[Cite as *State v. Jackson*, 2008-Ohio-2944.]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	Hon. William B. Hoffman, P.J.
Plaintiff-Appellant	:	Hon. W. Scott Gwin, J.
	:	Hon. Sheila G. Farmer, J.
-vs-	:	
	:	
ANTHONY JACKSON	:	Case No. 2007CA00274
	:	
Defendant-Appellee	:	O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Court of Common Pleas, Case No. 2006CR1022
JUDGMENT:	Affirmed/Reversed in Part & Remanded
DATE OF JUDGMENT ENTRY:	June 16, 2008

APPEARANCES:

For Plaintiff-Appellant

JOHN D. FERRERO
PROSECUTING ATTORNEY
Stark County, OH

By: KATHLEEN O. TATARSKY
Assistant Prosecuting Attorney
110 Central Plaza South
Suite 510
Canton, OH 44702-1413

JOSEPH MARTUCCIO
LAW DIRECTOR
City of Canton, OH

By: KEVIN L'HOMMEDIEU
Canton City Prosecutor
218 Cleveland Avenue, SW
Canton, OH 44701

For Defendant-Appellee

BRADLEY IAMS
400 Huntington Plaza
220 Market Avenue, South
Canton, OH 44702

Farmer, J.

{¶1} On August 21, 2006, the Stark County Grand Jury indicted appellee, Anthony Jackson, on one count of illegal possession of a firearm in liquor permit premises in violation of R.C. 2923.121, a felony of the fifth degree. At the time of the incident, appellee was a Canton City police officer on administrative leave due to pending criminal charges.

{¶2} Sometime during the discovery process, appellee learned his internal affairs file and his *Garrity* statement, a statement elicited from a public employee that cannot be used in a subsequent criminal proceeding, were in the possession of appellant, the state of Ohio. On July 6, 2007, appellee filed a motion to dismiss the indictment, claiming appellant "improperly utilized the fruits of the Canton Police Department's Internal Affairs investigation." A hearing was held on August 8, 2007. By judgment entry filed September 19, 2007, the trial court granted appellee's motion, finding the "derivative use" or the "non-evidentiary use" of the information contained in the internal affairs file "poses a problem in this matter."

{¶3} Appellant filed an appeal and this matter is now before this court for consideration. Assignments of error are as follows:

I

{¶4} "THE TRIAL COURT ERRED AS A MATTER OF LAW IN DISMISSING THE INDICTMENT FOR A GARRITY VIOLATION. MERE EXPOSURE TO AN INTERNAL AFFAIRS FILE BY THE PROSECUTOR WAS NOT A GARRITY VIOLATION."

II

{¶5} "THE TRIAL COURT ERRED AS A MATTER OF LAW IN DISMISSING THE INDICTMENT AND NOT CONSIDERING EVIDENTIARY METHODS TO HANDLE THE ALLEGED *GARRITY* VIOLATIONS."

I, II

{¶6} Appellant claims the trial court erred in dismissing the indictment for a *Garrity* violation, and in not considering evidentiary methods to handle the alleged violation. We agree in part.

GARRITY VIOLATION

{¶7} In *Garrity v. New Jersey* (1967), 385 U.S. 493, the United States Supreme Court reviewed a case wherein police officers being investigated were given the choice to either incriminate themselves or forfeit their jobs under a New Jersey statute dealing with forfeiture of employment, tenure, and pension rights of persons refusing to testify based on self-incrimination grounds. The officers chose to make confessions, and some of their statements were used to convict them in subsequent criminal proceedings. The officers argued their confessions were coerced because if they failed to cooperate, they could lose their jobs. In answering the question as to "whether a State, contrary to the requirement of the Fourteenth Amendment, can use the threat of discharge to secure incriminatory evidence against an employee," the *Garrity* court held the following at 500:

{¶8} "We now hold the protection of the individual under the Fourteenth Amendment against coerced statements prohibits use in subsequent criminal

proceedings of statements obtained under threat of removal from office, and that it extends to all, whether they are policemen or other members of our body politic."

{¶9} Five years later, the United States Supreme Court in *Kastigar v. United States* (1972), 406 U.S. 441, 442, reviewed the following question:

{¶10} "[W]hether the United States Government may compel testimony from an unwilling witness, who invokes the Fifth Amendment privilege against compulsory self-incrimination, by conferring on the witness immunity from use of the compelled testimony in subsequent criminal proceedings, as well as immunity from use of evidence derived from the testimony."

{¶11} The *Kastigar* court at 460 held the following:

{¶12} " 'Once a defendant demonstrates that he has testified, under a state grant of immunity, to matters related to the federal prosecution, the federal authorities have the burden of showing that their evidence is not tainted by establishing that they had an independent, legitimate source for the disputed evidence.' [*Murphy v. Waterfront Commission of New York Harbor* (1964)] 378 U.S. [52], at 79 n. 18, 84 S.Ct., at 1609.

{¶13} "This burden of proof, which we reaffirm as appropriate, is not limited to a negation of taint; rather, it imposes on the prosecution the affirmative duty to prove that the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony."

