[Cite as *State v. Yacchari*, 2011-Ohio-3911.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

CLERMONT COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellant,	:	CASE NO. CA2010-12-098
	:	O P I N I O N
- vs -		8/8/2011
	:	
DAVID T. YACCHARI,	:	
Defendant-Appellee.	:	

CRIMINAL APPEAL FROM CLERMONT COUNTY COURT OF COMMON PLEAS
Case No. 2010 CR 0538

Donald W. White, Clermont County Prosecuting Attorney, David H. Hoffman, 123 North Third Street, Batavia, Ohio 45103, for plaintiff-appellant

Gary A. Rosenhoffer, 302 East Main Street, Batavia, Ohio 45103, for defendant-appellee

PIPER, J.

{¶1} Plaintiff-appellant, the state of Ohio, appeals the decision of the Clermont County Court of Common Pleas suppressing the statements of defendant-appellee, David Yacchari, in relation to a charge of theft in office. We reverse the decision of the trial court.

{¶2} The Ohio State Highway Patrol received information from Yacchari's ex-wife, Mary Beth Snider, that certain theft offenses were being committed by the employees of the Clermont County section of the Ohio Department of Transportation. Lieutenant Douglas

McKinney with the Ohio State Highway Patrol, who is also the commander in charge of his department's investigative section, pursued the information by speaking with Snider.

{¶3} Without calling ahead or contacting Yacchari's supervisors, Lt. McKinney arrived at the ODOT garage and waited for Yacchari and other employees to arrive. After Lt. McKinney noticed that ODOT employees were not there, he contacted an ODOT employee to ask when the other employees would show at the garage. However, Lt. McKinney did not share any information with the ODOT employee regarding his investigation. Once the employees arrived, Lt. McKinney conducted several interviews and spoke with Yacchari in his office at the ODOT garage. At the time of the interview, Yacchari was acting as the interim supervisor of the Clermont County ODOT division. Before the interview began, Lt. McKinney told Yacchari who he was, that he was with the Ohio State Highway Patrol, and read Yacchari his *Miranda* rights from a form entitled "Constitutional Rights Waiver."

{¶4} Yacchari acknowledged that he understood his rights, as explained in detail on the written form, and signed the waiver, which stated: "I have read the statement of my rights shown above. I understand what my rights are. I am willing to answer questions and make a statement. I do not want a lawyer at this time. I understand and know what I am doing. No promise or threats have been made to me and no pressure or coercion of any kind has been used against me." Lt. McKinney then questioned Yacchari after the waiver was signed and witnessed.

{¶5} During the interview, Lt. McKinney asked questions regarding a stolen mobile home trailer. Yacchari stated that ODOT towed the abandoned mobile home trailer into the ODOT garage after it had set on the side of the road for about a week. After a month or more went by with no one claiming it, ODOT employees "tore it apart" and Yacchari eventually took it home. After the trailer sat in Yacchari's backyard for some time, he gave it to his ex-son-in-law.

{¶6} Yacchari admitted in the interview that the proper disposal would have been to haul the trailer to the scrap yard and that any monetary gain should have gone to the state. Yacchari then implicated some of his fellow employees as people who took apart the trailer and sold the metal for scrap, and that he was aware that they "ended up getting rid of it."

{¶7} Yacchari was indicted on one count of theft in office in violation of R.C. 2921.41(A)(1). Yacchari moved to suppress the statements he made to Lt. McKinney, and the trial court held a hearing on the matter. The trial court determined that the statements should be suppressed because Yacchari was compelled to cooperate with Lt. McKinney's investigation under penalty of loss of employment. The state now appeals, raising the following assignment of error.

{¶8} "THE TRIAL COURT ERRED IN GRANTING THE DEFENDANT'S MOTION TO SUPPRESS."

{¶9} The state argues in its sole assignment of error that the trial court erred in suppressing Yacchari's statements pursuant to *Garrity v. New Jersey* (1967), 385 U.S. 493, 87 S.Ct. 616. Finding the state's argument meritorious we sustain the assignment of error.

