Third District Court of Appeal

State of Florida

Opinion filed December 2, 2020.
Not final until disposition of timely filed motion for rehearing.

No. 3D19-2387
Lower Tribunal No. 18-32567

Moises Wahnon,
Petitioner,

vs.

Coral & Stones Unlimited Corp.,
Respondent.

A Writ of Certiorari to the Circuit Court for Miami-Dade County, David C. Miller, Judge.

Manos • Schenk, PL, and Tom J. Manos, for petitioner.

Daniel K. Bandklayder, P.A., and Daniel K. Bandklayder, and Douglas R. Feuer, for respondent.

Before FERNANDEZ, LOGUE, and MILLER, JJ.

LOGUE, J.

Moises Wahnon petitions for a writ of certiorari to quash orders imposing sanctions for civil contempt. The sanctions stem from Wahnon's refusal to answer

deposition questions based on his claim of the Fifth Amendment privilege against self-incrimination. The trial court found that Wahnon waived the privilege and that his invocation was in bad faith. The sanctions under review include (1) striking Wahnon's pleadings; (2) entering a default against Wahnon; (3) continuing to impose a $500 per day fine, totaling $157,000 as of October 31, 2019; and (4) issuing a writ of bodily attachment.

For the reasons stated below, we quash the orders under review. This case illustrates the problems that arise when a trial court attempts to use civil contempt to remedy the admittedly very real prejudice that arises when a party asserts the Fifth Amendment in a civil case.

BACKGROUND

Coral & Stones Unlimited Corp. and Wahnon are diamond merchants. Coral & Stones provided certain diamonds to Wahnon. The parties dispute the nature of their agreement in this regard, but Coral & Stones alleged the diamonds were provided under written agreements signed by Wahnon. This type of agreement, known as a memorandum, which is apparently standard in the industry, allows one merchant to provide diamonds to another for a short period of time so the diamonds can be shown to interested clients and then returned within a few days. If the client wishes to buy the diamonds, the parties negotiate a price and the merchants their respective commissions. Wahnon, however, asserts that he purchased the diamonds

outright, contingent on a payment on re-sale. When Wahnon failed to return the diamonds upon demand, Coral & Stones reported the diamonds as stolen to the police and sued Wahnon for replevin and civil theft.

Early in the case, Wahnon filed an affidavit in which he declared that he transferred the diamonds in a "bona fide sale to a third-party." But he refused to disclose additional details out of concern for his own and his client's right to privacy and his right to protect trade secrets. He did not assert the privilege against self-incrimination. On October 23, 2018, the trial court ordered Wahnon to submit to a deposition by the close of business on October 25, 2018.

On October 25, 2018, Wahnon was deposed for the first time. He testified that he sold the diamonds and obtained invoices documenting the transaction which he indicated he would disclose "when I need to." He otherwise declined to provide details regarding the sale, including the identity and location of the buyer. In so refusing, he again asserted his own and his client's right to privacy and the right to protect trade secrets. He did not mention the right against self-incrimination.

Coral & Stones moved for an order to show cause why Wahnon should not be held in contempt, and Wahnon moved for a protective order. At a December 11, 2018 hearing on the motions, the trial court overruled Wahnon's trade secrets and privacy objections and ordered Wahnon to answer questions regarding his sale of the diamonds to a third party.

On December 20, 2018, Wahnon was deposed for the second time. At this point, he asserted the Fifth Amendment privilege. In fact, he asserted the Fifth to nearly every question asked, whether or not pertinent to the disposition of the diamonds.[1] Coral & Stones subsequently moved for sanctions and Wahnon responded by again asserting the Fifth Amendment.

On March 25, 2019, the trial court entered the second sanction order. In it, the trial court ruled that Wahnon had waived the Fifth Amendment privilege: Wahnon, the trial court explained, "cannot use the [F]ifth [A]mendment as both a sword and shield, asserting the legitimacy of the transaction for this benefit and then refusing to disclose the details of the transaction on grounds that they may be incriminatory." The second sanction order found Wahnon in contempt. It further provided Wahnon would be taken into custody, his pleadings stricken, and a default entered unless, within 20 days, Wahnon answered questions regarding his transfer of the diamonds, including disclosing the buyer and the current whereabouts of the diamonds.

