

FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D20-1164

FRANCIS RAYMOND PALAZZI SR.,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

Petition for Writ of Certiorari—Original Jurisdiction.

November 30, 2020

ROWE, J.

Francis Raymond Palazzi Sr. seeks certiorari review of an order denying his motion to dismiss the first-degree murder indictment brought against him. During the murder investigation, the State subpoenaed Palazzi to provide testimony about the murder. Palazzi claims that the trial court departed from the essential requirements of the law by not dismissing the information because his compelled testimony entitles him to immunity from prosecution. He argues that the State's evidence against him derived from his compelled testimony. And even if it derived from independent sources, he is absolutely immune from prosecution based on representations made to him by the prosecution. We disagree. Palazzi's compelled testimony entitled him only to use and derivative use immunity, not absolute or

equitable immunity from prosecution. And because the trial court found that the evidence against Palazzi did not derive from his compelled testimony, it did not err when it denied the motion to dismiss the information. Because Palazzi failed to show irreparable harm or that the trial court departed from the essential requirements of the law, we deny his petition for certiorari relief.

Facts

In 1994, Jamal McGowan was shot and killed outside his home. Palazzi was the main suspect in the murder, but investigators did not obtain enough evidence to bring charges against him. In 1996, investigators discovered evidence directly linking Palazzi to the murder—the firearm used to kill McGowan. An associate of Palazzi’s son, Royce Waters, confessed that the son asked Waters to help dispose of the murder weapon.

Around the same time that investigators linked Palazzi to the murder weapon, they learned that Palazzi made several statements about the McGowan murder to third parties. An informant reported that Palazzi admitted that he committed the murder and asked his son to dispose of the firearm. Inmates at a federal prison where Palazzi was incarcerated on unrelated federal charges attested that Palazzi implicated his son in the murder. But the investigation stalled while Palazzi was in federal custody.

In 2015, the cold case unit reopened the investigation into McGowan’s murder. Investigators reconsidered the evidence previously collected against Palazzi. After confirming previous witness statements, the police arranged controlled meetings between Palazzi and Waters, the person who hid the murder weapon. Palazzi searched Waters for a wire, referred to McGowan’s death as the perfect murder, told Waters to not speak to law enforcement, and gave Waters hush money during these meetings.

The next step in the investigation was obtaining a subpoena to compel Palazzi to testify about his involvement in McGowan’s murder. Palazzi conferred with his counsel before answering any questions or making any statements. Counsel explained that the

State could not use Palazzi's testimony against him in any criminal investigation or proceeding. After conferring with his client, counsel told the officer that he believed that Palazzi would take responsibility for the murder. With this knowledge, they proceeded with the subpoena and Palazzi admitted that he shot McGowan.

The investigation continued after Palazzi gave his statement, and the State developed other evidence implicating Palazzi in McGowan's murder. In 2018, the State indicted Palazzi for first-degree murder.

Palazzi moved to dismiss the indictment claiming that the investigator and the assistant state attorney promised him that he would not get in trouble as long as he told the truth. He asserted that their promises granted him equitable immunity from prosecution. In the alternative, Palazzi argued that the trial court needed to hold a hearing under *Kastigar v. United States*, 406 U.S. 441 (1972),¹ because he was absolutely immune from prosecution. And even if he were only entitled to derivative use immunity, Palazzi argued that the evidence supporting the indictment derived from his immunized testimony. The trial court granted the request for a hearing.

When the hearing began, the State clarified that it would not seek to use Palazzi's compelled testimony against him. And the State conceded that it had the burden to prove that the indictment was supported by evidence independent of Palazzi's compelled testimony. To meet that burden, the State called Deputy Lance Yaeger. Yaeger explained in detail how the investigation proceeded before and after the police obtained Palazzi's compelled testimony.

¹ In *Kastigar*, the United States Supreme Court recognized that use and derivative use immunity can compel testimony over a claim of privilege. See 406 U.S. 441 at 453. But when faced with an immunity claim, the government has the burden to show that the evidence it proposes to use against the defendant is wholly independent of the compelled testimony. See *id.* at 460–63.

