

No. 46957-0-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

STEVEN CRAIG POWELL,

Appellant.

On Appeal from the Pierce County Superior Court
Cause No. 11-1-03893-1
The Honorable Ronald Culpepper, Judge

OPENING BRIEF OF APPELLANT

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I. ASSIGNMENTS OF ERROR

1. The Superior Court erred when it found that Appellant did not have a Fifth Amendment right to abstain from making potentially incriminating disclosures as part of his sex offender treatment.
2. The Superior Court erred when it imposed a term of incarceration as punishment for Appellant's decision to invoke his Fifth Amendment right against compelled self-incrimination and when it ordered him to waive the right and provide information that could result in new criminal proceedings against him.
3. The State violated Appellant's Fifth Amendment right against compelled self-incrimination when it punished his exercise of this right and refused to grant immunity for any new crimes that might be disclosed during Appellant's mandatory sex offender treatment.

II. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR

1. Did the State and the Superior Court violate Appellant's Fifth Amendment right against compelled self-incrimination, attempt to coerce incriminating statements from Appellant, and punish Appellant's decision to invoke this right, when it

punished Appellant with a term of confinement, and ordered Appellant to disclose his entire sexual history without a grant of immunity for any new crimes that might be disclosed in the process? (Assignments of Error 1, 2 & 3)

2. Does a sex offender on community custody have a Fifth Amendment right to refuse to give a complete sexual history as part of mandatory sex offender treatment, where the information disclosed might result in new criminal charges? (Assignments of Error 1, 2 & 3)
3. Does the Fifth Amendment restrain the government from coercing a sex offender to confess uncharged prior wrongdoing without first granting immunity? (Assignments of Error 1, 2 & 3)
4. Does the Fifth Amendment restrain the government from coercing a sex offender, who has already served his term of incarceration and who is presently on community custody, to either confess uncharged prior wrongdoing or face additional confinement? (Assignments of Error 1, 2 & 3)

III. STATEMENT OF THE CASE

In 2011, Steven Craig Powell was convicted of 12 counts of voyeurism (RCW 9A.44.115). (CP 26-27) The trial court imposed

an exceptional sentence of 30 months of confinement, to be followed by 30 months on community custody. (CP 31-32) One of the conditions of community custody was that Powell would “[e]nter and complete, following release, a state approved sexual deviancy treatment program through a certified sexual deviancy counselor” and “[f]ollow all conditions imposed by your sexual deviancy counselor.” (CP 42)

Powell’s direct appeal was unsuccessful. (CP 47-58) This Court affirmed Powell’s convictions, and reinstated a charge of possession of depictions of a minor engaged in sexually explicit conduct, which the trial court had previously dismissed. (CP 20, 48) The State refiled that charge on October 27, 2014. (CP 63-64)

On October 20, 2014, the State filed a notice alleging that Powell had violated the terms of his community custody. (CP 61, 62) In support of the allegation, the State filed a report from the Department of Corrections, which included reports from a polygraph examiner and Powell’s treatment provider. (CP 66-79) According to those reports, Powell had participated in a sexual history polygraph examination on May 8, 2014, and had answered “no” when asked the question, “Other than what we talked about, have you had sexual contact with any minors as an adult.” (CP 67-68, 70) However,

Powell exhibited a “significant response” to this question, which indicated to the examiner that Powell may not have been truthful in his answer. (CP 67-68, 70)

According to Powell’s treatment provider, Jenny Sheridan, they met on October 9, 2014, to begin Powell’s psychosexual examination. (CP 78) However, Sheridan noticed that Powell had not completed the pre-interview questionnaire that she had provided to him. (CP 78) Powell had provided his general background information, but had not completed the sexual history section. (CP 78) Sheridan indicated that she could not adequately treat him without a complete sexual history. (CP 78) Powell had also declined to sign the Release of Information and Agreement to Participate form, which was required before treatment could begin. (CP 78)