On November 7, 2019, the trial court entered its third sanction order, one of the orders under review. This order found that Wahnon was in continuing violation of the December 21, 2018 first sanction order and the March 25, 2019 second

[1] For instance, Wahnon pleaded the Fifth Amendment when asked "What is your email address?"; "What is your wife's name?"; and "Are you still married?" Obviously, the Fifth Amendment privilege extends only to questions whose answers would be self-incriminating. See Eller Media Co. v. Serrano, 761 So. 2d 464, 466 (Fla. 3d DCA 2000).

sanction order. Based on Wahnon's nonfeasance in this regard, the trial court again found Wahnon in contempt, struck his pleadings, entered a default, and ordered that Wahnon would be taken into custody "without further hearing" unless he submitted a sworn affidavit with "a complete and detailed explanation" regarding the "disposition of the subject diamonds and their whereabouts" and paid the accrued fines, subject to a claim of financial inability to do so, by November 20, 2019. This third sanction order expressly referenced Wahnon's "failure to pay the Court imposed fine of $500 per day, accruing since December 21, 2018" which the order calculated as "amounting to $157,000 as of October 31, 2019." On December 2, 2019, the trial court issued a writ of bodily attachment.

This petition for certiorari followed.

ANALYSIS

"To grant certiorari relief, there must be: '(1) a material injury in the proceedings that cannot be corrected on appeal (sometimes referred to as irreparable harm); and (2) a departure from the essential requirements of the law.'" Fla. Power & Light Co. v. Cook, 277 So. 3d 263, 264 (Fla. 3d DCA 2019) (quoting Nader v. Fla. Dep't of Highway Safety & Motor Vehicles, 87 So. 3d 712, 721 (Fla. 2012)). An order compelling potentially self-incriminating testimony qualifies as irreparable harm justifying the issuance of a writ of certiorari. See Aguila v. Frederic, 45 Fla. L. Weekly D2043 (Fla. 3d DCA Aug. 26, 2020). The question here thus turns to

whether the trial court departed from the essential requirements of law. See Boyle v. Buck, 858 So. 2d 391, 392 (Fla. 4th DCA 2003).

The Fifth Amendment provides no person "shall be compelled in any criminal case to be a witness against himself." Amend. V, U.S. Const. The Fourteenth Amendment incorporates the Fifth Amendment so that the privilege against self-incrimination is protected from both federal and state action. See, e.g., Malloy v. Hogan, 378 U.S. 1, 8 (1964). The privilege applies in civil as well as criminal cases. Kastigar v. United States, 406 U.S. 441, 444–45 (1972).

Of course, "[a] blanket assertion of the Fifth Amendment right is insufficient to invoke the privilege against self-incrimination." Uriquiza v. Kendall Healthcare Grp., Ltd., 994 So. 2d 476, 477 (Fla. 3d DCA 2008). Accordingly, "the 'central standard for the privilege's application has been whether the claimant is confronted by substantial and 'real,' and not merely trifling or imaginary, hazards of incrimination.'" Florida Dep't of Revenue v. Herre, 634 So. 2d 618, 619 (Fla. 1994) (quoting Marchetti v. United States, 390 U.S. 39, 53 (1968)). Nevertheless, the United States Supreme Court "has always broadly construed its protection to assure that an individual is not compelled to produce evidence which later may be used against him as an accused in a criminal action." Maness v. Meyers, 419 U.S. 449, 461 (1975). "In view of the place this privilege occupies in the Constitution and in our adversary system of justice, as well as the traditional respect for the individual

that undergirds the privilege," the standard for deciding whether the Fifth Amendment has been properly invoked in a civil proceeding is not demanding. Id. It concerns only whether "'the civil litigant has reasonable grounds to believe that direct answers to deposition or interrogatory questions would furnish a link in the chain of evidence needed to prove a crime against him.'" Aguila, 45 Fla. L. Weekly D2043, at *2 (quoting Rainerman v. Eagle Nat'l Bank of Miami, 541 So. 2d 740, 741 (Fla. 3d DCA 1989)).

Here, it is apparent that Wahnon could have reasonable grounds to believe that forcing him to disclose what he did with the diamonds could aid in his criminal prosecution. Diamonds are a ready currency for illicit trafficking due to their high value, portability, and ease in anonymous transfer. Moreover, Coral & Stones itself reported to the police that Wahnon had stolen the diamonds; Coral & Stones sued for civil theft; and the statute of limitations for theft has not expired.

The trial court nevertheless determined that Wahnon had waived the privilege by initially testifying without raising the privilege. In reviewing this conclusion, we must be mindful that "waiver of the privilege will not be lightly inferred, and courts will generally indulge every reasonable presumption against finding a waiver." State v. Spiegel, 710 So. 2d 13, 16 (Fla. 3d DCA 1998) (citing Smith v. United States, 337 U.S. 137, 150 (1949)).