At the end of the hearing, the trial court denied Palazzi's motion to dismiss the indictment. The court found that *Kastigar* did not apply to this case because the witnesses who provided testimony against Palazzi were already known to the police when Palazzi gave his compelled testimony. The court observed that the State "had an extremely good case to charge Mr. Palazzi before they ever went to talk to him." The court also rejected Palazzi's assertion that the statements made by law enforcement and the prosecutor granted him transactional immunity. Instead, it concluded that Palazzi was entitled to only use and derivative use immunity. Palazzi timely petitioned for a writ of certiorari to review the trial court's order denying the motion to dismiss.

Standard of Review

To obtain certiorari relief, Palazzi had to show: "(1) a departure from the essential requirements of the law, (2) resulting in material injury for the remainder of the case (3) that cannot be corrected on postjudgment appeal." *Williams v. Oken*, 62 So. 3d 1129, 1132 (Fla. 2011) (quoting *Reeves v. Fleetwood Homes of Fla., Inc.*, 889 So. 2d 812, 822 (Fla. 2004)). "The latter two elements—which are often collectively referred to as 'irreparable harm'—are jurisdictional and must be considered first." *Fla. Fish & Wildlife Conservation Comm'n v. Jeffrey*, 178 So. 3d 460, 464 (Fla. 1st DCA 2015).

Analysis

Palazzi advances two reasons why this Court should grant his certiorari petition and quash the trial court's order denying his motion to dismiss the indictment. First, he argues that he was immune from prosecution and that the indictment should have been dismissed because it was not supported by evidence independent of his compelled testimony. Second, he argues that even though Florida law no longer provides for absolute or transactional immunity, representations made by the prosecution entitled him to equitable immunity. Both arguments fail.

First, Palazzi argues that the trial court departed from the essential requirements of law when it denied his motion to dismiss because the indictment was not supported by evidence

independent of his compelled testimony. But Palazzi fails to meet the jurisdictional requirement of showing that any material injury he may suffer could not be corrected on direct appeal. *See Magbanua v. State*, 281 So. 3d 523, 527 (Fla 1st DCA 2019).

Certiorari is generally not available to review an order denying a motion to dismiss because the petitioner has a remedy available through direct appeal of the final judgment. *See Fieselman v. State*, 566 So. 2d 768, 770 (Fla. 1990). An exception to the general rule exists when a statute confers absolute immunity on a defendant. *See, e.g., Jefferson v. State*, 264 So. 3d 1019, 1023 (Fla. 2d DCA 2018) (immunity from suit under the Stand-Your-Ground statute); *Cedars Healthcare Grp., Ltd. v. Mehta*, 16 So. 3d 914, 917 (Fla. 3d DCA 2009) (immunity from suit under section 395.0193(5), Florida Statutes).

But Palazzi is not absolutely immune from prosecution. This is because the immunity statute here, section 914.04, Florida Statutes (2016), gave the prosecutor “no authority to extend [absolute or transactional] immunity.”² *State v. Williams*, 487 So. 2d 1092, 1094 (Fla. 1st DCA 1986). Although the statute once provided for both use/derivative use immunity and transactional immunity, the statute no longer allows a prosecutor to grant transactional immunity. *See McKay v. Great Am. Ins. Co.*, 876 So. 2d 666, 670 (Fla. 4th DCA 2004). And so, the only immunity the prosecutor could offer Palazzi for his compelled testimony under section 914.04 was use and derivative use immunity. *See DeBock v. State*, 512 So. 2d 164, 167 (Fla. 1987); *State v. Mitrani*, 19 So. 3d 1065, 1067 (Fla. 5th DCA 2009).

² A witness granted transactional immunity may have absolute immunity from prosecution for the matter about which the testimony was elicited, but use immunity is more limited and prevents only the compelled testimony from the witness from being used against the witness in a criminal prosecution. *See State v. Williams*, 487 So. 2d 1092, 1094 (Fla. 1st DCA 1986).

