FILED
SUPREME COURT
STATE OF WASHINGTON
5/29/2020 10:33 AM
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NO. 98094-2

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

In re Dependency of A.M.-S.

SERGIO MICHEL-GARCIA,

Petitioner,

v.

STATE OF WASHINGTON,

Respondent.

SUPPLEMENTAL BRIEF OF RESPONDENT STATE OF WASHINGTON

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I. ISSUE

In dependency proceedings, do courts have inherent authority to grant derivative use immunity, notwithstanding the legislature's decision to grant only use immunity?

II. STATEMENT OF THE CASE

The facts are set out in the Brief of Respondent at 4-8.

III. ARGUMENT

A. THE WASHINGTON LEGISLATURE HAS NEVER ADOPTED THE CONTROVERSIAL CONCEPT OF DERIVATIVE USE IMMUNITY.

The petitioner claims that courts have inherent authority to grant derivative use immunity in dependency cases. That form of immunity has never been recognized in Washington by statute or court rule. This legislative judgment should not be disturbed.

There are a number of statutes providing for transactional immunity in various kinds of proceedings. RCW 10.27.130 (grand jury and special inquiry proceedings), 10.52.090 (prosecutions for specified crimes),[1] 15.65.090 (certain Department of Agriculture

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[1] This provision was enacted as part of the 1909 Criminal Code. Laws of 1909, ch. 249, § 39. It originally applied in prosecutions for bribery and corruption (§ 78), dueling (§ 171), abortion (§ 199), gambling (§ 228), and advocating criminal anarchy (§ 316). The only one of these statutes remaining in effect is the one dealing with prosecutions for bribery and corruption, which is codified as RCW 9.18.080. See State v. Carroll, 83 Wn.2d 109, 515 P.2d 1299 (1973).

proceedings), 49.60.150 (Human Rights Commission proceedings), 50.12.010 (Employment Security Department proceedings), 78.52.031 (certain Department of Natural Resources proceedings), 81.04.510 (certain Utilities and Transportation Commission proceedings). By court rule, this court has expanded transactional immunity to all criminal prosecutions. CrR 6.14; CrRLJ 6.14.

There are also a few statutes that provide use immunity in certain proceedings. RCW 6.32.200 (proceedings supplemental to execution on judgments),[2] 26.44.053 (dependency proceedings), 80.04.050 (certain Utilities and Transportation Commission proceedings), 81.04.050 (certain other Utilities and Transportation Commission proceedings). None of these statutes mentions derivative use immunity. The question now before this court is whether to claim "inherent authority" to authorize a type of immunity that the legislature has never chosen to authorize.

The concept of derivative use immunity has always been controversial. In 1972, the United States Supreme Court held in a 5-2 decision that use and derivative use immunity are together

[2] This statute purports to compel witnesses to testify. That provision has been held invalid, because use immunity is insufficient to protect a witness's right against self-incrimination. Eastham v. Arndt, 28 Wn. App. 524, 530, 624 P.2d 1159 (1981).

sufficient to protect a witness against self-incrimination. As a result, a person who is granted such immunity can be compelled to testify to incriminatory facts. Kastigar v. United States, 406 U.S. 441, 92 S.Ct. 1653, 32 L.Ed.2d 212 (1972). The two dissenting justices believed that nothing short of transactional immunity is sufficient to protect a witness's Fifth Amendment rights. Id. at 462-67 (Douglas, J., dissenting), 467-71 (Marshall, J., dissenting).

The dissenters' reasoning has been persuasive to the highest courts of six states. They have held that, under their state constitutions, use plus derivative use immunity are insufficient to protect the right against self-incrimination. State v. Gonzalez, 853 P.2d 526 (Alaska 1993); State v. Miyasaki, 62 Haw. 269, 614 P.2d 915 (1980); Attorney General v. Colleton, 387 Mass. 790, 444 N.E.2d 915 (1982); Wright v. McAdory, 536 So. 2d 897 (Miss. 1988); State v. Soriano, 68 Ore. App. 642, 684 P.2d 1220 (1984), aff'd, 298 Ore. 392, 693 P.2d 26 (1984);[3] State v. Thrift, 312 S.C. 282, 440 S.E.2d 341 (1994); see Annot., Propriety, Under State Constitutional Provisions, of Granting Use or Transactional Immunity for Compelled Incriminating Testimony — Post-Kastigar

[3] The Oregon Supreme Court adopted the opinion of its Court of Appeals.

Cases, 29 A.L.R.5th 1 § 4 (1995). In a seventh state, the constitution expressly requires transactional immunity. Okla. Const., art. 2, § 27.

