

ORIGINAL

STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

-vs-

SEAN HARRIS and WILLIAM LITTLE,

Defendant-Appellants.

MSC Case No.

COA No. 317158

L/Crt No. 13-01620 -AR

317272

Wayne CRT

APPLICATION FOR LEAVE TO APPEAL

149872-3



Steven Fishman P 23049
Pamella Szydlak P49783
Attorneys for Defendants-Appellants
615 Griswold, Suite 1620
Detroit, Michigan 48226
sfish66@yahoo.com

844209

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STATEMENT OF QUESTION PRESENTED

I.

MAY A STATEMENT COERCED FROM A POLICE OFFICER PURSUANT TO *GARRITY v NEW JERSEY* BE USED AGAINST HIM IN A CRIMINAL PROSECUTION FOR OBSTRUCTION OF JUSTICE WHERE A MICHIGAN STATUTE, MCL 15.393 SPECIFICALLY PRECLUDES THE USE OF SUCH A STATEMENT IN A CRIMINAL PROSECUTION?

The district court and circuit court answered "no."

The majority of the Court of Appeals answered "yes."

The dissenting opinion of the Court of Appeals answered "no."

Appellees answer "no."

The prosecution answers "yes".

BASIS OF JURISDICTION

This Court has jurisdiction to review by appeal a decision by the Court of appeals. MCR 7.301(A)(2). MCR 7.302.

GROUND FOR APPEAL

1. The issue in this case involves a substantial question as to the validity and/or the interpretation of a legislative act, MCL 15.393. MCR 7.302(B)(1).
2. The issue in this case involved legal principles of major significance to the state's jurisprudence, "to wit; the application and/or the interpretation of MCL 15.393, which specifically provides that "an involuntary statement made by a law enforcement officer, and any information derived from that involuntary statement, shall not be used against the law enforcement officer in a criminal proceeding. MCR 7.302(b)(3).
3. The decision of the Court of Appeals is clearly erroneous and will cause a material injustice to Defendants Harris and Little, because they will be required to face criminal charges that are defiance of the clear language of the Legislature in a Michigan statute.

STATEMENT OF FACTS

On November 19, 2009 at approximately 4:50pm, an incident occurred in the parking lot of the Zoom gas station located at 9100 Chalmers that involved one civilian, Dejuan Lamar, and three Detroit Police officers, Nevin Hughes, Sean Harris, and William Little. The incident resulted in the issuance of a traffic ticket to Mr. Lamar for driving without proof of insurance. The incident did not result in an arrest or the confiscation of any evidence; hence, no police reports were filed by the officers. The officers did, however, note the incident on their activity log for that day.

On January 11, 2010, approximately two months later, Mr. Lamar provided a recorded statement about the incident to the Office of the Chief Investigator. In his statement, he claimed that he had been assaulted by Officer Hughes. He made no claim that either Officer Harris or Officer Little participated in the assault.

On August 5, 2010, approximately seven months later, and approximately nine months after the incident, Officers Harris and Little were interviewed by an investigator from the Office of Chief Investigator. Prior to being interviewed, and pursuant to Detroit Police Department policy, each officer signed a form entitled Certificate of Notification of Constitutional Rights - Departmental Investigation. The fourth paragraph of that form discusses the mandatory nature of the interview process and the consequences of refusal as follows:

If I refuse to testify or to answer questions in relation to; (a) my duties as a member of the department, (b) investigations of violations of state and federal laws and/or ordinances of the City of Detroit, and/or (c) my fitness for office or the fitness for office of another member of the department, **I will be subject to departmental charges which could result in my dismissal from the police department.** (Emphasis added)

The fifth paragraph of that form guarantees each officer that his answers will not be used against him criminally as follows:

If I do answer, and immunity, federal, state, or other has not been given, **neither my statements or any information or evidence which is gained by reason of such statements can be used against me in any subsequent criminal proceedings.** (Emphasis added)

In addition to the Certificate of Notification of Constitutional Rights form, each officer also signed a form entitled Reservation of Rights Addendum. That form contains the following language with respect to the mandatory nature of the interview process:

