

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

CALVIN SAUNDERS : CIVIL ACTION  
 :  
 v. :  
 :  
 CITY OF PHILADELPHIA, et al. : NO. 97-3251

MEMORANDUM

Dalzell, J.

July 11, 1997

The question before us is whether to stay this § 1983 civil suit pending resolution of a related state criminal action and a related investigation by the Philadelphia Police Department's Internal Affairs Division.

I. Background

Plaintiff Calvin Saunders alleges in his complaint, filed May 6, 1997, that a month earlier, on April 1, 1997, Philadelphia police officers Brian Sprowal and Brian Madalione falsely arrested him on charges of stealing a 1994 Acura Legend. See Compl. at ¶ 8. While arresting him, Officers Sprowal and Madalione, according to Mr. Saunders, "viciously and unnecessarily pistol whip[ped], beat and kick[ed]" him. Compl. at ¶ 11.

Mr. Saunders was then transported to St. Agnes Hospital, with his arms handcuffed behind his back, in a police van, without any safety belts, padding, or other safety restraints. See Compl. at ¶¶ 15-16. During the trip to the hospital, the officer driving the police van, identified as "John Doe Officer," "intentionally slammed on the brakes and drove erratically, causing plaintiff's body and head to violently collide with a steel wall inside the police van." Compl. at ¶

19. When Mr. Saunders finally arrived at St. Agnes, he was, according to the complaint, dragged from the police van and handcuffed to a wheelchair. See Compl. at ¶¶ 22-25. Mr. Saunders was ultimately charged with theft, receiving stolen property, resisting arrest, simple assault, and fleeing from a police officer.

Mr. Saunders alleges that the police officers' conduct in effectuating the arrest and transporting him to St. Agnes has rendered him a quadriplegic. See Compl. at ¶ 28. In support of his assertion, Mr. Saunders has submitted a letter from Kelly C. Crozier, M.D., of the Department of Rehabilitation Medicine at Thomas Jefferson University Hospital, who states unequivocally that Mr. Saunders "sustained at C4-5 dislocation of the cervical spine. This rendered him a cervical 4 complete quadriplegic . . . . This would be consistent with Calvin's reports of being thrown against the walls of the police van with his arms handcuffed behind his back." Ltr. from Dr. Crozier to Fred Perri, Esq., dated June 2, 1997, at 1. Notwithstanding the possibility of some degree of rehabilitation, Dr. Crozier opines that "Calvin will need 24 hour attending care for his feeding, grooming, transferring from bed to chair, turning him in bed every two hours for decubiti prevention, bowel and bladder care, dressing. He would need a fully automated wheelchair in order to do weight shifts every twenty minutes to prevent decubitus ulcer formation." Id. at 3. In addition, Mr. Saunders has filed a videotape with the Court showing his physical condition during a

therapy session at Magee Rehabilitation, on May 14, 1997. Dr. Cozier's description of Mr. Saunders's physical condition is consistent with Mr. Saunders appearance on the tape: Mr. Saunders appears to have no ability for volitional movement, as attendants hoist him from his wheelchair.

The City of Philadelphia has now filed a motion to stay Mr. Saunders's federal civil rights suit pending the completion of the state criminal prosecution against Mr. Saunders, including any appeals, and until the Internal Affairs Division of the Philadelphia Police Department completes its investigation into Mr. Saunders's charges against Officers Sprowal, Madalion, and possibly other officers. The City has represented to the Court that Mr. Saunders's trial was scheduled to begin on May 30, 1997. Notwithstanding that neither the City nor Mr. Saunders has updated us about the current status of the criminal charges, the City argues that this federal case should be stayed pending the resolution of the criminal case against Mr. Saunders because (1) "Mr. Saunders' conviction on any of the [the] charges pending against him may preclude him from making certain critical arguments in his civil case," and (2) "denying a stay . . . could impermissibly allow Mr. Saunders to use civil discovery to further his criminal defense . . . ." City's Mot. to Stay at ¶ 8.

As to the Internal Affairs' investigation into the matter, the City informs us that:

IAD is investigating the events underlying Mr. Saunders' complaint. IAD's usual procedure is to interview the involved police officers last, and, if there is any possibility that criminal charges may be filed against the officers, not to interview them until the Philadelphia District Attorney's Office has cleared them of any criminal wrongdoing. That procedure is being followed in this case. The officers involved in the events of Mr. Saunders' complaint have not yet been cleared by the District Attorney's Office, and consequently they have not been interviewed.

