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Compelling the accused to shine the light upon himself - a Constitutional No-No

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In a recent opinion, our Superior Court, Appellate Division reaffirmed the long standing principle that someone under investigation for a crime has a constitutional right to not become a witness against himself. While this constitutional principle is usually beyond serious debate, once in a while a factual scenario exists that calls upon the courts to define the contours of the right (for example, see this prior post). In the case of *State vs. Mylon Kelsey,* a police officer was under investigation for beating someone, while off duty, with a flash light. Investigators zeroed in on Mr. Kelsey because witnesses described the person with the flashlight as having emerged from a vehicle known to belong to him. When witnesses were shown a photograph of Mr. Kelsey, he was identified as the person with the flashlight. These witnesses allegedly saw him take the flashlight from the car, use the flashlight as a weapon to strike people involved in an altercation, and then return the flashlight to his vehicle.

As part of the investigation, detectives obtained a search warrant to search the car. While they found an empty flashlight box, no actual flashlight was located. Investigators then obtained an Order requiring Mr. Kelsey to turn over the flashlight, if it was in his possession. This Order was obtained without notice to Mr. Kelsey or his counsel. Upon learning of it, Mr. Kelsey's attorney moved for reconsideration, and the Court vacated the prior Order, finding that requiring Mr. Kelsey to turn over the flashlight under these circumstances would violate his rights against self-incrimination.

The State appealed the trial judge's Order that Mr. Kelsey could not be compelled to provide the flashlight. After surveying the law, the Appellate Division affirmed the trial court's ruling, and held that Mr. Kelsey could not be compelled to provide the evidence that the State would use against him. In its Opinion, the Appellate Division noted that:

As Chief Justice Weintraub ably noted 40-5 years ago, the right against self-incrimination protects a defendant from being "subpoenaed to produce the gun or the loot, no matter how probable the cause, for the Fifth [Amendment] protects the individual from coercion upon him to come forward with anything that can incriminate him."

The court distinguished this case from other cases in which persons under investigation for or accused of committing a crime have been ordered to provide evidence related to their physical attributes such as urine or blood samples, voice print samples, hair and saliva samples and handwriting samples. The Court in *Kelsey* ruled that producing the flashlight in issue here required conscious communication by the accused indicating his awareness of which flashlight the State was looking for, and would amount to an admission that he had custody and control over the flashlight. Therefore, the court held, compelling him to produce the flashlight would amount to compelling him to become a witness against himself. In the case of handwriting, DNA, voice samples, and the like, the court reasoned, there is no active communication on the part of the accused.

The Monitor would expect the decision in *Kelsey* to be relied upon by criminal defense attorneys who are seeking to block law enforcement access to evidence when the gatekeeper to the evidence is the person being investigated or accused. Mr. Kelsey's attorney, Scott Krasny, did an excellent job convincing the trial court to

reconsider its prior ruling, and the trial court should be commended for not hesitating to revisit and correct its prior erroneous Order.

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