

Court of Appeals No. 39042-6-II
Thurston County Superior Court 08-2-01147-7

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

JOSEPH R. AMEDSON, individually and with respect
to his licensure as a Pharmacist, No. PH00011607,

APPELLANT,

v.

WASHINGTON STATE BOARD OF PHARMACY, a Board as
established by law under RCW 18.64-001;
WASHINGTON STATE DEPARTMENT OF HEALTH, an admin-
istrative agency of the State of Washington;
ADJUDICATIVE SERVICE UNIT, a unit of the Wash-
ington State Department of Health; and
ARTHUR E. DeBUSSCHERE, Health Law Judge, Presid-
ing Officer, Ajudicative Service Unit, Department
of Health,

RESPONDENTS.

REPLY BRIEF OF APPELLANT

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ORIGINAL

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REPLY

Immunity. Involuntariness. Interrogation. The three "I's" at the heart of Amedson's appeal and the three "I's" that are most significant legal issues for this Court to resolve as such apply to professional license disciplinary proceedings.

Amedson was expressly granted immunity from both federal prosecution¹ and Board disciplinary action² in exchange for his full cooperation and assistance during the federal and State investigation of A-Z Pharmacy.³ That binding immunity agreements may be informal and oral is well-established in the law. Immunity agreements are considered contractual in nature and are subject to the rules of contract. State v. Bryant, 146 Wn.2d 90, 42

¹ This fact was independently confirmed in a personal conversation between J. Timothy Hinckley, Special Agent HHS/OIG, and Amedson's counsel on July 19, 2007. ARBN 373, ¶ 5.

² Expressly promised directly to Amedson by Board Investigator Stanley Jeppesen at their first meeting regarding information Amedson had regarding A-Z Pharmacy business practices in October 2004. ARBN 374 - 375, ¶ 9.

³ Amedson has competent first hand knowledge as to the specific agreement, terms and conditions relating to the immunity given by the Board sufficient and adequate to create a binding oral contract. See, e.g., ARBN 374 - 375, ¶ 9.

P.3d 1278 (2002).⁴ Accordingly, agreements for immunity may be oral and never reduced to a writing.⁵ Courts have also noted that public policy and the ends of justice mandate recognition of immunity agreements because a defendant is acting in good faith and gives up fundamental and valuable rights in the bargain.⁶ In general, "*fundamental fairness* and public confidence in government officials require that the government be held to meticulous standards of both promise and performance. . . . Therefore, the principle of *fundamental fairness* may require that the government perform a promise made by an agent who exceeded his actual authority. . . . *Fundamental fairness* has been applied

⁴ In this respect, agreements for immunity and plea bargains are treated similarly by Washington courts as contracts, and the law imposes upon the State an implied promise to act in good faith. State v. Sledge, 133 Wn.2d 828, 839, 947 P.2d 1199 (1997). "Generally speaking, a cooperation-immunity agreement is contractual in nature and subject to contract law standards." United States v. Irvine, 756 F.2d 708, 710 (9th Cir. 1985).

⁵ United States v. Nersesian, 824 F.2d 1294, 1320 (2d Cir. 1987); United States v. Heatley, 39 F. Supp. 2d 287, 299 (S.D.N.Y. 1998).

⁶ State v. Hingle, 139 So.2d 205 (La. 1961); Closson v. State, 812 P.2d 966 (Alaska 1991).

to informal immunity agreements. . . . [T]he government must scrupulously perform its end of the bargain." Bryant, 146 Wn.2d at 104-105. Due process not only "requires that the government adhere to the terms of any plea bargain or immunity agreement it makes," United States v. Pelletier, 898 F.2d 297, 302 (2d Cir. 1990), but also requires courts to construe agreements strictly against the government in recognition of its superior bargaining power and to "presume that both parties to the . . . agreements contemplated that all promises made were legal." United States v. Ready, 82 F.3d 551, 559 (2d Cir. 1996). These principles apply very clearly and fundamentally to the facts of our case.⁷ Because the State breached its immunity ag-

