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STATE OF WISCONSIN

I N S U P R E M E C O U R T

Case No. 2009AP002916-CR

STATE OF WISCONSIN,

Plaintiff-Respondent

vs.

GREGORY M. SAHS,

Defendant-Appellant-Petitioner

ON REVIEW OF A DECISION OF THE COURT OF APPEALS, DISTRICT I, AFFIRMING A JUDGMENT OF CONVICTION ENTERED IN MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE JEFFREY CONEN, PRESIDING

REPLY BRIEF OF DEFENDANT-APPELLANT-PETITIONER

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ARGUMENT

I. THE RESPONDENT MISREPRESENTS THE EFFECT OF THE WRITTEN NOTIFICATION ON THE COMPULSORY LEVEL OF DEFENDANT'S STATEMENTS. FURTHERMORE, DEFENDANT'S JANUARY 12, 2007 MEETING WITH HIS AGENT WAS NOT VOLUNTARY.

A. The Respondent Misrepresents the Effect of the Written Notification on the Complusory Level of Defendant's Statements.

In the State's Respondent's Brief, the State highlights and emphasizes the oral statement that Defendant had provided to the Department. The Brief minimizes the written statement. However, this is incomplete and incorrect.

The Respondent Brief argues that the State's trial brief did not stipulate to the existence of the written notification at the top of the Department of Corrections form that the Defendant had signed. This notification is the crux of this case. (Resp. Brf, pge 8). However, at the trial level, the State never disputed the existence, or contents, of this notification. The State's trial brief does not dispute the existence, or contents, of this notification. (9:1-10). The State, at the oral motion hearing, also did not dispute the either existence or contents of this notification. (25:5-6). The trial court, in its oral decision, never indicated that the existence of this notification was a factual issue. The trial court's oral decision emphasized Defendant's oral statement. This oral statement had supposedly occurred prior to the agent mandated written statement. (25:6-16). Hence, contrary to the Respondent's Brief, there was no dispute at the trial level to the existence of this notification.

According to Defendant's first Motion to Exclude, he had

provided an oral statement to his agent on January 12, 2007. The agent wrote down the oral statement verbatim. Mr. Sahs read the statement form and signed it to confirm that it accurately reflected what had been said. The statement form contained the specific written proviso that the dictated statement would not be used as evidence in a subsequent criminal proceeding. This proviso was in response to the holdings in Evans, Murphy, and Thompson. (7:6). These facts, contrary to the Respondent's Brief, had not been disputed at the trial level. The State's trial brief had agreed that the agent had wrote down the Defendant's oral statement onto the Department Corrections statement form. (9:2). This concedes, contrary to the Respondent's Brief, that the oral statement had occurred simultaneously to the written statement. (Resp. Brf, pge 8). There was no oral statement that had led to a subsequent written statement. There was only one statement.

A statement made to a Department of Corrections agent that could lead to revocation is compelled. The threat of possible revocation still leads to a finding of compulsion. State vs. Spaeth, 330 Wis.2d 220 at 244, 819 N.W.2d 769 (2012). The State's Brief errs in arguing otherwise. (Resp. Brf 37). The written notification at issue here provides this information.

Based upon the foregoing, and the facts and arguments before this Court, there were never separate oral and written statements. The agent wrote Defendant's oral statement verbatim onto the

written Department of Corrections form that contained the written notification at issue.

B. Defendant's Meeting with his Agent on January 12, 2007 was not Voluntary.

The State also argues that Defendant voluntarily met with his agent on January 12, 2007. This, in order to discuss his conduct. This is, essentially, the crux of the State's argument. However, this is not true.

One of the undisputed conditions of Defendant's probation was that he inform his agent of his whereabouts and activities as directed,... and submit to polygraphs. (7:1). Here, clearly, this indicates that Defendant had an obligation to meet with his agent in order to inform him of his activities. Such activities clearly include using a personal computer in order to access child pornography. Accordingly, although the Respondent argues that the January 12, 2007 was entirely at Defendant's discretion, this is not true. He had an obligation to inform his agent of such an activity. Failure to so inform would have constituted a violation of probation, thereby possibly leading to revocation. Therefore, the providing of such information was compulsory.

State vs. Peebles, 330 Wis.2d 243, 792 N.W.2d 212 (Ct. App. 2010) supports Defendant's position. In that case, Peebles had participated in sex offender treatment. As part of that treatment, he had been expected to admit all sexual behaviors, give details of

past hidden crimes, and to complete a sexual history time line. Peebles testified that he believed that if he did not talk about other sex offenses in treatment, he wouldn't be cooperating with his counselor and would be revoked. Id. at Wis.2d 249. Peebles was later revoked. Peebles agent later testified that the admissions had been conveyed from Peeble's sex offender treatment counselor. Id. at 250. There was no indication that these admissions had occurred only as a response to questioning.

At Peeble's sentencing after revocation, the revocation summary had been provided to the sentencing judge. However, Peebles had argued in a postconviction motion that the trial court's consideration at sentencing of his admissions made in treatment violated his right against self-incrimination. Id. at 251.

