

No: 45337-1-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

A.W.

and STATE OF WASHINGTON,

Petitioners,

vs.

Dwight Finch,

Respondent.

Wahkiakum County Superior Court Cause No. 11-8-00005-3

The Honorable Judge Michael Sullivan

Appellant's Amended Opening Brief

Jodi R. Backlund
Manek R. Mistry
Skylar T. Brett
Attorneys for Appellant

BACKLUND & MISTRY
P.O. Box 6490
Olympia, WA 98507
(360) 339-4870
backlundmistry@gmail.com

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

ISSUES AND ASSIGNMENTS OF ERROR..... 1

STATEMENT OF FACTS AND PRIOR PROCEEDINGS..... 2

ARGUMENT..... 3

I. Finch lacks standing to pursue affirmative relief in A.W.'s juvenile case. 3

A. Standard of Review..... 3

B. Finch has no legally cognizable interest in A.W.'s SSODA proceeding..... 3

II. The trial court lacked authority to permit Finch to intervene in the state's prosecution of A.W..... 6

A. Standard of Review..... 6

B. Third parties have no right to intervene in criminal cases absent authority granted by rule, statute, or precedent.
6

III. The trial court lacked authority to order a polygraph unrelated to A.W.'s treatment needs..... 7

A. Standard of Review 7

B. A juvenile court's authority to order polygraph testing is limited to examination for the purpose of evaluation and treatment. 7

IV. A.W. adopts and incorporates the arguments set forth in the state's Opening Brief..... 9

CONCLUSION 9

TABLE OF AUTHORITIES

FEDERAL CASES

Powers v. Ohio, 499 U.S. 400, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991). 3,
5

WASHINGTON STATE CASES

In re Det. of Reyes, --- Wn. App. ----, 309 P.3d 745 (2013)..... 3, 5

In re Estate of Becker, 177 Wn.2d 242, 298 P.3d 720 (2013)..... 3

McDevitt v. Harborview Med. Ctr., --- Wn.2d---, 291 P.3d 876 (2012) 6, 7

State v. Bianchi, 92 Wn.2d 91, 593 P.2d 1330 (1979)..... 6, 7

State v. Cloud, 95 Wn. App. 606, 976 P.2d 649 (1999) 7

State v. Combs, 102 Wn. App. 949, 10 P.3d 1101 (2000)..... 9

State v. Julian, 102 Wn. App. 296, 9 P.3d 851 (2000)..... 8

State v. Savoie, 164 Wn. App. 156, 262 P.3d 535 (2011)..... 7

State v. Wiens, 77 Wn. App. 651, 894 P.2d 569 (1995) 6

Yakima v. Yakima Herald-Republic, 170 Wn.2d 775, 246 P.3d 768 (2011)
..... 6

WASHINGTON STATUTES

RCW 13.40 7

RCW 13.40.162 7, 8

RCW 9.94A.145..... 6

ISSUES AND ASSIGNMENTS OF ERROR

1. The trial court erred by allowing Mr. Finch to intervene in the state's prosecution of A.W.
2. The trial court erred by granting Finch's request for an order directing A.W. to submit to a polygraph examination.

ISSUE 1: A private citizen wholly unconnected to a juvenile prosecution lacks standing to seek an order requiring the juvenile to submit to a polygraph examination. Here, Finch filed a motion and "complaint" asking the court to order A.W. to submit to a polygraph examination. Does Finch lack standing to pursue any court orders in the state's prosecution of A.W.?

ISSUE 2: Absent a rule, statute, or precedent, a third party may not intervene in a criminal case. No rule, statute, or precedent authorizes an unrelated third party to intervene in a juvenile offender matter. Did the trial court exceed its authority by allowing Finch to intervene in the state's prosecution of A.W.?

ISSUE 3: Polygraphy may be ordered as part of a Special Sex Offender Disposition Alternative (SSODA), but only for the limited purpose of monitoring compliance with treatment. Here, the trial court granted intervenor Finch's motion for an order requiring A.W. to submit to a polygraph examination. Did the trial judge exceed his authority by requiring a polygraph examination regarding A.W.'s allegations against Finch?