I am giving the attached Statement and/or Preliminary Complaint Report by reason of receipt of an Order from a superior officer **threatening me with immediate suspension as well as other disciplinary action for refusal to obey.**

In view of possible job forfeiture, I have no alternative but to abide by this Order. However, it is my belief and understanding that the Department requires this statement solely and exclusively for internal purposes and will not release it to any other agency.
(Emphasis added)

After signing the forms, Officers Harris and Little were then interviewed by an investigator from the Office of Chief Investigator. On information and belief, based on email exchanges with the prosecutor, the answers provided by the officers in those interviews form the basis for the charge in the instant case.

On September 29, 2011, almost two years after the original incident, Officers Harris and Little were again interviewed pursuant to *Garrity*. On information and belief, based on email exchanges with the prosecutor, the answers provided by the officers in those interviews did **not** form the basis for the charge in the instant case.

On October 6, 2011, a warrant request was presented to the Prosecutor's Office by Internal Affairs which only named Officer Hughes. The names of Officers Harris and Little were added to the Investigator's Report by the Prosecutor's Office. A complaint and warrant was subsequently issued against all three officers.

Preliminary examination was originally scheduled for October 25, 2012. Prior to preliminary examination, Officers Harris and Little moved to dismiss the case against them, arguing that the use of their *Garrity*-protected statements against them in a criminal prosecution

was prohibited by a Michigan statute (MCL 15.393) and the Reservation of Rights Addendum.¹

The parties agreed that the charge against Officers Harris and Little was based solely on the *Garrity* statements given by the officers. After argument on the motion to dismiss and completion of the preliminary examination,² the district court dismissed the charges against Officers Harris and Little, ruling that the use of the officers' *Garrity*-protected statements in a criminal prosecution was prohibited by MCL 15.393.³ The Court also ruled that a district court judge had no authority to overrule the State Legislature and/or the Michigan Court of Appeals.

The prosecution appealed the district court's dismissal of the charges against Officers Harris and Little to the Wayne Circuit Court. On June 27, 2013, the circuit court issued an order affirming the decision of the district court.

The prosecution appealed the circuit court's order to the Court of Appeals. On July 15, 2014, in a 2-1 decision, the Court of Appeals reversed the circuit court, and remanded the case to the district court for reinstatement of the obstruction of justice charges. The majority overruled *People v Allen*, 15 Mich App 387 (1968), and further ruled that MCL 15.393 did not apply to the

¹ At that time, the defense also argued that the use of the statements was prohibited by *People v Allen*, 15 Mich App 387 (1968). Since the Court of Appeals expressly disavowed *Allen* in its opinion in the instant case, this appeal is based solely on the Michigan statute, MCL 15.393.

² The evidence at the examination consisted of the audio of each of the officers' interviews, the video of the original incident at the gas station, and the testimony of the complainant.

³ The district court also ruled that the use of the statements was prohibited by the aforementioned *People v Allen*.

instant case because “the plain language of MCL 15.393 establishes than an ‘involuntary statement’ includes only truthful and factual information.”⁴

In a spirited dissent, Judge Wilder wrote that although he agreed with overruling *Allen*, MCL 15.393 barred the use of Defendants’ involuntary statements against them in the instant case. He indicated that the Court of Appeals was “bound to interpret the plain language set forth by the Legislature.....even if we disagree with the result.”⁵

Defendants-Appellants now file this Application for Leave to Appeal, asking this Court to reverse the Court of Appeals and reinstate the circuit court’s order affirming the district court’s dismissal of the obstruction of justice charge.

⁴ Because the Court of Appeals clearly had the authority to overrule *Allen, supra*, Defendants-Appellees are confining this appeal to the application of MCL 15.393 to the instant fact situation.

