United States Court of Appeals
For the Eighth Circuit

No. 20-1404

In re: Grand Jury Subpoena Dated August 14, 2019

Appeal from United States District Court
for the Southern District of Iowa - Des Moines

Submitted: June 16, 2020
Filed: July 9, 2020

Before LOKEN, ARNOLD, and GRASZ, Circuit Judges.

LOKEN, Circuit Judge.

On August 14, 2019, the United States District Court for the Southern District of Iowa issued a subpoena duces tecum commanding the Iowa Department of Public Safety ("IDPS") to appear before the court's grand jury and provide documents relating to the investigation of an Iowa State Patrol ("ISP") officer for misconduct or use of excessive force. IDPS complied with five of the listed document categories but filed a motion to quash categories 3 and 4, which seek the following:

> 3) Any and all records relating to the investigation of [Officer John Doe] for misconduct, violations of ISP policy, use of force, and other legal/administrative violations, including but not limited to:
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> a) ISP criminal, administrative, and Internal Affairs investigative records;
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> b) Records provided to ISP by outside agencies as a result of any

external investigations;
c) Internal communications between ISP employees, including but not limited to e-mails, letters, notes, memoranda, and similar communications;
d) Investigative findings of any such investigations and the resulting penalties/discipline levied against the employee listed above.

4) Any and all records relating to complaints made against [Officer John Doe], including but not limited to complaints by members of the public and internal complaints from ISP or State of Iowa employees.

On November 19, 2019, the district court[1] denied the motion to quash in a lengthy Order filed under seal. In re: Grand Jury Subpoena Dated August 14, 2019, No. 4:19-MC-00042, Opinion and Order (S.D. Iowa Nov. 19, 2019). Subsequently, the court held IDPS in contempt for failing to provide the documents, establishing jurisdiction for appellate review. See In re Grand Jury Subpoenas Dated Feb. 28, 2002, 472 F.3d 990, 1000 (8th Cir. 2007). IDPS appeals, arguing the district court abused its discretion in denying the motion to quash. See United States v. Kalter, 5 F.3d 1166, 1169 (8th Cir. 1993) (standard of review). To prevent undue delay of the grand jury proceedings, we granted the government's motion for expedited review. Based on the particular circumstances of this case, we affirm.

The Supreme Court has repeatedly recognized "the longstanding principle that the public has a right to every man's evidence, except for those persons protected by a constitutional, common-law, or statutory privilege." Branzburg v. Hayes, 408 U.S. 665, 688 (1972) (cleaned up). In this case, IDPS has not asserted a common law or constitutional privilege of the executive branch of government, such as President Nixon asserted in United States v. Nixon, 418 U.S. 683, 703-13 (1974), nor does

[1]The Honorable John A. Jarvey, Chief Judge of the United States District Court for the Southern District of Iowa.

IDPS rely on a federal, state, or local statutory privilege. Rather, its motion to quash was based upon Rule 17(c)(2) of the Federal Rules of Criminal Procedure, which provides: "On motion made promptly, the court may quash or modify the subpoena [duces tecum] if compliance would be unreasonable or oppressive." In its last major discussion of the subpoena power of a grand jury, the Supreme Court observed, "[t]his standard is not self-explanatory. . . . [W]hat is reasonable depends on the context." United States v. R. Enterprises, Inc., 498 U.S. 292, 299 (1991). "[A] grand jury subpoena issued through normal channels is presumed to be reasonable, and the burden of showing unreasonableness must be on the recipient who seeks to avoid compliance." Id. at 301.

IDPS is a Department housing several agencies, including the Professional Standards Bureau ("PSB"). The PSB conducts internal investigations of alleged misconduct by Department employees and operates an "early intervention system" to assist IDPS managers in identifying employees whose performance warrants review and intervention in the public interest. The PSB may order employees to cooperate with its investigations. Its employee complaint files are confidential. Investigated employees are given a written Order to Cooperate, which provides:

> Before you answer any questions, I wish to advise you that any answers you give may be used in any administrative proceeding against you but cannot be used in any criminal prosecution. Failure to answer any questions directed to you or answering such questions untruthfully will be considered insubordination and will be considered grounds for disciplinary action up to and including dismissal from the employment of the Department.

