Journal of Criminal Law and Criminology

Volume 38 | Issue 6 Article 5

1948

# Dismissal of Police Officers for Exercising Privilege against Self Incrimination

Dale Ellsworth Sherrow

# CRIMINAL LAW CASE NOTES AND COMMENTS

Prepared by students of Northwestern University School of Law, under the direction of student members of the Law School's Legal Publication Board

Peter A. Dammann *Criminal Law Editor*

## Dismissal of Police Officers for Exercising Privilege Against Self Incrimination.

The Civil Service Commission of the City of Chicago recently discharged two police officers[1] for invoking their constitutional privilege of immunity from self incrimination[2] by refusing to sign an immunity waiver[3] when called upon to testify before a grand jury. Subsequently the Superior Court of Cook County quashed the record returned by the commission,[4] and the two cases are now pending on appeal before the Illinois Appellate Court.

The two officers, previously assigned to investigate the killing of one James Ragen, were suspected with three private citizens of having conspired to obtain an unfounded indictment for that murder.[5] When

[1] In the Matter of Thomas E. Connelly, Captain, Department of Police of the City of Chicago, Respondent, Case No. H 4789 (October 16, 1947); In the Matter of William J. Drury, Lieutenant, Department of Police of the City of Chicago, Respondent, Case No. H 4790 (October 16, 1947).

[2] Ill. Const. Art. II, §10: "No person shall be compelled in any criminal case to give evidence against himself, . . . " Ill. Rev. Stat. (1947) c. 38, §734: ". . . a defendant in any criminal case or proceeding shall only at his own request be deemed a competent witness, . . ."

[3] In Cook County, Illinois, the state's attorney's office frequently asks a possible defendant to sign the following standard waiver before he is taken before the grand jury to testify:

> Chicago, Illinois, .....
>
> I, ..... have been advised of my legal rights. I now know I cannot be compelled or forced to give testimony against myself before the Grand Jury or any Court. I now know I do not have to make any statement nor give any answer to any question that may tend to incriminate me. I know now that whatever I say here can be used against me in any criminal proceeding involving the subject matter of my testimony.
>
> No one has forced me, by threats or otherwise, or promised me anything, either directly or indirectly to appear and testify before the Grand Jury.
>
> Of my own free will and with full knowledge of my rights in this matter I am willing to testify before the Grand Jury and I hereby waive all claim of immunity that I may have by reason of my appearing and giving testimony before the grand jury concerning certain matters of which I have knowledge.
>
> .....
>
> Witness to Signature:
>
> .....

[4] Drury v. Hurley, et al., case No. 47-S17720 (1948); Connelly v. Hurley, et al., case No. 47-S-17721 (1948). Both cases were decided by Judge Sbarbaro.

[5] Three witnesses testified before the grand jury on March 17, 1947 that they could identify persons in the truck from which Ragen was shot. At least partly on the strength of their testimony, three men were indicted for that killing. Sometime between March 17th and April 2nd, two of the three witnesses recanted their prior testimony. The three witnesses and the two officers were then suspected of conspiring to obtain the indictment.

called before the grand jury to testify about the alleged conspiracy, the two officers refused to sign an immunity waiver and were excused without questioning.

While expressly recognizing that the officers possessed the constitutional privilege to refuse to testify and that they had exercised the privilege in good faith, the Civil Service Commission of the City of Chicago held that refusal to sign the waiver was in effect a refusal to testify unless immunity be granted them and was, therefore, conduct unbecoming a police officer and cause for dismissal. The Superior Court of Cook County then entertained a motion to quash the record of the commission and issued a writ of certiorari. In an unpublished opinion, the court sustained the officers' motion on the grounds (1) that, while they did refuse to sign an immunity waiver when called before the grand jury, they at no time refused to testify; and (2) that as a matter of law, the refusal of the plaintiffs to waive their constitutional privilege in advance of testifying does not constitute cause for removal.

The Illinois statute regulating discharge of municipal civil service employees[6] provides that an employee may not be removed "except for cause, upon written charges and after an opportunity to be heard in his own defense." While no provision is made for review, and the statutory language might seem to indicate that none was intended,[7] the Illinois courts have held that common law certiorari is proper.[8] It seems that the courts formerly confined their review on certiorari to two questions: Did the administrative agency have jurisdiction, and did it comply with the procedure prescribed by the statute?[9] In recent years this review has apparently grown to include a finding of whether there is evidence fairly tending to support the conclusion of the agency.[10] However, the principal case involves no disputed issue of facts and no objections to the procedure followed by the commission, and the Superior Court found that the officers received a fair and impartial hearing. It

[6] Ill. Rev. Stat. (1947) c. 24½, §51.

