St. John's Law Review

Volume 34, December 1959, Number 1 Article 13

Constitutional Law--Grand Jury--Assertion of Privilege Against Self-Incrimination Not Required of Prospective Defendant (People v. Steuding, 6 N.Y.2d 214 (1959))

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By this decision the Commission must now adopt the absolute rule set up by the Court which restricts the flexibility existing under earlier Commission decisions. The Commission's original determination in the Aramco matter was to prevent unfair discrimination in Aramco's New York offices but to permit this discrimination where a visa is necessary for an applicant to go to Saudi Arabia. It will be interesting to observe whether the State Department will take any affirmative action, if and when an appeal is taken in this case.

CONSTITUTIONAL LAW—GRAND JURY—ASSERTION OF PRIVILEGE AGAINST SELF-INCRIMINATION NOT REQUIRED OF PROSPECTIVE DEFENDANT.—Defendant was subpoenaed to appear before a grand jury, and after being examined, was indicted for conspiracy and for giving bribes to public officers. Pursuant to Section 149 of the Judiciary Law,[1] he moved directly to the Appellate Division, Third Department, which dismissed the indictment on the ground that he had acquired immunity from prosecution for the crime to which he had been compelled to testify, even though Section 2447 of the New York Penal Law [2] provides for a grant of immunity to a witness *only* when he has claimed his privilege against self-incrimination. Defendant had at no time claimed his privilege. The Court of Appeals affirmed, *holding* that since defendant was before the grand jury as a prospective defendant, and not merely as a witness, he could not be compelled to testify at all. Since the defendant had been compelled to testify, his privilege against self-incrimination had been violated, and, consequently, the indictment predicated on his testimony was void. The Court of Appeals specifically left open the question whether the violation of defendant's constitutional privilege also afforded him an immunity from subsequent prosecution. *People v. Steuding*, 6 N.Y.2d 214, 160 N.E.2d 468, 189 N.Y.S.2d 166 (1959).

Section 2447 of the Penal Law was enacted to correct some of the deficiencies found in statutes which preceded it.[3] These deficiencies were, for the most part, products of two conflicting philosophies; on the one hand there prevailed the idea that "no person . . . shall be compelled in any criminal case to be a witness against him-

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[1] N.Y. JUDICIARY LAW § 149(2) (Supp. 1959) provides: "A motion involving a matter pending before such extraordinary special or trial term shall be made returnable at such term, or, at the option of the moving party, at a term of the appellate division of the supreme court in the department in which such . . . term is being held."

[2] N.Y. PENAL LAW § 2447 (Supp. 1959).

[3] See 1953 LEG. DOC. No. 68, THIRD REPORT, N.Y. STATE CRIME COMMISSION 14-15 (1953).

self . . . ," [4] while on the other it was felt that the state is entitled to a man's evidence.[5]

In 1857, Congress passed an immunity statute [6] which provided that one could not be held criminally liable "for any fact or act touching which he shall be required to testify before . . . Congress. . . ." [7] Because the liberality of the statute proved responsible for many abuses,[8] it was amended to read, "testimony . . . shall not be used as evidence in any criminal proceeding against such witness. . . ." [9] Subsequent legislation [10] in this area was patterned after this amended portion of the original act. The distinction between "any fact or act touching" and "testimony" was fully realized when the Supreme Court, in *Counselman v. Hitchcock*,[11] held that "a statutory enactment, to be valid, must afford absolute immunity against future prosecution for the offense to which the question relates." [12] This principle was followed in New York [13] when the Court of Appeals found that Section 342 of the Penal Law was not co-extensive [14] with the privilege against self-incrimination.

The problem of the legislature in drafting section 2447 was clear; it had to create an immunity which was absolute in the spirit of the *Counselman* decision and rigid enough to preclude the abuses which characterized the 1857 law.[15] The statute provides that in

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[4] U.S. CONST. amend. V. See N.Y. CONST. art. 1, § 6. Grand jury proceedings are criminal cases within the meaning of the Constitutional prohibitions. Counselman v. Hitchcock, 142 U.S. 547, 562 (1892).

[5] 8 WIGMORE, EVIDENCE § 2193(2) (3d ed. 1940).

