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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

LUPE E. MARTINEZ, et al.,

Plaintiffs,

v.

CITY OF FRESNO, et al.,

Defendants.

1:06-CV-00233 OWW GSA

[Consolidated with
1:06-cv-01851]

MEMORANDUM DECISION RE:
MARCUS TAFOYA'S MOTION
TO SET ASIDE HIS FIFTH
AMENDMENT ELECTION

CLAUDIA RENDON, et al.,

Plaintiffs,

v.

CITY OF FRESNO, et al.,

Defendants.

I. INTRODUCTION

Defendant Marcus Tafoya moves to set aside his November 16, 2009 assertion of his rights under the Fifth Amendment, previously electing not to testify in this action while a criminal case was pending against him. Plaintiffs oppose the motion.

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II. BACKGROUND

Plaintiffs Lupe Martinez, Ralph Rendon, Claudia Rendon, George Rendon, Priscilla Rendon, Lawrence Rendon, Ricardo Rendon, John Nunez, Jr., Alfred Hernandez, and Vivian Centeno bring this civil rights action against the City of Fresno, Chief Jerry Dyer, Sergeant Michael Manfredi, and Officers Belinda Anaya and Marcus Tafoya. Plaintiffs allege that on March 5, 2005, Defendant Officers unlawfully entered Ms. Rendon's residence, exercised excessive force during the encounter, and illegally seized and/or arrested them. Plaintiffs have brought claims against the Defendant Officers for violations of their federal and state constitutional rights, malicious prosecution, and false imprisonment. Plaintiffs have also brought claims against the City of Fresno for inadequate training and supervision.

On March 31, 2009, the parties appeared before the Court to discuss the difficulties raised by Defendant Tafoya's assertion of his rights under the Fifth Amendment. Defendant Tafoya, who was previously indicted on nine counts of criminal conduct,¹ was ordered to make his Fifth Amendment election by November 15, 2009. On November 15, 2009, Defendant Tafoya filed an "Election Regarding Testimony," asserting his Fifth Amendment right not to testify in this case.

Defendant Tafoya's criminal trial, People of the State of

¹ On December 7, 2007, a Fresno County grand jury indicted Marcus Tafoya on nine counts of criminal conduct based, in large part, on his conduct at 4519 E. Mono Lane, Fresno, California, on March 5, 2005.

1 California v. Marcus Tafoya, Case No. 07900100, commenced in
2 November 2009. After eight weeks of trial, on January 25, 2010,
3 Defendant Tafoya was acquitted on all counts related to the
4 incident forming the basis of this litigation.²

5 On January 29, 2010, the parties appeared before the Court to
6 discuss the impact, if any, of the acquittals on the issues raised
7 in this case.³ During the hearing, Defendant Tafoya announced his
8 intent to set aside his previous assertion of his Fifth Amendment
9 rights. The Court permitted the parties to brief the issue,
10 ordering Defendant Tafoya to file his motion by February 5, 2010.

11 On February 5, 2010, Defendant Marcus Tafoya moved to set
12 aside his November 16, 2009 assertion of his Fifth Amendment
13 rights. Plaintiffs opposed the motion on February 9, 2010.⁴

14 III. DISCUSSION

15 Defendant Tafoya argues that he should be relieved of his
16 prior election not to testify for two reasons. First, Tafoya
17 argues that he was not "gaming" the system as he was criminally
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² The one remaining count on which the jury was unable to
22 reach a verdict has been dismissed.

23 ³ The Court had previously invited the parties' input
24 concerning the impact, if any, of the acquittals on the issues
25 raised in this case. All parties submitted their comments prior to
the January 29, 2010 hearing.

26 ⁴ Plaintiffs Ralph Rendon, Claudia Rendon, Lawrence Rendon,
27 Ricardo Rendon, John Nunez, Jr., Alfred Hernandez, and Vivian
Centeno filed their opposition on February 9, 2010. (Doc. 474.)
28 Plaintiffs Lupe Martinez, Priscilla Rendon, and George Rendon
joined the opposition on February 19, 2010. (Doc. 476.)

1 indicted prior to asserting his Fifth Amendment rights in this
2 case. Second, any claimed prejudice by the Plaintiffs is
3 outweighed by the harm Tafoya will suffer if he is not allowed to
4 testify as he is personally liable for any potential punitive
5 damages award.

