STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case No. 2009AP2907-CR

STATE OF WISCONSIN,
Plaintiff-Respondent,
v.

JOSEPH J. SPAETH,
Defendant-Appellant.

APPEAL FROM A JUDGMENT OF CONVICTION ENTERED IN WINNEBAGO COUNTY CIRCUIT COURT, THE HONORABLE WILLIAM H. CARVER, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument and publication are unnecessary because the issues presented are fully briefed and may be resolved by applying well-established legal principles to undisputed facts.

STATEMENT OF THE CASE

The following facts are taken from testimony given at a suppression hearing in this case (60).

Spaeth is a registered sex offender who at the time of the events in dispute was on probation for first-degree sexual assault of a child (10:Ex. 2:1; 20:4; 60:7, 10, 38). On February 15, 2006, Spaeth took a polygraph as a condition of his probation (60:7, 37-38). The polygraph showed that Spaeth was being deceptive (60:43).

Spaeth's parole agent and the polygraph examiner talked with Spaeth after the exam (60:8). According to the probation agent, Spaeth admitted that he "may have brushed up against his nieces and nephews vaginas or butts or breast area" (60:8). His nieces and nephews were children (60:8).

The probation agent contacted the police to request that they take Spaeth into custody on a probation hold (60:8). The agent testified that she told the responding officer that Spaeth had admitted to physical contact that "may have been a sexual assault" (60:8). The responding officer recalled the agent telling him that Spaeth "had made some comments about possibly having inappropriate contact with some nephews and nieces," and about "having some contact with the vagina, breast and buttock area" (60:17-18). The officer testified that his conversation with the probation agent was "very, very brief" (60:25).

The officer handcuffed Spaeth and put him in the back of the squad car (60:9, 17). The officer asked Spaeth if he would be willing to talk to detectives (60:9). The probation agent, who had accompanied Spaeth to the squad car, told Spaeth "he didn't have to talk to them, that he could talk to an attorney, he wasn't compelled to give them any kind of statement" (60:9). She testified that Spaeth appeared to understand these instructions (60:9).

According to the agent, Spaeth said, "no, he wanted to get it off his chest" (60:9).

Once inside an interview room at the police station, a detective gave Spaeth a *Miranda* rights form and had Spaeth read the *Miranda* warnings out loud (60:20, 28). The detective asked Spaeth if he understood his rights; Spaeth said he did (60:28). Spaeth signed the *Miranda* waiver form (10:Ex. 1). At no time during police questioning did Spaeth say that he did not want to make a statement or that he wanted an attorney present (60:19-20, 21).

Spaeth gave the police a statement, which a detective wrote for him and read back to him, and which Spaeth signed (10:Ex. 2; 60:21). Spaeth's statement begins: "This statement is given freely and voluntarily to Det. J. Busha and Officer J. Framke by myself Joseph Spaeth. I understand and know what I am doing and have had no threats or promises made to me" (10:Ex. 2:1).

In his statement, Spaeth admitted to three separate incidents of sexual assault involving his nieces. First, he admitted that around Christmas of 2005, he was wrestling with his three nieces at his brother's house, and his hand "bumped and brushed into [their] vaginas, chest, and buttocks" (10:Ex. 2:1-2). Second, he admitted that while at his brother's house on February 11, 2006, his hand "brushed against" his niece's "vagina, buttocks and chest," and that "when my hand was on [my niece's] vagina, buttocks and chest, I knew that I need[ed] some help but at times I get a 'don't care' feeling and I just wish that I wouldn't have been sexually assaulted as a kid" (10:Ex. 2:2, 3). Third, he admitted that on February 14, 2006, at his brother's house, he was tickling his three nieces and "as I was tickling them my hand was brushing against [their] vagina, buttocks and chest" (10:Ex. 2:3). He stated that the "longest time my hand remained on [their] vagina buttocks and chest was between 30 seconds and 1 minute. My hand would just rest on the girls[']chest vagina and buttocks" (10:Ex. 2:3-4).

After a jury trial, Spaeth was convicted of four counts of first-degree sexual assault of a child (23).

The trial court later granted Spaeth's motion for a new trial after one of the jurors informed defense counsel that another juror had recognized Spaeth's address on his police statement and told the jurors that a registered sex offender lived at that address (29; 68:68-75).

Spaeth later pled no contest to and was convicted of four counts of child enticement (41; 42; 45). On each count, Spaeth was sentenced to five years of initial confinement and ten years of extended supervision, with the sentences running concurrently (45).

