

FILED

JUL 26 2010

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

28886-2-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

DONALD J. YORK, APPELLANT

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APPEAL FROM THE SUPERIOR COURT

OF BENTON COUNTY

---

APPELLANT'S BRIEF

---

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Attorney for Appellant

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(509) 838-8585

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A. ASSIGNMENTS OF ERROR

1. The trial court erred by denying Mr. York's motion to dismiss because Mr. York's statements during the polygraph were coerced and therefore involuntary, and the subsequent statements to the officer were fruits of the poisonous tree.
2. The trial court erred in findings of fact and conclusions of law finding 1: "The respondent made statements to a polygrapher. The polygrapher's questioning was not coercive." (CP 51)
3. The trial court erred in findings of fact and conclusions of law conclusion 1: "The informed consent form places the respondent on notice that his juvenile probation counselor may contact the police based on statements he makes to a polygrapher."
4. The trial court erred in findings of fact and conclusions of law conclusion 2: "Paragraph 3 of the informed consent form outlines mandatory disclosures based on state law and county policy. This includes reporting instances where the respondent is a victim of an alleged crime. Paragraph 3 provides the respondent with further notice of what

statements may be disclosed, but it does not limit all action that may be taken.”

5. The trial court erred in findings of fact and conclusions of law conclusion 4: “The statements the respondent made to Detective Shepherd were voluntary and are not suppressed.”
6. The trial court erred in findings of fact and conclusions of law conclusion 5: “The facts in this case are similar to those in *State v. Dods*<sup>1</sup> and the Court is following that case.”

## B. ISSUES

1. Where a polygraph is a condition of a juvenile’s sentence, does a presumption of compulsion exist surrounding the polygraph that renders statements to the administrator of the polygraph coerced and involuntary?
2. Where a juvenile submits to a polygraph as a condition of his sentence but does not receive *Miranda* warnings, and when police use the information provided by the examiner to subsequently obtain a confession from the juvenile, is the

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<sup>1</sup> *State v. Dods*, 87 Wn App. 312, 941 P.2d 1116 (1997).

subsequent confession fruits of the poisonous tree that must be suppressed?

### C. STATEMENT OF THE CASE

In September of 2008, fifteen-year-old Donald York peeked into his neighbor's window one night, was caught, and eventually pleaded guilty to voyeurism. (CP 21) He had no criminal history and received a Special Sex Offender Disposition Alternative sentence. (CP 24) A condition of his sentence required Mr. York to attend counseling with certain treatment providers, and to submit to polygraphs as a part of his treatment:

The Respondent shall submit to sexual history and monitoring polygraphs for treatment and supervision purposes, as arranged by Sex Offender Treatment Coordinator.

(CP 31)

Tim Markham, Mr. York's community placement supervisor, asked Randy H. Ruegsegger to perform a "Full Disclosure Sexual History Polygraph Examination." (CP 62) According to the examiner, "At issue was if Mr. York was going to provide truthful information about his sexual history." (CP 62) Mr. York was required to sign a consent form.

(CP 62)

The Benton-Franklin County Juvenile Justice Center Polygraph Informed Consent form sets forth specific ways in which the treatment provider may use the information gleaned in the polygraph:

It is my understanding that a polygraph exam is used as a treatment tool to help identify my sexual offense history, encourage me to take responsibility for my offense(s), and to help monitor and supervise my day to day behavior specific to my treatment plan.

I understand that during the examination, I must be as honest as possible. It is important that I disclose all information. I also understand that I may limit what I say in order to protect myself from new charges or civil commitment.

I have been informed that the Washington State Law, RCW 26.44.030, requires that any previously unreported disclosure of abuse and neglect must be reported to the Protective Services and/or the appropriate law enforcement agencies. Benton-Franklin Counties Juvenile Justice Center policy further requires that any previously unreported disclosures of violent crimes must be reported to law enforcement based upon what I say, the seriousness of the crime, as well as the statute of limitations.

I understand that failing to submit to the polygraph testing, when determined appropriate to be tested by the therapist, JPC and examiner, will result in a recommendation to have the SSODA option revoked.

(CP 13)

The polygraph examiner asked 97 questions about Mr. York's sexual history, including sexual abuse, masturbation, intercourse partners,

involvement with prostitutes, homosexual activity, foreign objects, sexual fantasies and sexual contact with animals. (See CP 61-76)

Mr. York reportedly told the polygraph examiner that he had a history of sexual contact with the family dogs, beginning at age 10, and most recently within the past month. (CP 61; 66) Mr. York also stated that he lied about having sex with the family pet to his mother. (CP 69)

The polygraph examiner reported this information to the Benton County Police. Officer Roy Shepherd drove to Richland High School, and pulled Mr. York out of class. (RP 61) The officer read Mr. York a *Miranda*<sup>2</sup> warning for juveniles. (CP 78) The officer spoke with Mr. York, and eventually had Mr. York sign a statement indicating that he had sex with the family dog Lexis until January of 2009, and he had done this approximately 25 times. (CP 79)

Mr. York was charged with engaging in sexual conduct with an animal, with a sexual motive allegation. (CP 1-2)

Prior to trial, Mr. York moved to suppress his statements made to Officer Shepherd. (CP 4-8) Mr. York argued that he was never informed that his statements during the polygraph could be used against him to file new charges unrelated to a violent crime or abuse and neglect, as stated on the form.

