SUPREME COURT OF NEW YORK
APPELLATE DIVISION, THIRD DEPARTMENT

People v. Smith[1]
(decided May 4, 2006)

Patricia Smith, a police officer, was charged with tampering with physical evidence, falsifying business records, and offering a false instrument of filing.[2] She filed a motion to suppress certain statements that she made to her supervisor, arguing that the statements were protected by her right against self-incrimination.[3] This right is afforded by both the United States Constitution[4] and the New York State Constitution.[5] Finding that Smith's statements "were made in response to inquiries from her supervisor that she was required to answer or face disciplinary action, including termination," her motion was granted because the statements were involuntary under *Garrity v. New Jersey*[6] and its progeny.[7]

The State appealed this determination pursuant to New York Criminal Procedure Law section 450.20(8),[8] arguing that Smith had

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[1] 814 N.Y.S.2d 360 (App. Div. 3d Dep't 2006).

[2] *Id.* at 361.

[3] *Id.*

[4] U.S. CONST. amend. V states in pertinent part: "No person shall . . . be compelled in any criminal case to be a witness against himself . . . ."

[5] N.Y. CONST. art. I, § 6 states in pertinent part: "No person shall . . . be compelled in any criminal case to be a witness against himself or herself . . . ."

[6] 385 U.S. 493 (1967).

[7] *See Smith*, 814 N.Y.S.2d at 361.

[8] N.Y. CRIM. PROC. LAW § 450.20(8) (McKinney 2006) states:

> An appeal to an intermediate appellate court may be taken as of right by the people from the following sentence and orders of a criminal court: An order suppressing evidence, entered before trial pursuant to section 710.20; provided that the people file a statement in the appellate court

voluntarily supplied her supervisor, Sergeant Herbert Barnhart, with an incident report which is normally filed after answering a complaint.[9] The Appellate Division, Third Department agreed, finding that there was no explicit demand that Smith make the self-incriminating statements or face termination.[10]

On September 1, 2003, Officer Smith was dispatched to a local residence after several juveniles had reported that they were approached by someone attempting to sell them marihuana.[11] While at the residence, Smith noticed that a small quantity of a leafy green substance had been left behind by the drug dealer.[12] It was alleged that she gathered the substance, but later disposed of it because of its small quantity.[13]

The following day, Sergeant Herbert Barnhart, Smith's supervisor, noticed that she never filed an incident report for the complaint.[14] Barnhart had previously discovered that Smith may have taken possession of some evidence at the scene, but he was unaware of what was done with it.[15] Internal affairs was notified about the incident prior to Smith's return.[16] When Smith came back to work after a short vacation, she was approached by Sergeant Barnhart, who asked whether there was any evidence collected at the

pursuant to section 450.50.

[9] *Smith*, 814 N.Y.S.2d at 361.
[10] *Id.* at 362.
[11] *Id.* at 361.
[12] *Id.*
[13] *Id.*
[14] *Smith*, 814 N.Y.S.2d at 361.
[15] *Id.*
[16] *Id.*

scene of the incident.[17]

Smith initially notified Barnhart that there was no evidence.[18] She further specified that a minimal quantity of what appeared to be marihuana and some ashes had been observed at the scene, but was not secured.[19] Although Barnhart was aware that Smith's actions may have constituted a violation of department procedures, he did not believe that a crime had been committed at the time.[20] Because he was interested in determining whether the alleged drug dealer could be charged with a crime, Barnhart directed Smith to file the incident report that she previously failed to file.[21] After further failing to include in the incident report what she had done with the evidence found at the scene, Smith revised the report and handed it back over to Barnhart.[22]

Barnhart testified at trial that he did not threaten to fire Smith if she did not answer his questions or file the missing report.[23] However, being that Barnhart was Smith's supervisor, she would have to cooperate in order to abide by the department's policies.[24] Following a hearing, the county court determined that Smith's statements were involuntary because she was given the choice between either answering the questions or losing her job.[25] The State

[17] *Id.*
[18] *Id.*
[19] *Smith*, 814 N.Y.S.2d at 361.
[20] *Id.*
[21] *Id.*
[22] *Id.*
[23] *Id.*
[24] *Smith*, 814 N.Y.S.2d at 361.
[25] *Id.* ("[D]efendant's statements were made in response to inquiries from her supervisor that she was required to answer or face disciplinary action, including termination, and,

appealed to the Appellate Division, Third Department, which reversed the judgment entered below after carefully reviewing both federal and state case law.[26]

The *Smith* court decided that the central issue in the case was "whether [Smith's] statements were compelled . . . ."[27] Courts across the country are split on which exact test is appropriate to use in this particular situation.[28] The two predominant tests addressed by the *Smith* court include the *United States v. Indorato*[29] test and the *United States v. Friedrick*[30] test.[31] The *Indorato* test requires that the defendant be "explicitly" made aware of possible discharge if he does not cooperate.[32] Under this test, the defendant is not protected simply because he subjectively fears disciplinary actions if he refuses to answer to his superiors.[33] This test has been used previously in New York.[34]

In order to be protected based on purely subjective fears, the defendant must be in a jurisdiction where the *Friedrick* test is applied. The *Smith* court noted that when applying this test, "the defendant must [have] subjectively believe[d]" that his job was in jeopardy and this belief must have been objectively reasonable given

therefore, the statements were not voluntary under [*Garrity*] and its progeny." (citing *Garrity*, 385 U.S. 493)).

