Id. at 737 (citations omitted). Hence, a penal statute will not be considered infirm if it outlines "a crime with sufficient definiteness that an ordinary person can understand and predict what conduct is prohibited. The law must provide reasonable standards which people can use to gauge the legality of their contemplated, future behavior." ***Id***. (citation omitted).

Nevertheless, "the void for vagueness doctrine does not mean that statutes must detail criminal conduct with utter precision. Condemned to the use of words, we can never expect mathematical certainty from our language." ***Id***. (citation omitted). Thus, the due process/void for

vagueness construct is "not intended to elevate the practical difficulties of drafting legislation into a constitutional dilemma." ***Id.*** (citation omitted). Instead, the doctrine is anchored by the idea of fairness, and statutes can be "general enough to embrace a range of human conduct as long as they speak fair warning about what behavior is unlawful." ***Id***.

There are two types of vagueness challenges to a statute. "First, a challenge of facial vagueness asserts that the statute in question is vague when measured against any conduct which the statute arguably embraces." ***Id***. at 738. "Second, a claim that a statute is vague as applied contends the law is vague with regard to the particular conduct of the individual challenging the statute." ***Id.*** Facial vagueness implicates First Amendment concerns, and when none is asserted, we evaluate the defendant's vagueness allegation "in light of the facts at hand—that is, the statute is to be reviewed as applied to the defendant's particular conduct." ***Id.***

In the ***Habay*** case, the defendant raised both facial and as-applied contentions. Since Appellant's argument herein fails to implicate First Amendment concerns, we discuss only the as-applied portion of ***Habay***. In this respect, Habay argued that the statute was unconstitutionally vague because it failed to define the words, "Use . . . of the authority of his office or employment" as well as the phrase "for the private pecuniary benefit of himself." ***Id***.

We rejected the challenges to the statute, holding that both phrases at issue utilized "commonly understood words in readily comprehensible ways." ***Id***. We continued, "There is nothing unclear about the concept of using the authority of an office to obtain private pecuniary benefit. The statute prohibits people who hold public offices from exercising the power of those offices in order to secure financially related personal gain." ***Id***. We held that Habay had fair notice and could anticipate that when he was elected to the Pennsylvania legislature, he was not permitted to use employees to work on political campaigns while they were being paid by the Commonwealth in order to personally benefit himself by avoiding payment for that work. In conclusion, we stated, "Given the straightforward language of the statute at hand, we find it sets forth the crime of conflict of interest with sufficient definiteness that [Habay], and indeed any ordinary person, could understand and predict what conduct is prohibited. It speaks fair warning of the proscribed conduct." ***Id***.

In this case, Appellant challenges the application of ***Habay*** on two grounds. He maintains ***Habay*** is distinguishable because the defendant in that case was an elected official, and Appellant suggests that he himself "could not be said to have had fair notice that [in] his actions as a nonelected person, unlike Habay, he would not be permitted to direct others under his authority to take action that would lead to his personal gain." Appellant's brief at 28. However, the conflict of interest statute plainly

states that either a public official, such as Habay, or a public employee, such as Appellant, is prohibited from using the authority of his employment for his own monetary gain. Thus, contrary to Appellant's assertion, he was on notice that the statute applied to him as a state employee. The evidence presented herein bears out that Appellant engaged in conduct constituting a conflict of interest. Hence, we reject his first attempt to distinguish ***Habay***.

Appellant also suggests that the reasoning of ***Habay*** was somehow eroded by the United States Supreme Court's decision in ***Skilling v. United States***, ___ U.S. ___, 130 S.Ct. 2896 (2010). ***See*** Appellant's brief at 25. After review, we conclude that ***Skilling*** does not impact upon ***Habay's*** validity because ***Skilling*** involved a federal statute that had materially different language.

