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Self Incrimination

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SELF INCRIMINATION

N.Y. CONST. art I, §6:

No person shall . . . be compelled in any criminal case to be a witness against himself

U.S. CONST. amend. V:

No person shall . . . be compelled in any criminal case to be a witness against himself

SUPREME COURT, APPELLATE DIVISION

THIRD DEPARTMENT

Curry v. Rogers¹
(decided December 22, 1994)

Petitioner, the District Attorney for the County of Hamilton, James T. Curry, filed a proceeding under New York Public Officers Law section 36² to remove the respondents, Supervisor of the Town of Arietta, and Supervisor of the Town of Wells, from their positions for failure to sign a waiver of immunity.³

1. 620 N.Y.S.2d 521 (App. Div. 3d Dep't 1994).

2. N.Y. PUB. OFF. LAW § 36 (McKinney 1988), provides in pertinent part:

Any town, village, improvement district or fire district officer . . . may be removed from office by the supreme court for any misconduct, maladministration, malfeasance or malversation in office. An application for such removal may be made by any citizen resident of such town, village, improvement district or fire district or by the district attorney of the county in which such town, village or district is located, and shall be made to the appellate court within the judicial department embracing such town, improvement district or fire district.

Id.

3. *Curry*, 620 N.Y.S.2d at 522.

Petitioner relied upon New York Constitution article I, section 6⁴ to remove respondents.⁵ The respondents argued that the provision violated the privilege against self-incrimination guaranteed under the Fifth Amendment⁶ of the United States Constitution.⁷ The court held that article I, section 6, of the New York Constitution was unenforceable against the defendants because it would deny them their rights afforded under the Fifth Amendment of the United States Constitution.⁸

Respondents were called before a grand jury to testify in a proceeding brought under New York Criminal Procedure Law section 190.55⁹ concerning possible misconduct in office by the respondents and others.¹⁰ The petitioner informed the respondents that they had to sign a waiver of immunity before

4. N.Y. CONST. art. I, § 6. Section 6 requiring the removal of a public official who refuses to testify before a grand jury, provides in pertinent part:

[A]ny public officer who, upon being called before a grand jury to testify concerning the conduct of his present office or of any public office held by him within five years prior to such grand jury call to testify, or the performance of his official duties in any such present or prior offices, refuses to sign a waiver of immunity against subsequent criminal prosecution, or to answer any relevant question concerning such matters before such grand jury, shall by virtue of such refusal, be disqualified from holding any other public office or public employment for a period of five years from the date of such refusal to sign a waiver of immunity against subsequent prosecution, or to answer any relevant question concerning such matters before such grand jury, and shall be removed from his present office by the appropriate authority or shall forfeit his present office at the suit of the attorney general.

Id.

5. *Curry*, 620 N.Y.S.2d at 522.

6. U.S. CONST. amend. V, provides in pertinent part “[n]o person shall be . . . compelled in any criminal case to be a witness against himself.”

7. *Curry*, 620 N.Y.S.2d at 522.

8. *Id.*

9. N.Y. CRIM. PROC. LAW § 190.55 (McKinney 1993). Section 190.55 provides in pertinent part, “[a] grand jury may hear and examine evidence concerning the alleged commission of any offense prosecutable in the courts of the county, and concerning any misconduct, nonfeasance or neglect in public office by a public servant, whether criminal or otherwise.” *Id.*

10. *Curry*, 620 N.Y.S. 2d at 522.

giving testimony to the grand jury.¹¹ Respondents refused to sign the waiver of immunity and consequently did not testify.¹² The petitioner then brought this action against respondents under the Public Officers Law section 36¹³ relying on article I, section 6 of the New York Constitution,¹⁴ to remove respondents from their office.¹⁵ Respondents claimed that enforcement of this section violated the right against self-incrimination as guaranteed by the Fifth Amendment¹⁶ of the United States Constitution.¹⁷

The issue before the court in *Curry* was whether article I, section 6 of the New York Constitution violated the Fifth Amendment privilege against self incrimination. In determining that article I, section 6 of the New York Constitution violated the Fifth Amendment of the United States Constitution, the court relied upon the United States Supreme Court case of *Gardner v. Broderick*.¹⁸ In *Gardner*, the appellant was a New York City police officer who was dismissed for refusing to sign a waiver of immunity under New York Constitution article I, section 6, and testify before a grand jury concerning corruption of police

11. *Id.*

12. *Id.*

13. See N.Y. PUB. OFF. LAW § 36.

14. See N.Y. CONST. art. I, § 6.

15. *Curry*, 620 N.Y.S.2d at 522.

