STATE OF MINNESOTA
IN COURT OF APPEALS
A11-790

State of Minnesota,
Appellant,

vs.

Marie Fierck Przynski,
Respondent.

Filed December 19, 2011
Reversed and remanded
Peterson, Judge

Hennepin County District Court
File No. 27-CR-10-18266

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Michael O. Freeman, Hennepin County Attorney, Michael Richardson, Assistant County Attorney, Minneapolis, Minnesota (for appellant)

Frederic Bruno, Bruno Law, Minneapolis, Minnesota (for respondent)

Considered and decided by Kalitowski, Presiding Judge; Peterson, Judge; and Collins, Judge.*

* Retired judge of the district court, serving as judge of the Minnesota Court of Appeals by appointment pursuant to Minn. Const. art. VI, § 10.

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

PETERSON, Judge

In this pretrial prosecution appeal, appellant state argues that the district court erred in granting respondent's motion to suppress evidence pursuant to *Garrity v. New Jersey*, 385 U.S. 493, 87 S. Ct. 616 (1967), and dismissing the complaint. We reverse and remand.

FACTS

Minneapolis Police Department Inspector Eddie Frizell became aware of a $1,500 withdrawal from a checking account of the International Association of Women Police (IAWP) and believed that respondent Lieutenant Marie Przynski was the only person who could have made the withdrawal. Przynski was on vacation when Frizell learned about the withdrawal, and, when she returned from vacation, Frizell, who was Przynski's commanding officer, called her into his office to speak to her about the withdrawal.

What occurred in Frizell's office is disputed. According to Frizell, he and Przynski engaged in a few minutes of general pleasantries, and then he calmly asked her whether she had recently made any transactions on the IAWP checking account. Frizell testified that after an "awkward silence," Przynski responded, "no," and then volunteered to retrieve the IAWP checkbook from her office. Frizell said, "okay, go to your office and get the checkbook," and Przynski left. When Przynski had not returned after about ten minutes, Frizell knocked on her office door and found that the lights were off and she was gone. Frizell called Przynski, and she said that she was at the bank. Frizell told Przynski that he needed her back at the station because internal affairs investigators were

arriving. Przynski returned and met with the investigators, but Frizell was not present at the meeting and did not know what occurred.

According to Przynski, Frizell's tone of voice changed when he asked her about recent financial transactions on the IAWP checking account, and she responded that she made "possibly two deposits and a withdrawal." Przynski first testified that she felt compelled to answer this question, but she later testified that she answered the question because she "had nothing to hide," and she did not feel compelled. Przynski testified that when Frizell asked her what she spent the withdrawal on, she responded that she had not used that money and did not understand what his questions were about, and she asked him what the questions were about. She told Frizell that she was not refusing to answer the question and that she wanted to seek a legal opinion about whether the Minneapolis Police Department had the right to ask about the IAWP's finances. Przynski testified that, in response, Frizell told her that if she did not answer the question, she would be relieved of duty. Przynski testified that rather than answer Frizell's question, she left his office to get the financial records because her first thought was to contact an attorney to find out whether the department had a right to the records.

Przynski was charged with one count of theft by swindle of over $1,000 in violation of Minn. Stat. § 609.52, subds. 2(4), 3(3)(a) (2008 & Supp. 2009). Przynski moved to suppress the statements that she made to Frizell, claiming that because the statements were compelled, they are not admissible under *Garrity v. New Jersey*, 385 U.S. 493, 87 S. Ct. 616 (1967). Following a hearing where Przynski and Frizell testified, the district court rejected Przynski's testimony that Frizell told her that she would be

relieved of duty if she did not answer and determined that because there was no express threat of police discipline, it was necessary to determine whether Przynski was compelled to answer a question under an implicit threat of discipline for failure to respond. The district court then reviewed the totality of the circumstances to determine whether Przynski's statements were compelled and concluded that Przynski's statements in response to Frizell's questions were compelled. The court concluded further that Przynski's belief that she was under an implicit threat of discipline if she failed to respond was objectively reasonable, based on

> the timing and location of the conversation, . . . closed door, the demeanor of the questioner, the tone of the questioner's questions, and the knowledge of the policies and procedures of the department, the references in many of the cases and also during the testimony of the paramilitary structure of the police department and the consequences of failing to obey an order or command.