In ***Skilling***, the defendant maintained both that the federal honest-services statute was unconstitutionally vague and that his conduct was not proscribed by the statute in question. The federal honest-services statute originally penalized "any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises." 18 U.S.C. § 1341. Following the initial enactment of § 1341, the federal appellate courts interpreted the words "scheme or artifice to defraud, or for obtaining money or property" to include deprivations of intangible rights in addition to money or property. ***See Shushan v. U.S.***, 117 F.2d 110 (1941). This type of action, referred to

as the honest services doctrine, involved an official's failure to perform honest services. Pursuant to this statute, an official could be prosecuted under the provision for accepting bribes or kickbacks even when there was no proof that the person paying the bribe or kickback was paid more in taxpayer funds for the public work than would have been paid to a person who did not tender a bribe or kickback. The reasoning was that the public official was liable for accepting the bribe or kickback even if the public was not harmed financially because the public was deprived of the official's honest services. The statute was also extended to the private sector, and courts affirmed convictions under the statute if an employee breached his loyalty to his employer by accepting bribes or kickbacks in connection with his employment decisions.

In 1987, the Supreme Court ruled in ***McNally v. United States***, 483 U.S. 350 (1987), that the language of § 1341 mandated proof that the public was somehow deprived of "money or property" and that an intangible right to honest services was not covered by its terms. In response, Congress amended the statute to include 18 U.S.C. § 1346, which provides that a "scheme or artifice to defraud" includes a scheme or artifice to deprive another of the intangible right to honest services.

In ***Skilling***, the defendant was convicted under the revised honest services language for conspiring to defraud a corporation's shareholders by misrepresenting the company's fiscal viability and inflating its stock price.

However, there was no proof that the defendant accepted either a bribe or kickback in connection with his activity. The defendant argued to the Supreme Court that the term "intangible right to honest services" was unconstitutionally vague. He averred that the phrase did not adequately define what behavior was prohibited.

Rather than accept the defendant's void-for-vagueness argument, the Supreme Court in ***Skilling*** construed the statute narrowly so as to uphold its constitutionality. It did so by interpreting the terms "intangible right to honest services" in accordance with the case law that developed the concept under § 1341's original wording. Pursuant to that authority, the Court concluded that bribes and kickbacks in the public or private sector were the only actions prohibited by the statute and that a person would have fair notice that accepting a bribe or kickback was illegal activity. Since the evidence against the defendant in ***Skilling*** failed to establish that he accepted a bribe or kickback in connection with the stock-valuation scheme, the Supreme Court concluded that he had not violated the federal honest-services statute.

Herein, we conclude that the Supreme Court's decision in ***Skilling*** does not impact on ***Habay*** for two reasons. First, the Supreme Court in ***Skilling*** did not hold that the statute in question was unconstitutionally vague; it merely held, after interpreting the statute so as to avoid rendering it vague, that the defendant's conduct did not fall within its parameters.

More importantly, the federal statute in question has wording that bears no resemblance to Pennsylvania's conflict of interest statute. One can legitimately question what the term "honest services" would include. On the other hand, ***Habay*** examined very specific and materially different language that prohibits a public official or a public employee from using the authority of his office or employment for his own private pecuniary benefit. ***Habay*** retains its precedential value since it holds that the wording of the statute at issue herein is clear and unambiguous. The statute in question fails to criminalize amorphous behavior. One can have no doubt that being paid bonuses with taxpayer money for services performed on political campaigns violated its strictures. Hence, we reject Appellant's challenge to his conflict of interest and conspiracy to commit conflict of interest convictions.

Appellant's fourth contention is that he should have been granted a judgment of acquittal on the charges of theft by unlawful taking, theft by deception, and theft of services because the Commonwealth cannot be considered a victim under these theft statutes. A request for a judgment of acquittal is a challenge to the sufficiency of the evidence. ***Commonwealth v. Abed***, 989 A.2d 23 (Pa.Super. 2010). Initially, we note that Appellant was not convicted of either theft by unlawful taking or theft by deception and was convicted only of theft of services. Thus, we address his challenge only with respect to that conviction. ***See Commonwealth v. Weis***, 611

A.2d 1218 (Pa.Super. 1992) (if a defendant is acquitted of a charge, any challenge to the sufficiency of the evidence supporting it is moot).

Next, we observe that Appellant's argument, although facially presented as a sufficiency claim, actually involves an interpretation of the theft of services statute and challenges whether, under its terms, the Commonwealth can be a victim of such crime. Hence, the issue is correctly framed as one of statutory construction. ***Commonwealth v. Gerald***, 47 A.3d 858 (Pa.Super. 2012). Since "statutory interpretation implicates a question of law, our scope of review is plenary and our standard of review is *de novo.*" ***Id****. at* 859*.*

Appellant was convicted of theft of services, 18 Pa.C.S.A. § 3926, which is defined in relevant part as follows:

> **(a) Acquisition of services**.--
>
> (1) A person is guilty of theft if he intentionally obtains services for himself or for another which he knows are available only for compensation, by deception or threat . . . .
>
> . . . .
>
> **(b) Diversion of services.--**A person is guilty of theft if, having control over the disposition of services of others to which he is not entitled, he knowingly diverts such services to his own benefit or to the benefit of another not entitled thereto.