16. See U.S. CONST. amend. V.

17. *Curry*, 620 N.Y.S.2d at 522.

18. 392 U.S. 273 (1968). The Supreme Court cited several cases that affirmed the holding in *Gardner* including, *Lefkowitz v. Cunningham*, 431 U.S. 801 (1977) (holding that a New York election law requiring an officer of a political party to sign a waiver of immunity and give testimony before a grand jury or be removed from office violated the right against self-incrimination under the Fifth Amendment); *Lefkowitz v. Turley*, 414 U.S. 70 (1973) (finding a New York law requiring contractors to sign a waiver of immunity and testify before a grand jury or be disqualified from further transactions with the state for five years invalid as it violated the privilege against self-incrimination under the Fifth Amendment); *Uniformed Sanitation Men Ass'n, Inc. v. Commissioner of Sanitation of N.Y.*, 392 U.S. 280 (1968) (declaring invalid a section of the New York City charter that required the dismissal of public employees who refused to give testimony in connection with an investigation of corruption on the basis that the section violated their Fifth Amendment right against self-incrimination).

officers in connection with illegal gambling operations.¹⁹ The officer filed a petition with the New York Supreme Court, Appellate Division seeking reinstatement and back pay but the petition was dismissed and the New York Court of Appeals affirmed the dismissal.²⁰ The Supreme Court reversed the New York Court of Appeals and held that article I, section 6 of the New York Constitution violated the Fifth Amendment privilege against self-incrimination.²¹

The court in *Curry* found the *Gardner* case to be dispositive of the question presented. The court, quoting the Supreme Court in *Gardner* stated:

The officer "was discharged from office, not for failure to answer relevant questions about his official duties, but for a refusal to waive a constitutional right" and . . . that "the mandate of the great privilege against self-incrimination does not tolerate the attempt, regardless of its ultimate effectiveness, to coerce a waiver of the immunity it confers on penalty of the loss of employment."²²

The court in *Curry* discussed *Mountain v. City of Schenectady*.²³ In *Mountain*, the plaintiff was a police officer who had been "indicted on counts of rape and sodomy and on two counts of official misconduct."²⁴ The officer appeared before a grand jury but refused to execute a waiver of immunity and subsequently gave no testimony.²⁵ An administrative hearing was commenced against the officer and he was dismissed for violating, once again, the same section of the New York Constitution at issue in *Curry*.²⁶ The officer filed a petition with the New York Supreme Court which held, citing *Gardner*, that the "petitioner's discharge was the result of unconstitutionally

19. *Gardner*, 392 U.S. at 274.

20. *Id.* at 276.

21. *Id.* at 279.

22. *Curry*, 620 N.Y.S.2d at 522 (quoting *Gardner*, 392 U.S. at 278-79).

23. 100 A.D. 2d 718, 474 N.Y.S.2d 612 (3d Dep't 1984).

24. *Id.* at 718, 474 N.Y.S.2d at 613.

25. *Id.*

26. *Id.* at 718, 474 N.Y.S.2d at 613-14.

coercive procedures prohibited by the Supreme Court.”²⁷ The court in *Mountain* reasoned that article I, section 6 had never “been accorded a literal construction, nor had it passed constitutional muster.”²⁸ The court then noted that the case was nearly identical to *Gardner* because the officer had not been fired for misconduct, but for the refusal to sign a waiver of immunity.²⁹ The court concluded by stating that, “[i]n essence, petitioner was presented with the choice of either surrendering his constitutional rights in an ongoing criminal investigation of him or risk losing his job. This is precisely the type of coercion and sanction expressly prohibited in *Gardner*, and not to be tolerated here.”³⁰ The court in *Curry* concluded its decision by noting that the facts in *Curry* were similar to *Mountain*, which required the dismissal of the petition for removal of the respondents.³¹

In conclusion, article I, section 6 of the New York Constitution, which required the defendants to sign a waiver of immunity, was held to be unenforceable against the defendants because it would encroach upon the protection from self-incrimination afforded to them by the Fifth Amendment of the United States Constitution.

27. *Id.* at 718, 474 N.Y.S.2d at 614.

28. *Id.* at 719, 474 N.Y.S.2d at 614.

29. *Id.*

30. *Id.* at 719, 474 N.Y.S.2d at 615.

31. *Curry*, 620 N.Y.S.2d at 523.