⁷ It absolutely belies belief and all common sense that if in fact Jeppesen told Amedson "that the Board of Pharmacy had begun an investigation against him regarding the prescription fraud," Amedson would nevertheless knowingly, intelligently and voluntarily waive his rights and privileges and (1) not even bother to consult with an attorney, and (2) sign an admission, statement or confession that would be used against him by the Board in this quasi-criminal professional license disciplinary action to revoke his license, terminate his livelihood, and impose substantial monetary penalties against him. ARBN 375, ¶ 10. The true fact is that Jeppesen never told Amedson that he was the target of a Board investigation because had he done so, Amedson would have ceased all
(continued...)

reement with Amedson and moreover obtained statements from Amedson used against him as a confession to revoke his professional pharmacist license, it was clear error of law for the Presiding Officer to deny Amedson's Motion to Dismiss, ARBN 622 - 632, and Motion to Suppress. ARBN 429 - 437. And further casting an ominous shadow over our case is the fact that the federal government has thrown up an impenetrable roadblock and has flatly refused several times⁸ to make Hinckley available for either deposition or as a witness at any Board hearing under the HHS' Touhy regulations.⁹ And, as a final nail in his rights driven by the Board, Amedson was prohibited from presenting at any disciplinary

⁷(...continued)

cooperation then and there. ARBN 376, ¶ 11. Not having been advised that he was the target of a Board investigation, Amedson continued his full cooperation until he was served with the Board's Complaint (filed June 5, 2007); as such constituted a material breach of the immunity agreement, Amedson thereupon ceased all cooperation and fully invoked his Fifth Amendment rights and privileges. ARBN 103 - 112; ARBN 373 - 374, ¶ 6.

⁸ ARBN 374, ¶ 8.

⁹ See 45 CFR § 2.4(a), et seq.; 5 U.S.C. § 301; United States ex rel. Touhy v. Ragen, 340 U.S. 462, 468, 71 S. Ct. 416, 95 L. Ed. 417 (1951).

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hearing his testimony and evidence regarding immunity from Board action both under express grant and pursuant to the Whistleblower statute. ARBN 742, 744. As an issue of material fact for the Board's determination,¹⁰ Amedson was nevertheless prohibited from presenting at any hearing in this quasi-criminal action his own evidence in his own defense in violation of U.S. Const. Amend. VI and Wash. Const. art. I, § 22.

The March 16, 2006 and March 21, 2006 Statements elicited by the federal and State government from Amedson were obtained during the Board's conduct of its secret investigation of him as its target in violation of the clear mandate of RCW 18.130.095(2)(a). ARBN 376, ¶ 11. These Statements were obtained from Amedson without knowledge that he was now the subject of a targeted investigation and during the period in which his continued cooperation and assistance in the A-Z Pharmacy investigation by the federal and State governments was compelled as an essential element and condition of

¹⁰ ARBN 627 (Prehearing Order No. 7; Findings of Fact ¶ 3.6).

their grants of immunity to him.¹¹ As a condition of a grant of immunity and rendered only under compulsion of compliance, any and all of Amedson's statements were involuntary. ARBN 377, ¶ 13.¹² It is a general rule that one who gives a statement amounting to a confession under a promise of immunity is entitled to the exclusion of any use of that testimony against him. Kastigar v. United States, 406 U.S. 441, 92 S. Ct. 1653, 32 L. Ed. 2d 212 (1972).¹³ Such promises have been shown to have a definite coercive and overbearing affect upon an individual's free will to overcome constitutional protections against self-incrimination. United

¹¹ ARBN 374 - 375, ¶ 9.

