

No. 98094-2

No. 79364-1-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

IN RE THE DEPENDENCY OF:

B.G.M.-S., A.M.-S., A.M.-S.,

Minor Children.

ON APPEAL FROM THE SUPERIOR COURT OF
THE STATE OF WASHINGTON FOR SNOHOMISH COUNTY

REPLY BRIEF OF FATHER

THOMAS M. KUMMEROW
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 610
Seattle, Washington 98101
(206) 587-2711
tom@washapp.org

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A. ARGUMENT

1. Courts are authorized to grant derivative use immunity to protect a parent's right against incrimination.

Mr. Michel-Garcia did not request derivative use immunity under all circumstances as claimed by the State. Rather, he sought the immunity in order to participate in the court ordered psychological evaluation in order to protect his Fifth Amendment right against incrimination. The Department did not oppose this request and has not contested it before this Court. Finally, it is important to emphasize that Mr. Michel-Garcia was not seeking transactional immunity, merely derivative use immunity.

The State's brief indicates a lack of understanding of the dynamics of the dependency process, especially in situations as here where there are allegations of physical abuse which are being investigated by the police. On first blush, the immunity granted under RCW 26.44.053 appears to provide sufficient immunity as the State suggests. But, as here, without the requested derivative use immunity under *State v. Decker*,¹ Mr. Michel-Garcia would have to choose

¹ 68 Wn.App. 246, 842 P.2d 500 (1992).

between engaging in the psychological evaluation and the subsequent treatment or protect his rights against self-incrimination.

Dependency proceedings are intended to be preliminary, remedial and non-adversarial proceedings designed to protect children and assist parents in order to reunite families. *In re the Dependency of Schermer*, 161 Wn.2d 927, 943, 169 P.3d 452 (2007). Evaluations are crucial in identifying and evaluating parental deficiencies and in determining the appropriate services to remedy any of these identified deficiencies. Thus, in order to successfully engage in treatment, a parent must provide full and truthful answers to his evaluators and treatment providers. But, RCW 26.44.030 requires that if a parent discloses any unreported or uncharged offense(s) against a child, the evaluator must to report these disclosures. Only a grant of derivative use immunity would ensure the evaluation is conducted free of fear of self-incrimination.

Thus, recognizing this inherent conflict, the decision in *In re Dependency of J.R.U.-S.*, 126 Wn.App. 786, 110 P.3d 773 (2005), provided the discretion for the juvenile court to grant derivative use immunity in order to encourage parents to be open in the evaluations,

thus assisting in resolving the dependency, and also protecting the parent's right against self-incrimination.

2. The inherent discretion possessed by courts is a proper balancing of the goals of dependency proceedings to reunite the family and the State's desire to investigate and prosecute.

The primary objection of the State, as described in the prosecutor's brief, to the grant of inherent authority by juvenile courts to grant derivative use immunity is that it makes it harder to obtain information in order to prosecute. The State takes exception to the underlying bases for the inherent discretion afforded courts to grant derivative use immunity, contending that only the State has that authority. Ultimately, the State is suggesting this Court overturn its decisions in *Decker* and *J.R.U.-S*. This Court should refuse the State's suggestion and follow the existing authority.

The State contends the decision in *State v. Escoto*, 108 Wn.2d 1, 734 P.2d 1310 (1987), did not discuss or decide any question of immunity. Brief of Prosecutor at 20. This reading overlooks the facts necessary for the Supreme Court's ultimate conclusion.

The trial court in *Escoto* believed it had inherent authority to order a post-adjudication, predisposition psychological evaluation as requested by the juvenile court case worker in order to craft an

appropriate disposition. *Escoto*, 108 Wn.2d at 3. But, the juvenile court limited the scope of the evaluation: “[A]ny evaluation would relate only to matters for which the juvenile had been found guilty and not any unadjudicated charge.” *Id.* The juvenile appealed this decision by the juvenile court. In affirming the juvenile court, the Supreme Court held:

A sincere, sensible and concerned trial judge was attempting to fashion the best disposition of a juvenile very much in need of all the help the system could provide. The juvenile’s criminal history was such that a disposition outside the standard range was virtually inevitable. The trial court was seeking the most thorough information it could obtain to help this youngster and still protect society against an increasingly dangerous child. *The court was precisely careful to limit use of the evaluation to matters already adjudicated and to permit presence of counsel.*

Escoto, 108 Wn.2d at 6-7 (emphasis added). Thus, without calling it immunity, by limiting the scope of the evaluation, the Court was affirming the juvenile court’s grant of derivative use immunity.

The State argues that the decision in *Decker* was based upon a flawed premise in relying on *Escoto* to find inherent authority to limit the use of information about unadjudicated crimes obtained as part of a court-ordered psychological evaluation. Brief of Prosecutor at 21.

Again, the State ignores the underlying facts and procedural posture of the case.

In *Decker*, as in *Escoto*, the juvenile court ordered a post-adjudication, predisposition psychological evaluation but limited it by imposing a protective order stating that “any discussion with evaluator in reference to matters that have not been adjudicated shall be granted use immunity.” 68 Wn.App. at 248. The juvenile appealed and this Court found that the juvenile court, over the State’s objection, had the inherent authority under *Escoto* to not only order the psychological evaluation but issue a protective order granting use immunity. *Decker*, 68 Wn.App. at 252-53. Again, the State is wrong that *Escoto* did not address the inherent authority to trial courts to grant immunity.

Finally, the State wrongly contends that the portion of *J.R.U.-S.* dealing with immunity was *dicta* and need not be followed. Brief of Prosecutor at 18-20. The language in *J.R.U.-S.* about the granting of derivative use immunity was not *dicta*. Although the discussion in the decision revolved around the parents’ right to counsel at court ordered psychological evaluations, the ultimate conclusion by this Court was that, while there was no right to counsel at the evaluations, the appropriate remedy was to grant derivative use immunity in order to

protect the parents' rights against self-incrimination. 126 Wn.App. at 796-800. The latter part of the decision only makes sense in light of the Department's argument that the parents' rights against self-incrimination were never threatened because RCW 26.44.053 adequately protected those rights. *Id.*

Contrary to the State's conclusion, the decisions in *Escoto*, *Decker*, and *J.R.U.-S.* provided the juvenile court with the inherent authority to grant Mr. Michel-Garcia derivative use immunity to allow him to provide truthful and complete answers to the evaluator in order to identify potential parental deficiencies and craft appropriate services without the fear that his answers will expose him to criminal liability. Thus, the juvenile court erred in refusing to grant derivative use immunity. This Court should reverse the order denying derivative use immunity and remand to the juvenile court.

B. CONCLUSION

For the reasons stated, Mr. Michel-Garcia asks this Court to reverse the order denying derivative use immunity and remand to the juvenile court.

DATED this 19th day of July 2019.

Respectfully submitted,

s/Thomas M. Kummerow

THOMAS M. KUMMEROW (WSBA 21518)

Washington Appellate Project – 91052

1511 Third Avenue, Suite 610

Seattle, WA. 98101

(206) 587-2711

tom@washapp.org

Attorneys for Father

WASHINGTON APPELLATE PROJECT

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