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<sup>2</sup> *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed 2d 694 (1966).

The Court denied the motion to suppress. (CP 40; RP 19-24) In denying the motion, the court relied upon the *Dods* case. (RP 19) The trial recognized that the *Dods* court did not address the “fruits of the poisonous tree” as a basis for exclusion. (RP 20)

But the trial court found that in *Dods*, no coercive effect was present, and thus the informed consent was sufficient. (RP 21) The trial court acknowledged that a viable appealable issue existed as to whether, under the present circumstances, the interview with the officer would constitute fruit of the poisonous tree:

Now that doesn't mean that, you know, there's not a good appealable issue here because, really, I think Ms. Magan makes a really good point. The Court of Appeals has never really addressed the issue in regards to the fruit of the poisonous tree relative to this situation, and maybe an argument can be made relative to this situation, and maybe an argument can be made relative to that, but that's not for me to determine. I'm looking at the *Dodds [sic]* case and saying the *Dodds [sic]* case is almost right on point with the facts of this case and I follow the *Dodds [sic]* case, and then the Court of Appeals can tell me if I'm wrong, if it goes that far.

(RP 24)

The Court entered findings of fact and conclusions of law.

(CP 51-52) The findings stated in part:

1. “The respondent made statements to a polygrapher. The polygrapher's questioning was not coercive.”

(CP 51) The conclusions stated in part:

1. “The informed consent form places the respondent on notice that his juvenile probation counselor may contact the police based on statements he makes to a polygrapher.”

2. “Paragraph 3 of the informed consent form outlines mandatory disclosures based on state law and county policy. This includes reporting instances where the respondent is a victim of an alleged crime. Paragraph 3 provides the respondent with further notice of what statements may be disclosed, but it does not limit all action that may be taken.”

\* \* \*

4. “The statements the respondent made to Detective Shepherd were voluntary and are not suppressed.”

5. “The facts in this case are similar to those in *State v. Dads* and the Court is following that case.”

(CP 52)

Also prior to trial, Mr. York moved to dismiss based upon *corpus delecti* grounds and argued that the State failed to present evidence of the crime independent of Mr. York’s statements. (CP 41-46) That motion was denied. (CP 116-17)

At trial, Mr. York’s brother Robert testified that in the summer of 2008, he walked into his brother’s bedroom and saw his brother in his bed, under the covers, with an erection and his pants down. (CP 40-41) A blanket was partially covering him, but his brother could see the bottom of his pants and his shoes. (RP 43)

When Robert opened the door, he noticed a “bad smell” that he described as “musty.” (CP 40) Robert also noticed that on the bed on top of the covers was the family dog, Lexus. (RP 42) He described the dog as lounging near Mr. York. (CP 43) Robert took the dog from the room. (RP 44) He did not see his brother touch the dog. (RP 46)

Over objection, veterinarian Sabina Gerds-Grogan testified that when a dog is stressed, the dog tends to vocalize, scratch, bite, and can voluntarily express its anal glands. (RP 51) Ms. Grogan described the smell as “very distinct” and “very strong and a very nasty, disgusting, intense flavor.” (RP 52) She also noted that dogs can secrete this smell without any contact, “There does not need to be any physical contact to the gland itself or to the rectum/anal area.” (RP 52)

The court found Mr. York guilty. (RP 85-88) He appeals.

#### D. ARGUMENT

1. MR. YORK’S STATEMENTS MADE IN A COURT-ORDERED POLYGRAPH EXAMINATION CONSTITUTE COERCED, COMPULSORY TESTIMONY AND THUS CANNOT BE USED AGAINST HIM WITHOUT VIOLATING THE FIFTH AMENDMENT.

The Constitution demands that confessions be made voluntarily. *See Lego v. Twomey*, 404 U.S. 477, 483-85, 92 S. Ct. 619,

30 L. Ed. 2d 618 (1972). A confession is involuntary if coerced either by physical intimidation or psychological pressure. *United States v. Tingle*, 658 F.2d 1332, 1335 (9th Cir. 1981). The totality of the circumstances contains no “talismanic definition” of voluntariness. *Schneckloth v. Bustamonte*, 412 U.S. 218, 224, 93 S. Ct. 2041, 36 L. Ed. 2d 854 (1973). Courts consider the following factors: the youth of the accused, his intelligence, the lack of any advice to the accused of his constitutional rights, the length of detention and the repeated and prolonged nature of the questioning. *Schneckloth v. Bustamonte*, 412 U.S. at 225-26.

