

OP. NO. 04-034

CRIMINAL PROCEDURE: EVIDENCE AND WITNESSES.

Witness who testifies or produces evidence pursuant to special grand jury subpoena is granted use/derivative use immunity; is not granted transactional immunity or immunity from future prosecution based on prior testimony.

The Honorable David M. Hicks
Commonwealth's Attorney for the City of Richmond
July 6, 2004

Issue Presented

You inquire concerning the kind of immunity that § 19.2-208 affords a witness who is subpoenaed to testify before a special grand jury.

Response

It is my opinion that a witness who testifies or produces evidence pursuant to a special grand jury subpoena under § 19.2-208 is afforded use immunity and derivative use immunity. Such a witness, however, is not granted transactional immunity, as he is not absolutely immune from future prosecution based on the mere fact of his prior testimony.

Applicable Law and Discussion

Article 3, Chapter 13 of Title 19.2, §§ 19.2-206 through 19.2-215, establishes the procedure for impaneling special grand juries. Section 19.2-208 authorizes a special grand jury to subpoena persons to testify before it and to produce specified records and documents. Prior to testifying, a witness "shall be warned by the [special grand jury] foreman that he need not answer any questions or produce any evidence that would tend to incriminate him."¹ Further, the foreman must warn the witness that he "may later be called" to testify in any subsequent case that might arise out of the special grand jury's investigation and report.²

Section 19.2-208 provides that a witness who is called to testify before a special grand jury and refuses to do so by expressly invoking his right against self-incrimination may nevertheless be compelled to testify or produce specified records. Further, a witness may be held in contempt if he refuses to testify after being ordered to do so by the presiding judge. Section 19.2-208 also provides that, if a witness expressly invokes his right not to incriminate himself and the presiding judge determines that such right

is bona fide, the compelled testimony, or any information directly or indirectly derived from such testimony or other information, shall not be used against the witness in any criminal proceeding except a prosecution for perjury.

Notwithstanding the provisions of this section, all provisions of this Code relative to immunity granted to witnesses who testify before a grand jury shall remain applicable.

In order to determine the kind of immunity that is available to a witness under § 19.2-208 and the impact of the above-quoted "notwithstanding" provision, it is necessary to assess the three levels of immunity that exist in Virginia: use immunity, derivative use immunity, and transactional immunity.³ "Use immunity protects the witness only from 'the use of the specific testimony compelled from him under the grant of immunity,' but not from evidence obtained as a result of such testimony."⁴

Thus, witnesses protected only by use immunity may be prosecuted, based on evidence indirectly obtained from the witness's compelled testimony.⁵ Because immunity must be "coextensive" with a witness's privilege against self-incrimination, in order for the witness to be constitutionally compelled to testify after invoking his Fifth Amendment right, use immunity has been deemed a "limited protection" that is "inadequate to overcome an assertion of the privilege."⁶

Derivative use immunity and transactional immunity afford a witness sufficiently greater safeguards. "[T]he protection against self-incrimination provided by each has been found consonant and coextensive with constitutional safeguards and, thus, sufficient to supplant the privilege."⁷ Derivative use immunity bars the use of evidence obtained "even indirectly" from a witness's compelled testimony, while transactional immunity prevents a witness from being prosecuted "for the offense related to compelled testimony."⁸

As stated in § 19.2-208, if a witness testifies or produces certain records pursuant to a special grand jury subpoena, his "compelled testimony, or any information directly or indirectly derived from such testimony or other information, shall not be used against the witness in any criminal proceeding except a prosecution for perjury."⁹ It is my opinion, therefore, that § 19.2-208 affords a witness both use immunity and derivative use immunity.

Significantly, the Court of Appeals of Virginia has held that § 19.2-215.7, which governs compelled testimony before multi-jurisdiction grand juries, affords witnesses "use immunity and derivative use immunity rather than transactional immunity."¹⁰ The fact that §§ 19.2-208 and 19.2-215.7(C) contain identical language barring the use of "compelled testimony, or any information directly or indirectly derived from such testimony or other information," reinforces the conclusion that § 19.2-208 likewise affords a witness use immunity and derivative use immunity.

It is true that, in contrast to § 19.2-215.7(C), § 19.2-208 states that, "[n]otwithstanding the provisions of this section, all provisions of this Code relative to immunity granted to witnesses who testify before a grand jury shall remain applicable." This language, however, does not alter the conclusion that a witness who gives compelled testimony before a special grand jury has use immunity or derivative use immunity.

