

NO. 288862-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

FILED

AUG 31 2010

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

THE STATE OF WASHINGTON, Respondent

v.

DONALD J. YORK, Appellant

APPEAL FROM THE SUPERIOR COURT
FOR BENTON COUNTY

NO. 09-8-00352-1

BRIEF OF RESPONDENT

ANDY MILLER
Prosecuting Attorney
for Benton County

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STATEMENT OF THE CASE

On July 23, 2008, the respondent pled guilty to one count of Voyeurism. (CP 21). The respondent was granted a Special Sex Offender Disposition Alternative (hereafter SSODA) on September 3, 2008, which included 24 months of supervision, as well as specific SSODA requirements. (CP 28-32). Those requirements included outpatient sex offender treatment as well as “polygraphs for treatment and supervision purposes.” (CP 31-32).

On February 17, 2009, Community Supervision Supervisor, Tim Markham, contacted the Richland Police Department regarding the results of a polygraph examination of the respondent on February 6, 2009. (CP 59, 61). The respondent had reported to the polygraph examiner that he had sexual intercourse with two family pets, a labrador and a pit bull, on about 25 different occasions. (CP 59, 61). The respondent stated that he had sexual intercourse with the pit bull as recently as one month ago. (CP 60).

Detective Roy Shepherd of the Richland Police Department contacted the respondent regarding this matter on March 6, 2009. (CP 60, 61). Detective Shepherd advised the respondent of his *Miranda* rights as well as the additional juvenile warnings; the respondent stated that he

understood those rights and was willing to speak with Detective Shepherd. (CP 60). The respondent admitted having sexual intercourse with dogs on approximately 25 occasions, the last incident occurring in January of 2009. (CP 60). The respondent completed a written statement as well. (CP 79).

Detective Shepherd also contacted the respondent's brother, Robert York, who stated that he had walked into the respondent's bedroom the previous summer and observed the respondent under the covers. (CP 81). When he pulled back the covers, he observed the respondent with his pants down and their pit bull. (CP 81). Robert York stated that the respondent had an erection and there was a very bad smell in the room. (CP 81).

The respondent was subsequently charged with one count of Animal Cruelty in the First Degree with an allegation of sexual motivation on April 15, 2009. (CP 1-2).

On September 23, 2009, the respondent moved to suppress statements he made to Detective Shepherd where he admitted to having sex with the family dog. (CP 51). At this hearing, the court found that the questioning by the polygraph examiner was not coercive and that the implied consent form signed by the respondent prior to the polygraph, placed the respondent on notice that the police may be contacted based on

the statements given during the examination. (CP 51-52). In addition, the court found that the respondent received his *Miranda* warnings prior to making any statements to Detective Shepherd, and that those statements were voluntary. (CP 51-52). The court also found that the facts in the present case were similar to the facts in *State v. Dods* and the court was following *Dods* in making its decision to deny the respondent's motion to suppress his statements given to law enforcement. (CP 51-52).

On November 16, 2009, the respondent moved the court to dismiss the charge of Animal Cruelty in the First Degree under corpus delicti. (CP 93). The court denied the respondent's motion, finding that the brother's observations of the respondent in bed with the family dog with his pants down, an erect penis, and a horrible smell, were sufficient to satisfy corpus delicti. (CP 116-117). In denying the respondent's motion, the court ruled that there was sufficient independent evidence to establish a prima facie case of Animal Cruelty in the First Degree with Sexual Motivation, and the case proceeded to trial. (CP 117).

At trial on February 26, 2010, the State presented three witnesses: Detective Roy Shepherd, the respondent's brother, Robert York, and expert witness, Dr. Sabine Gerds-Grogan. Detective Shepherd testified that the respondent told him in an interview that he had engaged in sexual contact with the family dog, Lexis, about 25 times. (02/26/10, RP 63).