Then, on October 24, 2014, Powell met with Sheridan and his DOC community corrections officer. (CP 68) Powell told them that he was not comfortable disclosing sexual behavior and sexual history information, and that he was invoking his Fifth Amendment right not to answer the questions. (CP 68-69) The corrections officer recommended that Powell be taken into custody for 60 days because of his refusal to disclose this information. (CP 69)

At the violation hearings, Powell indicated that he was willing

to participate in treatment, but not willing to give a sexual history. (11/07/14 RP 4; 11/21/14 RP 7; 11/26/14 RP 19) Powell indicated a concern that, because Sheridan is required by law to report if a client admits having committed criminal acts, he could be placing himself at risk of future criminal charges. (11/07/14 RP 6-7; 11/26/14 RP 17, 19, 23-24) And the State informed the court that it would not consider granting immunity for any revelations made by Powell during treatment. (11/26/14 RP 24)

The court found that Powell was in violation of the terms of his community custody. (11/26/14 RP 25; CP 80-81) The court imposed 40 days of incarceration as punishment and ordered Powell to complete the psychosexual evaluation. (11/26/14 RP 25-26; CP 80-81) This appeal timely follows. (CP 85)

IV. ARGUMENT & AUTHORITIES

The text of 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. It is well settled that the prohibition “not only permits a person to refuse to testify against himself at a criminal trial in which he is a defendant, but also ‘privileges him not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future

criminal proceedings.” Minnesota v. Murphy, 465 U.S. 420, 426, 104 S. Ct. 1136, 79 L. Ed. 2d 409 (1984) (quoting Lefkowitz v. Turley, 414 U.S. 70, 77, 94 S. Ct. 316, 38 L. Ed. 2d 274 (1973)). The privilege applies to the States through the Fourteenth Amendment, which “secures against state invasion the same privilege that the Fifth Amendment guarantees against federal infringement—the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty ... for such silence.” Malloy v. Hogan, 378 U.S. 1, 8, 84 S. Ct. 1489, 12 L. Ed. 2d 653 (1964); U.S. Const. amend. XIV.¹

“A defendant does not lose this protection by reason of his conviction of a crime; notwithstanding that a defendant is imprisoned or on probation at the time he makes incriminating statements, if those statements are compelled they are inadmissible in a subsequent trial for a crime other than that for which he has been convicted.” Murphy, 465 U.S. at 426 (citing Baxter v. Palmigiano, 425 U.S. 308, 316, 96 S. Ct. 1551, 1557, 47 L. Ed. 2d 810 (1976)).

If a person is protected by the privilege, he may “refuse to

¹ Because this case presents a question of law, the Superior Court’s judgment on this matter is reviewed do novo. See United States v. Antelope, 395 F.3d 1128, 1133 (9th Cir. 2005) (citing United States v. Rubio–Topete, 999 F.2d 1334, 1338 (9th Cir.1993)).

answer unless and until he is protected at least against the use of his compelled answers and evidence derived therefrom in any subsequent criminal case in which he is a defendant.” Turley, 414 U.S. at 78 (citing Kastigar v. United States, 406 U.S. 441, 92 S. Ct. 1653, 32 L. Ed. 2d 212 (1972)). And “countervailing government interests, such as criminal rehabilitation, do not trump this right.” United States v. Antelope, 395 F.3d 1128, 1134 (9th Cir. 2005). “Thus, when ‘questions put to [a] probationer, however relevant to his probationary status, call for answers that would incriminate him in a pending or later criminal prosecution,’ he may properly invoke his right to remain silent.” Antelope, 395 F.3d at 1134-35, (quoting Murphy, 465 U.S. at 435).²

Furthermore, “a State may not impose substantial penalties because a witness elects to exercise his Fifth Amendment right not to give incriminating testimony against himself.” Lefkowitz v. Cunningham, 431 U.S. 801, 805, 97 S. Ct. 2132, 53 L. Ed. 2d 1 (1977). But only “some penalties are so great as to ‘compel’ such testimony, while others do not rise to that level.” McKune v. Lile, 536

² For the purposes of this case, the Court may presume that Powell’s history would reveal other uncharged crimes. See Antelope, 395 F.3d at 1135 (“Based on the nature of this requirement and Antelope’s steadfast refusal to comply, it seems only fair to infer that his sexual autobiography would, in fact, reveal past sex crimes.”)

