IN THE

SUPREME COURT OF VIRGINIA

RECORD NO. 082122

JAMES TURNER

Appellant

v.

COMMONWEALTH OF VIRGINIA

Appellee

BRIEF FOR THE COMMONWEALTH

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Appellant

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BRIEF FOR THE COMMONWEALTH

STATEMENT OF THE CASE

On May 24, 2005, the Circuit Court of Fairfax County sentenced James Turner ("Turner" or "the defendant") to serve five years, three of which it suspended, for possession of child pornography. (App. 1-2). Subsequently, the trial court revoked the entire suspended sentence by order dated November 21, 2007. (App. 24-25).

The defendant appealed this revocation to the Court of Appeals of Virginia which denied his petitions for appeal and rehearing by Orders dated May 28, 2008, and September 29, 2008, respectively. (App. 26-28).

This Court granted the defendant's petition for appeal by order dated March 13, 2009.

ASSIGNMENT OF ERROR

THE COURT OF APPEALS ERRED WHEN IT AFFIRMED THE TRIAL COURT'S RULING THAT THE POLYGRAPH EXAMINATION EVIDENCE WAS ADMISSIBLE AND THUS APPROPRIATE EVIDENCE TO RELY UPON TO REVOKE THE ENTIRETY OF TURNER'S SUSPENDED SENTENCE.

QUESTION PRESENTED

DID THE COURT OF APPEALS ERR IN UPHOLDING THE TRIAL COURT'S RULING DURING A PROBATION VIOLATION HEARING THAT ADMITTED EVIDENCE THAT TURNER WAS DECEPTIVE ON A POLYGRAPH EXAMINATION?

STATEMENT OF FACTS

As a condition of the defendant's suspended sentence in 2005, the circuit court ordered a period of supervised probation upon his release from incarceration. At his initial meeting with his probation officer, the officer instructed him to "complete the District 29 Sex Offender Awareness Program (S.O.A.P.)." The probation officer instructed Turner to begin

treatment on December 2, 2007. The defendant "failed to report for [sex offender] sessions on January 9 and January 24, 2007," which "delay[ed] his completion of this phase of treatment." (App. 7).

The probation officer reported that in February 2007, the S.O.A.P. program was "superseded by the Center for Clinical and Forensic Services (CCFS) Introductory Group." The defendant began the "program as instructed" on February 15, 2007. However, he was "discharged unsuccessfully from treatment due to his 'failure to adhere to the attendance policy' and 'lack of progress.'" (App. 7).

The probation report also noted that the defendant's first "sexual history polygraph" indicated deception. The probation officer elaborated in the report that the defendant "maintained his initial admissions and failed to provide information which would explain the results of his first polygraph and attempted to control his breathing during a subsequent polygraph." His case manager described the defendant as "continuing to rely on distortions to justify and rationalize his behavior and the behavior of fellow group members [sic]." (App. 7).[1]

At the probation officer's request, the trial court held a revocation hearing on October 19, 2007. When asked whether the defendant

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[1] The probation officer relied on information from a case manager in compiling the report.

"admit[s] or den[ies] being in violation of the terms of his probation," defense counsel responded, "He admits, Your Honor." Counsel admitted that his client had missed sex offender treatment meetings in March, April, and May 2007 (one each month) and another meeting in August 2007. (App. 11).

The prosecutor argued that the defendant was not "amenable to probation or to social treatment." He elaborated that the defendant has "had two opportunities and failed at both of them. The one thing I would really like to draw the Court's attention to is the fact that he was deceptive, according to the probation violation –." (App. 12-13).

The defendant objected to the admission of any evidence regarding polygraph results. He specifically relied on this Court's decision in Odum v. Commonwealth, 225 Va. 123, 301 S.E.2d 145 (1983), in support of his argument. After defense counsel provided the trial judge with a copy of the opinion, she asked him, "Is [Odum] in a probation violation context?" (App. 14). Defense counsel acknowledged that Odum did not involve a revocation hearing and further stated that this Court had held that such results were inadmissible "in criminal proceedings." The trial judge then overruled the objection. (App. 13-14).

The prosecutor then made additional argument (including discussion of the "deceptive" polygraph results). After hearing further defense argument, the trial judge asked the defendant if he had any comments. The defendant replied, "Yes, Your Honor. I am sorry, and I take full responsibility for missing these classes, and if I was to get another opportunity that I would make attendance my first priority." (App. 15-18).

The trial court revoked the defendant's three-year suspended sentence, stating, "I do find you to be in violation of the terms of your probation today, and when I originally sentenced you on this charge back in 2005, I told you that the suspended sentence was condition [sic] upon your successful treatment [sic] of this program, and you have not successfully treated [sic] the program, and I am not willing to subject the community to the dangers of your further conduct. (App. 18). The trial court's written order did not provide further detail of the trial court's reasoning. (App. 24-25).

