7-1-1967

Immunity Agreement -- A Bar to Prosecution

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Recommended Citation
David Hecht, Immunity Agreement -- A Bar to Prosecution, 21 U. Miami L. Rev. 896 (1967)
Available at: http://repository.law.miami.edu/umlr/vol21/iss4/12

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The defendant was indicted for first degree murder and entered a plea of not guilty. He filed a motion to quash the indictment, alleging that he had entered into an immunity agreement with the assistant state attorney. The substance of the agreement was that the defendant would not be prosecuted if a polygraph examination indicated that he was telling the truth in denying his guilt. If the results showed that the defendant was guilty, then he would plead guilty to manslaughter, and if the test was inconclusive neither party would be bound. The polygraph operator concluded that the defendant was innocent. Upon hearing the motion the trial court quashed the indictment, whereupon the state appealed to the Second District Court of Appeal. On review, held, affirmed: a court approved agreement not to prosecute a professedly innocent defendant is a pledge of public faith and is binding and enforceable upon the state. State v. Davis, 188 So.2d 24 (Fla. 2d Dist. 1966).

The widely held opinion that prosecutors never bargain is a myth. As a practical matter they must in order to stay in business.

Agreements not to prosecute occur quite frequently today. The matter is seldom questioned in the courts because both sides are usually satisfied with and fulfill their part of the agreement. In bargaining the state avoids a protracted and expensive trial as well as the uncertainty of a jury verdict; the defendant in turn receives a lesser punishment or no punishment at all. This note will show the effect of immunity agreements as a bar to prosecution.

Over the years the enforcement of agreements not to prosecute has been recognized in varying forms. In 1878, in the Whiskey Cases, the district attorney acted without authority in granting immunity from prosecution to an accomplice in consideration for his testimony against his associate. The agreement was held not to be a legal bar or defense to a later prosecution against the accomplice for the offense to which he

1. It was the opinion of the polygraph operator that the defendant was telling the truth. Subsequently he changed his belief after conferring with another polygraph operator who was of the opinion that the test results were inconclusive. Thus, he was in fact accepting another person's opinion in lieu of his own. The court concluded that the polygraph test was to be given by a person selected by the parties. Since the first polygraph operator was the agreed upon person, his opinion before it was subsequently changed should control.


5. 99 U.S. 594 (1878).
testified. At most the agreement gave the defendant an equitable right to pardon.

It is commonly held that where a prosecuting attorney promises a defendant immunity to some or all criminal charges his promise will not bind the state unless the agreement has court approval. Some jurisdictions have taken the view that even with court approval such a promise will be of no avail because the prosecuting attorney exceeded his authority.

Where immunity agreements are broken by the prosecution, some courts indirectly enforce them by the grant of minimum or suspended sentences, together with recommendations for pardon. Thus, the full force and effect of a conviction by the state may be in fact almost a nullity.

Often a prosecuting attorney will enter into an agreement with a defendant providing that he will not be prosecuted for the same offense if he makes a full disclosure of the crime and testifies thereto. As previously noted, such agreements, if made without court consent, have generally been held to be of no effect in affording protection to the defendant if he is later placed on trial for the crime for which he had received immunity. This is done in spite of the recognition that it is often necessary for the state to resort to the testimony of criminals themselves for the detection and punishment of crime.

Whether court approval is necessary to make the agreement binding and enforceable is, in some jurisdictions, dependent on whether the prosecuting attorney has the statutory or case law authority to enter a nolle prosequi without court consent. Generally, courts are quite lenient in stretching the facts to find judicial approval. However, even where court consent is absent, none may be necessary to give effect to the agreement.

6. See note 15 infra for cases where the agreement is a bar to a subsequent prosecution.
7. See cases cited note 14 infra.
8. See, e.g., State v. Keep, 85 Ore. 265, 166 P. 936 (1917); Ingraham v. Prescott, 111 Fla. 320, 149 So. 369 (1933).
10. See cases cited note 14 infra.
11. 99 U.S. 594 (1878); Ingraham v. Prescott, 111 Fla. 320, 149 So. 369 (1933); State v. Guild, 149 Mo. 370, 50 S.W. 909 (1899).
12. In Ingraham v. Prescott, 111 Fla. 320, 321, 149 So. 369 (1933), the supreme court realized this when it stated: From the earliest times, it has been found necessary, for the detection and punishment of crime, for the state to resort to the criminals themselves for testimony with which to convict their confederates in crime. While such a course offers a premium to treachery, and sometimes permits the more guilty to escape, it tends to prevent and break up combinations, by making criminals suspicious of each other, and it often leads to the punishment of guilty persons who would otherwise escape. Therefore, on the ground of public policy, it has been uniformly held that a state may contract with a criminal for his exemption from prosecution if he shall honestly and fairly make a full disclosure of the crime, whether the party testified against is convicted or not.
13. Thus, in Florida, although the court in the instant case did not decide the issue,
The majority of jurisdictions which have been faced with the problem of enforceability of immunity agreements have refused to sanction them as a bar to prosecution regardless of whether court approval has been obtained; instead, they give the defendant an equitable right to clemency.\footnote{14} The few jurisdictions which do uphold the validity of court approved immunity agreements as a bar to prosecution require that the accused fulfill his part of the bargain.\footnote{16} It is an open question whether even these minority jurisdictions will sanction wholly extrajudicial agreements as a bar to prosecution.

