Circuit Court for Charles County
Case No. C-08-CR-18-000758

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2381

September Term, 2018

KARWIN MILBURN CARROLL

v.

STATE OF MARYLAND

Meredith,
Graeff,
Harrell, Glenn T., Jr.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Meredith, J.

Filed: May 4, 2020

In the Circuit Court for Charles County, Karwin Milburn Carroll, appellant, was found guilty of direct criminal contempt after he was called as a witness but, based on his assertion of the Fifth Amendment right against self-incrimination, refused to answer any questions. The Court sentenced Carroll to a term of 179 days' imprisonment. In this appeal, Carroll presents a single question for our review:

Did the circuit court err in finding Appellant in direct criminal contempt?

For the reasons that follow, we answer Carroll's question in the negative and affirm the judgment of the circuit court.

BACKGROUND

In September of 2017, Carroll and another man were the victims of a shooting in Charles County. During the investigation into the shooting, Carroll was found to be in possession of various items of contraband, which resulted in several criminal charges being filed against Carroll in the Circuit Court for Charles County. Carroll ultimately pleaded guilty to two of those charges: possession with intent to distribute cocaine and possession of a stolen firearm. Carroll was sentenced to a total term of eight years' imprisonment. Carroll did not appeal those convictions or seek any other post-conviction relief.

In September of 2018, the person who shot Carroll—Brian Pierce—was tried in the Circuit Court for Charles County on various charges in connection with the shooting of Carroll and one other man. The State's theory of the case was that Pierce deliberately and without justification shot both men. Pierce's defense theory was that Carroll and the other victim were drug dealers who had assaulted and threatened Pierce, and that Pierce had responded by shooting both men in self-defense.

On the fourth day of Pierce's trial, the State called Carroll to testify. Upon taking the stand, but before even being sworn in, Carroll stated: "I don't want to testify. I want to (inaudible) my Fifth Amendment." The trial court immediately excused the jury and, outside the presence of the jury, asked Carroll if he was asserting his Fifth Amendment right not to testify. Carroll responded in the affirmative. The court then asked Carroll if he had been charged criminally "in relation to this matter" and if he had already been sentenced as a result of those criminal charges. Again, Carroll responded in the affirmative. When asked whether any appeal had been filed in his own case, Carroll stated that he did not "have any knowledge of that."

The trial court then asked Carroll's attorney, who was in the courtroom, whether, given the procedural posture of Carroll's criminal case, there was "a substantial basis for the Fifth Amendment" assertion. Carroll's counsel declined to answer the question, stating that she "would be divulging privileged information if [she] did." The court then asked the State if it would be willing to grant Carroll immunity if he were to testify. The State responded that it wanted Carroll to testify, but no immunity would be granted. Pierce's attorney also wanted Carroll to testify. The court then held a bench conference, at which the following colloquy ensued:

> [CARROLL'S ATTORNEY]: Okay, the only thing I wanted to add is that while I don't feel I can divulge anything about the advice I have given Mr. Carroll –
>
> THE COURT: Yes, ma'am, I understand that.
>
> [CARROLL'S ATTORNEY]: It's that while he may or [may] not have a Fifth Amendment related to matters that he pled guilty to, and you all

may have just discussed this up here, and I apologize. There are lines of questioning that could come particularly from the Defense, but I don't know, they could go outside the scope of that. And then he may have a Fifth Amendment about that. I don't know, because I don't know where we are, but –

THE COURT: Right, but that would be on a question by question basis.

[STATE]: That would be.

[CARROLL'S ATTORNEY]: Right, and so I just want to make it clear that it's … because he has no immunity, there are plenty of issues that he could have a Fifth about.

At the conclusion of the bench conference, the trial court brought the jury back into the courtroom and had Carroll return to the witness stand. The court then asked the clerk to administer the oath, but, when she did, Carroll refused to cooperate, stating that he "ain't testifying, so need [sic] to even given me that." After the court directed Carroll to respond and the clerk reread the oath, Carroll again refused to answer, reiterating that he was "not testifying." Finally, after the clerk endeavored to administer the oath a third time, Carroll responded: "Alright." The State then attempted to begin its direct examination of Carroll:

[PROSECUTOR]: Now, Mr. Carroll, let me direct your attention to September 4th –

CARROLL: Man, I'm not, you know, I'm not testifying, so don't even ask me nothing.