Palazzi's claim that the prosecution may not proceed fails because use and derivative use immunity do not bar future prosecution against a defendant. Instead, this type of immunity prevents "the government from using evidence derived from the testimony, unless a source for the evidence independent of the compelled testimony can be shown." *See McKay*, 876 So. 2d at 670; *see also Zile v. State*, 710 So. 2d 729, 732 (Fla. 4th DCA 1998) (explaining that use immunity prevents the State from using the compelled testimony against the witness in any criminal prosecution). At the evidentiary hearing on Palazzi's motion to dismiss the indictment, the trial court considered the evidence offered by the prosecution. The court found that the State met its burden to overcome Palazzi's immunity claim by showing that the evidence developed against him derived from sources independent of his compelled testimony. This finding by the trial court will not be disturbed "unless clearly erroneous." *See Abbott v. State*, 438 So. 2d 1025, 1026 (Fla. 1st DCA 1983). The trial court's finding that the State's evidence supporting the indictment against Palazzi derived from independent sources is not clearly erroneous, and so the trial court did not err when it denied Palazzi's motion to dismiss.

Even if it is later learned that the State's evidence against Palazzi was drawn from his compelled testimony, certiorari is not available to review the trial court's order because Palazzi has an adequate remedy on direct appeal. *See id.* (reviewing an order denying a motion to dismiss based on a claim of use and derivative use immunity after the entry of final judgment). The availability of an adequate remedy on post-judgment appeal means that Palazzi does not meet the jurisdictional requirements for issuance of the writ of certiorari. *See Magbanua*, 281 So. 3d at 527.

Even so, Palazzi argues he is still entitled to certiorari relief because the trial court should have dismissed the indictment on equitable grounds. Palazzi points to statements by Yeager and the prosecutor that Palazzi was not in trouble, that they did not believe he was responsible for McGowan's death, and that he could not get in trouble as long as he testified truthfully. They also described the subpoena as giving Palazzi no choice but to testify. In support of his argument, Palazzi cites federal cases in which courts recognized the concept of "equitable immunity." Those courts held

that the judiciary could “enforce” informal promises of immunity made by the prosecutor—even when transactional immunity was not authorized by statute. *See, e.g., Rowe v. Griffin*, 676 F.2d 524, 526 n. 3 (11th Cir. 1982).

A few Florida courts have considered *Rowe* and suggested in dicta that equitable immunity may be available when a defendant provides testimony in exchange for an agreement from the state not to prosecute. *See McKay*, 876 So. 2d at 673 (observing that equitable immunity could bar the state from breaching an agreement not to prosecute if the defendant “relied on the state’s promise not to prosecute and this reliance worked to his detriment”); *see also State v. Borrego*, 445 So. 2d 666, 668 (Fla. 3d DCA 1984) (stating that “[e]quitable immunity, if it exists in Florida, is not present in this case”); *compare Johnson v. State*, 238 So. 3d 726, 737 (Fla. 2019) (holding that “general contract principles” required the state attorney to abide by a promise from another state attorney not to seek the death penalty if the defendant agreed to cooperate in the recovery of the victim’s remains).

But at least one Florida court has held that “the concept of equitable immunity does not exist in Florida.” *State v. Polnac*, 665 So. 2d 1095, 1097 (Fla. 3d DCA 1996). That court held that “Florida only recognizes immunity from criminal prosecution when that immunity stems from a specific statutory source.” *Id.* We believe that is the better view. For this reason, we hold that Palazzi was entitled only to the use and derivative use immunity available under section 914.04. And so, the trial court did not depart from the essential requirements of the law by rejecting Palazzi’s claim of equitable immunity from prosecution.

Because Palazzi failed to show irreparable injury or that the trial court departed from the essential requirements of the law, we dismiss his petition. *See Segura v. State*, 272 So. 3d 805, 806 (Fla. 1st DCA 2019); *see also Citizens Prop. Ins. Corp. v. San Perdido Ass’n, Inc.*, 104 So. 3d 344, 351 (Fla. 2012).

DISMISSED.

ROBERTS and KELSEY, JJ., concur.

Not final until disposition of any timely and authorized motion under Fla. R. App. P. 9.330 or 9.331.

Stacy A. Scott, Public Defender, and Kristofer W. Eisenmenger, Assistant Public Defender, Gainesville, for Petitioner.

Ashley Moody, Attorney General and Daren L. Shippy, Assistant Attorney General, Tallahassee, for Respondent.