In the instant case the agreement was dependent upon the outcome of a polygraph examination given to the defendant who had steadfastly professed his innocence. The court considered this professed innocence important in distinguishing this case from others where immunity promised an admittedly guilty criminal does not act as a bar to prosecution. The agreement here was treated as a "pledge of the public faith—a promise made by state officials—and one that should not be lightly disregarded."\footnote{18}

In this writer's opinion the agreement as a bar to prosecution was in the best interest of justice and was desirable on the ground of public policy. Furthermore, the defendant was entitled to have the bargain enforced as there was evidence of court approval.\footnote{17} The decision seems to place Florida in the growing minority of jurisdictions which recognize that court approved immunity agreements are binding upon the state.\footnote{18} Hopefully, this means that in the future all agreements not to prosecute, whether court approved or not, will be enforced. In upholding the validity of immunity agreements extended to professedly innocent defendants the bar to prosecution is the only equitable solution. Florida has thereby shown progress in the administration of its judicial system. Henceforth, state prosecutors, aware that their agreements may be enforced, court approval may not be necessary to make the agreement valid. In the case of Wilson v. Renfroe, 91 So.2d 857, 859 (Fla. 1956), the court stated:

There can be no doubt that under the common law the Prosecuting Attorney controlled the entry of a nolle prosequi, up to the time that the jury is sworn to try the cause. . . . Under the common law of England prosecution in criminal cases were controlled by the Attorney General and he alone had the exclusive discretion to decide whether prosecution should be discontinued prior to the inception of jeopardy. In the absence of statute, the common law continues to be in force in most states of this country. Florida has adopted no statute on the subject. (Emphasis added.)

\footnote{14} 99 U.S. 594 (1878); People v. Groves, 63 Cal. App. 709, 219 P. 1033 (1923); Commonwealth v. Smith, 244 S.W.2d 724 (Ky. 1951); State v. Kiewel, 166 Minn. 302, 207 N.W. 646 (1926); State v. Guild, 149 Mo. 370, 50 S.W. 909 (1899); State v. Keep, 85 Ore. 265, 166 P. 936 (1917).


\footnote{16} 188 So.2d 24, 27 (Fla. 2d Dist. 1966).

\footnote{17} Id. at 28.

\footnote{18} See cases cited note 15 supra.
will carefully scrutinize the situations wherein a compromise is advantageous. The public in general, and defendants in criminal cases in particular, must be able to trust in the American system of justice if it is to survive.

DAVID HECHT

THE APPEALING JUDGMENT CREDITOR’S RIGHT TO INTEREST

The plaintiff obtained a 15,000 dollar judgment. Believing the verdict inadequate, he appealed to the Third District Court of Appeal. The judgment was affirmed and a petition for rehearing denied. Thereupon the defendant tendered payment of the judgment, without including the interest that had accrued since the date of the original judgment. The plaintiff refused the tender and unsuccessfully petitioned for writs of certiorari to the Supreme Court of Florida and the Supreme Court of the United States. Upon conclusion of the proceedings in the United States Supreme Court, the defendant again tendered payment of the judgment without interest. The plaintiff again refused the tender and filed a motion with the trial court to compel the defendant to pay the principal with interest from the date of the original judgment, claiming that both tenders without interest were invalid. Upon hearing the motion, the trial court ordered the defendant to pay interest only from the date of judgment to the date of initial tender. On appeal by the plaintiff, held, reversed and remanded: A tender of payment by a judgment debtor to an appealing judgment creditor is an insufficient tender where the accrued interest from the date of the original judgment is not included in the tender. Stager v. Florida E. Coast Ry., 189 So.2d 192 (Fla. 3d Dist. 1966).

In the absence of a statute the common law rule is that judgments do not bear interest. Courts that grant interest without statutory authorization generally do so because the judgment debtor has caused a delay in the proceedings. The right to interest on judgments has been established by statute in most jurisdictions. Under the typical statute interest

5. E.g., Fitzgerald v. Bixler, 350 Mich. 688, 87 N.W.2d 174 (1957), where the court penalized a party for causing an unnecessary appeal; Hilton v. State, 60 Neb. 421, 83 N.W. 354 (1900) and Clinton v. Gant, 337 S.W.2d 761 (Tenn. 1960), where the party against whom the verdict was rendered caused delay. See generally Annot., 1 A.L.R.2d 495 (1945).