

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH : No. 04-12,057  
vs. : (CR-2057-2004)  
 : CRIMINAL DIVISION  
 :  
 :  
 :  
 :  
 : 1925(a) Opinion

ROBIN D. SHRAWDER,  
Defendant

**OPINION IN SUPPORT OF ORDER IN  
COMPLIANCE WITH RULE 1925(a) OF  
THE RULES OF APPELLATE PROCEDURE**

This opinion is written in support of this Court's Order entered on or about October 11, 2006, denying Defendant's Motion for Declaratory Judgment seeking to preclude the use of a polygraph as part of his sexual offender counseling.

**FACTS**

On April 12, 2005, Appellant Robin Shrawder pleaded nolo contendere to two counts (1 and 2) of luring a child into a motor vehicle, 18 Pa. C.S.A. §2506, and two counts (5 and 6) of corruption of minors, 18 Pa. C.S.A. §6301. All of these counts were misdemeanors of the first degree.

The offenses occurred on November 20, 2004 and involved Appellant deliberately importuning two (2) sixteen year old girls to come into his vehicle to perform sex acts for money. Appellant continued his overtures even after the young girls informed him of their age when he then inquired if they would give him a "blow job" for even more money.<sup>1</sup>

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<sup>1</sup> Facts taken from the Williamsport Police affidavit of probable cause attached to the criminal complaint.

The judge who took the guilty plea, who was different from the sentencing judge, did not order a pre-sentence investigation, but noted Appellant had a prior record score of zero. The Commonwealth and Appellant entered a plea agreement that Appellant would receive a sentence of probation in exchange for his plea of nolo contendere.

The undersigned sentenced Appellant on May 26, 2005 in accordance with the plea agreement to consecutive one-year terms of probation for two (2) counts of luring children into a vehicle and one (1) count of corruption of minors, for an aggregate probation term of three (3) years. The final count of corruption, Count 6, was a concurrent one-year of probation.

In its sentencing Order the Court ordered Appellant to cooperate with any counseling program as directed by the Probation office and the Court specifically asked the Adult Probation office to determine whether sexual offender counseling would be appropriate.

Subsequent to the sentencing hearing, Appellant moved to Northumberland County and the Lycoming County Probation office had the Northumberland County Probation office supervise Appellant's probation.

The Lycoming County Probation office determined sexual offender counseling to be appropriate to the case and Appellant was enrolled in such counseling in Northumberland County.

On September 26, 2006, Appellant, through his counsel, filed a petition styled "Motion for Declaratory Judgment." Appellant alleged in the petition that he cooperated with sex offender counseling for a year when he was informed that the procedures of the counseling program now would require him to take a polygraph test as a part of the process.

Appellant contended that the polygraph test would be an unreasonable condition of probation and it would violate his Fifth Amendment rights.

The Court held a hearing on Appellant's petition on October 11, 2006. The Court took testimony from John Kobierecki, the therapist in charge of the sexual counseling group in which Appellant was participating.

Mr. Kobierecki works for Pennsylvania Counseling Services based in Harrisburg, and he is a certified sex offender treatment specialist. N.T., at p. 19. He has a Master's degree in counseling and he worked twenty-seven years for the Department of Corrections as a counselor with sexual offenders. N.T., at p. 19.

In November 2006, Mr. Kobierecki was assigned to take over as the therapist for the sexual offender group in which Appellant participated. Mr. Kobierecki was going to include therapeutic polygraph testing as part of the counseling process. N.T., at p. 21. The polygraph test is given once per year to all participants as part of the counseling process. N.T., at pp. 21-22. Mr. Kobierecki described the use of the polygraph as a tool like a psychological test. N.T., at p. 21. The test is administered by a certified polygraph operator. N.T., at p. 22. The polygraph operator, who also has sex offender certification, is alone with the party taking the test and a tape is made of the session. N.T., at pp. 22-23. The Probation officer could receive a copy of the results of the test. N.T., at p. 37.

The first time an offender takes the polygraph test, the offender is asked about his sexual abuse history prior to the offense for which he is under supervision.<sup>2</sup> Thereafter, when the polygraph is given, it would cover the time frame from the last polygraph to the

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<sup>2</sup> Mr. Kobierecki testified that the sexual abuse history helps them identify patterns of behavior and helps them to get the offender to look at control issues. Mr. Kobierecki believes this is a very useful tool in the therapy N.T. p. 24.

current polygraph. N.T., at p. 46.