The statute in question does not include within its parameters any limitation on the type of entity or person who can be a victim of that crime. It does not require theft of services from "another" or from a "person"; it

merely prohibits a theft of services from anyone or anything. Despite this fact, Appellant's entire argument is premised upon the position that a victim of theft of services must be a person and that, under allegedly pertinent case authority, a person does not include the Commonwealth. Thus, Appellant's premise misses the mark since it is based upon the incorrect position that § 3926 provides that a victim of that statute must be a person.

Our interpretation of a statute "is guided by the polestar principles set forth in the Statutory Construction Act, 1 Pa.C.S.A. § 1501 *et seq.* [(the "Act")]" ***Gerald***, ***supra*** at 859-60. The overriding principle of the Act is to determine the General Assembly's intent in enacting the statute. ***Id***. at 860; 1 Pa.C.S.A. § 1921(a). "[T]he General Assembly's intent is best expressed through the plain language of the statute." ***Gerald***, ***supra*** at 860 (quoting ***Commonwealth v. Brown***, 981 A.2d 893, 897 (Pa. 2009)); ***accord*** 18 Pa.C.S.A. § 105 (the provisions of the Crimes Code are to "be construed according to the fair import of their terms"). Hence, if the "terms of a statute are clear and unambiguous, they will be given effect consistent with their plain and common meaning." ***Gerald***, ***supra*** at 860; 1 Pa.C.S. § 1921(b). The Act also contains presumptions applicable to interpretation of statutes. ***Gerald***, ***supra***. Applicable herein is the precept that "we must presume that the legislature does not intend a result that is unreasonable, absurd, or impossible of execution[.]" ***Gerald***, ***supra*** at 860; 1 Pa.C.S. § 1922(1).

In this case, § 3926 is plain and unambiguous. There is no limitation on the type of entity or person who can be a victim. It would be an unreasonable interpretation of the theft of services statute to allow a public employee of the Commonwealth or a local authority to commit this crime with impunity. Hence, we reject Appellant's fourth issue.

We now return to address Appellant's first contention, which is that he is entitled to a new trial due to jury misconduct.[1] It was discovered after trial that certain jurors traveled to the state building to view a room mentioned during the course of trial. Specifically,

> Here, the alleged prejudice [to Appellant] stems from a visit taken by some number of jurors to the State Capitol. In his blog, posted after the trial, one juror gives the reason for this excursion: "we wanted to see room 626 which was talked about so much during the trial." He goes on to report, "well we didn't make it to 626. But we did see the large painting of Bill De[W]eese hanging on the wall. Very creepy, I must say."

Trial Court Opinion, 10/26/10, at 18.

The decision of ***Commonwealth v. Pope***, 14 A.3d 139 (Pa.Super. 2011), examines the question of when a new trial is required after a juror or jurors visit a crime scene, which is precisely what occurred herein. Initially, we examine our standard of review:

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[1] While Appellant also claims entitlement to an arrest of judgment due to jury misconduct, Appellant's brief at 12, he provides no support for his position that such a remedy is required for this type of error. Simply put, a new trial is the relief granted when a jury acts improperly, and a defendant is not entitled to be discharged based on actions over which the prosecutor had no control.

> The refusal of a new trial on the grounds of alleged misconduct of a juror is largely within the discretion of the trial judge. When the facts surrounding the possible misconduct are in dispute, the trial judge should examine the various witnesses on the question, and his findings of fact will be sustained unless there is an abuse of discretion.

Id. at 145 (quoting ***Commonwealth v. Russell***, 445 Pa.Super. 510, 665 A.2d 1239, 1243 (1995)). In this case, there was no dispute regarding what misconduct was performed by jury members, and no evidentiary hearing was held.

