

NO. 45337-1-II

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,
Appellant

v.

A.W,
Appellant

DWIGHT A. FINCH, Real Party in Interest

ON REVIEW FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR WAHKIAKUM COUNTY

BRIEF OF *AMICI CURIAE* LEGAL VOICE, NATIONAL CRIME
VICTIM LAW INSTITUTE, AND SEXUAL VIOLENCE LAW
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I. INTRODUCTION

For years, sexual assault survivors and their advocates have worked on all fronts to improve the legal system's response to sexual violence – and to dispel myths about sexual assault that caused many courts and law enforcement officials to disbelieve, blame, and retraumatize survivors when they reported crimes. These efforts have resulted in major reforms, including laws that restrict the degrading and counterproductive practice of compelling sexual assault survivors to take polygraph examinations.

Despite significant progress, the legal system too often continues to treat women, men, and children who report sexual assaults as suspects, rather than as crime victims. This case, as well as the related case pending before this Court under Case No. 44637-5-II, illustrates the continuing depth of the problem.¹

This case concerns whether a court may order A.W. to submit to a polygraph examination regarding A.W.'s allegations that he was sexually assaulted by Dwight Finch. While undergoing treatment as a juvenile sex offender, A.W. revealed to his therapist that he had been sexually assaulted by Mr. Finch. As required by Washington law, the therapist reported A.W.'s disclosure to law enforcement, resulting in Mr. Finch

¹ The arguments presented by *amici* in this brief would be equally applicable to the related case of *State v. Finch* (Case No. 44637-5-II).

being charged with sex offenses. In response, Mr. Finch took two steps to attempt to compel A.W. to submit to a polygraph examination:

- In the criminal case filed against him by the State, Mr. Finch obtained an order to require A.W. to take a polygraph exam, purportedly pursuant to the terms of A.W.'s Special Sex Offender Disposition Alternative (SSODA).
- After the State appealed that ruling in the criminal case, Mr. Finch then successfully filed a motion in A.W.'s juvenile case to require A.W. to undergo a polygraph exam.

Both orders were entered by the Honorable Michael Sullivan, the presiding judge in A.W.'s juvenile case and Mr. Finch's criminal case.

In their briefing to this Court, the State and A.W., as well as *amicus* Department of Commerce in related case number 44637-5-II , have explained why Judge Sullivan's orders are procedurally improper and violate separation of powers principles. *Amici* agree with those arguments but write separately to explain how significantly an order directing a sexual assault survivor to undergo a polygraph examination offends the rights of crime victims, as well as Washington's public policy toward sexual assault survivors.

Such orders attempt to circumvent Washington's law that restricts compulsory polygraphs of those who report sexual assaults. They also

seriously undermine Washington's efforts to encourage sexual assault reporting and to ensure appropriate, respectful treatment of sexual assault survivors. Because the errors by the lower court have created such a substantial unfairness toward A.W., *amici* also argue that this matter should be reassigned to a new judge on remand.

II. IDENTITY AND INTEREST OF AMICI

The identity and interest of *amici* are set forth in the Motion for Leave to File Amici Curiae Brief, filed herewith.

III. STATEMENT OF THE CASE

Amici adopt the State of Washington's statement of the case.

IV. ARGUMENT

A. A Court Should Never Order A Sexual Assault Survivor To Undergo A Polygraph Examination

The Washington Legislature has expressed a clear and strong public policy against compelling – or even asking – the victim of an alleged sexual assault to take a polygraph examination. Since 2007, Washington law has provided:

A law enforcement officer, prosecuting attorney, or other government official may not ask or require a victim of an alleged sex offense to submit to a polygraph examination or other truth telling device as a condition for proceeding with the investigation of the offense. The refusal of a victim to submit to a polygraph examination or other truth telling device shall not by itself prevent the investigation, charging, or prosecution of the offense. For the purposes of this section, "sex offense" is any offense under chapter

9A.44 RCW.