Before taking the first polygraph, the offender is given a twenty-three (23) page questionnaire disclosure form. N.T., at p. 47. The pre-polygraph questionnaire is similar to what the therapist would be asking an offender in the group. N.T., at p. 46

The witness opined that the use of the polygraph is important and integral to the counseling process. N.T., at pp. 24, 45. The test helps the offender confront his honesty in the process, and it is an important part of the effort to rehabilitate the offender. N.T., at pp. 24-25.

The witness made it clear that the test is not given to try to place or return an offender to prison, but rather, it is part of a process to rehabilitate the offender and protect the public. N. T., at p. 26. The polygraph test gets many offenders to open up in the therapy process to confront their problems. N. T., at p. 47.

After completion of the testimony, the Court entered an Order on October 11, 2006 finding the use of the polygraph test to be a reasonable condition of probation for use in the sexual offender counseling of Appellant.

On or about October 27, 2006, Appellant filed a Notice of Appeal of the Court's Order of October 11, 2006 to the Pennsylvania Superior Court. In an Order dated October 30, 2006, the Court required Appellant to file a concise statement of matters complained of on appeal pursuant to Pennsylvania Rules of Appellate Procedure §1925 (b).

Appellant filed his concise statement of matters complained of on appeal on or about November 8, 2006. Appellant claims in his matters complained of on appeal that the Court erred in finding use of a therapeutic polygraph test to be a reasonable condition of probation. Appellant also appears to claim that requiring him to submit to a polygraph test as

a condition of probation violates his Constitutional rights not to incriminate himself.

On or about December 21, 2006, Appellant filed an application to the Court to stay its Order of October 11, 2006 pending the appeal to Pennsylvania Superior Court. The Court granted Appellant a stay of the test only to January 17, 2007 at 2:30 p.m. when it heard argument on the request for the stay. In an Order dated January 24, 2007, the Court denied Appellant's request for a stay of the polygraph test. In the Court's order it found the polygraph to be an appropriate and reasonable condition of supervision of Appellant. The Court also found that the use of the polygraph was reasonably related to the rehabilitation of Appellant and to the protection of the public. The Court found the use of the polygraph to be beneficial in enhancing the treatment and supervision of Appellant. The Order of January 24 found the polygraph test to be no different than probation officials orally interviewing Appellant as part of their supervision of him. The Court also made the finding that Appellant did not have an inherent or immediate Fifth Amendment right not to take a polygraph test for treatment and supervision purposes. The Court's Order of January 24 did caution probation officials not to ask questions during the test as to specific pre-probation victims as the Court felt such specific questioning could arguably raise a Fifth Amendment right to remain silent. The Court noted this does not mean Appellant can avoid answering general questions about his conduct in the past.

Appellant filed a Petition for Emergency Stay pending appeal directly to the Superior Court. The Pennsylvania Superior Court denied the Emergency Request for Stay.

## **DISCUSSION**

In our limited time to research this Matter, the Court is convinced that the use

of a therapeutic polygraph testing procedure in the counseling of sexual offenders is entirely reasonable and appropriate as a condition of probation or release from confinement of prison. Appellant has no vested or inherent right to serve his sentence on probation and the Court and the Adult Probation office have a duty to not only try to rehabilitate an individual such as Appellant, but also to take reasonable steps to insure that Appellant is not posing a threat to the public.

The polygraph test is no different than a probation officer's oral interview of an offender to monitor the progress of the individual under their supervision. To hold that sexual offenders could not be questioned about their conduct and history would diminish the supervision of the offender as well as the ability to rehabilitate the offender, who could hide behind the Fifth Amendment to avoid addressing the issue that brought the offender into the criminal system in the first place.

Our review of the case law indicates that courts have not broadly interpreted Fifth Amendment claims of sexual offenders who have been required to submit to counseling.

The case of Wolfe v. The Pennsylvania Department of Corrections, 334 F.Supp. 762 (E.D. Pa. 2004) is instructive because it discusses numerous cases, including United States Supreme Court cases, which have touched upon similar issues. Wolfe, a Pennsylvania State Prison inmate, filed a class action on behalf of herself and other similarly situated inmates complaining that prison sexual offender treatment programs required participants to disclose their sexual history. Wolfe claimed that the alleged failure to participate in the program resulted in a reduced chance for parole and an increased security status in the prison resulting in the loss of privileges. The Court found no violations of the

inmate's self incrimination rights as she was not compelled to incriminate herself in criminal proceeding.