6 Plaintiffs dispute the characterization of Tafoya's
7 gamesmanship, arguing that he received a "tactical advantage" in
8 both cases - criminal and civil - by invoking his right not to
9 testify in this case. According to Plaintiff, Tafoya was able to
10 cross-examine witnesses and "preview" the evidence against him
11 without submitting to a deposition. As to prejudice, Plaintiffs
12 argue that they have expended thousands of hours in discovery and
13 prepared summary judgment motions based on Tafoya's election not to
14 testify. Plaintiffs conclude that "balancing the appropriate
15 factors mandates that Defendant Tafoya not be allowed to withdraw
16 his election."

18 Courts have held that a trial court must "carefully balance"
19 the interests of the party claiming protection against self-
20 incrimination and the adversary's entitlement to equitable
21 treatment. See *Doe ex rel. Rudy-Glanzer v. Glanzer*, 232 F.3d 1258,
22 1265 (9th Cir. 2003) (citing *S.E.C. v. Graystone Nash, Inc.*, 25
23 F.3d 187, 192). "Because the privilege is constitutionally based,
24 the detriment to the party asserting it should be no more than is
25 necessary to prevent unfair and unnecessary prejudice to the other
26 side." *Id.* The tension between one party's Fifth Amendment rights
27 and the other party's right to a fair proceeding is "resolved by
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1 analyzing each instance [...] on a case-by-case basis under the
2 microscope of the circumstances of that particular civil
3 litigation." *Id.*

4 *Evans v. City of Chicago*, 513 F.3d 735 (7th Cir. 2008),
5 provides the closest specific context. There, Plaintiff brought
6 suit against the City of Chicago and several of its police officers
7 alleging that they conspired to falsely convict him of the
8 abduction, rape, and murder of a nine-year old girl. During
9 discovery, the group of allegedly corrupt officers refused to
10 testify, invoking their Fifth Amendment rights, in light of an
11 ongoing investigations into their conduct by both a grand jury and
12 special prosecutor. Prior to trial, the officers moved to withdraw
13 their Fifth Amendment election based on the special prosecutor's
14 report, which concluded that the officers would not face criminal
15 indictment. The trial court granted the motion and barred any
16 reference to the officers' prior invocation of their Fifth
17 Amendment privilege. The jury returned a verdict exonerating the
18 officers and Plaintiff appealed.

20 Affirming the trial judge's ruling to allow the officers to
21 withdraw their privilege claim and testify, rejecting Plaintiff's
22 motion for a new trial, the Seventh Circuit determined that the
23 record indicated a good-faith invocation of the Fifth Amendment:

24 [The trial judge] reasonably could have concluded that
25 the officers were not "gaming" the system but rather
26 were concerned about the special prosecutor's
27 investigation, which was only recently completed when
28 they decided to testify. When asked to explain why
they invoked the Fifth Amendment in this case, three
of the officers indicated that they made the decision

1 upon the advice of their attorneys after the special
2 prosecutor contacted them. [One officer], who did not
3 consult with counsel, said that he thought that the
4 special prosecutor's case was "broad" and did not know
5 if he was a target. Officer McKenna also stated that
6 he had been told by one of Plaintiff's trial counsel
7 that if he answered questions about the []
8 investigation, he would waive his right to assert the
9 privilege in response to questions about other
10 investigations. These reasons indicate a good-faith
11 invocation of the Fifth Amendment.

12 *Id.* at 743.

13 Here, like *Evans*, the record proves that Defendant Tafoya made
14 a good-faith and necessary election of his Fifth Amendment
15 privilege. At the time he elected not to testify, Tafoya faced
16 nine criminal counts and, if convicted, a considerable prison
17 sentence.⁵ This was not a hypothetical grand jury investigation
18 with an unknown target or scope. Although he was later acquitted,
19 the tension created by Tafoya's looming criminal trial and whether
20 he should invoke his Fifth Amendment rights in this case was
21 immediate and tangible. Compare *United States v. Allmon*, --- F.3d
22 ----, 2010 WL 445728 (8th Cir. Feb. 10, 2010) (discussing the
23 circumstances underlying a valid assertion of an individual's Fifth
24 Amendment rights) and *F.T.C. v. Kitco of Nev., Inc.*, 612 F.Supp.
25 1282 (D. Minn. 1985) (trial judge admitted the testimony of

26 ⁵ Plaintiffs filed this case in March 2006 and, in 2007,
27 Defendant Tafoya was indicted on nine counts of criminal conduct,
28 several of which were related to the incident forming the basis for
this litigation. During discovery in this case, Tafoya refused to
answer interrogatories or giving a deposition based on his ongoing
criminal case. On November 16, 2009, Tafoya invoked his Fifth
Amendment rights not to testify at trial, "in light of the
presently pending criminal matter [....]"