{¶10} Appellate review of a ruling on a motion to suppress presents a mixed question of law and fact. *State v. Cochran*, Preble App. No. CA2006-10-023, 2007-Ohio-3353. Acting as the trier of fact, the trial court is in the best position to resolve factual questions and evaluate witness credibility. Id. Therefore, when reviewing a trial court's decision regarding a motion to suppress, a reviewing court is bound to accept the trial court's findings of fact if they are supported by competent, credible evidence. *State v. Oatis*, Butler App. No. CA2005-03-074, 2005-Ohio-6038. "An appellate court, however, independently reviews the trial court's legal conclusions based on those facts and determines, without deference to the trial court's decision, whether as a matter of law, the facts satisfy the appropriate legal standard." *Cochran* at ¶12.

{¶11} The Fifth Amendment guarantees that no person "shall be compelled in any criminal case to be a witness against himself." Normally, we are asked to determine whether a defendant's Fifth Amendment rights have been violated in contravention of *Miranda v. Arizona* (1966), 384 U.S. 436, 86 S.Ct. 1602, regarding instances of custodial interrogation. However, the case at bar is specific to the Fifth Amendment as arising in circumstances apart from custodial interrogation.

{¶12} In *Garrity v. New Jersey*, the Supreme Court determined that the state cannot use for criminal purposes statements that were taken from employees during an internal investigation after the employee was assured that if he refused to answer the questions, he would be terminated from employment. Once employees received such assurances, the Supreme Court held "the choice imposed on [employees is] one between self-incrimination or job forfeiture," and such statements are therefore coerced. 385 U.S. at 495.

{¶13} In *Garrity*, police officers from various New Jersey boroughs were suspected of fixing traffic tickets and diverting bail and fine funds to unauthorized purposes. The New Jersey Supreme Court ordered the New Jersey Attorney General to investigate the matter and to make a report to the court. Before the New Jersey Attorney General interviewed the suspects, each was warned and assured "(1) that anything he said might be used against him in any state criminal proceeding; (2) that he had the privilege to refuse to answer if the disclosure would tend to incriminate him; but (3) that if refused to answer he would be subject to removal from office." Id. at 494. The circumstances were, in essence, give up your constitutional right not to incriminate yourself, or lose your job.

{¶14} The police officers in question were convicted of various counts of conspiracy to obstruct the administration of traffic laws, and appealed their convictions claiming that their statements were coerced "by reason of the fact that, if they refused to answer, they could lose their positions with the police department." Id. at 495.

{¶15} The Supreme Court stated that the question before it on appeal was "whether the accused was deprived of his free choice to admit, to deny, or to refuse to answer." Id. at 496. The Court went on to state, "the choice given petitioners was either to forfeit their jobs or to incriminate themselves. The option to lose their means of livelihood or to pay the penalty of self-incrimination is the antithesis of free choice to speak out or to remain silent." Id. at 497. The Court then considered whether a state can expressly use the "threat of discharge to secure incriminatory evidence against an employee," and ultimately held, "the protection of the individual under the Fourteenth Amendment against coerced statements prohibits use in subsequent criminal proceedings of statements obtained under the threat of removal from office, and that it extends to all, whether they are policemen or other members of our body politic." Id. at 500.

{¶16} This decision and holding of the Supreme Court recognized what we now know as "*Garrity* rights." Since 1967, *Garrity* rights jurisprudence has continued to evolve regarding how states must proceed if they wish to bring charges against a suspect who has been advised of his rights under *Garrity*, and whether or not a Fifth Amendment *Garrity* right even applies. The Ohio Supreme Court recently discussed the use of *Garrity* statements during grand jury proceedings made by a public employee under threat of removal from office. *State v. Jackson*, 125 Ohio St.3d 218, 2010-Ohio-621.