The court suppressed Przynski's statements because it determined that they were not freely and voluntarily given and were compelled. The court concluded that the state failed to meet its burden of establishing probable cause based on evidence wholly independent of the *Garrity* statements, and, therefore, dismissed the complaint. This appeal followed.

D E C I S I O N

"When reviewing pretrial orders on motions to suppress evidence, we may independently review the facts and determine, as a matter of law, whether the district court erred in suppressing—or not suppressing—the evidence." *State v. Harris*, 590 N.W.2d 90, 98 (Minn. 1999). The Fifth Amendment to the United States Constitution

provides, in part, that no person "shall be compelled in any criminal case to be a witness against himself."[1] U.S. Const. amend. V. The United States Supreme Court has explained

> that this prohibition not only permits a person to refuse to testify against himself at a criminal trial in which he is a defendant, but also "privileges him not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings."

Minnesota v. Murphy, 465 U.S. 420, 426, 104 S. Ct. 1136, 1141 (1984) (quoting *Lefkowitz v. Turley*, 414 U.S. 70, 77, 94 S. Ct. 316, 322 (1973)). In any proceeding,

> "a witness protected by the privilege may rightfully refuse to answer unless and until he is protected at least against the use of his compelled answers and evidence derived therefrom in any subsequent criminal case in which he is a defendant. . . . Absent such protection, if he is nevertheless compelled to answer, his answers are inadmissible against him in a later criminal prosecution."

Id. (omission in original) (quoting *Lefkowitz*, 414 U.S. at 78, 94 S. Ct. at 322).

In *Murphy*, the respondent Murphy was placed on three years' probation. 465 U.S. at 422, 104 S. Ct. at 1139. The terms of his probation required "that he participate in a treatment program for sexual offenders . . . , report to his probation officer as directed, and be truthful with the probation officer 'in all matters.'" *Id.* Murphy was told that failing to comply with these conditions could result in a probation-revocation hearing. *Id.* During Murphy's probation, a treatment-program counselor told Murphy's

[1] The Fifth Amendment privilege against "self-incrimination is also protected by the Fourteenth Amendment against abridgment by the states." *Malloy v. Hogan*, 378 U.S. 1, 6, 84 S. Ct. 1489, 1492 (1964).

probation officer that, during the course of treatment, Murphy had admitted to committing a rape and murder several years earlier. *Id.* at 423, 104 S. Ct. at 1140. The probation officer determined that the police should have this information, and she wrote to Murphy and asked him to contact her to discuss a treatment plan for the remainder of his probation. *Id.* Murphy arranged to meet with the probation officer, and the officer began the meeting by telling Murphy about the information she had received from the treatment counselor. *Id.* at 423-24, 104 S. Ct. at 1140. During the meeting, Murphy admitted that he committed the rape and murder, and the officer told Murphy that she had a duty to relay the information to the police. *Id.* at 424, 104 S. Ct. at 1140. About one month after the meeting, a state grand jury returned an indictment charging Murphy with first-degree murder. *Id.* at 425, 104 S. Ct. at 1141.

Murphy sought to suppress testimony about his confession on the ground that it was obtained in violation of the Fifth and Fourteenth Amendments. *Id.* The district court found that Murphy was not in custody at the time of the confession and that the confession was neither compelled nor involuntary even though Murphy had not been given a *Miranda* warning. *Id.* The Minnesota Supreme Court reversed on federal constitutional grounds. *State v. Murphy*, 324 N.W.2d 340 (Minn. 1982), *rev'd*, 465 U.S. 420, 104 S. Ct. 1136 (1984). The supreme court recognized that the Fifth Amendment privilege generally is not self-executing but, nevertheless, concluded that, although Murphy was not in custody in the usual sense during the meeting with his probation officer, his failure to claim his Fifth Amendment privilege when he was questioned was not fatal to his suppression claim because of the compulsory nature of the meeting,

because he was under court order to be truthful with the probation officer, and because the officer had substantial reason to believe that his answers were likely to be incriminating. *Id.* at 342, 344. The supreme court concluded that the officer's failure to warn Murphy of his privilege against compelled self-incrimination before she questioned him, when she had already decided to report his answers to the police, barred using Murphy's confession at his trial. *Id.* at 344.

