

STATE OF VERMONT

HUMAN SERVICES BOARD

In re) Fair Hearing No. A-06/18-410
)
Appeal of)
)

INTRODUCTION

Petitioner appeals his substantiation and placement on the Vermont Child Abuse Registry by the Vermont Department for Children and Families (Department or DCF). The Department moved for summary judgement based on the facts of the case and collateral estoppel and the petitioner filed a memorandum in opposition. The issue is whether the Department has shown by a preponderance of the evidence that the petitioner was properly substantiated for sexual abuse-exploitation. The following findings and analysis are based upon the written memoranda of the parties, with the record closing on August 30, 2018.

FINDINGS OF FACT

1. The facts underlying the substantiation relate to an incident that began on May 14, 2016 when petitioner took a video of two individuals having sexual intercourse without their consent. At the time he took the video, petitioner and

the individuals whom he filmed were all 16 years old or younger. As outlined below, petitioner also disseminated the video to others.

2. The incident was reported and subsequently investigated by the school (attended by petitioner and the individuals who were filmed), the Department and the police.

3. The investigations disclosed that on May 14, 2016 petitioner was living at a friend's home. Two other individuals, a male and a female, arrived at the home for a party and outdoor bonfire. At some point, the two individuals entered a room in the home and closed and blocked the door. Knowing the individuals were there, petitioner was able to open the door and enter the room. Petitioner observed the individuals and then took a Snapchat video of them having sexual intercourse. The video depicted the naked buttocks of one individual and the naked leg and breast of the other. Petitioner did not have consent from either individual to take the video. On the night that the video was taken, one of the individuals who was filmed had heard petitioner enter the room and followed petitioner out of the room, immediately objected to the video, and demanded that petitioner delete the video. Petitioner did ultimately delete the video but not before disseminating it to others.

Petitioner first forwarded the video to another friend's phone; that friend showed the video to other individuals. Petitioner also showed the video to several other individuals in the next few days after the video was made, including at the school that petitioner and the individuals who were filmed all attended. Neither of the individuals filmed gave consent for petitioner to observe them or for the video to be taken or disseminated.

4. As a result of the police investigation, a three-count delinquency petition was filed by the State's Attorney's Office in Vermont Superior Court Family Division alleging that petitioner had (1) disclosed sexually explicit images without consent, (2) possessed child pornography, and (3) engaged in voyeurism.

5. On September 21, 2016, the merits portion of the delinquency proceeding concluded with a stipulation. Petitioner was represented by counsel in all stages of the delinquency proceeding and a Guardian ad Litem was also involved in the case. The Stipulation provided that two counts of the original petition would be dismissed, and one count would be amended to a charge of 'Disorderly Conduct.' Petitioner admitted to an act of delinquency based on the offense of 'Disorderly Conduct' by intentionally causing a

public annoyance by engaging in tumultuous behavior, based on the following facts:

[Petitioner] intentionally videoed [names of two individuals] engaging in sexual intercourse without their consent and then distributed the video without their consent.

6. Based on the merits stipulation the Court issued the final Order in the case finding that petitioner had committed a delinquent act.

7. The Department substantiated petitioner for sexual abuse-exploitation based on his filming the video of two minors and his dissemination of the video, both without the consent of the individuals filmed.

8. Petitioner requested a Commissioner's review of the substantiation, which was heard on May 2, 2018. By letter dated May 24, 2018, the petitioner was notified that the substantiation was upheld based on the following findings:

On May 14, 2016, you videotaped two minors, [names of minors], engaging in sexual intercourse and then posted the videotape on Snapchat. You did not have permission from either [names of individuals] to videotape them or to post the videotape. The videotape depicted the naked buttocks of [name of one individual] and the naked breast and leg of [second individual]. Though you subsequently deleted the videotape after you posted it, other individuals disseminated your original post.

9. In his response to the Department's motion for summary judgment, petitioner argues that (1) his response

should be filed 'under seal' because it addresses delinquency matters that should not be open to public inspection, (2) collateral estoppel is inappropriate because his admission to the criminal offense of disorderly conduct is a different issue than a substantiation for sexual abuse, and (3) that the application of collateral estoppel would be fundamentally unfair because petitioner was unaware that his admission to a charge of disorderly conduct in the delinquency proceeding could result in collateral estoppel being applied in this case.