[STATE]: Let me ask the question.

CARROLL: Don't even waste your time. You're wasting time. I'm not responding.

THE COURT: Mr. Carroll, Mr. Carroll.

CARROLL: Mr. Carroll what?

THE COURT: Please sir, let her ask the question, then you can give –

CARROLL: I'm not … there's no need for her to ask me anything because I already said I'm not testifying.

THE COURT: Mr. Carroll, let her ask the question, sir, please?

CARROLL: Man, listen, you wasting your time.

THE COURT: Maybe.

CARROLL: Say something I'm gonna respond.

THE COURT: Mr. Carroll, I'm direct –

CARROLL: You might as well take me back now.

THE COURT: Mr. Carroll, I am directing that you let her ask the questions.

CARROLL: Man, you're not directing me. I'm not trying to hear none of that, man. Do what you gonna do. I'm not trying to hear none of that. She's talking to nothing, 'cause I'm not responding to nothing.

[PROSECUTOR]: So let me direct your attention to September 4 –

CARROLL: Let me direct your attention. I'm not … I'm not testifying, you understand that?

(Emphasis added.)

At that point, the trial court suspended Carroll's direct testimony and excused the jury. The court then advised Carroll that if he did not "answer the questions" he would be held in direct contempt. After the court advised Carroll of the consequences of a contempt finding and asked, repeatedly, if he understood those consequences, Carroll asked if he

could speak to his attorney. The court granted the request and took a recess. When the proceedings resumed approximately 20 minutes later, the following colloquy ensued:

> THE COURT: Alright, Mr. Carroll, you had an opportunity to talk to your attorney, sir. Are you still refusing to testify?
>
> CARROLL: I'm still refusing to testify.
>
> THE COURT: Alright, sir. Ms. Batey, is your client still asserting the Fifth?
>
> [CARROLL'S ATTORNEY]: Yes, Your Honor.
>
> THE COURT: Does the fact that he has a Fifth [sic] prevent him from answering any question in this case?
>
> [CARROLL'S ATTORNEY]: Your Honor, since I do not know what questions are going to be asked, it's certainly possible.
>
> THE COURT: Well the first one was, does he remember a day, and he refused to answer that one.
>
> [CARROLL'S ATTORNEY]: Your Honor, any … I'm here to advise Mr. Carroll.
>
> THE COURT: I understand that.
>
> [CARROLL'S ATTORNEY]: I think anything beyond that would violate privilege.
>
> * * *
>
> THE COURT: Okay. Alright, based upon the fact that Mr. Carroll has been charged, pled guilty, sentenced, the appeal time for leave to appeal has passed, the time to request a review of the sentence has passed, I see there is no foreseeable line of questions that could involve the Fifth Amendment in this case. Mr. Carroll, are you still refusing to testify, sir?
>
> CARROLL: Yes, sir.

> THE COURT: Okay. Based upon that, **I am finding that the defendant does not have a right to not answer any question in this case, as he asserted. There is a possibility that a question could come up that the Fifth Amendment would apply. I don't have any foreseeable question on that, but we could deal with that on a case by case basis.**
>
> **Since, Mr. Carroll, you are refusing** to testify, sir, directly in this case, **to answer any questions, I have no choice but to find you in direct criminal contempt of court.** I summarily find that and announce that the direct contempt has been committed.

(Emphasis added.)

DISCUSSION

Carroll contends that the trial court erred in finding him guilty of direct criminal contempt. Carroll maintains that the court erred because he "had a cognizable Fifth Amendment right to remain silent when he was compelled to testify against Pierce, who was on trial for attempting to murder appellant, and who claimed he had acted in self-defense." Carroll also maintains that the court erred because it focused exclusively on the charges for which appellant had pleaded guilty and "ignored the possibility that appellant could potentially be charged with myriad crimes outside the indictment that resulted in that plea."

