

NO. 45337-1-II

COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION II

A.W. and STATE OF WASHINGTON,

Appellants,

vs.

DWIGHT FINCH,

Respondent.

BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

On June 6, 2011, the Wahkiakum County Prosecutor filed a probable cause statement and an information alleging that between January and June of 2011, AW (DOB: 4/22/98) sexually abused his little brother on multiple occasions. CP 6-7, 300-302. The information charged AW with the crimes of first degree rape of a child and first degree child molestation. CP 6-7. AW later plead guilty to the second count of first degree child molestation as part of a plea bargain under an amended information whereby the Wahkiakum County Prosecutor agreed to dismiss the rape charge in Count I. CP 10. At disposition, AW requested a suspended sentence under the Special Sex Offender Disposition Alternative (SSODA) found in RCW 13.40.162. CP 10-13. Following a disposition hearing, the court granted AW's request and sentenced him to a term of from 15 to 36 weeks incarceration suspended for two years. CP 13-23. The Honorable Judge Michael Sullivan presided at this hearing. CP 22.

As part of the suspended sentence, the court imposed the following conditions:

1. The respondent shall participate in counseling as directed by his/her probation officer.
2. The respondent will participate in community-based rehabilitation programs as directed by his/her probation officer, RCW 13.40.020. These programs may include but are not limited to functional family therapy and/or aggression replacement therapy.

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3. The respondent shall submit to random UA tests as required by the probation office.
4. The respondent will sign a release of information for the probation office to receive evaluations and information.
5. The respondent will follow the treatment recommendations as set out in Appendix A which is attached and incorporated herein.
6. Respondent shall report as required by his/her probation officer.
7. Respondent shall not change his/her residence without prior permission of the juvenile department.
8. Respondent shall attend school. Respondent will have no periods of suspension and/or expulsion from school. These conditions may be waived at the discretion of the probation officer.
9. Respondent shall not Leave Wahkiakum County or Pacific County for more than three (3) consecutive days without prior permission from the juvenile department.
10. Respondent shall obey all municipal, county, state and federal laws.
11. Respondent shall abide by a curfew as directed by his/her probation officer.
12. Respondent shall not possess any firearms or weapons.
13. The respondent will have no contact with: WAW.
14. The respondent will not change any treatment providers without court approval.
15. The respondent will notify the probation officer prior to any change in respondent's address, education program, or employment.
16. The respondent shall not attend the public or private elementary, middle, or high school attended by the victim or the victim's siblings.

CP 16-19 (numbers added for clarity).

An attachment to the judgment and sentence added further conditions as follows:

1. Participate in a qualified SSODA program, either on a group or individual basis.
2. Participate in weekly treatment for an estimated 24 months, depending on treatment progress. Treatment issues shall include the following:
 - increase sexual knowledge
 - increase general comfort around sexual issues
 - increase social skills
 - development of a personal safety plan (*relapse prevention*)
 - increase victim empathy
 - dating skills
3. Have no unsupervised contact with youth two or more years younger than the respondent.
4. Victim clarification required prior to contact with respondent's younger brother (*recognize problem, complete treatment, apologize to brother and assure him it will never happen again*).
5. Respondent is prohibited from accessing pornography. Installation of blocking software is required, and computer use shall be supervised.
6. Treatment compliance could be monitored every 6 months through a polygraph, if available.

CP 22 (*italics in original*).

On August 2, 2012, the Wahkiakum County Prosecutor filed a motion and affidavit to modify the disposition order upon a claim that AW violated

the conditions of his SSODA sentence. CP 303-304. The prosecutor alleged the following in his supporting affidavit.

On July 16, 2012, defendant snuck out of his residence and went to his grandfather's home and viewed pornography on his grandfather's computer. This is a violation of his SSODA program requirement as outlined in Appendix A of his order of disposition, to-wit: "Respondent is prohibited from accessing pornography. Installation of blocking software is required, and computer use shall be supervised."

CP 304.