⁵ Judge Wilder concluded his dissent by urging the Legislature to revisit the statute to address the anomaly of permitting law enforcement officers to make false denials with impunity. (Court of Appeals opinion, dissent, p. 5-6)

ARGUMENT

I. A STATEMENT COERCED FROM A POLICE OFFICER PURSUANT TO *Garrity v New Jersey* MAY NOT BE USED AGAINST HIM IN A CRIMINAL PROSECUTION FOR OBSTRUCTION OF JUSTICE WHERE A MICHIGAN STATUTE SPECIFICALLY PRECLUDES THE USE OF SUCH A STATEMENT IN A CRIMINAL PROSECUTION.

A. MCL 15.393 prohibits the use of *Garrity*-protected statements in any criminal proceeding.

The prosecution has conceded that its entire case against Officers Harris and Little is based on their *Garrity* statements given during the August 5, 2010 interview. The use of those statements is prohibited by MCL 15.393 which provides that “[a]n involuntary statement made by a law enforcement officer, and any information derived from that involuntary statement, **shall not be used against the law enforcement officer in a criminal proceeding.**” (Emphasis added).

The statute constitutes a hard-and-fast rule and lists no exceptions. MCL 15.391(1)(a) defines an involuntary statement as “information provided by a law enforcement officer, if compelled under threat of dismissal from employment or any other employment sanction, by the law enforcement agency that employs the law enforcement officer.”

There is no doubt that Officers Harris and Little were interviewed pursuant to *Garrity*.⁶ At the same time, the Reservation of Rights form (a standard form in the Detroit Police Department) further guarantees each officer that his answers will not be used against him in **any** type of criminal action:

⁶ See Exhibit 1 - Certificate of Notification of Constitutional Rights - Departmental Investigation attached to original motion, and Exhibit 2 - Reservation of Rights Addendum

If I do answer, and immunity, federal, state, or other has not been given, **neither my statements or any information or evidence which is gained by reason of such statements can be used against me in any subsequent criminal proceedings.**
(Emphasis added)

The statute does not just refer to the use of coerced “information” against an officer in a criminal proceeding. The statute also provides that “an involuntary statement” may not be used. Regardless of the spin the prosecution and the Court of Appeals majority attempts to put on the word “information,” it certainly could not apply to the phrase “involuntary statement.” The statements of the officers were coerced under *Garrity*, and were, therefore, “involuntary statements” regardless of their alleged truth or falsity. And the statute bars the use of such statements in all cases.

The suggestion that the officers did not provide “information” in their statements deserves comment as well. The officers were interviewed on August 5, 2010 about an incident that occurred on November 19, 2009, some nine months earlier. They were questioned about the incident, and answered the questions.⁷ When they answered those questions, they clearly provided “information” as contemplated by the statute. Any other interpretation of the word “information” as used in the statute would require turning the English language on its head.

The prosecution and the Court of Appeals majority state that because the information provided by the officers to the Office of Chief Investigator was allegedly false, it was, therefore, misinformation rather than information and not covered by MCL 15.393. Unfortunately, no such distinction is made in the statute. If the Legislature intended to exempt *Garrity* statements that

⁷ As indicated in the prosecution’s Statement of Facts in its brief to the Court of Appeals, the officers indicated that they recalled the incident and denied that any type of physical altercation took place.

the prosecution contends are false, it could have and would have said so in the statute. Since it did not, and since the statute contains no language that would justify a conclusion that such an exemption exists, this Court should reverse the Court of Appeals majority.

In the lower courts and the Court of Appeals, the prosecution argued that MCL 15.393 should not apply in this case because "defendants provided no 'information' which is being used against them; indeed, what they provided was 'misinformation.'"⁸ That dubious proposition was adopted by the majority in the Court of Appeals which concluded "that the statute internally limits the phrase 'involuntary statement' to include true statements only, and that false statements and lies therefore fall outside the scope of the statute's protection"⁹

The majority accepted the prosecution's definition of the word "information" with the following analysis:

But when an officer is compelled to make a statement during an internal investigation, and provides only misinformation and lies, he or she has not provided any "information" at all within the commonly understood meaning of that word. Among other things, "information" is defined as "knowledge communicated or received concerning a particular fact or circumstance." (dictionary citation omitted). The word "knowledge," in turn, is defined as "The body of truths or facts accumulated in the course of time."¹⁰

The majority then concluded:

Because an officer's lies do not impart any truth or facts, they necessarily do not constitute "information." In other words, an

⁸ Prosecution's Brief to the Court of Appeals, p 8

⁹ Court of Appeals majority opinion, p 7

¹⁰ Court of Appeals majority opinion, p 7

officer's lies and false statements do not qualify as "involuntary statements" under MCL 15.393, and consequently may be used as evidence in a subsequent criminal prosecution.