A defendant’s constitutional rights during community placement are subject to the infringements authorized by the Sentencing Reform Act of 1981 (SRA), chapter 9.94A RCW. *State v. Riles*, 135 Wn.2d 326, 347, 957 P.2d 655 (1998) (citing *State v. Ross*, 129 Wn.2d 279, 287, 916 P.2d 405 (1996)). The SRA imposes a mandatory requirement that sex offenders be on community placement upon their release from prison and requires as a condition of that placement that the offender “perform affirmative acts [the department] deems appropriate to monitor compliance with the conditions of the sentence imposed.” RCW 9.94A.720(1)(a). This includes polygraph testing to monitor conditions of community placement. *See Riles*, 135 Wn.2d at 342.

Division Three, in relying upon *Riles*, cautioned that a court-ordered condition of polygraph testing can be used “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. 949, 952, 10 P.3d 1101 (2000).

a. The Trial Court’s Reliance Upon The *Dods* Case Is Misplaced.

The trial court based its decision upon *State v. Dods, supra*. But *Dods* is distinguishable. Mr. Dods was an adult registered sex offender, who pleaded guilty to public indecency. As a condition of his sentence, he was ordered to take polygraph and plethysmograph testing as directed by his therapist. *Id.* Prior to a polygraph, Mr. Dods was not given a *Miranda* warning. During the polygraph test, Mr. Dods admitted that he had sexually touched a minor. Immediately after the test, the polygraph administrator informed the community corrections officer of Mr. Dods’s admissions. The officer read Mr. Dods his *Miranda* warning, Mr. Dods agreed to waive his rights, and made incriminating statements. *Id.* at 315. The minor was contacted and corroborated Mr. Dods’s admissions. *Id.*

Mr. Dods moved to suppress his statements to the polygraph examiner and he argued that his subsequent statement to the police was fruit of the poisonous tree and should likewise be suppressed. The trial

court found that Mr. Dods made a voluntary, intelligent and knowing waiver. *Id.* at 315.

The *Dods* court relied upon two United States Supreme Court cases in analyzing the issue: *Oregon v. Elstad*, 470 U.S. 298, 105 S. Ct. 1285, 84 L. Ed. 2d 222 (1985) and *Michigan v. Tucker*, 417 U.S. 433, 94 S. Ct. 2357, 41 L. Ed. 2d 182 (1974). In *Elstad*, the court found that absent deliberately coercive or improper tactics, the mere fact that a suspect has made an unwarned admission does not warrant a presumption of compulsion. The court stated that the subsequent *Miranda* warnings would suffice to remove the conditions that precluded the admission of that suspect's earlier statement. "In such circumstances, the finder of fact may reasonably conclude that the suspect made a rational choice whether to waive or invoke his rights." *Dods*, 87 Wn. App at 317, quoting *Elstad*, 470 U.S. at 314.

In *Tucker*, a suspect who was not given *Miranda* warnings gave police the name of a witness who later implicated the suspect in the crime. The Court found that the unwarned statements should be suppressed, but the testimony of the witness that was discovered as a result of the unwarned statement did not violate the Fifth Amendment. *Dods*, 87 Wn. App. at 319, citing *Tucker*, 470 U.S. at 308.

This case is distinguishable from both *Elstad* and *Tucker* in significant facts: (1) Mr. York's first statement was compelled – it was a condition of the sentence; (2) no independent facts exist in this case to corroborate the statements made in the polygraph examination; and (3) Mr. York is a juvenile.

Moreover, this case is distinguishable from *Dods*. In *Dods*, no error was assigned to the finding that the polygrapher did not use coercive tactics, nor the finding that Mr. Dods “voluntarily submitted to the polygraph examination.” *Dods*, 87 Wn. App. at 315. In this case, Mr. York objected to the polygraph examination because he was compelled to attend and answer truthfully as a condition of his sentence. Unlike Mr. Dods, Mr. York challenges the nature of the statements made during the court-ordered polygraph examination.

Additionally, the confession by the defendant in *Dods* eventually lead police to independent corroborating evidence. No corroborating evidence exists in this case, other than the statements of the defendant and the vague testimony of Mr. York's brother.

In a sexually violent predator civil commitment case, *In re Detention of Law*, 146 Wn. App. 28, 204 P.3d 230 (2008), Division Two found that an adult's confession made during a community placement mandatory polygraph did not require a voluntariness hearing: “Thus, the

confession here was obtained by a constitutionally permissible procedure used to monitor an offender's compliance with conditions imposed as a consequence of a criminal conviction." *Id.*

But *Law* is not applicable to this case. Mr. Law was an adult, and he sought a voluntariness hearing in the context of a civil commitment hearing. Mr. York is a juvenile, a criminal defendant, and he challenged the nature of the polygraph as coercive, rendering his statements involuntary.