City's Mot. to Stay at ¶ 4. The City contends that this suit should be stayed until Internal Affairs starts and completes its investigation because (1) the law enforcement privilege precludes the public dissemination of investigative files, and (2) failure to stay these federal proceedings would "implicate" the Fifth Amendment right of Officers Sprowal, Madalion, and others. See City's Mot. to Stay at ¶ 7. For the reasons stated below, we will grant in part and deny in part the City's motion.

## II. Legal Analysis

"[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with the economy of time and effort for itself, for counsel, and for litigants. How this can best be done calls for the exercise of judgment, which must weigh

competing interests and maintain an even balance." Texaco, Inc. v. Borda, 383 F.2d 607, 608 (3d Cir. 1967) (quoting Landis v. North American Co., 299 U.S. 248, 254-55 (1936)); see also United States v. Mellon Bank, 545 F.2d 869, 872-73 (3d Cir. 1976). A court must, however, be cognizant that delaying a suit may increase the risk for both parties of, among other things, "loss of evidence through fading memories and the death of individuals." Shim v. Kikkoman Int'l Corp., 509 F. Supp. 736, 740 (D.N.J.), aff'd, 673 F.2d 1304 (3d Cir. 1981).

When deciding whether to stay a civil case pending the resolution of a related criminal case, Courts in our Circuit generally weigh the five factors Judge Pollak enunciated in Golden Quality Ice Cream Co. v. Deerfield Specialty Papers, 87 F.R.D. 53, 56 (E.D. Pa. 1980): (1) the plaintiff's interest in proceeding expeditiously with the civil action as balanced against the prejudice to the plaintiff from delay; (2) the burden on the defendants; (3) the burden and convenience of the Court; (4) the burden on, and interests of, non-parties; and (5) the burden on the public interest. See, e.g., In re Residential Doors Antitrust Litigation, 900 F. Supp. 749, 756 (E.D. Pa. 1995); SEC v. Mersky, No. 93-5200, 1994 U.S. Dist. LEXIS 519, at \*6-7 (E.D. Pa. Jan. 24, 1994). Since the convenience of the Court and the burdens on non-parties are not pertinent here, we shall analyze three of the factors Judge Pollak identified.

1. Mr. Saunders's Interests

Mr. Saunders maintains that we should not stay his federal civil suit until resolution of Internal Affairs' investigation and until the conclusion of the state criminal case, including any appeals, because "Mr. Saunders and his family cannot afford appropriate medical care for Mr. Saunders without receiving the compensatory relief sought in this action. Said care could exceed five million dollars over plaintiff's lifetime." Pl.'s Opp. at ¶ 4.

The City responds that delaying this federal case would not prejudice Mr. Saunders because "at present Defendants are without information sufficient to respond to many, if not most, of the allegations in Mr. Saunders' complaint." City of Philadelphia Mem. of Law in Support of Mot. to Stay at 3 (hereinafter "City's Mem. of Law at \_\_\_\_."). The City's argument in this regard is untenable: if we stay the federal case, including the taking of any discovery, the City will never get the information it needs to respond to the complaint. The City's argument, if we were to accept it, would result in this case never proceeding past the filing of the complaint.

Next, the City argues that the ultimate resolution of the state criminal proceedings against Mr. Saunders will narrow the issues to be litigated in this federal civil rights suit because "Mr. Saunders' conviction on any of [the criminal] charges may preclude [him] from making certain critical arguments

in his civil case." Id. at 6. The City apparently does not believe that it needs to identify what these "certain critical arguments" are, for nowhere in its motion does it elaborate on the issue. While we could speculate as to the nature of these "critical arguments," we will not.

## 2. The Defendants' Interests

The City asserts that, because the Internal Affairs Division's investigation is ongoing, denying the motion to stay this suit until the resolution of that investigation will "implicate" the Fifth Amendment right against self-incrimination of Officers Sprowal, Madalion, and possibly other officers. See City's Mem. of Law at 5.

