Third District Court of Appeal

State of Florida

Opinion filed August 26, 2020.
Not final until disposition of timely filed motion for rehearing.

No. 3D20-0726
Lower Tribunal No. 19-35140

Roberto Aguila and D.E. Pool Tech, LLC,
Petitioners,

vs.

Marjorie Frederic, etc.,
Respondent.

A Writ of Certiorari to the Circuit Court for Miami-Dade County, Oscar Rodriguez-Fonts, Judge.

Boyd & Jenerette, P.A., and Kansas R. Gooden, and Kevin D. Franz (Boca Raton), for petitioners.

Shaked Law Firm, P.A., and Joel L. Roth, Sagi Shaked, and Cory D. Lapin, for respondent.

Before SCALES, MILLER, and GORDO, JJ.

MILLER, J.

Petitioner, Roberto Aguila, seeks certiorari review of a lower court order compelling the disclosure of discovery relating to his possession and use of a mobile telephone during a crash that gave rise to the wrongful death lawsuit below.[1] Aguila asserts the order runs afoul of the Fifth Amendment, as it places him under compulsion to incriminate himself in an active criminal investigation. Finding a departure from the essential requirements of law, irremediable on appeal, we grant relief.

BACKGROUND AND PROCEDURAL HISTORY

In late 2019, while operating a motor vehicle owned by his employer, D.E. Pool Tech, LLC, Aguila struck and killed a pedestrian traversing a crosswalk. The North Miami Beach Police Department opened a traffic homicide investigation, which remains unresolved.

Marjorie Frederic, the daughter and personal representative of the Estate of the decedent, Roudel Frederic, filed a wrongful death lawsuit against both Aguila

[1] D.E. Pool has joined as a petitioner in order to ensure the proper alignment of the parties. However, as the entity "has no Fifth Amendment right, and it cannot vicariously assert that right on behalf of its employees because the privilege is a personal one," we dismiss it from this proceeding. Eller Media Co. v. Serrano, 761 So. 2d 464, 466 (Fla. 3d DCA 2000); see Braswell v. United States, 487 U.S. 99, 104-05, 108 S. Ct. 2284, 2288, 101 L. Ed. 2d 98 (1988) ("[F]or purposes of the Fifth Amendment, corporations and other collective entities are treated differently from individuals . . . [T]he corporation 'is a creature of the State,' with powers limited by the State. As such, the State may, in the exercise of its right to oversee the corporation, demand the production of corporate records.") (citation omitted).

and D.E. Pool. After Aguila unsuccessfully sought to stay the proceedings pending the outcome of the criminal investigation, discovery ensued.

The Estate, in the form of interrogatories, sought disclosure of whether Aguila possessed a cellular telephone in the vehicle at the time of the crash, and, if so, the telephone number and service provider associated with the device. The Estate further requested production of cellular telephone logs for the hour surrounding the crash, including all incoming and outgoing calls, emails, and text messages.

Aguila objected to the discovery, asserting his Fifth Amendment privilege against self-incrimination. After convening a hearing, the trial court overruled his objections and ordered disclosure of the mobile device number and carrier, along with production of the telephone log spanning the sixty minutes surrounding the incident. The instant petition ensued.

STANDARD OF REVIEW

"Certiorari will lie to review an order compelling discovery in a civil case over an objection that the order violates the Fifth Amendment privilege against self-incrimination." McKay v. Great Am. Ins. Co., 876 So. 2d 666, 669 (Fla. 4th DCA 2004) (quoting Boyle v. Buck, 858 So. 2d 391, 392 (Fla. 4th DCA 2003)). "The reviewing court must determine whether the trial court's discovery order departed from the essential requirements of law resulting in irreparable harm to the petitioner." Boyle, 858 So. 2d at 392.

LEGAL ANALYSIS

As expressly guaranteed by both the Florida and the United States constitutions, "[n]o person shall . . . be compelled in any criminal case to be a witness against himself."[2] Amend. V, U.S. Const.; see Art. I, § 9, Fla. Const. ("No person shall . . . be compelled in any criminal matter to be a witness against oneself."). The privilege against compulsory self-incrimination "sprang from an abhorrence of governmental assault against the single individual accused of crime and the temptation on the part of the State," Couch v. United States, 409 U.S. 322, 327, 93 S. Ct. 611, 615, 34 L. Ed. 2d 548 (1973), "such as ecclesiastical inquisitions and the proceedings of the Star Chamber, 'which placed a premium on compelling subjects of the investigation to admit guilt from their own lips.'"[3] Andresen v. Maryland, 427 U.S. 463, 470, 96 S. Ct. 2737, 2743, 49 L. Ed. 2d 627 (1976) (citation omitted).

"[T]he Fifth Amendment privilege . . . can be asserted in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory." Kastigar v. United States, 406 U.S. 441, 444, 92 S. Ct. 1653, 1656, 32 L. Ed. 2d 212 (1972).

