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et al.: Self Incrimination

THIRD DEPARTMENT

Curry v. Rogers
Curry v. Hunt
(decided December 22, 1994)[105]

Respondents, supervisors of different towns in Hamilton County who refused to sign a waiver of immunity before testifying before a grand jury, claimed their right to protection from self-incrimination embodied in the Fifth Amendment of the United States Constitution[106] was violated by article I, section 6, of the New York State Constitution.[107] Article I, section 6 requires that any public officer who refuses to sign a waiver of immunity against subsequent criminal prosecution be disqualified from holding office.[108] The Appellate Division, Third Department, held that New York State Constitution (article I, section 6) could not require public officers to execute waivers of immunity under penalty of removal from office because such action would be a direct violation of the respondent's constitutional privilege against self-incrimination.[109]

Respondents, Henry L. Rogers and Allen L. Hunt, supervisors of the Towns of Arietta and Wells respectively, both in Hamilton

105. 210 A.D.2d 784, 620 N.Y.S.2d 521 (3d Dep't 1994).

106. U.S. CONST. amend. V. This section provides in pertinent part: "[N]or shall [anyone] be compelled in any criminal case to be a witness against himself . . . ." *Id.*

107. *Rogers*, 210 A.D.2d at 785, 620 N.Y.S.2d at 522. N.Y. CONST. art. I, § 6. This section provides in relevant 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, 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.

108. *Rogers*, 210 A.D.2d at 785, 620 N.Y.S.2d at 522.

109. *Id.* at 786, 620 N.Y.S.2d at 523.

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County, were summoned to appear before a grand jury for the investigation of "possible misconduct, nonfeasance or neglect in office by respondents and other public servants" pursuant to New York Criminal Procedure Law section 190.55.[110]

Respondents appeared before the grand jury and were ready to testify, but when asked by petitioner to execute waivers of immunity, both respondents refused to do so.[111] Consequently, petitioner initiated this proceeding to have both respondents removed from public office pursuant to New York State Constitution, article I, section 6, which provides for the disqualification of any public official who refuses to sign a waiver of immunity.[112]

Respondents argued that article I, section 6 is a violation of their constitutional right against self-incrimination pursuant to the Fifth Amendment of the United States Constitution.[113] The court, after a brief discussion, ruled in favor of respondents and dismissed the petitioner's claim.[114] In doing so, the court relied on the United States Supreme Court case of *Gardner v. Broderick*[115] and the Appellate Division, Third Department case of *Mountain v. City of Schenectady*.[116]

The facts in the *Gardner* and *Mountain* cases presented similar circumstances. In both cases, the public official, a police officer, was discharged from his position because of his refusal to execute a waiver of immunity before testifying before a grand jury.[117]

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110. *Id.* at 785, 620 N.Y.S.2d at 522; N.Y. CRIM. PROC. LAW § 190.55 (McKinney 1993). This section 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.*

111. *Rogers*, 210 A.D.2d at 785, 620 N.Y.S.2d at 522.

112. *Id.*

113. *Id.*

114. *Id.*

115. 392 U.S. 273 (1968).

116. 100 A.D.2d 718, 474 N.Y.S.2d 612 (3d Dep't 1984).

117. *Gardner*, 392 U.S. at 274-75; *Mountain*, 100 A.D.2d at 718, 474 N.Y.S.2d at 613. In *Gardner*, appellant, a police officer of the City of New York, was subpoenaed to appear before a grand jury which was investigating

The *Mountain* court distinguished between the police officer's refusal to sign a waiver of immunity and refusal to answer questions "specifically, directly and narrowly related to the performance of his official duties."[118] The court noted that had the police officer refused to do the latter of the two, the privilege against self-incrimination would not have been a bar to the officer's discharge.[119] However, the facts indicated that the police officer was essentially being asked to either surrender his Fifth Amendment constitutional right or lose his job.[120] Citing *Gardner*, the court held that this sort of practice would not be tolerated.[121]

In *Gardner*, the Court noted that the police officer was not discharged from his duties for failure to testify before the grand jury about his official duties, but for a refusal to waive his constitutional right to the privilege against self-incrimination.[122] The Court further stated that had the purpose of the questions of the police officer been merely to secure an accounting of his performance of his public trust, there would have been no need to have the police officer sign a waiver of immunity.[123] It was clear, however, that the purpose was an attempt to prosecute the officer.[124] Subsequently, the Court held that compelling the officer to waive his privilege against self-incrimination, when refusal would have resulted in the loss of his job, could not be

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alleged bribery and corruption of the city police officers. 392 U.S. at 274-75. The appellant appeared before the grand jury and was subsequently ordered to sign a waiver of immunity or lose his job. *Id.* He refused to sign the waiver and, as a result, was discharged after an administrative hearing was held on the issue. *Id.* In *Mountain,* petitioner, a police officer of the City of Schenectady, was indicted on counts of rape and sodomy and on two counts of official misconduct. 100 A.D.2d at 718, 474 N.Y.S.2d at 613. Petitioner appeared before a grand jury, but refused to sign a waiver of immunity. *Id.* Subsequently, he was discharged from his official duties. *Id.*

118. *Mountain*, 100 A.D.2d at 719, 474 N.Y.S.2d at 614-15.

119. *Id.*

120. *Id. See supra* note 117.

121. *Mountain*, 100 A.D.2d at 719, 474 N.Y.S.2d at 614-15.

122. 392 U.S. at 278.

123. *Id.* at 279.

124. *Id.*

considered constitutional.[125] Thus, the *Gardner* Court stated that "the provision of the New York City Charter pursuant to which petitioner was dismissed cannot stand."[126]

In summary, both the federal and New York law, as evidenced by the United States Supreme Court case of *Gardner* and the New York cases of *Curry* and *Mountain*, are in accord in holding that to compel public officials to sign a waiver of immunity is to unlawfully disregard the public official's constitutional right to the privilege against self-incrimination.[127]

125. *Id.*
126. *Id.*
127. N.Y. CONST. amend. V.