Review of Recent Juvenile Cases (2011)

by
The Honorable Pat Garza
Associate Judge
386th District Court
San Antonio, Texas

Requiring participation in sex offender treatment as a condition of probation does not compel participation in a polygraph examination.[In the Matter of A.M.](11-1-7)

On February 11, 2011, the Eastland Court of Appeals held that respondent could have invoked his privilege against self-incrimination, prior to participation in polygraph examination, even though examination was part of mandatory sex offender treatment.

¶ 11-1-7. In the Matter of A.M., No. 11-09-00304-CV, --- S.W.3d ----, 2011 WL 491018 (Tex.App.-Eastland, 2/11/11).

Facts: In 2008, A.M. was charged with aggravated sexual assault of his twelve-year-old sister. At that time, A.M. was fourteen years old. Pursuant to a plea bargain agreement, the 2008 aggravated sexual assault charge was reduced to a charge of indecency with a child by exposure, and A.M. was placed on probation for two years. The conditions of probation required A.M. to participate in sex offender treatment. As part of that treatment, A.M.'s therapist required him to take a monitoring polygraph examination. On August 6, 2009, A.M. took the examination. During the interview part of the examination, A.M. told the polygraph examiner that he had engaged in sexual contact with his sister five times since the beginning of his probation period. On August 17, 2009, the State filed an original adjudication petition alleging that, on or about May 15, 2009, A.M. had committed the offense of aggravated sexual assault of his sister.

A.M. filed a motion to suppress the statements that he had made to the polygraph examiner. Following a hearing, the trial court denied the motion. A.M. then pleaded "true" to the allegations in the State's petition and, in a stipulation of evidence, judicially confessed that he had committed the alleged offense. The trial court entered an adjudication-hearing judgment in which it found that A.M. had committed the offense of aggravated sexual assault of a child and adjudicated A.M. as having engaged in delinquent conduct. The trial court also entered an order committing A.M. to the Texas Youth Commission.

Appellant contends that the trial court erred by denying his motion to suppress for two reasons. In his first issue, he argues that the condition of his probation requiring him to take the polygraph examination placed him in a "classic penalty situation" as described in Minnesota v. Murphy, 465 U.S. 420, 434-35 (1984), and that, therefore, his statements to the polygraph examiner were compelled and inadmissible. In his second issue, he argues that the disclosure of his polygraph examination results to the district attorney's office for the purpose of obtaining a new conviction against him violated his due process rights because he was led to believe that the results would be disclosed only to the probation department and his father.

Held: Affirmed

Opinion: In his first issue, A.M. contends that his statements to Perot were compelled. The State may not compel a person to make an incriminating statement against himself. U.S. CONST. amend. V; Tex. Const. art. I, § 10. A criminal defendant does not lose this constitutional protection against self-incrimination merely because he has been convicted of a crime. Murphy, 465 U.S. at 426; Chapman v. State, 115 S.W.3d 1, 5 (Tex.Crim.App.2003). A person who is on probation has a right against self-incrimination concerning statements that would incriminate him for some other offense. Murphy, 465 U.S. at 426; Chapman, 115 S.W.3d at 5-6.

As a general rule, the privilege against self-incrimination is not self-executing. Murphy, 465 U.S. at 428-29. With few exceptions to this general rule, a person must timely invoke the privilege to obtain its protections. Otherwise, the person may not claim that his statement was compelled. Murphy, 465 U.S. at 428-29, 434; Chapman, 115 S.W.3d at 6.

The privilege against self-incrimination is self-executing when a person is subjected to a custodial interrogation by law enforcement officers. Murphy, 465 U.S. at 429-30. Statements made by a suspect during a custodial interrogation are inadmissible unless the suspect was given a Miranda warning and knowingly and intelligently waived his privilege against self-incrimination and his right to counsel. Murphy, 465 U.S. at 430; Miranda, 384 U.S. at 475. However, requiring a probationer to submit to a polygraph examination does not subject the person to custodial interrogation. Ex parte Renfro, 999 S.W.2d 557, 561 (Tex.App.-Houston [14th Dist.] 1999, pet. ref'd); Marcum v. State, 983 S.W.2d 762, 766 (Tex.App.-Houston [14th Dist.] 1998, pet. ref'd). Therefore, the probationer need not be given Miranda warnings before administering the polygraph examination. Marcum, 983 S.W.2d at 766.

Another exception to the general rule is the "classic penalty situation." Murphy, 465 U.S. at 434-35; Chapman, 115 S.W.3d at 6. If a person is placed in a classic penalty situation, the privilege against self-incrimination is self-executing, the person's statements are deemed compelled, and the statements are inadmissible in a criminal prosecution. Murphy, 465 U.S. at 434-35; Chapman, 115 S.W.3d at 6-7. In the classic penalty situation, the State threatens a person with punishment for asserting his privilege against self-incrimination, thereby depriving him of his choice to refuse to answer. Chapman, 115 S .W.3d at 6. In the probation context, a classic penalty situation is created if the State, either expressly or by implication, asserts that invocation of the privilege against self-incrimination would lead to a revocation of probation. Murphy, 465 U.S. at 435. To determine the issue, courts must inquire "whether [the person's] probation conditions merely required him to appear and give testimony about matters relevant to his probationary status or whether they went farther and required him to choose between making incriminating statements and jeopardizing his conditional liberty by remaining silent." Id. at 436; Chapman, 115 S.W.3d at 7-8.

As the sole judge of the credibility of the witnesses, the trial court was free to believe Perot's and Hunt's testimony and to disbelieve A.M.'s statements in his affidavit. Valtierra, 310 S .W.3d at 447; Garza, 213 S.W.3d at 346. According to Perot, he told A.M. that the polygraph examination was voluntary and that he could refuse to take it. A.M. signed a release indicating that he understood these facts, and Perot believed that A.M. understood them. Hunt believed that A.M. would have understood the explanation that the test was voluntary and that he did not have to take it. Hunt testified that she did not tell A.M. his probation would be revoked if he did not take the examination. Based on the evidence, the trial court could have reasonably concluded that the State did not expressly or impliedly threaten A.M. with revocation of his probation if he exercised his privilege against self-incrimination and that, therefore, the State did not place A.M. in a classic penalty situation. Murphy, 465 U.S. at 435-36; Chapman, 115 S.W.3d at 6- 7.

Conclusion: Therefore, A.M.'s privilege against self-incrimination was not self-executing. Murphy, 465 U.S. at 434; Chapman, 115 S.W.3d at 11. Because A.M. did not invoke his privilege against self-incrimination, his

statements to Perot were not compelled within the meaning of the Fifth Amendment. Chapman, 115 S.W.3d at 3.