

CASE SUMMARIES

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Criminal Law and the Garrity Rule

[People v. Carey](#), No. 1-07-3262 , filed 11/07/08 , Illinois Appellate Court, Sixth Division (appeal from the Circuit Court of Cook County)

CASE SUMMARY:

On May 5, 2006, defendant, Kevin Carey, a Chicago police officer, was arrested and charged with driving under the influence of alcohol (DUI) and aggravated assault, following a traffic altercation while off duty in the City of Chicago. At the police station and during the arrest and booking process, Officer Carey refused to take a breath test. Along comes Sgt. Cannizzo, Chicago P.D. IAD investigator, who arrived at the police station at approximately 7:30 a.m. and was told by the arresting officers that Officer Carey was being processed as a “refusal” to submit to a breath test. The criminal case was terminated by the arresting officers. Sergeant Cannizzo thereafter began his internal investigation, and orders Officer Carey to take a breath after giving the officer Carey his Garrity warnings. The officer complies and submits to a breather test. The State gets a copy of the breath test results and plans to use it in the criminal trial. Prior to trial, defendant filed a motion to bar admission of the results of a breath test. Following a hearing on that motion, the trial court found that the breath test constituted an invalid search and seizure and granted the officer’s motion to bar admission of the test results. The State now appeals that suppression order to the Appellate Court. The Appellate Court reverses the trial court and remands the case back, reversing the motion to dismiss the breath test.

The **arguments** made by the parties to the Appellate Court were as follows:

The State contends that the trial court erred by suppressing the results of defendant’s breath test. The State asserts that the trial court erroneously considered whether defendant consented to the test when, in fact, consent is not a prerequisite to the admissibility of the test results. The State further maintains that defendant’s test results are admissible because the police had probable cause to arrest defendant and because defendant’s breath sample was properly obtained as a search incident to his lawful arrest.

Defendant responds that his breath-test results were properly suppressed because: (1) the results were obtained pursuant to an administrative, rather than criminal, investigation; (2) he did not voluntarily consent to the test; (3) he submitted to the test only under threat of termination; and (4) the State is precluded from using the test results under the doctrine of judicial estoppel.

Unfortunately for the Officer Carey, the Appellate Court ruled in favor of the State, and reversed the Circuit Court’s ruling on the motion to dismiss.

First, let's review Garrity. The Garrity Rule is the Police Officer's right to be free from compulsory self-incrimination. In 1966, in a case known as *Garrity v. New Jersey*, 385 U.S. 493 (1967), the U.S. Supreme Court faced the issue of how the Fifth Amendment's protection against compulsory self-incrimination applied in a law enforcement disciplinary setting.

The basic requirement of the Garrity Rule has been interpreted over the years. In essence, Garrity requires that before a law enforcement agency can question one of its officers in a formal investigation, and if the officer is subject to discipline for refusing to answer those questions, the department must first: 1) order the officer to answer the questions under threat of disciplinary action, 2) ask questions which are specifically, directly and narrowly related to the officers duties or the officers fitness for duty; and 3) advise the officer that the answers to the questions will not be used against the officer in criminal proceedings.

If the police officer then refuses to answer appropriate questions, the officer may be disciplined for insubordination or refusing to obey a lawful direct order. Since the officer's answers cannot be used against the officer in a subsequent criminal proceeding, discipline for refusing to answer appropriate questions is permissible even if the officer is the subject of an active criminal investigation. A statement under Garrity, however, can be used for a variety of other purposes. The statement can be used in a subsequent disciplinary proceeding against the officers, in a civil lawsuit brought against the Department and the officer, and even in criminal proceedings of persons other than the officer.

In *Carey*, the Appellate Court discussed the Garrity case. It said, "In *Garrity*, the United States Supreme Court held that the protections of the fifth and fourteenth amendments against coerced statements prohibit use in subsequent criminal proceedings of statements obtained from police officers under threat of removal from office. *Garrity*, 385 U.S. at 500, 17 L. Ed. 2d at 567, 87 S. Ct. at 620. Defendant asks this court to apply *Garrity* and the fifth amendment privilege against self-incrimination to the present case in order to bar the State from using the test results at his trial for DUI and aggravated assault. However, it is well settled that the fifth amendment applies only to testimonial or communicative evidence and that it does not apply to physical evidence. As the United States Supreme Court has explained, "[t]he distinction which has emerged *** is that the [fifth amendment] privilege is a bar against compelling 'communications' or 'testimony,' but that compulsion which makes the suspect or accused the source of 'real or physical evidence' does not violate it."

The Court also addressed the issue of obtaining evidence without the defendants consent. The court stated "The consent requirement found in section 11-501 (DUI statute) was eliminated by Public Act 82-311 (Pub. Act 82-311, January 1, 1982). See Ill. Rev. Stat. 1981, ch. 95½, par. 11-501; 625 ILCS Ann. 5/11-501. Subsequently, Illinois courts have repeatedly held that consent is not a factor to be considered by the court when determining whether blood-alcohol test results are admissible into evidence and that involuntary tests of bodily substances do not violate any constitutional rights where the search is supported by probable cause, the evidence is of an evanescent nature, and the procedures employed to obtain the substance are reasonable."

Although this case does not support the rights of Officer Carey, there are some things to take into consideration:

Remember, Police Officers have certain rights. Be familiar with the *Uniform Peace Officers' Disciplinary Act, 50 ILCS 725/3.9*, Right to Counsel-Presence of representation of collective bargaining unit. This section of the statute states, "the officer under investigation shall have the right to be represented by counsel of his or her choosing and **may request counsel at any time before or during an interrogation**. When such request for counsel is made, no interrogation shall proceed until reasonable time and opportunities are provided the officer to obtain counsel. If a collective bargaining agreement requires the presence of a representative of the collective bargaining unit during the investigation, such representative shall be present during the interrogation, unless this requirement is waived by the officer being interrogated."

This statute essentially allows that an officer have an attorney present before or during an interview. If the officer is covered by a collective bargaining agreement that requires a union rep to be present during the interview, the officer has the right to consult with him prior to and during the interview. The officer also has the right to ascertain what the charges are against him or her, and may offer mitigating circumstances with regards to the incident.

Internal investigations are always going to occur. People are going to make accusations against the police. The brass will always be watching over you and second-guessing your actions. Departments have an obligation to investigate citizen complaints of officer misconduct. The investigation should be done in a swift and professional manner. The investigation will exonerate the officer or sustain the complaint. Nobody is perfect. The punishment should fit the crime or misconduct. If it doesn't, there is an appeal process with the police and fire boards, the circuit court, and the appellate courts.

Remember, for the most part, you do not have any recourse but to talk and answer the internal investigators' questions. When answering those questions, use your common sense and be truthful. Keep to the point at hand. Don't expound with unnecessary statements. Do not give opinions. Remember Sgt. Friday's quote "just the facts, ma'am". Most important, ask for your union rep or MAP attorney. When at all possible, confer with them before you give an oral or written statement. Keep good notes for yourself. List any possible witnesses to the incident at hand. Don't panic nor fear the questioning. Remember, it's part of the job and it comes with the territory. Know your rights under your collective bargaining agreement and under state statute. Think before you talk and call MAP with any questions or concerns. We are here for you.