5 Rapp App. no. 4 (1948)

BARY V. UNITED STATES

Arthur Bary vs. United States
Paul Meir Kleinbord vs. United States

Applications for Bail Pending Appeal

These applications arise out of the same grand jury proceedings as those which produced the applications of Rogers, Wertheimer and Blau, in which bail recently was granted by myself pending appeal.

Bary is the chairman of the Commist [Publisher's note: "Commist" should be "Communist"] Party in Colorado and Kleinbord is a district organizer. There cases are somewhat different from those involved in the other three applications. The applications of Bary and Kleinbord relate to commitments for *civil contempt*, whereas the other three applications related to commitments for criminal contempt. Bary and Kleinbord have been committed to bail [Publisher's note: "bail" should be "jail"] for refusal to answer questions concerning their connections with their activities in the Communist Party until such time as they may purge themselves by obeying the District Court's order to answer the questions. Moreover, the present cases are unlike those of Wertheimer and Blau in that each of the present applicants voluntarily admitted that he was a member of the Communist Party, an officer in it, and each testified voluntarily to numerous questions relating to these activities and connections. Their cases therefore are more nearly like the case of Mrs. Rogers, than those of Miss Wertheimer and Mr. Blau.

Notwithstanding their admissions of membership and holding office, as well as their answers to other questions, Bary and Kleinbord each declined to answer a large number of questions going into details concerning their activities in the party; the identity of other members and officers; the number of clubs, cells or subdivisions of the Party in Colorado; the officers of each club, cell or subdivision; the names of members who collect dues; the names of individuals known to be members who can furnish information about the collection of dues; the witness's attendance at meetings of the Communist Party during the years 1947 and 1948.

At one point in the record before the District Court and before the Court of Appeals (which I have had an opportunity to read in full) Klein-

bord refused to answer questions relating to the identity of other members and officers on the ground that he did not wish to incriminate them. However, prior to his commitment and obviously acting under the advice of counsel, he grounded his refusal on the basis that to discloses [Publisher's note: "discloses" should be "disclose"] these names would tend to incriminate himself. There is no finding specifically made by the District Court that this claim was made in bad faith.

The short of the situation, therefore, is that each of the present applicants has admitted his membership in the Communist Party of Colorado, has admitted being an officer, and has testified in further detail concerning a considerable number of his activities in these connections.

However, each has, after going thus far, refused to testify to numerous other questions relating to the identities of other members and officers, to their own attendance at Communist meetings, and to other activities which the witness in each instance felt or claimed might tend to incriminate him.

On this record, as stated above, the District Court committed both Bary and Kleinbord to jail until they should purge themselves by answering the questions they had declined to answer. The District Court at the same time denied bail pending appeal. I am also informed that the Court of Appeals for the Tenth Circuit has refused to allow bail pending appeal. The application therefore comes to me as Circuit Justice after refusal of the two inferior courts to grant the relief sought. It may be added also that the record in the present case discloses what was not shown by the record in the three prior applications, namely, that the general subject of the grand jury's investigation is to ascertain whether federal employees, presumably in the Rocky Mountain region, have violated their loyalty oaths prescribed by 60 Stat. 480 [Publisher's note: the citation "5 U. S. C. § 16" is struck through and "60 Stat. 480" substituted] the apparent authority or basis of the investigation being that some of these employees whose identity is not disclosed by the record either are or have been members of the Communist Party at the time of taking their loyalty oaths and thus have violated the statute requiring the administration of those oaths.

I have had all the difficulties in these cases which I found in the case of Mrs. Rogers. Indeed, they have been somewhat magnified, both by virtue of the fact that these are civil rather than criminal contempt cases and by the fact that these applicants perhaps have gone farther both in answering

inquiries and in refusing to answer them than did Mrs. Rogers. On the other hand, the questions which Bary and Kleinbord refused to answer covered a considerably wider field than those which Mrs. Rogers declined to answer. So in my judgment the question presented by these applications comes down in shortened form to this: If we assume, as I felt in the other cases, that, until further clarification of the law by this Court and in view of the circumstances set out in my memorandum relating to Wertheimer and Blau, the present applicants might have claimed their privilege against self-incrimination by refusing to answer at the threshold of inquiry the question whether they were Communists and therefore all others which would tend to indicate that they were, does their admission that they are Communists and their responses made to other questions as shown by this record constitute a waiver of their privilege in toto so that they were precluded by such a waiver from asserting the privilege as to the questions they refused to answer and for which refusal they were committed to jail? There is also a preliminary question whether Rule 46 (a) (2) of the Federal Rules of Criminal procedure, which was applicable to the applications of Rogers, Wertheimer and Blau, is likewise applicable in these applications to authorize myself as Circuit Justice to grant bail pending appeal.