The Court of Appeals, in Peebles, agreed with Mr. Peebles. The Court concluded that any incriminating statements that the probation provides under the grant of immunity may be used as justification for revocation, but may not be used in any criminal proceedings; and that if a probationer is compelled by way of probation rules to incriminate himself or herself, the resulting statements may not be used in any criminal proceeding. Id. at 256. The Court found that, even though he did not invoke the privilege, he sought to exclude the statements in a subsequent criminal proceeding, arguing that they had been compelled. Id. at 257. The Court found that Peebles statements that had been used against him

at sentencing were incriminating and should have been excluded. The Court did not find important that Peebles had not invoked the right of silence, but instead sought to exclude statements that he had already made. Id. at 257-258.

Here, contrary to Respondent's Brief, Defendant may not have provided his statement to the agent in response to questions. However, as indicated in Peebles, this is not relevant. Defendant had an obligation, as part of his probation rules, to keep his agent informed of his whereabouts and activities. Accordingly, as supported by Peebles, this requirement created a Fifth Amendment privilege. His statements were incriminating. This, regardless of whether or not Defendant had responded to questions, or simply provided information.

Furthermore, the timing of the January 13, 2007 polygraph examination also leads to a finding of compulsion. Defendant had failed a polygraph test on December 15, 2005. He had been kicked out of the sex offender treatment program temporarily. His agent knew of this test result as well as the perceived noncompliance with treatment. Another polygraph test had been scheduled for January 13, 2007. One of his probation conditions was to submit to polygraphs. (7:1-2).

Clearly, Defendant knew that, on January 13, 2007, he was going to fail yet another polygraph test. He knew that on January 12, 2007. If that failure had occurred, then, clearly also, his

agent would have questioned him about this failure, and the conduct that had led to this failure. Such questioning would have been at the agent's discretion. Accordingly, Defendant's discussion of his conduct would have occurred regardless of whether or not he had scheduled the January 12, 2007 appointment. Defendant knew of such a situation. Such questioning, and providing of information, was inevitable. Therefore, the January 12, 2007 meeting was not voluntary. Such questioning would have occurred regardless of either the date or the sequence of events. This Court should not penalize the Defendant for providing such information on this date. This, when the agent would have obtained the information, in any event. This, by agent's direct questioning subsequent to the inevitable polygraph examination failure on January 13, 2007.

The State argues that there is no information that Defendant knew of the January 13, 2007 polygraph examination. (Resp. Brf, pges 27-28). However, this is mere unwarranted speculation. Such an argument defies logic. How else was Defendant to make the January 13, 2007 examination if he did not have prior knowledge of this scheduled examination?

Furthermore, the timing of the events in this matter clearly leads to a conclusion that Defendant knew of the January 13, 2007 polygraph examination prior to January 12. He had been discharged from the sex offender treatment program. Furthermore, he had failed his December 15, 2005 polygraph. Clearly, his making an appointment

with his agent in order to "confess his sins" the day prior to the scheduled test circumstantially shows that he was aware of the January 13, 2007 test.

For the foregoing reasons, as well as the arguments raised in Defendant-Appellant-Petitioner's Brief, Defendant had an obligation under his probation rules to inform his agent of his whereabouts and activities. Accordingly, any information that he provided to his agent on January 12, 2007 was mandated, not voluntary, and compulsory. This, regardless of how the agent had learned of the information.

Furthermore, the January 12, 2007 meeting was not voluntary. Defendant should not be penalized for making this appointment. This meeting was compulsory.

CONCLUSION

As indicated within this Reply Brief and within Defendant-Appellant-Petitioner's original Brief, the trial court erroneously and improperly concluded that Defendant's statements to his agent, whether oral or written, were not compulsory. The Court of Appeals improperly and erroneously affirmed this Decision.

Based upon the foregoing as well as the reasons outlined in his original Brief, the Defendant-Appellant-Petitioner respectfully requests that this Court reverse the Decision of the Court of

Appeals as well as the Decision and Order of the Trial Court.

Dated this 21st day of January, 2013.

Respectfully Submitted,

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CERTIFICATION

I hereby certify that the Appellant's Reply Brief of Defendant-Appellant-Petitioner in the matter of State of Wisconsin vs. Gregory M. Sahs, 2009AP002916 CR conforms to the rules contained in Wis. Stats. 809.19 (8)(b)(c) for a Brief with a monospaced font and that the length of the Brief is nine (9) pages.

Dated this 21st day of January, 2013, in Waukesha, Wisconsin.

Mark S. Rosen
Attorney for Defendant-
Appellant

CERTIFICATION

I hereby certify that the text of the e-brief of Appellant's Reply Brief of Defendant-Appellant in the matter of State of Wisconsin vs. Gregory M. Sahs, Case No. 2009AP002916 CR is identical to the text of the paper brief in this same case.

Dated this 21st day of January, 2013, in Waukesha, Wisconsin.

Mark S. Rosen
Attorney for Defendant-Appellant