North Dakota Law Review

Volume 41 | Number 2 Article 6

1964

Witnesses - Privilege of Witness - Privilege against Self-Incrimination

Lynn E. Crooks

RECENT CASES

WITNESSES—PRIVILEGE OF WITNESS—PRIVILEGE AGAINST SELF-INCRIMINATION—The defendant was called upon to testify at a hearing conducted by the Waterfront Commission of New York Harbor. He was granted immunity from prosecution under the laws of both New York and New Jersey.[1] Notwithstanding this grant of immunity he refused to answer certain questions claiming that his answers would tend to incriminate him under federal law. The defendant was thereupon adjudged in contempt. The United States Supreme Court *held* that a witness in a state proceeding may claim the privilege against self-incrimination if his answers might tend to incriminate him under federal law, even though there is no danger of prosecution for a state crime.[2] The Court further *held* that federal courts may not make any use of testimony elicited through the use of state immunity statutes. The immunity granted to the defendant was thus as broad as the privilege against self-incrimination, consequently he could be forced to answer the Commission's questions. *Murphy v. Waterfront Comm'n of N.Y. Harbor*, 84 Sup. Ct. 1594 (1964).

The first holding of the *Murphy* case represents a radical change in American jurisprudence. Under prior decisions a jurisdiction attempting to force a witness to testify despite his fear of self-incrimination had to show only that the grant of immunity prohibited the use of the testimony or its fruits against him in a criminal prosecution within that jurisdiction.[3] Such a showing satisfied the constitutional requirement that an immunity grant must be as broad as the privilege against self-incrimination if it is to be valid.[4] The fact that a different jurisdiction might subsequently be able to use the testimony against the witness in a criminal prosecution did not, in the absence of collusion between the two jurisdictions, deny the defendant due process of law.[5] The first holding of the *Murphy* case quite obviously changed these rules.[6] If the Court had stopped

---

1. The defendant had been granted immunity from both New York and New Jersey prosecutions pursuant to an interstate compact. See Application of Waterfront Comm'n of N.Y. Harbor, 39 N.J. 436, 189 A.2d 36 (1963).

2. In a companion case, Malloy v. Hogan, 84 Sup. Ct. 1489 (1964), the Court *held* that the fifth amendment privilege against self-incrimination is applicable to the states through the due process clause of the fourteenth amendment. Even before *Malloy*, however, a flagrant denial of the privilege probably would have violated the spirit of the due process cause; see Adamson v. California, 332 U.S. 46 (1947).

3. United States v. Murdock, 284 U.S. 141 (1931); Jack v. Kansas, 199 U.S. 372 (1905).

4. *Ibid.* See Counselman v. Hitchcock, 142 U.S. 547 (1892), which sets forth the rule that a statute may not replace the privilege against self-incrimination unless it is so broad as to have the same extent in both scope and effect.

5. Feldman v. United States, 322 U.S. 487 (1944).

6. A claim of privilege as to possible incrimination under the laws of a foreign jurisdiction will presumably be judged by the same standard as is now used when the claim is made with regard to the laws of the forum. See Hoffman v. United States, 341 U.S. 479 (1951), for a statement of the federal standard.

with its holding that a witness may claim the privilege against self-incrimination if he fears incrimination under the laws of another jurisdiction, many state immunity grants would have been rendered ineffective. A state statute standing alone could not have given a witness protection against the use of his testimony in a federal prosecution.[7] A realization of this fact is what prompted the Court to abandon the rule of *Feldman v. United States*,[8] and hold that any testimony forced under a state immunity grant must be excluded from the federal courts.