RCW 10.58.038. In addition to this specific provision governing polygraphing, Washington's constitution and statutes express clear protections for victims designed to secure for them a significant and meaningful role in the justice system. *See* Wash. Const. art. 1, § 35; RCW 7.69.010.

Ordering a sexual assault survivor to undergo a polygraph examination ignores the obvious purpose of the polygraph prohibition statute, the general victims' rights provisions, as well as the myriad of public policy rationales for why it is never appropriate for a court to order a sexual assault survivor to take a polygraph examination.

1. Polygraph Examinations Are Inherently Unreliable, And Are Particularly Likely To Yield "False Positives" When Administered To Sexual Assault Survivors

The unreliability of polygraph examinations is well-established.

As one commentator recently explained:

The biggest problem with polygraph tests is that there are no known physiological responses that directly correspond with deception. An examinee's physiological responses are often governed by whether the examinee believes the test is accurate, and from the atmosphere created by the examiner. Furthermore, external stimuli may cause a change in physiological responses, such as a surprising question or a noise outside the room. Likewise, stress, anxiety, and fear, all controlled by the autonomic nervous system, cause changes in the physiological responses of an examinee.

Shelley Gupta, *A Polygraph Test Wouldn't Know the Truth If It Hit It With a Brick: Perpetuation of the Normalization of Violence Against Women*, 34 Women's Rts. L. Rep. 282, 286-87 (2013).

Consistent with this analysis, the Washington Supreme Court has recognized that polygraph examinations are both unreliable and invasive. *See In re Detention of Hawkins*, 169 Wn.2d 796, 802, 238 P.3d 1175 (2010) (noting that polygraphs examinations have been “consistently recognized as unreliable” by courts and that “polygraph examinations are also invasive, both physically and of one’s private affairs.”).²

Because of the inherent unreliability of polygraph exams, Washington courts do not permit the admission of polygraph results at trial, absent a stipulation of the parties. For example, in *State v. Justesen*, 121 Wn. App. 83, 86 P.3d 1259, *review denied*, 152 Wn.2d 1033 (2004), a mother was charged with custodial interference after she concealed her child from the father because she suspected the father had sexually abused the child. The mother was convicted of custodial interference after the trial court admitted the father’s polygraph results denying the sexual

² The Court in *Hawkins* also indicated that “[b]ecause the legislature is undoubtedly aware of the inherent problems with polygraph examinations, it is fair to infer that the legislature intends to prohibit compulsory polygraph examinations unless it expressly allows for their use.” *Id.* at 803. However, the Court has also held that a trial court “has authority to impose monitoring conditions such as polygraph testing” in criminal sentences. *State v. Riles*, 135 Wn.2d 326, 342, 957 P.2d 655 (1998).

abuse. But the Court of Appeals reversed the conviction, holding “[t]he polygraph is not a reliable indicator of truth for purposes of court proceedings. Because the polygraph evidence was used to prove that the father's denial [of sexual abuse of the child] was truthful, it should not have been admitted without a stipulation.” *Id.* at 85.

Subjecting sexual assault survivors to polygraph examinations raises even greater concerns about reliability than in other situations because there is an increased risk of “false positives” – that is, that the polygraph exam will indicate deception when the examinee is being truthful. J.R. Reid, the developer of the modern polygraph examination, noted that many factors can influence the validity of test results, including:

- Extreme emotional tension or nervousness
- Overanxiety
- Anger
- Concern over neglect of duty or responsibility that made possible the commission of the offense by someone else
- Involvement in other similar acts or offenses
- Physical discomfort during test
- Adrenal exhaustion.

Lacey M. Sloan, *Revictimization by Polygraph: The Practice of Polygraphing Survivors of Sexual Assault*, 14 J. Med. & Law 255, 259 (1995) (citing J.E. Reid and F.E. Inbau, *Truth and Deception: The Polygraph ('Lie Detector') Technique* (1977)).