On August 20, 2012, the Wahkiakum County Juvenile Court, again with Judge Sullivan presiding, held a hearing on this motion and found that the state had proven that AW had wilfully violated the conditions of his SSODA sentence. CP 305-307. Although the court allowed the SSODA sentence to stay in place, the court did impose a sanction of 14 days in custody. *Id.*

AW later made an allegation to his therapist that Respondent Dwight Finch had sexually molested him. CP 65-69. Based upon these allegations the Wahkiakum County Prosecutor filed an information charging Respondent Dwight Finch with sex crimes against AW. CP 48. Following charging in this case Mr. Finch submitted to a polygraph test indicating that he was truthful when he denied any sexual contact with AW. CP 24-25. Mr. Finch then moved as part of his criminal case that the trial court require AW take a polygraph to determine whether or not he was violating the conditions of

his SSODA sentence by making a false allegations against Mr. Finch. CP 52-103. After a number of hearings, the Honorable Judge Michael Sullivan of the Wahkiakum County Superior Court ordered that AW submit to a polygraph examination at the court's expense with the report of the examination submitted directly to the court. *Id.* That order is now on appeal. *Id.*

On August 8, 2013, Respondent Finch filed a "complaint" against AW in this case alleging that AW had violated the conditions of his SSODA sentence by fabricating a claim that he had molested him. CP 35-36. This complaint stated:

1. My name is Dwight Finch, I am over 18 and am competent to testify.

2. I have been accused by Defendant of molesting/raping him. I utterly and categorically deny doing so. I have passed "with flying colors" a polygraph administered by Steven Norton on June 15, 2012. The Wahkiakum County Prosecuting Attorney has resisted any suggestion that Defendant take a polygraph regarding Defendant's accusations and appealed the Court's order for Defendant to do so. It appears that they now represent him in both this cause number and in my cause number. The Wahkiakum County Prosecutor has indicated that, if convicted, I could spend up to life in prison. This threat makes me a very interested person.

3. I want to intervene in this cause for a very limited purpose. I do not want to modify this Court's existing orders. I simply want to ask the Court to require the already ordered polygraph. If the Court will not allow me to intervene, I ask the Court to order the polygraph on its own motion and in the interest of justice.

CP 35-36.

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Respondent also filed a Motion to Compel AW “to undergo a polygraph examination to determine his compliance with this Court’s ordered treatment.” CP 38. Specifically, Respondent argued:

Mr. Finch is a citizen making an allegation of a violation of a SODDA sentence in Wahkiakum County Juvenile Court. The allegation of false reporting is credible because Mr. Finch has voluntarily taken and passed a polygraph. This Court now has a basis to implement the polygraph requirement already set out in the SODDA sentence.

CP 44.

Respondent’s motion later came on for hearing in this case with the state arguing that (1) Respondent had no right to appear as an intervener in the case, and (2) the court should not order the polygraph because the state did not believe there was any evidence that AW had violated any conditions of his SSODA sentence. CP 238-290. Following argument the court took the matter under advisement. CP 289-290. Judge Sullivan later granted Respondent’s request in part and entered the following written order:

1. Defendant [AW] is ordered to take a polygraph examination to determine whether he has complied with his treatment program; and said appointment to be made w/in 30 days; Actual exam may be later than 30 days.
2. Part of the polygraph examination will be specifically directed toward whether the Defendant truthfully and accurately reported the allegation of molestation regarding Dwight Finch.
3. Polygraph report shall be mailed to Wahkiakum Co. Clerk; Clerk shall place in sealed file for court in-camera review.

CP 224.

Both AW and the State thereafter filed timely notices of appeal from this order. CP 227 and 233.

ARGUMENT

I. THE VICTIM TO A CRIME MAY BE HEARD BY THE COURT UNDER RCW 7.69.030 AND MAY INTERVENE UNDER CR 24(A).

In the Wahkiakum County Prosecuting Attorney's brief the state first argues the following:

The *only parties* to a juvenile prosecution are the juvenile offender and the State of Washington. The *State may only appear* in a juvenile offender proceeding through a prosecuting attorney, the attorney general, or the juvenile court probation officer.

Brief of Appellant State of Washington, page 7 (emphasis added).

In support of this argument the state cited to three statutes: RCW 10.01.190, RCW 13.40.090 and RCW 36.27.020(4) and (6). A careful review of these authorities reveals that Appellant misstates their legal effect. Rather than holding that the prosecutor is the "only party" authorized to appear in a juvenile court criminal proceeding apart from defendant and defense counsel, these statutes actually simply state when a prosecutor "may" or "shall" appear in a juvenile court proceeding on behalf of the State of Washington. The following examines each authority.

Under RCW 10.01.190, the legislature explains that the attorney general is vested with "all prosecutorial powers" when instituting or conducting a criminal proceeding. This statute states:

In any criminal proceeding instituted or conducted by the attorney general, the attorney general and assistants are deemed to be

prosecuting attorneys and have all prosecutorial powers vested in prosecuting attorneys of the state of Washington by statute or court rule.

