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Constitutional Law--Self-Incrimination--Effect of Immunity from State Prosecution

David P. Freed

Recent Decisions

CONSTITUTIONAL LAW — SELF-INCRIMINATION — EFFECT OF IMMUNITY FROM STATE PROSECUTION

A witness subpoenaed to appear before the Ohio Un-American Activities Commission refused to answer questions propounded to her "... because to do so would give your committee an opportunity to incriminate me." Witnesses appearing before the commission were given immunity from subsequent state criminal prosecution by virtue of a state immunity statute.[1] One month after the hearing the commission caused an indictment to issue charging the witness with contempt for her refusal to answer the questions.[2] She, along with several others similarly charged, was convicted and sentenced.

On appeal, the defendant contended that in spite of the immunity statute, she was entitled to the constitutionally secured privilege not to incriminate herself.[3] She pointed out that the state immunity statute, though offering full protection from subsequent *state* prosecution did not and could not protect her from subsequent *federal* prosecution.

Thus the issue was presented, whether a state immunity statute, sufficient to preclude prosecution under the laws of the *state* but which could not afford immunity from *federal* prosecution, supplants the privilege against self-incrimination.

The Supreme Court of Ohio in a 4-3 decision affirmed the conviction.[4] The court relied heavily on decisions of the Supreme Court of the United States[5] wherein that court interpreted federal immunity statutes of similar language in construing the effect of the self-incrimination clause of the Federal Constitution.[6]

The Ohio court, in following the federal view, based its decision upon the concept of two separate and distinct sovereignties. The court reasoned that though the powers of government, both federal and state, are exercised within the same territorial limits, those powers are separate and distinct. The state and federal governments act separately and independently of each other. The state need only concern itself with activity within its own sphere. Once having laid this foundation, the court concluded that the state constitutional privilege against self-incrimination was satisfied by the

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[1] OHIO REV. CODE § 101.44.

[2] The witness was indicted under OHIO REV. CODE § 2917.42.

[3] The privilege against self-incrimination is secured by OHIO CONST. Art. 1 § 10.

[4] State v. Morgan, 164 Ohio St. 529, 133 N.E.2d 104 (1956).

[5] United States v. Murdock, 284 U.S. 141 (1931); Feldman v. United States, 322 U.S. 487 (1944).

[6] U. S. CONST. Amend. V.

immunity offered against subsequent state prosecution. Although this was the first time the court ruled on the extent of the privilege against self-incrimination with respect to this immunity statute, the clause was interpreted in the same way in a prior decision in which the court considered a statute of similar language.[7]

Three judges of the court dissented, each on different grounds. Judge Taft and Judge Stewart would have determined the case on other issues.[8] Judge Hart's dissent struck at the issue here presented. He said that since the state cannot give immunity from subsequent federal prosecution, the witness cannot be compelled to answer as she has available the privilege against self-incrimination secured by the *fifth amendment of the Federal Constitution.* To support this position Judge Hart relied on cases wherein the Supreme Court of the United States declared that federal immunity statutes did not supplant the privilege against self-incrimination since the statutes did not close the door completely as to *subsequent federal prosecutions.*[9] Some of the language in these decisions, when taken from context, appears to be authority for this dissent. However, closer examination reveals that the Supreme Court, when speaking of " . . . absolute immunity against future prosecution. . . . ,"[10] referred only to immunity within the *federal* sphere. In no way did the Supreme Court indicate that a federal immunity statute to be effective[11] must give full protection as to subsequent

[7] Mouser v. PUC, 124 Ohio St. 425, 179 N.E. 133 (1931).

[8] Judge Taft points out that the immunity statute under consideration applies only to hearings before "a *select committee* of the General Assembly." A reading of the statutes authorizing the Ohio Un-American Activities Commission (OHIO REV. CODE §§ 103.31-103.38) shows that, "Nowhere in those sections is there any suggestion that the General Assembly regarded this 'commission' as a 'committee.' It studiously and successfuly avoided the use of the word 'committee.' " He concluded that since this action was brought under a statute which referred specifically to "select committees" the action must fail, for this investigative group is a *commission.*

Judge Stewart in his dissent says that the court glossed over the record to arrive at their conclusion. He says the real facts of the case were that the commission, which was composed in part of able and experienced lawyers, apprised the witness that she had the privilege not to answer questions which would tend to incriminate her. She was told that this was a right guaranteed by the "Fifth Amendment." The questions were asked, and upon her refusal to answer no effort was made to insist upon an answer. Judge Stewart stated, "Even if the chairman was mistaken as to the law and the effect of the Ohio immunity statute, and Mrs. Morgan was likewise mistaken, how can it be said that she was in contempt of the commission in strictly following its direction and admonition? The point is further emphasized by the fact that in every instance when she refused to answer a question, claiming protection against self-incrimination, she was never directed to answer the question but the interrogator immediately proceeded with another inquiry."

[9] Counselman v. Hitchcock, 142 U.S. 547 (1892); United States v. Bryan, 339 U.S. 323 (1950).

[10] Counselman v. Hitchcock, 142 U.S. 547, 586 (1892).

[11] The immunity statutes herein considered protected the witness only as to the evi-

state prosecutions. The dissent completely ignored the line of United States Supreme Court decisions which hold that the rights secured by the fifth amendment are *not* rights of citizenship to be held inviolate from action by the states.[12] The Supreme Courts of Florida[13] and Louisiana[14] protect witnesses under the fifth amendment in state proceedings. It is submitted that these cases would be reversed by the United States Supreme Court because of their conflict with the federal view of the fifth amendment.

Michigan is the only other state which protects witnesses in state proceedings from incriminating themselves as to federal law. The Supreme Court of that state has held that state immunity statutes do not destroy the privilege against self-incrimination where the witness would be subject to subsequent federal prosecution.[15] The court here says the privilege is secured by the *state* constitution.

In a well reasoned opinion the Michigan Court said,

> We are aware that holdings at variance . . . can be found in other jurisdictions, including holdings in the Federal Courts. Nonetheless we adhere to our previous holdings, not alone on the ground of established precedent, but rather that the holdings . . . are essential to render fairly effective . . . the state constitutional provision against self-incrimination. It seems like a travesty on verity to say that one is not subjected to self-incrimination when compelled to give testimony in a State judicial proceeding which testimony may forthwith be used against him in a federal prosecution.[16]

This view would stand the test of an appeal to the United States Supreme Court since it represents the interpretation by a state court of the extent of its own state constitutional provision.

In analyzing the effect of immunity statutes under the federal and Ohio view, we find the potential witness in a peculiar position. A state body may compel testimony under a state immunity statute which may be used in a subsequent federal prosecution. The other side of the coin shows that a federal body may compel testimony under a federal immunity statute which may be used in a subsequent state prosecution.[17] This, in spite of

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dence elicited. The court held that an immunity statute to be effective must protect the witness from all prosecution in the area in which testimony was being elicited.

[12] Twining v. New Jersey, 211 U.S. 78 (1908); Adamson v. People, 332 U.S. 46 (1947).

[13] State *ex rel* Mitchel v. Kelly, 71 So.2d 887 (Fla. 1954).

[14] Louisiana v. Dominquez, 228 La. 284, 82 So.2d 12 (1955).

[15] People v. Den Uyl, 318 Mich. 645, 29 N.W.2d 284 (1947).

[16] *Id.* at 651, 29 N.W.2d at 287.

[17] The Supreme Court of the United States in a recent decision declared that Congress has the power to grant immunity from subsequent state prosecutions in cases involving an interference with the security or defense of the United States by treason, espionage, or other forms of subversion. Ullman v. United States, — U.S. —, 76