U.S. 24, 49, 122 S. Ct. 2017, 153 L. Ed. 2d 47 (2002) (O'Connor, J., concurring).

For example, in McKune, the Court found that an inmate's "reduction in incentive level, and a corresponding transfer from a medium-security to a maximum-security part of the prison" were not "serious enough to compel him to be a witness against himself." 536 U.S. at 50. In Murphy, the Court concluded that there was no Fifth Amendment violation where petitioner claimed he felt compelled to incriminate himself because he feared absent truthful statements his probation would be revoked. 465 U.S. at 434-39. And in Ohio Adult Parole Auth. v. Woodard, the Court found no compulsion where a death row inmate had to choose between incriminating himself at a clemency interview and having adverse inferences drawn from his silence. 523 U.S. 272, 286-88, 118 S. Ct. 1244, 140 L. Ed. 2d 387 (1998).

But in United States v. Antelope, the Ninth Circuit found that the revocation of supervised release as punishment for refusing to give potentially incriminating statements during sex offender treatment was a significant penalty and a Fifth Amendment violation. 395 F.3d at 1135-36.

The facts of Antelope are nearly identical to the facts of

Powell's case. In Antelope, the defendant finished serving his prison term and was released under supervision. The terms of supervision required Antelope to participate in sex offender treatment. Antelope invoked his Fifth Amendment right and refused to reveal his full sexual history absent an assurance of immunity. 395 F.3d at 1131-32. Antelope's supervision was revoked and he was sentenced to an additional term of incarceration. 395 F.3d at 1131-32. The Ninth Circuit reversed the lower court's revocation of supervision, stating:

[W]e reject that the state could sanction Antelope for his self-protective silence about conduct that might constitute other crimes. We do not doubt that [the State's] policy of requiring convicted sex offenders to give a sexual history, admitting responsibility for past misconduct to participating counselors, serves an important rehabilitative purpose. . . . The irreconcilable constitutional problem, however, is that even though the disclosures sought here may serve a valid rehabilitative purpose, they also may be starkly incriminating, and there is no disputing that the government may seek to use such disclosures for prosecutorial purposes. . . . [W]e hold that Antelope's privilege against self-incrimination was violated because Antelope was sentenced to a longer prison term for refusing to comply with [the treatment program's] disclosure requirements.

395 F.3d at 1137-38 (citations omitted, emphasis in original).

Similarly, Powell's privilege against self-incrimination was violated when he was sentenced to 40 days of incarceration for invoking his Fifth Amendment rights and refusing to fully comply with

the sex offender treatment program's disclosure requirements, without a guarantee of immunity against any new criminal charges. Antelope is nearly identical and its reasoning and ruling controls the outcome of this case.³

At the hearing below, the State argued instead that the controlling case is State v. King, 130 Wn.2d 517, 925 P.2d 606 (1996). (11/21/14 RP 4, 9, 11-12; 11/26/14 RP 15, 24) In that case, King pleaded guilty to several counts of first degree rape, and was sentenced to several 20-year terms which were suspended on condition he successfully complete the sexual psychopathy program at Western State Hospital. 130 Wn.2d at 520-21. During treatment, he admitted to staff members in the program that he had committed approximately 40 to 50 rapes in addition to the ones for which he was convicted. 130 Wn.2d at 521.