The United States Supreme Court reversed and began its analysis by noting

> that the general obligation to appear and answer questions truthfully did not in itself convert Murphy's otherwise voluntary statements into compelled ones. In that respect, Murphy was in no better position than the ordinary witness at a trial or before a grand jury who is subpoenaed, sworn to tell the truth, and obligated to answer on the pain of contempt, unless he invokes the privilege and shows that he faces a realistic threat of self-incrimination. The answers of such a witness to questions put to him are not compelled within the meaning of the Fifth Amendment unless the witness is required to answer over his valid claim of the privilege.

Murphy, 465 U.S. at 427, 104 S. Ct. at 1142.

The Supreme Court then explained that its earlier opinions make clear that

> "[t]he [Fifth] Amendment speaks of compulsion. It does not preclude a witness from testifying voluntarily in matters which may incriminate him. If, therefore, he desires the protection of the privilege, he must claim it or he will not be considered to have been 'compelled' within the meaning of the Amendment."

Id. (alterations in original) (quoting *United States v. Monia*, 317 U.S. 424, 427, 63 S. Ct. 409, 410 (1943) (footnote omitted)). If a witness "asserts the privilege, he 'may not be required to answer a question if there is some rational basis for believing that it will

incriminate him, at least without *at that time* being assured that neither it nor its fruits may be used against him' in a subsequent criminal proceeding." *Id.* at 429, 104 S. Ct. at 1143 (quoting *Maness v. Meyers*, 419 U.S. 449, 473, 95 S. Ct. 584, 598 (1975) (emphasis in original)). "But if he chooses to answer, his choice is considered to be voluntary since he was free to claim the privilege and would suffer no penalty as the result of his decision to do so." *Id.*

After explaining the general rule that to avoid self-incrimination, a witness must assert the Fifth Amendment privilege rather than answer a question, the Supreme Court acknowledged that there are certain well-defined situations in which applying the rule is inappropriate. *Id.* One of these well-defined situations occurred in what the Supreme Court described as the "penalty" cases, which are cases where "the State not only compelled an individual to appear and testify, but also sought to induce him to forgo the Fifth Amendment privilege by threatening to impose economic or other sanctions 'capable of forcing the self-incrimination which the Amendment forbids.'" *Id.* at 434, 104 S. Ct. at 1146 (quoting *Lefkowitz v. Cunningham*, 431 U.S. 801, 806, 97 S. Ct. 2132, 2136 (1977)). *Garrity v. New Jersey* is one of the "penalty" cases that the Supreme Court expressly addressed in *Murphy*. *Id.* at 434-35, 104 S. Ct. at 1146.

In *Garrity*, several police officers were questioned during an investigation of alleged traffic-ticket fixing. 385 U.S. at 494, 87 S. Ct. at 617. Before being questioned, each officer "was warned (1) that anything he said might be used against him in any state criminal proceeding; (2) that he had the privilege to refuse to answer if the disclosure would tend to incriminate him; but (3) that if he refused to answer he would be subject to

removal from office." *Id.* Also, a New Jersey statute provided that any person holding public employment "who, having been sworn, refuses to testify or to answer any material question upon the ground that his answer may tend to incriminate him or compel him to be a witness against himself" shall be removed from employment. *Id.* n.1.

The police officers answered the questions; no immunity was granted because no immunity statute applied; and, over the officers' objections, some of their answers were used in later prosecutions for conspiracy to obstruct the administration of traffic laws. *Id.* at 495, 87 S. Ct. at 617. The officers were convicted, and the convictions were affirmed over the officers' claim that their answers were coerced because, if they refused to answer, they could lose their positions with the police department. *Id.*, 87 S. Ct. at 617-18.

The Supreme Court determined that "[t]he choice given [the officers] was either to forfeit their jobs or to incriminate themselves," *Id.* at 497, 87 S. Ct. at 618, and that the officers had not waived the privilege against self-incrimination by answering the questions because "[w]here the choice is 'between the rock and the whirlpool,' duress is inherent in deciding to 'waive' one or the other." *Id.* at 498, 87 S. Ct. at 619 (quotation omitted). The court then held that "the protection of the individual under the Fourteenth Amendment against coerced statements prohibits use in subsequent criminal proceedings of statements obtained under threat of removal from office, and that it extends to all, whether they are policemen or other members of our body politic" and reversed the officers' convictions. *Id.* at 500, 87 S. Ct. at 620.

