10-1987

Vermont v. Cox

Lewis F. Powell Jr.

February 20, 1987

Court..... *Voted on*..... , *19*.....

Argued..... , *19*..... *Assigned* ..... , *19*..... No. 86-1108

Submitted..... , *19*..... *Announced* ..... , *19*.....

VERMONT

vs.

Cox
~~RICK~~

Grant

HOLD FOR	DEFER		CERT.			JURISDICTIONAL STATEMENT				MERITS		MOTION		
	RELIST	CVSG	G	D	G&R	N	POST	DIS	AFF	REV	AFF	G	D	
Rehnquist, Ch. J.			✓											
Brennan, J.			✓	✓										
White, J.			✓	~~✓~~										
Marshall, J.				✓										
Blackmun, J.				✓										
Powell, J.				✓										
Stevens, J.				✓										
O'Connor, J.				join 3										
Scalia, J.			✓											

ral 02/11/87

PRELIMINARY MEMORANDUM

February 20, 1987 Conference
List 7, Sheet 4

No. 86-1108-CSY

Cert to Vt. Sup. Ct. (Allen, CJ, Hill, Peck, Gibson, Hayes)

Vermont (sentenced resp on the basis of his statements in the presentence report)

v.

Cox (claims Fifth Amendment violation)

State/Criminal

Timely

1. SUMMARY: Petr contends that the Fifth Amendment privilege against self-incrimination does not apply to statements

DENY - Bob. I think the Vt. Sup. Ct. probably

made by resp in a court-ordered presentence interview conducted after resp entered a no-contest plea.

2. FACTS AND DECISION BELOW: Resp was charged with three counts of kidnapping. He entered no-contest pleas to three misdemeanor charges of simple assault in return for dismissal of the kidnapping charge. The tc ordered a presentence investigation. As part of the investigation, a probation officer interviewed resp, who was in jail awaiting sentencing. An investigator from the public defender's office was sent to assist resp, but had not arrived when the interview began. Resp asked to speak with the investigator before answering any questions. The probation officer told resp that she would not interview him at all if he insisted on waiting for the investigator. The interview proceeded without the investigator. Resp made statements about his involvement with drugs which were included in the presentence report. The tc sentenced resp to three consecutive terms of 6 to 12 months, in excess of the prosecutor's recommendation. At the sentencing hearing, the tc stated:

> "Your report indicates that you have had a substantial amount of contact with drugs and drug abuse in the past. Whether or not your trip to Vermont was a travelling of a merchant, I don't know. From some of the things you said that it may have been." Petn 7a.

Resp appealed the sentence on the ground that his statements during the presentence interview were made involuntarily, after he asserted his Fifth Amendment privilege. The Vt. Sup. Ct. agreed. It is true that a plea of nolo contendere waives the privilege against self-incrimination as to that particular crime. See United States v. Johnson, 488 F.2d 1206, 1209 (CA1 1973).

However, a defendant who has entered a plea of guilty or nolo contendere may invoke the Fifth Amendment to prevent enhancement of his sentence. In this case, resp indicated that he was reluctant to speak to the probation officer without the advice of the investigator from the public defender's office. The ct distinguished Fare v. Michael C., 442 U.S. 707, 724 (1979), which held that a juvenile's request to see his probation officer did not invoke the Fifth Amendment privilege. Determining whether a defendant has invoked the Fifth Amendment privilege requires "an inquiry into the totality of the circumstances surrounding the interrogation." Id., at 725. Although the investigator is not a lawyer, the circumstances suggest that resp wanted legal advice. Moreover, the investigator, unlike the probation officer in Michael C, clearly was the defendant's ally. Resp's statements were involuntary because the probation officer presented resp, who was incarcerated, with a choice between doing without the investigator's assistance and forfeiting the interview. Resp's statements were not merely cumulative. A victim's statement included in the PSI report contained some information about resp's drug-related activities, but resp's statements were more detailed. The court remanded for preparation of a new presentence report and for resentencing.

