

**[J-41-2013] [MO: Baer, J.]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT**

IN RE: E.A.	:	No. 87 MAP 2012
	:	
R.A.,	:	Appeal from the Order of the
	:	Commonwealth Court at No. 650 CD
Appellee	:	2011, dated January 9, 2012, Reversing
	:	the Order of the Department of Public
	:	Welfare, Bureau of Hearings and Appeals,
v.	:	at No. 21-09-1195, dated March 10, 2011
	:	
	:	41 A.3d 131 (Pa. Cmwlth. 2012)
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF PUBLIC WELFARE	:	
AND WYOMING COUNTY HUMAN	:	
SERVICES, Intervenor,	:	
	:	
Appellants	:	
	:	ARGUED: May 8, 2013

CONCURRING AND DISSENTING OPINION

MR. CHIEF JUSTICE CASTILLE

DECIDED: November 20, 2013

I join Mr. Justice Baer's learned Majority Opinion in full with respect to the issues that are properly before this Court. I respectfully dissent, in part, only because I believe the mandate here should include a remand for disposition of appellee's constitutional argument, which was not passed upon below and is not before us.

As the Commonwealth Court explained, appellee, who was the appellant before the Commonwealth Court, presented three distinct questions for that court's review.

First, he assert[ed] that allowing the New York DVD of Daughter's interview to be admitted into evidence under the tender years exception to the hearsay rule violated his constitutional right to confront witnesses against him.

Second, [appellee] contend[ed] that the hearing officer erred, procedurally, in admitting the New York DVD and determining that Daughter was unavailable to testify without having first talked to Daughter. Third, [appellee] argue[d] that the critical factual findings that he sexually abused his daughter are not supported by substantial evidence.

R.A. v. Dep't of Pub. Welfare, 41 A.3d 131, 136-37 (Pa. Cmwlth. 2012). The Commonwealth Court began its analysis with the third and final issue, ultimately concluding: “substantial evidence does not support the factual finding that [appellee] committed a sexual assault. . . .” Id. at 141. With respect to the second issue, whether the hearing officer should have admitted the DVD without first interviewing Daughter, the Commonwealth Court agreed with appellee that the hearing officer erred. In light of these holdings, the Commonwealth Court granted appellee relief, while expressly opting not to address appellee’s remaining constitutional issue, namely, whether the proceedings before the hearing officer violated appellee’s constitutional right to confront the witness against him. Id. at n.11 (“In light of this holding, we need not address [appellee]’s constitutional issue.”). The panel’s decision to resolve the case on non-constitutional grounds, when presented with multiple allegations of error, is a proper approach. In re Stevenson, 12 A.3d 273, 275 (Pa. 2010) (“[A]s a general matter, it is better to avoid constitutional questions if a non-constitutional ground for decision is available.”); Commonwealth v. Karetny, 880 A.2d 505, 519 (Pa. 2005) (“[T]his Court seeks to avoid constitutional issues if the claim may be resolved on alternative grounds.”). The Majority reverses the Commonwealth Court on those non-constitutional issues, and properly so.

However, appellee’s constitutional argument remains pending, it has not been briefed here (as it was not accepted for discretionary review), and thus, the case should be remanded for decision of the issue by the intermediate appellate court. As the Majority notes, we granted review exclusively to address the issue of whether the

Commonwealth Court erred by requiring corroboration in support of the videotaped statement at issue as pertaining to the substantial evidence standard. We have not, nor should we have, addressed the constitutional due process argument which appellee raised below.

I recognize that the Majority states that, given counsel's record statement of "no objection" to the formal admission of the child's DVD testimony, which occurred at the second hearing, "appellee waived **any** objections to the admission of the videotaped interview by failing to preserve the issue before the ALJ." Majority Slip Op. at 6 (emphasis added). The Majority does not indicate that it intends, by this broad conclusion, to rule upon issues not accepted for review, and thus to obviate, *sub silentio*, the necessity for a remand; more likely, it is an oversight.¹ In any event, the statement is overbroad as to the issues actually before us; the Commonwealth Court never passed upon whether the constitutional issue was properly preserved; and the constitutional issue (including the sub-issue of issue preservation) should be resolved, in the first instance, by the Commonwealth Court following targeted briefing. Hence, as to mandate, I would reverse and remand to the Commonwealth Court for resolution of the remaining claim.