RCW 10.01.190.

The word “only” does not appear in this statute and it does not purport to enumerate who is a party in a criminal proceeding and who may appear. This same general conclusion follows from RCW 13.40.090, which states as follows:

The county prosecuting attorney shall be a party to all juvenile court proceedings involving juvenile offenders or alleged juvenile offenders.

The prosecuting attorney may, after giving appropriate notice to the juvenile court, decline to represent the state of Washington in juvenile court matters except felonies unless requested by the court on an individual basis to represent the state at an adjudicatory hearing in which case he or she shall participate. When the prosecutor declines to represent the state, then such function may be performed by the juvenile court probation counselor authorized by the court or local court rule to serve as the prosecuting authority.

Attorney shall file with the county clerk each year by the first Monday in July notice of intent not to participate. In a county wherein the prosecuting attorney has elected not to participate in juvenile court, he or she shall not thereafter until the next filing date participate in juvenile court proceedings unless so requested by the court on an individual basis, in which case the prosecuting attorney shall participate.

RCW 13.40.090.

The gravamen of this statute is that it functions as a legislature mandate setting out those juvenile criminal cases in which a county

prosecutor “shall” appear as a party and those cases and circumstances in which a county prosecutor “may” appear or may decline to appear. Once again, it does not attempt to limit or define when other parties may or may not appear, contrary to Appellants’ assertions in this case. A similar conclusion follows from a careful review of RCW 36.27.030(4) and (6).

These provisions state:

The prosecuting attorney shall: . . .

(4) Prosecute all criminal and civil actions in which the state or the county may be a party, defend all suits brought against the state or the county, and prosecute actions upon forfeited recognizances and bonds and actions for the recovery of debts, fines, penalties, and forfeitures accruing to the state or the county;

. . .

(6) Institute and prosecute proceedings before magistrates for the arrest of persons charged with or reasonably suspected of felonies when the prosecuting attorney has information that any such offense has been committed and the prosecuting attorney shall for that purpose attend when required by them if the prosecuting attorney is not then in attendance upon the superior court;

RCW 36.27.030(4) and (6).

As with the other two provisions, this statute does not purport to limit who may or may not appear in a juvenile court criminal proceeding. Rather, by their plain terms they simply create a mandate requiring that the prosecuting attorney appear and perform certain functions in juvenile court criminal proceedings. Thus, the three statutes the state cites for the

proposition that “the only parties to a juvenile prosecution are the juvenile offender and the State of Washington” is not a correct statement of the law and is not supported by the authorities to which the state cites.

In its first argument the state goes on to argue that the “general rule is that non-parties may not intervene in criminal matters.” Brief of Appellant State of Washington, page 7. The state then cites to two cases in support of this legal claim: *State v. Savoie*, 164 Wn.App. 156, 262 P.3d 535 (2011), and *State v. Cloud*, 95 Wn.App. 606, 976 P.2d 649 (1999). Whether or not these two cases really stand for this general proposition is debatable, but a careful review of their holdings does set out instances in which a third party may definitely appear in a criminal proceeding. The following examines these cases.

In *State v. Savoie, supra*, a juvenile convicted in adult court of a murder appealed and requested a new trial on the basis the (1) the trial court had erred when it appointed an attorney at state expense to represent the family of the decedent to contest his efforts to obtain the decedent’s medical records, and (2) the trial court erred when it closed a hearing on the issue of the production of the medical records at that attorney’s request and over defendant’s strenuous objections without first performing a *Bone-Club* analysis. On appeal the state conceded the *Bone-Club* violation but argued that the error was harmless.

The court rejected the states argument, found that the trial court had improperly closed the court room, and vacated the conviction on this basis. Given the decision to reverse and remand the court on appeal did not even consider the defendant's other arguments. However, the trial court did state the following concerning the trial court's decision to appoint an attorney to represent the family of the decedent on the issue of the release of medical records:

The Grant County Prosecutor's Office cited RCW 7.69.030 as authority for appointment of private counsel. The statute provides a list of rights to "victims, survivors, and witnesses." RCW 7.69.030. The list includes 15 separate rights, but the list does not include provision for appointment of private counsel for the victim or the victim's family or allowing the victim or the victim's survivors to intervene in a criminal case. We are unaware of any inherent authority to do so, even in a civil context. *In re Marriage of King*, 162 Wn.2d 378, 174 P.3d 659 (2007). Because we cannot say this problem will not reoccur on retrial, we hold it was error for the trial court to appoint private counsel at public expense and allow intervention in this criminal case.