{¶14} In *State v. Conrad* (1990), 50 Ohio St.3d 1, 4, the Supreme Court of Ohio followed the *Kastigar* holding and stated the following:

{¶15} "In *Kastigar,* the United States Supreme Court dealt with an immunity statute similar to R.C. 101.44, *viz.,* Section 6002, Title 18, U.S.Code, and reviewed its constitutionality with respect to the Fifth Amendment protection against self-incrimination. Therein, the court essentially held, *inter alia,* that the purpose of a statute granting use immunity or derivative use immunity is to leave the witness and the prosecuting authorities in substantially the same position as if the witness had claimed the Fifth Amendment privilege. *Id.* at 457. In line with such purpose, the *Kastigar* court established a two-prong test that the prosecution must satisfy where a witness makes the claim that his or her immunized testimony was used: (1) the government must deny *any* use of the accused's own immunized testimony against him or her in a criminal case; and (2) the government must affirmatively prove that all of the evidence to be used at trial is derived from sources wholly independent of immunized testimony. *Id.* at 460-462."

{¶16} The *Conrad* court concluded the following at syllabus:

{¶17} "Where, in obtaining an indictment from the grand jury, the prosecution uses compelled testimony of a witness immunized pursuant to R.C. 101.44, and where the right of immunity accorded such compelled testimony has not been waived by the witness under the guidelines set forth in R.C. 101.44, any indictment issued against the witness as a result of such grand jury proceedings must be dismissed. (*Kastigar v. United States* [1972], 406 U.S. 441, and *New Jersey v. Portash* [1979], 440 U.S. 450, followed.)"

{¶18} In its judgment entry filed September 19, 2007, the trial court acknowledged, "[i]t is this 'non evidentiary ' use that is hard to define and which is most important in our case." The trial court then noted the following at 7:

{¶19} "There are two Federal decisions which reflect the differing opinions on the level of scrutiny non-evidentiary use of immunized testimony should receive. In *U.S. v. McDaniels,* 482 F2d 305 (C.A. 8 1973), the Court in citing *Kastigar* placed a 'heavy burden' on the government and enforced a strict interpretation upon the government. In *U.S. v. Semkius,* 712 F2d 891 (C.A. 3 1983), the Court refused to follow the strict interpretation of *McDaniels* and held that *Kastigar* only prohibits evidentiary use of immunized testimony."

{¶20} The trial court considered the *Garrity, Kastigar, Conrad, McDaniels,* and *Semkius* holdings, as well as numerous other cases and a law review article, and concluded the following:

{¶21} "I believe *United States v. McDaniels* is the appropriate measure under which to judge the issue before me. Because of the power and resources of the State, the conduct as it relates to the non-evidentiary use of immunized testimony is subject to extensive scrutiny. Under that test, set forth in State v. Conrad, I find that the State did use the accused' (sic) own testimony against him, and they failed to affirmatively prove that all the evidence to be used at trial is derived from sources wholly independent of the immunized testimony."

{¶22} Appellant argues any evidence it had was derived from other sources independent of appellee's *Garrity* statement. We disagree with this argument.

{¶23} As noted by the trial court throughout its judgment entry, the following facts are not in dispute:

{¶24} 1) Appellant was aware of the internal affairs investigation and appellee's *Garrity* statement at the time of the grand jury proceeding. During the proceeding, Canton City Lieutenant David Davis acknowledged the existence of the statement, but refused to divulge the statement's contents.

{¶25} 2) A witness, Vince Van, was disclosed by appellee during the *Garrity* interview.

{¶26} 3) The investigating officers from the Perry Township Police Department did not have any information about Mr. Van from their investigations. August 8, 2007 T. at 7-10.

{¶27} 4) The assistant prosecutor assigned to the case, Joseph Vance, received the entire internal affairs file including the *Garrity* statement after the September 15, 2006 felony arraignment hearing or sometime between July 24, 2006 and September 20, 2006. August 8, 2007 T. at 21-23.

{¶28} 5) Pursuant to appellee's *Garrity* interview wherein he named Mr. Van as a witness, Lieutenant Davis interviewed Mr. Van on July 24, 2006, and taped the conversation.

{¶29} 6) Appellant stipulated to the fact that Mr. Van was unknown to the state prior to the *Garrity* interview. August 8, 2007 T. at 31.

{¶30} We concur with the trial court's determination that the first prong of *Kastigar* has not been met: "the government must deny *any* use of the accused's own immunized testimony against him or her in a criminal case." *Conrad,* supra. The state

cannot deny the use of appellee's immunized statement in the criminal case. As the trial court concluded, appellant failed to establish that its knowledge of Mr. Van could be derived from any other source wholly independent of appellee's *Garrity* statement. There was no evidence of any wholly independent source that could have identified Mr. Van. In fact, after the *Garrity* interview on July 21, 2006 at 9:00 a.m., Lieutenant Davis took a statement from one Tina Ogle at 13:12 p.m. and attempted to identify Mr. Van (information contained in sealed documents).

