

A woman sued her friend for injuries she received as a passenger in the friend's car. On direct examination, the woman testified that the friend had been speeding and ran a red light. On cross-examination, the woman was asked whether she was under the influence of drugs at the time of the accident. The woman invoked the privilege against self-incrimination.

How should the court treat the woman's claim of privilege?

- A. Deny it, because evidence of the woman's drug intoxication is essential to assessing the accuracy of her observations.
- B. Deny it, because the woman waived the privilege by voluntarily testifying.
- C. Uphold it, because the privilege applies in both civil and criminal cases.
- D. Uphold it, because the woman's credibility cannot be impeached by a crime for which she has not been convicted.

Explanation:

The Fifth Amendment **privilege against self-incrimination**:

protects a criminal defendant from being compelled to produce self-incriminating testimonial communications (eg, testify at trial) *and*

allows a **witness**—in both **civil and criminal cases**—to refuse to answer questions that the witness reasonably believes might incriminate him/her.

Here, the woman invoked her privilege against self-incrimination after being asked if she was under the influence of drugs at the time of the accident. The woman's belief that her answer might incriminate her—by subjecting her to a future prosecution for drug possession—was reasonable. And since the privilege against self-incrimination applies in both civil and criminal cases, the court should uphold her claim of privilege.

(Choice A) As a general evidentiary principle, a party may impeach (ie, discredit) a witness by challenging the witness's perception and recollection. Evidence of the woman's drug intoxication—which would affect both—is essential to assessing the accuracy of her observations. However, her constitutional right against self-incrimination trumps this principle.

(Choice B) Although a *criminal defendant* waives the privilege against self-incrimination by testifying as to his/her culpability, a *witness* does not waive the privilege by voluntarily testifying. However, if the witness voluntarily testifies about a potentially incriminating matter (not seen here), the privilege is waived, and the opposing party may examine the witness on that matter.

(Choice D) A witness's credibility *can* be impeached by a crime for which he/she has not been convicted if (1) the crime affected the witness's perception or memory (as argued here) or (2) the crime concerns the witness's character for truthfulness. Therefore, this is not a basis to uphold the woman's claim of privilege.

Educational objective:

The privilege against self-incrimination (1) protects a criminal defendant from being compelled to produce self-incriminating testimonial communications and (2) allows a witness, in both civil and criminal cases, to refuse to answer questions that the witness reasonably believes might incriminate him/her.

References

U.S. Const. amend. V (privilege against self-incrimination).

Copyright © 2011 by the National Conference of Bar Examiners. All rights reserved.

Copyright © UWorld. All rights reserved.

Privilege against self-incrimination

