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Virginia v. Baust

No. CR141439 (Va. Cir. Ct. Oct. 28, 2014)

KATHERYN HUDMAN*

BACKGROUND

Defendant, David Charles Baust, was charged with violating Code of Virginia § 18.2-51.6, Strangling Another Causing Wounding or Injury. The victim claimed that, on February 19, 2014, the Defendant assaulted her in his bedroom. The Defendant allegedly recorded the incident via a recording device that transmitted the recordings from his bedroom to his smart phone. Previously, the Defendant used the recording device to transmit videos “of the victim and himself engaging in sexual intercourse in his room.”¹

The Commonwealth of Virginia was granted a search warrant that allowed them to recover computer equipment, recording devices, computer discs, flash drives, and the Defendant’s smart phone. The Defendant and the victim both affirmed that there was likely a recording of the assault on the Defendant’s smart phone, however, the police could not access the contents of the phone because it was protected by passcode and fingerprint encryption.

The Commonwealth of Virginia brought a “Motion to Compel the Production of the Passcode or Fingerprint to Encrypted Smartphone”² against the Defendant. The defense argued that the passcode and fingerprint encryption are testimonial, and thus protected under the Defendant’s Fifth Amendment privilege against self-incrimination.

ISSUE

The issue before Circuit Court of Virginia was whether the production of the Defendant’s passcode or fingerprint is considered testimonial communication, and thereby protected by the Fifth Amendment privilege against self-incrimination.

DECISION

The court granted the state’s motion to compel the Defendant’s fingerprint, but denied the motion to compel the passcode.

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1. Virginia v. Baust, No. CR141439, 2014 WL 6709960, at *1 (Va. Cir. Ct. Oct. 28, 2014).
2. *Id.*

REASONING

The court began its analysis by evaluating the Fifth Amendment of the U.S. Constitution, which stipulates that no one “shall be compelled in any criminal case to be a witness against himself.”³ The Fifth Amendment grants a criminal defendant the right to withhold incriminating testimony.⁴ The court stated that the proper inquiry in resolving the matter is to examine “whether granting the motion to compel the fingerprint or passcode ‘would require (1) compulsion of a (2) testimonial communication that is (3) incriminating.’”⁵ The court agreed that a motion to compel constitutes the type of compulsion protected by the Fifth Amendment and that producing the passcode or fingerprint could be incriminating. Therefore, the court was left to determine whether producing a fingerprint or passcode encryption is the functional equivalent to “testimonial communication,” and thus protected by the Fifth Amendment privilege against self-incrimination.

The court reasoned that the Fifth Amendment privilege does not protect against the compulsion of a defendant to give a voice sample, handwriting sample, blood sample, or take part in a line-up. While these compulsions may provide the police with incriminating evidence, they are not thought to be testimonial. The court stated “[a]n act is testimonial when the accused is forced to reveal his knowledge of facts relating him to the offense or from having to share his thoughts and beliefs with the government.”⁶ Using that definition, the court determined that communicating a passcode to the police forces the Defendant to relay his knowledge, and that knowledge that is protected under the Fifth Amendment. However, providing a fingerprint does not require the witness to reveal any knowledge, belief, or thought process. The court held that the fingerprint itself is not testimonial communication, and therefore is not protected under the Fifth Amendment.

3. U.S. CONST. amend. V.

4. *Id.*

5. *Baust*, 2014 WL 6709960, at *1 (quoting *United States v. Authement*, 607 F.2d 1129, 1131 n.1 (5th Cir. 1979)).

6. *Id.* at *2 (quoting *United States v. Kirschner*, 823 F. Supp. 2d 665, 668 (2010)).