{¶17} In *Jackson*, the court was asked to "(1) define the meaning of 'use' for *Garrity* purposes and (2) clarify the remedy for a *Garrity* violation." Id. at ¶11. The court addressed that "use" of a *Garrity* statement can be direct or derivative, and that the proper remedy is dismissing the indictment or suppressing the statement and all evidence derived from it. Id. In doing so, the *Jackson* court noted that the case involved a *Garrity* statement because it concerned "a public employee's statement given during an internal investigation under the threat of the employee's termination from office" along with a promise of use immunity as to

any incriminating statements made. Id. at ¶1.

{¶18} Anthony Jackson was a police officer for the Canton Police Department, and while on administrative leave, was involved in a bar fight. After police came to break up the fight, they later learned that Jackson possessed a firearm in the bar. A lieutenant on behalf of the Canton Police Department's Internal Affairs Unit investigated the gun issue and "ordered Jackson to submit to an interview and make a statement." Id. at ¶3. Before the interview began, the lieutenant gave Jackson a document tilted "*Garrity* Warning," which stated:

{¶19} "This questioning concerns administrative matters relating to the official business of the Canton Police Department. During the course of this questioning, if you disclose information which indicates that you may be guilty of criminal conduct, neither your self-incriminating statements nor the fruits of any self-incriminating statement you made will be used against you in any criminal legal proceedings. Since this is an administrative matter and any self-incriminating information you may disclose will not be used against you in a court of law, you are required to answer my questions fully and truthfully. *** If you refuse to answer all my questions, this in itself is a violation of the rules and procedures of the department, and you will be subject to separate disciplinary action." Id. at ¶4.

{¶20} After analyzing *Garrity*, the *Jackson* court concluded that "in a criminal proceeding against a public employee, the state may not make a direct or derivative use of an employee's statement that was compelled under threat of the employee's removal from office." Id. at ¶14. The court then reviewed the way in which the prosecution used Jackson's *Garrity* statement, and stated that "the police department broke its promise to Jackson that neither the statement nor the fruits of the statement would be used in a later criminal proceeding. *When* such *a promise has been made* to a public employee, the public employer should not provide the prosecutor with the compelled statement." Id. at ¶26. (Emphasis

added.) Pursuant to *Garrity*, the police department had "assured Jackson that neither his statement nor its 'fruits' would be used later in any criminal proceeding." Id. at ¶5.

{¶21} Based on *Garrity and Jackson*, the precipitating event that triggers the Fifth Amendment privilege against self-incrimination recognized in *Garrity* is an internal investigation wherein an employee is actually coerced into giving a statement by threat of removal from office. Beside the very obvious fact that Lt. McKinney's investigation was criminal in nature on behalf of the Ohio State Highway Patrol rather than an internal investigation on behalf of ODOT, Lt. McKinney testified at the motion to suppress hearing that he never suggested to Yacchari that he would lose his job if he did not participate in the interview. At one point, the trial court asked Lt. McKinney, "at any time did any – was there any discussion of any job action toward them that would indicate that you could lose your job if you don't talk to me, or anything like that?" Lt. McKinney answered, "no, Sir." No other testimony contradicted this evidence.

{¶22} Instead of arguing that Lt. McKinney expressly threatened job-related discipline, Yacchari argued to the trial court, and on appeal, that he was indirectly aware of the possibility that he would lose his job if he did not cooperate with Lt. McKinney's investigation from the posted ODOT policies and procedures.

{¶23} The question now becomes, in the absence of expressed *Garrity* rights, (a forced choice between employment sanctions or waiving the right to be silent), was Yacchari's Fifth Amendment protection against self-incrimination violated? Ohio courts have not addressed this specific factual scenario, wherein a defendant claims his statement should be suppressed because his *Garrity* rights were violated when he was never actually given *Garrity* rights in the first place. When addressing at what point *Garrity* rights, or even the Fifth Amendment itself, is implicated, we must ask ourselves, are these rights self-executing?

