In The

Supreme Court of Virginia

RECORD NO. 082122

JAMES TURNER,

Appellant,

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

BRIEF OF APPELLANT

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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.

Statement of the Case

This case is before the Court upon an appeal by James Turner (hereinafter "appellant" or "Turner") of the sentence imposed in the Fairfax County Circuit Court upon a finding that Turner was in violation of the terms of his probation. Joint Appendix (hereinafter App.) at 1-3.

On October 19, 2007, Turner came before the Fairfax County Circuit Court, the Honorable Leslie M. Alden presiding to show cause, if any, why his suspended sentence should not be revoked. App. at 24-25. On that date, Turner admitted that he was in violation of the terms of his probation – specifically that he was "unsuccessfully discharged from the treatment program" into which he was ordered. App. at 10. Turner presented evidence by way of proffer, to show cause, why his suspended sentence should not have been revoked.

App. at 10-12. The Commonwealth did not present evidence. App. at 12.

During her argument, the Commonwealth made reference to Turner's performance and results on a polygraph examination, to which Turner made a timely objection and presented applicable case law. App. at 13-14. Turner's objection was overruled by the Court. App. at 13-14.

Upon completion of evidence and argument, the circuit court found Turner in violation of his probation and departed from the Virginia Probation Violation Guidelines by revoking Turner's remaining three-year suspended sentence.

Turner timely noticed his appeal to the Virginia Court of Appeals on December 13, 2007. By Final Order dated September 29, 2008, the Court of Appeals denied Turner's petition for appeal.

Turner filed a notice of appeal to this Court on October 29, 2008. This Court awarded an appeal from the judgment rendered by the Court of Appeals, and a Certificate of Appeal was issued on march 13, 2009.

Question Presented

I. 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?

The sole question presented relates to the assignment of error (I), and was preserved at the probation violation hearing. App. at 13-14 and 24-25. This issue was preserved in the Court of Appeals. App. at 26-28. See Turner's Petition for Appeal to the Court of Appeals, Question Presented No.1.

Statement of the Facts

Turner was placed on probation in November, 2006, for the underlying charge of possession of child pornography. App. at 1-3 and 7. He began a sex offender treatment program shortly thereafter with the Sex Offender Awareness Program (SOAP), as ordered by probation. App. at 7. In February 2007, SOAP was superseded by the Center for Clinical and Forensic Services (CCFS), where Turner continued treatment. App. at 7.

While participating in treatment at CCFS, Turner missed one appointment in March, one in April, and one in May. App. at 11. It is undisputed that Turner was consistently present at the next ten or eleven appointments over the next three months, until mid-August,

when he missed an appointment because his car broke down due to a problem with his clutch. App. at 11. Despite his consistent attendance for three months, Turner was unsuccessfully discharged from the program for failure to adhere to the attendance policy and "lack of progress." App. at 7-8. There was no allegation that Turner ever missed meetings with his probation officer. App. at 7-8. There were no allegations that Turner ever engaged in inappropriate recidivist behavior related to his underlying charge, or any other criminal conduct. App. at 7-8.

Turner's "lack of progress" was allegedly due to deceptive polygraph results. App. at 7-8. Turner, through counsel, objected to the admissibility of the purportedly deceptive polygraph results, which was overruled by the circuit court. App. at 13-14. The evidence of a deceptive polygraph result was essentially the only fact relied upon by the Commonwealth in its argument at the violation hearing. App. at 13-15. According to Commonwealth, this was "*the one thing* I would really like to draw the Court's attention to." App. at 13 (emphasis added). The Commonwealth did not argue, nor did the court specifically address concerns, that Turner's attendance was a problem which made him not amenable to treatment. App. at 10-18.

While on probation, Turner was also caring for his mother who had suffered from a stroke. App. at 12. He was the primary person caring for his parents as they have been suffering recent negative health conditions. App. at 12. Additionally, while on probation, Turner was working as a landscaper for approximately nine months. App. at 12.

