STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0264

State of Minnesota,
Respondent,

vs.

Christopher Jerome Salazar,
Appellant.

Filed April 14, 2009
Affirmed
Peterson, Judge

Stearns County District Court
File No. K0-06-1705

Lori Swanson, Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101-2134; and

Janelle P. Kendall, Stearns County Attorney, Sarah E. Hilleren, Assistant County Attorney, Administration Center, Room 448, 705 Courthouse Square, St. Cloud, MN 56303 (for respondent)

James M. Ventura, 1000 Twelve Oaks Center Drive, Suite 100, Wayzata, MN 55391 (for appellant)

Considered and decided by Klaphake, Presiding Judge; Peterson, Judge; and Bjorkman, Judge.

U N P U B L I S H E D O P I N I O N

PETERSON , Judge

In this appeal from convictions of two counts of aiding and abetting furnishing alcohol to minors and one count of indecent exposure, appellant argues that (1) the district court erred in finding that his criminal case was not tainted by compelled statements given during an internal-affairs investigation, (2) his codefendant's acquittal precludes his aiding-and-abetting convictions, and (3) the state failed to comply with its discovery obligations. We affirm.

FACTS

Appellant Christopher Salazar, a Benton County sheriff's deputy, lived with John Dirksen, a Wright County sheriff's deputy. Appellant also rented a room in the basement of his house to H.P.

On February 12, 2006, H.P. was visited by her 16-year-old sister and her sister's 16-year-old friend. At around 2:36 a.m., appellant and Dirksen entered H.P.'s part of the basement, woke H.P. and the two girls, and told them that it was "underage consumption night and to get upstairs and . . . come drinking with them." H.P. initially refused, but eventually followed the others to the kitchen, where many bottles of alcohol and glasses had been set out. Appellant began mixing alcoholic drinks, which either he or Dirksen handed to the visitors. H.P., who was pregnant, refused to drink and attempted to discourage the two underage girls from drinking. However, each girl ultimately drank a large quantity of alcohol. H.P. could not recall how much the girls consumed, but noted that her sister's glass "never got empty" because Dirksen kept refilling it.

Appellant and Dirksen both began to encourage the two girls to flash their breasts at them. H.P.'s sister refused, but her friend "finally gave in" and briefly exposed her breasts and/or buttocks. At some point, appellant and Dirksen borrowed H.P.'s cell phone and photographed their testicles, intending to send the pictures to H.P.'s fiancé as a joke. Appellant then shocked H.P. by walking over and "pull[ing] his penis out in front of [her]."

Several days later, after discussing the incident with her mother and fiancé, H.P. decided to report the incident to an officer with the St. Cloud Police Department. As a result, the St. Cloud Police Department initiated a criminal investigation of both appellant and Dirksen and notified the sheriff's offices where they worked, which prompted each office to begin an internal-affairs investigation.

Detective Sergeant Troy Heck conducted Benton County's investigation of appellant. During the investigation, Heck took a compelled *Garrity*[1] statement from appellant after giving him the appropriate warning that failure to discuss the incident could result in dismissal and that the contents of his statement would not be used in any criminal proceeding.

Appellant was charged with two counts of aiding and abetting furnishing alcohol to a minor in violation of Minn. Stat. §§ 340A.503, subd. 2(1), .702(8), 609.05 (2004); one count of indecent exposure in violation of Minn. Stat. § 617.23, subd. 1(1) (2004);

[1] *See generally Garrity v. New Jersey*, 385 U.S. 493, 87 S. Ct. 616 (1967) (holding that compelled self-incriminatory statements during an internal-affairs investigation may not be used in subsequent criminal proceedings and requiring investigator to warn subject of investigation of consequences of making or refusing to make such statements).

and one count of aiding and abetting procuring indecent exposure in violation of Minn. Stat. §§ 617.23, subd. 1(2), 609.05 (2004). Dirksen was also charged with all of these offenses, except indecent-exposure.