1 Defendant even though he had previously invoked the Fifth Amendment
2 during discovery) with *Gutierrez-Rodriguez v. Cartagena*, 882 F.2d
3 553 (1st Cir. 1989) (“[a] defendant may not use the fifth amendment
4 to shield herself from the opposition's inquiries during discovery
5 only to impale her accusers with surprise testimony at trial.”).
6 Defendant Tafoya has not “gamed the system” when he invoked his
7 right not to testify. His case is more persuasive than the
8 officers in *Evans*. 513 F.3d at 738 (“The officers [asserted their
9 Fifth Amendment rights] in light of an *ongoing investigation* by a
10 special prosecutor into certain abuses committed by police
11 officers.”) (emphasis added).

12
13 There is also the issue of prejudice. Plaintiffs suggest that
14 prejudice exists here because Tafoya was “able to preview all of
15 Plaintiff’s discovery against him, without having to submit to
16 examination [a deposition].” In the context of this case, this
17 contention is meritless. Tafoya’s election and withdrawal are
18 totally distinguishable from *Nationwide Life Insurance Company v.*
19 *Richards*, 541 F.3d 903 (9th Cir. 2008), where the Ninth Circuit
20 discussed the atypical situation of an “eve of trial” withdrawal
21 where the adverse party “conducted discovery and prepared the case
22 without the benefit of knowing the content of the privileged
23 matter.” In this case, unlike *Nationwide* and *Evans*, there is
24 substantial sworn testimony from Defendant Tafoya concerning the
25 March 5, 2005 incident, to all of which Plaintiffs have had access.
26 The Court discussed in detail the existence of such testimony - and
27 its possible effect on a motion to withdrawal - during the January
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1 29, 2010 hearing:

2 Now, in valuing the plaintiffs' rights and determining
3 the potential inconvenience or prejudice to the
4 plaintiffs, we have to be able to know and we have to
5 define and quantify and weigh and balance what is
6 known, what is not known about what the prospective
7 witness who's seeking to waive will say. And so that
8 the plaintiff can be fully and fairly prepared for
9 trial if there is a waiver.

10 Now, in this case, which makes it completely
11 distinguishable from these other cases, Evans and the
12 rest of them. My understanding is that initially
13 officer Tafoya testified at a preliminary hearing [in
14 a criminal case] involving some of the plaintiffs and
15 was subject to cross-examination. At least the
16 opportunity was there when that case was being
17 criminally prosecuted. I know that some of the
18 Rendons, and I think Rodriguez was in that case. But
19 I'm not certain about Rodriguez.

20 In Rodriguez' case, Tafoya's deposition was taken
21 before the criminal charges were filed. So we have,
22 one, the testimony at the prelim. Two, his deposition
23 in the civil case in the Rodriguez case. And now,
24 there is a transcript of - I don't know how many days
25 he testified in his criminal case, but there's a
26 complete transcript of at least, I'm going to assume,
27 eight of the plaintiffs, the interactions and the
28 circumstances of those interactions that were the
subject of the criminal charges. And so, quite
frankly, given the totality of that evidence, I would
say even before taking Tafoya's deposition in this
case, if it is to be taken, the plaintiffs are going
to be better prepared to deal with Tafoya than
probably any plaintiffs in any civil rights case at
least that I've ever tried or seen. Because there is
more information, not to mention what happened in the
administrative proceedings concerning officer Tafoya's
employment, some of which is protected by the peace
officer's bill of rights, some of which is privileged,
but some of which concerns his actual performance in
the field under conditions and for which the test
normally is does that conduct comport with prevailing
police practices and protocols under POST and other
relevant standards of police conduct, including the
rules of the Fresno police department.

29 (Reporter's Transcript ("RT"), January 29, 2009, 32:2-33:15.)