It is worth noting that the constitutional issue is of some substance. While Section 505 of the General Rules of Administrative Practice and Procedure, 2 Pa.C.S. § 505, provides that "Commonwealth agencies shall not be bound by technical rules of

¹ I recognize that the Majority Opinion has responded to my concern by adding a footnote declaring that it does, in fact, intend its broad statement to stand as a definitive and final ruling upon the issue of whether appellee waived his constitutional due process issue. The responsive declaration, however, does not come to terms with the salient points I have made in the text. Respectfully, the declaration does not alleviate my concerns, as in foreclosing appellee's constitutional issue without affording appellee an opportunity to be heard on the matter, the Majority leaves itself open to the charge of an additional, and gratuitous, due process infraction.

evidence at agency hearings,” it also provides that “[r]easonable examination and cross-examination shall be permitted.” Id. Beyond that, legitimate constitutional concerns are implicated in DPW’s expungement proceedings pertaining to indicated reports of child abuse or child sexual assault, as the accused person’s reputation is at stake. Reputation is a fundamental interest under the Pennsylvania Constitution, which cannot be abridged without compliance with constitutional standards of due process. R. v. Dep’t of Pub. Welfare, 636 A.2d 142, 149 (Pa. 1994) (“Having determined that R. has a protected interest that will be affected by his expungement hearings, we must assess the extent to which he will be deprived of that interest.”). In that case, the Court reasoned:

[W]e are mindful of the nature of the inquiry being conducted at an expungement hearing and the role that cross-examination plays in it. An expungement hearing is devoted to determining whether information in an indicated report is either inaccurate or is being maintained in a manner inconsistent with the Child Protective Services Act. . . . This factual determination will partly depend on the credibility and veracity of testimonial evidence. **Cross-examination plays a crucial role in this regard because it enables the accused to expose testimonial weaknesses** which would cause a fact finder to discount the weight of the testimony of an adverse witness.

Id. at 150 (emphasis added) (citations omitted). Thus, in the context of expungement hearings before DPW, the accused’s right to cross-examine witnesses is both statutorily provided and constitutionally protected. As stated in R. v. DPW, however, such cross-examination can take a variety of forms, which may vary according to the tender age of a child-witness and/or for the protection of the child’s emotional well-being.

In R. v. DPW, the Court held that the accused received Fourteenth Amendment due process because he was afforded a meaningful opportunity to cross-examine the child-witness against him where his attorney was permitted to question the witness

during an *in camera* proceeding, despite the fact that the accused was not allowed to be present during the hearing, and was not permitted to communicate with his attorney during the cross-examination. Notably, after the child finished testifying on direct examination in that case, DPW provided a transcript of her testimony to the accused and his attorney to review in preparation for cross-examination. “This procedure allowed R. to know precisely what evidence the government was using to prove its case, and gave R. an opportunity to challenge that evidence.” Id. at 150.

In this case, appellee had no opportunity to cross-examine his daughter. The question of waiver is complicated by appellee’s tardiness in securing counsel, and the ALJ’s March 15, 2010 determination not to afford him a continuance to secure counsel when admission of the DVD was first discussed. As the Majority notes, although the ALJ approved admission of the DVD at that hearing, it was not actually viewed because of technical difficulties, a circumstance that undercut the ALJ’s rationale for denying a continuance. The ALJ held a second hearing on April 20, 2010, where the DVD was introduced. At that time, appellee appeared with counsel. Concerning the issue of Daughter’s unavailability, the ALJ informed appellee’s counsel at the outset, “We’re not going to go back and rehash the hearing.” N.T., 4/20/10, at 6. Whether these circumstances, and counsel’s later failure to lodge an objection to formal admission of the DVD, in fact operate to waive the constitutional claim, is a matter for the Commonwealth Court to determine in the first instance.

For these reasons, although I join the Majority with respect to the issues accepted for review, I respectfully dissent from its mandate of straight reversal, as I favor a remand to the Commonwealth Court to address the remaining constitutional issue.

Madame Justice Todd joins this opinion.