

No. 79364-1-I

No. 98094-2

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 REVIEW FROM THE SUPERIOR COURT OF
THE STATE OF WASHINGTON FOR SNOHOMISH COUNTY

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

TABLE OF CONTENTS

A. SUMMARY OF ARGUMENT 1

B. ASSIGNMENTS OF ERROR 1

C. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR..... 2

D. STATEMENT OF THE CASE..... 3

E. ARGUMENT 4

 1. Granting use and derivative use immunity is a proper exercise of the juvenile court’s inherent authority. 4

 2. This Court’s decision in *J.R.U.-S.* is consistent with *Escoto* and *Decker* and authorizes a limited grant of use and derivative use of immunity to protect the parent’s right against self-incrimination. 7

 a. *The juvenile court possessed the authority to grant the motion for use and derivative use immunity.* 7

 b. *RCW 26.45.053(2) alone does not protect Mr. M.-G.’s right against self-incrimination.* 9

F. CONCLUSION 11

TABLE OF AUTHORITIES

UNITED STATES CONSTITUTION

U.S. Const. amend. Vpassim

WASHINGTON CONSTITUTION

Article I, section 9.....5

FEDERAL CASES

Lefkowitz v. Turley, 414 U.S. 70, 94 S.Ct. 316, 38 L.Ed.2d 274 (1973) 6

United States v. McLaughlin, 126 F.3d 130 (3d Cir.1997)6

WASHINGTON CASES

Dependency of Q.L.M. v. State, Dep't of Soc. & Health Servs., 105
Wn.App. 532, 20 P.3d 465 (2001).....7

In re the Dependency of J.R.U.-S., 126 Wn.App. 786, 110 P.3d 773
(2005).....passim

State v. Bryant, 97 Wn.App. 479, 983 P.2d 479 (1999), *review denied*,
140 Wn.2d 1026, *cert. denied*, 531 U.S. 1016, 121 S.Ct. 576, 148
L.Ed.2d 493 (2000)..... 11

State v. Decker, 68 Wn.App. 246, 842 P.2d 500 (1992)passim

State v. Escoto, 108 Wn.2d 1, 735 P.2d 1310 (1987).....i, 7, 8

STATUTES

RCW 13.34.0303

RCW 13.34.1303

RCW 26.45.053passim

A. SUMMARY OF ARGUMENT

S.M.-G.'s children were found to be dependent based upon allegations of parental abuse. A police investigation was begun regarding the allegations. In order to access services to regain custody of his children, the father sought a protective order pursuant to *State v. Decker* for use and derivative use immunity. The juvenile court's denial was contrary to existing law and requires reversal and remand for the juvenile court to grant the limited protective order.

B. ASSIGNMENTS OF ERROR

1. The court erred in denying Mr. M.-G.'s motion for use and derivative use immunity.

2. The court erred in entering Conclusion of Law 9, finding “[T]here is no caselaw on point with this issue of whether or not a parent should be granted *Decker* immunity in a dependency case so they can engage in evaluations and treatment.”

3. The court erred in entering Conclusion of Law 10(c), finding “There is no broad granting of *Decker* immunity, and the court has very little discretion in granting such immunity.”

4. The court erred in entering Conclusion of Law 11(c) that:

In order for the Fifth Amendment to apply, there has to be complete compulsion and consequence. There has to

be real testimony, sworn testimony, or testimony one could see there was a direct consequence to.

5. The court erred in entering Conclusion of Law 11(d) that:

According to *J.R.U.-S.*, “compulsion must be real and immediate.” Dependency evaluations do not fall into that category.

6. The court erred in entering Conclusion of Law 11(j) that:

A parent can go to the evaluation and take their chances with the answers they give. The court can draw any conclusions they wish from those answers after they come from the evaluator. This is not testimonial, so *Decker* does not apply.