At this early stage of the litigation, the City's assertion is merely a future contingency: no criminal indictment has been returned against any of the officers in question and no Fifth Amendment interest has been invoked or threatened. The only representation the City has made to the Court is that Internal Affairs has not interviewed the officers involved in the incident at issue here. See Affidavit of Lt. Joseph Sweeney (attached as Exh. C to City's Mem. of Law). With regard to the District Attorney's investigation of the officers in question, the City has provided the Court with no information. As Judge Milton Pollack has explained:

If no indictment has been returned  
and no known investigation is  
underway, the case for a stay of  
discovery, no matter at whose

instance, is far weaker. A criminal action may never commence. The civil plaintiff may be substantially affected by the delays involved in waiting for the criminal action to commence; and, unless it does, the stay will end only when the criminal statute of limitations has run -- possibly several years hence.

Milton Pollack, Parallel Civil and Criminal Proceedings, 129 F.R.D. 201, 204 (1990).<sup>1</sup>

Furthermore, the Fifth Amendment privilege is personal to the one invoking it, and there is as of yet no credible suggestion from the police officers in question that they will in fact claim the privilege. See Rogers v. United States, 340 U.S. 367, 371 (1951); Bowman v. United States, 350 F.2d 913, 915-16 (9th Cir. 1965); United States v. O'Neil, 619 F.2d 222, 222 (3d Cir. 1980).

### 3. The Public Interest

The City maintains that this case should be stayed because the possible disclosure of investigative files would violate the "law enforcement privilege."

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1. Indeed, New York Life Ins. Co. v. Daly, No. 95-6702, 1996 U.S. Dist. LEXIS 18054 (E.D. Pa. Dec. 4, 1996), a case the City cites in support of staying these proceedings so as not to "implicate" the Fifth Amendment right of the officers, illustrates Judge Pollack's point. In Daly, the plaintiff did not oppose staying its civil case against a defendant, who was likely to invoke his Fifth Amendment right in that civil case, because at the same time there was a criminal case pending against him. There is, by contrast, no criminal case pending against the officers here nor any prospect (that we have been informed about) of there even being a criminal indictment of the police officers in the near future.

In civil rights actions brought under 42 U.S.C. § 1983, the law and privileges of the Commonwealth of Pennsylvania do not govern the discoverability and confidentiality of documents in the possession of the City of Philadelphia. See King v. Conde, 121 F.R.D. 180, 187 (E.D.N.Y. 1988) (Weinstein, J.), rather, "[q]uestions of privilege in federal civil rights cases are governed by federal law." Id. (citing many cases); see also 2 Jack B. Weinstein et al., Weinstein's Evidence ¶ 501[02] (1995). This rule is especially compelling in police misconduct cases, such as this one:

It obviously would make no sense to permit state law to determine what evidence is discoverable in cases brought pursuant to federal statutes whose central purpose is to protect citizens from abuses of power by state and local authorities. If state law controlled, state authorities could effectively insulate themselves from constitutional norms simply by developing privilege doctrines that made it virtually impossible for plaintiffs to develop the kind of information they need to prosecute their federal claims.

King, 121 F.R.D. at 187-88 (citing many cases).

Under Federal Rule of Civil Procedure 26, a party to a civil litigation is presumptively entitled to "obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action."

Thus, the federal "law enforcement" privilege is a qualified privilege designed to prevent the disclosure of

information that would be contrary to the public interest in the effective functioning of law enforcement. A federal court applying the privilege must weigh the Government's interest in ensuring the secrecy of the materials in question against the need of the adverse party to obtain the information. See Torres v. Kuzniasz, 936 F. Supp. 1201, 1209 (D.N.J. 1996). Among the list of factors useful in weighing these competing interests are: (1) the extent to which disclosure will thwart governmental processes by discouraging citizens from giving the government information; (2) the impact upon persons who have given information of having their identities disclosed; (3) the degree to which governmental self-evaluation and consequent program improvement will be chilled by disclosure; (4) whether the information sought is factual data or evaluative summary; (5) whether the party seeking the discovery is an actual or potential defendant in any criminal proceeding either pending or reasonably likely to follow from the incident in question; (6) whether the police investigation has been completed; (7) whether any intradepartmental disciplinary proceedings have arisen or may arise from the investigation; (8) whether the plaintiff's suit is non-frivolous and brought in good faith; (9) whether the information sought is available through other discovery or from other sources; and (10) the importance of the information sought to the plaintiff's case. See Frankenhauser v. Rizzo, 59 F.R.D. 339, 344 (E.D. Pa. 1973).