[7] *Ibid.* "The finding and decision of such commission or investigating officer or board, when approved by said commission, shall be certified to the appointing officer, *and shall be forthwith enforced by such officer.*" (Italics supplied.)

[8] Kamman v. City of Chicago, 222 Ill. 63, 78 N.E. 16 (1906); People ex rel Fosse v. Allman, 329 Ill. App. 296, 68. N.E. (2d) 203 (1946).

[9] A return to a writ of certiorari would not bring up the evidence nor would an error of judgment be inquired into or corrected; only jurisdiction and whether the commission proceeded legally were subject to review. Doolittle v. Galena and Chicago Union R. Co., 14 Ill. 381 (1853); Chicago and Rock Island R. Co. v. Fell, 22 Ill. 333 (1859); Donahue v. County of Will, 100 Ill. 94 (1881); Joyce v. City of Chicago, 216 Ill. 466, 75 N.E. 184 (1905); Kamman v. City of Chicago, 222 Ill. 63, 78 N.E. 16 (1906); Peoply v. Lindblom, 182 Ill. 241, 55 N.E. 358 (1899) (court cannot review errors of law or errors of application of law to facts on writ of certiorari).

Removal of federal civil service employees by appointing officer is not subject to judicial review providing the removal was in compliance with the procedure prescribed by statute. Eberlein v. U.S., 257 U.S. 82 (1921) (charges subsequently found to be unfounded, but finding by executive officer of "cause" for removal not subject to revision by the courts); Levine v. Farley, 107 F. (2d) 186 (Dist. Ct. D. C. 1939), *cert. denied*, 308 U.S. 622; Asher v. Forrestal, 71 F. Supp. 47D, (Dist. Ct. D. C. 1947).

[10] Funkhouser v. Coffin, 301 Ill. 257, 133 N.E. 649 (1921); Carroll v. Houston, 341 Ill. 531, 173 N.E. 657 (1930). *But cf.* Hine v. Roberts, 309 Ill. 439, 141 N.E. 166 (1923); Hopkins v. Ames, 344 Ill. 527, 176 N.E. 729 (1931). For a more extended discussion of the trend toward a broader scope of review on certiorari, see Note (1946) 14 U. of Chi. L. Rev. 270.

appears that the Superior Court judge recognized *refusal to testify* under the circumstances as "cause" for dismissal, but, contrary to the Commission's decision, held that the *refusal to sign the waiver* did not constitute such "cause."

Since the statute does not define "cause," the legislature, as apparently recognized by the courts, left its definition and application to the discretion of the commission.[11] The principal case would, therefore, appear to present the question of whether the courts should review the commission's finding that refusal to sign a waiver was "cause" for dismissal, and if so, what test should be used on review. Since the civil service commission was established to administer the city's personnel affairs and is charged with the duty to hold hearings to determine whether there is adequate cause for removal, it would seem that the courts should not reverse the commission's finding of "cause" unless the finding is so unrelated to the requirements of the service that it is unreasonable and, therefore, arbitrary.[12] While some may take issue with the commission, its decision is not so unreasonable that it should be reversed by the courts.

On the merits, this case lends itself to simple analysis. On the one hand is the position taken by the civil service commission.[13] It held that the two policemen, though possessing the privilege guaranteed by the constitution, had an overshadowing duty to give their testimony. It was their privilege to remain silent, but having done so they had breached their duties as policemen. This breach of duty, the commission concluded, warrants dismissal. An opposing theory, starting with the truism that to condition the privilege with punishment is to restrict it, reasons that in effect these two officers were deprived of the immunity from self incrimination guaranteed them by the constitution. While the Superior Court apparently did not reject the commission's theory, it

---

[11] Joyce v. City of Chicago, 216 Ill. 466, 75 N.E. 184 (1905); Kamman v. The City of Chicago, 222 Ill. 63, 78 N.E. 16 (1906). *See* Hopkins v. Ames, 344 Ill. 527, 532, 176 N.E. 729, 731 (1931).

In two cases, the Illinois Appellate Court apparently acknowledged the rule that definition of "cause" lies within the commission's discretion, but circumvented it by considering the "cause" found by the commission only as evidence indicating misconduct. Thus, although the facts were not in issue, the court enabled itself to review the finding of the commission without expressly reversing a finding of "cause." Campbell v. Civil Service Commission of Springfield, 290 Ill. App. 105, 8 N.E. (2d) 49 (1937); Cartan v. Gregory, 329 Ill. App. 307, 68 N.E. (2d) 193 (1946).

[12] *See* Murphy v. Houston, 250 Ill. App. 385, 394 (1928).

