STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant,	UNPUBLISHED July 8, 2010
v	No. 290341 Wayne Circuit court
BRANDON HENRY BARBOUR, Defendant-Appellee.	LC No. 08-008374-AR

Before: SHAPIRO, P.J., and JANSEN and DONOFRIO, JJ.

PER CURIAM.

The prosecutor appeals by delayed leave granted from a circuit court order affirming a district court's decision to dismiss without prejudice charges of first-degree premeditated murder, MCL 750.316(1)(a), two counts of assault with intent to commit murder, MCL 750.83, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b, and to deny plaintiff's motion to disqualify defense counsel. We affirm in part, reverse in part, and remand for further proceedings.

I. FACTS

The charges arise from a shooting death in January 2008. Defendant's mother, Lisa Barbour, gave a statement to the police, and also in response to an investigative subpoena, in which she recounted hearing gunshots outside her house, after which defendant appeared and informed her that he had grabbed a gun and began shooting, apparently because he believed he was being threatened by rival gang members.

At defendant's preliminary examination, defendant's attorney explained that he was also Barbour's attorney, and that the latter would be invoking her Fifth Amendment privilege not to offer self-incriminating testimony. When Barbour was sworn in, the prosecutor asked her to name her several children. The district court terminated the questioning, citing Barbour's Fifth Amendment right not to incriminate herself. The prosecutor obtained a continuance in order to explore the possibility of working out an immunity arrangement for Barbour. When the proceedings resumed, the prosecutor argued that there was no need to offer immunity because no testimony sought from Barbour would incriminate her. The prosecutor additionally moved to disqualify defense counsel on the ground that it was improper for counsel to represent both defendant and a prosecution witness in the same cause. The district court reiterated its conclusion that Barbour had legitimately invoked her Fifth Amendment privilege and denied the

motion to disqualify as premature. The prosecutor then asked for a stay of proceedings for the purpose of appealing the court's decision concerning Barbour's testimony and stated that the prosecution was not prepared to proceed without her testimony. The district court denied that motion and granted defendant's motion to dismiss the case, without prejudice.

On appeal to the circuit court, that court affirmed the district court's decisions, finding that the district court's determination that Barbour had validly exercised her Fifth Amendment privilege did not constitute a perversity of will, defiance of judgment, or exercise of passion or bias, and that because Barbour was not available as a witness, the prosecutor's request to disqualify defense counsel from representing defendant was premature. This Court subsequently granted the prosecutor's delayed application for leave to appeal.

II. SELF-INCRIMINATION

The Fifth Amendment of the United States Constitution provides that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself . . . ." The Michigan Constitution mirrors that guarantee. Const 1963, art 1, § 17.[1] The privilege against self-incrimination may be asserted "in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory; and it protects against disclosures that the witness reasonably believes could be used in a criminal prosecution or could lead to other evidence that could be so used." *Kastigar v United States*, 406 US 441, 444-445; 92 S Ct 1653; 32 L Ed 2d 212 (1972). Although the right against self-incrimination belongs to the witness, "the witness is not the sole judge of whether certain testimony is or may be incriminating." *People v Dyer*, 425 Mich 572, 578; 390 NW2d 645 (1986). It is thus the duty of the judge to determine whether a witness can legitimately assert the privilege. *People v Ferency*, 133 Mich App 526, 534; 351 NW2d 225 (1984).

The privilege protects against exposure to genuine prosecutions, not remote or speculative possibilities. "It must appear to the court, from the character of the question, and the other facts adduced in the case, that there is some tangible and substantial probability that the answer of the witness may help to convict him of a crime." *In re Vickers*, 371 Mich 114, 119; 123 NW2d 253 (1963) (internal quotations and citations omitted). A judge "must be certain that a witness's answer to a question 'cannot possibly' have an incriminating tendency before ordering the witness to respond." *Ferency*, 133 Mich App at 534, quoting *Malloy v Hogan*, 378 US 1, 12; 84 S Ct 1489; 12 L Ed 2d 653 (1964). A witness may not invoke the Fifth Amendment "where there is no reasonable basis for a witness to fear incrimination from questions which are merely preliminary." *Dyer*, 425 Mich at 578.