{¶24} If a person chooses to participate in a situation where he could otherwise assert

his Fifth Amendment rights, that person has made a choice that is considered voluntary, "since he was free to claim the privilege and would suffer no penalty as the result of his decision to do so. *** [A]pplication of this general rule is inappropriate in certain well-defined situations. In each of those situations, however, some identifiable factor 'was held to deny the individual a free choice to admit, to deny, or to refuse to answer.'" *Minnesota v. Murphy* (1984), 465 U.S. 420, 429, 104 S.Ct. 1136, quoting *Garner v. United States* (1976), 424 U.S. 648, 657, 96 S.Ct. 1178.

{¶25} Both federal and Ohio case law is clear that the Fifth Amendment, specific to *Miranda*, is implicated when the individual is subjected to custodial interrogation, with custodial interrogation being the identifiable factor. "Police [officers] are not required to administer *Miranda* warnings to everyone whom they question." *State v. Biros,* 78 Ohio St.3d 426, 440, 1997-Ohio-204, citing *Oregon v. Mathiason* (1977), 429 U.S. 492, 495, 97 S.Ct. 711. "It is well-established that the duty to advise a suspect of constitutional rights pursuant to *Miranda* * * * arises only when questioning by law enforcement officers rises to the level of a custodial interrogation." *In re J.B.,* Butler App. No. CA2004-09-226, 2005-Ohio-7029, ¶53, citing *State v. Gumm,* 73 Ohio St.3d 413, 429, 1995-Ohio-24.

{¶26} Custodial interrogation, as defined by *Miranda,* is any "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Miranda* at 444. In other words, the threat of being arrested or the compulsion one might feel in being confronted by a police officer is insufficient to render any statements involuntary—the questioning must occur in an identifiable custodial setting.

{¶27} Much like *Miranda* rights, *Garrity* rights apply only when the Fifth Amendment's prohibition against self-incrimination is clearly being deprived. Regarding rights under *Garrity*, the touchstone is whether or not the individual's "free choice" has been deprived and

whether he is compelled to give up his right to remain silent and not incriminate himself based on the coercion of losing one's livelihood.

{¶28} *Garrity* does not hold that an employer is forbidden from obtaining voluntary statements from an employee that might possibly be used in subsequent criminal proceedings; but rather that the statement cannot be the result of coercion such that the statements are involuntary because the employee was forced to choose between substantial employment sanctions or the forced waiver of a constitutional right. Nor does *Garrity* hold that a duty to cooperate with one's employer is inherently tantamount to coercion.

{¶29} If an individual is in custody and interrogated, his self-incrimination would be involuntary without first being afforded the opportunity to invoke, or waive, the right not to speak against oneself. The Fifth Amendment's right against self-incrimination is a personal right "that can only be invoked by the individual whose testimony is being compelled." *Moran v. Burbine* (1986), 475 U.S. 412, 106 S.Ct. 1135, fn. 4.

{¶30} The *Garrity* court recognized that the New Jersey police officers were deprived of the opportunity to invoke the Fifth Amendment because of the duress and coercion used to obtain their statement, rendering them involuntary. From the time of *Garrity* forward, the threat of discharge to secure incriminating evidence against one's free choice is prohibited.

{¶31} An individual's "free choice" is an integral aspect of Fifth Amendment jurisprudence because whether or not an individual is coerced into incriminating himself is determined by the facts and circumstances specific to that case. See *Vilardo v. Sheets*, Clermont App. No. CA2005-09-091, 2006-Ohio-3473, ¶48, citing *Garner v. United States* (1976), 424 U.S. 648, 657, 96 S.Ct. 1178, 1183, (noting that the Fifth Amendment is implicated when an individual is divested of his "free choice to admit, to deny, or refuse to answer").

{¶32} In *McKune v. Lile* (2002), 536 U.S. 24, 122 S.Ct. 2017, an inmate claimed that

his free choice was deprived when the prison's sex offender program in which he was required to participate if he hoped for privileges and possibly early release required him to admit to his prior sex offenses as part of treatment. In finding that Lile's free choice was not denied, the Supreme Court noted that Lile was required to participate in his rehabilitation, and that admitting to past crimes was the first step in the treatment process. However, the Court concluded that Lile was not compelled to incriminate himself by those with authority over him because he possessed the free choice not to discuss his past crimes if he so desired.