A review of other witness immunity statutes in the Virginia Code discloses no particular framework of protections. For example, the Court of Appeals of Virginia has held that § 18.2-262, which requires a witness to testify as to alleged drug offenses, establishes both use and transactional immunity.¹¹ Specifically, the Court of Appeals has ruled that, insofar as § 18.2-262 provides that a witness's compelled testimony "shall be in no case used against him," it affords him use immunity.¹² The Court of Appeals further held that the provision in § 18.2-262, mandating that a witness "shall [not] be prosecuted as to the offense as to which

he testifies," affords him transactional immunity.¹³ Further, § 19.2-270, which governs a witness's immunity at trial in connection with his prior statements "as a witness upon a legal examination, in a criminal or civil action," "confers only use immunity."¹⁴

Several other statutes in Title 18.2 provide a witness with transactional immunity.¹⁵ Moreover, § 24.2-1018 provides transactional immunity for a witness who testifies concerning election offenses. Other Code provisions, however, provide lesser levels of protection for witnesses. For example, § 4.1-350 establishes use immunity for witnesses testifying with respect to Alcoholic Beverage Control Act offenses. Further, § 52-8.2(B) affords use immunity and derivative use immunity regarding testimony involving elected officials.

Given the varying levels of immunity established in other Code sections for witnesses testifying in criminal proceedings, it is my opinion that the phrase in § 19.2-208, "[n]otwithstanding the provisions of this section," indicates the intent of the legislature that, in the event of conflict between the immunity established in § 19.2-208 and immunity created in another statute, the latter statute controls. In this regard, it is fundamental that where two statutes "are closely interrelated [they] must be read and construed together and effect given to all of their provisions. They should be construed, if possible, so as to harmonize, and force and effect should be given the provisions of each."¹⁶ In addition, "when one statute speaks to a subject in a general way and another deals with a part of the same subject in a more specific manner, the two should be harmonized, if possible, and where they conflict, the latter prevails."¹⁷

Thus, for example, if a witness were compelled under § 18.2-337 to give testimony before a "grand jury" concerning a gambling matter, he would receive transactional immunity, because, under the statute, he "shall [n]ever be prosecuted for the offense" about which he testifies. A witness in such a case would not have mere use immunity or derivative use immunity under § 19.2-208, because § 18.2-337, the more specific statute, would control, and § 19.2-208 commands that the other statute's immunity provisions "shall remain applicable."

Conclusion

Accordingly, it is my opinion that a witness who testifies or produces evidence pursuant to a special grand jury subpoena under § 19.2-208 is afforded use immunity and derivative use immunity. Such a witness, however, is not granted transactional immunity, as he is not absolutely immune from future prosecution based on the mere fact of his prior testimony.

¹Va. Code Ann. § 19.2-208 (LexisNexis Repl. Vol. 2004).

²*Id.*

³Tharpe v. Commonwealth, 18 Va. App. 37, 39, 441 S.E.2d 228, 230 (1994).

⁴Gosling v. Commonwealth, 14 Va. App. 158, 164, 415 S.E.2d 870, 873 (1992) (quoting Kastigar v. United States, 406 U.S. 441, 450 (1972)); see also § 19.2-215.7(C) (LexisNexis Repl. Vol. 2004).

⁵Gosling, 14 Va. App. at 164, 415 S.E.2d at 873.

⁶*Id.* at 164-65, 415 S.E.2d at 873.

⁷*Id.* at 164, 415 S.E.2d at 873.

⁸*Id.*; *see also* *Caldwell v. Commonwealth*, 8 Va. App. 86, 88-89, 379 S.E.2d 368, 369-70 (1989).

⁹For purposes of this opinion, I assume that the witness has expressly invoked his right against self-incrimination before a special grand jury and that the presiding judge has determined that the assertion of the witness's privilege is bona fide.

¹⁰*Tharpe*, 18 Va. App. at 44, 441 S.E.2d at 233.

¹¹*Caldwell*, 8 Va. App. at 88-89, 379 S.E.2d at 369-70.

¹²*Id.* at 88, 379 S.E.2d at 370.

¹³*Id.*

¹⁴*Boney v. Commonwealth*, 16 Va. App. 638, 642, 432 S.E.2d 7, 10 (1993) (quoting *Gosling*, 14 Va. App. at 164, 415 S.E.2d at 873).

¹⁵*See* Va. Code Ann. § 18.2-337 (Michie Repl. Vol. 1996) (providing that witness who gives compelled testimony in gambling case "shall [n]ever be prosecuted for the offense being prosecuted concerning which he testifies"); § 18.2-437 (Michie Repl. Vol. 1996) (providing transactional immunity for witness who testifies in perjury prosecution); § 18.2-445 (Michie Repl. Vol. 1996) (providing that witness who gives compelled testimony in bribery case shall not be prosecuted "for any offense of giving, or offering to give, or accepting a bribe committed by him at the time and place indicated in such prosecution"); § 18.2-450 (Michie Repl. Vol. 1996) (providing that witness who gives compelled testimony in prosecution for bribery of public servant or party official is afforded transactional immunity); § 18.2-501(a) (Michie Repl. Vol. 1996) (providing transactional immunity for witness who gives testimony in case involving conspiracy to injure business).

¹⁶*Tharpe*, 18 Va. App. at 43, 441 S.E.2d at 232 (citation omitted).

¹⁷*Va. Nat'l Bank v Harris*, 220 Va. 336, 340, 257 S.E.2d 867, 870 (1979).

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