

STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

vs.

MSC Case No. _____

COA No. 316072

L/Crt. No. 13-001041-01 FH

NEVIN HUGHES,

Wayne CR7

Defendant-Appellant.

Lower Court No. 13-1041

APPLICATION FOR LEAVE TO APPEAL

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STATEMENT OF QUESTION PRESENTED

I.

MAY 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, 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".

Appellee answers "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 involves legal principals of major significance to the state's jurisprudence, to wit: the application and/or the interpretation of MCL 15.393(3), 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 Defendant Hughes, because he will be required to face criminal charges that are contrary to the clear language of the Legislature as set forth in a Michigan statute.

STATEMENT OF FACTS

On November 19, 2019, at approximately 4:50 p.m., Police Officer Nevin Hughes and his partners, Sean Harris and William Little, were assigned to the Gang Squad Unit of the Detroit Police Department in plainclothes and in a semi-marked Detroit Police Department vehicle. At that time and date, an incident occurred in the parking lot of the Zoom gas station, located at 9100 Chalmers in the City of Detroit, that involved a civilian, by the name of Dajuan Lamar, and the above Detroit Police Officers. The incident resulted in the issuance of a traffic ticket to Mr. Lamar for driving without insurance. Since this incident

did not result in an arrest or the confiscation of any evidence, no police reports were required to be filed by the police officers. The officers did note the incident on their activity log.

After issuing the ticket, the officers left the location. Mr. Lamar then called his mother and EMS. EMS conveyed him to St. John's Hospital, where he was prescribed Ibuprofen and discharged. Mr. Lamar did not have any injuries.

On or about November 19, 2009, Mr. Dejuan Lamar filed a complaint with the Office of the Chief Investigator¹ alleging excessive force and demeanor (CCR 40604; BPC 09-1598). Two months later, on or about January 11, 2010, 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 Nevin Hughes.

The Chief Investigators Office did not refer or transfer the case to Internal Affairs for investigation of criminality, but rather continued to investigate the claims of Mr. Lamar for violations of the Department Rules and Procedures, with an eye toward bringing disciplinary charges against him if the allegations were sustained.

On July 20, 2010, Officer Nevin Hughes, the focus of this internal investigation, was interviewed by an investigator from the Office of the Chief Investigator. Prior to being interviewed, Officer Hughes signed a form entitled Certificate of Notification of Constitutional Rights--Departmental Investigation. The fourth paragraph of that form discussed the mandatory nature of this interview process and the consequences of refusal as

¹The Office of the Chief Investigator, an investigative arm of the Detroit Board of Police Commissioners is charged with investigating civilian complaints of violations of the Rules and Regulations of the Detroit Police Department. It does not investigate allegations of criminality. This is the role of Internal Affairs.

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 © 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.

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

If I do answer, and immunity, federal, state, or other has not been given, neither my statements nor any information or evidence which is gained by reason of such statements can be used against me in any subsequent criminal proceeding.

In addition to the Certificate of Notification of Constitutional Rights form, Officer Hughes also signed a form entitled Reservation of Rights Addendum. The 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 or refusal to obey.

In view of the 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, as indicated above, Officer Hughes, was interviewed by an investigator of the Office of the Chief Investigator.

Other members of the Detroit Police Department were interviewed as part of this Departmental Investigation including Officers Sean Harris and Officer Wayne Little, the

partners of Officer Hughes on November 19, 2009. At the conclusion of the investigation, the allegations of Force and Demeanor were sustained and Departmental charges alleging Mistreatment of a Person were filed. These charges are found in Disciplinary Administration Number 11-0254.

A hearing on this charge was scheduled for August 19, 2011. At that time, the charge against the officer was dismissed for the reasons set forth on the Trial Board record and adopted by then-Chief Godbee.

On September 15, 2011, Officer Nevin Hughes appeared at Professional Standards of the Detroit Police Department (a/k/a Internal Affairs). At that time, he was informed that he was the focus of a criminal investigation into allegations of Assault and Force, arising out of the complaint of Mr. Lamar on November 19, 2009. At that time, he was provided with his Miranda rights, he exercised those rights, and no statement was given.²

On October 6, 2011, a warrant request was presented to the prosecutor's office naming your Defendant Nevin Hughes. Defendant Hughes was charged with Misconduct in Office, Obstruction of Justice, and Assault and Battery. Co-Defendants Sean Harris and William Little were charged with one count of Obstruction of Justice each.