The Court did not state whether the exclusionary rule set forth was based on constitutional grounds or whether it was merely an exercise of the Supreme Court's supervisory power over the lower federal courts.[9] An analysis of the opinion indicates, however, that the exclusionary rule was based on the former rather than the latter. The Court explicitly stated that its first holding was based on constitutional requirements.[10] Although the case was concerned only with fear of incrimination under federal law it would seem that the first holding would also allow a witness to refuse to answer if he feared incrimination under the laws of another state.[11] If this is true it is difficult to comprehend how the Court could have reached its second point and upheld the statute if it was relying solely on its supervisory power. To do so it would have had to restrict the case entirely to its facts.[12] Its supervisory power over the lower federal courts does not extend to the state courts and could not have prevented the use of the forced testimony there.[13] If the Court's second holding, establishing the exclusionary rule, is based only on supervisory power, it is difficult to understand why the Court found it necessary to answer the constitutional question of whether or not a witness is entitled to claim a privilege against incrimination under the laws of another jurisdiction. The result of the case would have been the same had the Court said only that testimony once forced must be excluded from the federal courts.[14]

---

7. Jack v. Kansas, *supra* note 3 (dictum).

8. 322 U.S. 487 (1944).

9. Examples of the Supreme Court's supervisory power can be found in Elkins v. United States, 364 U.S. 206 (1960) and McNabb v. United States, 318 U.S. 332 (1943).

10. Murphy v. Waterfront Comm'n of N.Y. Harbor, 84 Sup. Ct. 1594, 1609 (1964).

11. *Id.* at 1608, the Court stated: "[T]here is no continuing legal validity to, or historical justification for, the rule that one jurisdiction within our federal structure may compel a witness to give testimony which could be used to convict him of a crime in another jurisdiction." This language indicates that the Court is abolishing the rule entirely. In cases where a witness feared prosecution in another state, the courts have rested their refusal to extend the privilege to him on the very rule which the Court has abolished. *E.g.*, Application of Herlands, 204 Misc. 373, 124 N.Y.S.2d 402 (1953); State v. Wood, 99 Vt. 490, 134 Atl. 697 (1926).

12. At the hearing the defendant did not make any claim that he would be incriminated under the laws of another state. Perhaps the Court reasoned that since the defendant did not raise such a defense at the first hearing he would not do so at the new hearing which it ordered. The question of waiver, however, was not raised by this case because the defendant had not yet given any testimony.

13. See Stein v. New York, 346 U.S. 156, 186 (1953) wherein the Court refused to apply the rule of McNabb v. United States, *supra* note 9, to state courts.

14. This approach, of course, would have made the entire opinion mere dicta because the specific question of exclusion was not before the Court.

The answer to the question of whether or not the exclusionary rule applies between the states will ultimately depend upon whether it rests on constitutional grounds. If it does not rest on those grounds a witness in one state who feared incrimination under the laws of another state could not be forced to testify because the immunity grant would not be as broad as the privilege against self-incrimination.[15]

The case raises another very interesting question. Might some immunity statutes, though valid under the fifth amendment, be void because they violate the supremacy clause?[16] This question may well arise in a situation where the local law enforcement officials are very hostile to a federal law and would use their immunity statutes to frustrate, if not wholly curtail, federal prosecutions.[17] Attempts to render the Civil Rights Act of 1964[18] inoperative might well illustrate how this could happen. It is true, of course, that the federal courts are very reluctant to strike down state legislation based on the police power. Since the primary responsibility for protecting the public safety, health and morals rests with the states[19] rather than the federal government, the rule is that federal courts should not overturn state police statutes unless they are clearly inconsistent with federal law or enter into fields which have been closed to state action.[20] The question posed here, however, does not fit neatly within the ambit of this reasoning. The situation presented resembles more closely the conflict involved in the famous case of *McCulloch v. Maryland*[21] wherein Maryland was using its admittedly valid taxing authority to frustrate and destroy a valid exercise of federal power. There, as here, the conflict did not come so much from an inconsistency of state and federal law as it did from the practical application and effect of the state statute on the federal law. It would seem that the exercise of any state power, be it taxing power or police power, for the purpose of rendering a valid federal law ineffective would contravene the supremacy clause.[22]