Many of these factors are likely to be present when a sexual assault survivor takes a polygraph exam, due to the traumatizing nature of the crime. For example:

[T]he overwhelming emotion expressed by sexual assault survivors is fear. In addition to fear (that is, what Reid calls ‘extreme emotional tension and nervousness’), survivors may also experience anxiety (that is, what Reid calls ‘overanxiety’), anger, and self-blame (that is, what Reid calls ‘concern over neglect of duty or responsibility that made possible the commission of the offense by someone else’). It must also be noted that the survivor’s reaction may be increased at times when he or she is reminded of the assault, such as during questioning about the offense.

Id. As a result, “[i]t is highly unlikely that a polygraph exam can separate the reaction of a trauma survivor from that of a liar.” *Id.* at 263.

Congress recognized the inherent flaws in using polygraphing in the context of sexual violence when it reauthorized the Violence Against Women Act (VAWA) in 2005. Congress specifically added a provision to the law that prohibits state and local governments from receiving certain grants under VAWA unless they certify that their laws, policies, and practices will ensure that:

- (i) no law enforcement officer, prosecuting officer or other government official shall ask or require an adult, youth, or child victim of a sex offense as defined under Federal, tribal, State, territorial, or local law to submit to a polygraph examination or other truth telling device as a condition for proceeding with the investigation of, trial of, or sentencing for such an offense; and
- (ii) the refusal of a victim to submit to an examination described in

clause (i) shall not prevent the investigation of, trial of, or sentencing for the offense.

42 U.S.C. § 3796hh(c)(1)(E).

Even before this provision was added to VAWA in 2005, many states had recognized this concern and had adopted legislation to prevent sexual assault survivors from being compelled to take polygraph examinations. For instance, in 1996, New York State restricted the use of polygraph examinations on sexual assault survivors. In signing the legislation, the Governor noted that "[a]s empirical studies show . . . the emotional responses manifested by victims of sexual assault as they relive harrowing attacks during polygraph tests commonly result in false conclusions that they are lying." Raymond Hernandez, *Lie-Detector Tests Are Banned on Victims Alleging Rape*, New York Times, Mar. 6, 1996.³

Similarly, when the Washington Legislature unanimously passed a bill in 2007 to restrict compulsory polygraphs on sexual assault survivors, the testimony presented to the House Judiciary Committee noted "[t]here is data showing that when a person is emotional and upset, as a sexual assault victim would be, a polygraph exam is not accurate." Wash. Leg., House Bill Report on H.B. 1520 (2007).⁴

³ Available at <http://www.nytimes.com/1996/03/06/nyregion/lie-detector-tests-are-banned-on-victims-alleging-rape.html>.

⁴ Available at <http://apps.leg.wa.gov/documents/billdocs/2007-08/Pdf/Bill%20Reports/House/1520.HBR.pdf>.

The International Association of Chiefs of Police (IACP) also disapproves of using polygraph tests with sexual assault victims, based on factors that make exams unreliable:

Based on the misperception that a significant percentage of sexual assault reports are false, some law enforcement agencies use polygraphs . . . when interviewing victims. Victims often feel confused and ashamed, and experience a great deal of self-blame because of something they did or did not do in relation to the sexual assault. These feelings may compromise the reliability of the results of such interrogation techniques. . . . A competent, evidence-based investigation will reveal the truth much more effectively than these interrogation tactics.

IACP National Law Enforcement Policy Center, *Investigating Sexual Assaults*, at 13 (2005).⁵ The IACP indicates that “[l]aw enforcement agencies should establish policies to clearly state that officers should not require, offer, or suggest that a victim take a polygraph examination . . . during the investigative stage.” *Id.*

Given both the clarity of the evidence of increased likelihood of false positives, and the consensus surrounding those findings, it is clear that there can simply be no legitimate purpose for the court to order A.W. to undergo a polygraph examination regarding his disclosures that he was sexually assaulted.