ARGUMENT

I. THE DEFENDANT'S CLAIM THAT THE TRIAL COURT ERRED IN ADMITTING POLYGRAPH RESULTS DURING HIS REVOCATION HEARING IS DEFAULTED BECAUSE HE DID NOT MAKE AN ADEQUATE CONTEMPORANEOUS OBJECTION AT TRIAL.

In order to preserve an issue for appellate review, an appellant must make a timely and specific objection at trial. Buck v. Commonwealth, 247 Va. 449, 452-453, 443 S.E.2d 414, 416 (1994). The "main purpose of requiring timely specific objections is to afford the trial court an opportunity to rule intelligently on the issues presented, thus avoiding unnecessary appeals and reversals." See Weidman v. Babcock, 241 Va. 40, 44, 400 S.E.2d 164, 167 (1991). Under the facts of this case, the defendant did not do so.

When the defendant cited this Court's opinion in Odum to the trial judge, she immediately asked, "Is [Odum] in a probation violation context?" (App. 14). Defense counsel admitted that it was not, but stated "the case make it clear that ...Virginia considers them scientifically unreliable, and [this] Court has held that they are inadmissible in ***criminal*** proceedings." Defense counsel reiterated that Odum was a case "dealing with ***criminal*** proceedings." (App. 14). The trial judge overruled the objection. (App. 14).

It is a reasonable inference from the record that the trial judge (correctly) understood that there are "relaxed" standards regarding the admissibility of evidence in a revocation proceeding. See Gagnon v. Scarpelli, 411 U.S. 778, 789 (1973) ("formal procedures and rules of evidence are not employed" in a revocation proceeding); Dickens v. Commonwealth, 52 Va. App. 412, 422, 663 S.E.2d 548, 552 (2008) (discussing "relaxed" rules of evidence in revocation hearings). The defendant's objection did nothing to disabuse the judge of the notion that "polygraph" results may fit within the broader category of evidence she could consider in this "relaxed" setting. Accordingly, the issue before this Court is procedurally defaulted.[2]

II. ANY ERROR IN ADMITTING THE POLYGRAPH RESULTS WAS HARMLESS.

As the Court of Appeals noted in this case, "the trial court predicated its decision...on [Turner's] failure to comply with the terms of his probation: specifically, the successful completion of a treatment program for sex

[2] The Court of Appeals' decision in White v. Commonwealth, 41 Va. App. 191, 583 S.E.2d 771 (2003) (holding that polygraph results may not be admitted even in a probation revocation proceeding) predated the 2007 revocation hearing in the instant case. Although the defendant relies on that case in his brief on appeal, he did not cite it to the trial court, even though a copy of the probation officer's report describing the polygraph results was sent to his defense lawyer on August 28, 2007, prior to the October 2007 hearing. (App. 7-8).

offenders, not...on the results of his polygraph tests." The Court further noted, "[t]he record in this case also reflects that Turner was expelled from the program for his 'failure to adhere to the [program's] attendance policy' and his 'lack of progress' [which admittedly may have included in part his failing a polygraph test, App. 7-8] in meeting the program's objectives."[3] (App. 26).

When she revoked the defendant's probation, the trial judge specifically said, "I do find you to be in violation of the terms of your probation today, and when I originally sentenced you on this charge back in 2005, I told you that the suspended sentence was condition[ed] upon your successful treatment [sic] of this program, and you have not successfully treated [sic] the program, and I am not willing to subject the community to the dangers of your further conduct." (App. 18). The trial judge clearly believed that the defendant, a convicted sex offender (he was convicted of possessing child pornography) was not a good "social risk." See Slayton v. Commonwealth, 185 Va. 357, 366, 38 S.E.2d 479, 483 (1946). She had evidence before her that he had missed four of his "sex offender therapy"

[3] These facts were contained in the probation officer's report. (App. 7). The trial court did not hear any live testimony but instead relied on the report, a proffer from defense counsel, and the argument of counsel for both parties. (App. 10-19).

meetings and was discharged from treatment "unsuccessfully" due to his attendance issues and his "lack of progress." (App. 7, 10-17).

Based on this information, the trial judge correctly believed that any further extension of judicial "grace," see Rease v. Commonwealth, 227 Va. 289, 295, 317 S.E.2d 148, 151 (1984), was inappropriate, and that it was proper to revoke the defendant's entire suspended sentence.

Furthermore, unlike a juror or lay persons, the trial judge was not susceptible to giving the results of any polygraph test undue weight due to an "aura of scientific infallibility". See Barefoot v. Estelle, 463 U.S. 880, 926 (1983); Robinson v. Commonwealth, 231 Va. 142, 156, 341 S.E.2d 159, 167 (1986) ("aura of authority"); Bennett v. Commonwealth, 29 Va. App. 261, 271, 511 S.E.2d 439, 444 (1999) ("aura of authority").[4] In fact, because she is well aware of the concerns expressed by this Court and the Court of Appeals, a trial judge should be presumed not to have accorded polygraph results any undue weight under the circumstances.