Prior to the preliminary examination, it was stipulated by the parties and accepted by the examining magistrate that the sole basis for the Obstruction of Justice charges against all of the Defendants were their protected Garrity statements made to the Office of the Chief Investigator. A copy of the Garrity interviews were submitted for Judge Katherine

²Garrity rights were not given to Officer Hughes by Internal Affairs, as they were by the Office of the Chief Investigator, because he was now the focus of a criminal investigation.

Hansen's review and made part of the record.

The preliminary examination was completed on January 24, 2013, with the taking of testimony of the complainant. On February 1, 2013, the 36th District Court bound your Defendant, Nevin Hughes, over on Misconduct in Office and the misdemeanor of Assault and Battery and dismissed the Obstruction of Justice charge, finding in a well-reasoned opinion, that Officer Hughes' Garrity-protected statements in a criminal prosecution were prohibited by Garrity v New Jersey, 385 US 492 (1967); People v Allen, 15 Mich App 387 (1968) and MCL 15.393. Judge Hansen also indicated that the lower court had no authority to overrule either the state legislature or the Michigan Court of Appeals. The charges against both Officers Little and Harris were dismissed for the same reasons.

As indicated above, Officer Hughes was bound over on Misconduct in Office and Assault and Battery. A trial date was set before Judge Morrow. On the eve of the trial date, the people filed a motion to reinstate the Obstruction of Justice charge.

In an order dated May 6, 2013, the Honorable Bruce Morrow denied that motion as well as the people's request for a stay. Judge Morrow, in denying the motion, followed the well-reasoned opinion of Judge Hansen that the Garrity-protected statements are prohibited in a criminal prosecution.

The people filed an Application for Leave to Appeal and an Order to Stay the Proceedings which the lower court granted on or about June 3, 2013.

On July 15, 2014, in a two-to-one Decision, the Court of Appeals reversed the Circuit Court and remanded the case to the District Court for reinstatement of the Obstruction of Justice charge. The majority overruled People v Allen, 15 Mich App 387 (1968) and further

ruling that MCL 15.393 did not apply in the instant case, finding that “the plain language of MCL 15.393 establishes that an ‘involuntary’ statement includes only truthful and factual information.”³

In a dissenting opinion, Judge Wilder wrote that he agreed with the majority in overruling Allen, supra, but that MCL 15.393 barred the use of Defendant’s involuntary statements in the instant case. He indicated that the Court of Appeals is bound to interpret the plain language set forth by the Legislature, even if we disagree with the results, and suggested that the Legislature revisit the statute.

Defendant-Appellant Hughes now files 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.

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.

Officer Nevin Hughes was charged with one count of Misconduct in Office, contrary to MCL 750.505 (common law offense); one count of Assault and Battery, contrary

³The Court of Appeals had the authority to overrule Allen, supra; and as such, the Defendant-Appellant Hughes limits his appeal to the application of MCL 15.393 to the instant fact situation.

to MCL 750.81; and one count of Obstruction of Justice, contrary to MCL 750.505 (common law offense). The sole issue now before this Honorable Court is Count III, Obstruction of Justice. The prosecution concedes this count is based entirely on a Garrity statement given by Officer Hughes to an Investigator at the Chief Investigator's Office on July 20, 2010. This statement was given as part of an internal investigation into alleged violations of the Detroit Police Department's Rules and Regulations and for which Officer Hughes was the focus.

The statement provided by Officer Hughes was part of an internal investigation. When the criminal investigation was initiated, subsequent to the dismissal of Departmental charges filed against Officer Hughes, he was not provided with Garrity rights, as were his co-defendants, Officers Harris and Little. Rather, he was provided with his Constitutional Rights pursuant to Miranda, and he exercised those rights and refused to answer any questions.⁴

The use of these statements is prohibited by MCL 15.393. That statute states: “[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). **There are no exceptions.** The statute which bans the use of Officer Hughes' statement to support the Obstruction of Justice charges, not only bans “any information derived from that involuntary statement” but the very statement itself.

When Officer Hughes made the Garrity and statutorily-protected statement, he signed the Reservation of Rights form which stated in part:

If I do answer, and immunity, federal, state or other has not been given, **neither my statements nor any information or evidence which is gained by reason of such statements can**

⁴Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602 (1966).

be used against me in any subsequent criminal proceedings.
(Emphasis added).

The statement provided by Officer Hughes was involuntary. This has been conceded by the People throughout these proceedings. MCL 15.391 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.

The statute does not only refer to the use of coerced information in a criminal proceeding, but further mandates that the involuntary statement cannot be used against an officer in any proceeding.

The statement of Officer Hughes was coerced and, as such, was involuntary regardless of the alleged truth or falsity. No exception exists; and therefore, the statute bars the use of the statement regardless of the misconstrued definitions that both the prosecution and the Majority Opinion wish to place on the word "information".

