Gullen v. Pierce County

Concurring Opinion

Supreme Court of the State of Washington

Opinion Information Sheet

Docket Number: 68535-5

Title of Case: Ignacio Guillen

v.

Pierce County

File Date: 09/13/2001

Oral Argument Date: 11/16/2000

SOURCE OF APPEAL

Appeal from Superior Court,

Pierce County;

96-2-13404-5

Honorable Frederick B. Hayes, Judge.

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Guillen, et al. v. Pierce County, et al.

Majority by Bridge, J.

Concurrence by Madsen, J.

No. 68535-5

MADSEN, J. (concurring)--Privileges are the exception, not the rule, and therefore, they are 'not lightly created nor expansively construed, for they are in derogation of the search for the truth.' United States v. Nixon, 418 U.S. 683, 710, 94 S. Ct. 3090, 41 L. Ed. 2d 1039 (1974). Today our court sidesteps this admonition and construes 23 U.S.C. sec. 409 in a sweeping manner, far beyond that intended and, most importantly, dictated by Congress. While I concur in the result of the majority, I do so only because the majority, not entirely comfortable with its own result, determined that its own interpretation of sec. 409 exceeds Congress' authority under the Tenth Amendment, and therefore, refused to enforce its

own expansive interpretation.

In 1973, Congress enacted 23 U.S.C. sec. 152, which establishes a voluntary national funding program for enhancement of dangerous roadways, requiring states to identify hazardous locations and prioritize them for correction. 23 U.S.C. sec. 152. To thwart an unintended and unsavory result of sec. 152--that private plaintiffs might gain a work free 'tool' to use in civil litigation--Congress enacted 23 U.S.C. sec. 409, which lies at the heart of this dispute. See Coniker v. State, 695 N.Y.S.2d 492, 181 Misc. 2d (Ct. Cl. 1999).

Section 409 currently reads:

Notwithstanding any other provision of law, reports, surveys, schedules, lists, or data compiled or collected for the purpose of identifying evaluating, or planning the safety enhancement of potential accident sites, hazardous roadway conditions, or railway-highway crossings, pursuant to sections 130, 144, and 152 of this title or for the purpose of developing any highway safety construction improvement project which may be implemented utilizing Federal-aid highway funds shall not be subject to discovery or admitted into evidence in a Federal or State court proceeding or considered for other purposes in any action for damages arising from any occurrence at a location mentioned or addressed in such reports, surveys, schedules, lists, or data.

23 U.S.C. sec. 409 (emphasis added). In 1995, Congress added the term 'collected' to sec. 409, thus making inadmissible in court, those materials

'compiled or collected' for purposes of sec. 152. Congress was clear in its intent regarding this amendment:

This section amends section 409 of title 23 to clarify that data 'collected' for safety reports or surveys shall not be subject to discovery or admitted into evidence in Federal or State court proceedings.

This clarification is included in response to recent State court interpretations of the term 'data compiled' in the current section 409 of title 23. It is intended that raw data collected prior to being made part of any formal or bound report shall not be subject to discovery or admitted into evidence in a Federal or State court proceeding or considered for other purposes in any action for damages arising from any occurrence at a location mention{ed} or addressed in such data.

H.R. Rep. 104-246 sec. 328, at 59 (1995).

I agree with the majority that this amendment was intended to make a 'change' in sec. 409. Majority at 22; See Home Indem. Co. v. McClellan Motors, Inc., 77 Wn.2d 1, 3, 459 P.2d 389 (1969). However, I disagree with the majority as to the import of that change. Under the majority's holding, original police reports prepared for purposes unrelated to sec. 152, become privileged, even in the hands of the party that created them, once they have been 'collected' by any entity for purposes of sec. 152. Majority at 22. Contrary to the majority's assertions, this was not the result intended by Congress, nor is it a holding dictated by any decisional law.

This point is easily shown by examining: (1) the well settled purpose behind sec. 409; (2) how state courts partially undermined that purpose prior the 1995 amendment; (3) how the 1995 amendment can be logically read to bring the interpretation of sec. 409 back in line with its purpose; and (4) what state courts have done since the amendment.