State v. Savoie, 164 Wn.App at 163.

As a careful review of this holding indicates, the court's primary concern was with the trial court's decision to expend public funds for the appointment of an attorney to represent a non-party to a criminal proceeding and to then "intervene" as a party. This was not a holding that the non-party did not have the right to appear and be heard in the proceeding through counsel. In fact, the statute cited specifically provides for such. Subsections

13 thru 15 of this statute state:

There shall be a reasonable effort made to ensure that victims, survivors of victims, and witnesses of crimes have the following rights, which apply to any criminal court and/or juvenile court proceeding: . . .

(13) To submit a victim impact statement or report to the court, with the assistance of the prosecuting attorney if requested, which shall be included in all presentence reports and permanently included in the files and records accompanying the offender committed to the custody of a state agency or institution;

(14) With respect to victims and survivors of victims, to present a statement personally or by representation, at the sentencing hearing for felony convictions; and

(15) With respect to victims and survivors of victims, to entry of an order of restitution by the court in all felony cases, even when the offender is sentenced to confinement, unless extraordinary circumstances exist which make restitution inappropriate in the court's judgment.

RCW 7.69.030(13)-(15)

Although this statute does not authorize a third person to appear in a criminal proceeding as a "party," it certainly does create a right for a third-party "victim" to appear and be heard by the court in the matter. As used in this statute, the term "victim" is not limited to those who are the victim of the crime then at issue. Rather, the definition includes any person who is a victim of "a" crime committed by the defendant. This definition states:

(3) "Victim" means a person against whom a crime has been committed or the representative of a person against whom a crime has been committed.

RCW 7.69.020(3).

In the case at bar Respondent meets this definition of “victim.” He specifically alleged that he was the “victim” of “a” crime committed by AW. The offensive conduct, false reporting, was not only a crime, but it constituted a violation of the AW’s SSODA sentence which prohibited AW from committing any criminal conduct during the pendency of his sentence. Respondent not only supported this claim with his sworn statement but he also supported this claim with the positive results from a polygraph to which he submitted. Thus, while RCW 7.69.030(13)-(15) may not have authorized Respondent to appear in the juvenile court proceeding as a party, it did authorize him to appear before the court and level his grievance.

A review of the second case cited by the state, *State v. Cloud, supra*, also recognizes a second statutory basis authorizing a third-party to appear and actually intervene in a criminal case. In *Cloud* a defendant convicted of murder after unsuccessfully arguing insanity discharged his counsel and retained a new attorney, who moved for a new trial arguing ineffective assistance of counsel. At the hearing on the motion the court allowed the former counsel to intervene and ultimately denied the motion for a new trial. The defendant then appealed, arguing in part that the trial court had erred when it allowed the defendant’s prior attorney to intervene and that this had caused prejudice to his motion for a new trial. On review defendant’s prior

attorney argued that he was entitled to appear under CR 24(a)(2) and (b)(2).

These provisions state:

(a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicants interest is adequately represented by existing parties.

(b) Permissive Intervention. Upon timely application, anyone may be permitted to intervene in an action: (1) When a statute confers a conditional right to intervene; or (2) When an applicants claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirements, or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

CR 24(b) and (b).

Although the court of appeals rejected this argument and remanded the case for a new hearing on the defendant's motion for a new trial, the court did not do so on the basis that a third party may never intervene in a criminal case. Rather, it did so on the basis that the defendant's prior attorney had not met the criteria enumerated under CR 24. The court held:

Civil Rule 24(a)(2) allows intervention of right to applicants who are "so situated that the disposition of the action may as a practical matter impair or impede [their] ability to protect that interest...." The

court did not specifically base its ruling on CR 24(a)(2), but it did state that this rule influenced its decision to allow Browne to intervene: “in the absence of criminal rules ... in situations which are covered in similar civil rules, the court is usually at least guided by the civil rules.” Although the trial court was correct that civil rules “can be instructive” when criminal rules are silent on procedural matters, labeling Browne’s full intervention rights in this post-trial proceeding “procedural” is an inaccurate characterization. As Cloud notes, Browne and his two attorneys “led the [S]tate’s efforts, calling more witnesses, engaging in more cross-examination, and eliciting far more damaging information and expert opinion” than the State.FN8 This active participation was not necessary. The prosecutor’s interest in preserving the conviction, together with Browne’s testimony as a witness, would have provided the trial court with an adequate basis for its decision.