7. The court erred in entering Conclusion of Law 13(d), finding:

“[RCW 26.45.053(2)] was created because of *J.R.U.-S.*”

C. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR

Courts have inherent authority to enter protective orders granting parents use and/or derivative use immunity in limited circumstances. This Court has held that use and/or derivative use immunity may be granted to parents for the purposes of psychological evaluations where there is a police investigation into allegations of abuse which is the basis for a dependency petition. Mr. M.-G.’s children were found to be dependent following allegations of physical abuse and for which a police investigation is underway. Mr. M.-G. was ordered to obtain a psychological evaluation and domestic violence

assessment and he asked for use and/or derivative use immunity. The juvenile court refused to grant the requested immunity, ruling that no decision of this Court has authorized such immunity, ignoring the clear holding of this Court in *In re the Dependency of J.R.U.-S.*, 126 Wn.App. 786, 110 P.3d 773 (2005). Is Mr. M.-G. entitled to reversal of the court's decision and remand for the court to grant such immunity?

D. STATEMENT OF THE CASE

S.M.-G. is the father of B.G.M.-S., A.M.-S., and A.M.-S. Due to evidence of bruising and other injuries observed on A.M.-S. and A.M.-S., as a result suspected child abuse by the parents, the Department of Children, Youth and Families (the Department) took custody of the children and filed dependency proceedings. CP 483-93.

The children were subsequently found to be dependent under RCW 13.34.030(6)(b), (c). Pursuant to RCW 13.34.130, the juvenile court ordered the parents to obtain a psychological evaluation with a parenting component. CP 385.

The parents moved under *State v. Decker*, 68 Wn.App. 246, 842 P.2d 500 (1992) for use and derivative use immunity for the psychological evaluations. CP 281-87, 363-67. On September 20, 2018, the juvenile court held a hearing regarding the father's request for

immunity under *Decker*. The juvenile court refused to issue an order granting the request for use and derivative use immunity. CP 133-210, 231-37. In its findings, the court found that there was a pending criminal investigation but also found that Mr. M.-G.’s Fifth Amendment rights were not in danger and RCW 26.45.053(2) provided sufficient protection. CP 235-36.

On May 17, 2019, Commissioner Kanazawa granted discretionary review, finding that Mr. M.-G.’s motion raised a significant issue.

E. ARGUMENT

1. Granting use and derivative use immunity is a proper exercise of the juvenile court’s inherent authority.

The Fifth Amendment provides that no person “shall be compelled in any criminal case to be a witness against himself.” U.S. Const. amend. V; *see also* Const. art. I, § 9 (“No person shall be compelled in any criminal case to give evidence against himself.”). The privilege protects a defendant from being compelled to provide evidence of a “testimonial or communicative nature.” *In re Dependency of J.R.U.-S.*, 126 Wn.App. 786, 793, 110 P.3d 773 (2005).

The privilege may be raised in any proceeding, “civil or criminal, formal or informal, where the answers might incriminate [the questioned person] in future criminal proceedings.” *Lefkowitz v. Turley*, 414 U.S. 70, 77, 94 S.Ct. 316, 38 L.Ed.2d 274 (1973). When compulsion is present, the privilege is self-executing, and an individual “does not waive the privilege by failing to invoke it.” *United States v. McLaughlin*, 126 F.3d 130, 135 (3d Cir.1997). Compulsion exists when a person is threatened with serious penalties if the evidence sought is not produced. *J.R.U.-S.*, 126 Wn.App. at 794. Generally, the privilege “may be invoked whenever circumstances indicate that a real and substantial danger of incrimination exists.” *J.R.U.-S.*, 126 Wn.App. at 793.

Because of the threat to a juvenile’s Fifth Amendment right, this Court in *Decker* examined a juvenile court’s inherent authority to issue protective orders and affirmed a protective order granting a juvenile use immunity in a criminal case for information about unadjudicated crimes when the juvenile, who had been found guilty of a criminal offense, was compelled to participate in a postadjudication predisposition psychological evaluation without his attorney present. *Decker*, 68 Wn.App. at 247. *Decker* recognized that the grant of immunity is

normally a prosecutorial function, but in certain limited circumstances, a court has inherent authority to grant a limited protective order, which includes use and derivative immunity. *Decker*, 68 Wn.App. at 252. This Court found that “the trial court was merely limiting the scope of the evaluation and attempting to fashion a means by which to protect Decker’s Fifth Amendment rights.” *Id.* at 252.