Since the Washington Legislature has never authorized derivative use immunity, this court has had no occasion to consider this issue under the self-incrimination provision of the Washington constitution, art. 1, § 9. In other contexts, however, this court has held that the protection provided by that provision is coextensive with that provided by the Fifth Amendment. State v. Unga, 165 Wn.2d 95, 196 P.3d 645 (2008). Accordingly, if the legislature ever provided for derivative use immunity, that decision would be constitutionally valid.

But not everything that is constitutionally permissible is wise public policy. A number of judges have believed that derivative use immunity is insufficient to protect individual rights. A reasonable legislator could believe the same. This court has no basis for overturning that legislative judgment.

B. AS A PRACTICAL MATTER, THE HEAVY BURDEN IMPOSED BY A GRANT OF DERIVATIVE USE IMMUNITY OFTEN LEADS TO AN UNINTENTIONAL GRANT OF TRANSACTIONAL IMMUNITY.

Derivative use immunity is also problematic for another reason: its scope is difficult to predict. When derivative use immunity is granted, the State has "the heavy burden of proving that all of the evidence it proposes to use was derived from legitimate independent sources." Kastigar, 406 U.S. at 461–62. It is not enough to show that the State's witnesses had independent knowledge of the crime. Rather, the prosecution must show that "no use whatsoever was made of any of the immunized testimony." United States v. North, 910 F.2d 843, 872, modified on other grounds on rehearing, 920 F.2d 940 (D.C. Cir. 1990). This burden can be impossible to fulfill.

Two examples will demonstrate how heavy this burden is. One of them involves the well-known prosecution of Oliver North for obstruction of Congress, destruction of public records, and accepting an illegal gratuity. North testified before a Congressional committee under a grant of derivative use immunity. Before this occurred, many of the government's witnesses had already testified before a grand jury. North, 910 F.2d at 855. That, however, was not

sufficient to allow them to testify at North's trial. Rather, their testimony had to be examined "line-by-line and item-by-item," to ensure that they had not made any use of any of the immunized testimony. Id. at 872. As the District Court later recognized, this made a successful prosecution impossible. United States v. Slough, 36 F. Supp. 3d 37 (D. D.C. 2014); see Judge In Iran-Contra Trial Drops Case Against North After Prosecutor Gives Up, New York Times, Sept. 17, 1991.[4]

A second example is provided by State v. Bryant, 97 Wn. App. 479, 983 P.2d 1181 (1999). That case involved a burglary suspect who provided information under a cooperation agreement, which provided for derivative use immunity. An accomplice in the burglary later decided to testify against him. Obviously the accomplice's knowledge about the burglary was not derived from the immunized information. But again, this was not enough to allow the accomplice to testify. Rather, the State had to prove that the accomplice's desire to cooperate did not result from the immunized statements. Since such proof was impossible, the defendant could

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[4] This newspaper article can be viewed at nytimes.com/1991/09/17/us/judge-in-iran-contra-trial-drops-case-against-north-after-prosecutor-gives-up.html (visited 5/28/2020).

not be prosecuted on the basis of the accomplice's testimony. Id. at 490-91.

As the Court of Appeals has pointed out, the problems illustrated by North and Bryant are particularly glaring in the context of dependency proceedings. "Many of the State's likely witnesses in a child abuse prosecution, such as the abused child, the other parent, and other siblings, are usually parties to the dependency proceeding and would have access to any evaluations ordered by the dependency court." In re Dependency of A.M.-S., 11 Wn. App. 2d 416, 440 ¶ 54, 454 P.3d 117 (2019) (slip op. at 24). How could the State prove that their testimony was not affected by the immunized statements? Moreover, family members are often reluctant to testify in domestic violence cases. If they do decide to testify, how could the State prove that their cooperation was not affected by the immunized statements? Such proof will often be impossible. When it is, the "derivative use immunity" will as a practical matter become transactional immunity.

Compounding this problem, prosecutorial authorities have very little ability to protect their cases against the loss of critical testimony. Dependency proceedings are usually brought by the Department of Children, Youth, and Families, which has no

prosecutorial functions. Prosecutors are not normally involved. It would not be appropriate to leave children in a dangerous situation by delaying dependency proceedings, so that a criminal prosecution could proceed.

Once dependency proceedings are instituted, neither the Department nor prosecutors would have any control over grants of immunity. Indeed, the petitioner argues that *no one* except the suspected parent would have any control. According to him, a dependency court is *required* to grant derivative use immunity whenever there is a police investigation into the allegation of abuse that form the basis for the petition. Brief of Father at 2-3, 11. So if the petitioner's argument is accepted, the Department's efforts to protect children from abuse will start a chain of events that will often prevent prosecution of the abusers.