{¶33} Similarly, in *Minnesota v. Murphy* (1984), 465 U.S. 420, 104 S.Ct. 1136, the Supreme Court was asked to decide whether a probationer's free choice was denied when he was required to be truthful to his probation officer. Murphy, who had been under suspicion of a rape and murder, admitted to committing the crimes during a treatment program and meeting with his probation officer. In holding that Murphy was not denied his free choice in admitting to the previous crimes, the Court stated, "we note first that the general obligation to appear and answer questions truthfully did not in itself convert Murphy's otherwise voluntary statements into compelled ones. In that respect, Murphy was in no better position than the ordinary witness at a trial or before a grand jury who is subpoenaed, sworn to tell the truth, and obligated to answer on the pain of contempt, unless he invokes the privilege and shows that he faces a realistic threat of self-incrimination." Id. at 427.

{¶34} Instead of holding that Murphy's statement was involuntarily made, the Court determined that "the factors that the probation officer could compel [Murphy's] attendance and truthful answers and consciously sought incriminating evidence, that [Murphy] did not expect questions about prior criminal conduct and could not seek counsel before attending the meeting, and there were no observers to guard against abuse or trickery, neither alone nor in combination, are sufficient to excuse [Murphy's] failure to claim the privilege in a timely

manner." Id. at paragraph four of the syllabus.

{¶35} The court in *Murphy* went on to say, "thus it is that a witness confronted with questions that the government should reasonably expect to elicit incriminating evidence ordinarily must assert the privilege rather than answer if he desires not to incriminate himself. If he asserts the privilege, he may not be required to answer a question if there is some rational basis for believing that it will incriminate him, at least without *at that time* being assured that neither it nor its fruits may be used against him in a subsequent criminal proceeding." Id. at. 429. (Emphasis in original.)

{¶36} These same principles apply when determining when *Garrity* rights vest. Among Federal courts, the issue becomes a matter of determining whether the threat of termination was implied to the degree that the implication rises to coercion, thereby denying the individual's free choice. According to the First Circuit, "coercion is lacking so long as the employee was never threatened or forewarned of any sanction for refusing to testify, even though the employee suffers adverse action after-the-fact as a result of refusing to cooperate." *Dwan v. City of Boston* (C.A.1, 2003), 329 F.3d 275, 279. See also *United States v. Johnson* (C.A.2, 1997), 131 F.3d 132, 1997 WL 792443, 2, (holding that an individual is not subject to *Garrity* where "he was never explicitly threatened with termination of his employment").

{¶37} Conversely, The D.C. Circuit has held that a defendant claiming *Garrity* protections, "must have in fact believed [his] statements to be compelled on threat of loss of job and this belief must have been objectively reasonable." *United States v. Friedrick* (D.C.Cir.1988), 842 F.2d 382, 395. See also *United States v. Trevino* (C.A.5, 2007), 215 Fed.Appx. 319, 321-322; and *United States v. Vangates* (C.A.11, 2002), 287 F.3d 1315, 1322. The Sixth Circuit held that there is sufficient coercion to implicate the Fifth Amendment when the defendant reasonably believes that he will be subject to "substantial

penalties" such as "job loss or disciplinary sanctions ***" if he refused to answer the questions. *McKinley v. Mansfield* (C.A.6, 2005), 404 F.3d 418, 436.

{¶38} The difference in approaches has little impact on the case at bar because no matter which analysis is applied, Yacchari was not coerced into giving his statement to Lt. McKinney. Under the First Circuit's approach, there was no coercion because Lt. McKinney never communicated, threatened, or forewarned Yacchari of any job-related sanction for refusing to answer his questions. In fact, Lt. McKinney expressly warned Yacchari that he had the right to remain silent and did not insinuate in any way that Yacchari would face repercussions if he chose to invoke his right to remain silent.

