# STATE OF MICHIGAN

# COURT OF APPEALS

In the Matter of NAKIA MANEA SANTEE, DREAMA ARIE ROBINSON, and JAYLEE DESHAWN ALLEN, Minors.

DEPARTMENT OF HUMAN SERVICES,

Petitioner-Appellee,

v

LEROY NASH,

Respondent-Appellant,

and

ERIC CLIFTON ROBINSON and JAMI LEE SANTEE,

Respondents.

UNPUBLISHED
May 7, 2009

No. 288789
Genesee Circuit Court
Family Division
LC No. 06-120697-NA

Before: Borrello, P.J., and Murphy and M.J. Kelly, JJ.

PER CURIAM.

Respondent Leroy Nash appeals as of right from a circuit court order terminating his parental rights to Jaylee Allen pursuant to MCL 712A.19b(3)(c)(i), (g), (j), and (n)(ii). For the reasons set forth in this opinion, we affirm.

This appeal arises from a finding by the trial court that terminated respondent Leroy Nash's parental rights. On appeal, respondent does not challenge the underlying basis on which the trial court terminated his parental rights, but rather raises the claim on appeal that the trial court erred in compelling him to testify in violation of his Fifth Amendment right against self-incrimination.

When respondent was first called to testify, he objected on the basis that he had not been subpoenaed as a witness. The trial court determined that respondent was "stuck" and accordingly ordered him to testify. Respondent did not raise any Fifth Amendment privilege at that time, and raises his Fifth Amendment privilege for the first time on appeal. Due to respondent's failure to object, this issue is not preserved. *Williams v Coleman*, 194 Mich App

606, 620; 488 NW2d 464 (1992). Thus, "review is limited to determining whether a plain error occurred that affected substantial rights." *In re Egbert R Smith Trust*, 274 Mich App 283, 285; 731 NW2d 810 (2007), aff'd 480 Mich 19 (2008).

"The Fifth Amendment and Const 1963, art 1, § 17 provide that no person shall be compelled to be a witness against himself in a criminal trial." *People v Schollaert*, 194 Mich App 158, 164; 486 NW2d 312 (1992). "The privilege against self-incrimination not only permits a person to refuse to testify against himself at a criminal trial in which he is a defendant, but also permits him not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings." *Phillips v Deihm*, 213 Mich App 389, 399-400; 541 NW2d 566 (1995). Any testimony "having even a possible tendency to incriminate is protected against compelled disclosure." *People v Lawton*, 196 Mich App 341, 346; 492 NW2d 810 (1992). The privilege may be invoked even when criminal proceedings have not been instituted or even planned. *People v Guy*, 121 Mich App 592, 609-610; 329 NW2d 435 (1982). *Larrabee v Sachs*, 201 Mich App 107, 110; 506 NW2d 2 (1993).

In *Larrabee v Sachs*, 201 Mich App 107, 110; 506 NW2d 2 (1993), this Court held:

> The protection against compulsory self-incrimination provided by the Fifth and Fourteenth Amendments of the United States Constitution and Const 1963, art. 1, § 17 does not entitle defendant to refuse to give any testimony in a civil action. The privilege against self-incrimination may be invoked only when the testimony sought to be elicited will in fact tend to incriminate the witness. *People v Ferency*, 133 Mich App 526; 351 NW2d 225 (1984).

Unlike a criminal defendant's right to refuse to testify, the privilege against self-incrimination does not entitle a person to refuse to provide testimony in a civil action; rather, a person may invoke the privilege only after a potentially incriminating question has been posed. *Id.* at 612-613. Once the witness invokes the protection of the Fifth Amendment, it is up to the trial court to determine whether any direct answer could implicate the witness and, on that basis, to either compel the witness to answer or sustain his refusal to do so. *People v Joseph*, 384 Mich 24, 29-30; 179 NW2d 383 (1970); *People v Hoffa*, 318 Mich 656, 661-663; 29 NW2d 292 (1947).

In this matter, respondent failed to object to any questions based on his Fifth Amendment privilege. Furthermore, on appeal, defendant has failed to demonstrate how responding to any of the questions posed to him during the hearing would incriminate respondent. Rather, the questions presented to defendant that elicited specific information concerning criminal activity pertained to an offense for which respondent was convicted in 2004 and the time for appeal had long since expired. Thus, application of the general rule that once a criminal defendant has been convicted and sentenced and the sentence has become final, there is no basis for assertion of the privilege, *Mitchell v United States*, 526 US 314, 326; 119 S Ct 1307; 143 L Ed 2d 424 (1999) bars respondent from demonstrating that plain error occurred in this case. Accordingly, we affirm.

Affirmed.

/s/ Stephen L. Borrello
/s/ William B. Murphy
/s/ Michael J. Kelly