

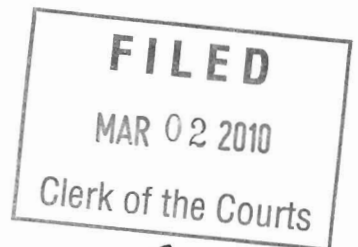
ORIGINAL

IN THE TENNESSEE COURT OF THE JUDICIARY

**IN RE: THE HONORABLE JOHN A. BELL
JUDGE, GENERAL SESSIONS COURT
COCKE COUNTY, TENNESSEE**

Docket No. M2009-02115-CJ-CJ-CJ

**COMPLAINT OF DAVID PLEAU
FILE NO. 08-3508**



**RESPONDENT JOHN A. BELL'S CONSOLIDATED REPLY TO MOTIONS TO
COMPEL AND MOTIONS IN LIMINE**

Defendant Judge John A. Bell ("Judge Bell"), by and through undersigned counsel, and hereby submits a consolidated reply to (1) the Motion to Compel and Motion in Limine filed by Disciplinary Counsel regarding Judge Bell's assertion of the attorney-client privilege and the privilege against self-incrimination under the federal and state Constitutions and (2) the Motion to Compel and Motion in Limine filed by Disciplinary Counsel regarding Thomas V. Testerman's assertion of the attorney-client privilege on Judge Bell's behalf.

I. BACKGROUND

This action originates from a complaint lodged on July 14, 2008 against Judge Bell by David J. Pleau ("Pleau"). Pleau was a litigant in Judge Bell's court and alleged (1) that Judge Bell improperly delayed issuing an opinion, and (2) that Judge Bell was responsible for him not receiving a copy of the order until after the time to appeal had lapsed. As part of its investigation, Disciplinary Counsel obtained evidence that attorney Tom Testerman contacted Mr. Pleau on behalf of Judge Bell, and this allegation is a

major theme of the Formal Charges, which were filed by Disciplinary Counsel on October 13, 2009.¹ The Formal Charges not only allege ethical violations by Judge Bell, but also aver that Judge Bell's conduct is criminal under applicable Tennessee law.

From his initial pleadings in this matter and at every turn thereafter, Judge Bell has asserted (1) his rights under the U.S. and Tennessee Constitutions to remain silent regarding any fact which could be used against him in prosecuting alleged criminal activity, and (2) his right under the state law attorney-client privilege not to have his confidential communications with Tom Testerman revealed.²

At their recent depositions, both Judge Bell and Mr. Testerman refused to answer certain questions asked by Disciplinary Counsel. Disciplinary Counsel has brought separate motions seeking to compel their testimony alleging that the privileges were not properly invoked. Disciplinary Counsel also seeks an order in limine requiring Judge Bell and Mr. Testerman to "stand on [their] properly excluded testimony or in the alternative provide notice of intent to waive or otherwise abandon the privilege."

For the reasons set forth below, Disciplinary Counsel's motions should be denied.

II. SUMMARY

Disciplinary Counsel's Motions seek to undermine two of the most sacrosanct rights in American jurisprudence, namely the privilege against self-incrimination and the attorney-client privilege.

¹ Disciplinary Counsel is currently seeking to amend the Formal Charges. Judge Bell objects to the proposed amendment.

² During the investigation, Mr. Testerman was interviewed by Disciplinary Counsel J.S. Daniel. Mr. Testerman concedes it was improper for him to consent to the interview, but he states he did so because he was "intimidated" by Mr. Daniel's threats against him.

Judge Bell and Mr. Testerman properly invoked these privileges at their recent depositions and now the Court must determine the extent to which these privileges apply to the questions asked by Disciplinary Counsel during the deposition.³

While the record before the Court clearly establishes that each and every invocation of privilege by or on behalf of Judge Bell was appropriate and lawful, counsel for Judge Bell will be prepared to address the application of privilege to any particular question(s) at the hearing set for March 3, 2010.

Disciplinary Counsel's request for an order requiring Judge Bell and Mr. Testerman to permanently stand on their properly excluded testimony or in the alternative provide advance notice of his intent to abandon a privilege is contrary to United States Supreme Court precedent. Accordingly, this request should be summarily denied by this Court without further consideration.

III. ARGUMENT

A. Judge Bell has properly invoked both the privilege against self incrimination and the attorney-client privilege, such that the Court must now determine which questions Judge Bell should be required to answer.