State v. Cloud, 95 Wn.App. at 612-613 (footnotes omitted).

As the court’s statement clarifies, it did not hold that a third party could never intervene in a criminal proceeding. Indeed it recognized that a third party could take such action under CR 24. The reason the court reversed was that the third party did not meet the criteria set out in the court rule because that party’s “active participation was not necessary” in that (1) the prosecutor’s interest mirrored his and (2) he had the opportunity to appear as a witness.

By contrast, in the case at bar the prosecutor’s interest was exactly contrary to that of Respondent. Although Respondent provided evidence to the prosecutor in the form of a sworn statement and a favorable polygraph that AW had again violated the conditions of his SSODA sentence, the state had no interest in holding AW responsible for his actions. As a result the

state did not even initiate a probation violation proceeding against AW much less given Respondent the opportunity to appear as a witness in the matter. Thus, while the defendant's former attorney in *Cloud* did not meet the criteria for intervention under CR 24, Respondent in this case did meet those criteria and the trial court did not err when it allowed him to be heard on the matter.

II. THE JUVENILE COURT'S INTEREST IN ASSURING COMPLIANCE WITH THE CONDITIONS OF SSODA SENTENCE DOES NOT VIOLATE THE SEPARATION OF POWERS DOCTRINE.

In its second argument on appeal the Wahkiakum County Prosecuting Attorney argues as follows:

Judge Sullivan allowed Finch and Crandall to assume the role of prosecutor to file a probation violation against A.W. in A.W.'s case. This not only violated separation of powers, but also violated A.W.'s due process rights.

Brief of Appellant State of Washington, page 10.

The state's second argument that the court violated AW's due process rights when it "allowed Finch and Crandall to assume the role of prosecutor" is ironic in the extreme in light of the state's first argument on appeal that Respondent did not have standing to be heard in AW's criminal case. In this case AW appeared before the trial court and appears before this court with appointed counsel representing him. In making this due process argument the state does not provide any law to support a conclusion that it some how has

standing to assert AW's constitutional rights. However, even if the state did have such standing to assert AW's constitution rights, it's argument for a due process violation fails for the same reason that its argument for a separation of powers violation fails. The reason is that they are based upon an erroneous rendition of the facts in this case. The following explains this argument.

As the state points out in the first half of its second argument the constitution imbues the prosecuting attorneys of this state with the near unfettered discretion when deciding whether or not to bring a criminal charge. Thus, the state argues that any impingement on this power, such as allowing a third party to file and prosecute a probation violation thereby impinges upon the constitutionally created executive authority. In addition, as the state points out in the second half of its second argument a defendant has the due process right to have a disinterested party as the prosecutor in a case. *See* Brief of Appellant State of Washington, pages 6-7 (citing *Young v. United States ex rel. Vuitton Et Fil S.A.*, 481 U.S. 787, 107 S.Ct 2124, 95 L.Ed.2d 740 (1987)). Thus, the state argues that allowing Respondent to prosecute a probation violation would impinge upon the defendant's right to due process because he is not a disinterested party.

The problem with both of these arguments lies in the fact that the trial court did not allow Respondent to appear in the role of or assume the role of the prosecutor and did not allow Respondent to file or prosecute a probation

violation in this case. Indeed, a careful look at Respondent's pleading reveals that he was not asking the court to modify or revoke AW's sentence in any way. In his "complaint" against AW, Respondent specifically states the following on this issue:

3. I want to intervene in this cause for a very limited purpose. I do not want to modify this Court's exiting orders. I simply want to ask the Court to require the already ordered polygraph. If the court will not allow me to intervene, I ask the Court to order the polygraph on its own motion and in the interest of justice.

CP 36.

As Respondent's pleading and arguments reveal, he did not seek permission to file a probation violation proceeding against AW, he did not seek any modification of AW's sentence and he certainly did not seek to have AW's SSODA sentence revoked. In other words, he did not seek to appear as or on behalf of the prosecutor and he did not perform any prosecutorial function. Thus, the trial court's decision to allow him to appear and be heard in AW's juvenile proceeding did not violate either the separation of powers doctrine and it did not violate AW's due process rights.

III. THE JUVENILE COURT HAS AUTHORITY TO ORDER POLYGRAPH EXAMINATIONS OF CONVICTED SEX OFFENDERS TO ASSURE COMPLIANCE WITH SSODA SENTENCES.