The decision in *Decker* relied on the Supreme Court’s decision in *State v. Escoto*, 108 Wn.2d 1, 735 P.2d 1310 (1987), in finding the inherent authority to order a limited protective order such as that sought here. *Decker*, 68 Wn.App. at 253. In *Escoto*, the juvenile court ruled it had inherent authority to order a postadjudication psychological evaluation but limited it only to “matters for which the juvenile had been found guilty and not any unadjudicated charge[s].” *Escoto*, 108 Wn.2d at 3.

Taking a cue from *Escoto*, *Decker* ruled the juvenile court had the inherent authority to grant a limited protective order granting what it described as “use immunity” but was in reality use and derivative use immunity. *See J.R.U.-S.*, 126 Wn.App. at 799 (“[T]he immunity granted in *Decker* actually included both use and derivative use immunity.”). *See also Dependency of Q.L.M. v. State, Dep’t of Soc. &*

Health Servs., 105 Wn.App. 532, 544, 20 P.3d 465 (2001) (Because the Fifth Amendment allows a person not to answer official questions put to him in a civil proceeding where the answer might incriminate him in future criminal proceedings, protective orders may be appropriate in some juvenile dependency cases).

Both *Escoto* and *Decker* recognize a trial court's inherent authority to fashion protective orders, which includes the authority to grant limited use and derivative use immunity.

2. This Court's decision in *J.R.U.-S.* is consistent with *Escoto* and *Decker* and authorizes a limited grant of use and derivative use immunity to protect the parent's right against self-incrimination.

- a. *The juvenile court possessed the authority to grant the motion for use and derivative use immunity.*

The juvenile court here ruminated that there was no appellate decision which authorized a protection order granting use or derivative use immunity in a dependency matter such as here. CP 231-37. But the court ignored the clear holding in *J.R.U.-S.*:

We conclude that while the parents had no constitutional or statutory right to counsel during their evaluations, the courts did not abuse their discretion because the parents' Fifth Amendment rights were implicated, and the immunity statute provides inadequate protection for those rights. *We hold, however, that when Fifth Amendment rights are threatened, the courts should*

enter protective orders granting additional immunity rather than allowing counsel to attend psychological evaluations.

J.R.U.-S., 126 Wn.App. at 790 (emphasis added). *J.R.U.-S.* involved parents whose child had been found dependent based on a suspicion of child abuse. 126 Wn.App. at 790-91. The parents agreed to services and were required by the juvenile court to undergo psychological evaluations. *Id.* The father objected to the psychological evaluation because it would infringe on his rights under the Fifth Amendment. *Id.* at 792. As a result, the father asked to have counsel present during the evaluation. *Id.* The trial court agreed to allow counsel to attend the evaluations and restricted dissemination of the results of the evaluation to the parties and treatment providers. *Id.* at 791-92. The Department challenged the orders. *J.R.U.-S.*, 126 Wn.App. at 791-92.

This Court agreed with the Department that the parents were not under compulsion to speak, thus there was no right to counsel at the evaluations. *Id.* at 793. But, this Court did find that the parents' right to be free from self-incrimination was implicated and in danger:

In summary, because there was a real and substantial danger of incrimination from the parents' evaluations, and because the immunity statute does not adequately protect their Fifth Amendment rights, we reject the Department's argument that the parents' Fifth Amendment rights were not threatened.

J.R.U.-S., 126 Wn.App. at 799-800. Because of this danger of infringement of the parents' Fifth Amendment rights, this Court agreed the juvenile court did not abuse its discretion by allowing the parents' counsel to be present during the evaluation. *Id.*

The same scenario is present here. Although Mr. M.-G. did not request the presence of counsel, he did request that the court issue an order granting him use and/or derivative use immunity for the purpose of undergoing the psychological evaluation and domestic violence and anger management assessment. This is what *J.R.U.-S.* authorized and the juvenile court erred in denying Mr. M.-G.'s request.

b. *RCW 26.45.053(2) alone does not protect Mr. M.-G.'s right against self-incrimination.*

The court's ruling appeared to find that RCW 26.45.053 (2) provided sufficient protection for Mr. M.-G. CP 236-37.