Upon hearing the above evidence and arguments, the trial court departed from the recommendation of probation/no incarceration under the Virginia Probation Violation Guidelines, and instead terminated probation and revoked the remaining three years of appellant's suspended prison sentence. App. at 18. In doing so, the trial court stated to Turner that the court was "not willing to subject the community to the dangers of your further conduct." App. at 18. The trial court subsequently indicated that it departed from the Virginia Probation Violation Guidelines because Turner "is a danger to children in the community and is not amenable to treatment." App. at 21-22. No evidence was presented at the hearing suggesting that Turner did anything on probation to threaten or otherwise create a danger to children in the community. App. at 10-19.

The Probation Violation Guidelines which the trial court departed from took into account appellant's unsuccessful discharge from treatment, but still recommended probation/no incarceration for Turner because the following reasons: (1) Turner had no previous adult probation revocation events; (2) Turner had no new arrests; (3) Turner maintained employment; and (4) Turner never absconded. App. at 23.

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. Standard of Review

A trial court "may for any cause deemed by it sufficient which occurred within the period of suspension fixed by the court, revoke the suspension of sentence." Duff v. Commonwealth, 16 Va. App. 293, 297, 429 S.E.2d 465, 467 (1993). The trial court, therefore, has broad but not unlimited discretion. Id. "[The trial court's] finding of fact and judgment thereon are reversible only upon a clear showing of abuse of such discretion. Id. The discretion required is a judicial

discretion, the exercise of which implies conscientious judgment, not arbitrary action." Id.

A trial court does not have discretion to admit clearly inadmissible evidence, as the question of whether or not evidence is admissible is determined through legal principles. Gray v. Rhoads, 26 Va. 81, 597 S.E.2d 93 (2004). "By definition, when the trial court makes an error of law, an abuse of discretion occurs." Bass v. Com., 31 Va. App. 373, 382, 523 S.E.2d 534, 539 (2000). This court reviews questions of law de novo. Gray, 26 Va. 81, 597 S.E.2d 93.

B. Substantive Argument

Results of polygraph examinations are not admissible in probation revocation hearings in Virginia. White v. Com., 41 Va. App. 191, 194, 583 S.E.2d 771, 772-73 (2003). In establishing this rule, Virginia courts have reasoned that polygraph examinations "are not viewed as scientifically reliable," and as such, exclusion of such results is proper. See, e.g., Odum v. Com., 225 Va. 123, 132, 301 S.E.2d 145, 150 (1983). In holding that the inadmissibility of polygraph results extends to probation revocation proceedings, the Virginia Court of Appeals stated:

> The Supreme Court has not wavered in its rulings concerning the inadmissibility of polygraph examination

> results. In a long line of cases, spanning almost thirty years, [the Supreme Court has] made clear that polygraph examinations are so thoroughly unreliable as to be of no proper evidentiary use whether they favor the accused, implicate the accused, or are agreed to by both parties. See, e.g., Odum v. Commonwealth, 225 Va. 123, 301 S.E.2d 145 (183); Skinner v. Commonwealth, 212 Va. 260, 183 S.E.2d 725 (1971); Barber v. Commonwealth, 206 Va. 241, 142 S.E.2d 484 (1965); Lee v. Commonwealth, 200 Va. 233, 105 S.E.2d 152 (1958). The point of these cases is that the lie-detector or polygraph has an aura of authority while being wholly unreliable.

White v. Com., 41 Va. App. at 194 (quoting Robinson v. Com., 231 Va. 142, 156, 341 S.E.2d 159, 167 (1986).

