Sunshine, immunity conferred by subpoena

Number: INFORMAL

Date: December 05, 1997

The Honorable Katherine Fernandez-Rundle
State Attorney
Eleventh Judicial Circuit
E.R. Graham Building
1350 Northwest 12th Avenue
Miami, Florida 33126-2111

Dear Ms. Fernandez-Rundle:

You ask whether the immunity conferred upon a person by a lawfully issued subpoena from a state attorney prevents the use of compelled testimony of that person in an action charging that person with a noncriminal Sunshine Law infraction pursuant to section 286.011(3)(a), Florida Statutes.

In sum, the immunity granted under section 914.04, Florida Statutes, is coextensive with the protection afforded by the Fifth Amendment to the United States Constitution and, therefore, does not prohibit the use of compelled testimony in a noncriminal infraction case. This office's research, however, indicates that the legal resolution of such situations is fact intensive and hinges on the peculiar facts of each case. Based upon the specific circumstances of your inquiry, it may be problematic to use compelled testimony against an individual in a noncriminal Sunshine Law prosecution.

The United States Supreme Court has held that grants of immunity must be at least coextensive with the right against self-incrimination provided by the Fifth Amendment to the United States Constitution.[1] Thus, the scope of the immunity statute must be broad enough to protect the witness against criminal punishment, although it need not be any broader.[2]

Transactional immunity, which accords full immunity from prosecution for the offense to which the compelled testimony relates, affords the witness considerably broader protection than the Fifth Amendment privilege. Statutes that provide use and derivative use immunity, however, are coextensive with the scope of the privilege against self-incrimination, and such a statute is sufficient to compel testimony over a claim of privilege.[3]

The privilege, however, does not extend to penalties of a noncriminal nature.[4] Where a legislative body has evinced a manifest intention to establish a civil mechanism and where the sanctions provided for are not so punitive as to turn a civil remedy into a criminal penalty, the Fifth Amendment right against self-incrimination is not implicated.[5]

Pursuant to section 27.04, Florida Statutes, the state attorney is given the power to issue investigative subpoenas. The immunity granted by such investigative subpoenas is delineated in section 914.04, Florida Statutes, which provides in part:

"[B]ut no testimony so given or evidence so produced shall be received against him upon any criminal investigation or proceeding."

This immunity then is only for use and derivative use of the compelled testimony and as such is coextensive with the Fifth Amendment.

In imposing a penalty for violation of the Sunshine Law, section 286.011(3)(a), Florida Statutes, provides that "[a]ny public officer who violates any provision of this section is guilty of a noncriminal infraction, punishable by fine not exceeding $500." In *Board of Public Instruction of Broward County v. Doran*,[6] the Florida Supreme Court recognized that the Sunshine Law is a remedial statute designed to benefit or protect the public. The Court held that the fact that the Sunshine Law has penal aspects does not alter its basic purpose and transform it into a penal measure.[7]

A "noncriminal infraction" is defined in sections 775.08(3) and (4), Florida Statutes, as follows:

"(3) The term 'noncriminal violation' shall mean any offense that is punishable under the laws of this state, or that would be punishable if committed in this state, by no other penalty than a fine, forfeiture, or other civil penalty. A noncriminal violation does not constitute a crime, and conviction for a noncriminal violation shall not give rise to any legal disability based on a criminal offense. The term "noncriminal violation" shall not mean any conviction for any violation of any municipal or county ordinance. Nothing contained in this code shall repeal or change the penalty for a violation of any municipal or county ordinance.
(4) The term 'crime' shall mean a felony or misdemeanor."

A statute should be interpreted according to its plain language, absent clear evidence to the contrary.[8] The question of whether a penalty is civil or criminal in nature is one of statutory construction as to whether the Legislature expressly or impliedly indicated a preference of one label over the other.[9] Section 286.011(3)(a), Florida Statutes, in providing that a violation of the section constitutes a noncriminal infraction, appears to establish the penalty for such violation as a civil rather than a criminal penalty.

While the Legislature has indicated its intention to establish a civil penalty, the courts have inquired further to determine whether the statutory scheme is so punitive in effect or purpose as to negate that intention. Such a determination requires a particularized assessment of whether the sanction as applied in the individual case serves the goals of punishment. The holdings in these cases reflect the courts' concern with imposing penalties on individuals who have been compelled to testify but may not be aware of their exposure to liability in so testifying.

The courts, therefore, have carefully scrutinized the circumstances under which an individual compelled to testify may be exposed to liability.[10] Moreover, the use of criminal process as a tactic to obtain evidence to be used in a civil prosecution may give rise to allegations of misuse or abuse of such process.[11]

Accordingly, the immunity conferred by a lawfully issued subpoena from a state attorney does not prevent the use of compelled testimony in an action charging a person with a noncriminal infraction. However, in light of the heightened scrutiny courts have historically afforded these

cases in order to determine whether the subsequent action would result in a punitive or remedial penalty, it may be highly problematical to use the testimony of an individual who was forced to testify under threat of contempt in a Sunshine Law prosecution.

Sincerely,

Robert A. Butterworth
Attorney General

RAB/tgk

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[1] *Counselman v. Hitchcock*, 142 U.S. 547, 12 S. Ct. 195, 35 L. Ed. 1110 (1892).

[2] *Ullman v. United States*, 350 U.S. 422, 76 S. Ct. 497, 100 L. Ed. 511 (1956).

[3] *Kastigar v. United States*, 406 U.S. 441, 92 S. Ct. 1653, 32 L. Ed. 2d 212 (1972).

[4] *United States v. Apfelbaum*, 445 U.S. 115, 100 S. Ct. 948, 63 L. Ed. 2d 250 (1980).

[5] *United States v. Ward*, 448 U.S. 242, 100 S. Ct. 2636, 65 L. Ed. 2d 742 (1980).

[6] 224 So. 2d 693 (Fla. 1969).

[7] *See also DeBpock v. State*, 512 So. 2d 164, 167 n. 2 (Fla. 1987).

[8] *Apfelbaum, supra* at 121.

[9] *Ward, supra* at 248.

[10] *Cf. DeBock v. State, supra* (grant of statutory immunity from criminal proceedings does not extend to inquiry by state bar, since bar disciplinary proceedings are not penal, but rather are remedial so as to protect public rather than punish attorney); *United States v. Halper*, 490 U.S. 435, 448, 104 L. Ed. 2d 487, 109 S. Ct. 1891 (1989) (whether a given civil sanction constitutes punishment requires a particularized assessment of what the penalty is meant to do).

[11] *Cf. United States v. Lawson*, 502 F. Supp. 158 (D.C. Md. 1980) (search pursuant to administrative warrant violated Fourth Amendment where purpose was to gather evidence for criminal prosecution); *United States v. Rand*, 398 F. Supp. 1231 (D.C. Ohio 1970) (court dismissed criminal indictment when prosecutors sought to use civil proceeding to discover evidence for use in the criminal prosecution).