

STATE OF VERMONT

HUMAN SERVICES BOARD

In re ) Fair Hearing No. A-12/10-644  
 )  
Appeal of )

INTRODUCTION

The petitioner appeals a decision by the Department for Children and Families, Family Services Department, to substantiate petitioner for sexual abuse and to place petitioner upon the child protection registry. The petitioner is a minor and the alleged incident involves inappropriate sexual touching of a fellow student, A.R., on March 18, 2010.

The petitioner filed for fair hearing on December 17, 2010. A telephone status conference was held on January 3, 2011. The Department informed the Board that the Family Court Division adjudicated petitioner delinquent based on the acts forming their substantiation and that the Department intended to file a Motion for Summary Judgment based upon collateral estoppel. A briefing schedule was set. The schedule was extended upon the Department's Motion.

The following recommendation is based upon the written argument of the parties.

DISCUSSION

Factual Basis

The petitioner is a high school student. The underlying substantiation is based upon petitioner's actions towards A.R., a classmate on March 18, 2010 in the high school building while students were changing classes. Petitioner was fourteen-years-old at the time of the incident.

The petitioner, A.R., and A.C. were in the same science class. A.R. stopped for a drink of water prior to class. The petitioner and A.C. crowded A.R. into a corner. Both petitioner and A.C. inappropriately touched A.R., but this case only concerns petitioner. Petitioner touched A.R.'s breasts and put his hand under her skirt touching her vaginal area outside of her underwear. A.R. told the petitioner and A.C. to stop, but they did not stop until it was time for class. A.R. came to class crying. Her teacher noticed that A.R. was crying and took her outside the class and escorted her to the vice-principal's office. A.R. continued to be visibly upset and crying when brought to the vice-principal's office.

Petitioner admitted to the vice-principal that he touched A.R.'s breast. Petitioner admitted to Detective C that he touched A.R.'s breast and pinched her thigh.

Petitioner characterized his touching of A.R.'s breast as "flipping".

A delinquency petition was filed in the Family Division of Franklin Superior Court. Petitioner was represented by legal counsel. A merits hearing was held on September 29, 2010. Judge M.K. entered his decision on October 19, 2010 finding that the State had proved beyond a reasonable doubt that petitioner engaged in lewd and lascivious conduct towards A.R.

Judge M.K. reduced the charge to a prohibited act based on lewdness<sup>1</sup> on January 18, 2011. But, the Court did not amend any of the factual findings found in the October 19, 2010 decision.

Judge M.K.'s findings of fact are instructive. He specifically found A.R., the victim, to be credible and that she accurately recalled the incident. In contrast, Judge M.K. found that the petitioner did not testify truthfully at the hearing.

Judge M.K. made the following findings:

In this case, the state has proven the elements beyond a reasonable doubt. [Petitioner] was clearly engaged in intentional acts when he was touching [A.R.]. [Petitioner] knew what he was doing and acting on

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<sup>1</sup> 13 V.S.A. § 2632(a)(8).

purpose. The actions were open in that [petitioner's] actions were witnessed by [A.R.]. The act of touching her breasts and placing his hands under the skirt of [A.R.] and touching her vaginal area through her underwear, beneath her skirt, is patently offensive and is known to be patently offensive by any law abiding person in [petitioner's] situation. By touching her breasts and by placing his hands under [A.R.'s] skirt and touching her vaginal area, [petitioner] acted in with gross and wanton indecency. Further, the actions clearly intended to excite lust.

Legal Discussion

Once the Department received a report of risk of sexual abuse to A.R., they were required by statute to investigate the report. 33 V.S.A. §§ 4914 and 4915.

The pertinent sections of 33 V.S.A. § 4912 define abuse and harm as follows:

(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.

. . .

(8) "Sexual abuse" consists of any act or acts by any person involving sexual molestation or exploitation of a child **included but not limited to** incest, prostitution, rape, sodomy, or any lewd and lascivious conduct involving a child. (emphasis added).

The Department is basing their Motion for Summary Judgment on collateral estoppel. The Board has long

recognized the doctrine of collateral estoppel and has relied on the test articulated in Trepanier v. Styles, 155 Vt. 259, 265 (1990), to determine whether the Board is precluded by the findings in a prior court proceeding from making its own findings in a case. Fair Hearing Numbers 11,444; 13,432; 20,476 and Y-01/08-05. The Trepanier ruling set out the following criteria at page 265:

- (1) preclusion is asserted against one who was a party or in privity with a party in the earlier action;
- (2) the issue was resolved by a final judgment on the merits.
- (3) the issue is the same as the one raised in the later action.
- (4) there was a full and fair opportunity to litigate the issue in the earlier action; and
- (5) applying preclusion in the action is fair.

See also Alpine Haven Property Owners Assn., Inc. v. Deptula, 175 Vt. 559 (E.O. 2003). