

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MYRNA MOORE, SHEILA YOUNG,  
RICHARD SAFFORD, WILLIAM  
MCKENNA, AND RAY CARNATION,  
Plaintiffs

CIVIL ACTION

v.

CITY OF PHILADELPHIA, et. al., :  
Defendants

NO. 99-1163

MEMORANDUM AND ORDER

McLaughlin, J.

June 18, 2002

On January 21, 2002, plaintiff Raymond Carnation was deposed with regard to his section 1983 complaint against the defendants. During that deposition, it was revealed for the first time that Carnation had recorded certain phone conversations that he had with defendant Captain William Colarulo over Memorial Day weekend in 1998.<sup>1</sup>

When asked whether he had Captain Colarulo's permission to record the conversations, Carnation's lawyer instructed him not to answer the question based on "privilege." Carnation also

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<sup>1</sup> At the time of the phone conversations, Carnation was a Philadelphia police officer assigned to the 25<sup>th</sup> District, and Colarulo was a Philadelphia police captain assigned to the same district. Although Colarulo is now an inspector with the Philadelphia police department, he will be referred to as Captain Colarulo throughout this opinion.

refused to turn over the tapes of the conversations, asserting his Fifth Amendment privilege against self-incrimination.

The defendants have filed the instant motion to compel Carnation to answer deposition questions concerning the circumstances of the taping and to compel Carnation to produce the audiotapes in question. Carnation has resisted these requests, asserting that because Pennsylvania makes it a felony in the third degree to intercept or disclose any wire or oral communication without the consent of all parties to the conversation, his Fifth Amendment rights are implicated by the requests. See 18 Pa. Cons. Stat. Ann. § 5703.

The defendants also point out that the tapes in question fall into a category of materials that were requested by the defendants during earlier discovery in the case. The defendants requested that Carnation produce "every audio or visual recording which mentions, discusses, describes, relates to or embodies in any way [Carnation's] employment by the Defendant City of Philadelphia and/or [Carnation's] claims asserted in the Amended Complaint." The defendants argue that Carnation's failure to respond to the earlier discovery request or to assert his Fifth Amendment privilege at that time constitutes a waiver of his ability to **now** assert his privilege in refusing to produce the tapes. The defendants also argue that Carnation's failure to

comply with his discovery obligations in a timely manner merits the sanction of dismissal of his claims.

Because different analysis is appropriate when considering the applicability of the Fifth Amendment to the production of the tapes and to the deposition testimony itself, the Court will address each issue in turn. The Court will then address the issue of whether it is appropriate to dismiss Carnation's claims as a sanction for the alleged discovery violations.

#### I. Production of the Tapes

Initially, Carnation seems to argue that the tapes need not be produced because they are not relevant to the underlying action. It is clear, however, that the tapes are relevant to issues central to Carnation's claim.

In the Amended Complaint, Carnation asserts, in part, that he was retaliated against by the police department for his complaints regarding the racially discriminatory conduct of one of his supervising officers. In March of 1999, Carnation was served with a Notice of Dismissal, informing him that effective March 12, 1999, he was dismissed from his position as a police officer with the City of Philadelphia. The official reasons given by the Police Department for Carnation's dismissal involve

his behavior during the phone conversations which took place over Memorial Day weekend in 1998.

In the Notice of Dismissal, it is reported that during a phone conversation with Captain Colarulo on May 22, 1998, Carnation was given a direct order not to call Sergeant John Moroney. See Notice of Dismissal, Ex. E to Defs.' Mot. The Notice reports that in contravention of this order, Carnation called for Sergeant Moroney two times on May 23, 1998. Id. It is also reported that Carnation called Captain Colarulo again on May 24, 1998, stating that he "didn't care" about what Captain Colarulo had told him, and that he had called Sergeant Moroney anyway. Id. Based, in part, on these allegations, the Notice indicates that Carnation was dismissed for Conduct Unbecoming an Officer, Insubordination, and Neglect of Duty. Id.

At his deposition, Carnation testified that he had recorded certain telephone conversations with Captain Colarulo during the weekend of May 22 - May 24, 1998. Because it is Carnation's conduct surrounding these very conversations that served as the basis for his dismissal from the police department, the tapes are clearly relevant to his claims against the defendants. Even though they are relevant, however, Carnation may not **be** required to produce the tapes if they are protected by the scope of his Fifth Amendment privilege against self-

incrimination.