[13] In the Matter of Thomas E. Connelly, Respondent, case No. H 4789 (October 16, 1947), cited *supra* note 1:

"If the respondent had resigned in advance it would have been proper for him to refuse as he did to waive immunity from criminal prosecution. A police officer always has that choice. He may forego his constitutional privilege and keep his job, or he may resign, and, being thus relieved of his duty to the public as a police officer, he may exercise his constitutional privilege. He may not do both.

"Police officers charged with the investigation of crime and employed, paid and relied upon by the public to aid both in its detection and proof, should not, in criminal cases, hide behind the cloak of constitutional privilege either by refusing to testify or by claiming in advance immunity from prosecution as to matters as to which they are called to testify, through their refusal to sign immunity waivers before so testifying.

"Police officers should at all times so conduct themselves that they may have no hesitancy in appearing before a grand jury in any criminal case without claiming immunity from criminal prosecution."

drew a distinction between refusing to testify and refusing to sign an immunity waiver and reversed the commission's decision on that ground.

There is nothing startling in the conception that a public servant's right to retain his employment should depend upon his willingness to forego his constitutional rights to the extent that the exercise of such rights may be inconsistent with the performance of his duties.[14] Thus, in *McAuliffe v. City of New Bedford*,[15] the removal of a police officer was affirmed although the petitioner argued that his discharge from the force for actively engaging in politics invaded his right to express his political opinions. The late Justice Holmes, writing for the Supreme Judicial Court of Massachusetts, said: "The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman."[16]

The few cases in point[17] seem to take the position that police officers are necessary exceptions to the rule that the privilege is positive and unequivocal, subject to no condition. According to these cases, police officers are employed to detect crime, to prevent it where possible, and to bring criminals to punishment. They hold that to preserve one's privilege of being a policeman—an agent of the city—one must express his willingness to expose all crimes within his knowledge, or his "agency" will be terminated. To take the example used by the California District Court of Appeal in *Christal v. Police Commission of San Francisco*:[18]

---

[14] Executive Order 9835, 12 Fed. Reg. 1935 (1947) (President's Loyalty Order); McAuliffe v. City of New Bedford, 155 Mass. 216, 29 N.E. 517 (1892) (police officer discharged for taking active part in politics); Perez v. Board of Police Commissioner of Los Angeles, 68 Cal. App. (2d) 638, 178 P. (2d) 537 (1947) (police officers restricted from joining labor unions). *But cf.* Bomar v. Keyes, 162 F. (2d) 136 (C.C.A. 2d, 1947), *cert. denied*, 16 Law Week 3162 (1947) (school teacher served on federal grand jury instead of claiming exemption; discharge for absenteeism held infringement of Civil Rights Act); Note (1948) 43 Ill. L. Rev. ———; Note (1947) 47 Col. L. Rev. 1082; Note (1947) 60 Harv. L. Rev. 1346.

[15] 155 Mass. 216, 29 N.E. 517 (1892).

[16] *Id.* at 220, 29 N.E. at 517.

[17] Christal v. Police Commission of San Francisco, 33 Cal. App. (2d) 564, 92 P. (2d) 416 (1939) (police officer refused to testify before grand jury). *Accord*, Souder v. City of Philadelphia, 305 Pa. 1, 156 Atl. 245, 77 A.L.R. 610 (1931). Souder's personal income far exceeded his yearly salary as a police captain. When testifying before the grand jury and before the commission, he failed to give an explanation that in any degree removed the suspicion that was upon him. The court held that not only was it his duty to protect the citizens of the municipality, but also, especially in light of his high position on the force, to hold himself above suspicion; his failure to account for the source of his income was in itself conduct unbecoming an officer.

8 Wigmore, Evidence (3rd ed. 1940) §2251. In discussing the significance of the privilege, Wigmore points out that it originated as a restriction on the inquisitorial powers of the ecclesiastical courts, and that its restriction of inquisitions and stimulation of the prosecution to a full and fair search for evidence procurable by their own exertions are its principal justifications in our legal system. Cautioning that the privilege works more directly to protect the guilty than it does to protect the innocent, he warns that in preserving the privilege, one must not give it more than its due significance. Wigmore, in referring to the specific problem of the principal case, quotes dicta by Judge Lassing in Scholl v. Bell, 125 Ky. 750, 102 S.W. 248 (1907), as the correct moral attitude toward the privilege. Judge Lassing, referring to police who refused to testify in reference to an election fraud, pointed out that the privilege is a rule of necessity beyond which it should not be extended and that its use should not be considered as affording the witness a certificate of good character.