The State responds that "simply declaring the desire to remain silent, across the board, is insufficient to invoke the privilege against self-incrimination." Moreover, the State notes that, although the trial court "ruled that it would need to resolve whether a Fifth Amendment privilege applied on a question-by-question basis, and directed Carroll to testify[,] Carroll refused to answer the State's first question—and Carroll does not identify any way in which the answer to that question could have incriminated him." Consequently,

the State asserts: "The court properly ruled that Carroll's refusal to answer was contempt of court."

The Fifth Amendment to the United States Constitution states, in pertinent part, that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. In interpreting this privilege, the Supreme Court has concluded that "[t]he Amendment not only protects the individual against being involuntarily called as a witness against himself in a criminal prosecution but also privileges him not to answer official questions put to him in any other proceeding . . . where the answers might incriminate him in future criminal proceedings." *Lefkowitz v. Turley*, 414 U.S. 70, 77 (1973). "Consequently, the privilege may be asserted by anyone who expects that responding to the information sought would tend to incriminate him or her in a subsequent criminal case[.]" *Jung Chul Park v. Cangen Corp.*, 416 Md. 505, 513 (2010). "The privilege afforded not only extends to answers that would in themselves support a conviction under a [] criminal statute but likewise embraces those which would furnish a link in the chain of evidence needed to prosecute the claimant for a [] crime." *Hoffman v. United States*, 341 U.S. 479, 486 (1951).

"The mere assertion of the privilege, however, does not excuse the witness from testifying." *Park*, 416 Md. at 513. "Rather, 'it is for the court to say whether his silence is justified, and to require the witness to answer, if it clearly appears to the court that the witness is mistaken' in relying on the privilege for the refusal to testify." *Id.* (quoting *Hoffman*, 341 U.S. at 486). The standard guiding that inquiry is whether "there is a

reasonable cause for the witness to fear self-incrimination from a direct answer to the question posed, or from an explanation of the failure to answer, and whether the danger of self-incrimination is evident from the nature of the question and the circumstances of the case." *Dickson v. State*, 188 Md. App. 489, 506 (2009). Further, "[t]o sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result." *Simmons v. State*, 392 Md. 279, 297 (2006). "Thus, 'for the trial court to determine that the Fifth Amendment privilege does not apply, it must be *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 a tendency to incriminate.'" *Park*, 416 Md. at 514 (citing *Smith v. State*, 394 Md. 184, 211 (2006)) (emphasis in original). "A failure by the trial court to conduct the proper inquiry into a witness's refusal to testify (or a failure to conduct any inquiry at all) may constitute reversible error." *Dickson*, 188 Md. App. at 509-10.

In *Bhagwat v. State*, 338 Md. 263 (1995), the Court of Appeals set forth the procedure a trial court must follow in deciding whether a witness's claim of Fifth Amendment privilege is proper:

> [I]t is well-settled that the privilege is personal to the witness and, thus, must be exercised by the witness. And because the privilege is not a prohibition of inquiry, but is an option of refusal, the witness should first be called to the stand and sworn. Interrogation of the witness should then proceed to the point where he or she asserts his or her privilege against self-incrimination as a ground for not answering a question. If it is a jury case, the jury should then be dismissed and the trial judge should attempt to determine whether the claim of privilege is in good faith or lacks any reasonable basis. If further

> interrogation is pursued, then the witness should either answer the questions asked or assert his or her privilege, making this decision on a question by question basis.

Id. at 271-72 (internal citations, quotations, and footnote omitted).

As we explained in *Conway v. State*, 15 Md. App. 198 (1972):

> [B]ecause of the elusive character of the privilege against self-incrimination, which may vary from question to question, the questions must be propounded to the witness on the stand on a one-by-one basis; the witness must then evaluate each question severally and decide, question by question, whether to assert his privilege or not. The trial judge must then decide on an individual question basis whether the privilege has been properly asserted or whether he, the judge, must compel the answer under threat of contempt.

Id. at 219-20 (internal citations omitted).