STANDARD OF REVIEW

Spaeth claims that his police confession was taken in violation of his Fifth Amendment privilege against compulsory self-incrimination. The application of constitutional standards to the facts is a question of law, reviewed independently on appeal. *State v. Mark*, 2008 WI App 44, ¶ 15, 308 Wis. 2d 191, 747 N.W.2d 727. This Court reviews the trial court's findings of facts under the clearly erroneous standard of review. *Id.*

ARGUMENT

I. INTRODUCTION.

As discussed above, Spaeth gave two incriminating statements: one to his probation agent and another to police. It is undisputed that the State never made any evidentiary use at trial of his statement to his agent. As the trial court stated and all counsel agreed during a postconviction hearing, "we never used the probation agent at trial and the probation agent's findings or any statements made by [Spaeth] to the probation agent . . . . We definitely eliminated all that" (74A:17).

Thus, the only issue on appeal is whether Spaeth's police confession should have been suppressed as having been taken in violation of his Fifth Amendment privilege against compulsory self-incrimination. The trial court denied Spaeth's arguments on this point, holding in pertinent part:

> The issue does come down to this voluntariness of Mr. Spaeth in making the statement.
>
> . . . .
>
> . . . [The probation agent's] polygraph procedure seems to be a procedure even authorized by the Legislature, and it seems to be monitored in an appropriate manner. It's for informational purposes. It's for aid and assistance to a probation officer to determine whether or not those on probation are engaged in potentially inappropriate or illegal behavior. And they are properly told that; statements made during the polygraph process would not be used against them in Court.
>
> But it's a fair means of the Probation Department to determine whether or not people are complying with rules. And when they come across situations that are deemed to be questionable, it certainly is appropriate to refer the matter to the police, to potentially place people in custody for potential rules violations and allow the police departments to conduct further inquiry.
>
> It's interesting to note, . . . [the probation agent] . . . told Mr. Spaeth that he's going to be turned over to the police. She advised him clearly that he didn't have to talk to the police and that whatever he said to her wouldn't be admissible at trial. I don't know how far one would have to go here to be fair in conducting the business of the Probation and Parole Department.
>
> And we talked about whether a person comes in, admits to a burglary or anything else, much less a sexual contact that was inappropriate in itself as a rule violation and allowing the police to inquire to see if there was, in fact, a criminal violation. He wasn't even supposed to be in contact,

> my understanding, with juveniles but that in itself would give grounds to place him in custody.
>
> I understand where [defense counsel is] coming from, but it doesn't really make sense. We would never have an admissible statement made to the police once the agent has ordered a custodial order here, because then you're arguing no matter what the police do, they could never formulate a statement that would be admissible.
>
> But we do have a separation here. We've got the Department of Corrections, they did their job; turned the defendant over to the police. They take the defendant in custody. They advise the defendant all the usual Miranda rights and that's on top of what, in this case, Mr. Spaeth was advised by the agent; and he proceeds to voluntarily make a statement.

(60:51-53).

The trial court later confirmed its holding that Spaeth's police confession was not compelled in two subsequent postconviction hearings (64; 74A).

II. SPAETH'S POLICE CONFESSION WAS NOT COMPELLED.

The State concedes, as it did below (74A:26), that Spaeth's statement to his probation agent was compelled. *See State v. Thompson*, 142 Wis. 2d 821, 830, 419 N.W.2d 564 (Ct. App. 1987) ("[A] probationer's answers to a probation agent's question prompted by accusations of criminal activity are 'compelled.'"). This is so because a probationer has an "absolute obligation" to keep his probation agent informed of his whereabouts and activities; this obligation is the "very essence" of the system of probation. *State v. Evans*, 77 Wis. 2d 225, 231, 252 N.W.2d 664 (1977). "If the probationer refuses to discuss his activities or answer specific questions, such refusal under the probation agreement may be grounds for revocation." *Id.* "[P]robation revocation, the loss of

conditional liberty[,] constitutes compulsion for purposes of the Fifth Amendment." *State ex rel. Tate v. Schwarz*, 2002 WI 127, ¶ 17, 257 Wis. 2d 40, 654 N.W.2d 438. It is undisputed here that Spaeth's probation agent required him to take a polygraph, and that if he had refused, the agent would have considered him in violation of his probation terms (60:44-45). Thus, it follows that his post-polygraph statement to his agent was compelled.

To simultaneously guarantee a probationer's Fifth Amendment rights and also preserve the probation system's integrity, a probationer's compelled answers to a probation or parole agent's questions are covered by "use and derivative use immunity." *Evans*, 77 Wis. 2d at 235-36; *Tate*, 257 Wis. 2d 40, ¶ 20. This form of immunity "'permits prosecution for the crimes if the prosecuting agency does not offer the immunized testimony and establishes that the evidence offered is not derived from the immunized testimony.'" *Tate*, 257 Wis. 2d 40, ¶ 20 n.8 (citation omitted).

