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Grant of judicial immunity to witnesses may be a first

By: Kris Olson January 5, 2017

"Although we have left open the possibility that 'unique circumstances' could require a judge to grant a limited form of immunity to a defense witness … we have not yet been presented with such a scenario."

So wrote the Supreme Judicial Court last year in *Commonwealth v. Brewer*.

Now, for what is believed to be the first time in Massachusetts, a Superior Court judge recently determined that she had indeed been "presented with such a scenario."

Judge Angel Kelley Brown granted judicial immunity to a group of defense witnesses, a determination that was subsequently validated by SJC Single Justice Frank M. Gaziano.

Once the trial resumed in *Commonwealth v. Dominico* and the jury heard from the newly immunized witnesses, the defendant, who was facing a charge of motor vehicle homicide while under the influence of alcohol, was acquitted.

Defense lawyers say they are heartened to finally have proof that that particular legal needle can be threaded and are hopeful that it will embolden others to similarly seek to safeguard their clients' due process rights, even as they encourage the SJC to provide trial judges further guidance on when to grant such unusual relief.

Fifth Amendment concerns

In the early morning hours of New Year's Day 2015, a multi-car accident in Rockland left 18-year-old high school senior Patrick Sullivan dead and then-23-year-old Timothy Dominico under arrest. Both drivers were legally intoxicated.

As Dominico's trial was getting under way last month, his attorney, David J. Grimaldi of Cambridge, filed a motion to compel Sullivan's teenaged friends, whom he had subpoenaed, to testify. In the alternative, he asked Kelley Brown to grant them judicial immunity.

Grimaldi argued in the motion that the witnesses would provide "powerful and persuasive evidence" that Sullivan was intoxicated to the point that he was swerving all over the road, that friends were scared to get in the car with him, and that he had admitted in a text message to one of those friends to being "folded," or impaired, after drinking for several hours.

The witnesses, all under 21, faced at least some risk of incriminating themselves for underage drinking if they took the stand, though Grimaldi noted that nearly two years had passed without any sign the teens would be prosecuted for an offense that carried a maximum penalty of a minimal fine and 90-day driver's license suspension.

Prosecutors claimed that, because they had already conceded the fact that Sullivan had a blood alcohol content of 0.19 and had been speeding, the witnesses' testimony would be cumulative.

Grimaldi countered that the witnesses' testimony would be anything but, given the prosecution's theory of the case: that Dominico's aggressive driving had forced Sullivan to speed and then veer off the road and into several trees, sending his vehicle airborne.

Had Grimaldi offered for the state to stipulate to the subpoenaed witnesses' proposed testimony, the offer would have undoubtedly been rejected, "further proof that the Commonwealth seeks to prevent this crucial, fresh,

exculpatory, and consequential evidence from reaching the jury," he wrote in his motion.

Kirsten V. Mayer, who served as lead counsel for MACDL, which submitted an amicus brief in Brewer, suggested that defense attorneys should take Dominico as a "green light" and not be shy in similarly seeking immunity in appropriate cases.

Should bar be set at 'prosecutorial misconduct'?

In the SJC's *Brewer* ruling, one of the "unique circumstances" that the court said might trigger a need for judicial immunity of defense witnesses is "where there exists prosecutorial misconduct arising from the government's deliberate intent to distort the fact-finding process."

Neither Kelley Brown nor Gaziano used the phrase "prosecutorial misconduct" in their decisions, Grimaldi told Lawyers Weekly. However, he said such a finding would have been warranted because prosecutors had "purposefully engineered" just such a distortion by only calling the judge's attention to potential Fifth Amendment issues with the witnesses nine days into the trial, after the prosecution had rested its case.

That was long after Grimaldi, in his opening statement, had promised the jury that it would hear from Sullivan's friends about his drinking and erratic driving, he said.

It also was long after the very same Fifth Amendment issue had come up on the prosecutors' radar as they considered whether to call another of Sullivan's friends, whose anticipated testimony would have been more favorable to its case, something they ultimately elected not to do.

That prosecutors had already considered the Fifth Amendment issue was "an astonishing admission," Grimaldi wrote in his motion to Kelley Brown.

"Indeed, if the Commonwealth succeeds in its efforts, the jury will not only hold undersigned counsel's unfulfilled promise of critical witness testimony against the defendant, but also allow the Commonwealth to subvert the historical truth" regarding Sullivan's intoxication and erratic driving, something that would be "reversible error" if allowed to stand, Grimaldi suggested in his motion.

In their memo to Kelley Brown, prosecutors stressed "nothing in this case approaches any semblance of prosecutorial misconduct or a decision made to distort the fact finding process."