{¶39} Under the D.C. and Sixth Circuit analysis, the circumstances surrounding the actual interview itself demonstrate that Yacchari could not reasonably believe that he would have been subject to loss of job, or even substantial penalties, if he invoked his Fifth Amendment right to remain silent. Analyzing the surrounding circumstances in which Yacchari was questioned, it is clear that he was not coerced or otherwise forced to waive his constitutional rights and incriminate himself or forfeit his job/incur substantial penalties. See *Murphy* at 438, (finding Murphy's belief that he would have his probation revoked if he invoked his Fifth Amendment right unreasonable because a state cannot "constitutionally carry out a threat to revoke probation for the legitimate exercise of the Fifth Amendment privilege").[1]

{¶40} The facts do not establish that Yacchari made his incriminating statements

1. The Court compared the facts in *Murphy* to *Garrity*, and found that "there is no direct evidence that Murphy confessed because he feared that his probation would be revoked if he remained silent. Unlike the police officers in *Garrity v. New Jersey,* *** Murphy was not expressly informed during the crucial meeting with his probation officer that an assertion of the privilege would result in the imposition of a penalty. And the fact that Murphy apparently felt no compunction about adamantly denying the false imprisonment charge on which he had been convicted before admitting to the rape and murder strongly suggests that the 'threat' of revocation did not overwhelm his resistance." 465 U.S. at 437-438.

because he feared that he faced job-related sanctions if he remained silent. Instead, Lt. McKinney's investigation was specific to criminal activity, and was in no way, shape, or form, an internal investigation that could have resulted in job loss or substantial job-related penalties. Lt. McKinney introduced himself as being from the Ohio State Highway Patrol, and stated that he was there to discuss suspicions of criminal activity. Lt. McKinney testified at the motion to suppress hearing that he was never contacted by ODOT, and instead interviewed Yacchari solely to investigate the statement made by Yacchari's ex-wife that he stole the trailer. When asked if Ohio State Highway Patrol policies as an investigator would forbid him from giving or receiving information from an internal investigation if there was one, Lt. McKinney answered that he would be forbidden from doing so, and that his only purpose of interviewing Yacchari that day was to "look into any possible criminal misconduct." All of this helps explain why Lt. McKinney gave Yacchari his *Miranda* rights even though Yacchari was not in custody. According to Lt. McKinney's testimony, "I read him exactly what I read everybody in a criminal proceeding that is a suspect."

{¶41} Moreover, Yacchari's supervisors were not present during his interview with Lt. McKinney, and no one from ODOT directed Yacchari to speak with Lt. McKinney or spoke to Yacchari about possible job-related penalties for not cooperating. Yacchari answered Lt. McKinney's questions after Lt. McKinney stated specifically, "alright Dave as I said before the reason I'm here is I'm looking into this mobile home trailer and I'm gonna be upfront with you I have found it." When faced with Lt. McKinney's evidence and the fact that he located the trailer, Yacchari then offered an explanation regarding what happened with the trailer, and in doing so voluntarily and of his free choice, incriminated himself.

{¶42} Instead of referencing any type of immunity or discussing the possibility of job-related sanctions, Lt. McKinney specifically informed Yacchari that anything Yacchari said could be used against him in a criminal proceeding, and that Yacchari had the right to remain

silent. Unlike *Garrity*, and as mentioned in *Murphy*, Yacchari was not *assured* at the time of his interview that if he did not cooperate he would face job-related discipline. To the contrary, Yacchari agreed to waive his Fifth Amendment rights, with no hint of even a veiled suggestion of the possibility of job-related penalties at any time during the interview.

{¶43} Yacchari asserts that he was coerced into answering the questions because the ODOT policies require him to cooperate with investigations and that he knew that if he did not, he would be subject to dismissal. However, compulsion and cooperation are distinguished from coercion. The circumstances surrounding the interview and the ODOT policy itself do not demonstrate that Yacchari was deprived of his free choice.