The language "*derived from the immunized testimony*" is the basis for Spaeth's argument on appeal. He claims that because his statement to his probation agent ultimately led police to *Mirandize* and question him – *i.e.*, that it was the "but for" cause of the police questioning – the resulting confession is "derived from" his immunized statement and therefore must be suppressed.

Spaeth's argument, if correct, would place the State's probation system at odds with itself. The probation system depends on cooperation between probation agents and law enforcement. *See* Wis. Admin. Code § DOC 328.01(5) (stating that one of the goals of the adult field supervision system is "[t]o cooperate with other public and private agencies in activities for the purpose of prevention of crime . . . "). Such cooperation is *mandatory*. For example, probation agents must report probationers' criminal activity to law enforcement. Probation agents are duty-bound to "[r]eport[] child abuse

cases under s. 48.09, Stats., to the appropriate authority," § DOC 328.04(2)(t), and to "[r]eport[] all violations of the criminal law by clients to a supervisor or appropriate law enforcement authority," § DOC 328.04(2)(w). Probation agents also must request help from law enforcement in certain circumstances. For example, an agent must take a probationer into custody if he "is alleged to have been involved in assaultive or dangerous conduct," and the agent "shall rely on law enforcement authorities" whenever practical to do so. § DOC 328.22(1).

If this Court rules in Spaeth's favor, cooperation between probation agents and police will transform from being required as an important part of crime prevention, to being avoided as poisonous to the evidentiary value of criminal investigations. According to Spaeth, probation agents to whom probationers have admitted criminal activity must wall themselves off from law enforcement or risk tainting entire police investigations. Consider the Catch-22 that Spaeth believes his agent was in. The agent could either: (a) comply with her duties by reporting Spaeth's admitted child sexual assaults to police, with the subsequent police questioning and resulting confession deemed tainted; or (b) breach her duties by not reporting the assaults to police, and hope the police eventually discovered the assaultive behavior – which was ongoing – on their own.

Spaeth's argument, if correct, also would have troubling consequences beyond the factual scenario presented here. Assume that a probationer admitted to his agent that he had hidden at his home certain materials forbidden by his terms of probation. By law, the agent may ask police to be present during a probation search for protection purposes. *State v. Hajicek*, 2001 WI 3, ¶ 30, 240 Wis. 2d 349, 620 N.W.2d 781. But under Spaeth's reasoning, the agent could not tell the officers what the agent was searching for or risk tainting any subsequent police investigation. This would be a precarious situation for the agent, the police, and the probationer alike: the agent could be searching for something as dangerous as a

gun or as relatively innocuous as a bottle of booze, and the police would not know exactly what they were there to protect against.

From a common sense perspective, Spaeth's argument cannot be right. Fortunately, from a legal perspective, it isn't. *Cf. Mapp v. Ohio*, 367 U.S. 643, 657 (1961) ("There is no war between the Constitution and common sense.")

No decision cited by Spaeth supports his claim: that the disclosure by a probation agent to a police officer of a probationer's admitted misconduct ruins the evidentiary value of any subsequent police investigation, unless the police already knew about the misconduct. (Or, in Spaeth's vernacular, had knowledge "untainted" by the probationer's statement to his agent.) Such a result would confer on the probationer a form of *transactional* immunity – a broad form of immunity which precludes prosecution for the offense to which the compelled testimony (or here, the probationer's statement to his agent) relates. *Kastigar v. United States*, 406 U.S. 441, 453 (1972).

The lead case cited by Spaeth, *Kastigar v. United States*, makes clear that a witness whose testimony was compelled is *not* entitled to transactional immunity. "Transactional immunity . . . affords the witness considerably broader protection than does the Fifth Amendment privilege." *Id.* at 453. Instead, the purpose of the Fifth Amendment bar against the use of immunized testimony is to "'leave[] the witness and the Federal Government in *substantially* the same position as if the witness had claimed his privilege' in the absence of the grant of immunity," *id.* at 458-59 (citation omitted; emphasis added), not in the identical position or in a position as if the witness had remained silent. *See United States v. Apfelbaum*, 445 U.S. 115, 127 (1980) ("For a grant of immunity to provide protection 'coextensive' with that of the Fifth Amendment, it need not treat the witness as if he had remained silent."). Thus, *Kastigar*

and its Wisconsin progeny do not require that the probation agent become impotent to report criminal activity to police for investigation.

Holding otherwise would upset the quid pro quo between the probationer and the State. The State exchanges "use and derivative use immunity" for the mandatory information exchange between agents and probationers so as to ensure that probationers are adequately supervised and the public is in turn protected. *Evans*, 77 Wis. 2d at 231-32. If Spaeth prevails, the State would find itself on the receiving end of a terrible bargain. The only thing the State received in exchange for granting Spaeth use and derivative use immunity was compliance with conditions of probation that he already was bound by – to follow the law; to accurately report his activities to his agent; to take a polygraph. Spaeth, on the other hand, would receive what amounts to complete immunity for his crimes. Nothing in the law requires or justifies this kind of asymmetric bargain. *See State ex rel. Eckmann v. DHSS*, 114 Wis. 2d 35, 46, 337 N.W.2d 840 (Ct. App. 1983) ("Probation is an affirmative correction tool which is used not because it is of maximum benefit to the defendant but because it is of maximum benefit to society.")