The Supreme Court has held that the Fifth Amendment protection against self-incrimination is limited to "compelled incriminating communications" that are "testimonial" in character. United States v. Hubbell, 530 U.S. 27, 34 (2000). However, the production of a non-compelled, non-testimonial document may still be privileged under the Fifth Amendment. This is because even though "the contents of a document may not be privileged, the act of producing the document may be." United States v. Doe, 465 U.S. 605, 612 (1984). For example, by producing the documents, the party "would admit that the [documents] existed, were in his possession or control, and were authentic." Hubbell, 530 U.S. at 36-37. Therefore, the act of production itself could be testimonial in that it "may certainly communicate information about the existence, custody, and authenticity of the documents." Id.

The Court concludes that the tapes in question here are not "compelled incriminating communications" that are testimonial in nature. Carnation was in no way compelled to create the audiotapes. He did **so** voluntarily. As such, any "testimony" that appears on the tapes was not compelled, and the privilege

against self-incrimination does not apply.<sup>2</sup> ~~See Id.~~ at 35-36 (recognizing the "settled proposition that a person may be required to produce specific documents even though they contain incriminating assertions of fact or belief because the creation of those documents was not 'compelled' within the meaning of the privilege"); Doe, 465 U.S. at 611 (citing Fisher v. United States, 425 U.S. 391, 409-10 (1976)); In re Application to Ouash a Grand Jury Subpoena, 597 N.Y.S.2d 557, 560-61 (N.Y. Sup. Ct. 1993) (statements on voluntarily created tape not compelled testimony).

In addition, the Court concludes that any testimonial aspect to the production of the audiotapes in question does not subject the tapes to Fifth Amendment protection. Because

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<sup>2</sup> To the extent that some courts have recognized that wholly personal papers might be protected from production via the Fifth Amendment even if they were voluntarily created, the tapes in question do not fall into this category. See In re Grand Jury Proceedinss, 632 F.2d 1033, 1042-43 (3d Cir. 1980) (recognizing that the privilege extends to "self-incriminating private papers, such as purely personal date books"). ~~But see In re Grand Jury Subpoena Duces Tecum~~, 1 F.3d 87, 93 (2d Cir. 1993) ("the Fifth Amendment does not protect the contents of voluntarily prepared documents, business or personal"). The tapes, because they relate to official orders given to Carnation by his superior, relate to his job, and do not "touch upon the intimate aspects *of* [Carnation's] life." In re Application to Ouash a Grand Jury Subpoena, 597 N.Y.S.2d 557, 561 (Sup. Ct. NY 1993); see In re Proceedings Before the Aug. 6, 1984 Grand Jury, 767 F.2d 39, 41 (2d Cir. 1985) (recognizing that because taped statements in question were disclosed to several persons they did not touch on the more intimate aspects of [witnesses'] life).

Carnation has testified that he made the tapes and suggested that he has custody of them, their existence is a "foregone conclusion", and the act of producing them has no independent testimonial significance. See Hubbell, 530 U.S. at 44; In re Application, 597 N.Y.S.2d at 562-63 (admission that tape exists makes existence foregone conclusion and other participant to conversation on tapes could testify as to authenticity); see also Day v. Boston Edison Co., 150 F.R.D. 16, 21 (D. Mass. 1993) (existence of tape not foregone conclusion where plaintiff "never admitted making a tape of the meeting"); Parker v. Balt. and Ohio R.R. Co., 555 F. Supp. 1177 (D.D.C. 1983) (existence of tapes not a foregone conclusion where plaintiff never testified to existence of tapes).

Therefore, the tapes about which Carnation testified at his deposition are not protected by his Fifth Amendment privilege against self-incrimination, and they must be produced.<sup>3</sup> However,

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<sup>3</sup> The Court declines to find that Carnation's right to assert his Fifth Amendment privilege was waived by his delay in doing so. Although some courts have found such a waiver where the delayed assertion of the privilege was part of a larger scheme of dilatory tactics or procedural gamesmanship, the record before the Court does not clearly support a similar conclusion. See United States v. Ehrlich, NO. Civ. A. 95-661, 1998 WL 372355, \*5 (E.D. Pa. May 28, 1998) (no waiver where defendant was "not guilty of the procedural gamesmanship and dilatory tactics that would require a finding of loss of his constitutional protection against self-incrimination"); Day, 150 F.R.D. at 23-25 (right to  
(continued..)

the act of producing any other recordings which may exist might have independent testimonial significance. Producing any such recordings could independently establish, apart from knowledge already available to the defendants, that such recordings exist and are in Carnation's custody. The Court, therefore, will uphold Carnation's assertion of his Fifth Amendment privilege as to any such tapes.<sup>4</sup> See In re Application, 957 N.Y.S.2d at 563-64 (limiting production to those recordings that could be identified and authenticated apart from the act of production).