As we noted in ***Pope***, a jury member is prohibited from visiting a crime scene unless that trip is sanctioned by the court. Nevertheless, "not every unauthorized visit by a juror requires the grant of a new trial." ***Pope***, ***supra*** at 145. If an unauthorized viewing of the crime scene occurs, the trial court is required to "assess the prejudicial effect of the extraneous influence of traveling to the place where the crime was committed." ***Id***. In connection with its assessment, the trial court considers:

> (1) whether the extraneous influence relates to a central issue in the case or merely involves a collateral issue; (2) whether the extraneous influence provided the jury with information they did not have before them at trial; and (3) whether the extraneous influence was emotional or inflammatory in nature.

Id. (quoting ***Commonwealth v. Messersmith***, 860 A.2d 1078, 1085 (Pa.Super. 2004)).

In deciding whether prejudice occurred, the trial court does not consider any proof regarding the subjective effect the extraneous influence had on any juror in question, but must instead determine in what manner an

objective and reasonable juror would be impacted by the outside facts to which the juror was exposed. ***Pope***, ***supra***. The moving party has the burden of proving that the visit to the crime scene was prejudicial. ***Id***. As noted, "It is within the discretion of the trial court to determine whether a defendant has been prejudiced by misconduct or impropriety to the extent that a mistrial is warranted." ***Id***. at 145 (quoting ***Commonwealth v. Brown***, 567 Pa. 272, 292, 786 A.2d 961, 972 (2001)).

In ***Pope***, we upheld the trial court's refusal to grant a new trial based on the fact that jurors viewed the crime scene. The trial court noted in that case that the defendant did not establish that any physical aspect of the crime scene, which was described extensively at trial, would have prejudiced him if viewed. Furthermore, the trial court in ***Pope*** relied upon the fact that the scene of the crime was an unimportant, collateral issue to the facts that were dispositive of proving the crime in question. In ***Pope***, we distinguished a case upon which Appellant herein relies, ***Commonwealth v. Price***, 344 A.2d 493 (Pa. 1975). In ***Price***, a new trial was granted after the jurors traveled to the crime scene. In ***Pope***, we noted that in ***Price***, "the physical aspects of scene of the crime were central to the disposition in ***Price*** and at the time the juror made the unauthorized visit, the crime scene had been substantially and materially changed." ***Pope***, ***supra*** at 146.

In declining to grant a new trial based upon the jurors' visit to the Capitol building, the trial court herein employed reasoning analogous to that

applied in ***Pope***. It concluded that Appellant was not prejudiced by the visit in that there was no indication that anything inflammatory or emotional was seen. The court continued that the interior of the Capitol building, including any portraits therein, were not "central to the resolution of the case." Trial Court Opinion, 10/26/10, at 19. The trial court also observed that the jurors' time in the building was brief and that there was no indication that any member of the jury was exposed to any information at the building relevant to the case that had not already been disseminated to him or her at trial.

The trial court's reasoning is unassailable. The building wherein certain activities occurred was entirely peripheral to the facts pertinent to the crimes in question. The viewing of the building did not expose the jurors to any information pertinent to Appellant's guilt that had not already been outlined by the witnesses. There was nothing emotional or inflammatory viewed by the jurors. The jurors did observe the portrait, which was described as "creepy," of one of the figures in the scheme, DeWeese. However, as the trial court aptly observed, "any sense of menace it may have instilled could well have bolstered Defendants' theory of the case that Mr. DeWeese was the sinister architect of the bonus scheme." ***Id***. at 18 n.10. As the trial court did not abuse its discretion in concluding that the crime scene viewed by the jury did not prejudice Appellant, we affirm its decision to deny Appellant a new trial on this basis.

Finally, we address Appellant's position that a new trial is required under the rules of criminal procedure and due process since an alternate juror was improperly seated after deliberations started when one of the deliberating jurors became sick. The record reveals that one of the deliberating jurors was excused, without objection, after falling ill. N.T. Trial, 3/19/10, at 6-8. All four defendants refused to continue with less than twelve jurors so, again without objection, alternates were called back to the courtroom. The first alternate juror was questioned by the trial judge, who then asked if there were, "Any objections to him having a seat on the jury?" ***Id***. at 17. Appellant responded, "No." ***Id***.