In light of his *Garrity* statements, appellant requested a *Kastigar*[2] hearing to ensure that none of the statements he was compelled to make during the internal-affairs investigation were being improperly used to prosecute him. At the *Kastigar* hearing, Heck testified that he performed his internal-affairs investigation without assistance from anyone else and that he did not discuss his investigation with anyone from either the St. Cloud Police Department or the Stearns County Attorney's Office or disclose its contents to them. The only person to whom Heck disclosed the contents of appellant's *Garrity* statements was a deputy in the Benton County Sheriff's Office. This was confirmed by the officer in charge of the criminal investigation conducted by the St. Cloud Police Department, who testified that his contact with the internal-affairs investigation was limited to providing information to Heck and that he received no information from Heck. A Stearns County prosecutor testified that he made the charging decision based entirely on information provided by the St. Cloud Police Department and that the case file contained no information from any other investigative body. The district court found this testimony credible and concluded that the criminal proceedings were not tainted by the contents of appellant's *Garrity* statements.

[2] *See Kastigar v. United States*, 406 U.S. 441, 460, 92 S. Ct. 1653, 1665 (1972) (explaining that state has burden of showing that proposed evidence is derived from legitimate source independent of compelled testimony).

Following appellant and Dirksen's joint trial, the jury found appellant guilty on all counts, except aiding and abetting procuring indecent exposure, and acquitted Dirksen on all counts. This appeal followed.

D E C I S I O N

I.

Appellant argues that the state's failure to call H.P. and the two 16-year-old girls at the *Kastigar* hearing prevented the state from establishing that their trial testimony was not tainted by his compelled *Garrity* statements. When a police officer is compelled under threat of dismissal to give statements during an internal-affairs investigation of misconduct, the Fourteenth Amendment prohibits the use of those statements in subsequent criminal proceedings. *Garrity v. New Jersey*, 385 U.S. 493, 499-500, 87 S. Ct. 616, 620 (1967). Although the officer being investigated may be prosecuted for the underlying acts to which the statements relate, he is entitled to use-and-derivative immunity with respect to those statements. *State v. Gault*, 551 N.W.2d 719, 723 (Minn. App. 1996) (applying *Kastigar v. United States*, 406 U.S. 441, 453, 460, 92 S. Ct. 1653, 1661, 1664-65 (1972)), *review denied* (Minn. Sept. 20, 1996) *and appeal dismissed and order granting review vacated* (Minn. Feb. 27, 1997). Consequently, the district court must hold a *Kastigar* hearing to determine whether, and to what extent, criminal proceedings are tainted by the use of the defendant-officer's compelled *Garrity* statements. *See id.* (describing hearing requirements). On appeal, we review the constitutional question of taint de novo, but defer to the district court's findings on the underlying factual circumstances unless clearly erroneous. *See State v. Buchanan*, 431

N.W.2d 542, 551-52 (Minn. 1988) (stating standard of review in a suppression-of-involuntary-confession context).

At a *Kastigar* hearing, the state has the burden of proving by a preponderance of the evidence that it did not use the *Garrity* statements "'in any respect' that could 'lead to the infliction of criminal penalties on [the defendant].'" *Gault*, 551 N.W.2d at 723, 725 (emphasis omitted) (quoting *Kastigar*, 406 U.S. at 453, 92 S. Ct. at 1661). Appellant contends that the state failed to meet this burden because it did not call any of the three fact witnesses. Appellant argues that calling these witnesses was necessary to establish that Heck did not taint them by revealing information gleaned from appellant's compelled statements when he questioned them during the internal-affairs investigation. Rather than calling only law-enforcement witnesses to testify about their agency's respective exposure to the contents of the *Garrity* statements, appellant argues that the state was required to call each fact witness and proceed through their testimony "'line-by-line and item-by-item'" in order to demonstrate "'that no use whatsoever was made of any of the [privileged statements] either by the witness or by the [investigator] in questioning the witness.'" *Id.* at 723 (first alteration in original) (quoting *United States v. North*, 910 F.2d 843, 872 (D.C. Cir. 1990), *modified on other grounds*, 920 F.2d 940 (D.C. Cir. 1990)).

The facts of this case distinguish it from the cases that appellant relies on in his argument. In *Gault*, for example, the city attorney's office's case file initially contained the defendant-officer's *Garrity* statements. *Id.* at 722. Once a prosecutor assigned to the case recognized the statements for what they were, the office attempted to purge itself of

the taint by removing and sealing the problematic statements and reassigning the case. *Id.* Thus, the detailed inquiry that appellant contends is needed in this case was necessary in *Gault* because the city attorney's office responsible for prosecuting the defendant-officer was exposed to his *Garrity* statements and might have used the statements, even unintentionally, to develop its trial strategy. *Id.* at 724-25. Unlike *Gault*, however, the district court found that Heck did not disclose the contents of the internal-affairs investigation to either the police department conducting the criminal investigation or to the county attorney's office responsible for prosecuting appellant.