The Legislature carefully balanced the conflicting interests by enacting RCW 26.44.053(2). Under that statute, a parent is *not* compelled to provide evidence against himself. He is free to assert his privilege against self-incrimination at any court-ordered examination. If he chooses not to exercise his privilege, he still has some protection: "No information given at any such examination ... may be used against such person in any subsequent criminal

proceedings ... concerning the alleged abuse or neglect of the child." Since the State is only barred from direct use of the information, this prohibition will generally not be an undue obstacle to prosecution. So the right against self-incrimination is respected, and parents are protected from having their statements used against them — but prosecutorial authorities are still able to protect children by prosecuting child abusers. The policy decisions reflected in this statute should not be overturned by the courts.

C. THERE IS NO CONSTITUTIONAL RIGHT TO IMMUNITY — ONLY A RIGHT NOT BE PENALIZED FOR EXERCISING THE PRIVILEGE AGAINST SELF-INCRIMINATION.

The petitioner claims that his right against self-incrimination requires a grant of immunity. This argument reflects a misunderstanding of the law relating to immunity. Under the Fifth Amendment, a person cannot be "compelled in any criminal case to be a witness against himself." A person can nonetheless be compelled to testify to incriminating facts — but only if the person is granted immunity that is "coextensive with the scope of the privilege." If "the immunity granted is not as comprehensive as the protection afforded by the privilege," then a person cannot be penalized for refusing to testify. Kastigar, 406 U.S. at 449. "Since immunity is granted as a substitute for a person's Fifth Amendment

rights, the refusal to grant immunity permits the [witness] to exercise his usual rights under the Constitution." United States v. Karas, 624 F.2d 500, 505 (4th Cir. 1980).

Applying these principles in the present case is straightforward. As the Court of Appeals recognized, the use immunity provided by RCW 26.44.053 is *not* co-extensive with the Fifth Amendment privilege. A.M.-S., 11 Wn. App. at 429-30 ¶ 26 (slip op. at 12). Consequently, the petitioner remains free to assert his privilege notwithstanding the limited statutory immunity. The trial court recognized this. CP 166. The Court of Appeals decision is consistent with these basic principles.

In one respect, however, the Court of Appeals went beyond what is necessary to decide this case. It suggested that the dependency court would be free to draw adverse inferences from a parent's exercise of the privilege. A.M.-S., 11 Wn. App. at 428 ¶ 22 (slip op. at 9-10). This is the governing rule in civil cases. In criminal cases, a different rule applies: "no negative inference from the defendant's failure to testify is permitted." Mitchell v. United States, 526 U.S. 314, 328, 119 S.Ct. 1307, 143 L.Ed.2d 424 (1999).

This issue may require more careful consideration than it received from the Court of Appeals. In other jurisdictions, courts

have distinguished between requiring parents to incriminate themselves and requiring them to participate in treatment services. See, e.g., Matter of Ma.H., 134 N.E.3d 41, 46-48 (Ind. 2019), pet. for cert. filed, no. 19-8180 (3/30/20); In re C.O., 171 N.H. 748, 761-64, 203 A.3d 870, 880-82 (2019); Matter of A.D.L., 133 Nev. 561, 566-68, 402 P.3d 1280, 1285-86 (2017). This issue does not, however, arise in the present case. Nothing in the record indicates that the petitioner has refused to answer any questions in the course of evaluation or treatment. As a result, the trial court apparently has had no occasion to decide what inference, if any, could be drawn from such refusal. If this court were to consider the issue, it would be rendering an advisory opinion on hypothetical facts.[5]

If the Court of Appeals' statement appears overly broad, this court may wish to point out that the issue remains open for future consideration. For now, however, it should not affect this court's decision on the immunity issue. Since the petitioner has not been offered adequate immunity, he cannot be deprived of parental

[5] Since the Prosecutor is not normally involved in dependency proceedings, we have no basis for arguing what inferences may be appropriate. If briefing on this issue is necessary, we will defer to the Department.

rights for asserting his Fifth Amendment privilege. Because he is free to exercise his right against self-incrimination, he is not entitled to immunity.