⁵ Available at <http://www.theiacp.org/portals/0/pdfs/InvestigatingSexualAssaultsPaper0705.pdf>

2. Requiring Sexual Assault Survivors to Undergo Polygraph Examinations Discourages Crime Reporting

Sexual assault is one of the most seriously underreported crimes. Studies have indicated that between 65 to 84 percent of sexual assaults in the United States are not reported to the police. *See* National Research Council, *Estimating the Incidence of Rape and Sexual Assault*, at 3-3 (2013).⁶ One reason why sexual assault is such a highly underreported crime is because many survivors fear that they will not be believed. Centers for Diseases Control & Prevention, *Understanding Sexual Violence: Fact Sheet* (2012).⁷

Requiring sexual assault survivors to undergo a polygraph examination would result in even greater underreporting because it sends a clear message that survivors should not be trusted when they report crimes. As the U.S. Senate observed in its report on the Violence Against Women Act:

Any person would think twice before reporting and prosecuting a crime if the police responded by demanding a polygraph exam, the prosecutor suggested that the victim had not complained promptly enough ... and the judge announced to the jury at the end of the trial that the victim's testimony under oath should be viewed with suspicion.

S. Rep. No. 103-138, at 44-45 (1993). The Washington Legislature was

⁶ Available at http://www.nap.edu/catalog.php?record_id=18605.

⁷ Available at <http://www.cdc.gov/violenceprevention/pdf/svfactsheet2012-a.pdf>.

presented with similar testimony when it adopted legislation (later codified at RCW 10.58.038) restricting the use of polygraph examinations on sexual assault survivors. Wash. Leg., House Bill Report on H.B. 1520 (2007) (noting that “[m]aking a victim take a polygraph exam can deter victims from reporting the crime.”).

Washington has long expressed a clear public policy to encourage survivors of sexual assault to report crimes. *See, e.g., State v. Hudlow*, 99 Wn.2d 1, 16, 659 P.2d 514 (1983) (noting that Washington’s rape shield law “is designed to encourage rape victims to step forward and prosecute these crimes where conviction rates historically have been very low.”). Permitting a court to order polygraph examinations of persons who report sexual assaults would seriously undermine Washington’s public policy by discouraging reporting and prosecution of these crimes.

3. The Court’s Order Reflects and Perpetuates Myths About Sexual Assault

Despite major legal reforms, sexual assault survivors continue to face substantial barriers in obtaining justice due to persistent myths about sexual assault. “In no crime other than sexual assault is there such an extensive history of myths and disbelief surrounding the survivor of the crime.” Sloan, *supra*, at 255. Many of these myths blame the victim, trivialize the seriousness of sexual assault, or assume the victim’s

untruthfulness. *See, e.g.*, Martha R. Burt, *Rape Myths and Acquaintance Rape*, in *Acquaintance Rape: The Hidden Crime* 27 (2001).

Ordering a person who reports a sexual assault to take a polygraph examination perpetuates discredited myths that sexual assault is rare and that those who report sexual assaults are likely to lie. *See, e.g.*, 3 S. Greenleaf, *Evidence* § 212 (15th Ed. 1892) (citing Lord Hale’s view that rape is “an accusation easily made, hard to be proved, and still harder to be defended, by one ever so innocent.”); *see also* 3A J. Wigmore, *Evidence* § 924a, at 737 (Chadbourn rev. ed. 1970) (recommending mandatory psychiatric evaluation for all rape complainants to assess whether the victim “suffers from some mental or moral delusion or tendency . . . causing distortion of the imagination in sex cases.”). These archaic views put a “spotlight of suspicion on the victim” and meant that “courts, prosecutors, and law enforcement frequently required additional corroboration of victims’ testimony, such as a prompt complaint, physical injuries, and a polygraph exam.” Sen. Joseph R. Biden, Jr., *The Civil Rights Remedy of the Violence Against Women Act: A Defense*, 37 *Harv. J. on Legis.* 1, 34 (2000).