1 Recognizing the importance of available prior testimony to the
2 prejudice calculus, Defendant's motion delineates five instances of
3 such testimony and/or statements made by Tafoya:

- 4 1. Tafoya's June 2, 2006 deposition testimony in a
5 related civil case;
- 6 2. Tafoya's testimony at the March 10, 2006
7 preliminary hearing concerning the criminal
8 prosecution of some of the Plaintiffs in this
9 action;
- 10 3. Tafoya's statements during the City of Fresno's
11 Internal Affairs Investigation (March 2005);
- 12 4. Tafoya's Probable Cause Declaration and related
13 City of Fresno P.D.'s internal memoranda; and
- 14 5. Tafoya's testimony in his recent criminal trial,
15 which concluded on January 25, 2010.

16 (Doc. 472, Kazalbasch Dec. ¶'s 11-15.)

17 Plaintiffs' prejudice arguments are resolved by the existence
18 of Tafoya's prior testimony/statements concerning the May 5, 2005
19 incident. There is no "surprise" testimony in this case.
20 Plaintiffs will have full opportunity to take Tafoya's deposition
21 in this case armed with five prior testimonial records of Tafoya's
22 description of the circumstances of his interactions with
23 Plaintiffs under higher burdens of proof in the criminal case.
24 Also weighing in Tafoya's favor is that he faces considerable
25 personal liability on Plaintiffs' liability and punitive damages
26 claims. The City of Fresno is not liable for and need not
27 indemnify any punitive damages award against Tafoya. See Cal.
28 Gov't. Code § 825(a).

If this motion is granted, discovery will be reopened only for

1 Tafoya's deposition and to answer interrogatories, and Defendants
2 have agreed to make Tafoya available for deposition within ten days
3 of an order setting aside his election. The reopening of discovery
4 will cure any prejudice to Plaintiffs. See *Evans*, 513 F.3d at 745
5 ("[The trial judge] reasonably could have determined that ordering
6 additional discovery cured any prejudice [...] [t]he trial had not
7 yet begun when the officers waived the privilege, which gave them
8 time to provide amended answers to all discovery and appear for
9 redepositions.").

10 Plaintiffs advance an additional argument, namely that they
11 have expended thousands of hours in discovery and prepared motions
12 based on Tafoya's election not to testify. Plaintiffs maintain
13 that Defendant Tafoya should be required to pay for all the
14 attorneys' fees and costs incurred as a result of his "recent
15 change of heart." This is an unfair characterization. Tafoya
16 effectively did not have a choice to testify. Plaintiffs also did
17 not disclose whether they are being paid on an hourly basis or on
18 contingency. If they prevail, they will undoubtedly seek
19 attorneys' fees. This request is DENIED without PREJUDICE.
20 Although Tafoya was criminally indicted, he was presumed innocent -
21 an acquittal remained a possibility throughout his criminal case.
22 Moreover, an order requiring Tafoya to pay for all future
23 attorneys' fees and costs - the extent of which is unknown - could
24 lead to abuse and require constant judicial oversight. Plaintiffs
25 also do not cite any legal authority to support their position.
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1 IV. CONCLUSION

2 After carefully considering the parties' positions, Defendant
3 Tafoya's motion is GRANTED and his prior election of his Fifth
4 Amendment privilege is set aside. Here, Plaintiffs have not been
5 unfairly surprised or prejudiced by Tafoya's assertion of privilege
6 and subsequent decision to testify at trial. Defendant Tafoya has
7 not "gamed the system" when he invoked his right not to testify and
8 Plaintiffs have gained substantial prior testimony from Tafoya
9 relating to his account of the March 5, 2005 incident to anticipate
10 his testimony in this civil case.

11 Tafoya faces considerable personal liability on Plaintiffs'
12 punitive and compensatory damages claims. The additional discovery
13 as to Tafoya will cure any prejudice arising from setting aside
14 Tafoya's November 19, 2009 election. There is a preference for
15 trial on the merits. Each party is entitled to his or her day in
16 court. The motion is GRANTED.

17 Defendant Tafoya shall submit a form of order consistent with,
18 and within five (5) days following electronic service of, this
19 memorandum decision.
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22 IT IS SO ORDERED.

23 **Dated: March 2, 2010**

/s/ Oliver W. Wanger

24 UNITED STATES DISTRICT JUDGE
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