In its motions, Disciplinary Counsel takes the untenable position that Judge Bell has not established the basic two elements of the attorney-client privilege: (1) communications were made pursuant to an attorney-client relationship with (2) the intention that the communications remain confidential. Clearly however, the record demonstrates that this minimum threshold showing has been adequately made. Specifically, the following statements in Judge Bell's Affidavit filed in support of his Motion for Summary Judgment establishes that an attorney-client relationship was

³ The process for this Court to undertake in light of Judge Bell's proper assertion of privilege is fully set forth in Judge Bell's Combined Response to (1) Motion to Set and/or Motion for Scheduling Order, and (2) Motion for Protective Order dated November 27, 2009.

formed between he and Tom Testerman and that communications were made pursuant to that relationship with the intention that the communications remain confidential:

8. In late December 2008 - mid January 2009, I received an anonymous phone call during which the caller stated that Mr. Pleau was going to drop his complaint.
9. I have never learned the identity of the anonymous caller.
10. Shortly after receiving the anonymous call, I engaged the professional services of Attorney Tom Testerman of the Cocke County Bar.
11. I intended and understood that my conversations with Mr. Testerman were privileged as attorney-client communication. I have never authorized Mr. Testerman to reveal to anyone our communications with each other.⁴

B. Because Judge Bell's retention of Tom Testerman may be alleged to be an element of a crime, the Fifth Amendment to the United States Constitution and Article 1, §9 of the Constitution of the State of Tennessee preclude further inquiry into this issue.

There can be no legitimate dispute that any statements Judge Bell may have made to Tom Testerman concerning the complaint made by Mr. Pleau against Judge Bell were confidential as part of Mr. Testerman's legal representation of Judge Bell. Nonetheless, it is possible that Disciplinary Counsel may want to discover more facts about the relationship; for example, past legal work performed by Tom Testerman, the precise date Mr. Testerman was engaged on the Pleau matter, whether the attorney-client relationship continues, and if not the date the attorney-client relationship ceased.

Without question, however, in light of the unique facts and circumstances present in this case, the Fifth Amendment to the United States Constitution and Article 1, §9 of the Constitution of the State of Tennessee preclude any such any inquiry by Disciplinary

⁴ The following pages of Judge Bell's and Tom Testerman's deposition also demonstrate that confidential communications were made pursuant to an attorney-client relationship: Bell: Page 151, Line 14; Page 174, Line 10. Testerman: Page 51, Line 7 through Page 52, line 6.

Counsel. Because the very existence of the attorney-client communication appears to be an element of an offense that may be considered a crime, Judge Bell can not be compelled to provide further evidence on this subject. For example, Judge Bell can not be forced to answer questions regarding the dates Tom Testerman represented him because such information could be used by a prosecutor to convict Judge Bell of Official Misconduct by simply comparing those dates to days in which Mr. Testerman appeared in Judge Bell's court.

The proposed Amended Formal Charges allege that during the time in which Tom Testerman was his lawyer, Judge Bell had a duty to advise litigants that Tom Testerman represented him when Mr. Testerman appeared in his Court. The Amended Formal Charges further allege Judge Bell's failure to do so rises to the level of criminal activity, including, without limitation, "Official Misconduct" under Tenn. Code Ann. §39-16-402.

Given these allegations, Judge Bell has a legitimate concern of criminal prosecution. The Tennessee Bureau of Investigation conducted a 17 month long investigation into Judge Bell. At the end of the investigation, TBI Special Agent Scott Lott sent reports regarding Judge Bell to state and federal prosecutors seeking to have criminal charges brought him. Importantly, Special Agent Lott's report does not include reference to Judge Bell's alleged official misconduct and obstruction of justice for failing to advise Mr. Testerman's adversaries that he represented Judge Bell. Thus, it appears that no prosecutor has reviewed these allegations and decided not to pursue criminal charges against Judge Bell.

No other facts exist to lessen Judge Bell's concern of criminal prosecution. Judge Bell has not been granted immunity (immunity was offered to Tom Testerman). Nor does the statute of limitation provide him any protection. Official misconduct is a Class E felony with a limitations period of 2 years, which means Judge Bell remains at risk of prosecution through at least February 2011 -- possibly longer if this alleged crime is deemed to have been concealed such that the any limitations period is tolled under Tenn. Code Ann. §40-2-103.

The U.S. Supreme Court has recognized that a citizen can not be denied one right as a consequence of invoking another. See, *Girhan v. Western Line Consolidated School Dist.*, 439 U.S. 410 (1979) (holding that teacher could not be terminated - in other words deprived of her property rights in her employment - for exercising her right to free speech). But, of course, that is precisely what Disciplinary Counsel is asking this Court to do -- Disciplinary Counsel wants this Court to deny Judge Bell his right to assert the attorney-client privilege as a consequence of him invoking his 5th Amendment protection against self-incrimination.

However, the law clearly does not support Disciplinary Counsel. Rather, the law protects a defendant who is in the unfortunate position of having the fact he hired an attorney potentially used against him in criminal prosecution. Accordingly, although information concerning the existence of the attorney-client relationship is generally not privileged or protected by the attorney-client privilege, an important and notable "exception is made for cases where the existence of the attorney-client relationship might be incriminating to a client." *In Re Michaelson*, 511 F. 2d 882 (9th Cir. 1975). See also, *Baird v. Koerner*, 279 F.2d 623 (9th Cir. 1960) (holding attorney did not have to reveal

name of client where mere fact of engaging the attorney was incriminating to the client) citing 97 C.J. Witnesses § 283.

C. Disciplinary Counsel's motion in limine seeking to require Judge Bell and Tom Testerman to "stand on [their] properly excluded testimony or in the alternative provide notice of intent to waive or otherwise abandon the privilege" is likewise unconstitutional.