¹² These purported written statements were used against him as confessions. ARBN 119. "The admissibility of a confession depends upon its free and voluntary nature; that is, it must not be . . . obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence." State v. Setzer, 20 Wn. App. 46, 49, 579 P.2d 957 (1978) (promise of immunity and assurances rendered confession involuntary).

¹³ When a defendant puts the voluntariness of any statement into issue, be it an admission or a confession, that statement may not be used for any purpose whatsoever against him until it is first held to be voluntary. Gaertner v. State, 150 N.W.2d 370 (Wis. 1967). Voluntariness of a statement must first be established even where such is used only for purposes of impeachment. People v. Tate, 197 N.E.2d 26 (1964).

States v. Conley, 859 F. Supp. 830, 836-37 (W.D.Pa. 1994); United States v. Walton, 10 F.3d 1024, 1029-30 (3d Cir. 1993); United States v. Swint, 15 F.3d 286 (3d Cir. 1994) (in which the State and federal authorities used a "bait-and-switch" technique to obtain the incriminating statements).¹⁴ Evidence of guilt obtained from a person under a governmental promise of immunity must be excluded under the Self-Incrimination Clause of the Fifth Amendment, because a confession must be voluntary and not "obtained by any direct or implied promises, however slight." Shotwell Manufacturing Company v. United States, 371 U.S. 341, 347, 9 L. Ed. 2d 357, 83 S. Ct. 448 (1963). The rationale is most obvious, as the basic purpose of a grant of immunity is to permit the compulsion of testimony which otherwise

¹⁴ Although statements and confessions call into play the Fifth Amendment privilege against self-incrimination, the requirement of voluntariness actually stems from the application of the Fourteenth Amendment's due process clause to the States. Setzer, 20 Wn. App. at 49 (citing Malloy v. Hogan, 378 U.S. 1, 84 S. Ct. 1489, 12 L. Ed. 2d 653 (1964). Schneckloth v. Bustamonte, 412 U.S. 218, 223, 93 S. Ct. 2041, 36 L. Ed. 2d 854 (1973) ("The most extensive judicial exposition of the meaning of 'voluntariness' has been developed in those cases in which the Court has had to determine the 'voluntariness' of a defendant's confession for purposes of the Fourteenth Amendment.").

would be privileged by the Fifth Amendment. United States v. Tramunti, 500 F.2d 1334 (2d Cir. 1974).¹⁵ And here there was positive misleading of Amedson by the federal and State governments by the express notice given to him in bold print that such statements were solely "regarding AZ Pharmacy and business practices." ARBN 121 - 122.¹⁶ Nevertheless, Amedson was prohibited from presenting his own testimony surrounding the circumstances of the March 16 and March 21, 2006 written statements and his defense as to the involuntariness of those purported statements that were used against him at the Board hearing as his alleged confession of unprofessional conduct. ARBN 744.¹⁷ Such use as

¹⁵ As so succinctly described by one appellate court, "if induced by an express or implied promise of immunity, defendant's admissions could be deemed involuntary, and thus inadmissible, under both the state and federal constitutions." State v. Kahut, 692 P.2d 138, 139-40 (Or.App. 1984).

¹⁶ Belying belief in light of such express purpose is the Department's assertion that Amedson was specifically advised that he was personally the subject of a Board investigation. Brief of Respondent, at p. 5. Had Amedson truly been so informed, the omission of such "fact" from these written statements is inexplicable and is tantamount to fraud.

¹⁷ At the Board hearing conducted in Amedson's absence because of the gag order, the Department's counsel advised the Board
(continued...)

primary evidence to adjudge him guilty of unprofessional conduct notwithstanding the grant of immunity and involuntariness of these statements is contrary to law¹⁸ and violates Amedson's Fifth Amendment and Due Process rights and privileges.¹⁹

¹⁷(...continued)

that "these statements against interest can be used against Mr. Amedson, even though he chooses to now deny them and claim other protections." ARBN 866 - 867. See also ARBN 901 (Department counsel's closing remarks drawing attention to Amedson's signed statements and admitting to prescription fraud).