A third question raised by the *Murphy* case is one that may

---

15. See note 4 *supra*.
16. U.S. CONST. art. VI, § 2.
17. The exclusionary rule would not prohibit a subsequent federal prosecution, see Murphy v. Waterfront Comm'n of N.Y. Harbor, *supra* note 10, at 1610 (White J., concurring), but when both the testimony and its fruits are excluded from a federal prosecution it places an almost impossible burden upon the federal government to establish that its investigation was not influenced by either. See United States v. Coplon, 185 F.2d 629, (2d Cir. 1950), where it was held that once an illegal wiretap was proved, the burden rested on the government to establish that its evidence in no way arose therefrom.
18. 78 Stat. 241.
19. Patterson v. Kentucky, 97 U.S. 501 (1878).
20. Reid v. Colorado, 187 U.S. 137 (1902); Patterson v. Kentucky, *supra* note 19.
21. 17 U.S. (4 Wheat) 315 (1819). *Cf.*, Bibb v. Navajo Freight Lines, 359 U.S. 520 (1959).
22. "[T]he states have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by congress to carry into execution the powers vested in the general government." McCulloch v. Maryland, *supra* note 21, at 435. *Cf.*, Terral v. Burke Constr. Co., 257 U.S. 529 (1922); Tennessee v. Davis, 100 U.S. 257 (1879); *accord, In re* Neagle, 135 U.S. 1 (1890).

prove to be very significant in the field of criminal law. The question is: If it is a violation of due process to deny a witness the privilege against self-incrimination, to force him to testify if his testimony can be used by another jurisdiction, and to allow another jurisdiction to use the testimony once it has been forced under an immunity statute, is it not equally a violation of due process to allow one jurisdiction to prosecute a defendant for a criminal act for which he has already been acquitted or convicted in another jurisdiction? The reason given for allowing both state and federal governments to prosecute the same defendant for the same criminal act is that the governments are separate sovereignties, and therefore there has been a crime committed against both.[23] It should be patently obvious that this is a mere fiction derived from a legal concept that has ceased to be significant in American constitutional law.[24] If the Court has abolished the dual sovereignty fiction in the area of self-incrimination should it not also abolish it in the area of double jeopardy? The dual crime argument might have logical force in the case of a continuing crime between two states, but it has, by the *Murphy* case, lost what strength it once had with reference to acts which violate both state and federal law.[25]

The *Murphy* case represents the Court's increased willingness to expand on the concept of due process of law. Considering this tendency it is not highly speculative to predict that in the near future the law will see many new developments in this area. Because of the many problems arising with each new opinion, one cannot help but ask if perhaps the Court is not moving too fast. This is not to say that the decisions themselves have been wrong but it is to suggest that society needs time to adjust to new constitutional standards just as it needs time to adjust to new legislation. In the last analysis the results of both are the same.

LYNN E. CROOKS

CONSTITUTIONAL LAW—DUE PROCESS—JURY DETERMINATION OF VOLUNTARINESS OF CONFESSION—Convicted of first degree murder, the defendant petitioned for habeas corpus in federal court asserting that his conviction in New York was invalid as founded upon a confession improperly determined voluntary. During trial

23. United States v. Lanza, 260 U.S. 377 (1922); *accord*, Bartkus v. Illinois, 359 U.S. 121 (1959); Abbate v. United States, 359 U.S. 187 (1959).

24. The concept of federalism espoused by Mr. Justice Harlan in his dissenting opinions in Roth v. United States, 354 U.S. 476, 496 (1957); Mapp v. Ohio, 367 U.S. 643, 672 (1961); and more recently in Malloy v. Hogan, 84 Sup. Ct. 1489, 1497 (1964), has been consistently rejected by the Court.

25. See Bartkus v. Illinois, *supra* note 23, at 150 (Black J., dissenting); Abbate v. United States, *supra* note 23, at 201 (Black J., dissenting).