The majority then proceeded to interpret what it believed to be the Legislature's intent in passing the statute:

We conclude that the **Legislature's manifest intent** was to create a mechanism for facilitating internal police investigations and to provide an incentive for officers who cooperate by providing needed facts. **The Legislature certainly did not intend to immunize police officers by precluding the use of their lies and false statements in criminal proceedings. Indeed, such a strained construction of MCL 15.393 would be wholly contrary to the Legislature's purpose in enacting the statute. (Emphasis added)**

The majority's attempt to read the collective minds of the Legislature and contort the plain language of the statute has no basis in law or fact. As thoroughly discussed in Judge Wilder's dissent, it is contrary to established Michigan Supreme Court case law, United States Supreme Court case law, and the Legislature's use of the term "information" in other Michigan statutes.

Judge Wilder first discussed the concept of statutory interpretation:

The principles of statutory interpretation are well established. The "goal in interpreting a statute 'is to ascertain and give effect to the intent of the Legislature. The touchstone of legislative intent is the statute's language. If the statute's language is clear and unambiguous, we assume that the Legislature intended its plain meaning and we enforce the statute as written.' *People v Hardy*, 494 Mich 430, 439 (2013), quoting *People v Gardner*, 482 Mich 41, 50 (2008).¹¹

¹¹ Court of Appeals dissenting opinion, p 2

Judge Wilder went on to discuss the Legislature's use of the indefinite article "a" in MCL 15.393 in concluding that the Legislature did not limit the application of the statute solely to the criminal proceeding being investigated or other crimes already committed:

The Legislature used the indefinite article "a", not "the", to modify the phrase "criminal proceeding." "The' and 'a' have different meanings. 'The' is defined as 'definite article. 1. (Used, [especially] before a noun, with a specifying or particularizing effect, as opposed to the indefinite or generalizing force of the indefinite article a or an)... *Robinson v City of Lansing*, 486 Mich 1, 14 (2010), quoting *Massey v Mandell*, 462 Mich 375, 382, n 5 (2000).

By using the indefinite article, the Legislature did not limit the application of the statute to **the** criminal proceeding being investigated or **the** other crimes already committed. Rather, by choosing the phrase "a criminal proceeding," the Legislature expressed its intention to require a more generalized application of the statute than the narrower protection the Fifth Amendment would afford, and therefore bars the use of involuntary statements in subsequent prosecutions for perjury or obstruction of justice.¹²

Judge Wilder then reached what he believed to be the obvious conclusion about the Legislature's intent:

If the Legislature intended involuntary statements and information derived from them to be used in collateral proceedings for obstruction of justice or perjury, the Legislature could and would have expressly excluded those proceedings from the statute. *People v Underwood*, 278 Mich App 334, 338 (2008) ("[P]rovisions not included in a statute by the Legislature should not be included by the courts.")¹³

Judge Wilder next took issue with the majority's agreement with the prosecution that an officer's false denials do not constitute "information" as contemplated by the statute:

¹² Court of Appeals dissenting opinion, pp 2-3

¹³ Court of Appeals dissenting opinion, p 3

The majority agrees, relying on the Random House Webster's College Dictionary (1997), which defines "information" as "knowledge communicated or received concerning a particular fact or circumstance." The majority concludes that an officer's false denials do not impart any truth or facts, so they cannot constitute "information." I disagree.