ORDER

The Department's motion for summary judgment is granted based on the undisputed facts of the case.

REASONS

The Department is required by statute to investigate reports of child abuse and to maintain a registry of all investigations unless the reported facts are unsubstantiated. 33 V.S.A. §§ 4914, 4915 and 4916. Appeals from a substantiation determination are heard de novo and the Department bears the burden of establishing the substantiation by a preponderance of the evidence. *See In re R.H.* 189 Vt. 15, 14 A.3d 267, 2010 VT 95, at ¶16; *In re*

Selivonik, 164 Vt. 383, 670 A.2d 831 (1995); Fair Hearing No. B-01/12-69.

Request that petitioner's filing be sealed

As a preliminary matter, petitioner asks that his response to the Department's motion for summary judgment be filed under seal, arguing that the family court records regarding the delinquency case "are confidential pursuant to 33 V.S.A. §5117(a) and should not be inspected or disseminated to the Human Services Board for review or consideration." See Petitioner's Response to the Department's Motion for Summary Judgment (Under Seal), p 2.

Petitioner correctly notes that the files of juvenile proceedings are, except for listed statutory exceptions, deemed confidential.

Records of juvenile judicial proceedings

(a) Except as otherwise provided, court and law enforcement reports and files concerning a person subject to the jurisdiction of the Court shall be maintained separate from the records and files of other persons. . . such records and files shall not be open to public inspection nor their contents disclosed to the public by any person. . .

33 V.S.A. §5117.

However, there is an additional statutory exception that authorizes the introduction of juvenile adjudications in

Human Services Board proceedings when a petitioner has filed an appeal of his substantiation to the Board.

Human Services Board hearing

* * * *

(4) Convictions **and adjudications** which arose out of the same incident of abuse or neglect for which the person was substantiated, whether by verdict, by judgment, or by a plea of any type, including a plea resulting in a deferred sentence, shall be competent evidence in a hearing held under this subchapter.

33 V.S.A. §4916b(4).

Therefore, while the records relating to the Family Court juvenile case remain confidential, the factual findings or stipulation supporting an adjudication and the fact of the adjudication are admissible evidence before the Board and that information is available to the Board for its review in reaching a decision in the case.

Petitioner's request that his counsel's responsive filing be "filed under seal" is, presumably, a request for confirmation that the general confidentiality of juvenile records is otherwise intact. The request is unnecessary given the confidential and closed nature of Board proceedings in substantiation cases. See Fair Hearing Rules 1000.3 M [Closed sessions].

Motion for Summary Judgement

Turning to the substantive argument in this case, the language of Vermont's Reporting Abuse of Children statute provides the following definitions of sexual abuse-exploitation

(2) An "abused or neglected child" means a child whose physical health, psychological growth and development or welfare is harmed or is at substantial risk of harm by the acts or omissions of his or her parent or other person responsible for the child's welfare. **An "abused or neglected child" also means a child who is sexually abused** or at substantial risk of sexual abuse by any person.

(3) "Child" means an individual under the age of majority.

* * * *

(15) "Sexual abuse" consists of any act or acts by any person involving sexual molestation or **exploitation of a child**, including:

* * * *

(G) **viewing, possessing, or transmitting child pornography, with the exclusion of the exchange of images between mutually consenting minors, including the minor whose image is exchanged;**

(J) **voyeurism;**

33 V.S.A. § 4912 (emphasis added).

The Department has also adopted policies governing abuse and neglect allegations. The policies provide the following guidance on the criteria for substantiation

Child Pornography: A person possesses any visual representation of a child or portion of a child's body which depicts nudity, sexual conduct or sado-masochistic abuse and which is harmful to children or violates community standards of morality and decency. The definition of child pornography includes:

- aiding, abetting, counseling, hiring, or procuring of a child to perform or participate in any photograph, motion picture, exhibition, show representation, or other presentation which, in whole or in part, depicts sexual conduct, sexual excitement, or sadomasochistic abuse involving a child; OR

- viewing, possessing, or transmitting child pornography, with the exclusion of the exchange of images between mutually consenting minors, including the minor whose image is exchanged.

All criteria listed above is substantiated as 'Exploit'.

Exploitation: A person has taken unjust advantage of a child for their own gain or gratification. Exploitation is substantiated as 'Exploit.'