The respondent also told Detective Shepherd that the dog was no longer living in the home: that she was sent to live with a brother in Portland. (02/26/10, RP 63). Robert York testified that one morning in the summer of 2008, he entered the respondent's room and found him lying on his bed with the family dog, Lexis, with his pants down, and saw that he had an erection. (02/26/10, RP 40). Robert York detected a bad "musty" smell that he had only experienced in the respondent's room before, and he had the impression that something sexual such as masturbating had been taking place. (02/26/10, RP 41-42). Veterinarian, Dr. Sabine Gerds-Grogan, then testified that when a canine is in a stressful situation such as sexual abuse, it is common for them to express their anal glands, releasing a horrible smell. (02/26/10, RP 51). Dr. Gerds testified that although the smell is distinct and can't be directly related to another smell, it could be described as "musty." (02/26/10, RP 52, 55-56).

The court found the respondent guilty of Animal Cruelty in the First Degree With Sexual Motivation. (CP 118-120). He now appeals. (CP 130-131).

ARGUMENT

1. **THE STATEMENTS GIVEN BY THE RESPONDENT DURING A POLYGRAPH EXAM WERE VOLUNTARY, AND THE RESPONDENT WAS INFORMED OF THE POTENTIAL FOR LEGAL CONSEQUENCES BY THE IMPLIED CONSENT FORM. THEREFORE, THE CONFESSION GIVEN BY THE RESPONDENT TO DETECTIVE SHEPHERD IS ADMISSIBLE EVIDENCE.**

It is well established under Washington law that a court may order polygraph testing to monitor compliance with sex offender treatment or other conditions of the sentence. *State v. Combs*, 102 Wn. App. 949, 952, 10 P.3d 1101, 1102 (2000). The scope of the polygraph examination is implicitly limited by the context of the order. *State v. Riles*, 86 Wn. App. 10, 16-17, 936 P.2d 11, 14 (1997). A therapist or probation officer may not order polygraph testing for impermissible purposes. *Id.* Polygraph testing may not be utilized “as a fishing expedition to discover evidence of other crimes, past or present.” *Combs*, 102 Wn. App. at 953, 10 P.3d at 1103. Absent stipulation, polygraph testimony is generally inadmissible at trial. *State v. Renfro*, 96 Wn.2d 902, 905, 639 P.2d 737, 739 (1982).

In this matter, polygraph testing was ordered to monitor the respondent’s compliance with sex offender treatment requirements and other conditions of supervision. There is no indication that the polygraph administered on February 6, 2009 was ordered for any other purpose

beyond those objectives. During this permissible use of polygraph testing, the respondent voluntarily disclosed that he had repeatedly engaged in sexual intercourse with dogs, a topic certainly relevant to his successful participation in sex offender treatment. (CP 59, 61). At the respondent's September 23, 2009 motion hearing, the State conceded that the respondent's statements to the polygraph examiner were not admissible at trial. (09/23/09, RP 4). However, the trial court was correct to find that the respondent's subsequent post-*Miranda* confession to Detective Shepherd was admissible. (09/23/09, RP 23-24).

- a. The trial court was correct to rely on *Dods*, because it is nearly factually identical to the present case.**

The only Washington case on point in this matter is *State v. Dods*, 87 Wn. App. 312, 941 P.2d 1116 (1997), which is also nearly factually identical to the case at bar. In *Dods*, the defendant was already a registered sex offender when he was convicted of public indecency. *Id.* at 313. A condition of his sentence included polygraph testing at his therapist's discretion. *Id.* While submitting to a polygraph test, the defendant informed the polygraph examiner that he had sexual contact with a minor female and masturbated in her presence. *Id.* The polygraph examiner informed the defendant's community corrections officer (CCO) of the disclosures. *Id.* at 315. The CCO then *Mirandized* the defendant,

who stated that he understood his rights and was willing to answer questions regarding the incident discussed in the polygraph examination. *Id.* The defendant was subsequently charged with attempted child molestation in the first degree. *Id.* The trial court admitted the defendant's statements to his CCO over objection, and the defendant was found guilty. *Id.* at 315-316.

The conviction in *Dods* was affirmed on appeal, where the Court held that the CCO's testimony was not fruit of the poisonous tree (the tree being the polygrapher's examination). *Id.* at 320. The Court concluded that the defendant's statements to his CCO were made after he was properly *Mirandized* and then knowingly, voluntarily, and intelligently waived his rights. *Id.* at 319.