The word "misinform" is defined as "giv[ing] false or misleading **information** to." Random House Webster's College Dictionary (1997). (emphasis added). Therefore, the term "information" as used in MCL 15.393 must be interpreted to include the giving of "misinformation."¹⁴

Judge Wilder then made reference to the United States Supreme Court's interpretation of the federal immunity statute to make the same point:

Our United States Supreme Court has ruled that similar language in the federal immunity statute, 18 USC 6002, "makes no distinction between truthful and untruthful statements made during the course of the immunized testimony." *United States v Apfelbaum*, 445 US 115, 122 (1980). Section 6002 provides, in relevant part, "no testimony or other **information** compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case. (Emphasis added).¹⁵

Judge Wilder also pointed out that in addition to using the dictionary, courts look to the use by the Legislature of the same or similar terms in other statutes "to divine Legislative intent." He indicated that courts "make every effort to interpret clear and unambiguous language in accordance with its plain meaning because "[c]ourts may not read or include provisions into a

¹⁴ Court of Appeals dissenting opinion, p 3

¹⁵ Court of Appeals dissenting opinion, p 3

statute that the Legislature did not.” *People v Haynes*, 281 Mich App 27, 32 (2008). In support of that notion, he quoted *People v Underwood, supra*, at 338: “The omission of a provision in one statute that is included in another statute should be construed as intentional.”¹⁶

Judge Wilder then cited specific examples of statutes where the Legislature referred to inaccurate or misleading information and discussed them as follows:

The Legislature’s specific references to inaccurate or misleading information in the above-cited provisions demonstrate that the distinction between accurate and inaccurate information was relevant to those legislative schemes, and that when such a distinction is important to the Legislature to make, it will do so. The Legislature’s failure to make a distinction between accurate and inaccurate information here demonstrates its intent that MCL 15.393 broadly apply to defendants’ involuntary statements, regardless of their accuracy. *Underwood*, 278 Mich App at 338.¹⁷

Judge Wilder correctly held that when it crafted MCL 15.393, the Legislature “used broad language that did not just protect factually true statements, but “involuntary statements,” and did not only protect statements made during the investigation of crimes already committed, but more generally, statements made “in a criminal proceeding.” He then concluded that by the plain language of the statute, “the Legislature intended MCL 15.393 to protect a law enforcement’s officer’s false denials, even in a subsequent, collateral criminal proceeding such as perjury or obstruction of justice.”¹⁸

Judge Wilder recognized that although MCL 15.393 as presently written clearly bars the use of the officers’ statements in the instant case, it may seem untenable to permit law

¹⁶ Court of Appeals dissenting opinion, pp 3-4

¹⁷ Court of Appeals dissenting opinion, p 4

¹⁸ Court of Appeals dissenting opinion, p 5

enforcement officers to make false denials with impunity. However, he also acknowledged the limits of appellate review, concluding his dissent as follows:

But we are bound to interpret the plain language set forth by the Legislature. We cannot rewrite the law and must apply the statutory text even if we disagree with the result. (citation omitted). Therefore, I would affirm the district court and urge the Legislature to revisit MCL 15.393 to address this anomaly.¹⁹

What the dissent recognized, and what the majority failed to recognize, is the permissible extent of judicial authority, to wit; while courts have great power to adjudicate, they do not have the power to legislate. This Court undoubtedly recognizes that statutes are passed by the Legislature and not the appellate courts, and it is not the job of appellate courts to rewrite statutes any more than it is the job of the Legislature to write appellate opinions.

This Court should , therefore, correct the majority's error by ruling that unless and until the Legislature repeals MCL 15.393 or changes its wording to conform to the prosecution's theory, courts do not have the authority to do so on their own.

¹⁹ Court of Appeals dissenting opinion, pp 5-6

RELIEF SOUGHT

Wherefore, for the reasons set forth above, Defendants-Appellees Harris and Little request that this Court grant their application for leave to appeal, reverse the 2-1 decision of the Court of Appeals, and reinstate the circuit court's order affirming the district court's dismissal of the obstruction of justice charge.

Respectfully submitted,


— Steven Fishman (P23049)
Pamella Szydlak (P49783)
Attorneys for Defendants-Appellants
615 Griswold, Suite 1125
Detroit, Michigan 48226
(313) 962-4090
Email: sfish66@yahoo.com

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