The Wolfe Court discussed the United States Supreme Court plurality decision in McKune v. Lile, 536 U.S. 24, 122 S.Ct. 2017 (2002). The Wolfe Court noted that the Fifth Amendment implication of inmate sex offender treatment programs, which require an inmate to admit responsibility for past sexual crimes and provide details about the inmates' sexual history, have been discussed at length by the Supreme Court. The Court noted that the McKune plurality opinion found that the consequences of an inmate's failure to participate in a sex offender program, such as loss of prison privileges, are not ones that violate an inmate's Fifth Amendment rights.

Federal courts have also found that denial of parole for an inmate for failure to participate in a sex offender treatment program does not violate an inmates' Fifth Amendment right. See Ainsworth v. Stanley, 317 F.2d 1, 5 (1st Cir. 2002); Thorpe v. Grillo, 80 Fed. Appx. 215, 217 (3d Cir. 2003) (finding no constitutional right to parole and no Fifth Amendment self-incrimination violation because inmate is not automatically denied consideration of parole and because inmate was not forced to incriminate herself at trial).<sup>3</sup>

In the case of Minnesota v. Murphy, 465 U.S. 420, 104 S.Ct. 1136 (1984), the United States Supreme Court considered a situation in which a sexual offender on probation made incriminating admissions to a counselor in his treatment program. The defendant admitted to an earlier rape and murder. The counselor reported the admission to the Appellant's probation officer.

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<sup>3</sup> The decision in Wolfe, *supra*, refers to the decision in Thorpe as being a non-presidential Third Circuit opinion. However, the Wolfe Court found the Thorpe analysis to be persuasive and adopted it.

The probation officer then scheduled the Appellant to come in for a meeting and during the meeting she confronted him about his admissions to the rape and murder. She did not advise the defendant of his Miranda rights before asking him about the prior crimes. The defendant admitted his criminal conduct to the probation officer. The defendant was then criminally charged for the rape and murder and he sought to suppress his confession to the probation officer because he was not given Miranda warnings before his confession.

In denying the defendant's request to suppress his confession the United Supreme Court determined that the defendant was not in custody at the conference with the probation officer and thus, he was not required to receive Miranda warnings before he was asked about his criminal conduct. The Supreme Court did note that a defendant does not lose Fifth Amendment protection by reason of conviction of a crime and stated that if the statements are compelled they are inadmissible in a subsequent trial for a crime other than that which he has been convicted. 465 U.S. at 425, 104 S.Ct. at 1142. However, the Supreme Court found the statements to have been made in a non-custodial setting and found the statements were not compelled in violation of the defendant's Fifth Amendment rights.

In McKune v. Lile, *supra*, the plurality opinion of Justice Kennedy, in which Rehnquist, Scalia and Thomas joined, cites statistics that point to the concern of the threat sex offenders can pose to the public, including the threat of their re-offending and states:

Denial is generally regarded as a main impediment to successful therapy and therapists depend on offenders' truthful description of events leading to past offenders in order to determine which behaviors need to be targeted in therapy. H. Barbaree, Denial Minimization Among Sex Offenders; assessment and treatment outcome, 3 Forum on Corrections Research, No. 4, p. 30 (1991). Research indicates that offenders who deny all allegations of sexual abuse are three times more



likely to fail in treatment than those who admit even partial complicity. See B. Moletzky and K. McGovern, *Treating the Sexual Offender*, 253-255 (1991).

536 U.S. at 33, 122 SCt. at 2024.

The case law the Court has examined indicates that the fact of a valid conviction and resulting supervision is essential to the analysis of a Fifth Amendment claim from one in Appellant's situation.. Appellant is under probation supervision as an alternative to incarceration. The Court does not believe he can thwart meaningful efforts to counsel and rehabilitate him by waving the flag of the Fifth Amendment. His claim is premature and he has not demonstrated any immediate and actual danger of self-incrimination.

The Court believes that the use of a therapeutic polygraph test as part of the counseling process is reasonable condition of probation and important to the process of sexual offender treatment and rehabilitation.

For these reasons, the Court **DENIED** Appellant the relief he requested.

DATE: \_\_\_\_\_

By The Court,

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Kenneth D. Brown, P. J.

cc: Kenneth Osokow, Esquire (ADA)  
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Superior Court (original & 1)  
Work file