[26] *Id.* at 363.

[27] *Id.* at 362.

[28] *Id.*

[29] 628 F.2d 711, 716 (1st Cir. 1980).

[30] 842 F.2d 382, 395 (D.C. Cir. 1988).

[31] *Smith*, 814 N.Y.S.2d at 362.

[32] *Id.* (citing *Indorato*, 628 F.2d at 716-17).

[33] *Indorato*, 628 F.2d at 716.

[34] *See* People v. Marchetta, 676 N.Y.S.2d 791 (Crim. Ct. 1998).

the circumstances.[35] Both prongs of this test must be satisfied in order to conclude that the statements were compelled and thus inadmissible.[36]

Although the appellate division did not determine which test is applicable in New York, it did come to the conclusion that Smith's suppression motion failed regardless of which test was applied.[37] Under the first test, it was clear that Smith was not explicitly made aware that she would be discharged if she failed to answer Sergeant Barnhart's questions or provide the completed incident report.[38] In fact, Barnhart testified that he never threatened Smith in any manner.[39] Therefore, under the *Indorato* test, Smith's oral and written statements were not coerced, but were voluntary and admissible.

Furthermore, under the second "subjective" test, there was no evidence on the record that Smith had the subjective belief that if she did not cooperate and instead avowed her constitutional privilege, she would have been terminated from her position.[40] Even if Smith had satisfied this part of the test, the record did not show that her fear would have been objectively reasonable under the circumstances.[41] Barnhart testified that he did not threaten to terminate Smith because

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[35] *Smith*, 814 N.Y.S.2d at 362 (citing *Friedrick*, 842 F.2d at 395).
[36] *Friedrick*, 842 F.2d at 395.
[37] *Smith*, 814 N.Y.S.2d at 362.
[38] *Id.*
[39] *Id.*
[40] *Id.*
[41] *Id.*

he did not have the authority to do so.[42] Moreover, Smith did not produce evidence establishing that termination was the only sanction that could apply in a case like this.[43] Therefore, under both the state and federal constitutions, Smith's statements were made voluntarily and were not gathered in an unconstitutional manner.

The *Smith* court relied on the United States Supreme Court's decision in *Garrity*, which set forth the circumstances under which a State could not use the threat of discharge to secure incriminatory evidence against an employee.[44] In *Garrity*, several police officers from certain New Jersey boroughs were questioned pursuant to an investigation headed by the Attorney General concerning alleged fixing of traffic tickets.[45] The officers were warned that they had the privilege to refuse to answer to protect themselves against self-incrimination, that if they refused to answer they would be discharged, and that anything they did say could be used against them in a court of law.[46] Defendants, given the choice to either forfeit their jobs or incriminate themselves, answered all questions.[47] Several of their responses were used against them in a later trial.[48] Defendants were ultimately convicted of conspiracy to obstruct the administration of traffic laws.[49]

The Supreme Court granted the officers petition for

[42] *Smith*, 814 N.Y.S.2d at 362.
[43] *Id*. at 362-63.
[44] *Garrity*, 385 U.S. at 500.
[45] *Id.* at 494.
[46] *Id*.
[47] *Id*. at 495.
[48] *Id*.
[49] *Garrity*, 385 U.S. at 495.

certiorari.[50] The Court reversed, holding that "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."[51] This rule was extended to all people, whether they were police officers or other political figures.[52] The Court observed that the option given to the officers to surrender their self incrimination rights or "lose their means of livelihood . . . is the antithesis of free choice to speak out or to remain silent."[53] Applying this kind of pressure on someone is likely to hinder him from exercising his free choice.[54] The statements induced by the investigation could not be sustained as voluntary because they were coerced.[55]

The *Smith* court also made reference to New York State case law that has provided insight regarding the privilege against self-incrimination.[56] The New York Court of Appeals announced in *People v. Avant*[57] that "the State may compel any person enjoying a public trust to account for his activities and may terminate his services if he refuses to answer relevant questions, or furnishes information indicating that he is no longer entitled to public confidence."[58] In *Avant*, the defendants, two public contractors, were

[50] *Id.* at 496.
[51] *Id.* at 500.
[52] *Id.*
[53] *Id.* at 497.
[54] *Garrity*, 385 U.S. at 497 (quoting Miranda v. Arizona, 384 U.S. 436, 464-65 (1966)).
[55] *Id.* at 497-98.
[56] *Smith*, 814 N.Y.S.2d at 361-62.
[57] 307 N.E.2d 230 (N.Y. 1973).
[58] *Id.* at 233.