Spaeth disagrees, relying heavily on this Court's ruling in *State v. Mark*. The *Mark* court held that two sets of incriminating statements by Mark to his parole agent were compelled under the Fifth Amendment and, therefore, inadmissible. *Mark*, 308 Wis. 2d 191, ¶¶ 16-25. In reaching this result, the court ruled that when the State attempts to have admitted a statement made after an involuntary statement was made, the State bears the burden of proving that the second statement is separate from the circumstances surrounding the first, involuntary statement. *Id.*, ¶ 20. The State must show a "'break in the stream of events,' between the first statement to the second, 'sufficient to insulate the statement from the effect of all that went before.'" *Id.*, ¶ 20 (citation omitted). Factors that may be relevant in deciding whether there is a

"sufficient break" in the "stream of events" from the first statement to the second statement include: the change in the place of the interrogations, the time that passed between the statements, and the change in the identity of the interrogators. *Id.*, ¶ 22. Additionally, this Court should also consider the extent to which the coercion employed in obtaining the initial confession was severe enough to likely affect the defendant's subsequent statements. *Id.* The ultimate inquiry is: what evidence shows that the compulsion that produced the initial statement was removed? *Id.*, ¶ 23.

Looking first at the factors that examine the level of "coercion" applied by the State, even Spaeth admits that neither the probation agent nor the police engaged in any improper tactics. Spaeth concedes that "the conduct that elicited the first statement [to the probation agent] was not flagrant or shocking," and that "the second statement [to police] was not made under circumstances that would render it compelled independent of the first statement" (Spaeth's Brief at 18). Thus, as Spaeth acknowledges, there was no bad faith conduct connecting Spaeth's statement to his probation agent and his police confession.

Moreover, there were at least four "breaks" in the "stream of events" between Spaeth's statement to his agent and his statement to police. First, Spaeth's agent told him that he could remain silent and that he did not have to speak to police at all (60:9), thus removing any reasonable fear on Spaeth's part that he had to talk with police to avoid a probation revocation. Second, Spaeth gave his statements to two different sets of questioners: the first statement to his probation agent, and the second to police. Third, the statements occurred in two separate locations: the first in the polygraph examination room at the probation agent's office (60:7-8), and the second at the police station. Fourth, and most importantly, the police officers gave Spaeth his *Miranda* warnings before the police interview, and Spaeth expressly waived his right to remain silent (60:20, 28). Although Spaeth claims that he

suffers from low intelligence and was confused by a waiver form given to him as part of his polygraph exam, there is no evidence in the record that his intellectual abilities or any instructions he was given adversely affected his ability to understand and knowingly waive his *Miranda* rights; tellingly, Spaeth never testified that he was unclear about his rights or was unwilling to speak with police. Because of these four "breaks" between his first and second statements – especially the fact that Spaeth was read his *Miranda* rights but chose to waive his right to remain silent – there was no "threat" or coercion that compelled his police confession. In the language of *Kastigar*, Spaeth's police confession was "derived from a legitimate source wholly independent of" his compelled and immunized statement to his agent; namely, his knowing and voluntary decision to speak with police. *Kastigar*, 406 U.S. at 460.

The only factor that may weigh against the validity of Spaeth's confession is the relatively brief time lapse – about an hour – between Spaeth's first and second statements. But the lapse of time between statements is not dispositive. *See State v. Artic,* 2010 WI 83, ¶¶ 73-78, ___ Wis. 2d ___, ___ N.W.2d ___ (July 15, 2010) (holding, in the context of a Fourth Amendment attenuation analysis, that an approximate five minute interval between an illegal entry of a house and a search of an upstairs residence weighed against attenuation, but was not dispositive because "time is not necessarily of the essence when it is outweighed by other factors in an attenuation analysis.") Moreover, Spaeth's preoccupation with timing causes him to underestimate the importance of the four "breaks" between his first and second statements, described above.

Thus, although it is true that Spaeth's immunized statement to his agent was the "first cause" of his later *Mirandized* police confession, Spaeth fails to show the link between this chain of causation and any violation of the policies underlying the Fifth Amendment.

CONCLUSION

The judgment of conviction should be affirmed.

Dated this 16th day of July, 2010.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 3,492 words.

Dated this 16th day of July, 2010.

_____
Mark A. Neuser
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 16th day of July, 2010.

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