When addressing *Garrity* in *Murphy*, the Supreme Court explained that, in *Garrity*, "the Court held that an individual threatened with discharge from employment for exercising the privilege [against self-incrimination] had not waived it by responding to questions rather than standing on his right to remain silent." 465 U.S. at 434-35, 104 S. Ct. at 1146. The Supreme Court then explained why *Garrity* presented one of the well-defined situations in which it is inappropriate to apply the general rule that to avoid self-incrimination, a witness must assert the Fifth Amendment privilege rather than answer the question and why Murphy was not within this well-defined situation:

> The threat of punishment for reliance on the privilege distinguishes cases of this sort from the ordinary cases in which a witness is merely required to appear and give testimony. A State may require a probationer to appear and discuss matters that affect his probationary status; such a requirement, without more, does not give rise to a self-executing privilege. The result may be different if the questions put to the probationer, however relevant to his probationary status, call for answers that would incriminate him in a pending or later criminal prosecution. There is thus a substantial basis in our cases for concluding that *if the State, either expressly or by implication, asserts that invocation of the privilege would lead to revocation of probation*, it would have created the classic penalty situation, the failure to assert the privilege would be excused, and the probationer's answers would be deemed compelled and inadmissible in a criminal prosecution.
>
> Even so we must inquire whether Murphy's probation conditions merely required him to appear and give testimony about matters relevant to his probationary status or whether they went further and required him to choose between making incriminating statements and jeopardizing his conditional liberty by remaining silent. Because we conclude that Minnesota did not attempt to take the extra, impermissible step, we hold that Murphy's Fifth Amendment privilege was not self-executing.

Id. at 435-36, 104 S. Ct. 1146-47 (footnote omitted) (emphasis added).[2]

Przynski contends that because she subjectively believed that she could be fired for refusing to answer Frizell's questions and her subjective belief was objectively reasonable, her answers were compelled and, therefore, under *Garrity*, they are inadmissible in a criminal prosecution. But in our careful review of the record we have found nothing that distinguishes the situation that Przynski faced in Frizell's office from the ordinary case in which a witness is merely required to appear and give testimony. Przynski was not expressly told that she would be disciplined if she asserted her Fifth Amendment privilege, and, if she harbored a belief that asserting the privilege would lead to discipline, that belief was not reasonable.

Just as Murphy was required to meet with his probation officer and answer questions truthfully, Przynski was required to attend the meeting in Frizell's office and Minneapolis Police Department regulations required that she truthfully answer Frizell's questions. And, as in *Murphy*, these circumstances may have created a sense of compulsion. But, given the district court's finding that there was no express threat of police discipline during the exchange between Przynski and Frizell, there is no basis to conclude that Frizell or the Minneapolis Police Department took the extra, impermissible

[2] In the district court and on appeal, the parties disputed whether an explicit or implicit threat of discipline is needed to invoke protection under *Garrity*. The emphasized language in this quotation indicates that either an express or implied assertion is sufficient. But the assertion must threaten discipline for invoking the Fifth Amendment privilege, not simply for refusing to answer a question.

step of requiring Przynski to choose between making incriminating statements and losing her employment.

In fact, Minneapolis Police Department Policy and Procedure Manual § 2-106, which Przynski urges us to consider on appeal, provides: "All employees shall answer all questions truthfully and fully render material and relevant statements to a competent authority in [a Minneapolis Police Department] investigation when compelled by a representative of the Employer, *consistent with the constitutional rights of the individuals*." (Emphasis added.) This regulation expressly requires an employee to answer questions only to the extent that answering is consistent with the employee's constitutional rights. In other words, if Przynski was asked a question that could reasonably be expected to elicit incriminating evidence, the regulation expressly permitted her to assert the Fifth Amendment privilege and refuse to answer. Consequently, we cannot conclude that Przynski was deterred from asserting her Fifth Amendment privilege by a reasonable fear that asserting the privilege would lead to discipline. Therefore, the privilege was not self-executing, Przynski's failure to assert the privilege is fatal to her suppression claim, and the district court erred in excluding Przynski's answers as compelled within the meaning of the Fifth Amendment and dismissing the complaint.

Reversed and remanded.