{¶31} Upon review, we concur with the trial court's analysis of a *Garrity* violation.

OTHER EVIDENTIARY METHODS TO HANDLE THE *GARRITY* VIOLATION

{¶32} Appellant claims the trial court erred in determining the appropriate remedy was to dismiss the indictment.

{¶33} In *Conrad,* supra, the privileged statement was presented to the grand jury. In the case sub judice, the grand jury testimony establishes appellee's *Garrity* statement was not used to obtain the indictment.

{¶34} The problematic area in this case is that appellant undoubtedly has the benefit and therefore the use of appellee's *Garrity* statement post-indictment. As the trial court noted to the prosecutor, "you can't unring the bell, you can't take it out of your mind, although many people have argued you should have had a lobotomy a long time ago, but you haven't had it so you can't take it out of your mind." August 8, 2007 T. at 34. In other words, appellant cannot erase the knowledge of appellee's defense and the existence of Mr. Van.

{¶35} The trial court struggled with the appropriate remedy and determined dismissal of the indictment was the only alternative. We understand the trial court's

angst, but conclude the dismissal of the indictment was not the appropriate remedy. We so find because the information garnered from appellee's *Garrity* statement was not used to procure the indictment as in *Conrad*.

{¶36} In addition, we note that generally when a statement is suppressed, the appropriate remedy is to exclude the statement and any information derived therefrom, which would include Mr. Van as a witness. However, this also is not the appropriate remedy in the case sub judice. First, appellee's *Garrity* statement was never available to appellant for use at trial and secondly, Mr. Van is a possible witness for the defense. Any exclusion of Mr. Van at trial could potentially impact appellee's defense and trial strategy.

{¶37} We find the appropriate remedy is to purge appellant's file of appellee's *Garrity* statement, the entire internal affairs file, and any references to Mr. Van. In addition, we order the exclusion of Lieutenant Davis as a witness. Further, we order the trial court to appoint a visiting prosecutor from outside of Stark County to try the matter. We order an out-of-county prosecutor because the prosecutor for the Massillon Municipal Court conducted the preliminary hearing. We do not know, nor will we speculate, as to that office's exposure to the internal affairs file.

{¶38} The assignments of error are denied as to a *Garrity* violation, but granted as to the dismissal of the indictment as the appropriate remedy. The case is re-instated pursuant to the guidelines of this opinion.

{¶39} The judgment of the Court of Common Pleas of Stark County, Ohio is hereby affirmed in part, reversed in part and remanded.

By Farmer, J.

Gwin, J. concur and

Hoffman, P.J. concurs in part and dissents in part.

.

_____

_____

_____

JUDGES

SGF/sg 0512

Hoffman, P.J., concurring in part and dissenting in part

{¶40} I concur in the conclusion reached by both the majority and the trial court the state has not satisfied the first prong of the *Kastigar* test. However, unlike the majority, I find the state used Appellee's *Garrity* Statement not only to develop derivative evidence; but also, and more significantly, made use of his *Garrity* Statement (albeit indirectly and in limited fashion) to secure his indictment.

{¶41} Had the State's use of Appellee's *Garrity* Statement been limited to developing derivative evidence and not used in any manner to secure his indictment, I would concur with the majority dismissal before trial is not the appropriate remedy. My review of the case law, and more specifically the syllabus in *Conrad*, suggests pretrial dismissal is warranted only when the *Garrity* statement is used to secure an indictment or it is otherwise impossible to remove the taint on any evidence derived from it.

{¶42} I believe the majority's attempt to purge the *Garrity* violation in this case comes too late. Upon my review of the grand jury proceedings of August 10, 2006, I conclude the State did make some use of Appellee's *Garrity* Statement in securing his indictment. Under *Kastigar*, **any** use is prohibited. The use need not be actual revelation of the statement itself, it includes indirect use as well. I conclude such indirect use occurred in the case sub judice, as did the trial court. The trial court specifically found Lt. Davis' testimony at the grand jury was influential in the decision of the Grand Jury to indict, citing Tr. 31, L 6-10, Tr. 32 and 33. Having reviewed Lt. Davis's entire grand jury testimony, I concur with the trial court's assessment. Having so found, as clearly pronounced by the Ohio Supreme Court in *Conrad,* "This fact alone

ends the inquiry of whether use of the defendant's immunized testimony constituted error." *Conrad*, at 4.

{¶43} Accordingly, I would affirm the trial court's decision to dismiss the indictment.

_____

HON. WILLIAM B. HOFFMAN

IN THE COURT OF APPEALS FOR STARK COUNTY, OHIO

FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
Plaintiff-Appellant	:	
-vs-	:	JUDGMENT ENTRY
ANTHONY JACKSON	:	
Defendant-Appellee	:	CASE NO. 2007CA00274

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Stark County, Ohio is hereby affirmed in part and reversed in part, and the matter is remanded to said court for further proceedings consistent with this opinion. Costs to appellant.

_____

_____

_____

JUDGES