THE FEDERAL GOVERNMENT'S ACCESS TO STATE-COMPELLED TESTIMONY: APPLICATION OF THE TRANSACTIONAL IMMUNITY RULE

United States v. McDaniel, 449 F.2d 832 (8th Cir. 1971)

The president of a bank was subpoenaed before a federal grand jury investigating irregularities in its operation. Invoking his privilege against self-incrimination he refused to testify. Immediately after his appearance before the federal grand jury, he was subpoenaed to appear before the state grand jury where he again invoked his privilege. The state, under authority of the immunity provision of the North Dakota Corrupt Practices Act,[1] compelled him to testify. The United States Attorney then requested and received a copy of the testimony. Both state and federal indictments were returned. After the state court granted McDaniel's motion to suppress the state indictment on the ground that the statute immunized him from prosecution, he moved to suppress the federal indictment on the ground that his privilege against self-incrimination required that the federal government be prohibited from prosecuting. His motion was overruled.[2] McDaniel was convicted on the federal charges of embezzlement and misappropriation. *Held*: the federal government's access to McDaniel's compelled testimony, given under a state grant of immunity, gave McDaniel absolute immunity from both federal and state prosecution for any crime relating to the subject matter of the testimony.[3]

The conflict between the need for gathering information in areas of public concern and the citizens' privilege against self-incrimination,[4] required the Supreme Court to rule on the constitutionality of statutes which grant immunity to witnesses in order to compel testimony.[5] The

1. N.D. CENT. CODE § 16-20-10 (Repl. vol. 1971).

2. United States v. McDaniel, 449 F.2d 832, 835 (8th Cir. 1971).

3. *Id.* at 841. The case was remanded for an evidentiary hearing to determine if the subject matter of the compelled testimony related to the federal charges.

4. *See* Note, *The Federal Witness Immunity Acts in Theory and Practice: Treading the Constitutional Tightrope*, 72 YALE L.J. 1568, 1568-70 (1963).

5. *See* Note, *Counselman, Malloy, Murphy and the States' Power to Grant Immunity*, 20 RUTGERS L. REV. 336 (1966).

Supreme Court fashioned two rules in an attempt to resolve this conflict.[6]

If a witness is compelled to testify under a federal immunity statute invoked by a federal investigatory agency, the federal government is precluded from prosecuting the witness for any crime relating to the subject matter of the compelled testimony.[7] This rule, known as the transactional immunity rule, operates as a complete bar to prosecution of the witness and can be enforced against the government in the form of a motion to suppress the indictment.[8]

If a witness is compelled to testify under a state immunity statute invoked by a state investigating agency, the federal government is only precluded from using the compelled testimony or its fruits in a future prosecution against the witness.[9] This rule, known as the "use rule",[10] is enforced against the government in the form of a motion to suppress evidence.[11]

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6. These rules are a result of two decisions, Counselman v. Hitchcock, 142 U.S. 547 (1892), and Murphy v. Waterfront Comm'n of N.Y. Harbor, 378 U.S. 52 (1964). In *Counselman*, a federal immunity statute was invoked by a federal grand jury, and the threat of prosecution was from the federal government. In *Murphy*, a state immunity statute was invoked by a state investigating agency, and the threat of prosecution was from the federal government. Under United States v. Murdock, 284 U.S. 141 (1931), the fifth amendment simply did not apply to state immunity statutes. Malloy v. Hogan, 378 U.S. 1 (1964), made the fifth amendment applicable to the states, and the *Murphy* decision followed in the same term. *See* Note, *Counselman, Malloy, Murphy and the States' Power to Grant Immunity*, 20 RUTGERS L. REV. 336 (1966).

