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IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT OF FLORIDA

FILED

JAN 22 PM 1:26
DIVISION OF
ADMINISTRATIVE
HEARINGS

ROLAND ROZAS,

Petitioner,

v.

DEPARTMENT OF HEALTH

Respondent.

CASE NO.:

00-2413
JDP

PETITION FOR A WRIT OF CERTIORARI
OR IN THE ALTERNATIVE, WRIT OF
PROHIBITION

COMES NOW the Petitioner, Roland N. Rozas, by and through undersigned counsel, pursuant to Rules 9.030, 9.100, F. A. R. and moves this Court to issue its most gracious Writ of Certiorari or, in the alternative, its most gracious Writ of Prohibition to prohibit the Administrative Hearing, set for January 29, 2001 in this cause from proceeding while a parallel criminal court case is pending. He would state:

1. The Petitioner is pending an administrative hearing in DOAH Case # 00-2413 and 1999-62290, Department of Health v. Roland Rozas before the Respondent.
2. The jurisdiction of this Honorable Court is invoked pursuant to Rules 9.030 and 9.100, R. A. P.
3. This Petition is accompanied by an appendix as required by Rule 9.220, F. A. R.
4. The facts on which Petitioner relies are:

The Respondent filed an Order of Emergency Suspension of License (A. 1-9). The basis for the emergency suspension was that Dr. Rozas allegedly engaged in sexual activity with patient C. Y. (A. 5-6).

Thereafter, an administrative complaint (A. 10-19) was filed by Respondent against Dr. Rozas. The administrative complaint also alleged improper sexual activity with patient C. Y.

Petitioner filed a Motion to Stay Proceedings (A. 20-33). Petitioner showed that he was charged in criminal court with committing a sexual battery upon patient C. Y. (Caroline Yaya) (A. 23).

Petitioner submitted that he would not "be discussing this case with anyone and will exercise his Fifth Amendment Right to Remain Silent with regard to any discovery in the administrative case as well as the Administrative Hearing itself" "Until this criminal case is resolved" (A. 20).

The Administrative Law Judge issue an Order asking the Respondent to show cause why the case should not "be remanded to the agency pending the resolution of the criminal case related to the allegations of the instant case" (A. 33).

The Department filed a Response to Order to Show Case (A. 35-37) the Department argued:

"There is absolutely no legal authority to place a disciplinary case in abeyance pending the disposition of a criminal case"

(A. 35)

"Respondent is in no way precluded from putting on a defense due to the pending criminal matter"

(A.35)

"The Respondent can present an adequate defense without choosing to testify, or conversely, by choosing to testify".

(A. 35)

The Petitioner Replied to the Department's Response:

"The Respondent... is precluded from putting on a defense due to the pending criminal matter since the allegations of sexual misconduct on the part of Dr. Rozas are a one on one "he said she said" with no witnesses other than the accuser and Dr. Rozas". In order for Dr. Rozas to defend these alleged allegations, he must waive his Fifth Amendment right against self-incrimination and testify. There is absolutely no defense that Dr. Rozas can put forward without him testifying in this matter. Therefore, it is imperative that Dr. Rozas be allowed to deal with the criminal matter first so he does not have to waive his Fifth Amendment right and clearly lose the Administrative Hearing.

(A. 39)

This is not merely a discovery matter, and any testimony of Dr. Rozas as well as any questions posed to Dr. Rozas in cross-examination would go to the heart of the criminal charges pending in the Dade County Circuit Court.

(A. 40)

Thereafter, the Administrative Law Judge issued an Order (A. 42) denying Petitioner's Request for a Stay.

The Administrative Hearing in this cause is presently set for January 29, 2001.

5. The nature of the relief sought is the issuance of a Writ of Certiorari finding that the lower tribunal departed from the essential requirements of the law in not granting the stay, or, in the alternative, a Writ of Prohibition prohibiting the lower tribunal from proceeding with the administrative proceedings until the completion of the criminal case.

ARGUMENT

As shown by the following cases certiorari is an appropriate remedy when a defendant is forced to testify/give information in violation of his Fifth Amendment Right against Self Incrimination.

The Due Process requirement of an administrative hearing is that the proceeding must be essentially fair. See *Student Alpha ID No. Guja v. School Board*, 616 So.2d 1011 (Fla. 5th DCA 1993). By denying a Stay and forcing a defendant/Respondent to exercise his Fifth Amendment Right against Self Incrimination and, in fact, so precluding him from defending himself, Due Process is so offended that a Writ of Prohibition should issue to prohibit such a hearing from proceeding until the disposition of the criminal case.

Both the Order of Emergency Suspension (A. 2- para 7,8; A.3, para 9; A. 4, para 15) and the Administrative Complaint (A. 11, para 7; A. 12, para 8, 9; A. 13, para 15) show that the only two people present at the time of the alleged incidents were Dr. Rozas and C. Y., the alleged victim.

Only Dr. Rozas, both in the administrative hearing and criminal case, is available to contradict C. Y.'s version of the events. Only Dr. Rozas as able to testify that he did not do the criminal acts alleged. Contrary to the Respondent's belief (A. 35), there is simply no way Dr. Rozas can present a defense without testifying.

There can be no dispute that the forced compelling of testimony violates the Fifth Amendment.

In Steward v. Mussoline, 487 So.2d 96 (Fla. 3rd DCA 1986), the Court stated:

In any type of proceeding, a person is exempt from answering questions, which may constitute "a link in a chain of evidence leading to his conviction in a criminal case".

(p. 97)

In Rainerman v. Eagle National Bank of Miami, 541 So.2d 740 (Fla. 3rd DCA 1989), the Court stated:

A witness need show only a realistic possibility that his answer will be used against him.