RCW 26.45.053(2) states in relevant part:

At any time prior to or during a hearing ... the court may ... order the examination of any parent ... if the court finds such an examination is . . . necessary to the proper determination of the case ... *No information given at any such examination of the parent or any other person having custody of the child may be used against such person in any subsequent criminal proceeding against such person or custodian concerning the alleged abuse or neglect of the child.*

(Emphasis added).

“RCW 26.45.053(2) speaks only of ‘use’ immunity. It does not purport to provide immunity for evidence derived from immunized statements. The statute thus provides less comprehensive immunity than the Fifth Amendment.” *J.R.U.-S.*, 126 Wn.App. at 798.

J.R.U.-S. demonstrated why simple use immunity as authorized by RCW 26.45.053(2) is not sufficient protection for Mr. M.-G.:

“Use immunity” prohibits the direct use of compelled statements in a later criminal trial. “Derivative use immunity” bars the use of any evidence derived from immunized statements. When granted together, “derivative use” and “use” immunity provide protection that is “coextensive” with the Fifth Amendment privilege. “In essence, use and derivative use immunity leave the witness, and the government, in the same situation they would have been in had the witness not given a statement or testified.”

J.R.U.-S., 126 Wn.App. at 797-98, quoting *State v. Bryant*, 97 Wn.App. 479, 484-85, 983 P.2d 479 (1999), review denied, 140 Wn.2d 1026, cert. denied, 531 U.S. 1016, 121 S.Ct. 576, 148 L.Ed.2d 493 (2000).¹

¹ In *Kastigar v. United States*, the United States Supreme Court characterized use and derivative use immunity as a ‘total prohibition on use’ which “provides a comprehensive safeguard, barring the use of compelled testimony as an ‘investigatory lead,’ and also barring the use of any evidence obtained by focusing investigation on a witness as a result of his compelled disclosures.” Such immunity prohibits “prosecutorial authorities from using the compelled testimony in *any* respect...” Under *Kastigar*, the government may still prosecute a witness for a crime to which the immunized testimony relates. But if the witness challenges the

The juvenile court erred in assuming the immunity under RCW 26.45.053(2) was sufficient to protect Mr. M.-G.'s rights. In light of Mr. M.-G.'s motion for use and derivative use immunity, the juvenile court had the inherent authority to grant it and erred in failing to do so. This Court must reverse the denial of use and derivative use immunity and remand for entry of a protection order granting said immunity.

F. CONCLUSION

For the reasons stated, Mr. M.-G. asks this Court to reverse the juvenile court's denial of the father's motion for use or derivative use immunity and remand for an order granting use and derivative use immunity.

DATED this 14th day of June 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 Appellant

source of the government's evidence, the prosecution bears 'the heavy burden of proving that all of the evidence it proposes to use was derived from legitimate independent sources.

Bryant, 97 Wn.App. at 485 (internal footnotes omitted).

WASHINGTON APPELLATE PROJECT

June 14, 2019 - 6:47 PM

Transmittal Information

Filed with Court: Court of Appeals Division I
Appellate Court Case Number: 79364-1
Appellate Court Case Title: In re Dependency of : A.M-S., DOB: 12/17/08, Sergio Michel-Garcia, Pet v. State of WA, Resp
Superior Court Case Number: 18-7-00836-7

The following documents have been uploaded:

- 793641_Briefs_20190614164131D1183693_2517.pdf
This File Contains:
Briefs - Appellants
The Original File Name was washapp.061419-12.pdf

A copy of the uploaded files will be sent to:

- Brice_Timm@frontier.com
- Diane.Kremenich@co.snohomish.wa.us
- LaurenD2@atg.wa.gov
- diane.kremenich@snoco.org
- evedfax@atg.wa.gov
- kirsten.haugen@snoco.org
- sfine@snoco.org

Comments:

Sender Name: MARIA RILEY - Email: maria@washapp.org

Filing on Behalf of: Thomas Michael Kummerow - Email: tom@washapp.org (Alternate Email: wapofficemail@washapp.org)

Address:
1511 3RD AVE STE 610
SEATTLE, WA, 98101
Phone: (206) 587-2711

Note: The Filing Id is 20190614164131D1183693