¹⁸ The exclusionary rule applies for violations of not only the Fourth Amendment but also as to illegally obtained evidence in violation of the Fifth Amendment and the coercion of involuntary statements. State v. Wethered, 110 Wn.2d 466, 475, 755 P.2d 797 (1988); State v. Stone, 56 Wn. App. 153, 162, 782 P.2d 1093 (1989).

¹⁹ "An out-of-court statement made by the defendant while not in custody can be as damaging, or more so, than one made while in custody. A statement involuntarily made can in no way be held to be the statement of the person allegedly making the same. . . . To hold otherwise would destroy the guarantees of due process of law which protect an accused from the use of confessions, statements or admissions obtained by force, coercion or violence." People v. King, 316 N.E.2d 642, 646 (Ill.App. 1974), remanded for hearing, 335 N.E.2d 417 (Ill. 1975). In this context it is most interesting to note that the State of Maryland, based on the common law concern for fairness as well as State and federal constitutional requirements, mandates that even in a noncustodial setting a defendant's statement is not voluntary unless it was elicited in conformance with the mandates of Miranda. Hof v. State, 655 A.2d 370 (Md. 1995). Such extra precautionary measures ensure that any statement to be voluntary and admissible against the declarant is truly a product of that person's rational intellect and free will, rather than the product of the coercive barnacles of promises made. Hoey v. State, 536 A.2d 622 (Md. 1988). Hence, the cogent rationale underlying the mandates of RCW 18.130.095(2) (a).

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As the defendant in a quasi-criminal action,²⁰ Amedson cannot be subjected to compulsory interrogation by deposition or by being called by the State as a witness in its case-in-chief;²¹ moreover, he is entitled to such constitutional privileges and rights free from any and all adverse consequences.²² That Boyd²³ and Spevack²⁴ still reign supreme

²⁰ A professional license disciplinary proceeding is a quasi-criminal action, Washington Medical Disciplinary Board v. Johnston, 99 Wn.2d 466, 474, 663 P.2d 457 (1983); and as observed by the Washington Supreme Court "[a professional license revocation proceeding's] consequence is unavoidably punitive, despite the fact that it is not designed entirely for that purpose." In re Revocation of License of Kindschi, 52 Wn.2d 8, 10-11, 319 P.2d 824 (1958). "Johnston and Kindschi are unquestionably the law of this jurisdiction." Nguyen v. Department of Health Medical Quality Assurance Commission, 144 Wn.2d 516, 528, 29 P.3d 689 (2001).

²¹ "The Fourteenth Amendment secures against state invasion the same privilege that the Fifth Amendment guarantees against federal infringement -- the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty . . . for such silence." Malloy v. Hogan, 378 U.S. 1, 8, 84 S. Ct. 1489, 12 L. Ed. 2d 653 (1964).

²² Cases from other jurisdictions holding to this same fundamental treatment of professional license disciplinary cases as quasi-criminal actions subject to the Fifth Amendment protections are most compelling and persuasive. See, e.g., State ex rel. Vining v. Florida Real Estate Commission, 281 So.2d 487 (Fla. 1973) (real estate); State Bar of Michigan v. Woll, 194 N.W.2d 835 (Mich. 1972) (attorney).

²³ Boyd v. United States, 116 U.S. 616, 6 S. Ct. 524, 29 L. Ed. 746 (1886). Under the long-standing ruling of Boyd, the Self-Incrimination Clause of the Fifth Amendment applies in (continued...)

for the application of the Fifth Amendment privilege against self-incrimination and right to remain silent²⁵ in a quasi-criminal action is unquestioned and deserves the utmost judicial protection.

It may be said that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. . . . It is the duty of courts to be watchful for the constitutional rights of the citizens, and against any stealthy encroachments thereon.