In their third arguments both the State and AW claim that the trial court's order that AW submit to a polygraph was in error because 'polygraph

examinations are not authorized to confirm or dispel” allegations that a juvenile has violated the conditions of his SSODA sentence. Brief of Appellant State of Washington, page 16; Brief of Appellant AW, page 8. Specifically, state argued that “while polygraph examinations may be ordered as part of a SSODA, either initially or in a subsequent modification of the SSODA, the polygraph examination must serve a therapeutic purpose.” Brief of Appellant State of Washington, page 16. Both the state and AW cite to the decision in *State v. Combs*, 102 Wn.App. 949, 952-53, 10 P.3d 1101 (2000) to support this claim. As the following examination of *Combs* reveals, the case does not stand for this proposition.

In *Combs, supra*, a defendant convicted on child molestation charges and sentenced to three years of community supervision appealed the imposition of a number of community custody conditions, including a requirement that he submit to periodic polygraphs in order to monitor his conformity with those conditions. Specifically, appellant argued that the polygraph requirement was invalid because it was not “limited to the authorized purpose of monitoring his compliance with the court’s order” as was required under the decision in *State v. Riles*, 135 Wn.2d 326, 957 P.2d 655 (1998). The court of appeals responded as follows:

Polygraph testing may be utilized to monitor compliance with the requirement of making reasonable progress in treatment *or with other special conditions of community supervision*. One of the issues in

Riles was whether the trial court exceeded its authority when it required the petitioners, who had been convicted of sex crimes, to submit to polygraph and plethysmograph testing during their period of community placement. Division One originally heard the *Riles* case and determined that although the challenged portion of the community placement order did not expressly limit the scope of the polygraph testing, a sufficient limitation was implicitly imposed, considering the context of the entire order. *State v. Riles*, 86 Wn.App. 10, 16-17, 936 P.2d 11 (1997), *aff'd*, 135 Wn.2d 326, 957 P.2d 655 (1998). Relying on *Riles*, we conclude that the language of Mr. Combs's judgment and sentence, taken as a whole, impliedly limits the scope of polygraph testing to monitor only his compliance with the community placement order and not as a fishing expedition to discover evidence of other crimes, past or present.

State v. Combs, 102 Wn.App. at 962-963 (emphasis added).

The *Combs* case does not stand for the proposition that a court may only order polygraph examination for a therapeutic purpose. Rather, it squarely stands for the proposition that the court may order polygraph examinations to monitor a defendant's compliance with any conditions of community custody. As a result, the trial court in the case at bar did not err when it ordered AW to submit to a polygraph to monitor his compliance with the requirements with his judgment and sentence whether it had a therapeutic purpose or not.

IV. THERE IS NO LEGAL BASIS TO REMOVE JUDGE SULLIVAN IN THIS CASE.

In its brief the state argues that under the decisions in *State v. Romano*, 34 Wn.App. 567, 662 P.2d 406 (1983), *State v. Madry*, 8 Wn.App.

1, 504 P.2d 1156 (1972), and a number of federal cases this court should vacate Judge Sullivan's order and remand for further proceedings in front of a different judge under the appearance of fairness doctrine. Specifically the state complains about the fact that Judge Sullivan questioned AW's treatment provider at a hearing in which on the prosecutor was present. See Brief of Appellant State of Washington, page 20-23. As the following examination of *Romano* and *Madry* explain, this argument should fail.

In *Romano, supra*, a defendant convicted of first degree theft appealed his sentence, particularly the restitution portion of that sentence, on the basis that the trial court's actions verifying his claim of seasonal income with personal friends of the trial judge in the same line of work violated the appearance of fairness doctrine even though the information the judge obtained corroborated the defendant's testimony. The court of appeals agreed and reversed, holding that a judge's decision to seek evidence from a third party, while not causing actual prejudice, did create an appearance of unfairness. The crux of the appearance of unfairness was the judge's action seeing ex-parte information.

Similarly, in *Madry*, a defendant convicted of first degree assault appealed arguing that he had been denied a fair trial because the judge who presided over his case was involved in investigating claims that the motel the defendant leased and managed was regularly used for prostitution. In fact all

of the Superior Court judges of the county had become involved in the investigation after they learned that the majority of the arrests for solicitation in the county happened just outside the hotel and that a local District Court Judge had an interest in that property. The judges then wrote and signed a letter to the District Court Judge expressing their concerns.