The purpose of sec. 409 is clear:

The manifest Congressional intent in enacting 23 U.S.C. sec. 409 was to 'foster the free flow of safety-related information by precluding the possibility that such information later would be admissible in civil suits. The interest to be served by such legislation is to obtain information with regard to the safety of roadways free from the fear of future tort actions' (Perkins v. Ohio Dept. of Transportation, 65 Ohio App.3d 487, 500, 584 N.E.2d 794, 802; see also Palacios v. Louisiana and Delta RR, 740 So.2d 95; Reichert v. State of Louisiana, 694 So.2d 193). The statute has the dual effect of (1) facilitating candor in the evaluation of highway safety hazards, and (2) prohibiting federally required record keeping from being used as a tool by civil litigants (see, Robertson v. Union Pacific RR Co., 954 F.2d 1433 (8th Cir.1992); Stephens v. Town of Jonesboro, 642 So.2d 274).

Coniker, 695 N.Y.S.2d at 494-95. This is distilled into one basic and obvious rule: Congress did not want to create a 'virtually no-work, tool for direct use in private litigation,' Light v. State, 560 N.Y.S.2d 962, 965, 149 Misc. 2d 75 (Ct. Cl. 1990). In essence, Congress did not want any party involved in litigation to be better off, or for that matter worse

off, by reason of a State's participation in seeking sec. 152 funding.

State courts began to undermine this purpose by giving sec. 409 an unduly narrow construction. An examination of one of the leading state court opinions on the proper scope of section 409 during the period preceding the 1995 amendment shows the limited construction of sec. 409 that Congress was aiming to overturn by its amendment. Wiedeman v. Dixie Elec. Membership Corp., 627 So. 2d 170 (La. 1993), cert. denied, 511 U.S. 1127 (1994), concerned a plaintiff's discovery requests to the State Department of Transportation and Development (DOTD). Plaintiffs sought information, such as accident reports, traffic counts, and other raw data collected by the department that was gathered by the DOTD in preparing its applications for federal funding. Id. Plaintiffs also sought surveys, compilations, and the actual applications for federal funding.

The Louisiana Supreme Court held that the raw data and reports gathered by the DOTD, which were later incorporated into a report, were not privileged by reason of sec. 409:

DOTD argues for an even more expansive interpretation that would protect data and raw facts as well as the written documents incorporating the data. DOTD essentially asks this Court to transform a statute, which by its literal wording protects information compiled for certain purposes, into one which protects all information in DOTD's possession. We refuse. The word "compiled" indicates that information is collected into one document or composed from other sources. {See Webster's New Collegiate Dictionary p. 230, (1977).} The term suggests an end product, something more than unedited factual material. Section 409 creates a privilege for

compilations enumerated in the statute, but the privilege does not extend to reports and data gathered for or incorporated into such compilations. . . . . A rule which requires DOTD to divulge source data but not the end product fosters candor by shielding the state's self-critical evaluations and conclusions from outside scrutiny. It also accords with Louisiana's strong interest in fully and fairly adjudicating matters before its courts and the concomitant need to facilitate open and evenhanded development of the facts underlying a dispute.

Wiedeman, 627 So. 2d at 173 (emphasis added). Other state courts construed section 409 in a similar fashion during this period. See Tardy v. Norfolk S. Corp., 103 Ohio App. 3d 372, 659 N.E.2d 817 (1995); S. Pac. Transp. Co. v. Yarnell, 181 Ariz. 316, 890 P.2d 611, cert. denied, 516 U.S. 937 (1995).

In Wiedeman, and other similar cases, plaintiffs were attempting to gain information that was 'collected' by an agency for purposes of preparing an application for federal funding from the agency that 'collected' the information. In none of these cases were plaintiffs seeking information or reports from their original source, such as accident reports from a law enforcement agency. This is a critical distinction, and one that is unnecessarily dismissed as inconsequential by the majority. As illustrated below, it is a distinction that makes sense.

When Congress amended sec. 409 to include within its scope information that was 'collected' it was reacting to decisions like Wiedeman. Congress simply 'intended that raw data collected prior to being made part of any formal or bound report shall not be subject to discovery or admitted into

evidence.' H.R. Rep. 104-246 sec. 328 (emphasis added). However, this did not obviate the express statutory requirement that the raw data and information be 'collected' pursuant to sec. 152.