D. COURTS HAVE NO "INHERENT AUTHORITY" TO GRANT IMMUNITY.

The petitioner also claims that courts have "inherent authority" to grant derivative use immunity. As the Court of Appeals has recognized, the normal rule is that granting immunity is a prosecutorial executive function. In re Dependency of Q.L.M, 105 Wn. App. 532, 544, 20 P.3d 465 (2001). In criminal proceedings, that court has consistently held that trial courts lack inherent authority to grant immunity. State v. Matson, 22 Wn. App. 114, 119-21, 587 P.2d 540 (1978); State v. Carlisle, 73 Wn. App. 678, 681-82, 871 P.2d 174 (1994). Every federal Circuit Court that has considered the issue has reached the same conclusion. United States v. Quinn, 728 F.3d 243, 251 (3rd Cir. 2013) (citing cases from 11 other circuits). The Third Circuit Court of Appeals explained the reasons for this rule when it overruled a contrary decision:

> Often the decision to grant or deny immunity impinges on the Government's broad discretion as to whom to prosecute. In any later prosecution, the Government bears a heavy burden because it must prove that its evidence against the immunized witness has not been obtained as a result of his immunized testimony. In

> some cases, the Government may have already assembled the evidence it needs, or it can "sterilize" the immunized testimony by isolating those investigating or prosecuting the witness from any incriminating information provided through his testimony. But if these precautions are unsuccessful or unavailable, a court's granting immunity to a witness to secure another's criminal conviction may prevent the Government from ever prosecuting the witness for his own criminal behavior.
>
> Courts are not in the best position to decide these prosecutorial tradeoffs. Such factors as the strength of the case, the prosecution's general deterrence value, the Government's enforcement priorities, and the case's relationship to the Government's overall enforcement plan are not readily susceptible to the kind of analysis the courts are competent to undertake. Giving judges the power to immunize witnesses would carry the courts into policy assessments which are the traditional domain of the Executive Branch. As Congress has given the power to immunize a witness solely to the Executive Branch, it is not a power courts can exercise.

Id. at 253-54 (citations omitted).

Nor does the concept of "inherent authority" apply to this situation.

> The inherent power of the court is the power to protect itself; the power to administer justice whether any previous form of remedy had been granted or not; the power to promulgate rules for its practice; and the power to provide process where none exists.

In re Bruen, 102 Wash. 472, 476, 172 P. 1152 (1918).

For example, courts have an inherent contempt authority, "as a power necessary to the exercise of all others." In re

Dependency of A.K., 162 Wn.2d 632, 645 ¶ 15, 174 P.3d 11 (2007). Similarly, courts have inherent authority to control calendars, proceedings, and parties. State v. Gassman, 175 Wn.2d 208, 211 ¶ 4, 283 P.3d 1113, 1114 (2012). Exercise of that inherent authority is, however, limited to situations where statutory procedures are specifically found inadequate. A.K., 162 Wn.2d at 647 ¶ 19. For example, a court lacks the inherent authority to dismiss a case for want of prosecution, when the situation was covered by a court rule. Wallace v. Evans, 131 Wn.2d 572, 934 P.2d 662 (1997). Beyond the areas of contempt and the authority to control proceedings, claims of inherent authority have generally been rejected. See, e.g., State v. Pillatos, 159 Wn.2d 459, 469-70 ¶¶ 12-13, 150 P.3d 1130 (2007) (no inherent authority to empanel sentencing jury); State v. Masangkay, 121 Wn. App. 904, 91 P.3d 140 (2004) (no inherent authority to issue certificate of rehabilitation); State v. Gilkinson, 57 Wn. App. 861, 790 P.2d 1247, 1248 (1990) (no inherent authority to expunge criminal records).

Granting immunity lies outside the legitimate areas of inherent authority. See Matson, 22 Wn. App. at 119-21. Moreover, even if there were some inherent power to grant immunity, it could only be exercised if the statutory immunity provision was

specifically found to be inadequate in a particular case. See A.K., 162 Wn.2d at 647 ¶ 19. No such finding was made in the present case. To the contrary, the trial court believed that the statutory protections allowed the parents to "meaningfully engage in treatment without ever having to incriminate themselves." CP 161. So the statutory grant of use immunity was adequate under the circumstances, there was no basis for the court to grant any broader immunity.

IV. CONCLUSION

The legislature has limited immunity in dependency cases to use immunity only. That decision respects the constitutional rights of parents, while also allowing the protection of children via criminal prosecution of abusers. This court has no basis for interfering with that legislative decision. The Court of Appeals should be affirmed.

Respectfully submitted on May 29, 2020.

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IN THE SUPREME COURT
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I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 29th day of May, 2020, at the Snohomish County Office.

Diane K. Kremenich
Legal Assistant/Appeals Unit
Snohomish County Prosecutor's Office

SNOHOMISH COUNTY PROSECUTOR'S OFFICE

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