3. Pursuant to RAP 10.1, A.W. adopts and incorporates the assignments of error set forth in the state's Opening Brief.

ISSUE 3: Pursuant to RAP 10.1, A.W. adopts and incorporates the issues set forth in the state's Opening Brief.

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

A.W. pled guilty in juvenile court to one count of child molestation. He sought and was granted a Special Sex Offender Sentencing Disposition Alternative (SSODA). CP 13. He is in full compliance with his SSODA treatment, and is on track to complete the program in January of 2014. CP 49, 262.

Polygraphs may be inappropriately coercive for children going through adolescence. CP 59-60. A child with A.W.'s characteristics may actually be harmed by polygraphy. CP 61, 63. Because of this, A.W.'s treatment provider has elected not to administer polygraphs to monitor his compliance with treatment. CP 59.

In his treatment, A.W. disclosed that a man named Dwight Finch had raped and molested him. CP 35. The treatment provider contacted police, and Finch faces sex offense charges. CP 40.

Finch then filed a motion to intervene in A.W.'s case. CP 35, 38. Finch sought an order compelling A.W. to submit to a polygraph examination. CP 38. Finch claimed to have an interest in A.W.'s case because A.W. had accused him of rape and child molestation. CP 35. Finch wanted A.W. to submit to a polygraph specifically to determine the truth of the accusation. CP 35.

The juvenile court heard argument, and granted Finch's motion.¹ CP 224. A.W. appealed. CP 227. The state appealed as well. CP 84. A joint motion to accelerate review is pending.

ARGUMENT

I. FINCH LACKS STANDING TO PURSUE AFFIRMATIVE RELIEF IN A.W.'S JUVENILE CASE.

A. Standard of Review

Standing is a threshold issue, reviewed *de novo*. *In re Estate of Becker*, 177 Wn.2d 242, 246, 298 P.3d 720 (2013). Washington courts employ the federal test for standing. *In re Det. of Reyes*, --- Wn. App. ----, ___, 309 P.3d 745 (2013).

B. Finch has no legally cognizable interest in A.W.'s SSODA proceeding.

A litigant must assert her or his own legal rights. *Reyes*, --- Wn. App. at ___. S/he may not pursue another's interests except in limited circumstances. *Id.* A person may assert the rights of another only if three criteria are met. *Id.* (citing *Powers v. Ohio*, 499 U.S. 400, 410-11, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991)). First, the person must suffer an injury in fact which provides a sufficiently concrete interest in the dispute.

¹ Finch had already obtained a similar order in his own case. That order is under appeal as well. *See* Court of Appeals No. 44637-5-II.

Powers, 499 U.S. at 410-411. Second, the person must have a close relationship with the other, whose rights s/he seeks to assert. *Id.* Third, there must be some hindrance to the person's ability to assert her or his own interests. *Id.*

Finch lacks standing to pursue a violation of A.W.'s SSODA.

This case involves the criminal prosecution of A.W. by the State of Washington. CP 8. Finch is not the victim; rather, the victim is named as "W.A.W." CP-8.

Finch's motion and "Complaint" allege a violation of A.W.'s SSODA. CP 35, 38. Finch has no personal interest in the state's prosecution of A.W. for the rape of W.A.W. Accordingly, the motion and complaint cannot be read as an attempt to assert Finch's own legal rights in the dispute.

Nor can Finch establish standing to pursue the alleged violation on behalf of the state or any other third party.

First, Finch cannot claim an injury in fact. A.W.'s compliance or noncompliance with his SSODA has no effect on Finch.² Finch remains unaffected by A.W.'s case, whether A.W. finishes his SSODA or ends up

² Finch claims that he is injured by A.W.'s accusation. CP 35. Even if he is injured by the accusation, he is not injured by A.W.'s compliance or noncompliance with the court's disposition order. Like any person defamed by an allegedly false accusation, Finch may undertake a tort action against A.W.

being revoked following a violation. Finch has no sufficiently concrete interest in the state's prosecution of A.W. to seek a hearing on an allegation that A.W. violated the terms of his disposition. His motion and complaint fail the first element of the federal standing test. *Powers*, 499 U.S. at 410-411.