In addition, "a claim of . . . law enforcement privilege must be asserted by the head of the agency claiming the privilege after he or she has personally reviewed the material and submitted precise and certain reasons for preserving the confidentiality of the communications." Torres, 936 F. Supp. at 1210; see also Crawford v. Dominic, 469 F. Supp. 260, 264 (E.D. Pa. 1979) (claim of privilege must be made by the senior official of the agency to "insure[] that each claim . . . has received the personal attention of the official whose department's operations may be affected by a decision to make documents public").

Furthermore, a claim of law enforcement privilege is ordinarily accompanied by an affidavit containing information such as: (1) an affirmation that the agency generated or collected the material in issue and has in fact maintained its confidentiality (if the agency has shared some or all of the material with other governmental agencies it must disclose their identity and describe the circumstances surrounding the disclosure, including steps taken to assure preservation of the confidentiality of the material); (2) a statement that the official has personally reviewed the material in question; (3) a specific identification of the governmental or privacy interests that would be threatened by disclosure of the material to plaintiff and/or his or her lawyer; (4) a description of how disclosure subject to a carefully crafted protective order would create a substantial risk of harm to significant governmental or privacy interest; and (5) a projection of how much harm would be

done to the threatened interests if the disclosure were made. See Torres, 936 F. Supp. at 1210 (citing Miller v. Pancucci, 141 F.R.D. 292, 300 (C.D. Cal. 1992) (finding that specificity is necessary "to provide a court with the information necessary to make a reasoned assessment of the weight of the interests against and in favor of disclosure," and to allow a plaintiff "a fair opportunity to challenge the bases for the assertion of the privilege"))).

The City has failed to make any factual showing that even approximates what is required to meet its burden when invoking the law enforcement privilege. Simply stated: the City has cited not an iota of factual support that would merit us even considering the granting of the motion to stay because of the law enforcement privilege. See United States v. Nixon, 418 U.S. 683, 710 (1974) ("Whatever their origins, these exceptions to the demand for every man's evidence are not lightly created nor expansively construed, for they are in derogation of the search for the truth.").

Finally, the City contends that this case should be stayed because Mr. Saunders should not be allowed to use civil discovery to further his pending (we presume) criminal case. While the Federal Rules of Civil Procedure allow for broad discovery, see Fed. R. Civ. P. 26, the Commonwealth's Criminal Rules of Procedure are more restrictive, see Pa. R. Crim. P. 305. Courts that have addressed analogous situations to the one here have sought to harmonize the differences between civil and

criminal discovery rules, so as not to allow a civil litigant to discover through civil discovery what he could not get through criminal discovery. See, e.g., Founding Church of Scientology v. Kelley, 77 F.R.D. 378, 380 (D.D.C. 1977) (It "is well established that a litigant should not be allowed to make use of the liberal [civil] discovery procedures . . . to avoid the restriction on criminal discovery and, thereby, obtain documents he might not otherwise be entitled to use for his criminal case."); United States v. One 1964 Cadillac Coupe DeVille, 41 F.R.D. 352, 353 (S.D.N.Y. 1966) ("[W]here both civil and criminal proceedings arise out of the same or related transactions the government is ordinarily entitled to stay all discovery in the civil action until disposition of the criminal matter.").

The narrow scope of discovery in criminal cases is generally justified by reference to three considerations unique to criminal prosecutions. First, broad disclosure of the prosecutor's case may result in perjury and the manufacturing of evidence. Next, revealing the identity of confidential government informants may create the opportunity for intimidation of prospective witnesses and may discourage citizens from giving information to the Government. Finally, a defendant may invoke his right against self-incrimination to block the Government's attempt to discover evidence from the defendant, thereby maintaining his ability to surprise the prosecution at trial. See generally Founding Church of Scientology, 77 F.R.D. at 381.

Although the City has not specified how these general considerations apply to the criminal prosecution of Mr. Saunders, the public interest, we find, is best served where all parties have a level playing field, as set forth in the apposite rules of civil and criminal procedure. See Milton Pollack, supra, at 208. Since it would be inequitable to allow Mr. Saunders to obtain full discovery in his civil case, while the Commonwealth, in turn, could not obtain similar discovery from him in the state criminal case, we shall grant the City's motion for a stay. Our stay is not, however, open-ended: this case will be stayed until September 10, 1997, at which time the parties shall report to us as to the status of Mr. Saunders's criminal prosecution in state court, and the progress of Internal Affairs' investigation into this matter. We may then revisit our holding of today accordingly.

An appropriate Order follows.