Appellant also relies on *North* to suggest that a witness-by-witness inquiry was necessary because Heck might have unintentionally used what he learned from appellant's compelled statements to formulate his questions when interviewing the three fact witnesses, thereby using that information to refresh their recollections. But in *North*, many of the fact witnesses had been directly exposed to the substance of defendant Lieutenant Colonel Oliver North's compelled testimony before Congress because the congressional hearings were broadcast live on national television and radio, replayed on the news, and extensively analyzed in the public media. *North*, 910 F.2d at 851, 863-64. In contrast, the witnesses here had no comparable exposure to appellant's statements, and Heck testified that the only person to whom he disclosed the *Garrity* information was a deputy at the Benton County Sheriff's Office. Also, although the state had the burden of proving that it did not use the contents of appellant's statements, appellant offered no evidence to rebut Heck's testimony, and the district court was entitled to find the

testimony credible. *See State v. Sletten*, 664 N.W.2d 870, 876 (Minn. App. 2003) (stating that weighing witness credibility is exclusive function of fact-finder).

The evidence establishes that the criminal proceedings were effectively "screened off" from appellant's *Garrity* statements. *Cf.* Minn. R. Prof. Conduct 1.10 (b)(2) (requiring law firms wishing to avoid an imputed conflict of interest when representing a party adverse to a lawyer's former client to subject that lawyer "to screening measures adequate to prevent disclosure of the confidential information and to prevent involvement by that lawyer in the representation", 1.11 (similar rule for lawyer who is former or current public officer or employee), 1.12 (similar rule for lawyer who is former judge, arbitrator, or other third-party neutral). Consequently, we conclude that the district court did not err when it determined that appellant's criminal prosecution was not tainted by exposure to the *Garrity* statements.

II.

Appellant argues that Dirksen's acquittal on the aiding-and-abetting furnishing-alcohol-to-minors counts precludes his convictions on them. This argument is without merit.

Under the aiding-and-abetting statute, "[a] person is criminally liable for a crime committed by another if the person intentionally aids, advises, hires, counsels, or conspires with or otherwise procures the other to commit the crime." Minn. Stat. § 609.05, subd. 1. Appellant emphasizes the phrase "crime committed by another," but he ignores the subdivision of the statute that provides that "[a] person liable under this section may be charged with and convicted of the crime although the person who directly

committed it has not been convicted." *Id.*, subd. 4. Thus, Dirksen's acquittal does not preclude appellant's conviction.

Also, the complaint charged appellant with "aiding and abetting *and being aided and abetted by another*" to furnish alcohol to each minor girl. (Emphasis added.) In other words, appellant was charged as both principal and accomplice. The jury's verdict reflects a finding that appellant, not Dirksen, was the principal.

III.

Appellant argues that he is entitled to a new trial because the prosecution failed to provide him with Heck's file from the internal-affairs investigation. This argument is without merit.

A prosecutor must, upon request, "allow access at any reasonable time to all matters within the prosecuting attorney's possession or control which relate to the case." Minn. R. Crim. P. 9.01, subd. 1. In addition, the prosecutor must permit defense counsel to inspect and reproduce any "relevant written or recorded statements and any written summaries . . . of the substance of relevant oral statements made by [witnesses intended to be called at trial] to prosecution agents." *Id.*, subd. 1(1)(a).

The scope of a prosecutor's obligations under rule 9.01, extends only "to material and information in the possession or control of members of the prosecution staff and of any others who have participated in the investigation or evaluation of the case and who either regularly report or with reference to the particular case have reported to the prosecuting attorney's office." *Id.*, subd. 1(8). Under the plain language of rule 9.01, the prosecutor's discovery obligations do not extend to the internal-investigation file in this

case. The Stearns County Attorney's Office did not have possession or control of, or even access to, the contents of Heck's investigation. And Heck did not report to the Stearns County Attorney's Office with respect to an internal-affairs investigation conducted by the Benton County Sheriff's Office. Indeed, as the state astutely asserts, requiring the prosecutor to obtain the internal-investigation materials in order to give them to appellant would create a further *Garrity* issue in and of itself. Regardless of whether appellant was entitled to access these materials for *Kastigar* hearing purposes, requesting them from the prosecutor was not the appropriate channel.

Affirmed.