Spevack, 385 U.S. at 515 (quoting Boyd, 116 U.S. at 635). It was clear error of law for the Presiding Officer to deny Amedson's Motion to Quash. ARBN

²³ (...continued)
quasi-criminal cases with equal force as applied to defendants in criminal cases. 116 U.S. at 634.

²⁴ Spevack v. Klein, 385 U.S. 511, 87 S. Ct. 625, 17 L. Ed. 2d 574 (1967). "[T]hreat of disbarment and the loss of professional standing, professional reputation, and of livelihood are powerful forms of compulsion." 385 U.S. at 516. Fines or imprisonment are unnecessary to invoke the protection of the Fifth Amendment. 385 U.S. at 515.

²⁵ Where the Fifth Amendment applies, the Supreme Court has admonished that sanctions that would make use of the privilege "costly" may not be imposed, because that would effectively destroy the right to remain silent. Spevack, 385 U.S. at 515.

199 - 209, ARBN 380 - 382. And contrary to the Respondents' contentions,²⁶ neither Hayden²⁷ nor Fisher²⁸ diminish Amedson's absolute and unfettered Fifth Amendment right to remain silent and privilege against self-incrimination one iota as applied here. The Board's Presiding Officer refusing to honor Amedson's invocation of his Fifth Amendment right to remain silent and privilege against self-incrimination in this quasi-criminal action, and sanctioning Amedson for such invocation with testimonial and evidentiary prohibitions, clearly violated Amedson's constitutional rights and invalidates the Board's Final Order revoking Amed-

²⁶ Brief of Respondent, at p. 25 n.18.

²⁷ Warden, Maryland Penitentiary v. Hayden, 387 U.S. 294, 87 S. Ct. 1642, 18 L. Ed. 2d 782 (1967). The Supreme Court simply noted that "the items of clothing involved in this case are not 'testimonial' or 'communicative' in nature, and their introduction therefore did not compel respondent to become a witness against himself in violation of the Fifth Amendment." 387 U.S. at 302 - 303.

²⁸ Fisher v. United States, 425 U.S. 391, 96 S. Ct. 1569, 48 L. Ed. 2d 39 (1976). The Supreme Court simply observed that "whether the Fifth Amendment would shield the taxpayer from producing his own tax records in his possession is a question not involved here; for the papers demanded here are not his 'private papers'" 425 U.S. at 414.

son's pharmacist license.²⁹ RCW 34.05.570(3)(a), -
(3)(d), and -(3)(h) (see RCW 34.05.020; WAC 246-11-
480(3)(b); WAC 10-08-220).

CONCLUSIONS

Respondents herein fervently desire that the Court cast a blind eye on the fundamental legal truth that the Board's professional license disciplinary proceeding against Amedson is a quasi-criminal action as to which Amedson is afforded full and absolute Fifth Amendment rights and privileges. Respondents wish that the Court consider the underlying proceeding nothing other than a civil case with Amedson accorded nothing more than but mere civil witness privileges available by Due Process under the Fifth Amendment.³⁰ But the Court should not and cannot do so; for to cast a blind eye here

²⁹ It was clear error of law for the Presiding Officer to order sanctions, ARBN 586 - 592, and to dictate the conduct of the hearing removing issues from consideration and imposing sanctions. ARBN 736 - 751. The Board's Final Order is fatally flawed by the flagrant abuse and violation of Amedson's constitutional rights and privileges. ARBN 785 - 800.