IDPS argues on appeal, as it did to the district court, that the challenged portions of the subpoena are unreasonable for two interrelated reasons -- because producing the internal investigation materials would violate participating officers' Fifth Amendment privilege against self-incrimination and would "eviscerate" IDPS's

efforts to investigate and prevent misconduct by destroying the confidentiality of its internal investigations. IDPS relies heavily on In re Grand Jury, John Doe No. G.J.2005-2, 478 F.3d 581, 587 (4th Cir. 2007) (John Doe). In that case, affirming a decision to quash a federal grand jury subpoena issued to a city police department, the Fourth Circuit noted that the district court "took the City's two interests -- in preserving confidentiality and forestalling possible self-incrimination problems -- together, and weighed those interests as a whole against those of the United States." In this case, the district court, like the Fourth Circuit, considered both IDPS interests but concluded they did not warrant quashing the challenged parts of the subpoena.[2]

1. We reject IDPS's assertion that quashing the subpoena is needed to protect the Fifth Amendment rights of IDPS employees who participated in internal investigations. "The Fifth Amendment privilege against self-incrimination extends to statements a government employee is compelled to make under the threat of removal from public office." United States v. Moten, 551 F.3d 763, 766 (8th Cir. 2008), citing Garrity v. New Jersey, 385 U.S. 493, 500 (1967). The government may compel an officer to answer questions, but the Constitution is violated only "when the compelled statement, or the fruit of that statement, is used against the officer in a subsequent criminal proceeding." In re Grand Jury Subpoenas Dated Dec. 7 & 8, Issued to Bob Stover, 40 F.3d 1096, 1102 (10th Cir. 1994), cert. denied, 514 U.S. 1107 (1995) (Stover). If an officer whose compelled statements are subpoenaed by a federal grand jury is eventually indicted, he is entitled to a hearing at which the government must prove that the indictment was not based in any way on the officer's compelled statements or the fruits of those statements. See Kastigar v. United States, 406 U.S. 441 (1972).

[2]The government does not argue that IDPS lacks standing to assert individual officers' Fifth Amendment rights, so we need not decide the issue.

When compelled statements are produced in response to a grand jury subpoena, this strict Kastigar prohibition gives the government strong incentive to employ what it calls a "Garrity screening team" to remove compelled statements of the target of the federal investigation, including investigative fruits of those statements, before the subpoenaed material is given to the grand jury or to the prosecution team. At least two of our fellow circuits have concluded that this "Garrity review procedure," combined with Kastigar protections if the target is criminally prosecuted, provide sufficient Fifth Amendment protection from improper use of the compelled statements. See In re Grand Jury Subpoena, 75 F.3d 446, 448 (9th Cir. 1996) (Huntington Beach); Stover, 40 F.3d at 1103; accord John Doe, 478 F.3d at 587.

IDPS argues that allowing the government to use compelled statements from police officers regarding other police officers as an "investigatory lead" for the grand jury violates the Supreme Court's instruction that the "total prohibition on use provides a comprehensive safeguard, barring the use of compelled testimony as an 'investigatory lead.'" Kastigar, 406 U.S. at 460. This argument overstates the scope of the Fifth Amendment privilege, which applies only to the use or derivative use of compelled statements, not their mere production. Id. at 453. "When federal officials are barred not only from introducing the testimony into evidence in a federal prosecution but also from introducing any evidence derived from such testimony, the [compelled] disclosure has in no way contributed to the danger or likelihood of a federal prosecution." Murphy v. Waterfront Comm'n of N.Y. Harbor, 378 U.S. 52, 101 (1964) (White, J., concurring). Moreover, the privilege only prohibits the use of compelled statements and their fruits against the person making the compelled statements. Thus, it does not prohibit a grand jury or government investigators from using compelled statements *of other officers* against the target of the investigation. "[T]he Fifth Amendment allow[s] the government to prosecute using evidence from legitimate independent sources." Kastigar, 406 U.S. at 461.

2. IDPS further argues that the subpoena is unreasonable because producing the subpoenaed documents would undermine the confidentiality of the PSB's internal investigations. The Supreme Court in R. Enterprises held that a grand jury subpoena may be quashed if it is unreasonable or oppressive -- for example, if the grand jury is "engage[d] in arbitrary fishing expeditions" or has "select[ed] targets of investigation out of malice or an intent to harass." 498 U.S. at 299. The subpoena in that case was challenged on relevancy grounds; the Court upheld the subpoena, adopting a broad view of what is relevant to a grand jury -- a motion to quash must be denied unless "there is no reasonable possibility [the subpoenaed] materials . . . will produce information relevant to . . . the grand jury's investigation." Id. at 301.