Second, Finch has no close relationship with any third party. He has no community of interest with the state, the probation department, the court, or W.A.W. His motion and complaint fail the second element of the federal standing test. *Id.*

Third, there is no hindrance to Finch's asserting his own interests. He has no interest in the prosecution of A.W. There is no obstacle impairing his ability to bring a tort suit for the allegedly false accusation. Accordingly, his motion and complaint fail the third element of the federal standing test. *Id.*

The trial court's order granting Finch's request for a polygraph must be vacated. Finch's motion and complaint do not assert his own legal right, and he lacks standing to assert anyone else's interests in the case. *Reyes*, --- Wn. App. at ____.

II. THE TRIAL COURT LACKED AUTHORITY TO PERMIT FINCH TO INTERVENE IN THE STATE’S PROSECUTION OF A.W.

A. Standard of Review

Issues of law are reviewed *de novo*. *McDevitt v. Harborview Med. Ctr.*, ___ Wn.2d ___, ___, 291 P.3d 876 (2012).

B. Third parties have no right to intervene in criminal cases absent authority granted by rule, statute, or precedent.

The Supreme Court has long recognized that courts lack inherent authority to permit third parties to intervene in criminal proceedings. *State v. Bianchi*, 92 Wn.2d 91, 92, 593 P.2d 1330 (1979).³ Absent some rule, statute, or precedent authorizing intervention, a third party may only seek a remedy through “a separate action.” *Id.*, at 93.

Here, the court did not enter an order formally authorizing Finch to intervene. However, the court granted Finch the relief sought in his “complaint,” and the court’s order was drafted by Finch’s attorney on the attorney’s own stationery. CP 224.

No statute, rule, or other precedent authorizes the intervention here. The absence of authority requires reversal of the court’s order in this

³ *Bianchi* has been modified to allow “a limited intervention by a third party in a criminal case after trial to review a prior sealing decision.” *Yakima v. Yakima Herald-Republic*, 170 Wn.2d 775, 781, 246 P.3d 768 (2011). The legislature has authorized victims a limited right to seek enforcement of restitution orders. *See State v. Wiens*, 77 Wn. App. 651, 655, 894 P.2d 569 (1995) (addressing former RCW 9.94A.145(4) (1995), now RCW 9.94A.760(4)). Neither exception is applicable to this case.

case. *Bianchi*, 92 Wn.2d at 92-93.; *see also, e.g., State v. Savoie*, 164 Wn. App. 156, 163, 262 P.3d 535 (2011) (reversing order permitting victim's family to intervene in a criminal case); *State v. Cloud*, 95 Wn. App. 606, 612-13, 976 P.2d 649 (1999) (reversing order permitting prior attorney to intervene where ineffective assistance alleged).

III. THE TRIAL COURT LACKED AUTHORITY TO ORDER A POLYGRAPH UNRELATED TO A.W.'S TREATMENT NEEDS.

A. Standard of Review

Errors of law are reviewed *de novo*. *McDevitt* --- Wn.2d at ____,

B. A juvenile court's authority to order polygraph testing is limited to examination for the purpose of evaluation and treatment.

When a juvenile offender is sentenced under the Special Sex Offender Disposition Alternative, the court must impose community supervision of at least two years. RCW 13.40.162. The statute does not specifically authorize the court to order polygraphy as a condition of supervision.⁴ RCW 13.40.162.

Arguably, the court has the implicit authority to order polygraphy as a tool to monitor compliance with treatment.^{5,6} The disposition order

⁴ Nor does any other provision of the Juvenile Justice Act grant such authority. *See* RCW 13.40 *generally*.

⁵ Such implicit authority may stem from any combination of three relevant provisions. First, the court may order the offender to undergo sex offender treatment. RCW

here included an appendix noting that “Treatment compliance could be monitored every six months through a polygraph, if available.” CP 22.