[6] Act of Jan. 26, 1857, ch. 19, § 2, 11 Stat. 155.

[7] Act of Jan. 26, 1857, ch. 19, § 2, 11 Stat. 156.

[8] See Dixon, *The Fifth Amendment and Federal Immunity Statutes*, 22 GEO. WASH. L. REV. 447, 453-54 (1954).

[9] 18 U.S.C. § 3486 (1958).

[10] See, *e.g.*, Act of Mar. 2, 1889, ch. 382, § 3, 25 Stat. 855; Act of Mar. 3, 1887, ch. 345, § 2, 24 Stat. 488; Act of Feb. 25, 1868, ch. 13, 15 Stat. 37.

[11] 142 U.S. 547 (1892).

[12] *Id.* at 586. The Court reasoned that if a statute only excludes the use of testimony in a subsequent prosecution, it would still be within the power of a prosecutor to use the testimony to obtain *other evidence* which in turn could be used against the witness. However, "any fact or act touching" would seem to exclude all possibilities.

[13] People *ex rel.* Lewisohn v. O'Brien, 176 N.Y. 253, 68 N.E. 353 (1903).

[14] "Co-extensive" is the term usually employed to define the relation the immunity must bear to the privilege it replaces. See Counselman v. Hitchcock, 142 U.S. 547, 565 (1892); People *ex rel.* Lewisohn v. O'Brien, *supra* note 13, at 266.

[15] See People v. DeFeo, 308 N.Y. 595, 603, 127 N.E.2d 592, 596 (1955). Prior to the enactment of § 2447, the courts generally construed the then existing immunity statutes to give an automatic immunity to prospective defendants. As a result, prosecutors often inadvertently conferred immunity upon persons later found to be criminals; § 2447 was designed to shift the burden from the prosecutor to the witness, by making him assert his constitutional privilege before obtaining an immunity. In other words, the claim of privilege would act as a signal to the prosecutor; he could then either grant

order to obtain the immunity [16] one must: (1) make a good faith claim of privilege, (2) be directed by a competent authority to testify, (3) testify.[17] The statute further provides that an immunity may be obtained *only* in the manner prescribed by the statute itself.[18]

In the instant case,[19] the defendant made no attempt to comply with the terms of the statute. In dismissing the indictment against him, the Court held that a prospective defendant "may not be called and examined before a Grand Jury and, if he is, his constitutionally-conferred privilege against self incrimination is deemed violated *even though he does not claim or assert the privilege.*" [20] The Court also stated that "the statute does not apply . . . to a defendant or to one who is in the shoes of a defendant, insofar as it provides that the burden is cast upon him of claiming privilege, and any attempt to invoke it against such a person would offend against the constitutional provision . . . . [S]ince the right granted by the Constitution is automatically conferred, section 2447 is . . . unconstitutional." [21]

The Court's position is consistent with what has traditionally been the law in New York.[22] The reasoning is based on the proposition that a defendant in a criminal case cannot possibly be asked a relevant question which will not incriminate him,[23] hence, any attempt [24] to make him talk operates automatically as a violation of

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the immunity and continue the investigation, or switch to a more innocuous line of questioning and "keep" the witness as a future defendant.

[16] N.Y. PENAL LAW § 2447(1) (Supp. 1959). "In any investigation or proceeding where, by express provision of statute, a competent authority is authorized to confer immunity, if a person refuses to answer a question . . . on the ground that he may be incriminated thereby, and . . . an order is made . . . that such person answer the question . . . such person shall comply. . . . If such person complies with the order, and if, but for this section, he would have been privileged to withhold the answer . . . immunity shall be conferred. . . ." *Ibid.*

[17] 1953 LEG. DOC. No. 68, THIRD REPORT, N.Y. STATE CRIME COMMISSION 15 (1953).

[18] N.Y. PENAL LAW § 2447(4) (Supp. 1959). "Immunity shall not be conferred upon any person except in accordance with the provisions of this section." *Ibid.*

[19] People v. Steuding, 6 N.Y.2d 214, 160 N.E.2d 468, 189 N.Y.S.2d 166 (1959).