In this case, IDPS does not challenge the subpoena on relevancy grounds, nor does it argue compliance would be unduly burdensome or otherwise oppressive. Rather, IDPS argues that its interests in confidentiality and the integrity of its internal affairs investigations outweigh the federal government's interest in enforcing a subpoena to produce documents relevant to a grand jury investigation of possible civil rights violations by Iowa law enforcement officers. This is a timely and important issue. The government argues that the judiciary *may not* engage in the balancing of interests IDPS urges. "[I]f evidence is relevant and unprivileged," the government argues, "the grand jury is entitled to it," citing Branzburg, 408 U.S. at 688. We reject this argument. In Branzburg, the Court declined to recognize a new testimonial privilege for newsmen. The Court did not foreclose the kind of Rule 17(c) interest-balancing the Fourth Circuit upheld in John Doe based on the Supreme Court's later statement in R. Enterprises that "what is reasonable depends on the context." We agree with the Fourth Circuit that a district court has discretion to quash a subpoena under Rule 17(c)(2) if it "intrudes gravely on significant interests outside of the scope of a recognized privilege." 478 F.3d at 585 (citation omitted).

The district court recognized the importance of confidentiality in the PSB's internal investigations of law enforcement officers. Like the district court in John Doe, the district court balanced IDPS's interests in confidentiality against the federal government's legitimate interest in enforcing the subpoena and came to a different conclusion given the circumstances of this case:

> The[] interests served by grand jury secrecy are the same as or analogous to those cited by the IDPS as reasons that its own internal investigations must be kept confidential. . . . [T]he court believes that the IDPS goes too far when it asserts that "no employee would come forward with early intervention problems or participate in investigations if their statements could be used to criminally indict a fellow officer." . . . [E]mployees who make statements reporting misconduct of a fellow employee, to PSB and more particularly in the course of an internal affairs investigation, are well aware that a result of such reports could be the indictment of a fellow officer for criminal wrong-doing. IDPS cites no evidence that the internal investigations of any specific law enforcement agency that has complied with a comparable grand jury subpoena have subsequently lost effectiveness or that the agency has since been unable to investigate misconduct internally. Instead, IDPS has . . . provided affidavits of law enforcement officers . . . stating *concerns* that compliance with grand jury subpoenas for information from internal investigations *might* have a chilling effect. . . . Opinions that are based on concerns rather than actual experience are too speculative to outweigh a grand jury's legitimate interests in obtaining the information in question . . . .

(Emphasis in original.) Turning to the government's interest, the court reasoned that internal affairs materials are likely to have significant value in the grand jury's investigation because they include contemporaneous statements that may or may not have remained consistent over time, and information concerning prior incidents that may shed light on whether an officer acted willfully. The court emphasized that the facts in John Doe were materially distinguishable because in that case the government was indifferent to obtaining the information in question. See 478 F.3d at 587-88

("[C]ounsel for the United States repeatedly suggested that the information sought was of negligible value to the government.").

On appeal, IDPS argues the district court gave insufficient weight to its interest in an effective early intervention program to prevent employee misconduct. Confidentiality is an essential aspect of this program, IDPS argues, because assurance that an officer can cooperate without being ostracized or prosecuted is needed to overcome the so-called "blue wall of silence." See id. at 586. We agree with the district court that this interest, while important, does not control the issue in this case. As the district court noted, the Fifth Amendment privilege applies only to *self* incrimination. See Moten, 551 F.3d 763, 766. Whether to discipline an officer for refusing to discuss another officer's misconduct, the most effective way to take down the "blue wall," is an issue of state law and agency policy. Therefore, compliance with a federal grand jury subpoena will not "intrude gravely" on IDPS's ability to deal effectively with any "blue wall" it encounters in conducting its internal investigations.

We conclude that the district court did not abuse its Rule 17(c)(2) discretion in deciding that IDPS failed to meet its substantial burden to show that compliance with the challenged portions of the grand jury subpoena would be "unreasonable or oppressive" when balanced against the interests of the government in enforcing the subpoena. Therefore, we affirm the Order denying IDPS's motion to quash. Our decision is based on the record and the issues raised in this case, including the absence of a relevant statutory or executive privilege.

The district court Opinion and Order Regarding Motion To Quash Grand Jury Subpoena dated November 19, 2019 is affirmed.