(p. 741)

and,

Allegations of Rainerman's fraudulent banking relationship with Eagle suggest that revelations in the discovery could furnish a link in ongoing and future criminal proceedings. In this posture of the case any answers Rainerman may give to relevant questions may tend to incriminate him, therefore, he has a right to assert the privilege.

(p. 741)

In Best Pool and Spa Service v. Romanik, 622 So.2d 65 (Fla. 4th DCA 1993), the Court stated:

We agree that requiring Kassoner to answer these questions does violate his right against self-incrimination, which applies not only to criminal matters but also administrative proceedings such as licensing.

(p. 66)

In *Raass v. Borgia*, 644 So.2d 121 (Fla. 2nd DCA 1994, the Court considered the question of self-incrimination and stated:

The privilege must be sustained if it is not perfectly clear, from a careful consideration of all the circumstances in the case, that the witness is mistaken, and that the answers cannot possibly have such tendency to incriminate.

(p. 122)

In *O'Neal v. Sun Bank, N. A.*, 754 So.2d 170 (Fla. 5th DCA 2000, the Court stated:

The privilege against self-incrimination is to be liberally construed and may be invoked where the party has a reasonable cause to apprehend danger from a direct answer.

(p. 171)

and,

The privilege may be invoked in a civil action during a discovery proceeding if the civil litigant has reasonable grounds to believe that direct answers to deposition or interrogatory would furnish a link in the chain of evidence needed to prove a crime against him (citation omitted). A

court may compel a litigant to answer question only if it is perfectly clear taken in his apprehension and that the answers to the interrogatories cannot possibly have a tendency to incriminate.

(p. 172)

In this case, a 1- on 1, how can Dr. Rozas present a defense without testifying? The Department alleges that he can but doesn't say how. How can he? He can't.

The Department next asserted:

"There is absolutely no legal authority to place a disciplinary case in abeyance pending the disposition of a criminal case".

(A. 35)

Again, the Department is mistaken.

In Hargis v. Florida Real Estate Commission, 174 So.2d 419 (Fla. 2nd DCA 1965), the Court stated:

The above makes it clear that had this petitioner stood "criminally accused" or had this been a "criminal" case the mere permitting of petitioner to be called as a adverse witness would have been violative of petitioner's constitutional and statutory privilege.

(p. 471)

In Jones v. Turlington, 504 So.2d 811 (Fla. 3rd DCA 1987), the administrative hearing of Mr. Jones was stayed pending the disposition of criminal charges both cases involving the same issues.

In Miami National Bank v. Greenfield, 488 So.2d 559 (Fla. 3rd DCA 1986), a civil case against Mr. Greenfield was stayed pending the disposition of criminal proceedings involving the same subject matter.

In Childs v. Solomon, 615 So.2d 865 (Fla. 3rd DCA 1993), Mr. Childs was involved in both a civil and criminal action. The Court stated:

It is settled law that the privilege against self-incrimination may be properly asserted during discovery proceedings if the civil litigant has reasonable grounds to believe that direct answers to deposition or interrogatory questions would furnish a link in the chain of evidence needed to prove a crime against him. Rainerman v. Eagle National Bank, 541 So.2d 740 (Fla. 3rd DCA 1989). One remedy used by courts when faced with that situation is to continue the civil action. See, Miami National Bank v. Greenfield, 488 So.2d 559 (Fla. 3rd DCA) (civil trial delayed until criminal prosecution is completed or abandoned), rev. denied, 497 So.2d 1217 (Fla. 1986).

On the facts presented by the record in this case, dismissal of the counterclaim, effectively with prejudice, was an abuse of discretion. We agree with the counterclaimant that, assuming that the plaintiff could show some prejudice by his assertion of the Fifth Amendment right, the court should have

considered a remedy, which was not tantamount to a denial of the right to assert the privilege.

Reversed and remanded.

(p. 866)

It is evident from the above cases that the courts have been vigilant in protecting a person's Right against self-incrimination when faced with defending both against criminal charges and a civil/administrative hearing.

A solution found by the Courts was to stay the civil/administrative hearing until disposition of the criminal charge.

Such a solution even more appropriate in this case. Dr. Rozas is not practicing medicine. No client or potential client is in danger. He is abiding by the Suspension Order now in effect.

By staying these administrative proceedings until the disposition of the criminal proceedings both the Public and Dr. Rozas's Fifth Amendment Right against self-incrimination would both be protected. Isn't that the goal of the law? Aren't the Rights of all parties to be protected?

A stay until disposition of the criminal case would, indeed protect all parties.

WHEREFORE in reliance upon the above facts, argument, and authorities, the Petitioner, Dr. Roland Rozas, respectfully requests this Honorable Court to issue its most gracious Writ of Certiorari or, in the alternative, its most gracious Writ of Prohibition staying the Administrative Hearing in this case until the disposition of the criminal charges in State v. Rozas, # 99-40382, presently pending in Dade County Circuit Court.

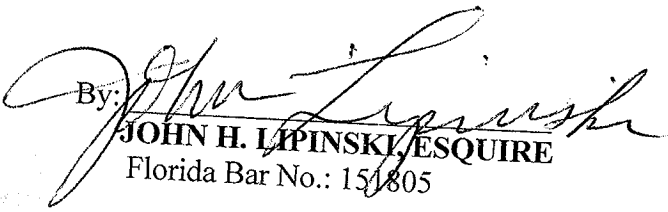
I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed to the office of Kim M. Kluck, Senior Attorney, Agency for Health Administration, P. O. Box 14229, Tallahassee, Florida 32308, and to J. D. Parrish, Administrative Law Judge, Division of Administrative Hearings, The DeSoto Building, 1230 Apalachee Parkway, Tallahassee, Florida 32399-3060, on this 18 day of January 2001.

Respectfully submitted,

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