



NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

Fairfax County Courthouse
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Fairfax, Virginia 22030-4009

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COUNTY OF FAIRFAX

CITY OF FAIRFAX

January 24, 2020

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RETIRED JUDGES

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Dennis M. Hottell
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10486 Armstrong Street
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Re: *Justin Zakia v. Xiaoqian Zakia*, CL 2019-14281

Dear Mr. Thompson and Mr. Hottell:

This matter was before the court on January 10, 2019 on Defendant's motion to compel discovery responses and overrule objections as to Interrogatory #22 and Request for Admissions #6.

Interrogatory #22 requested Plaintiff to answer the following:

Have you engaged in sexual intercourse or intimate sexual contact with any person other than your spouse during your marriage? (For the purpose of these interrogatories, intimate sexual contact is defined as oral genital contact, or the touching, sensual kissing or fondling of the genitals of another.)

Request for Admissions #6 similarly asked Plaintiff to admit or deny the following:

[Y]ou engaged in sexual intercourse or intimate sexual contact (oral genital contact, or the touching, sensual kissing or fondling of the genitals of another) with any person other than your spouse during your marriage.

As to both Interrogatory #22 and Request for Admissions #6, Plaintiff invoked his "right to plead the Fifth Amendment."

Analysis

The Fifth Amendment to the Constitution of the United States,¹ as applied to the states by the Fourteenth Amendment,² and Article I, Section 8, of the Constitution of the Commonwealth of Virginia,³ guarantee a person's right against self-incrimination. This protection affords a person the right "not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings." *Husske v. Commonwealth*, 252 Va. 203, 214 (1996) (quoting *Lefkowitz v. Turley*, 414 U.S. 70, 77 (1973)). But, the Fifth Amendment:

does not immunize people from making difficult choices or embarrassing disclosures. . . . Even an answer that admits the past commission of a crime is unprotected by the Fifth Amendment if the person giving the answer cannot face future criminal prosecution for the crime described.

Zebbs v. Commonwealth, 66 Va. App. 368, 376-377 (2016).

Thus, "expiration of the applicable statute of limitations for the conduct described can operate to remove the protections against compelled self-incrimination." 66 Va. App. at 377.

The crime of "adultery" is defined in Virginia in Code § 18.2-365 ("Any person, being married, who voluntarily shall have sexual intercourse with any person not his or her spouse shall be guilty of adultery, punishable as a Class 4 misdemeanor."). As a Class 4 misdemeanor, prosecution for adultery "shall be commenced within one year next after there was cause therefor" Code § 19.2-8.

¹ "No person . . . shall be compelled in any criminal case to be a witness against himself"

² "We hold today that the Fifth Amendment's exception from compulsory self-incrimination is also protected by the Fourteenth Amendment against abridgment by the States." *Malloy v. Hogan*, 378 U.S. 1, 6 (1964).

³ "He shall not be . . . compelled in any criminal proceeding to give evidence against himself. . . ." The privilege against compelled testimony under Article I, § 8 of the Virginia Constitution is coextensive with the Fifth Amendment. See *Farmer v. Commonwealth*, 12 Va. App. 337, 340 (1991) ("The privilege against compelled testimony under Article I, § 8 of the Virginia Constitution is no broader in its application than its counterpart under the federal Constitution."). Thus, when referring to the Fifth Amendment, the court is also referring to Article I, § 8 of the Virginia Constitution.

The punishments for adultery are not, however, limited to Class 4 misdemeanors. A "person who commits adultery . . . with any person whom he or she is forbidden by law to marry shall be guilty of a Class 1 misdemeanor" Further, a person who commits adultery:

with his daughter or granddaughter, or with her son or grandson, or her father or his mother, shall be guilty of a Class 5 felony. However, if a parent or grandparent commits adultery . . . with his or her child or grandchild, and such child or grandchild is at least thirteen years of age but less than eighteen years of age at the time of the offense, such parent or grandparent shall be guilty of a Class 3 felony.

Code § 18.2-366.⁴

There is no statute of limitations for a felony.

Although the law plainly makes adultery a criminal offense, Defendant argued that it is well known that adultery is not prosecuted in Fairfax County, and thus there is no risk of prosecution and hence Plaintiff may not invoke his right under the Fifth Amendment. Defendant relied upon *Cornelison v. DeWeese*, 22 Va. Cir. 234 (1990), which stated, *inter alia*, that, to invoke the Fifth Amendment, the claimant "must be faced with a risk of incrimination that is substantial and real and not merely trifling or imaginary. *United States v. Apfelbaum*, 445 U.S. 115 (1980) on remand 621 F.2d 62 (3rd Cir.1980)." *Cornelison* thus held that:

[T]he hazard of prosecution to which the DeWeeses are exposed for any claimed violation of the referenced statutes to be theoretical, remote and unlikely. First, no one has cited any arrests or prosecutions for violation of these criminal laws under the circumstances which exist in this case, which have been pursued in recent memory.