In this case, plaintiff framed this issue not to assert that there was no possibility that Barbour had Fifth Amendment rights in this situation, but to assert that the procedure employed to determine the applicability of the privilege in this instance was faulty. We agree that the procedure employed below was flawed and that remand is appropriate. The district court

[1] The state constitutional privilege against self-incrimination has been held to be no broader than the federal right. See *People v Safiedine*, 152 Mich App 208, 212; 394 NW2d 22 (1986).

recognized the existence of a Fifth Amendment privilege on the basis of (1) defense counsel's representations, apparently reflecting counsel's private discussions with Barbour, (2) the concern that Barbour might be charged in connection with what she did for defendant immediately after the incident engendering this case, and (3) the prosecutor's refusal to guarantee immunity in the matter for that witness. The district court terminated additional questioning when the prosecutor asked Barbour to name her several children. The circuit court in turn opined that further questioning would have been appropriate, but that the district court did not abuse its discretion in the matter.

At issue is the proper procedure for identifying a Fifth Amendment right not to testify on the part of a witness who does not stand accused. In *People v Guy*, 121 Mich App 592, 612-613; 329 NW2d 435 (1982), this Court quoted with approval from McCormick, Evidence (2d ed), § 136, p 289, as follows:

> "The privilege of one not an accused is a privilege to decline to respond to inquiries, not a prohibition against inquiries designed to elicit responses incriminating in nature. Because of this difference in the nature of the privilege of one not an accused, the manner of invoking it correspondingly differs from the manner of invoking the privilege of an accused. Thus by universal holding, one not an accused must submit to inquiry (including being sworn, if the inquiry is one conducted under oath) and may invoke the privilege only after the potentially incriminating question has been put. Moreover, invoking the privilege does not end the inquiry and the subject may be required to invoke it as to any or all of an extended line of questions."

Thereafter, in *Dyer*, 425 Mich at 579, our Supreme Court approved of a procedure for determining the existence of a self-incrimination hazard whereby the trial court "appointed counsel for [the witness] and held an evidentiary hearing outside of the jury's presence in order to establish [the witness's] intention to 'plead the Fifth' on the record."

What took place in this case hearkens to *Dyer*, except that the witness had retained, instead of appointed, counsel and the issue was developed in the course of defendant's preliminary examination, instead of a separate evidentiary hearing. Nevertheless, the development of the evidentiary basis for the district court's determination was minimal, consisting of counsel's expressed concern that the witness could be charged as an accessory and the prosecutor's attempt to elicit from that witness the names of her children. There was certainly no extended line of questions such as *Guy* envisioned. Indeed, the questioning went no further than asking Barbour to name her children, an honest response to which would have meant including defendant, her son. However, the existence of a mother-son relationship between Barbour and defendant is a fact incriminating to neither. Instead, that is the sort of "merely preliminary" questioning from which Barbour had "no reasonable basis . . . to fear incrimination . . . ." *Dyer*, 425 Mich at 578. As it stands, the record is bereft of any question put to Barbour any answer to which might have aided in any criminal prosecution of her.

It seems significant that the prosecutor apparently could not be persuaded to underscore the assertion that none of Barbour's testimony would have exposed her to criminal prosecution by offering her immunity in the matter. However, the prosecutor insisted that no question would be posed that presented any such hazard to that witness. We hold that the district court erred in

presuming such a hazard, without itself questioning Barbour, or allowing the prosecutor to do so, to where a question inviting a possibly incriminating answer came to light.

The circuit court apparently agreed, given its indications that it would have allowed additional questioning, but nonetheless determined that the district court's procedure did not amount to "a perversity, defiance of judgment, or excess of passion or bias." The circuit court thus revealed that it was reviewing the district court's decision for an abuse of discretion under the standard defined in *Spalding v Spalding*, 355 Mich 382, 384-385; 94 NW2d 810 (1959), and applied in many subsequent cases, whereby the inquiry is whether the result is "so palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will, not the exercise of judgment but defiance thereof, not the exercise of reason but rather of passion or bias." However, our Supreme Court has more recently formulated a less deferential standard for what constitutes an abuse of discretion, holding that "[a]n abuse of discretion occurs . . . when the trial court chooses an outcome falling outside [the] principled range of outcomes." *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). This formulation has since been applied consistently in various criminal matters. See *People v Plumaj*, 284 Mich App 645, 648; 773 NW2d 763 (2009), *People v Horn*, 279 Mich App 31, 35 n 1; 755 NW2d 212 (2008), *People v Unger*, 278 Mich App 210, 259; 749 NW2d 272 (2008), *People v Kahley*, 277 Mich App 182, 184; 744 NW2d 194 (2007), and *People v Carnicom*, 272 Mich App 614, 616-617; 727 NW2d 399 (2006).