The Washington Legislature took a significant step toward preventing reliance on these myths when it adopted RCW 10.58.038 to restrict the use of polygraph examinations on victims of alleged sexual

assaults. The order entered by the lower court circumvents the restrictions of this law and seemingly falls directly in line with many of the myths this State's legislature has worked so hard to dispel. Permitting the ruling to stand would send a clear message to sexual assault survivors that courts may continue to treat persons who report sexual assaults as suspects, rather than as victims. Such an outcome cannot stand.

B. Requiring A.W. To Undergo A Polygraph Examination Raises Significant Constitutional Concerns

The Washington Supreme Court has recognized that polygraph examinations are “invasive, both physically and of one’s private affairs” and that “polygraph examinations implicate privacy concerns.” *In re Detention of Hawkins*, 169 Wn.2d 796, 803, 238 P.3d 1175 (2010). The Court indicated that “polygraph examinations are intrusive and implicate constitutional concerns.” *Id.* Those concerns are even more troubling when a polygraph examination is “truly compulsory.” *Id.*

The constitutional concerns arising from compulsory polygraph examinations are even more acute when ordered by a court to evaluate the veracity of a crime victim’s allegations. Such an order not only raises concerns about violation of general privacy rights, but also implicates concerns about violating the rights of crime victims under the Washington Constitution. *See* Wash. Const., art. I, § 35. The Washington Supreme

Court has made it clear that this provision of the state constitution “demands that the victims of crime receive ‘due dignity and respect.’” *State v. Devin*, 158 Wn.2d 157, 171, 142 P.3d 599 (2006). Requiring a crime victim to undergo a polygraph examination is entirely inconsistent with ensuring that the victim is treated with “due dignity and respect” by the legal system.

To be sure, the Washington Constitution does not specifically enumerate that crime victims have a right not to be compelled to take polygraph examinations. However, when the crime victim protections provided by the Washington Constitution are considered in tandem with the privacy protections provided by both the state and federal constitutions, the lower court’s orders are especially troubling from a constitutional standpoint.⁸

C. Many Crime Victims Would Be Impacted By Permitting Alleged Perpetrators To Compel Polygraph Examinations Of Victims

Mr. Finch suggests that Washington’s statute providing rights for crime victims (RCW 7.69.030) entitles him to seek an order directing A.W. to submit to a polygraph examination. If accepted, this argument

⁸ In addition, A.W.’s due process rights were plainly violated when the trial court in Mr. Finch’s criminal case ordered A.W. to undergo a polygraph examination without providing A.W. with notice and an opportunity to be heard on the matter.

would have severe consequences in a wide variety of cases and would significantly erode the rights of crime victims.

Mr. Finch argues that he is a crime victim because he alleges that A.W. has leveled false charges against him. (Resp. Br. at 14). As such, Mr. Finch suggests that the crime victim protections provided by RCW 7.69.030 entitle him to seek a polygraph of A.W. This argument is without merit.

Nothing in RCW 7.69.030 suggests that a crime victim is entitled to seek a polygraph examination of the alleged perpetrator. The statute cannot be read to provide such a right, particularly in light of the Washington Supreme Court's disapproval of permitting polygraphs that are not expressly allowed by statute. *See Hawkins*, 169 Wn.2d at 803 ("Because the legislature is undoubtedly aware of the inherent problems with polygraph examinations, it is fair to infer that the legislature intends to prohibit compulsory polygraph examinations unless it expressly allows for their use.").

Mr. Finch's argument would also open the door for the defendant in literally any criminal case to seek a polygraph examination of the victim. Under Mr. Finch's apparent reading of the statute, a defendant who maintains that he or she is a victim of "false reporting" should have a right under RCW 7.69.030 to seek a polygraph examination of the victim.