In the instant case, the respondent made incriminating statements to Detective Shepherd after he was advised of his *Miranda* rights as well as the juvenile warnings. (CP 51-52). The State agrees that the statements made by the respondent to the polygraph examiner were correctly suppressed under *Dods*, but statements made to Detective Shepherd were correctly found to be admissible.

- b. The respondent had the same privilege against self-incrimination as an adult.**

The respondent's brief alleges that because he is a juvenile, this changes the way in which the Court should review the voluntariness of his statements. (App. Brief, 12-13). This is not correct. Under RCW 13.40.140(8), juveniles have the same right as adults: they are not afforded more or less rights against self-incrimination. RCW 13.40.140(8) states:

A juvenile shall be accorded the same privilege against self-incrimination as an adult. An extrajudicial statement which would be constitutionally inadmissible in a criminal proceeding may not be received in evidence at an adjudicatory hearing over objection. Evidence illegally seized or obtained may not be received in evidence over objection at an adjudicatory hearing to prove the allegations against the juvenile if the evidence would be inadmissible in an adult criminal proceeding. An extrajudicial admission or confession made by the juvenile out of court is insufficient to support a finding that the juvenile committed the acts alleged in the information unless evidence of a corpus delicti is first independently established in the same manner as required in an adult criminal proceeding.

c. The independent corroborating evidence supported a reasonable and logical inference of criminal activity.

The respondent also asserts that, "no corroborating evidence exists in this case, other than the statements of the defendant and the vague testimony of Mr. York's brother." (App. Brief, 12). This allegation is false. At trial, in addition to Detective Shepherd's testimony that the respondent stated to him that he had engaged in sexual contact with the family dog Lexis about 25 times, the State also provided the testimony of

the respondent's brother, Robert York, and Dr. Sabine Gerds-Grogan. (02/26/10, RP 63). The testimony of both witnesses corroborated the confession given by the respondent.

Robert York testified that he walked into the respondent's room one morning in the summer of 2008, and saw the respondent on his bed with his pants down with an erection. (02/26/10, RP 40). Mr. York stated that the family dog, Lexis, was also on the bed. (02/26/10, RP 42). He stated that immediately upon entering the room he smelled something bad that he described as "sort of like musty" and he had only smelled this odor inside the respondent's room. (02/26/10, RP 41). Mr. York indicated that he had the feeling that the respondent was doing something sexual, such as masturbating, and he was upset that he wasn't doing it in private when nobody was home. (02/26/10, RP 41, 42).

Dr. Sabine Gerds-Grogan provided testimony as an expert witness for the State. Dr. Gerds informed the court that she is a veterinarian at Meadow Hills Veterinary Clinic in Richland, Washington, and in January 2010 attended the North American Veterinary Conference in Orlando where she received education on sexual abuse of animals. (02/26/10, RP 48, 49). Dr. Gerds indicated that when a canine is in a stressful situation, such as sexual abuse, it is common for them to express their anal glands. (02/26/10, RP 51). She stated the smell associated with expressing the

anal gland is very difficult to describe and, “some people describe it as a little fishy, but it’s very strong and very nasty, disgusting, intense flavor.” (02/26/10, RP 52). On cross-examination, Dr. Gerds informed the court that although difficult to describe, smell could be described as “musty”. (02/26/10, RP 55-56).

The State’s independent corroborative evidence need not establish the corpus delicti beyond a reasonable doubt, or even by a preponderance of the evidence; rather, such evidence is sufficient if it prima facie establishes the corpus delicti. *State v. Baxter*, 134 Wn. App. 587, 596, 141 P.3d 92, 96 (2006). The independent evidence must support a logical and reasonable inference of criminal activity only. *State v. Whalen*, 131 Wn. App. 58, 63, 126 P.3d 55 (2005) citing *Aten*, 130 Wn.2d at 659-60, 927 P.2d 210. If that evidence “supports reasonable and logical inferences of both criminal agency and noncriminal cause, it is insufficient to corroborate a defendant's admission of guilt.” *State v. Brockob*, 159 Wn.2d 311, 329, 150 P.3d 59, 68 (2006) (quoting *Aten*, 130 Wn.2d at 660). (interior quotations omitted). Here, the State’s corroborating evidence clearly presented that the respondent was engaged in sexual contact with the family dog, Lexis. Under the respondent’s argument, the State would need to have an independent witness view a respondent engaging in sexual intercourse with an animal in order to convict under

Animal Cruelty in the First Degree. This argument is not based on law. The State's corroborating evidence supports a reasonable and logical inference of animal sex, which constitutes the crime of Animal Cruelty. When the corroborating evidence was considered with the respondent's voluntary confession, the State proved the charge beyond a reasonable doubt.

d. The respondent's interpretation of the informed consent form is clearly erroneous when the form is looked at as a whole.

