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Criminal Law—Attorney-Client Privilege

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CRIMINAL LAW

Grand Jury

The New York Code of Criminal Procedure[1] provides that a Grand Jury may indict if acting upon evidence that would be sufficient if unexplained or uncontradicted to warrant a conviction.[2] In *People v. Donahue*[3] the Court held that the evidence contained in the Grand Jury minutes, to the effect that defendant's accomplice actually effected an entry into the burglarized premises after all its doors and windows had been locked and that he handed stolen merchandise through the door to the defendant, was sufficient to sustain a charge of Burglary.[4] Defendant's claim that he did not intend to commit a theft would therefore have to wait the decision of a jury.

Attorney-Client Privilege

In a prosecution for robbery in the first degree, defendant after taking the stand in his own behalf was cross-examined about his conversations with his attorney concerning the whereabouts of a girl involved in his defense. The questions were admitted by the trial court over objection, on the ground that the defendant, by taking the stand in his own behalf, had waived the right to avoid these questions. The conviction was reversed and a new trial was granted.[5]

Defendant, accused of being the "get-away" man for a group of men arrested in the course of a robbery, contended that he was at the scene of the crime for the purpose of keeping a date with a girl known only as "Doris." Doris' whereabouts was not known to the prosecution and she had not been called as a witness by the defense prior to the defendant's appearance on the stand. In the course of cross-examination of the defendant, the prosecutor asked if the defendant had told his attorney where Doris could be located, or whether his attorney had ever told him not to contact her. Defense counsel objected, but the objection was overruled.[6] He then solicited the aid of the court in securing Doris Davis, the young lady in question. This action was taken because the defense was, in the words of

1. N. Y. CODE CRIM. PROC. §258.
2. *People v. Galbo,* 218 N. Y. 283, 112 N. E. 1041 (1916); *People v. Toland,* 217 N. Y. 187, 111 N. E. 760 (1916).
3. 309 N. Y. 6, 127 N. E. 2d 725 (1955).
4. N. Y. PENAL LAW §404, subd. 1.
5. *People v. Shapiro,* 308 N. Y. 453, 126 N. E. 2d 559 (1955).
6. The exact wording of the trial court's ruling was: "Let me inform you that when you take the witness stand to testify, you are the same as any other witness. If you didn't want to take the witness stand, nobody could have compelled you to take the stand, but when you take the witness stand, then you answer all questions that are put to you; is that clear to you?"[2] 308 N. Y. at 457, 126 N. E. 2d at 561.

the Court of Appeals, "faced with the dilemma created by this line of questioning."[7] The testimony of Miss Davis contradicted that of the defendant in many important details, and did much to demolish the defense.

The right of a defendant in a criminal action not to take the stand is set forth in both the Federal and State Constitutions.[8] When he voluntarily takes the stand, though, he waives his privilege against self-incrimination and subjects himself to the same rules as all witnesses.[9] The privilege of confidential communications between a lawyer and his client, however, is a separate and distinct one, which applies whether the action is civil or criminal, and whether the witness is or is not a party to the action. It is established by the rules of evidence in the Civil Practice Act.[10] It is the privilege of the client only,[11] and can be waived only expressly or by voluntarily testifying about the privileged matter.[12]

The Court of Appeals held that it goes beyond the grounds of basic fairness to maintain that a privileged communication is waived when a defendant takes the stand in a criminal case. The defendant in the instant case protested against the questions, and his attorney interposed specific objections to them. Only under judicial direction did he answer the questions on these communications. The court stated that it was clearly error to infer a waiver from the fact of the defendant's taking the stand in his own behalf.

The dissent, while admitting that the privilege may have been violated, claimed that the error was not prejudiccial to the defendant. His answer to each of the questions was either in the negative or "I don't know." Therefore, argued the dissent, it is difficult to see exactly how the defendant was harmed by being required to answer the questions.

While on the face of the facts as they appear in the Court's opinion the dissent seems to have a valid rationale, two policy considerations militate in favor of the majority. First, not all prejudice appears in the nature of the defendant's replies to the questions. The exact causal relationship of these questions to the calling of Miss Davis as a witness is not apparent from the case, but the Court indicates that such a relationship is present. Furthermore, the implied accusation in the questions that the defendant was deliberately concealing Miss Davis was

7. *Ibid.*
8. U. S. CONST. amend. V; N. Y. CONST. art. I, §6. See also N. Y. CODE CRIM. PROC., §10.
9. *People v. Tice,* 131 N. Y. 651, 30 N. E. 494 (1892); *People v. Trybus,* 219 N. Y. 18, 113 N. E. 538 (1916); *People v. Russo,* 251 App. Div. 176, 295 N. Y. Supp. 457 (1st Dep't 1937).
10. N. Y. CIV. PRAC. ACT §353.
11. *Id.* §354.
12. *People v. Patrick,* 182 N. Y. 131, 74 N. E. 843 (1905).

certainly damaging. Secondly, the unprecedented use of the waiver of self-incrimination as a waiver of the protection of the rules of evidence is so dangerous to our basic policy of a fair trial for everydefendant that it is wise to put aside all other considerations in striking down this principle before it gains any momentum.

Privilege Against Self-Incrimination

In New York it has consistently been held that when a Grand Jury subpoenaed a witness without apprizing him of his privilege against self-incrimination, and it could reasonably be said that he was the target of the investigation, then his status as a prospective defendant would be sufficient to confer automatic immunity upon him with regard to testimony which might tend to incriminate him.[13] It would appear that the resulting conferral, perhaps unwittingly,[14] of an "immunity bath" prompted the enactment of Penal Law §2447,[15] which holds that to obtain any immunity the witness must 1) claim his privilege, 2) be directed to answer, and 3) testify.

In *People v. De Feo*,[16] the prospective defendant was subpoenaed three times before the Grand Jury without being informed of his privilege, and was interrogated in regard to the alleged bribery of union officials. Before his fourth appearance he was informed of the privilege and invoked it, and the Grand Jury attempted to confer upon him a qualified immunity for "crimes of conspiracy and bribing labor officials." In a subsequent trial for contempt, defendant's evasive answers[17] were held to amount to contumacious conduct by the trial court; the Court of Appeals reversed, holding that under these circumstances it would be a violation of defendant's Constitutional privilege against self incrimination[18] to base any indictment on his testimony.

The Court felt that requiring the witness to invoke the privilege when he had not been put on notice that he was likely to be the target of the investigation was in itself unconstitutional, and that the attempted conferal of a qualified immunity at his fourth appearance did not meet the requirement that the immun-

13. *People ex rel. Coyle v. Truesdell*, 259 App. Div. 282, 18 N. Y. S. 2d 947 (2d Dep't 1940); *People v. Cahill*, 193 N. Y. 239, 86 N. E. 39 (1908); *People v. Sharp*, 107 N. Y. 427,14 N. E. 319 (1887).

14. NEW YORK STATE LEGISLATIVE ANNUAL 1953, at 480.

15. ". . . if a person refuses to answer a question . . . and . . . an order is made that . . . (he) answer the question . . . (he) shall comply with the order. If . . . (he) complies . . . and if, but for this section, he would have been privileged to withhold the answer . . ., then immunity shall be conferred upon him . . ."

16. 308 N. Y. 595, 127 N. E. 2d 592 (1954).

17. *Finkel v. Mc Cook*, 247 App. Div. 52, 286 N. Y. Supp. 755 (1st Dep't), *aff'd*, 271 N. Y. 636, 3 N. E. 2d 460 (1936).

18. N. Y. CONST. art. I §6.