Officer Hughes gave a Garrity statement as part of an internal investigation in July of 2010. This was approximately nine months after the incident. He provided answers to the questions presented. The information that he provided to that investigator was information that was contemplated and protected by the statute.

The prosecution and the Majority Opinion have now contorted the word **information** as contemplated by the statute into a picking and choosing as to what the prosecution believes to be truthful. This was not what was contemplated by the statute.

In determining that the statement provided by Officer Hughes to the Office of the Chief Investigator as part of an internal investigation, it was necessary for the majority to

make the unsupported leap from internal investigation to criminal proceedings. The majority wrote at page 7:

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).

Though the Majority Opinion accurately determined that it was the Legislature's intent to **facilitate internal investigations**, they then attempted to include criminal investigations.

The Office of the Chief Investigator was not investigating a criminal matter. It was investigating alleged violations of the rules and regulations of the Department. In fact, one of the allegations made by Mr. Lamar was the demeanor of Officer Hughes. The Office of the Chief Investigator was clear in informing Officer Hughes that nothing he said could be used against him in any criminal proceeding. That is because they were not investigating a criminal matter.

The majority Opinion, in reaching its conclusion that MCL 15.393 did not protect the statement provided by Officer Hughes, adopted the tortured definition of information and determined that, if the statements were false, they were not information. However, a review of the statute clearly shows that there are no exceptions. They deal with both the statement and any information derived. Further, had the Legislature wished to include exceptions, they would have.

Judge Wilder in his Dissenting Opinion at page 3 wrote:

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; 750 NW2d 612 (2008); ((P)rovisions not included in the statute by the Legislature should not be included by the courts.). (Emphasis added).

No exception to MCL 15.393 exists. This is clear.

MCL 15.395 does address the availability of involuntary statements in non-internal investigations. That statute states:

An involuntary statement made by a law enforcement officer is a confidential communication not open to public inspection. The statement may be disclosed by a law enforcement agency only under one or more of the following circumstances. . . (Emphasis added).

None of these circumstances exist.

The Legislature specifically set forth these circumstances and reasoning under which statements could be released; and arguably used and the purposes for their use. Neither the truthfulness or the alleged falsity of those statements are reasons for the statements to be released.

Judge Wilder in his Minority Opinion also reviewed and determined the definition of information in the context of the statute. Rather than apply the prosecution's and Majority Opinion's definition of information to involuntary statement, he wrote at page 14:

The word 'misinform' is defined as giving 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 'misinformation'.

The Majority Opinion did not address the protections afforded by that portion of MCL 15.393

which protects an **involuntary statement**. Rather, it applied the tortured definition to the word information only with respect to that portion of the statute which states that such information derived from an involuntary statement shall not be used against a law enforcement officer. Judge Wilder's definition, which should be controlling, goes to the actual statement itself in applying the statute in this instant case.

It should also be noted that in Judge Wilder's Dissenting Opinion, he reviewed, not only the definition of information in reaching his opinion, but correctly held that broader language was used in crafting the statute by the Legislature. He wrote at page 5 of his Dissenting Opinion:

The Legislature's enactment of MCL 15.395 in the Disclosure by Law Enforcement Officers' Act also demonstrates its intention to codify broader protections for officers' involuntary statements by making them confidential communications except under limited circumstances relying on Myers v City of Portage, 304 Mich App 637 (2014).

Judge Wilder also found that Statute distinguishes between criminal actions and civil actions in which such confidential statements could be used under certain circumstances.

The Dissenting Opinion has realized the distinction between the statutory protections provided to public employees, and your Defendant-Appellant Nevin Hughes in particular, when he notes that the alleged false statements provided during the internal investigation to the Office of the Chief Investigators are protected. Under the Statute they were confidential and were made as part of an internal investigation for which he could have been disciplined. The Majority Opinion does not recognize this.

This Honorable Court should correct the Majority's error and rule that, until the Legislature repeals 15.393 or amends that statute to conform to the prosecution's theory, courts

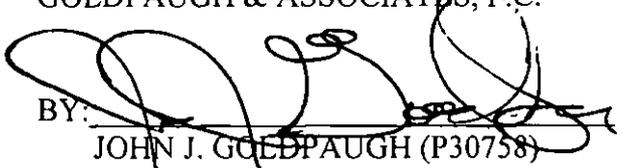
do not have the authority to do that on their own.

RELIEF SOUGHT

Wherefore, for the reasons set forth above, Defendant-Appellant Nevin Hughes, requests that this Court grant his Application for Leave to Appeal, reverse the two-one 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,

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