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<sup>3</sup>(...continued)  
assert privilege waived where tactics "employed by plaintiff's attorneys were clearly 'dilatory' and where plaintiff and his attorneys had "engaged in a significant amount of 'procedural gamesmanship'"); Brock v. Gerace, 110 F.R.D. 58, 64 (D.N.J. 1986) (no waiver where delay caused no "material prejudice" to the plaintiff).

<sup>4</sup> The defendants also argue that simply by filing suit, Carnation has placed the issue of the conversations in controversy, and he has therefore waived his right to assert his Fifth Amendment privilege to refuse to answer relevant questions or to produce relevant documents. The Court does not find that such a waiver has occurred. See Wright, Miller & Marcus, Federal Practice and Procedure: Civil 2d, § 2018, at p. 279 ("It is inconceivable that by exercising the constitutional right to bring or defend an action a person waives his or her constitutional right not to be a witness against himself or herself, and no case has so held."). The question becomes, then, whether a sanction, such as allowing an adverse inference to be drawn against Carnation, is appropriate in response to Carnation's invocation of his Fifth Amendment privilege. See Sec. and Exch. Comm'n v. Graystone Nash, Inc., 25 F.3d 187, 190-91 (3d Cir. 1994). As discussed below, that question is one that the Court leaves open at this time.

## 11. Testimony Regarding Circumstances of Taping

Carnation also argues that his answer to the question of whether he had Captain Colarulo's consent to record the conversations in question is not relevant. The defendants assert that Carnation's answer is relevant to their after-acquired evidence defense to Carnation's claim for reinstatement and damages. Because "discovery requests do not have to relate to a party's case in chief, but may relate to a defense", the Court concludes that Carnation's testimony is relevant and discoverable. 6 Moore's Federal Practice, § 26.43 (Matthew Bender 3d ed. 2000); Fed. R. Civ. P. 26(b) (1). Whether Carnation may refuse to answer the question based on the assertion of his Fifth Amendment privilege is a different question.

Carnation's answer to the question of whether he had Captain Colarulo's consent to record the telephone conversations could tend to incriminate him under Pennsylvania's Wiretapping and Electronic Surveillance Control Act (the "Act"). See 18 Pa. Cons. Stat. Ann. § 5704(4); Commw. v. Junq, 531 A.2d 498, 503 (Pa. Super. Ct. 1987) ('all parties to the communication must consent to the interception'). Because Carnation did answer some questions about the recording of these conversations, however, the question of waiver arises.

If a party volunteers incriminating testimony **on** a

topic, he may not later claim his Fifth Amendment right and refuse to answer additional questions on the topic which would not subject him to further incrimination. See, e.g., Rogers v. United States, 340 U.S. 367, 373 (1951) ("where criminating facts have been voluntarily revealed, the privilege cannot be invoked to avoid disclosure of the details"); In re Gi Yeong Nam, 245 B.R. 216, 227 (Bankr. E.D. Pa. 2000); Day v. Boston Edison Co., 150 F.R.D. 16, 21 (D. Mass. 1993); Mitchell v. Zenon Constr., 149 F.R.D. 513, 514 (D.V.I. 1992). The question here, then, is whether Carnation's statement that he recorded the conversations is "incriminating" and, if so, whether his response to the question of whether he had consent to tape the conversations would subject him to further incrimination.

Simply by testifying that he had recorded the conversations with Captain Colarulo, Carnation raised the possibility that he could be linked to a violation of the Act, and therefore he may have incriminated himself. See In re Gi Yeong Nam, 245 B.R. at 225. If through his testimony Carnation has already incriminated himself, then answering the further question about whether he had consent to record the conversation would not "further incriminate" him regarding a violation of the Act. See Mitchell, 149 F.R.D. at 515. However, courts have cautioned that a "testimonial waiver of an individuals's Fifth

Amendment right is not to be lightly inferred", and "courts must indulge every reasonable presumption against finding testimonial waiver." In re Gi Yeong Nam, 245 B.R. at 228. See Wayne R. LaFave & Jerold H. Israel, 3 Criminal Procedure, § 8.10(e) (noting that courts rarely reject witnesses' assertions that further answers would increase the risk of incrimination).