On review the Court of Appeals first noted that the Superior Court judges had undertaken their investigation and correspondence with the District Court Judge because they were concerned that the District Court judge's interest in the hotel would harm the reputation of the entire judiciary in the county. Although the Court of Appeals found no evidence of actual prejudice, the court none the less found the appearance of unfairness and that this appearance was sufficient to violate the defendant's right to a fair trial. In this case, the crux of the of the appearance of unfairness came from the judge's actions seeking ex-parte information and the judge's perceived personal interest in the case.

By contrast in the case at bar Judge Sullivan did not seek or obtain any ex-parte information from AW's treatment provider or from any other person. Rather, any and all questions the judge propounded to any witness came during a hearing on the record in Respondent's criminal case. The state was present and had notice of the hearing and itself examined the witness, as did Respondent's attorney. There was no appearance of fairness violation as

existed in either *Romano* or *Madry*. As a result, this court should deny the state's request that Judge Sullivan be barred from hearing any further proceedings in this case.

V. THERE IS NO LEGAL BASIS FOR THE IMPOSITION OF CR 11 SANCTIONS IN THIS CASE.

In its last argument the state submits that this court should assess costs and attorney's fees against Respondent and his trial attorney under CR 11. Specifically, the state claims that since neither Respondent or his trial attorney were authorized to appear as a prosecutor bringing a probation violation claim against AW that sanctions under CR 11 are appropriate. As the following explains this argument is incorrect.

Under CR 11 this court has authority to impose sanctions against a party who files a pleading that presents a legal argument that is not warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law. *Neal v. Wallace*, 15 Wn.App. 506, 550 P.2d 539 (1976). The purpose of this rule is to deter baseless filings and to curb abuses of the judicial system. *Skimming v. Boxer*, 119 Wn.App. 748, 82 P.3d 707 (2004). Although a civil rule it has previously been found applicable in criminal cases. *State v. Cameron*, 30 Wn.App. 229, 633 P.2d 901 (1983).

Under CR 11 an attorney signing a pleading certifies that the legal arguments presented are warranted by existing law or a good faith argument of an extension, modification, or reversal of existing law. This duty is stated as follows:

The signature of a party or of an attorney constitutes a certificate by the party or attorney that the party or attorney has read the pleading, motion, or legal memorandum; that to the best of the party's or attorney's knowledge, information, and belief, formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

CR 11.

The rule goes on to allow the imposition of sanctions should an attorney violate its requirements. The rule states:

If a pleading, motion, or legal memorandum is signed in violation of this rule, the court, upon motion or upon its own initiative, may impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or legal memorandum, including a reasonable attorney fee.

CR 11.

The state's contention that Respondent's filing of his Motion to Compel Polygraph was not well grounded in law and fact is contingent upon the state's inaccurate claim that Respondent tried to usurp the role of the prosecutor and bring a probation violation charge against AW and thereby

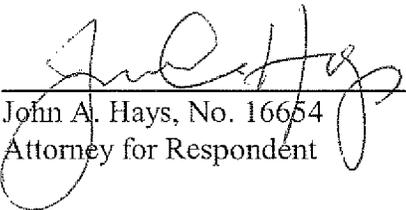
sought to either modify or revoke AW's SSODA sentence. As has already been explained in this brief, the state's argument grossly mischaracterizes Respondent's actions. Respondent did not seek to usurp the prosecutor's role in this case. Rather, as is allowed under both RCW 7.69.020 and CR 24, Respondent merely requested an opportunity to be heard before the juvenile court as a victim of a convicted sex offender's false allegations that themselves constituted a violation of the sex offender's SSODA sentence. As a result this court should deny the state's request for sanctions under CR 11.

CONCLUSION

Respondent respectfully requests that this court affirm the decision of the trial court ordering AW to submit to a polygraph examination to verify that he is meeting the conditions of his SSODA sentence.

DATED this 3rd day of December.

Respectfully submitted,



John A. Hays, No. 16654
Attorney for Respondent

APPENDIX

RCW 7.69.030

Rights of Victims, Survivors, and Witnesses

There shall be a reasonable effort made to ensure that victims, survivors of victims, and witnesses of crimes have the following rights, which apply to any criminal court and/or juvenile court proceeding:

(1) With respect to victims of violent or sex crimes, to receive, at the time of reporting the crime to law enforcement officials, a written statement of the rights of crime victims as provided in this chapter. The written statement shall include the name, address, and telephone number of a county or local crime victim/witness program, if such a crime victim/witness program exists in the county;