In light of this record, we conclude that Appellant has waived any challenge to the fact that the alternate juror was seated after the deliberating juror became ill. ***Commonwealth v. Sanchez***, 36 A.3d 24, 42 (Pa. 2011) (in order to preserve issue for purposes of appeal, the defendant must raise an objection to the proceedings "in order to give the trial court a contemporaneous opportunity to address the alleged error[.]"); ***accord*** Pa.R.A.P. 302(a) ("Issues not raised in the lower court are waived and cannot be raised for the first time on appeal.").

In this case, the trial court had just conducted a six-week trial. If Appellant believed the procedure in question violated the rules of criminal procedure or due process, he should have objected on that basis so the trial court could have taken corrective measures to avoid having to repeat the

trial proceedings. Appellant suggests the issue is not waived because a rule of criminal procedure was violated, and the rule does not require an objection. This position cannot be sustained. Numerous rules of criminal procedure applicable to the operation of criminal proceedings do not require that an objection to its violation be raised. Waiver flows from the operation of Pa.R.A.P. 302(a) and the case law interpreting that rule, not from any language in any criminal procedure rule. Appellant also claims that the issue is not waived since it is of constitutional dimension. Again, this position is inconsistent with prevailing case law. ***Commonwealth v. Strunk***, 953 A.2d 577, 579 (Pa.Super. 2008) ("Even issues of constitutional dimension cannot be raised for the first time on appeal."). Hence, Appellant must litigate this contention through the guise of ineffective assistance of counsel in a post-conviction setting. ***Commonwealth v. Fitzgerald***, 877 A.2d 1273 (Pa.Super. 2005).

Finally, we note that, as to each of his four issues, Appellant "adopts by reference all arguments as set forth" by his co-defendants, Veon and Perretta-Rosepink. Appellant's brief at 15, 24, 29, 36. He relies upon Pa.R.A.P. 2137,[2] briefs in cases involving multiple appellants or appellees, which states:

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[2] In each instance, Appellant actually directs our attention to Pa.R.A.P. 2317, which does not exist. We believe that Appellant transposed two numbers and meant to reference Pa.R.A.P. 2137.

> In cases involving more than one appellant or appellee, including cases consolidated for purposes of the appeal pursuant to Rule 513 (consolidation of multiple appeals), any number of either may join in a single brief, and any appellant or appellee may adopt by reference any part of the brief of another. Parties may similarly join in reply briefs.

Appellant's reliance upon that rule is misguided. This case does not involve multiple appellants or appellees. It also was never consolidated with that of Veon and Perretta-Rosepink. Veon and Perretta-Rosepink filed separate appeals and are not appellants in this appeal. Thus, the rule is inapplicable on its face. Moreover, our Supreme Court has spoken quite plainly on the prohibition against adopting arguments by reference from other non-consolidated cases. ***Commonwealth v. Briggs***, 12 A.3d 291, 342 (Pa. 2011) ("'incorporation by reference' is an unacceptable manner of appellate advocacy"). In ***Briggs***, the Court observed:

> Our rules of appellate procedure specifically require a party to set forth in his or her brief, in relation to the points of his argument or arguments, "discussion and citation of authorities as are deemed pertinent," as well as citations to statutes and opinions of appellate courts and "the principle for which they are cited." Pa.R.A.P. 2119(a), (b). Therefore our appellate rules do not allow incorporation by reference of arguments contained in briefs filed with other tribunals, or briefs attached as appendices, as a substitute for the proper presentation of arguments in the body of the appellate brief. Were we to countenance such incorporation by reference as an acceptable manner for a litigant to present an argument to an appellate court of this Commonwealth, this would enable wholesale circumvention of our appellate rules which set forth the fundamental requirements every appellate brief must meet.

Id. at 343 (footnoted omitted).

The Court continued that incorporation by reference also could render a brief in violation of the rules setting limits on the page numbers of briefs. The ***Briggs*** Court noted that the briefing mandates of the rules of appellate procedure "are not mere trifling matters of stylistic preference; rather, they represent a studied determination by our Court and its rules committee of the most efficacious manner by which appellate review may be conducted[.]" ***Id***. It ruled that an argument incorporated by reference from another document is undeveloped and waived.

Hence, we decline, in this matter, to consider arguments that Appellant has failed to develop at all in his brief and that are contained in briefs in different appeals involving different appellants.

Judgment of sentence affirmed.