The Court concludes that requiring Carnation to state whether or not he had Captain Colarulo's consent to record the telephone conversations could tend to further incriminate him with regard to the Act. Were Carnation to testify that Captain Colarulo did not consent to the recording of the conversations, then Carnation would have implicated himself with regard to an element of a violation of the Act. See Jung, 531 A.2d at 503. This element was not necessarily established **by** Carnation's testimony that he recorded the conversations in question. Therefore, the Court declines to find, based on this record at this time, that Carnation has waived his right to assert his Fifth Amendment privilege in refusing to answer the question **of** whether he had Captain Colarulo's consent to record the telephone conversations.

The Court will leave open, at this point, the question of whether it is appropriate to allow an adverse inference to **be** drawn from Carnation's invocation of his Fifth Amendment right.

The Court notes, however, that such a sanction may be wholly appropriate in civil cases where the plaintiff claims his privilege against self-incrimination in refusing to answer questions related to his claim. See, e.g., Secc. and Exch. Comm'n v. Graystone Nash, Inc., 25 F.3d 187, 191 (3d Cir. 1994); Cont'l Assurance Co. v. Lombardo, Civ. A. No. 85-4867, 1988 WL 38377, at \*3 (E.D. Pa. Apr. 11, 1988); Justice v. Laudermilch, 78 F.R.D. 201, 203 (M.D. Pa. 1978); see also Doe v. Glanzer, 232 F.3d 1258, 1266 (9<sup>th</sup> Cir, 2000).

#### 111. Sanctions for Discovery Delays

The defendants have also requested that Carnation's claims be dismissed as a sanction for his repeated failure to comply with their discovery requests for any recordings related to his claims. The determination of whether dismissal is an appropriate sanction is governed by a six factor test set forth by the Third Circuit in Poulis v. State Farm Fire and Casualty Company, 747 F.2d 863 (3d Cir. 1984).

The six factors set forth in Poulis are: (1) the extent of the party's personal responsibility; (2) the prejudice to the adversary caused by the failure to meet scheduling orders and respond to discovery; (3) a history of dilatoriness; (4) whether the conduct of the party or the attorney was willful or in bad

faith; (5) the effectiveness of sanctions other than dismissal, which entails an analysis of alternative sanctions; and (6) the meritoriousness of the claim. Poulis, 747 F.2d at 868. See, e.g., United States v. \$1,322,242.58, 938 F.2d 433 (3d Cir. 1991); Hicks v. Feeney, 850 F.2d 152 (3d Cir. 1988); Nat'l Grange Mutual Ins. Co. v. Sharn Equip. Co. of Reading, Nos. Civ. A. 01-0628, 01-1184, 2002 WL 442823 (E.D. Pa. Mar. 1, 2002). Although not "all of these factors need be met for a district court to find dismissal is warranted", the Third Circuit has cautioned that "dismissal is a sanction of last resort". Hicks, 850 F.2d at 156.

Although certain of the above factors could be read to justify dismissing Carnation's claims, the Court concludes that dismissal is not appropriate in this case. The Court finds that Carnation's invocation of his Fifth Amendment right, although late, was not frivolous. The Court also notes that the defendants have not articulated any real prejudice occasioned by Carnation's delayed invocation of his Fifth Amendment privilege. In addition, given the representational history of this case, it is difficult, at this point, to determine the extent of Carnation's personal responsibility for the failure to turn over the tapes or to claim his privilege at an earlier date. For these reasons, the Court declines to impose sanctions on

Carnation at this point in time.

An appropriate Order follows.

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CIVIL ACTION

v.

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CITY OF PHILADELPHIA, et. al.  
Defendants

NO. 99-1163

ORDER

AND NOW, this 18<sup>th</sup> day of June, 2002, upon  
consideration of the defendants' Motion to Compel and for  
Sanctions Against Plaintiff Raymond Carnation (Docket #71), and  
Raymond Carnation's Memorandum in Opposition thereto, IT IS  
HEREBY ORDERED that in accordance with and for the reasons given  
in a Memorandum of today's date, said Motion is GRANTED in part  
and DENIED in part, as **follows**:

The Motion is GRANTED insofar as it seeks to compel  
Plaintiff Raymond Carnation to produce audiotapes of the  
telephone conversations that during his deposition he admitted to  
recording. Carnation shall, within 10 days of this Order,  
produce to the defendants such audiotapes.

The Motion is DENIED insofar as it seeks to compel  
Carnation to answer the question of whether he got "permission

from Captain Colarulo to record him."

The Motion is DENIED insofar as it seeks the sanction of dismissal of Carnation's claims against the defendants.

The Motion is also DENIED, at this point, insofar as it seeks other sanctions.

BY THE COURT:

  
MARY D. McLAUGHLIN, J.