Disciplinary Counsel further seeks an order in limine to require Judge Bell⁵ to decide now and forever whether and to what extent to waive the state and federal privileges against self-incrimination and attorney-client privilege. Disciplinary Counsel cites no authority in support of a party's ability to obtain such a ruling.

Without doubt, this request is not designed by Disciplinary Counsel to obtain a legitimate pretrial order on the admissibility of evidence, but rather to gain a tactical advantage in the discovery process and ultimate trial by exacting a heavy toll from Judge Bell for the proper assertion of testimonial privileges guaranteed to him under federal and state law.

The 5th Amendment grants a defendant the right "to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty...for such silence." *Malloy v. Hogan*, 378 U.S. 1, 8 (1964). Applying this standard, the U.S. Supreme Court in *Brooks v. Tennessee*, 406 U.S. 605 (1972), declared a former Tennessee statute (TCA §40-2403) which required a criminal defendant to testify first or not at all to be unconstitutional. In so holding, the Supreme Court explained its rationale as follows:

Although a defendant will usually have some idea of the strength of his evidence, he cannot be absolutely certain that his witnesses will testify as expected or that they will be effective on the stand. They may collapse under skillful and persistent cross-examination, and through no fault of

⁵ Because Judge Bell owns the privilege, he alone can make the decision to waive it.

their own they may fail to impress the jury as honest and reliable witnesses. In addition, a defendant is sometimes compelled to call a hostile prosecution witness as his own. Unless the State provides for discovery depositions of prosecution witnesses, which Tennessee apparently does not, the defendant is unlikely to know whether this testimony will prove entirely favorable.

Because of these uncertainties, a defendant may not know at the close of the State's case whether his own testimony will be necessary or even helpful to his cause. Rather than risk the dangers of taking the stand, he might prefer to remain silent at that point, putting off his testimony until its value can be realistically assessed. Yet, under the Tennessee rule, he cannot make that choice "in the unfettered exercise of his own will." Section 40-2403 exacts a price for his silence by keeping him off the stand entirely unless he chooses to testify first. This, we think, casts a heavy burden on a defendant's otherwise unconditional right not to take the stand. The rule, in other words, "cuts down on the privilege [to remain silent] by making its assertion costly." *Griffin v. California*, 380 U.S. 609, 614 (1965)...

Pressuring the defendant to take the stand, by foreclosing later testimony if he refuses, is not a constitutionally permissible means of ensuring his honesty. It fails to take into account the very real and legitimate concerns that might motivate a defendant to exercise his right of silence. And it may compel even a wholly truthful defendant, who might otherwise decline to testify for legitimate reasons, to subject himself to impeachment and cross-examination at a time when the strength of his other evidence is not yet clear. For these reasons we hold that § 40-2403 violates an accused's constitutional right to remain silent insofar as it requires him to testify first for the defense or not at all.

The pending motion in limine seeks to punish Judge Bell for exercising his rights to privilege in the same manner as the Supreme Court declared unconstitutional in *Brooks*. Judge Bell does not know what evidence will be introduced by Disciplinary Counsel at trial, nor does he know how Disciplinary Counsel's witnesses will present themselves – in fact, because Disciplinary Counsel is still conducting an active investigation and seeks to amend its Formal Charges, Judge Bell does not know at this time what charges will ultimately go trial and what evidence Disciplinary Counsel may have to support those charges.

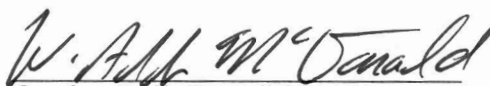
Accordingly, Judge Bell can not make an intelligent, informed decision on whether to waive his rights to privilege at this time – nor can he or any other person faced with the threat of criminal prosecution make an informed decision, until the facts and testimony of other witnesses are fully and completely developed. Under the U.S. Supreme Court’s ruling in *Brooks, infra*, Judge Bell respectfully submits that it would be unconstitutional for this Court to limit his right to assert privilege or punish him in any way for asserting such rights. Specifically, this Court should deny Disciplinary Counsel’s motion for an order in limine requiring Judge Bell or Tom Testerman (as Judge Bell’s attorney) to stand on their properly excluded testimony or in the alternative provide notice of intent to waive or otherwise abandon the privilege claim sufficiently in advance of trial to permit discovery.”

IV. CONCLUSION

Judge Bell properly invoked the attorney-client privilege in his deposition and the deposition of his attorney, Tom Testerman. Judge Bell further properly asserted his privilege against self-incrimination under the United States Constitution and the Constitution of Tennessee. According, this Court should now determine the extent to which these privileges apply to the questions asked by Disciplinary Counsel during those depositions. Disciplinary Counsel’s motion in limine seeking an order limiting Judge Bell’s ability to assert or waive these privileges is not supported by law, and if granted would be an unconstitutional penalty for asserting his rights.

Accordingly, Judge Bell respectfully requests that Disciplinary Counsel’s Motions be denied in full.

Respectfully submitted this 1st day of March, 2010.



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CERTIFICATE OF SERVICE

A copy of the foregoing was served upon the following via electronic mail.

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This 1st day of March 2010.



W. Allen McDonald