3. CONTENTIONS: Petr contends that this case presents an opportunity to decide whether the Fifth Amendment privilege extends to a non-capital, post-conviction, presentence interrogation, a question expressly left open by Estelle v. Smith, 451 U.S. 454, 469 n. 13. (1981). Estelle v. Smith holds that the

Fifth Amendment privilege applies to a psychiatric examination admitted at the penalty phase of a capital trial. The Court stated: "Of course, we do not hold that the same Fifth Amendment concerns are necessarily presented by all types of interviews and examinations that might be ordered or relied upon to inform a sentencing determination." Ibid. There is a conflict over whether Estelle applies to non-capital sentencing proceedings. Baumann v. United States, 692 F.2d 565, 576 (CA9 1982) ("neither Estelle itself, nor the general principles announced in Miranda, require that a convicted defendant be warned of his right to counsel and his right to remain silent prior to submitting to a routine, authorized presentence interview."); United States v. Chitty, 760 F.2d 425, 431 (CA2 1985) (sentencing ct may not rely on statements made by defendant in competency examination in non-capital proceeding); Jones v. Cardwell, 686 F.2d 754, 765 (CA9 1982) (Fifth Amendment applies where probation officer seeks a confession of additional criminal activity, and confession is used to enhance the sentence). It is true that the Vt. Sup. Ct. did not decide whether the presentence interview was a custodial interrogation. If it was, however, and if resp was entitled to invoke his Fifth Amendment privilege, it follows that the probation officer was required to give the Miranda warnings. Four state appellate cts have held that Miranda warnings need not be given prior to a routine presentence investigation interview, petn 8 (citing cases from Ind., Cal., Pa. and Ky.).

In general, a presentence report should contain as much information about the defendant's background as possible. The

Due Process Clause requires that information considered by the sentencer must be reasonably accurate. United States v. Tucker, 404 U.S. 443 (1972). Any additional constitutional limitations on the gathering of information for sentencing would impair the rationality of the sentencing process. The Fifth Amendment privilege applies only to proceedings which carry a "danger to a witness forced to give testimony leading to the reflection of 'penalties affixed to criminal acts ....'" Ullman v. United States, 350 U.S. 422, 438-439, quoting Boyd v. United States, 116 U.S. 616, 634 (1886). Once the defendant has admitted his guilt and awaits sentencing, he faces only the range of penalties prescribed by the statute, and so his statements cannot lead to an "enhanced" punishment. If the Vt. Sup. Ct.'s holding were followed, it might lead to grants of immunity to defendants in order to obtain background information, an absurd result. Moreover, resp's general statements could not form the basis for additional criminal charges. Petr also contends that resp's decision to proceed with the interview was voluntary.

Resp contends that a defendant who pleads guilty or nolo contendere may assert a Fifth Amendment privilege to prevent enhancement of his sentence or prosecution for other crimes. United States v. Miller, 771 F.2d 1219, 1235 (CA9 1985); Jones v. Cardwell, 686 F.2d 754 (CA9 1982). In this case, resp asserted his privilege, and then was misled into making damaging statements. Under Vermont law, resp's statements could be admitted against him as evidence of additional crimes. The Vt. Sup. Ct. did not hold that resp. was entitled to Miranda warnings, and

therefore that question is not presented by this case. This case presents only a fact-bound application of the settled rule that a convicted defendant has the right to remain silent when interviewed by a probation officer. The probation officer's coercive tactic rendered resp's statements involuntary. In any event, whether the statements were voluntary is a fact-bound issue.

4. DISCUSSION: There does appear to be some uncertainty among the lower cts over the extent to which the Fifth Amendment privilege applies to presentence interviews. The Court may wish to grant cert. to determine whether the privilege applies to any post-conviction statement that might result in a longer sentence. If the privilege applies, it seems to follow that probation officers must give Miranda warnings before conducting routine presentence interviews, at least when the convicted defendant is in custody. Apparently no ct. has reached this result, and the Vermont Sup. Ct. did not discuss Miranda. On balance, I suggest waiting until a conflict develops on the Miranda question. There is no doubt that a convicted defendant may refuse to answer questions at a presentence interview, with or without the Fifth Amendment privilege. Similarly, there is no doubt that a convicted defendant may voluntarily provide information whether or not he can claim the privilege. Thus, the question may not arise with great frequency.

The ct's conclusion that resp invoked the Fifth Amendment is doubtful in light of Fare v. Michael C. However, that holding is inherently fact-bound, and petr has not asked the Court to review it. It is also doubtful whether resp's waiver of his

Fifth Amendment privilege was involuntary. Resp retained a right of allocution before sentencing. But this is also a fact-bound question.

5. RECOMMENDATION: I recommend denial.

There is a response.

February 11, 1987 Long Opinion in petn

reached the wrong result. But, as discussed in the memo, I think this issue is not yet developed enough to warrant a grant.

agree