The latter question is discussed in the memorandum which has been prepared for my use in these cases. Although there may be some question concerning this, I have come to the conclusion that, notwithstanding the technical differences between civil and criminal contempts (whatever they may be), they are not such as ought to preclude the granting of bail under Rule 46 (a) (2) by any of the officers or tribunals authorized by that section to grant bail, merely because the committing court chooses to send the person to jail in the one instance for a fixed term and in the other for a term coextensive with the witness's continuance of refusal to answer. In both cases the citizen is imprisoned, being deprived his liberty. In the one he cannot escape continuance of the imprisonment during the fixed period of the sentence even if he should change his mind and indicate his willingness to answer. It is beyond his power to end the period of his incarceration by his own action. In the other situation it is true that he can recant and terminate the period of imprisonment by answering the questions. On the other hand, if his claim of constitutional privilege is well grounded he cannot terminate his imprisonment except by surrendering that claim. That is a price which in my opinion it was not intended to require of the

citizen if he should be improperly committed. Accordingly, for the purposes of applying Rule 46 (a) (2) my present opinion is that it applies insofar as jurisdiction to grant bail is concerned to both civil and criminal contempt.

In this view I am forced to answer for myself the question whether under the circumstances of the present commitments I think a substantial federal question has been presented by the appeals from the District Court's commitments, in which event it becomes my duty to grant bail pending the determination of those appeals. Resolution of this question in the present circumstances again turns on whether, by responding to the questions which the applicants have answered, they have waived their privilege and their right to stand upon it with reference to the questions which they have refused to answer.

In view of the number and variety of these questions, it may be that responding to some of them would have no tendency to incriminate the witnesses. However, the commitments in both of the present applications were not for refusal simply to answer some of the questions which the applicants declined to answer. They were committed to remain until they had purged themselves by answering all of the questions which they refused to answer. In this case, therefore, the civil commitments were in this respect like the criminal sentences imposed in the three prior cases, namely, a single commitment for refusal to answer numerous questions rather than merely some. As I understand the District Court's order, neither of the present applicants could purge himself unless he should answer all of the inquiries which he declined to answer before the jury and special hearing in court.

Upon the question of waiver, I find no case exactly in point. I do find cases bearing on the problem which indicate to me that there is a large degree of indetermination concerning how far a witness may go toward incriminating himself and still have the right to refuse to answer further incriminating inquiries. The cases bearing most directly on the problem which have come to my attention are *Arndstein* v. *McCarthy*, 254 U. S. 71, and *McCarthy* v. *Arndstein*, 262 U. S. 355, together with *United States* v. *St. Pierre*, 132 F. 2d 837 (CCA 2). As I read the Arndstein cases, they stand for the proposition that a witness before a grand jury does not waive or forfeit his privilege against self-incrimination merely by refusing to assert it at the threshold of inquiry. The bankrupt called for examination before the grand

jury had declined to answer numerous inquiries about his assets. He did this, asserting his constitutional privilege. The District Court upheld the privilege and denied a motion to punish for contempt. Thereafter under the court's direction the bankrupt filed schedules under oath purporting to show his assets and liabilities. The schedule showed only a single item of assets. When interrogated concerning his assets he again set up his constitutional privilege and refused to answer many questions about them. Thereupon he was committed to jail. As stated by this Court, per McReynolds, J.,

"The writ [of habeas corpus] was refused upon the theory that by filing schedules without objection the bankrupt waived his constitutional privilege and could not thereafter refuse to reply when questioned in respect of them. This view of the law we think is erroneous. The schedules standing alone did not amount to an admission of guilt or furnish clear proof of crime and the mere filing of them did not constitute a waiver of the right to stop short whenever the bankrupt could fairly claim that to answer might tend to incriminate him. [Citations.] It is impossible to say that mere consideration of the questions propounded, in the light of the circumstances disclosed, that they could have been answered with entire impunity. The writ should have issued." 254 U. S. 71, 72.

The cause was remanded for further proceedings to the District Court. On remand that court vacated its former order and issued the writ of habeas corpus. To this the marshal made return exhibiting the transcript of the entire proceedings before the commissioner. This disclosed that the bankrupt before refusing to answer the questions in issue "had … testified of his own accord, without invoking any privilege, to the very matters with which these questions were concerned, thereby waiving his privilege upon further examination concerning them." *McCarthy* v. *Arndstein*, 262 U. S. 355, 357.

Upon hearing, the report states "the District Court was of opinion that … the conclusion to be drawn from the decision of this Court in reference to the schedules was that his denials or partial disclosures as a witness did not terminate his privilege so as to deprive him of the right to refuse to testify further about his property, and that he was at liberty to cease disclosures, even though some had been made, whenever there was just ground to believe the answers might tend to incriminate him; …." Accordingly, the Court sustained the writ and discharged the petitioner from cus-

tody. The marshal appealed again to this Court. It affirmed the order sustaining the writ and discharging Arndstein. The Court repeated the language quoted above from the first *Arndstein* opinion. It also referred to state cases and the English case of *Regina* v. *Garbett* and then said "since we find that none of the answers which had been voluntarily given by Arndstein, either by way of denials or partial disclosures, amounted to an admission or showing of guilt, we are of opinion that he was entitled to decline to answer further questions when so to do might tend to incriminate him." 262 U. S. 355, 359-360. "In short, it is apparent not only from the language of the former opinion, but from its citations, that this Court applied to the non-incriminating schedules the rule in the cases cited, namely, that where the previous disclosure by an ordinary witness is not an actual admission of guilt or incriminating facts, he is not deprived of the privilege of stopping short in his testimony whenever it may fairly tend to incriminate him." 262 U. S. at 359.