- b. The Implied Consent Form Failed To Place Mr. York On Notice That His Statements Could Lead To His Prosecution For Additional Crimes.

The Court found that the implied consent form gave Mr. York notice that his juvenile probation counselor may contact the police based on statements he makes to the polygraph examiner. The Court's conclusion is untenable.

First, the implied consent form advised Mr. York that the information obtained in the examination could be reported if it was previously unreported abuse or neglect under RCW 26.44.030, or previously unreported violent crimes. He was not informed he could be charged with animal cruelty or for any crimes outside those categories.

The form contained a paragraph that stated “I understand that during the examination, I must be as honest as possible. It is important that I disclose all information. I also understand that I may limit what I say in order to protect myself from new charges or civil commitment.”

Under the court’s interpretation, this paragraph requires a juvenile to be savvy enough to parse the words and understand that he is to be as “honest as possible” but not disclose information that could incriminate him. But Mr. York’s treatment provider specifically requested a Full Disclosure Sexual History Polygraph Examination, during which the examiner was charged with discovering whether Mr. York would provide truthful information about his sexual history. The question arises as to what consequences would be present if Mr. York withheld information about sexual contact with the dog, but the polygraph indicated deception. Mr. York would likely not receive the necessary treatment, and he may be required to undertake more polygraph exams until he answered truthfully and provided information with which to convict him.

This places juveniles in an untenable position: be honest in order to get the necessary treatment, but not completely honest or run the risk of additional criminal convictions. This presents a no-win situation for the juvenile, as well as for the juvenile’s treatment providers.

The court's determination that a juvenile signing the "implied consent" form has been informed that his honesty in taking a polygraph test could result in additional charges that do not involve a violent crime or abuse or neglect is unreasonable and should be reversed.

c. Mr. York's Statements To The Officer Were Fruit Of The Poisonous Tree And Must Be Suppressed.

A defendant's statements must be excluded if they are induced by evidence seized in an illegal search. Such inducement may occur when the defendant is confronted with evidence that demonstrates the futility of remaining silent. *See, e.g.* LaFave, *Search and Seizure*, § 11.4(c); *People v. Robbins*, 54 Ill.App.3d 298, 12 Ill.Dec. 80, 369 N.E.2d 577 (1977); *People v. Johnson*, 70 Cal.2d 540, 75 Cal.Rptr. 401, 450 P.2d 865 (1969).

The test is "whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." *United States v. Wong Sun*, 371 U.S. 471, 487, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963) (*quoting* Maguire, *Evidence of Guilt*, 221 (1959)).

This argument was addressed by the Washington State Supreme Court in *State v. Byers*, 88 Wn.2d 1, 559 P.2d 1334 (1977). In *Byers*, defendants confessed to burglary after watching the police illegally seize evidence of their guilt. The court excluded confessions voluntarily made after *Miranda* warnings because the defendants “thought [they] were had,” and because,

[t]he State has offered no alternative explanation for [defendants’] action and has not met its burden of proving that the confessions were Not [sic] produced by confronting [defendants] with the illegally seized evidence.

*Byers*, 88 Wn.2d at 9.

This case presents similar facts. Mr. York had submitted to a polygraph test. He apparently honestly answered detailed questions about his sexual history, and was subsequently confronted at his high school by a police officer about these statements. It is unreasonable to expect a juvenile, pulled out of class by a police officer, to assert his right to remain silent when the officer confronts a juvenile with his detailed confession from a polygraph. This court should apply the reasoning in *Byers* and *Wong Sun*, and find that Mr. York’s admissions to the officer were simply fruit of the poisonous tree and thus inadmissible.

E. CONCLUSION

Mr. York submitted to the polygraph involuntarily – he was ordered to do so by the court. The informed consent for the polygraph never advised him that his statements could be used against him to charge him with crimes other than a violent crime, or abuse and neglect. The confession obtained by the police officer using Mr. York’s admissions during the polygraph was fruit of the poisonous tree and must be suppressed. Given the totality of the circumstances, this court should find that Mr. York’s statements were coerced, involuntary and fruit of the poisonous tree. His conviction should be reversed.

Dated this 26th day of July, 2010.

GEMBERLING & DOORIS, P.S.

  
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Respondent,	)	No. 28886-2-III
	)	
vs.	)	CERTIFICATE
	)	OF MAILING
DONALD J. YORK,	)	
	)	
Appellant.	)	

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I certify under penalty of perjury under the laws of the State of Washington that on July 26, 2010, I mailed copies of Appellant's Brief in this matter to:

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Signed at Spokane, Washington on July 26, 2010.



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