[20] *Id.* at 216-17, 160 N.E.2d at 469, 189 N.Y.S.2d at 167. (Emphasis added.)

[21] *Id.* at 217, 160 N.E.2d at 470, 189 N.Y.S.2d at 168.

[22] See, *e.g.*, People v. Gillette, 126 App. Div. 665, 111 N.Y. Supp. 133 (1st Dep't 1908); People v. Dooling, 14 Misc. 2d 907, 180 N.Y.S.2d 618 (Erie County Ct. 1958); People v. Rauch, 140 Misc. 691, 251 N.Y. Supp. 454 (Ct. Gen. Sess. 1931); People v. Bermel, 71 Misc. 358, 128 N.Y. Supp. 524 (Sup. Ct. 1911).

[23] 8 WIGMORE, EVIDENCE § 2276(2) (3d ed. 1940).

[24] Regardless of whether the defendant may be questioned, he can probably be made to appear and be put under oath. See O'Connell v. United States, 40 F.2d 201, 205 (2d Cir. 1930); People *ex rel.* Hummel v. Davy, 105 App. Div. 598, 94 N.Y. Supp. 1037 (1st Dep't 1905); 8 WIGMORE, EVIDENCE § 2268(2) (3d ed. 1940).

his constitutional privilege.[25] A very acute problem arises, however, when a party testifies before a grand jury, because very often at the inception of the investigation his status has not been clarified. It is possible that he may be a witness *or* a defendant, and it may well be that at a given point in an investigation, the prosecutor himself does not know. In enacting section 2447, the legislature sought to relieve the prosecutor of the burden of guessing whether the party would turn out to be a witness or a defendant.[26] If the rule that the questioning of a defendant results in a violation of the defendant's constitutional privilege against self-incrimination is to include prospective defendants before grand juries as well as defendants in criminal cases, the effectiveness of section 2447 has been severely curtailed.

The Court specifically left unanswered the question whether the violation of the constitutional privilege also cloaked the defendant with an immunity from subsequent prosecution.[27] Some courts have answered the question in the affirmative.[28] Better reasoning, however, leads to the opposite conclusion.[29]

The immunity statute, enacted to make available evidence which would otherwise be unobtainable,[30] and the constitutional privilege are *pari materia*.[31] The statute is a substitute for the constitutional privilege, but only on a *quid pro quo* basis.[32] Since the immunity is authorized conditionally upon and in exchange for the relinquishment of the privilege,[33] the privilege itself must be claimed before the immunity can come into being.[34]

An "automatic" immunity would be not only contrary to authority, but against the public interest. The immunity statute is not intended as a gratuitous offer to criminals, and it should not be regarded as such. Clearly, the Court of Appeals should have answered the immunity question in the negative.

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[25] See cases cited note 22 supra. But if he takes the stand voluntarily, has he waived the privilege? See 8 WIGMORE, EVIDENCE § 2276 (3d ed. 1940).

[26] See 1953 LEG. DOC. No. 68, THIRD REPORT, N.Y. STATE CRIME COMMISSION 14-15 (1953); see also note 15 *supra*.

[27] People v. Steuding, 6 N.Y.2d 214, 217, 160 N.E.2d 468, 470, 189 N.Y.S.2d 166, 168 (1959).

[28] See People v. Steuding, 7 A.D.2d 566, 185 N.Y.S.2d 34 (3d Dep't 1959); People *ex rel.* Coyle v. Truesdell, 259 App. Div. 282, 18 N.Y.S.2d 947 (2d Dep't 1940).

[29] See generally 8 WIGMORE, EVIDENCE §§ 2282-84 (3d ed. 1940).

[30] See Heike v. United States, 227 U.S. 131, 142 (1913).

[31] United States v. Monia, 317 U.S. 424, 427 (1943). See Note, *Compulsory Self-Incrimination and Statutory Immunity*, 33 ST. JOHN'S L. REV. 330, 332 (1959).

[32] United States v. Monia, *supra* note 31, at 441 (dissenting opinion).

[33] 8 WIGMORE, EVIDENCE § 2282, at 510 (3d ed. 1940).

[34] *Id.* at 509-11.