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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Maynard, Justice, dissenting:

Contrary to the majority’s opinion, there is no violation of the constitutional right to compulsory process in this case, and the circuit court did not abuse its discretion in refusing the appellant’s request to call Ms. Day to the stand.

First, the appellant’s right to compulsory process was not violated. Courts have held that “[o]nce a witness appears in court and refuses to testify, a defendant’s compulsory process rights are exhausted. It is irrelevant whether the witness’s refusal is grounded in a valid Fifth Amendment privilege, an invalid privilege, or something else entirely.” *U.S. v. Griffin*, 66 F.3d 68, 70 (5th Cir. 1995) (footnote omitted). The court in *Griffin* explained the reason for this rule as follows,

[A] claim of Fifth Amendment privilege is likely to be regarded by the jury as high courtroom drama and a focus of ineradicable interest, when in fact its probative force is weak and it cannot be tested by cross-examination. . . . Juries are no less likely to draw improper influences from an invalid assertion of privilege than from a valid assertion. In either case, the witness avoids cross-examination.

Griffin, 66 F.3d at 70-71 (internal quotation marks and citations omitted). In the instant case, once Ms. Day appeared before the trial court and refused to testify, the appellant’s right to compulsory process was satisfied. At that point, the court was under no obligation to compel Ms. Day to take the stand.

However, even if the right to compulsory process was implicated under the facts of this case, Ms. Day's testimony was not required because the appellant made absolutely no showing that her testimony would have been material and favorable to his defense. In its extremely weak analysis of this issue, the majority finds that the requisite showing was made because "there is little question that Ms. Day's testimony could have been both material and favorable to Appellant, had she chosen to testify in open court." Majority opinion at 15. The record is clear that Ms. Day had no intention of testifying in open court. Ms. Day invoked her Fifth Amendment privilege against self-incrimination before the trial court *in camera*. After the trial court found that Ms. Day had no valid Fifth Amendment privilege under these facts, she nevertheless still refused to testify, was held in contempt, and jailed for the duration of the trial. There simply is no reason to believe that Ms. Day, once she took the stand, would have admitted to being solely responsible for the victim's murder.

Second, the trial court did not abuse its discretion in not compelling Ms. Day to take the stand in front of the jury and refuse to testify. Her refusal to testify would have had absolutely no probative value in determining the guilt or innocence of the appellant. On the other hand, it would likely have done substantial harm to the fact-finding process. First, Ms. Day's silence would have led to speculation on the part of the jury. Second, it would have caused the jury to draw improper inferences. The law is clear that "[n]either side has

the right to benefit from any inferences the jury may draw simply from the witness' assertion of the privilege either alone or in conjunction with questions that have been put to him." *Griffin*, 66 F.3d at 71. Finally, the appellant suffered absolutely no prejudice from the trial court's refusal of his request to call Ms. Day as a witness. Several witnesses testified regarding statements Ms. Day made that implicated her in the victim's murder. Therefore, the appellant was able to present his theory to the jury that Ms. Day, and not he, murdered the victim.

In sum, the majority opinion has no basis in our constitutional or evidentiary law. Accordingly, I dissent.