But Grimaldi wrote that "a growing body of law across the country finds that immunity of defense witnesses is appropriate even in cases where … prosecutorial misconduct is not an issue."

As the SJC had in *Brewer*, both sides analyzed the witnesses through the 9th Circuit case *United States v. Straub*.

Prosecutors asserted they had dodged a "*Straub* issue" by not immunizing Sullivan's friend, whose testimony would have been favorable to the prosecution. Under the *Straub* test, immunity should be granted to defense witnesses who would "directly contradict" an immunized government witness. By not immunizing or even calling such a witness, prosecutors believed they had taken the issue off the table.

Hewing to the language in *Straub*, prosecutors also argued to Gaziano that they did not "intentionally cause the defense witness to invoke the Fifth Amendment right against self-incrimination."

Instead, the commonwealth felt it was its obligation to alert the judge to the issue and did so outside the presence of the jury, ADA Corey Sullivan-Martin argued in her brief.

Yet Gaziano left undisturbed Kelley Brown's determination that "unique circumstances" existed in *Dominico*.

While one Superior Court judge's oral decision does not change the law, Grimaldi said he is hopeful that it might encourage a judge who is otherwise disinclined to apply the doctrine in a case in which it is justified.

In an emailed statement, Beth Stone, a spokesperson for Bristol County District Attorney Timothy J. Cruz, said that the office continues to "strongly disagree with Judge Kelley Brown's order granting immunity to non-percipient witnesses."

She added: "There was no finding of prosecutorial misconduct by the trial judge or the single justice's summary denial of the commonwealth's petition in conjunction with this grant of judicial immunity. We stand firm in our position that the order was erroneous."

SJC could provide clarity

In *Brewer*, the SJC surveyed the landscape of how other jurisdictions handle judicial immunity and, while discussing *Straub* at length, did not exactly settle on a test in Massachusetts, Grimaldi noted.

Some believe it is high time for the SJC to revisit the issue and articulate clearer guidance, including Boston attorney Kirsten V. Mayer, who served as lead counsel for the Massachusetts Association of Criminal Defense Lawyers, which submitted an amicus brief in *Brewer*.

"I would love to see the full SJC weigh in on this in a more meaningful and thoughtful way," Mayer said.

While *Brewer* had theoretically opened the door to the granting of judicial immunity, *Dominico* is "proof of concept," she said.

Mayer suggested that defense attorneys should take *Dominico* as a "green light" and not be shy in similarly seeking immunity in appropriate cases, particularly given the severe risk of a miscarriage of justice if a jury never gets to hear significant exculpatory testimony. If defense attorneys do so, the issue will inevitably get before the full SJC once again, Mayer said.

She added that it is a "matter of basic fundamental fairness" to extend to defendants a tool available to prosecutors.

In its amicus brief in *Brewer*, MACDL addressed one of the government's primary objections to judicial immunity: that immunizing defense witnesses undercuts prosecutorial independence and discretion by foreclosing future criminal cases against the witnesses.

Mayer acknowledged the validity of that concern but said judges are equipped to put that consideration in perspective.

"That is a factor that can be weighed by the judge, who can give it the weight it deserves but no more than that," she said.

Charlestown criminal defense attorney Peter T. Elikann said it will be a positive development if *Dominico* encourages defense counsel to pursue judicial immunity for defense witnesses more frequently.

"The bottom line is that the jury should be presented a fact-finding process that is as undistorted as possible," he said.

While immunity may continue to be found warranted in only the "rarest of circumstances," Elikann said, it is "encouraging we've now seen that the court will grant this immunity if the conditions are met and the case really merits it."

MACDL President Michael S. Hussey agreed. He expressed a hope that Kelley Brown's decision — and Gaziano leaving it undisturbed — portends that judges will be more willing to grant immunity, and not just in cases involving prosecutorial misconduct.

"It seems unnecessary to make such a finding when the real issue is whether the defendant can receive a fair trial without putting on the witness," he said.

If and when the SJC does revisit the issue of judicial immunity of defense witnesses, Hussey said, the court should consider making immunity available to witnesses, like those at issue in *Brewer*, whose testimony would call into question the credibility of witnesses on whom the prosecution has built its case. Doing so would help safeguard the defendant's due process rights, he said.

Grimaldi said it is particularly encouraging that his was not the "strictest or most obvious case of prosecutorial misconduct." Nor was there a straight line drawn between the prosecution's immunized witnesses and those to whom the defense proposed granting immunity.

"In that sense, [Kelley Brown's decision] is a bit more expansive," he said.

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