There is some authority, Stewart v. United States, 440 F.2d 954, 957 (9th Cir. 1971); Comment, 33 FORDHAM L. REV. 77, 80 (1964); Comment, 10 N.Y.L.F. 627 (1964), which holds that *Murphy* abrogates *Counselman*, therefore leaving only one rule. The court in the present case relies on Albertson v. Subversive Activities Control Bd., 382 U.S. 70 (1965), decided after *Murphy* as supporting the continued viability of *Counselman*, leaving both rules intact. United States v. McDaniel, 449 F.2d 832, 836 (8th Cir. 1971).

7. Counselman v. Hitchcock, 142 U.S. 547 (1892). This rule under authority of the supremacy clause, was used to bar prosecution by state authorities when federal immunity was given. Adams v. Maryland, 347 U.S. 179 (1953).

8. Smith v. United States, 337 U.S. 137, 145 (1949); Edwards v. United States, 312 U.S. 473 (1941).

9. Murphy v. Waterfront Comm'n of N.Y. Harbor, 378 U.S. 52 (1964).

10. Violation of the use rule is determined by a test put forth by Justice Goldberg in *Murphy*, "Once a defendant demonstrates that he has testified under a state grant of immunity, to matters related to the federal prosecution, the federal authorities have the burden of showing that their evidence is not tainted by establishing that they had an independent, legitimate source for their evidence." *Id.* at 79 n.18.

11. United States v. Keilly, 445 F.2d 1285, 1287 (2d Cir. 1971); United States

The need for two rules in immunity statutes is brought out in the concurring opinion of Mr. Justice White in *Murphy v. Waterfront Comm'n of N.Y. Harbor.*[12] Applying the "use rule" to state immunity statutes diminishes the restrictive effect that these statutes might have on federal investigations. Often both governments are investigating areas which involve possible violations of both state and federal law. If the states were allowed to give transactional immunity to a witness, federal prosecution of the witness would be precluded even though the federal investigation is proceeding independently of the state investigation. Within the federal system, state and federal authorities often operate at cross purposes, and the transactional immunity rule may be used by the state to obstruct the federal prosecution.[13] For example, ". . . [A]n obstreperous South state legislature could 'investigate' election activities within the state to gain the testimony of officials who had interfered with the right to vote in violation of the Civil Rights Acts."[14]

Because in the principal case the compelled testimony was given to a state investigating agency under a state grant of immunity and the federal government is attempting to prosecute, the "use rule" appears to be controlling.[15] Nevertheless, the transactional immunity rule applied, because the federal government's access to the compelled testimony constitutes prima facie use of the testimony. The act of viewing the compelled testimony violated the basic principle of the self-incrim-

v. Wolfson, 294 F. Supp. 267, 273 (D. Del. 1968) (dictum); United States v. American Radiator and Standard Sanitary Corp., 278 F. Supp. 608, 613 (W.D. Pa. 1967) (dictum), *aff'd* 433 F.2d 174 (1970). The *Murphy* independent source test is also cited in decisions determining the admissibility of seized evidence. James v. United States, 418 F.2d 1150 (D.C. Cir. 1969); United States v. Balistrieri, 403 F.2d 472 (7th Cir. 1968). In United States v. Blue, 384 U.S. 251 (1966), the Supreme Court held that even if tainted evidence were admitted to the grand jury, that fact alone would not constitute a basis for baring prosecution. The defendant would only be allowed to suppress the evidence and its fruits at trial. *See also* Note, *Unconstitutionally Obtained Evidence Before the Grand Jury as a Basis for Dismissing the Indictment,* 27 MD. L. REV. 168 (1967).

A pre-indictment motion to suppress evidence might be in order under the Federal Rules of Criminal Procedure. For the possibilities and problems of this course of action, *see* Note, *The Pre-Indictment Suppression of Illegally Obtained Confessions,* 1970 WASH. U.L.Q. 73.

12. 378 U.S. 52, 92 (1964) (concurring opinion).