³⁰ The government wishes nothing more than basic notice with an opportunity to be heard, subject most grudgingly to an elevated standard of proof. Brief of Respondent, at pp. 29 - 30.

and allow Amedson to be severely sanctioned for invoking his Fifth Amendment right to remain silent and privilege against self-incrimination undermines these most fundamental constitutional protections and puts all professional license holders at substantial risk of deprivation not as a result of a fair hearing and the use of honestly-derived evidence, but by the compulsion of being forced to testify against oneself and provide the incriminating evidence of unprofessional conduct from his own mouth. The Constitution requires "that the government seeking to punish an individual produce the evidence against him by its own independent labors, rather than by the cruel, simple expedient of compelling it from his own mouth." Miranda v. Arizona, 384 U.S. 436, 460, 16 L. Ed. 2d 694, 86 S. Ct. 1602 (1966).³¹ Not unless and until Amedson's constitu-

³¹ "And any compulsory discovery by extorting the party's oath . . . to convict him of crime, or forfeit his property, is contrary to the principles of free government. It is abhorrent to the instincts of an Englishman; it is abhorrent to the instincts of an American. It may suit the purposes of despotic power; but it cannot abide the pure atmosphere of political liberty and personal freedom." Boyd, 116 U.S. at 631-32. Contrary to the Department's contentions, Brief of Respondent, at pp. 31 - 33, the mini-Miranda mandatory advise-
(continued...)

tional rights and privileges under the Fifth Amendment are fully enforced will Amedson be entitled to receive a fair hearing by the Board and a just result as to the charges of unprofessional conduct levied against him.³²

Respectfully, this Court must vacate the Board's Final Order and remand this matter to the Board for further proceedings that fully acknowledge and protect Amedson's constitutional rights and privileges as invoked and as asserted herein.

DATED this 24th day of July, 2009.

Respectfully submitted,

RHYS A. STERLING, P.E., J.D.



Rhys A. Sterling, WSBA #13846
Attorney for Appellant Joseph R.
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³¹(...continued)

ments are not contingent on the one under investigation being in custody. RCW 18.130.095(2)(a).

³² Amedson's refusal to attend the Board hearing was done in utmost respect for the federal and State Constitution protections afforded him that were summarily trampled and destroyed by the Board and its Presiding Officer through the series of challenged Prehearing Orders; as one must firmly stand on the Constitution and bear unjust consequences in order ultimately to secure justice and protect his rights. ARBN 756 - 780.

Court of Appeals No. 39042-6-II
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of Health,

RESPONDENTS.

DECLARATION OF SERVICE

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ORIGINAL

STATE OF WASHINGTON)
) ss. DECLARATION OF RHYS A.
) STERLING
COUNTY OF KING)

RHYS A. STERLING hereby says and states under penalty of perjury:

1. I am over the age of 21 and I am competent to testify regarding the matters herein described. I make this declaration on my own personal knowledge.

2. I am the attorney of record representing Appellant Joseph R. Amedson in the appeal captioned Amedson v. State Board of Pharmacy, et al., Court of Appeals No. 39042-6-II.

3. By first class mail postage prepaid on July 24, 2009 I filed in this Court (a) the original and one copy of the REPLY BRIEF OF APPELLANT, and (b) the original DECLARATION OF SERVICE in this matter by their delivery to the Hobart Post Office and addressed to:

Court of Appeals, Division II
950 Broadway, Suite 300
Tacoma, Washington 98402
Attn: David C. Ponzoha,
Clerk/Administrator

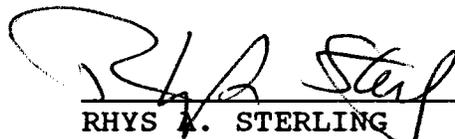
4. By first class mail postage prepaid on July 24, 2009 I served on the other parties in this action, through their respective counsel, a copy of the REPLY BRIEF OF APPELLANT and DECLARATION OF SERVICE by their delivery to the Hobart Post Office and addressed to:

Cindy Carra Gideon, AAG
Office of the Attorney General
Gov't Comp & Enforce Division
P.O. Box 40100
Olympia, Washington 98504-0100

Attorney for Respondents.

I certify and declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct:

July 24, 2009
DATE


RHYS A. STERLING
(WRITTEN) WSBA # 13846

Hobart, WA
PLACE OF SIGNATURE


RHYS A. STERLING
(PRINTED)