In White, the defendant – like Turner in this case – was charged with violating his probation for "deceptive" polygraph results during sex offender treatment. Id. at 193. The trial court in White relied on the polygraph results in finding that the court was "not in a position to take a gamble with this man and young children." Id. Similarly, in the instant case, with respect to Turner the trial court concluded that it was "not willing to subject the community to the dangers of your further conduct." App. at 18. Most importantly, in this case, as in White, aside from the "deceptive" polygraph results, there was no evidence presented to the trial court to suggest that the defendant

engaged in any conduct dangerous to children or the community.[1] White, 41 Va. App. at 194, 583 S.E.2d at 772. The Commonwealth essentially conceded this point by making no reference to the missed appointments, and in fact stating that the erroneously admitted polygraph results are "the one thing [the Commonwealth] would really like to draw the Court's attention to." App. at 13.

Mr. Turner was removed from the treatment program for missing appointments and "lack of progress." App. at 7-8. The "lack of progress" language in the probation violation report relates solely to polygraph evidence and should have been excluded from evidence. App. at 7-8. Therefore, the only admissible evidence submitted to the trial court that Turner did anything wrong was that he missed four meetings over the course of seven months. App. at 11. Even then, the evidence in this case was that Turner was present at ten or eleven straight meetings leading up to his last absence, and the fact that Turner missed the last meeting because of car problems went uncontested by the Commonwealth. App. at 11. These missed

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[1] In the case of Appellant, unlike in the White case, there was no evidence that the substance of the "deceptive" polygraph results even suggested actual contact or attempted contact with children. Indeed, the absence of any allegations of further criminal conduct in Turner's case suggests the contrary.

meetings alone, that is, without the erroneously admitted evidence of "deception," would have proven insufficient to support the trial court's conclusion that the community was being subjected to "further misconduct" by Turner. App. at 10-19. The statements made by the trial court indicate that the trial court considered inadmissible evidence when fashioning the sentence. Admitting inadmissible evidence is an error of law and results in an abuse of discretion. Bass, 31 Va. App. at 382, 523 S.E.2d at 539. Relying on the inadmissible evidence compounds the error. It cannot be assumed that the trial court would still have revoked the entirety of Mr. Turner's suspended sentence had the polygraph evidence been excluded and the trial court only considered the missed meetings.

It should be noted that the sole difference between Turner's case and the White case is that the defendant in White claimed the evidence was insufficient to support a finding that he had violated his probation, whereas Turner admitted that he was in violation because he was "unsuccessfully discharged from the treatment program," App. at 10; White, 41 Va. App. at 194, 583 S.E.2d at 772. In admitting that he was unsuccessfully discharged and thus in violation, Turner in no way conceded having deceptive polygraph results, but

rather, as is evident through the evidence and argument presented on his behalf, he only acknowledged missing four meetings spread out over the course of seven months. App. at 10-12 and 15-17.[2]

In Billips v. Commonwealth, 274 Va. 805, 652 S.E.2d 99 (2007), this Court considered a similar issue where the trial court excluded polygraph evidence but admitted evidence relating to plethysmograph testing at a sentencing hearing. This Court ruled that the trial court abused its discretion by admitting the plethysmograph evidence and the error was not harmless. Billips, 274 Va. at 810, 652 S.E.2d at 102. This Court relied on the United States Supreme Court's test for harmless error in criminal cases that "[i]f one cannot say, with fair assurance . . . that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected . . .If so, or if one is left in grave doubt, the conviction cannot stand." Billips, 274 Va. at 810, 652 S.E.2d at 102, (citing Clay v. Commonwealth, 262 Va. 253, 260, 546 S.E.2d 728, 731-732 (2001), (quoting Kotteakas v. United States, 328 U.S. 750, 764-65, 66 S. Ct. 1239, 90 L. Ed. 1557 (1946)). There is no "fair assurance" in this case that the trial court did not rely on and

[2] Turner's timely objection to the Commonwealth's reference to the polygraph results made his position clear.

was not “substantially swayed” by inadmissible evidence in revoking the suspended sentence. Billips, 274 Va. at 810, 652 S.E.2d at 102. The trial court’s statements that it was “not willing to subject the community to the dangers of your further conduct,” indicate a concern over conduct more criminal than missing treatment appointments. App. at 18. Here, the trial court admitted inadmissible evidence and it cannot be assumed that the trial court did not consider and was not “substantially swayed” by this inadmissible evidence when revoking the entirety of Turner’s suspended sentence. In revoking the suspended sentence, the trial court abused its discretion and without a “fair assurance” the trial court was not “substantially swayed” by the inadmissible evidence, the error was not harmless. Billips, 274 Va. at 810, 652 S.E.2d at 102.