Coral & Stones cites two cases in support of the claim that Wahnon waived the privilege by his testimony. In Goethel v. Lawrence 599 So. 2d 232, 233 (Fla. 3d DCA 1992), this Court held that a party waived the privilege after he knowingly accepted a position as personal representative, which statutorily required him to produce an accounting of an estate, and "he made numerous prior representations and responses to the court concerning the subject of the accounting without then raising the privilege." Similarly, in Schlien v. Schlien, 763 So. 2d 350, 351 (Fla. 4th DCA 1998), the Fourth District held that a party who provided financial information to his expert accountant, which formed the basis of the financial information presented at trial, constituted a waiver of that party's Fifth Amendment privilege regarding that financial information. Here, however, Wahnon's testimony, while self-serving, was purely conclusory in nature and always accompanied by claims of privilege regarding the supporting details. Given these circumstances, Wahnon's testimony did not rise to the level found in Goethel and Schlien to constitute a waiver.

Although Wahnon first asserted other privileges before invoking the Fifth Amendment privilege, Wahnon never actually disclosed the privileged information before asserting the Fifth, and he consistently claimed the information was privileged. We are reluctant to find a voluntary waiver in these circumstances. Cf. Truly Nolen Exterminating, Inc. v. Thomasson, 554 So. 2d 5, 5–6 (Fla. 3d DCA

1989) ("A failure to assert a work-product privilege at the earliest opportunity, in response to a discovery motion, does not constitute a waiver of the privilege so long as the privilege is asserted by a pleading, to the trial court, before there has been an actual disclosure of the information alleged to be protected.").

While Wahnon did not waive the Fifth Amendment privilege, his assertion of that right in a civil case to bar relevant discovery nevertheless directly conflicts with Coral & Stones' constitutional right of access to the courts. See Art. I, § 21, Fla. Const. In these circumstances, civil courts face the considerable challenge of making "enough room for one party's right against self-incrimination without infringing upon the other litigant's right to use the court." Matthew C. Lucas, Balance of Silence: Weighing the Right to Remain Silent Against the Right of Access to Florida Civil Courts, 22 U. Fla. J.L. & Pub. Pol'y 1, 4 (2011). There is no easy fix to this dilemma. Any solution must be driven by the facts and circumstances of the individual case. Several guiding principles, however, emerge from the caselaw.

In these circumstances, the trial court must fashion a remedy that has the least intrusive impact on the assertion of the Fifth Amendment privilege while alleviating the prejudice to the other party and providing a "just, speedy, and inexpensive determination" of the underlying dispute. Fla. R. Civ. P. 1.010. The trial court's

toolkit in this regard includes, but is not limited to, staying the case,[2] preventing a witness from testifying or a party from presenting evidence,[3] and recognizing an adverse inference.[4] The more onerous remedies become appropriate "only where other, less burdensome, remedies would be an ineffective means of preventing unfairness" to the opposing party. Village Inn Rest. v. Aridi, 543 So. 2d 778, 781 (Fla. 1st DCA 1989) (quoting Wehling v. Columbia Broad. Sys., 608 F.2d 1084, 1088 (5th Cir. 1979)). Where the privilege has not been waived, the use of civil contempt to force a party asserting the Fifth Amendment to testify should be reserved for only the most extraordinary circumstances, if at all.

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[2] See Childs v. Solomon, 615 So. 2d 865, 866 (Fla. 3d DCA 1993) (noting a continuance, rather than dismissal or striking of the pleadings, may be an appropriate remedy when defendant in a civil proceeding asserts the Fifth Amendment). But see Urquiza, 994 So. 2d at 478 ("Although under certain circumstances, a trial court may grant a stay in a civil proceeding for a limited time during the pendency of a concurrent criminal proceeding, such a stay is not constitutionally required."); Klein v. Royale Grp., Ltd., 524 So. 2d 1061, 1062–63 (Fla. 3d DCA 1988) (finding too prolonged stay granted because parties were asserting the Fifth Amendment to be a departure from the essential requirements of law).

[3] See Sule v. State, 968 So. 2d 99, 105–06 (Fla. 4th DCA 2007) (holding that exclusion of a defense witness' testimony was not erroneous because invocation of the Fifth Amendment privilege prevented full and fair cross-examination as to material issues); Kelly v. State, 425 So. 2d 81, 84 (Fla. 2d DCA 1982) ("If a defendant's right to cross-examination on such matters [as a witness' credibility] is thwarted, the remedy is to strike the witness' testimony.").

[4] See Vasquez v. State, 777 So. 2d 1200, 1203 (Fla. 3d DCA 2001) (noting that a "trial court may draw an adverse inference against a party in a civil action who invokes his privilege against self-incrimination").

Petition granted.