13. Note, *Self-Incrimination and the States: Restriking the Balance,* 73 YALE L.J. 1491, 1496 (1964).

14. *Id.*

15. United States v. McDaniel, 449 F.2d 832, 836 (8th Cir. 1971).

ination protection, which is "to leave the witness in substantially the same position as if the witness had claimed his privilege in the absence of a state grant of immunity."[16] This "prima facie use" put the federal government in the same position as if it were the investigating agency compelling the testimony, and this called for application of the transactional immunity rule.[17] Judge Gibson clearly limits the "prima facie use" rule to situations in which access is involved, allowing the exclusionary rule of evidence to apply in other cases in which the investigating sovereign is the state government and the prosecuting sovereign is the federal government.[18]

This approach is directly aimed at access. If access is not proved in the motion to suppress the indictment, the defense is limited to challenging the state's evidence through a motion to suppress, but if access is proved, the indictment is suppressed, and prosecution barred. One reason for this approach is the inherent difficulty of proving or disproving a link between the prosecutor's access to the testimony and the evidence produced at trial.[19] Judge Gibson sees the "prima facie use" theory as an effective method of deterring prosecutor misconduct without reaching the difficult problems involved in the independent source test of the "use rule."

While covering the misconduct involved in this case, it may be over-inclusive in its effect. The revelation of compelled testimony from the state prosecutor to the federal prosecutor in a casual conversation constitutes access to that testimony, and strict adherence to the prima facie use theory would bar prosecution even though the federal prosecutor had a case built on evidence totally independent of the testimony revealed to him.

It is submitted that the prosecutor's misconduct in the principal case could have led to a dismissal of the indictment without application of the transactional immunity rule, and any problems of overinclusion could have been avoided. By combining the defendant's right to due process with Rule 12(b)(1) of the Federal Rules of Criminal Procedure, grounds for dismissal of the indictment can be found. In

16. Murphy v. Waterfront Comm'n of N.Y. Harbor, 378 U.S. 52, 79 (1964).

17. United States v. McDaniel, 449 F.2d 832, 838 (8th Cir. 1971).

18. *Id.* at 840.

19. *See* Comment, 33 FORDHAM L. REV. 77, 80 (1964). For a discussion of the derivative evidence rule generally, see also George, *The Faults of Miranda: Scope of the Exclusionary Rule*, 39 U. COLO. L. REV. 478 (1967).

Mooney v. Holohan,[20] a case involving the prosecutor's use of perjured testimony, the Supreme Court established that prosecutor misconduct can be a violation of the defendant's right to due process when the conduct would result in an unfair trial for the accused.[21] This establishes a constitutional violation for prosecutor misconduct and, Rule 12(b)(1) allows that "any defense or objection which is capable of determination without trial of the general issue" may be raised in a pretrial motion.[22] The trial court may then determine if the misconduct is so prejudicial that a fair trial would be impossible, and dismiss the indictment.[23] Another ground can be found in the court's supervisory power,[24] although there is little case law specifically using this vehicle for dismissal of the indictment on the ground of prosecutor misconduct.

By attacking the prosecutor's misconduct in this fashion, the defendant's freedom from an improper indictment is preserved; and the government is allowed to maintain a prosecution when there is no misconduct and the prosecution is based on evidence which passes the independent source test.

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20. 294 U.S. 103 (1935).

21. *See* United States v. American Radiator and Standard Sanitary Corp., 433 F.2d 174, 191 (3d Cir. 1970) (dictum); United States v. Young, 426 F.2d 93 (6th Cir. 1970) (dictum); Ganger v. Peyton, 379 F.2d 709 (4th Cir. 1967).

22. FED. R. CRIM. P. 12(b)(1).

23. Woody v. United States, 370 F.2d 214 (D.C. Cir. 1966).

24. "Another view of the supervisory power is that it permits the judiciary to decline to entertain a prosecution by reason of official conduct, particularly in relation to the gathering of evidence, that is wrongful from a judicial perspective though not violative of constitutional or statutory provisions." Hill, *The Bill of Rights and the Supervisory Power*, 69 COLUM. L. REV. 181, 199 (1969).