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[4] Obviously, admission of evidence that the defendant attempted to "control his breathing" during a second polygraph examination (App. 7) does not implicate the concerns addressed in this Court's jurisprudence regarding admission of polygraph ***results***. Cf. State ex rel. Koszewski, 659 N.W.2d 506 (Wisc. Ct. App. 2003) (unpublished opinion) ("lack of cooperation" with polygraph testing, including use of countermeasures, was admissible in revocation proceeding even though state law did not allow results of such tests to be admitted).

Unlike the trial judge in White, 41 Va. App. at 193, 583 S.E.2d at 772, the trial judge in the instant case considered significant evidence besides failed polygraph results before deciding to revoke the defendant's probation. (App. 7, 10-17). It thus plainly appears from this record that any error in admitting the polygraph results was harmless. See Clay v. Commonwealth, 262 Va. 253, 259, 546 S.E.2d 728, 731 (2001) (discussing nonconstitutional harmless error standard).[5]

III. THIS COURT SHOULD OVERRULE WHITE v. COMMONWEALTH OR FIND THAT IT IS DISTINGUISHABLE.

This Court has never addressed the issue of whether polygraph results are admissible in revocation proceedings in Virginia. Several other jurisdictions have held that they are admissible under the relaxed evidentiary standards applicable to such proceedings. See State v. Travis, 867 P.2d 234, 236-238 (Idaho 1994); Carswell v. State, 721 N.E.2d 1255, 1265-1266 (Ind. 1999); State v. Lumley, 977 P.2d 914, 921 (Kan. 1999) ("[t]he relaxed standard of proof and the fact that a probation revocation decision is a judicial decision rather than a jury decision are additional

[5] The Commonwealth agrees with the defendant that if the Court finds reversible error in this case, that the proper remedy would be to remand this matter to the circuit court for resentencing. Cf. Resio v. Commonwealth, 29 Va. App. 616, 623-624, 513 S.E.2d 892, 896 (1999). The defendant has already admitted that he was in violation of the terms of his probation in the trial court. (App. 10).

factors that strongly support a determination that polygraph test results are sufficiently reliable to be considered evidence in probation revocation hearings"); State v. Hammond, 180 P.3d 137, 141-142 (Ore. Ct. App. 2008) (similar holding); but see, State v. Ramey, 359 N.W.2d 402, 403-405 (Wisc. Ct. App. 1984) (blanket exclusion of polygraph evidence in criminal proceedings applies to revocation proceedings).[6]

The notorious recidivism of sex offenders is well recognized. See McKune v. Lile, 536 U.S. 24, 33, (2002). In the case of sex offenders who victimize children, the very strictest supervision is necessary both for purposes of rehabilitation and for the protection of the Commonwealth's children. See Lile, 536 U.S. at 33 ("States have a vital interest in rehabilitating convicted sex offenders"). Thus the trial judge was entitled to the widest possible latitude under our probationary statutes in supervising the defendant's conduct. The Commonwealth respectfully asks that this

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[6] Other courts have held that it is proper to require polygraph testing as a condition of probation. See United States v. Locke, 482 F.3d 764, 767-768 (5th Cir. 2007); United States v. Taylor, 338 F.3d 1280, 1283-1284 (11th Cir. 2003); State v. Naone, 990 P.2d 1171, 1182-1189 (Haw. Ct. App. 1999) (specifically noting, however, that results of such examinations could not be admitted into evidence, even though polygraph was a useful tool to ensure compliance with probation terms); Mangarella v. State, 17 P.3d 989, 991-994 (Nev. 2001) (interpreting state statute); Commonwealth v. Shrawder, 940 A.2d 436 (Pa. Super. Ct. 2007); Ex parte Renfro, 999 S.W.2d 557, 559-561 (Tex. Ct. App. 1999); Commonwealth v. Hill, 55 Va. Cir. 155, 155-173 (Fairfax County Circuit Court 2001).

Court overrule the Court of Appeals' holding in White-or at a minimum find it is distinguishable because the trial court in White relied solely on polygraph results, unlike the trial judge in the instant case.

CONCLUSION

The Commonwealth asks that this Court affirm the judgment of the Fairfax County Circuit Court and the Court of Appeals of Virginia.

Respectfully submitted,

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Appellee herein.

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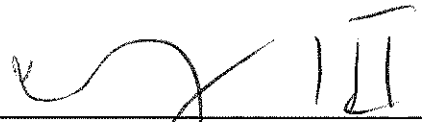
CERTIFICATE OF COUNSEL

On May 18, 2009, the required copies of this Brief for the Commonwealth were hand-filed with this Court, and the required number of copies were mailed to Brienne Schaefer, Esquire, Office of the Public Defender, 4103 Chain Bridge Road, Suite 500, Fairfax, Virginia 22030, counsel for appellant. Counsel for the Commonwealth also caused a copy of this brief to be e-mailed to scvbriefs@courts.state.va.us.



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