An example illustrates this point, and the flaw in the majority's analysis. Take the simple case of a Pierce County Sheriff's Department officer completing a written accident report for a valid law enforcement purpose (e.g., documenting why a citation was given or an arrest made), a duty regularly performed long before 1973, the year sec. 152 was originally enacted. Pub. L. 100-17, Title I, section 132(a) (Apr. 2, 1987) 101 Stat. 170; see RCW 46.52.060 and accompanying historical information. This report, and others like it, might contain myriad relevant information for a plaintiff pursuing a negligent traffic design claim against the government. Now, let us assume that these reports are kept on microfiche, and several years later the Pierce County Engineer's Office begins 'collecting' copies of these reports, but does not make them 'part of any formal or bound report.' See H.R. Rep. 104-246 sec. 328. Under section 409, as amended, a plaintiff would not be entitled to have access to the actual documents 'collected' by the Pierce County Engineer's Office. Indeed, this would provide a 'virtually no-work, tool for direct use in private litigation,' Light, 560 N.Y.S.2d at 965, as a litigant would be able to obtain a collection of reports that is part of a work in progress. However, to say that a litigant would not have access to the original reports, still contained on microfiche, from Pierce County is an entirely different matter.

By preventing a litigant from gaining access to information that has been

'collected' for purposes of securing federal funding, Congress has made the litigant no better off than they would have been had the State not participated in the funding program, which is the obvious goal of sec. 409. However, if, as the majority suggests, Congress has prevented a litigant from having access to original reports from their original sources, prepared for purposes unrelated to securing federal funding, then a litigant would be in a far worse position than if the State did not participate in the funding program. I do not believe that was the result intended by Congress, nor do I believe it is dictated by the language of sec. 409.

No post-1995 amendment case involves the discovery of original 7reports from the agency creating them for purposes unrelated to the securing of federal funding. Instead, each involves an attempt to gather information already collected or prepared by a state agency, from the agency that 'collected' the information for the purpose of securing sec. 152 funds. See, e.g., Reichert v. Dep't. of Transp. & Dev., 694 So. 2d 193 (La. 1997) (discovery request to DOTD for documents collected by DOTD); Mackie v. Grand Trunk W. R.R., 215 Mich. App. 20, 544 N.W.2d 709 (1996) (involving 'Grade Crossing Report' compiled by Michigan Department of Transportation; decided under pre-amended version of section 409). Not surprisingly, in each instance courts have reached the conclusion that the 'collected' information is privileged:

On November 28, 1995 section 409 was amended to include the words "or collected" after "compiled" to effectively eliminate the admissibility of "{a}ccident reports, traffic counts, and other raw data collected by the

Department" allowed by the holding in Wiedeman. Id. This clarification was added in response to recent State court decisions, like Wiedeman, that in the view of Congress, misinterpreted the term "data compiled." . . . In other words, such information is collected or compiled to protect the public by ensuring that safety measures are routinely explored by DOTD without exposing their efforts.

Reichert, 694 So. 2d at 198 (emphasis added).

A narrow construction of sec. 409 is also supported by several rules of statutory interpretation. The first is that there is a strong presumption against federal preemption, requiring a showing that this is 'the clear and manifest purpose of Congress.' Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230, 67 S. Ct. 1146, 91 L. Ed. 1447 (1947). Second, privileges are to be narrowly construed, as they stand in 'derogation of the search for truth.' Nixon, 418 U.S. at 710; see Trammel v. United States, 445 U.S. 40, 51, 100 S. Ct. 906, 63 L. Ed. 2d 186 (1980). Finally, this Court should be mindful that 'where a statute is susceptible of more than one interpretation, some of which may render it unconstitutional, the court will adopt a construction which sustains the statute's constitutionality, if at all possible.' State ex rel. Faulk v. CSG Job Ctr., 117 Wn.2d 493, 500, 816 P.2d 725 (1991). The majority holds that Congress does not have the authority, as a result of the Tenth Amendment, to enact a provision as sweeping as the majority believes sec. 409 and its subsequent amendment were intended to be. Specifically, the

majority states:

While Congress was authorized under its enumerated powers to enact 23 U.S.C. sec. 409 in its pre-1995 form, we find that its 1995 amendment of that statute cannot be characterized as a valid exercise of any power constitutionally delegated to the federal government.

Majority at 43. Of course, the interpretation of sec. 409 that I propose does not run afoul of the Tenth Amendment, as is all but conceded by the majority, since it is a clearly valid exercise of the Federal Spending Power. Id. at 36; see Martinolich v. So. Pac. Transp. Co., 532 So. 2d 435, 438 (La. Ct. App. 1988); Claspill v. Mo. Pac. R.R., 793 S.W.2d 139 (Mo.), cert. denied, 498 U.S. 984 (1990); South Dakota v. Dole, 483 U.S. 203, 107 S. Ct. 2793, 97 L. Ed. 2d 171 (1987).

Because the record before this Court does not permit us to accurately determine whether the disputed documents would be privileged under the correct interpretation of sec. 409, like the majority, I would remand for further proceedings.