In this case, the district court's overly generous identification of a Fifth Amendment hazard, on the basis of counsel's representations and minimal benign questioning of the witness, may not have constituted a perversity of will or a defiance of judgment, but because the district court failed to follow important guidance provided by *Dyer*, 425 Mich at 578-579, and *Guy*, 121 Mich App at 612-613, its decision is outside the principled range of outcomes.

For these reasons, we hold that the district court erred in its handling of the Fifth Amendment question, and that the circuit court in turn erroneously affirmed through its use of the overly deferential, now outdated, standard for identifying an abuse of discretion.

Accordingly, we reverse the district court's determination that Barbour had invoked a valid Fifth Amendment privilege, and the circuit court's affirmance of it, and remand this case to the district court for further proceedings. We express no opinion concerning whether Barbour can show a valid self-incrimination hazard upon inquiry resulting from procedures approved of in *Dyer*, 425 Mich at 578-579, or *Guy*, 121 Mich App at 612-613.

III. MOTION TO DISQUALIFY DEFENSE COUNSEL

This Court reviews a trial court's decision affecting a defendant's right to the attorney of his choice for an abuse of discretion. *People v Akins*, 259 Mich App 545, 556; 675 NW2d 863 (2003).

The Sixth Amendment of the United States Constitution guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right to . . . the Assistance of Counsel for his defence."[2] The United States Supreme Court has held that "an element of this right is the right of a defendant who does not require appointed counsel to choose who will represent him." *United States v Gonzalez-Lopez*, 548 US 140, 144; 126 S Ct 2557; 165 L Ed 2d 409 (2006). This right is of such fundamental importance that erroneous denial of it is a structural error requiring reversal. *Id.* at 146-150.

However, as with all rights, this one is not absolute. *Id.* at 151-152. Among the limitations inhering in this right is that a defendant may not "demand that a court honor his waiver of conflict-free representation," because a court has a duty to ensure that ethical standards are observed and the appearance of fairness preserved. *Id.* at 152. However, "'[a] voluntary waiver of this constitutional right [of conflict-free representation], knowingly and intelligently made, must be honored by the court in the absence of compelling circumstances.'" *People v Crawford*, 147 Mich App 244, 250; 383 NW2d 172 (1985), quoting *People v Reese*, 699 F2d 803, 805 (CA 6, 1983).

MRPC 1.7(b) provides:

> A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:
>
> (1) the lawyer reasonably believes the representation will not be adversely affected; and
>
> (2) the client consents after consultation.

In this case, defense counsel reported that he had been the family attorney for witness Barbour's family for some time, and that defendant and Barbour had both waived any conflict in this matter.

The primary reason why an attorney cannot properly represent both a criminal defendant and a witness against that defendant is that cross-examination of that client-witness on behalf of the client-accused would tempt the attorney to use information gleaned from the attorney-client relationship with that witness. See *United States v Provenzano*, 620 F2d 985, 1004-1005 (CA 3, 1980).

Here, however, as things stood below, defense counsel had no need to cross-examine Barbour, because she had successfully invoked the Fifth Amendment, and therefore was not in a position to offer substantive testimony. Defense counsel acknowledged that an irreconcilable conflict would arise if Barbour were to become a prosecution witness, or herself a defendant in the matter, and agreed that under such circumstances he would have to withdraw. Accordingly,

[2] See also Const 1963, art 1, § 20.

the district court was, at that time, faced with no compelling reason to override defendant's and Barbour's choice of counsel. See *Crawford*, 147 Mich at 250; *Reese*, 699 F2d at 805.

Accordingly, we conclude that the district court correctly regarded the motion to disqualify defense counsel as "premature," and the circuit court correctly recognized that, because Barbour never testified, no conflict arose. Should proceedings on remand result in Barbour's testifying as a prosecution witness, or becoming a defendant herself, the problem of a conflict would certainly arise should Barbour and defendant again be represented by the same attorney. The court below would then have to consider anew any motion to disqualify defense counsel.

Affirmed in part, reversed in part, and remanded. We do not retain jurisdiction.

/s/ Douglas B. Shapiro
/s/ Kathleen Jansen
/s/ Pat M. Donofrio