Both the *Arndstein* opinions are very short and neither is too clear in the scope of the ruling made. The second opinion, by Sanford, does refer to "the non-incriminating schedules" (p. 359) but previously it states (p. 358) that "the sworn schedules were, impliedly at least, assimilated to evidence given by the bankrupt as a witness …" and the Court repeated the statement of the first *Arndstein* opinion by McReynolds that "the schedules standing alone did not amount to an admission of guilt or furnish clear proof of crime."That opinion had also stated, as quoted above, it is" impossible to say that mere consideration of the questions propounded, in the light of the circumstances disclosed, that they could have been answered with entire impunity."

The latter statement seems to me inconsistent with McReynold's [Publisher's note: "McReynold's" should be "McReynolds'"] rationalization and disposition of *Mason* v. *United States*, 244 U. S. 362, and if the quoted language is to be taken as specifying the test it leads me to the conclusions in the present circumstances, first, that by testifying to facts which may not be wholly incriminatory but may have some tendency in that direction when connected with other facts, the witness may stop short of going forward to testify to such other facts; second, that in the circumstances of the present application it cannot be said with certainty that answering the questions which the applicants refused to answer could have been done in the light of all the circumstances with entire impunity.

Even though the witnesses admitted their Communist affiliations both as members and as officers, and even went further to relate some of their activities in connection with the party, it does not follow that answering the questions which they refused to answer would have no further or greater tendency to incriminate them. It is difficult of course to see how answering such further questions could have any greater tendency toward proving that they were members or officers of the Party, but it would almost certainly tend to prove particular types of activity both by the Part and by themselves and to tie them more tightly into the web of any criminal activities which the Party or others belonging to it may have engaged in. Moreover, to identify the other persons asked about conceivably could furnish evidence or links in the chain of evidence which might be used either to tie the present applicants into such criminal activities or indeed into proving beyond the mere charge of belonging to and being an officer in the Communist Party that they had advocated the overthrow of the Government by force, contrary to the Smith Act.

The ramifications of the possible application of that statute, broad as are its terms; the presumption which usually applies in favor of the validity of congressional enactments; the tendency of admissions of membership in the Communist Party to form a link in the chain of proof of violation of the statute; the possible tendency of answering the questions refused by the applicants to connect them individually and beyond mere membership in the Party to violations of the statute; all combine to make me feel that the questions posed by the witnesses' refusal in this case are not merely frivolous and without substance. There is no finding, as stated above, that these claims were made in bad faith. I do not consider it my function in this application to make such a finding in the absence of one by the District Court or the Court of Appeals. It may be that the applicants were simply or primarily seeking to protect their comrades from disclosure. On the other hand, it may be that they were also seeking to protect themselves from disclosures tending to incriminate them which might be made by those comrades once their identity and activities had been drawn out.

I have also given careful attention in considering these problems to the majority and dissenting opinions of the Court of Appeals for the Second Circuit in United States v. St. Pierre, supra. Although the majority there ruled that when St. Pierre admitted that he had embezzled funds and later transported them in interstate commerce he could not stand on his privi-

lege to decline to identify the name of the person from whom the funds were taken. There was a vigorous dissent by Judge Frank which seems to me clearly to show that the question the court determined was not an insubstantial one. It is perhaps as close to the present case as any I have seen, though not of course directly in point. The majority does not assert that in all cases where a witness gives testimony which may have some tendency to incriminate himself go further and disclose all of his knowledge which would complete the chain of incrimination.

It seems to me, therefore, that beyond the questions which I considered substantial in the cases of Miss Wertheimer and Mr. Blau this case presents additional substantial questions involving what constitutes a waiver of the privilege, whether testifying to facts disclosing some links in a possible chain of criminality outs off the privilege to refuse to testify to others, and more especially the application of those questions to the larger problems presented by the circumstances of this case. Accordingly, until these issues are determined by this Court I feel that the questions presented concerning the waiver of the privilege are in themselves sufficiently substantial to require the granting of bail pending the determination of the appeal.

I may add that the manner in which I have read the *Arndstein* decisions, as well as the consideration which I have given to the problem presented by the *St. Pierre* case, seemed to me to be in line in a general way with this Court's decision in *Counselman* v. *Hitchcock,* 142 U. S. 547. This is not so much on the problem of waiver but in the aspect of the general problem that forcing a witness to answer questions which would draw out clues, that is, not only evidence tending to incriminate, but evidence which would supply sources for securing incriminating evidence, would be in violation of the constitutional privilege.

[November 3, 1948]