Voyeurism: A person has viewed, photographed, filmed, or recorded in any format the intimate areas of a child naked or undergarment-clad, including genitals, pubic area, buttocks, or female breast of a child that is unrelated to a legitimate professional or caretaker purpose and the conduct violates community standards of morality and decency. Voyeurism should be substantiated as 'Exploit'.

DCF Policy 56 (Substantiating Child Abuse and Neglect), pp. 6, 9 (emphasis added).

The issue in dispute is whether the evidence presented by the parties, including the facts as outlined in the

delinquency adjudication, establishes the substantiation without the need for further hearing¹.

Here, summary judgement is appropriate based on the undisputed facts of the case including petitioner's admissions in the juvenile case. See Fair Hearing No. V-02/10-92 (Board may take notice of the admissions petitioner made during Vermont District Court case.) See also Fair Hearing No. S-03/13-241 (summary judgment appropriate in sexual abuse substantiation based on petitioner's admissions in 'prohibited acts' case).

In this case, the stipulation entered into by petitioner in the delinquency case included admissions that (1) petitioner was a delinquent child by (2) committing a delinquent act, based on the stipulated facts that petitioner videoed two minors having sexual intercourse and distributed

¹The Department has argued that the principle of collateral estoppel, also known as issue preclusion, should be applied in this case. Collateral estoppel may be appropriate based on the five-part test established in *Trepanier v. Getting Organized*, 155 Vt. 259, 265 (1990). See also *In re P.J.*, 2009 VT 5, ¶ 8. Here, the question is whether a plea and conviction for 'Disorderly Conduct' serves as a bar to challenging the substantiation for "sexual abuse/exploitation." While the factual basis for the 'Disorderly Conduct' conviction mirrored the facts underlying the substantiation, the question remains whether the court in the criminal proceeding applied the same legal standard as the Department followed in upholding the substantiation for sexual abuse-exploitation. See *In re Harwood*, 2013 CR 89, ¶14 ("Issues are separate for collateral estoppel purposes 'if the second action involves application of a different legal standard, even though the factual setting of both suits be the same.'") (internal citations omitted). This remains an open legal question that is not necessary for the resolution of this case.

the video, all without the minors' consent. The terms 'delinquent child' and 'delinquent act' are defined as

'Delinquent child' means a child who has been adjudicated to have committed a delinquent act.

'Delinquent act' means an act designated a crime under the laws of this State, or of another state if the act occurred in another state, or under federal law. . .

33 V.S.A. §5102 (9) and (10).

The legal standard in this appeal is whether it is proven by a preponderance of the evidence that petitioner engaged in sexual abuse-exploitation by taking a video of two minors engaging in sexual intercourse and disseminating the video, all without the minors' consent. The stipulated facts in the juvenile adjudication were specifically listed as the type of factual scenario which should be considered sexual abuse-exploitation under Department policy. See DCF Policy 56, at pp 6 ("viewing, possessing, or transmitting child pornography, with the exclusion of the exchange of images between mutually consenting minors, including the minor whose image is exchanged" and "voyeurism"). The victims named in the delinquency stipulation are the same as those named in the substantiation and the acts that the adjudication was based on are also the same as the definition of sexual-abuse exploitation. Considering the undisputed facts, it must be

concluded as a matter of summary judgment that the Department has established that the substantiation was properly founded under its rules.

As a final matter, in his response to the Department's Motion, petitioner argues that it is unfair to apply summary judgment here because when he entered an admission in the delinquency case, he did not know that the Department intended to place his name on the Child Abuse Registry. However, petitioner did in fact know that the Department was involved in the investigation of the underlying events. And, the issue is not whether petitioner knew he would be placed on the Registry, but whether the Department has established that summary judgment is appropriate based on the facts of the case. See Fair Hearing No. S-09/12-572 at 5 (petitioner's claim that he was unaware that his guilty plea to criminal case could lead to issue preclusion in appeal of substantiation rejected). Considering the statute authorizing the use of an adjudication as evidence in an appeal to the Board, Petitioner has not established why it would be unfair to apply his admissions to this proceeding. 3 V.S.A. §4916b (4).

For these reasons, the Department's substantiation of petitioner for sexual abuse-exploitation is consistent with

its rules and must be affirmed by the Board. See 3 V.S.A. §
3091(d), Fair Hearing Rule No. 1000.4.D.

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