(2) To be informed by local law enforcement agencies or the prosecuting attorney of the final disposition of the case in which the victim, survivor, or witness is involved;

(3) To be notified by the party who issued the subpoena that a court proceeding to which they have been subpoenaed will not occur as scheduled, in order to save the person an unnecessary trip to court;

(4) To receive protection from harm and threats of harm arising out of cooperation with law enforcement and prosecution efforts, and to be provided with information as to the level of protection available;

(5) To be informed of the procedure to be followed to apply for and receive any witness fees to which they are entitled;

(6) To be provided, whenever practical, a secure waiting area during court proceedings that does not require them to be in close proximity to defendants and families or friends of defendants;

(7) To have any stolen or other personal property expeditiously returned by law enforcement agencies or the superior court when no longer needed as evidence. When feasible, all such property, except weapons, currency, contraband, property subject to evidentiary analysis, and property of which ownership is disputed, shall be photographed and returned to the owner within ten days of being taken;

(8) To be provided with appropriate employer intercession services to ensure that employers of victims, survivors of victims, and witnesses of crime will cooperate with the criminal justice process in order to minimize an employee's loss of pay and other benefits resulting from court appearance;

(9) To access to immediate medical assistance and not to be detained for an unreasonable length of time by a law enforcement agency before having such assistance administered. However, an employee of the law enforcement agency may, if necessary, accompany the person to a medical facility to question the person about the criminal incident if the questioning does not hinder the administration of medical assistance. Victims of domestic violence, sexual assault, or stalking, as defined in RCW 49.76.020, shall be notified of their right to reasonable leave from employment under chapter 49.76 RCW;

(10) With respect to victims of violent and sex crimes, to have a crime victim advocate from a crime victim/witness program, or any other support person of the victim's choosing, present at any prosecutorial or defense interviews with the victim, and at any judicial proceedings related to criminal acts committed against the victim. This subsection applies if practical and if the presence of the crime victim advocate or support person does not cause any unnecessary delay in the investigation or prosecution of the case. The role of the crime victim advocate is to provide emotional support to the crime victim;

(11) With respect to victims and survivors of victims, to be physically present in court during trial, or if subpoenaed to testify, to be scheduled as early as practical in the proceedings in order to be physically present during trial after testifying and not to be excluded solely because they have testified;

(12) With respect to victims and survivors of victims, to be informed by the prosecuting attorney of the date, time, and place of the trial and of the sentencing hearing for felony convictions upon request by a victim or survivor;

(13) To submit a victim impact statement or report to the court, with the assistance of the prosecuting attorney if requested, which shall be included in all presentence reports and permanently included in the files and records accompanying the offender committed to the custody of a state agency or institution;

(14) With respect to victims and survivors of victims, to present a statement personally or by representation, at the sentencing hearing for felony convictions; and

(15) With respect to victims and survivors of victims, to entry of an order of restitution by the court in all felony cases, even when the offender is sentenced to confinement, unless extraordinary circumstances exist which make restitution inappropriate in the court's judgment.

CR 24 INTERVENTION

(a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicants interest is adequately represented by existing parties.

(b) Permissive Intervention. Upon timely application, anyone may be permitted to intervene in an action: (1) When a statute confers a conditional right to intervene; or (2) When an applicants claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirements, or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

(c) Procedure. A person desiring to intervene shall serve a motion to intervene upon all the parties as provided in rule 5. The motion shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought.

**COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II**

AW & STATE OF WASHINGTON,
Appellants,

No. 45337-1-II

vs.

AFFIRMATION OF
OF SERVICE

DWIGHT FINCH,
Respondent.

Donna Baker states the following under penalty of perjury under the laws of Washington State. On December 3, I personally e-filed and/or placed in the United States Mail the following document with postage paid to the indicated parties:

1. Brief of Respondent
2. Affirmation of Service

Dwight Finch
372 Salmon Creek Road
Naselle, WA. 98638

Pamela B. Loginsky
Special Deputy Prosecuting Attorney
206 10th Ave. SE
Olympia, WA. 98501

Dated this 3rd day of December, 2013, at Longview, Washington.



Donna Baker
Legal Assistant

HAYS LAW OFFICE

December 03, 2013 - 10:54 AM

Transmittal Letter

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Case Name: A.W. and State of Washington vs. Dwight Finch

Court of Appeals Case Number: 45337-1

Is this a Personal Restraint Petition? Yes No

The document being Filed is:

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Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

Brief: Respondent'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

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Petition for Review (PRV)

Other: _____

Comments:

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