The trial court erred in considering the “deceptive” polygraph results in this case. Considering this, combined with the fact that the proceeding lacked any evidence to support the trial court’s finding that Turner was “a danger to children in the community,” shows that the trial court considered and relied on this inadmissible evidence and in so doing, abused its discretion in revoking the entirety of Turner’s remaining suspended sentence. As such, this court should remand

the case back to the Fairfax County Circuit Court to impose a sentence that is supported by the evidence presented.

Furthermore, while the language of Va. Code § 19.2-306 indicates that the court may revoke a suspended sentence for "any cause the court deems sufficient," this language must be construed to fall within the context of the rules of probation. See, e.g., Alsberry v. Com., 39 Va. App. 314, 318 (2002) (upon a violation of probation, the issue is whether to continue all or any portion of a previously imposed and suspended sentence *due to the defendant's failure to abide by the terms of his probation*) (emphasis added). The phrase "any cause the court deems sufficient," for example, cannot be construed to mean that the court may revoke a suspended sentence because the court arbitrarily finds the defendant to be a physically unattractive person.

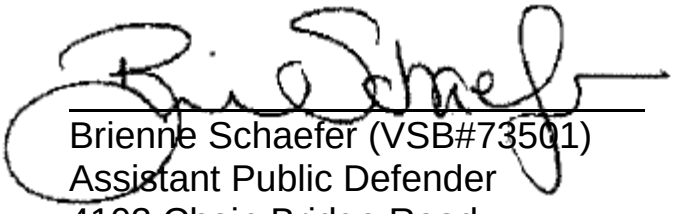
Here, the court provided a reason that at first glance, seems to be a reasonable one under Code § 19.2-306 – i.e. that Turner was "a danger to children in the community," and that the court was "not willing to subject the community to the dangers of [Turner's] conduct"; however, these reasons were not supported by the *admissible* evidence at the hearing. Furthermore, even with the inadmissible

polygraph results, there was no evidence presented that Turner ever engaged in recidivist activity or had any contact with children to support the Court's provided reasons.

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



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Certificate

I, Brienne Schaefer, certify as follows:

1. The Appellant's name is James Turner. His last known address is as follows:
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2. Counsel for the Appellant is:
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3. The Appellee is the Commonwealth of Virginia.

4. Counsel for the Appellee is:
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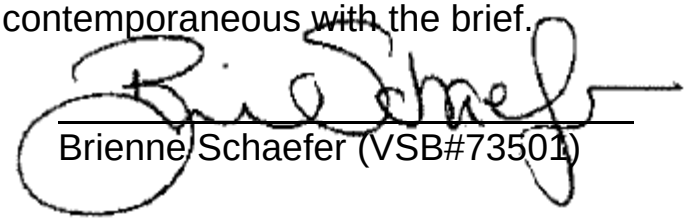
5. The Appellant is indigent and Counsel for the Appellant was appointed by the court.

6. The undersigned has complied with Rule 5:26(d). Fifteen paper copies of this Brief of Appellant and Appendix were hand filed with the Clerk of Court, Supreme Court of Va. and three paper copies of this Brief of Appellant and Appendix were sent via U.S. mail, postage prepaid, to opposing counsel on April 22, 2009. An electronic copy of this Brief and Appendix were hand filed with the clerk on CD contemporaneous with the brief.



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