King eventually completed all stages of the treatment

³ The Court also found that Antelope's claim was ripe for review because he had already suffered injury from incarceration and because his "case history reads like a never-ending loop tape: he asserts his constitutional rights, the district court advises him that surely his statements will be confidential but that he must comply with what he views as a violation of his constitutional rights, he refuses to comply, his release is revoked, and Antelope ends up incarcerated." Antelope, 395 F.3d at 1133. Similarly, Powell was incarcerated once, and the trial court ordered him to comply with the disclosure portion of the treatment program. (11/26/14 RP 25-26; CP 80-81) Powell will surely be faced with the same constitutional choice in the future and will face the same or similar punishment if he chooses to exercise his constitutional rights.

program, but the treatment providers believed he had not progressed to the point where he would successfully modify his behavior, and believed he was still a risk to society at large. 130 Wn.2d at 521. The Superior Court found that King had failed to successfully complete the sexual psychopathy program and had therefore violated the conditions of his probation, and revoked King's suspended sentences. 130 Wn.2d at 522.

At a subsequent intake hearing, the Indeterminate Sentence Review Board reviewed the report from Western State Hospital and considered the admissions that King made regarding the uncharged rapes. 130 Wn.2d at 522. The Board then set an increased mandatory minimum term of confinement totaling 370 months. 130 Wn.2d at 522. King filed a Personal Restraint Petition arguing, among other things, that the Board violated this Fifth Amendment rights by considering statements he made at Western State Hospital in setting his minimum term of confinement. 130 Wn.2d at 523.

Our State Supreme Court found that the Fifth Amendment privilege against self-incrimination does not apply to minimum term settings because the criminal proceeding has terminated, reasoning that:

King was not exposed to criminal liability in violation of

the Fifth Amendment when the Board used his treatment disclosures to support an exceptional minimum term sentence.... [T]he State may validly insist on answers to incriminating questions and properly administer its probation system so long as the State recognizes that the answers may not be used in a subsequent criminal proceeding.

King, 130 Wn.2d at 529.

King is distinguishable from this case for several reasons. First, King did not invoke his right to remain silent and instead made disclosures which he later argued could not be used against him. Powell, on the other hand, asserted his Fifth Amendment privilege and refused to make any potentially incriminating disclosures. King's disclosures were properly used in the punishment phase of his existing criminal case, and he was not exposed to additional criminal liability. But Powell was punished for his silence in the form of additional imprisonment. Furthermore, the State did not recognize in this case that it may not use any disclosures in a subsequent criminal proceeding against Powell; rather the State repeatedly asserted that it would not consider immunity. (11/26/14 RP 24) The State's and the trial court's reliance on King was therefore misplaced.

Rather, this case is directly analogous to Antelope, *supra.*, which Powell urged the court to follow below. (11/21/14 RP 4, 6-7; 11/26/14 RP 15, 19-20, 22) Like Antelope, Powell invoked the Fifth

Amendment and refused to give a full sexual history, and was subsequently incarcerated and ordered to waive his right by fully participating and disclosing his full sexual history. (11/26/14 R 25-26; CP 80-81) Like Antelope, Powell was not given immunity, and was instead punished with imprisonment for refusing to make disclosures that could result in new criminal proceedings. The State violated Powell's constitutional rights by imposing a substantial penalty when he elected to exercise his Fifth Amendment right against compelled self-incrimination.

V. CONCLUSION

The Superior Court's order imposing confinement and ordering Powell to fully participate in treatment should be stricken, and Powell should either be excused from giving a full sexual history or granted immunity from new criminal charges that could follow from any disclosures.

DATED: May 29, 2015



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Attorney for Steven C. Powell

CERTIFICATE OF MAILING

I certify that on 05/29/2015, I caused to be placed in the mails of the United States, first class postage pre-paid, a copy of this document addressed to: Steven C. Powell, #2014300017, Pierce County Jail, 910 Tacoma Ave. S., Tacoma, WA 98402.

Stephanie Cunningham

STEPHANIE C. CUNNINGHAM, WSBA #26436

CUNNINGHAM LAW OFFICE

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