This provision cannot justify the order entered in this case. The polygraph exam here was ordered to vindicate Finch’s claim of innocence, not to ensure A.W.’s compliance with treatment. CP 224. The request for a polygraph did not come from the prosecutor, the probation officer, the treatment provider, or the court. Furthermore, the order explicitly requires examination regarding the allegations against Finch, despite the absence of any evidence linking those allegations to A.W.’s treatment needs. *Cf. State v. Combs*, 102 Wn. App. 949, 952, 10 P.3d 1101 (2000) (finding a polygraphy order valid because it included an implicit limitation).

The trial court lacked authority to enter the polygraph order in this case. The order must be vacated.

13.40.162(4)(b). If the treatment provider uses polygraphy as a component of treatment, the order to participate may require the offender to undergo polygraph examinations. Second, a proposed treatment plan must include a “monitoring plan.” RCW 13.40.162(2)(b)(iii). If the treatment provider requires polygraph examinations to monitor treatment compliance, this provision could be read to grant the court authority to order polygraph examinations. Third, the treatment provider must submit reports that include the “respondent’s compliance with requirements, treatment activities, the respondent’s relative progress in treatment, and any other material specified by the court at the time of the disposition.” RCW 13.40.162(7)(a). This provision arguably permits the treatment provider to administer polygraph examinations for the purpose of reporting the offender’s progress.

⁶ In the adult system, polygraphy is an acceptable tool to monitor compliance with the conditions of supervision. *State v. Julian*, 102 Wn. App. 296, 305, 9 P.3d 851 (2000). There is no authority suggesting that polygraphy can be used to monitor a juvenile offender’s compliance with non-treatment related conditions of supervision.

**IV. A.W. ADOPTS AND INCORPORATES THE ARGUMENTS SET FORTH
IN THE STATE'S OPENING BRIEF.**

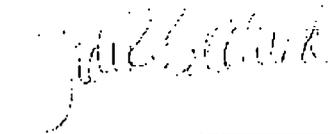
Pursuant to RAP 10.1, A.W. adopts and incorporates the arguments set forth in the state's Opening Brief.

CONCLUSION

For the foregoing reasons, the court's September 9th order must be vacated. The case must be remanded with instructions prohibiting further polygraph orders, except as may be required by A.W.'s treatment provider for the sole purpose of monitoring compliance with treatment.

Respectfully submitted on November 4, 2013,

BACKLUND AND MISTRY



Jodi R. Backlund, WSBA No. 22917
Attorney for the Appellant



Manek R. Mistry, WSBA No. 22922
Attorney for the Appellant

SKYLAR T. BRETT

Skylar T. Brett, WSBA No. 45475
Attorney for Appellant

CERTIFICATE OF SERVICE

I certify that on today's date, I mailed a copy of Appellant's Amended Opening Brief, postage prepaid, to:

A.W.
429 Spruce St E
Ilwaco, WA 98624

and:

Dwight Finch
1811 229th Place
Ocean Park, WA, 98640

With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

Wahkiakum County Prosecuting Attorney
jwetle@wapa-sep.wa.gov
pamloginsky@waprosecutors.org

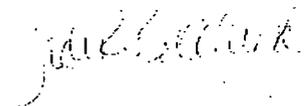
and:

Duane Crandell, Attorney for Dwight Finch
dcrandall@longviewlaw.com

I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on November 4, 2013.



Jodi R. Backlund, WSBA No. 22917
Attorney for the Appellant

BACKLUND & MISTRY

November 04, 2013 - 3:54 PM

Transmittal Letter

Document Uploaded: 453371-Amended Appellant's Brief.pdf

Case Name: A.W. and State v. Finch

Court of Appeals Case Number: 45337-1

Is this a Personal Restraint Petition? Yes No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: _____

Answer/Reply to Motion: _____

Brief: Amended Appellant's

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: _____

Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: . Manek R Mistry - Email: backlundmistry@gmail.com

A copy of this document has been emailed to the following addresses:

pamloginsky@waprosecutors.org
jwetle@wapa-sep.wa.gov
dcrandall@longviewlaw.com