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[2] "[T]he Fifth Amendment's exception from compulsory self-incrimination is also protected by the Fourteenth Amendment against abridgment by the States." Malloy v. Hogan, 378 U.S. 1, 6, 84 S. Ct. 1489, 1492, 12 L. Ed. 2d 653 (1964).

[3] "The 'historic function' of the privilege has been to protect a 'natural individual from compulsory incrimination through his own testimony or personal records.'" Andresen, 427 U.S. at 470-71, 96 S. Ct. at 2743 (citation omitted).

However, the Fifth Amendment is not without limits. It "protects a person only against being incriminated by his own compelled testimonial communications." Fisher v. United States, 425 U.S. 391, 409, 96 S. Ct. 1569, 1580, 48 L. Ed. 2d 39 (1976) (citations omitted). "[I]n order to be testimonial, an accused's communication must itself, explicitly or implicitly, relate a factual assertion or disclose information. Only then is a person compelled to be a 'witness' against himself." Doe v. United States, 487 U.S. 201, 210, 108 S. Ct. 2341, 2347, 101 L. Ed. 2d 184 (1988).

Such an assertion need not be direct. Indeed, "[i]t is settled law that the privilege against self-incrimination may be properly asserted during discovery proceedings if 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." Rainerman v. Eagle Nat'l Bank of Miami, 541 So. 2d 740, 741 (Fla. 3d DCA 1989) (citing Pillsbury Co. v. Conboy, 459 U.S. 248, 266, 103 S. Ct. 608, 619, 74 L. Ed. 2d 430 (1983); Hoffman v. United States, 341 U.S. 479, 486, 71 S. Ct. 814, 818, 95 L. Ed. 1118 (1951); Meek v. Dean Witter Reynolds, Inc., 458 So. 2d 412 (Fla. 4th DCA 1984); DeLisi v. Bankers Ins. Co., 436 So. 2d 1099 (Fla. 4th DCA 1983); DeLisi v. Smith, 423 So. 2d 934, 938 (Fla. 2d DCA 1982)). This "link in the chain" doctrine is not strictly limited to statements. Rather, if an "act of production could constitute protected testimonial

communication because it might entail implicit statements of fact: by producing documents in compliance with a subpoena, the witness would admit that the papers existed, were in his possession or control, and were authentic," it is afforded Fifth Amendment protection.[4] Doe, 487 U.S. at 208, 108 S. Ct. at 2347 (citation omitted). Further "[i]t need not be probable that a criminal prosecution will be brought or that the witness's answer will be introduced in a later prosecution; the witness need only show a realistic possibility that the answers will be used against him." Magid v. Winter, 654 So. 2d 1037, 1039 (Fla. 4th DCA 1995). Accordingly, in analyzing an assertion of constitutional privilege, "it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer . . . might be dangerous because injurious disclosure could result." Hoffman, 341 U.S. at 486-87, 71 S. Ct. at 818.

In the instant case, the criminal investigation into Frederic's death remains unresolved and there is no indication that any potentially applicable statutes of limitations have run or immunity has been conferred. See Kastigar, 406 U.S. at 449, 92 S. Ct. at 1659 (Where "the immunity granted . . . is coextensive with the scope of

[4] "The privilege against self-incrimination protects the individual from being compelled to incriminate himself in any manner; it does not distinguish degrees of incrimination. Similarly, for precisely the same reason, no distinction may be drawn between inculpatory statements and statements alleged to be merely 'exculpatory.'" Rhode Island v. Innis, 446 U.S. 291, 301 n.5, 100 S. Ct. 1682, 1690 n.5, 64 L. Ed. 2d 297 (1980).

the privilege [a litigant's refusals to answer based on the privilege [against self-incrimination] [is] unjustified."); Brown v. Walker, 161 U.S. 591, 603-04, 16 S. Ct. 644, 649, 40 L. Ed. 819 (1896) ("If . . . at the time of the transactions respecting which his testimony is sought, . . . the offense is barred by the statute of limitations, and there is no pending prosecution against the witness,-he cannot claim any privilege under this provision of the constitution, since his testimony could not be used against him in any criminal case against himself, and, consequently, he is not compelled to be a witness 'against himself.") (citation omitted). As the operator of the vehicle responsible for causing the life-ending injuries, Aguila harbors a "reasonable fear of prosecution." In re Moses, 132 B.R. 837, 843 (Bankr. E.D. Mich. 1990).