{¶44} The ODOT "Work Rules and Discipline" Directive states that "disciplinary actions should be imposed at the lowest level possible with the intent of giving the employee the opportunity to correct his/her behavior so long as the discipline is commensurate with the infraction. If this does not occur, discipline should become more severe up to and including removal; certain offenses warrant severe disciplinary action on the first offense." The Directive goes on to state that supervisors have the responsibility of enforcing work rules and initiating the appropriate disciplinary action, but that no disciplinary action "shall be imposed upon any employee without first consulting with the appropriate Labor Relations Officer."

{¶45} The Directive also includes a list of violations and the accompanying discipline progression. For example, for a violation of failing to meet work standards, the first discipline is reprimand or suspension, the second is suspension or removal and the final level of discipline is removal. Under the "interfering with and or/failing to cooperate in an official investigation or inquiry," the first offense is punished with reprimand/suspension, the second is suspension or removal, and the third is removal.

{¶46} While Yacchari asserts that he was coerced into answering because the ODOT disciplinary policy warned of possible dismissal for failure to cooperate, the Directive did not

threaten loss of job (or even substantial penalties) should the employee interfere with or fail to cooperate in an official investigation on a single occasion. Instead, the Directive lists a first offense as punishable by reprimand or possible suspension, and removal is not even an option until multiple violations occur, and after involvement from the Labor Relations Officer, who we note was not involved in the interview. Therefore, Yacchari's reliance on the ODOT Directive to prove his objective belief that he would be fired if he did not cooperate is little more than speculation as to possibilities. Because there was no expressed threat of employment consequences here, as there was in *Garrity* and *Jackson*, Yacchari's attempts to rely on the ODOT Directive is misplaced, as the Directive's application is based on contingencies with no definitive consequences.

{¶47} Even if the Directive had listed removal or some other substantial penalty for not cooperating for a first offense, there is nothing in the record to indicate that the Directive played any part in the interview process. Yacchari testified that he had "seen" the Directive, was instructed to review it when he first started his employ with ODOT, and that a copy of the Directive was posted on the wall in the ODOT garage. However, Lt. McKinney never once referenced the Directive, or reminded Yacchari of the ODOT policy on failing to cooperate. An employee's mere knowledge that work policies favor cooperation in an official investigation comes nowhere close to the same standards and circumstances inherent in *Garrity* cases, where the employee is coerced into answering questions and incriminating himself to prevent job loss. As the United States Supreme Court has noted in *Lile* and *Murphy*, being called to cooperate or being under a duty to 'appear and answer questions truthfully' does not deprive an individual of their free choice to admit, deny, or refuse to answer.

{¶48} Lt. McKinney's criminal investigation was just that, a criminal investigation wherein a state trooper interviewed a suspect in a theft case. The mere fact that the

interview took place at Yacchari's place of work is meaningless, as no constitutional right forbids officers from interviewing suspects at their place of employment. ODOT was not involved in the criminal proceedings and Yacchari received no assurance or promise that his statement, or the fruits of the statement, would not be used in a later criminal proceeding. In fact, he was given the opposite warning, that anything he said *would* be used against him. The implied promise of immunity recognized in *Garrity*, and referenced by the court in *Jackson*, that neither the statement nor the fruits of the statement would be used in a later criminal proceeding, is rightly absent from the facts of this case. For a host of reasons, Lt. McKinney was not in a position to give anyone, including Yacchari, *Garrity* assurances.

{¶49} The trial court erred by suppressing Yacchari's statements because Yacchari was never coerced into answering Lt. McKinney's questions and deprived of his free choice to admit, deny, or refuse to answer. Instead, because of Lt. McKinney's thoroughness, it is well documented that Yacchari voluntarily waived his Fifth Amendment rights against self-incrimination, and the statements he made can be used against him in subsequent criminal proceedings. The state's assignment of error is therefore sustained, and the decision of the trial court is reversed.

{¶50} Judgment reversed and the case is remanded for further proceedings consistent with this opinion.

POWELL, P.J., and HENDRICKSON, J., concur.