Contrary to case law, the respondent seeks to have his statements to Detective Shepherd suppressed based on his interpretation of the Polygraph Informed Consent form he signed prior to being administered the polygraph test at issue. (CP 34). The second paragraph of the form states:

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.

CP 34.

The third paragraph of the informed consent form states:

I have been informed that the Washington State Law, R.C.W. 26.44.030, requires that any previously unreported disclosure of abuse and neglect must be reported to 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 on what I say, the seriousness of the crime, as well as the statute of limitations.

CP 34.

The respondent's narrow interpretation of the third paragraph of the informed consent form is erroneous when the form is looked at as a whole. The form does not state that disclosure is limited to violent crimes and abuse and neglect as defined by RCW 26.44.030. To the contrary, the form first provides the respondent with a general warning in paragraph two that he may limit his disclosure to avoid implicating himself in undisclosed criminal matters. Paragraph three further details examples of disclosures that are required by law or county policy to be reported to law enforcement. The respondent's interpretation of paragraph three makes paragraph two devoid of any meaning.

Adherence to the respondent's interpretation of the informed consent form would also result in that document, not signed by a judge or a deputy prosecuting attorney, being elevated to the status of a protective order granting use immunity. The court did not enter any such order in this matter pertaining to the results of polygraph examinations. There is no mention of use immunity for information obtained from polygraph examinations in the Order on Adjudication and Disposition or in Appendix B of the Order of Disposition. (CP 21-32).

Concerns about disclosure eroding the efficacy of sex-offender treatment are unfounded because disclosure is already required. Participants in sex offender treatment who are ordered to undergo polygraph examinations are already aware, pursuant to paragraph three of the informed consent form, that state law requires provider reporting of child abuse and neglect, and county policy requires reporting of violent offenses. The success of sex offender treatment is wholly dependent upon the efforts of the respondent. That a person would continue to engage in sexually-deviant behavior while in sex-offender treatment is far more detrimental to his or her treatment program than the State filing new criminal charges disclosed in a polygraph examination.

Additionally, criminal conviction often provides the only impetus for those who need treatment to participate in it. Given the respondent's statements to Detective Shepherd, his need for treatment and monitoring may extend well beyond the supervision period ordered for his voyeurism conviction. Had the State not been permitted to proceed with criminal charges in this matter, an individual who continues to commit sexually-motivated crimes would not be prosecuted. Public safety concerns strongly outweigh any perceived detriment disclosure causes to the respondent's relationship with his treatment provider.

CONCLUSION

The trial court correctly found that the statements given by the respondent to the polygraph examiner were voluntary and that the respondent was put on notice that the police may be contacted based on the statements given during the examination. The respondent's interpretation of the implied consent form is clearly illogical when the form is looked at as a whole, and therefore, the respondent's argument that the advisement only related to violent crime, abuse, or neglect is not valid. Because the use of the polygraph information was lawful, the respondent's post-*Miranda* confession to Detective Shepherd is not fruit of the poisonous tree. Therefore, the State respectfully asserts that the respondent's conviction should be affirmed.

RESPECTFULLY SUBMITTED this 30th day of August 2010.

ANDY MILLER

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for:

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ORIGINAL

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

NO. 288862

vs.

DECLARATION OF SERVICE

DONALD J. YORK,

Appellant.

I, PAMELA BRADSHAW, declare as follows:

That I am over the age of eighteen (18) years, not a party to this action, and competent to be a witness herein. That I, as a Legal Assistant in the office of the Benton County Prosecuting Attorney, served in the manner indicated below, a true and correct copy of the *Brief of Respondent* and this *Declaration of Service*, on September 30, 2010.

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

EXECUTED at Kennewick, Washington, on August 30, 2010.



PAMELA BRADSHAW