Hence, absent a determination that it is "perfectly clear, from a careful consideration of all the circumstances in the case, that the witness is mistaken, and that the answer(s) cannot possibly have such tendency" to "incriminate," the trial court is to defer to the asserted privilege. Hoffman, 341 U.S. at 488, 71 S. Ct. at 819 (citation omitted); see also Magid, 654 So. 2d at 1039 ("A trial court may properly require a witness to answer questions only if it is perfectly clear that the witness is mistaken in his apprehensions and the answers cannot possibly have a tendency to incriminate.") (citation omitted); Temple v. Commonwealth, 75 Va. 892, 898 (1881) ("[W]here the witness on oath declares his belief that the answer to the question

would criminate, or tend to criminate him, the court cannot compel him to answer, unless it is perfectly clear, from a careful consideration of all the circumstances in the case, that the witness is mistaken, and that the answer cannot possibly have such tendency.") (citation omitted). Accordingly, under our precedent, we must next consider whether the discovery responses cannot be possibly used to aid the prosecution in incriminating Aguila. See Hoffman, 341 U.S. at 488, 71 S. Ct. at 819 (The privilege is inapplicable only if answers "'cannot possibly have [a] tendency' to incriminate.") (citation omitted); Brown v. Walker, 161 U.S. 591, 597, 16 S. Ct. 644, 647, 40 L. Ed. 819 (1896) ("[I]f the testimony sought cannot possibly be used as a basis for, or in aid of, a criminal prosecution against the witness, the [privilege against self-incrimination] ceases to apply.").

The first part of the order requires Aguila, an "involuntary party" to litigation, to attest to whether he had in his possession a cellular device at the time of the crash.[5] Fischer v. E.F. Hutton & Co., Inc., 463 So. 2d 289, 290 (Fla. 2d DCA 1984); see Baksinski v. Corey, 529 N.E.2d 232, 235 (Ill. App. Ct. 1988) ("Defendants, by definition, are involuntary and unwilling parties to litigation generally."). Compliance with the remainder of the order, compelling the disclosure of the

[5] "[A] compulsory production of the private . . . papers of the owner . . . is compelling him to be a witness against himself, within the meaning of the Fifth Amendment of the Constitution." Fisher, 425 U.S. at 406-07, 96 S. Ct. at 1579 (citation omitted).

telephone number, carrier information, and a compendium of data evidencing device usage, is wholly contingent upon the response to the threshold inquiry. Moreover, the production component tacitly requires a concession as to the authenticity of any responsive records. United States v. Hubbell, 530 U.S. 27, 36, 120 S. Ct. 2037, 2043, 147 L. Ed. 2d 24 (2000) ("By 'producing documents in compliance with a subpoena, the witness would admit that the papers existed, were in his possession or control, and were authentic.'") (citation omitted). Consequently, the order compels testimonial communication.

It is axiomatic that, given the illegality associated with operating a motor vehicle while "manually typing or entering multiple letters, numbers, symbols, or other characters into a wireless communications device or while sending or reading data on such a device for the purpose of nonvoice interpersonal communication, including, but not limited to, communication methods known as texting, e-mailing, and instant messaging," § 316.305(3)(a), Fla. Stat., the compelled disclosures may well "furnish a link in the chain of evidence" necessary to establish Aguila's criminal culpability. Maness v. Meyers, 419 U.S. 449, 461, 95 S. Ct. 584, 592, 42 L. Ed. 2d 574 (1975). Thus, particularly in light of "other practicable means . . . to obtain the desired information," we decline to countenance the terms of the order. Bd. of Comm'rs of New Orleans Exhibition Auth. v. Missouri Pac. R.R. Co., 647 So. 2d 340, 341 (La. 1994).

Finally, because "the Fifth Amendment is a personal privilege," Couch, 409 U.S. at 328, 93 S. Ct. at 616, Aguila is "privileged from producing the evidence, but not from its production." Johnson v. United States, 228 U.S. 457, 458, 33 S. Ct. 572, 572, 57 L. Ed. 919 (1913). As Aguila cannot be compelled to bear witness against himself, adhering to our prior precedent, we conclude that "the trial court's order directing petitioner to reveal information regarding [his] cell phone violates petitioner's Fifth Amendment rights, while [his] criminal case is pending, and constitutes a departure from the essential requirements of law from which petitioner has no adequate remedy on appeal." Restrepo v. Carrera, 189 So. 3d 1033, 1034 (Fla. 3d DCA 2016). Accordingly, we grant the petition for certiorari and quash the order under review.[6]

Certiorari granted; order quashed.

[6] While the order under review departs from the essential requirements of law, our ruling is not intended to divest the trial court of discretion to effect any other remedy to properly address the concerns involved with the invocation of the privilege against self-incrimination, including the decision to allow for adverse inferences. See United States v. Acclarent, Inc., No. 1:11-cv-11217-DLC, at *2 (D. Mass. June 1, 2020) ("When a witness in a civil matter asserts the Fifth Amendment privilege against self-incrimination in response to questioning, the court may allow an adverse inference to be drawn from the answer -- that is, an inference that if the witness had answered, the answer would have been unfavorable to the witness.") (citations omitted).