"[T]he Supreme Court has directed that 'the central standard for the privilege's application has been whether the claimant is confronted by substantial and real, and not merely trifling or imaginary, hazards of incrimination.'" *In re Misc. 4281*, 231 Md. App. 214, 225 (2016) (citing *Marchetti v. United States*, 390 U.S. 39, 53 (1968)). In other words, "the claimant must face a substantial, non-speculative risk of criminal sanction resulting from the government's use of the coerced statement in a criminal proceeding." *Id.* at 226. And, as noted, it is for the trial court, not the witness, to determine whether the witness "can properly assert the privilege against self-incrimination; the witness's merely saying that he or she would be incriminated does not excuse the witness from answering the questions." *Simmons*, 392 Md. at 297.

Here, the trial court properly applied the requisite procedures and analysis to conclude that Carroll's Fifth Amendment privilege did not permit him to totally refuse to

answer all questions; the court did not err in finding him in direct criminal contempt as a result of his blanket refusal to answer any questions whatsoever. *See Dickson*, 188 Md. App. at 508-09 (noting that if a witness "persists in refusing to answer a question after the court has decided the Fifth Amendment privilege does not apply, the witness may be convicted of direct criminal contempt.").

The court correctly concluded that Carroll's Fifth Amendment privilege did not apply to questions related to his guilty pleas to possession of a stolen firearm and to possession of cocaine with intent to distribute. For those crimes, there could be no reasonable fear of self-incrimination because Carroll had already been convicted and sentenced, and the time for filing an appeal or request for sentence review had expired. *See Archer v. State*, 383 Md. 329, 344 (2004) (holding that the defendant had no Fifth Amendment privilege to refuse to testify where the defendant "had been convicted, sentenced, and the time for filing an application for leave to appeal his guilty plea had expired").

Before the State could ask a single question, Carroll insisted that he was not going to testify to anything, and asserted that it was a waste of time to ask him any questions. The court asked Carroll, repeatedly, to allow the State to ask a question, yet Carroll refused, all the while being generally obstinate and repeating his decision not to testify without giving the court any indication of any basis for his assertion of a Fifth Amendment privilege. After it became clear that Carroll would not answer *any* questions, the court dismissed the jury and allowed Carroll to consult with his attorney. But, when the parties

returned from the break, Carroll still refused to testify. Even though the court informed Carroll that the court could perceive no basis for him to claim a Fifth Amendment privilege and that there appeared to be "no foreseeable line[s] of questions that could involve the Fifth Amendment in this case," Carroll steadfastly refused to testify, without providing any explanation of the reasons behind his invocation.

Carroll argues on appeal that, considering the circumstances of Pierce's claim that he had shot Carroll in self-defense, there were "no questions" Carroll could have answered on direct examination "without potentially exposing himself to further criminal liability." Carroll further contends that, even if he could have answered some of the prosecutor's questions without impinging on his Fifth Amendment right, Pierce's defense attorney "would have certainly elicited questions on cross-examination" that would have caused Carroll to assert the privilege. Carroll further speculates that, had such a situation arisen, Pierce's counsel "would have moved to strike all of [Carroll's] testimony." Carroll maintains, therefore, that, "even if this Court were to find that appellant could have answered some questions without waiving his privilege, the practical result would have been the same even if he had done so."

This speculation provides no justification for Carroll's refusal to answer any questions whatsoever. As the trial court noted, the State's first and only question, which Carroll did not allow the State to fully ask, appeared to inquire whether Carroll remembered a particular day. Answering that question, had Carroll permitted the State to complete it, would not have exposed Carroll to criminal liability. It was not for Carroll to decide that

there were "no questions" he could have answered without incriminating himself; rather, it was for the trial court to rule, on a question by question basis, whether the privilege had been properly asserted with respect to each particular question. And, as noted, such a determination could not be made here because Carroll did not allow the State to pose any questions, and refused to answer when the State asked him whether he remembered the 4th of September.

The potential for criminal exposure, cited by Carroll on appeal, including the "myriad crimes" he could have "potentially" been charged with had he testified, is purely speculative, as is his claim regarding what defense counsel may or may not have done during cross-examination. *See Zicarelli v. New Jersey State Commission of Investigation*, 406 U.S. 472, 478 (1972) ("It is well established that the privilege protects against real dangers, not remote and speculative possibilities."). Accordingly, the trial court did not err.

JUDGMENT OF THE CIRCUIT COURT FOR CHARLES COUNTY AFFIRMED; COSTS TO BE PAID BY APPELLANT.