[18] 33 Cal. App. (2d) 564, 92 P. (2d) 416 (1939), cited *supra* note 17.

One of the most cherished rights guaranteed by our constitution is the right to freedom of speech. A police officer, relying upon his right of freedom of speech, might warn the proprietors of an illegal establishment of an impending police raid, but such conduct would clearly constitute cause for dismissal. A claim that such dismissal violated the officer's right to freedom of speech is obviously untenable. From this it would seem that when the police officers in the principal case refused to expose all they knew regarding criminal activities, they failed to perform the very function for which they were commissioned.

In *re Holland*[19] apparently is the only Illinois case dealing with a similar problem. The respondent, at the time a judge of the Municipal Court of the City of Chicago, exercised his privilege from self incrimination and refused to sign an immunity waiver when called before the grand jury. The Chicago Bar Association commenced disbarment proceedings. In distinguishing the cases cited above involving policemen, the Illinois Supreme Court emphasized that the respondent could be tried *only as a lawyer*, and that while a lawyer is *generally* obligated to assist in the investigation of crime, he is not *specifically* charged as is a policeman. The court concluded that "unless the circumstances surrounding him or duties placed upon him are of such character as to require, in honesty and good conscience, that he waive the right," a person is not guilty of wrong should he claim it.[20] It is the contention of the civil service commission in the principal case that the duties of police officers clearly place them within the exception for which the Illinois Supreme Court provided.[21]

The Superior Court did not take issue with the holding in the cases cited by the commission. Instead, after emphasizing that the officers *"at no time refused to testify before the grand jury,"* and that they testified before the commission concerning the conspiracy charge,[22] the court carefully attempted to distinguish the cases on the grounds that the two officers only refused to sign an immunity waiver. The court's opinion raises two questions with which it did not specifically deal:

[19] 377 Ill. 346, 36 N.E. (2d) 543 (1941).

[20] *Id.* at 357, 36 N.E. (2d) at 548.

Conceding that the respondent could not be tried as a judge but only in his capacity as a lawyer, it could be argued that his position on the bench imposed upon him, as a lawyer, a stricter code of duty which would require him to waive his immunity. Surely we can expect as high a standard of conduct from our judges as we do from the policeman on the street corners. Are the distinctions in In re *Holland* valid?

[21] *In re* Grae, 282 N.Y. 428, 26 N.E. (2d) 963 (1940) holds that the exercise of the privilege by a lawyer is not grounds for disciplinary action. While Canteline v. McClellen, 282 N.Y. 166, 25 N.E. (2d) 972 (1940) was decided on Art. I, section 6, of the New York constitution (as amended in 1939), it cites with approval Christal v. Police Commission of San Francisco, 33 Cal. App. (2d) 564, 92 P. (2d) 416 (1939), cited *supra* note 17. Do these two New York cases indicate a distinction in that state between cases involving lawyers and cases involving policemen?

[22] The commission found that although the officers testified before the grand jury at an earlier investigation of the Ragen killing, they refused to testify before that body when it was investigating the alleged conspiracy, and that the officers breached their duty at that time. It has been held that a change of mind after discharge proceedings have commenced does not purge a policeman of his errors. Roche v. Police Commission of San Francisco, 33 Cal. App. (2d) 574, 92 P. (2d) 422 (1939) (police officer expressed desire to testify before grand jury after police commission hearing on charges very similar to the charges in the principal case).

(1) Did the officers actually refuse to testify when they refused to sign the immunity waiver? (2) If the answer is no, is there a valid distinction between refusal to testify and refusal to sign a waiver under the circumstances in the principal case?

(1) Could the police officers have quashed a resulting indictment if the state's attorney's office had gone one step farther and questioned the officers before the grand jury without the benefit of a signed waiver? If the answer to this question is yes, it is obvious that the police officers stood on their immunity from self incrimination and refused to make their testimony available to the state's attorney. It is generally conceded that the privilege from self incrimination applies to grand jury proceedings.[23] It is usually stated that the privilege is not a prohibition of inquiry and that it only gives a witness an option to refuse to answer when the answer would tend to incriminate him. This option is personal and must be claimed by the person entitled to the protection from self incrimination. If a witness answers a question, he is considered to have waived his privilege.[24] However, many jurisdictions have made a distinction between general witnesses and persons against whom an investigation is actually directed. One group of jurisdictions follows the rule that if the person testifying is a mere witness, he must claim his privilege as to individual questions, whereas, if he is in fact the party proceeded against (even though the investigation be ostensibly general), he cannot be called before the grand jury and questioned. If he answers the questions put to him before the grand jury, any resulting indictment is invalid even though he claimed no privilege.[25] This rule applies even though the accused was aware of his privilege[26] and even though the accused's testimony was not the only evidence to support the indictment.[27] The opposing group of jurisdictions does not make this distinction, but treats the person against whom the investigation is directed in the same manner as any witness and considers him to have waived the immunity if he answers an incriminating question, whether or not he was aware of his privilege.[28]