subpoenaed to appear and produce certain business records relating to their snow removal contract with the City of Albany.[59] The defendants appeared before the Albany County Grand Jury and executed a limited waiver, which was only to extend to their performance of the city contract.[60] However, they were both charged with grand larceny[61] and knowingly "offering a false instrument for filing[62] by the Grand Jury."[63]

Before the start of trial, the contractors moved to dismiss the charges, claiming that their constitutional rights were violated when they were compelled to give testimony that was self-incriminating.[64] The court determined that testimony given under threat of termination may not be used against a person to initiate a subsequent prosecution against that individual.[65] Although the court held that the Grand Jury considered unconstitutional evidence, defendants were not exempted from subsequent action if their constitutional rights were fully respected.[66] Reindictment was possible if adequate evidence other than that furnished by the prospective defendant was used to support it.[67]

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[59] *Id.* at 231.

[60] *Id.*

[61] N.Y. PENAL Law § 155.35 (McKinney 2006) states: "A person is guilty of grand larceny in the third degree when he steals property and when the value of the property exceeds three thousand dollars."

[62] N.Y. PENAL Law § 175.35 states in pertinent part: "A person is guilty of offering a false instrument for filing in the first degree when, knowing that a written instrument contains a false statement . . . with intent to defraud the state . . . he offers or presents it to a public office . . . ."

[63] *Avant*, 307 N.E.2d at 231.

[64] *Id.*

[65] *Id.* at 233 (citing *Garrity*, 385 U.S. at 500).

[66] *Id.* at 233-34.

[67] *Id.* at 234 (quoting People v. Laino, 176 N.E.2d 571, 578 (N.Y. 1961)).

Furthermore, the Court of Appeals in *People v. Corrigan*[68] determined that under both the federal and state constitutions, the privilege against self-incrimination exists if the statement is made under the threat of removal or termination.[69] The defendant, an off-duty police officer, was working security at a local restaurant when he arrested a patron who had refused to leave.[70] It was alleged that the defendant had grabbed the patron by the throat and hit him over the head with his flashlight.[71] After the allegations, the Police Department investigated the incident internally and threatened to dismiss the defendant if he did not cooperate.[72] Defendant then voluntarily waived immunity in order to testify before the Grand Jury.[73] Although the prosecutor was armed with previous statements made by the defendant, he never used them during the proceedings.[74] Defendant, however, "moved to dismiss the information on the ground that during the Grand Jury proceedings, the People had made use of defendant's involuntary statement in violation of his rights under the Federal and New York State Constitutions."[75]

The court announced that the automatic immunity from use in criminal proceedings that attached to the compelled statement

[68] 604 N.E.2d 723 (N.Y. 1992).
[69] *Id*. at 724.
[70] *Id*.
[71] *Id*.
[72] *Id*. ("The Police Department conducted an internal investigation of the incident which included taking an internal affairs statement from defendant – a compulsory interview under threat of dismissal.").
[73] *Corrigan*, 604 N.E.2d at 724.
[74] *Id*.
[75] *Id*.

prohibited the People from using the speech or any evidence that could be deduced from the statement.[76] Nevertheless, the court found that the People had not utilized the statement as a source of information for questioning the defendant during the Grand Jury hearing.[77] There was no evidence on the record that the People could have used such information to control the witness.[78] The prosecutor's mere possession of the immunized statement, without more, did not constitute a violation of the state and federal constitutions.[79] The court then reversed the dismissal of the charges because there was ample evidence to sustain the charges independent of the immunized statement.[80]

Both the state and federal constitutions afford similar protections and privileges.[81] For example, both protect a statement made under threat of dismissal based upon the privilege against self-incrimination. Further, any compelled statements are automatically immunized from use in criminal proceedings. The central determination under both constitutions is whether or not the statements were made as a result of a threat of termination. If such a threat were made, the statements would be inadmissible in any future criminal proceedings. The New York Constitution is slightly broader than the United States Constitution in one particular respect: it

[76] *Id.*

[77] *Id.* at 725.

[78] *Corrigan*, 604 N.E.2d at 726.

[79] *Id.* ("Defendant argues, nevertheless, and both courts below agreed, that the prosecutor's mere possession and viewing of defendant's immunized statement, without more, constituted a 'use' prohibited by the State and Federal Constitutions. Defendant cites no authority, nor have we found any, to support his contention.").

[80] *Id.* (citing *Avant*, 307 N.E.2d at 233-34).

[81] *See* U.S. CONST. amend V; N.Y. CONST. art I, § 6.

actually carves out an exception to the rule.[82] Article I, section 6 implicates that a public officer who fails to sign a waiver of immunity upon being called before a grand jury to testify concerning his or her performance and duties can be disqualified from holding that public office.[83]

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[82] N.Y. CONST. art. I, § 6.
[83] *Id.*