

ORIGINAL

Case No. 2008-1499

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In the Supreme Court of Ohio

APPEAL FROM THE COURT OF APPEALS  
FIFTH APPELLATE DISTRICT  
STARK COUNTY, OHIO  
CASE No. 2007CA0027

STATE OF OHIO,  
*Plaintiff-Appellant/Cross-Appellee,*

v.

ANTHONY D. JACKSON  
*Defendant-Appellee/Cross-Appellant,*

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**Reply Brief of Appellee/Cross Appellant Anthony D. Jackson**

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APPELLEE'S RESPONSE TO APPELLANT'S REPLY BRIEF

In its reply brief Appellant mischaracterizes Appellee's arguments and then proceeds to attack those "straw men." As a result, Appellee will respond only to the extent of clarifying his arguments.

1.) Contrary to Appellant's claim that Appellee's solution to the "*Garrity* issue" is to have the state wait until the criminal case is concluded, or drop any criminal case; that has never been Appellee's "position." Appellee's position is simply that if a police department chooses to take advantage of *Garrity*<sup>1</sup>, it must also accept the responsibility of complying with the immunity provision which that action creates. In other words, if you promise not to use the statement in a criminal investigation or prosecution, you can't use it.

In the case at bar no one forced the internal affairs unit to invoke *Garrity*, and thereby compel Appellee to provide a pre-indictment statement. They chose that path, even though the City of Canton had contractually obligated itself to wait until the criminal case was concluded before taking disciplinary action.<sup>2</sup>

In any event, Appellee has never suggested that he should be immune from prosecution, or that the police department had to choose between competing investigations. Clearly both investigations could have proceeded contemporaneously. The only caveat was that the *Garrity* statement had to be kept from the criminal investigators. The Canton Police chose to provide the

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<sup>1</sup>*Garrity v. New Jersey*, (1967), 385 U.S. 493, 87 S.Ct. 616, 17 L. Ed 2d 562

<sup>2</sup>Pursuant to Article 22.3 of the Collective Bargaining Agreement in effect between the Canton Police Patrolmen's Association and the City of Canton, if discipline is based upon an alleged criminal offense, the Safety Director must suspend any decision until the final outcome of the criminal proceedings. (See internal affairs file exhibit from Kastigar Hearing)

statement, and the prosecutor chose to use it, despite the fact that they had other viable options.

2.) In its second argument, Appellant somehow attempts to turn *State v. Conrad*<sup>3</sup> on its head by suggesting that, as the victim of a *Garrity* violation, Appellee has the burden of proving that his ability to present affirmative defenses was “seriously undermined”, and/or that possession of the *Garrity* statement gave the prosecutor a “clear advantage” in the case.

It is unclear where Appellant finds authority for that shifting of the burden, because no authority is cited. It certainly didn’t come from *State v. Conrad*, or *Kastigar v. United States*,<sup>4</sup> because the clear line of authority derived from those cases make it clear that when an immunity agreement is violated, it is the government that bears the heavy burden of proving that it did not make any use of the immunized statement.

In the case at bar, both the trial court, and the Court of Appeals correctly found that the state had the burden of proof, and that the state failed to carry that burden. Therefore to suggest that this Court should reverse those findings based upon Appellant’s bald assertions that it really didn’t learn anything from having the statement, would be contrary to well established precedent and not supported by the record in this case.

3.) Finally, while Appellee will agree that there are clearly procedural differences between the case at bar, and *United States v. Hubbell*<sup>5</sup>, he stands by his argument that *Hubbell* clearly demonstrates that the United States Supreme Court was not backing away from the

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<sup>3</sup>*State v. Conrad*, (1990), 50 Ohio St. 3d 1, 552 N.E.2d 214

<sup>4</sup>*Kastigar v. United States*, (1972), 406 U.S. 441, 92 S.Ct.1653, 32 L. Ed. 2d 212

<sup>5</sup>*United States v. Hubbell*, (2000) 530 U.S. 27, 120 S.Ct. 2037, 147 L. Ed. 2d 24

*Kastigar* pronouncements that defined "use" as a much broader concept than actual testimonial use.

**CONCLUSION**

Wherefore Appellee respectfully requests that this Court affirm the decision of the Fifth District Court of Appeals finding that a *Garrity* violation occurred and reverse that Court's remand for trial by upholding the trial court's dismissal of the criminal charges against him.

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

A copy of the foregoing Reply Brief of Appellee/Cross Appellant was served upon counsel for Appellant/Cross-Appellee, John D. Ferrero and Kathleen O. Tatarsky by regular U.S. mail addressed to 110 Central Plaza South, Suite 510, Canton, Ohio 44702-1413 this 16 day of July, 2009.



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