In The

Supreme Court of Virginia

RECORD NO. 082122

JAMES TURNER,

Appellant,

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

REPLY BRIEF OF APPELLANT

Brienne Schaefer (VSB No. 73501)
OFFICE OF THE PUBLIC DEFENDER
4103 Chain Bridge Road, Suite 500
Fairfax, Virginia 22030
(703) 934-5600 (Telephone)
(703) 934-5160 (Facsimile)
bschaefer@IDC.Virginia.gov

Counsel for Appellant

THE LEX GROUP ♦ 1108 East Main Street ♦ Suite 1400 ♦ Richmond, VA 23219
(804) 644-4419 ♦ (800) 856-4419 ♦ Fax: (804) 644-3660 ♦www.thelexgroup.com

Table of Contents

Page

Table of Citations ii

Argument 1

I. This Honorable Court should reverse the holding that the polygraph results were properly admitted, because the trial court abused its discretion and erred in admitting and relying upon this evidence to revoke the entirety of Turner's suspended sentence 1

A. Contemporaneous Objection at Trial 1

B. Harmful Error 2

C. This Court Should Uphold White v. Commonwealth 2

Conclusion 3

Certificate 5

Table of Citations

Page(s)

Cases

Buck v. Commonwealth,
247 Va. 449, 443 S.E.2d 414 (1994) 1

Odum v. Commonwealth,
225 Va. 123, 301 S.E.2d 145 (1983) 2

White v. Commonwealth,
41 Va. App. 191, 583 S.E.2d 771 (2003) 2, 3

Rule

VA. SUP. CT. R. 5:25 1

Argument

I. This Honorable Court should reverse the holding that the polygraph results were properly admitted, because the trial court abused its discretion and erred in admitting and relying upon this evidence to revoke the entirety of Turner's suspended sentence.

A. Contemporaneous Objection at Trial

Rule 5:25 of the Rules of the Supreme Court of Virginia explains that an "objection must be stated with reasonable certainty at the time of the ruling." An appellant must make a timely and specific objection at trial in order to preserve an issue for appellate review. Buck v. Commonwealth, 247 Va. 449, 452-453, 443 S.E.2d 414, 416 (1994).

Here, defense counsel made a specific and contemporaneous objection to the admission of the polygraph test results. App. 13. Defense counsel immediately objected and the objection was clear that defense counsel took issue with the admission of the polygraph test results. App. 13. That objection was overruled by the court. Defense counsel pressed the issue and explained to the court that Virginia courts have held that "polygraph results are inherently unreliable, and that's the way Virginia courts have always ruled, and that even when the parties stipulate to their admissibility, they are

inadmissible. . ." App. 13. Defense counsel relied on Odum v. Commonwealth, 225 Va. 123, 301 S.E.2d 145 (1983), to demonstrate to the trial court that polygraph results are viewed as inherently unreliable by Virginia courts. Although Odum is not in a probation violation context, counsel's objection was contemporaneous, specific, and clear. As such, this issue was properly preserved for appellate review.

B. Harmful Error

The trial court admitted inadmissible polygraph results and relied on that inadmissible evidence in fashioning a sentence that sent Mr. Turner to prison for the remainder of his suspended sentence.

C. This Court Should Uphold White v. Commonwealth

This Court should uphold White and prevent the admission of polygraph results in probation violation hearings. This Court was clear in Odum that polygraph examinations "are not viewed as scientifically reliable," and has excluded the admission of polygraph results in criminal prosecutions. Odum, 225 Va. at 132, 301 S.E.2d at 150. The Court of Appeals of Virginia extended this ruling in White v. Commonwealth, 41 Va. App. 191, 583 S.E.2d 771 (2003), looking

to several cases from this Court to support the conclusion that the "polygraph has an aura of authority while being wholly unreliable," and excluding the admission of the polygraph results from evidence in a probation revocation hearing. White, 41 Va. App. at 194, 583 S.E.2d at 772.

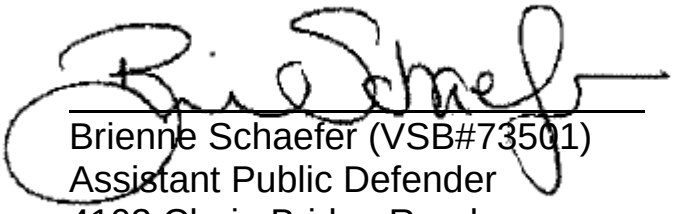
The Commonwealth looks nationwide to support the proposition that polygraph results should be admitted in probation violation hearings, however, there is no nationwide agreement on the matter.

The Commonwealth argues that sex offenders are a particularly insidious type of offender that require polygraph tests to monitor behavior and avoid recidivism. There is no indication that Mr. Turner has committed new offenses nor is there any indication of escalating sexual deviance that may give rise to a recidivist action.

Conclusion

WHEREFORE, appellant respectfully requests this Honorable Court reverse the judgment of the Court of Appeals and to remand the case to the Fairfax County Circuit Court for re-sentencing.

Respectfully submitted,
James Turner
By Counsel

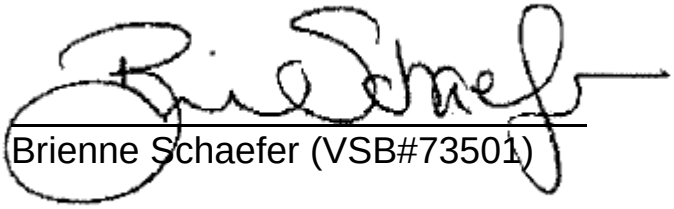


Brienne Schaefer (VSB#73501)
Assistant Public Defender
4103 Chain Bridge Road
Suite 500
Fairfax, VA 22030
(703) 934-5600 (Telephone)
(703) 934-5160 (Facsimile)
bschaefer@IDC.Virginia.gov

Certificate

The undersigned has complied with Rule 5:26(d). Fifteen paper copies of this Reply Brief of Appellant were hand filed with the Clerk of Court, Supreme Court of Va. and three paper copies of this Reply Brief of Appellant were sent via U.S. mail, postage prepaid, to Donald E. Jeffrey, III, Senior Assistant Attorney General, Office of the Attorney General, 900 East Main Street, Richmond, VA 23219, on June 1, 2009. An electronic copy of this Brief was hand filed with the clerk on CD contemporaneous with the brief.

Mr. Turner desires to state orally why his conviction should be reversed.



Brienne Schaefer (VSB#73501)