22 Va. Cir. 234 (1990).

This court rejects the holding of *Cornelison* for two reasons. First, *Apfelbaum* did not involve the risk of prosecution based upon a statute being in desuetude. Rather, *Apfelbaum* involved immunized testimony and making false statements, holding that "the Fifth Amendment does not prevent the use of respondent's immunized testimony at his trial for false swearing because, at the time he was granted immunity, the privilege would not have protected him against false testimony that he later might decide to give." 445 U.S. at 130.

⁴ "For the purposes of this section, parent includes step-parent, grandparent includes step-grandparent, child includes a step-child, and grandchild includes a step-grandchild." Code § 18.2-366(C).

Second, Defendant is, in effect, asking the court to take judicial notice of the "fact" that adultery is not prosecuted in Fairfax County since no evidence was offered by Defendant showing that adultery is not prosecuted in Fairfax County. A court, however, may only "take judicial notice of a factual matter not subject to reasonable dispute in that it is either (1) common knowledge or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Rule 2:201(a).

Even assuming that Defendant was referring only to sexual intercourse with any person not his spouse (a Class 4 misdemeanor), and not to sexual intercourse with any person whom he is forbidden by law to marry (a Class 1 misdemeanor), or sexual intercourse with his daughter or granddaughter (a Class 5 felony), or his mother (a Class 5 felony), the court declines to take judicial notice of such a fact because the court does not believe that it is either "common knowledge" or "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned."

Although the court will not take judicial notice of the purported absence of prosecutions of adultery, as a result of the fact that the statute of limitations for a misdemeanor is one year, Plaintiff faces no risk of prosecution if he had sexual intercourse with any person not his spouse, or with a woman he is forbidden by law to marry, more than one year before answering the interrogatory and responding to the request for admissions.

Accordingly, Plaintiff is ORDERED to answer Interrogatory #22, if he had sexual intercourse with any person not his spouse, or with a woman he is forbidden by law to marry, more than one year before answering the interrogatory, and is ORDERED to respond to Request for Admissions #6, if he had sexual intercourse with any person not his spouse, or with a woman he is forbidden by law to marry, more than one year before responding to the request.

Because there is no statute of limitations for a felony, if Plaintiff had sexual intercourse with his daughter or granddaughter, or his mother, he may invoke his right under the Fifth Amendment as such sexual intercourse is a felony.

With respect to the part of Interrogatory #22 and Request for Admissions #6 which inquires into intimate sexual contact (oral genital contact, or the touching, sensual kissing or fondling of the genitals of another) with any person other than Plaintiff's spouse during his marriage, it is a Class 5 felony to "perform[] . . . cunnilingus, [or] fellatio . . . upon or by his daughter or granddaughter, son or grandson, brother or sister, or father or mother" Code § 18.2-361(B).

Accordingly, Plaintiff is ORDERED to answer Interrogatory #22, if he had oral genital contact with any person not his spouse, unless such person was his daughter or granddaughter, son or grandson, brother or sister, or

father or mother, and is ORDERED to respond to Request for Admissions #6, if he had had oral genital contact with any person not his spouse, unless such person was his daughter or granddaughter, son or grandson, brother or sister, or father or mother.

Because there is no statute of limitations for a felony, if Plaintiff had oral genital contact with his daughter or granddaughter, son or grandson, brother or sister, or father or mother, he may invoke his right under the Fifth Amendment as such acts are a felony.

An appropriate order will enter.

Sincerely yours,

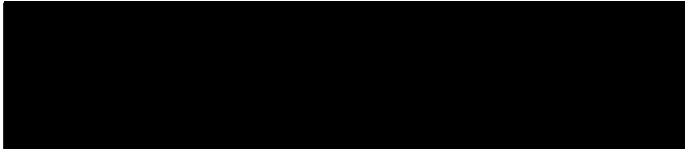
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Richard E. Gardiner
Judge

or mother, and

Plaintiff is further ORDERED to respond to Request for Admissions #6, if he had oral genital contact with any person not his spouse, unless such person was his daughter or granddaughter, son or grandson, brother or sister, or father or mother.

ENTERED this 24th day of January, 2020.



Richard E. Gardiner
Judge

**ENDORSEMENT OF THIS ORDER BY COUNSEL OF RECORD FOR THE PARTIES IS
WAIVED IN THE DISCRETION OF THE COURT PURSUANT TO RULE 1:13 OF THE
SUPREME COURT OF VIRGINIA**

Copies to:

Dennis M. Hottell
Counsel for Plaintiff

Henry A. Thompson, II
Counsel for Defendant