In *Boone v. People*[29] the Illinois Supreme Court declared that the grand jury constitutes a part of the court, and that witnesses sworn before that body are sworn in open court, although not necessarily in the presence of the judge. The defendant in that case was taken from jail and examined as a witness before the grand jury. Refusing to consider whether the defendant's testimony influenced the grand jury's finding, the court held the questioning before the grand jury grounds to quash the indictment. In arriving at its conclusion, the court laid great

---

[23] Counselman v. Hitchcock, 142 U.S. 547 (1892); People v. Spain, 307 Ill. 382, 138 N.E. 614 (1923); and 8 Wigmore, Evidence (3rd ed. 1940) §2252.

[24] 8 Wigmore, *op. cit. supra* note 23, §2268.

[25] State v. Froiseth, 16 Minn. 296 (Gil 260) (1870); People v. Bermel, 71 Misc. 356, 128 N.Y.S. 524 (1911); State v. Smith, 56 S.D. 233, 228 N.W. 240 (1920).

[26] State v. Naughton, 221 Mo. 398, 120 S.W. 53 (1909); People v. Singer, 18 Abb. N.C. 96 (N.Y. 1886); People v. Seaman, 174 Misc. 729, 22 N.Y.S. (2d) 917 (1940) (defendant exercised privilege in response to one question).

[27] Boone v. People, 148 Ill. 440, 36 N.E. 99 (1894); State v. Gardiner, 88 Minn. 120, 92 N.W. 529 (1902).

[28] Powers v. United States, 223 U.S. 303 (1912); People v. Lauder, 82 Mich. 109, 46 N.W. 956 (1890); Burke v. State, 104 Ohio St. 220, 135 N.E. 644 (1922).

[29] 148 Ill. 440, 36 N.E. 99 (1894), cited *supra* note 27.

emphasis on the statutory provision[30] that a defendant in any criminal case or proceeding shall only at his own request be deemed a competent witness. *Boone v. People* would seem to indicate that the Illinois courts would quash all resulting indictments if the person proceeded against answered questions before a grand jury.[31] At least it should justify the practice of the Cook County state's attorney's office of not taking a party proceeded against before the grand jury unless he signs an immunity waiver. In light of the ruling in the *Boone* case, refusal to express willingness to testify before the grand jury by signing a waiver is probably, for all practical purposes, refusal to testify before that body.

(2) But even if one assumes that the Illinois courts would treat the person against whom the investigation is directed in the same manner as any witness called to testify before the grand jury, is there a valid distinction between refusal to testify and refusal to sign an immunity waiver? This distinction drawn by the Superior Court leaves one faced with the rule that a police officer will not be discharged for refusing to sign an immunity waiver before he is taken before the grand jury, but if he invokes his constitutional immunity in response to any question asked him before that body, he is subject to dismissal. This distinction between refusing to testify and refusing to sign an immunity waiver before appearing before the grand jury is unimpressive. Refusal to sign an immunity waiver can mean only one thing—the person refusing to sign is unwilling to expose all he knows about certain alleged criminal activities because the exposure will tend to incriminate him. That is the only grounds upon which this constitutional privilege can be invoked. Refusal to sign the waiver would seem to be just as much a breach of duty as an actual refusal to testify.

DALE ELLSWORTH SHERROW

---

[30] Ill. Rev. Stat. (1947) c. 38, §734.

[31] The defendant, Boone, was taken from jail before the grand jury. It does not appear that he was advised of his constitutional rights, and the court also found an insufficiency of evidence. These are factual distinctions from the principal case. However, considering the express wording of the statute (Ill. Rev. Stat. (1947) c. 38, §734, cited *supra* note 2) and the court's ruling that a witness before the grand jury is a witness in open court, all indications are that Illinois courts would make no distinction in the cases where the defendant was aware of his rights. Note, however, that, in spite of similar circumstances, the federal courts have not arrived at this rule. In Counselman v. Hitchcock, 142 U.S. 547 (1892) the court ruled that a grand jury hearing was a "criminal case" within the meaning of the constitution. The Counselman case and 20 Stat. 30 (1878), 28 U.S.C., §632 (1928) (a defendant is a competent witness "at his own request, but not otherwise") were on the records when the Supreme Court decided Powers v. U.S., 233 U.S. 303 (1912) cited *supra* note 28.