More narrowly, Mr. Finch suggests that he is entitled to seek an order requiring A.W. to undergo a polygraph examination because A.W. is subject to a SSODA that permits A.W.'s compliance with treatment to be monitored by polygraph, if available. As the State and A.W. have explained, this argument must fail for multiple reasons, including Mr. Finch's lack of standing to seek such an order. But this argument must also be rejected because it would impermissibly allow widespread use of polygraph examinations on a particularly vulnerable group of sexual assault survivors – namely, survivors who are serving sentences that include (or could include) polygraph monitoring as a condition of their sentences.

A very high percentage of women who are involved in the criminal justice system have experienced sexual assault during their lifetimes. *See* Nat'l Clearinghouse for the Defense of Battered Women, *Abuse History Among Incarcerated Women* (2011) (collecting studies). In addition, the National Juvenile Justice Network reports that approximately 20 to 55 percent of youth who commit sex offenses self-report sexual abuse. *National Juvenile Justice Network Fact Sheet: Youth Who Commit Sex Offenses*, at 3 (2007).⁹ Allowing a person who is subject to polygraph examinations as a condition of a criminal sentence to be forced to take a

⁹ Available at http://www.njjn.org/uploads/digital-library/resource_626.pdf.

polygraph exam when he or she reports a sexual assault would severely discourage reporting of sexual assault by victims who are incarcerated or in community custody.

The Washington's Department of Corrections (DOC) recognizes that polygraph examinations are inappropriate when an offender alleges that he or she has been sexually assaulted while incarcerated. DOC policy provides:

Offenders who are alleged victims, reporters, or witnesses in Prison Rape Elimination Act (PREA) investigations will not be asked or required to submit to a polygraph examination regarding the alleged misconduct under investigation.

Wash. State Dep't of Corrections, *Polygraph Testing of Offenders*, DOC 400.360. It would be incongruous for polygraphs to be unavailable when a person under state supervision reports that he or she was sexually assaulted during incarceration, while on the other hand permitting the use of such examinations if the same person reports a sexual assault that occurred outside prison.

D. This Matter Should Be Reassigned to a New Judge on Remand

Finally, *amici* agree with the State that this matter should be reassigned to a new judge on remand. The ruling can only suggest that Judge Sullivan believes that A.W. should be subject to a polygraph

examination and that the court would have significant difficulty overlooking its previously stated views.

In determining whether to reassign a case to a different judge, the first question for the Court to consider is whether the trial court has shown personal bias. *See Ellis v. U.S. Dist. Court*, 356 F.3d 1198, 1211 (9th Cir. 2004). If not, the Court must consider whether unusual circumstances support reassignment. *Id.* The Court may find unusual circumstances if it appears that the trial court would have substantial difficulty overlooking its previously stated views and findings or that reassignment would preserve the appearance of justice. *Id.* The court must also consider “whether reassignment would entail waste and duplication out of proportion to any gain in preserving the appearance of fairness.” *Id.* (quoting *United Nat’l Ins. Co. v. R&D Latex Corp.*, 242 F.3d 1102, 1118-19 (9th Cir. 2001)).

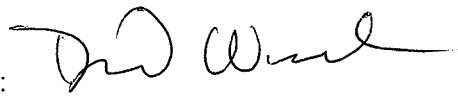
Here, the order clearly communicates a message of distrust, especially because a polygraph examination is almost never used with victims of any other type of crime. *See* Kristen House & Emily Dworkin, Nat’l Sexual Violence Resource Ctr., *The Use of Truth-Telling Devices in Sexual Assault Investigation*, 8 (2009). As explained earlier, the ruling also appears to rely upon myths about sexual assault and fails to treat A.W. with the due dignity and respect that must be accorded to crime

victims. Under these circumstances, reassignment is necessary to preserve the appearance of justice.

V. CONCLUSION

For the foregoing reasons, the lower court's order requiring A.W. to take a polygraph examination should be reversed, and this Court should direct that this matter be reassigned to a new judge on remand.

DATED: January 17, 2014

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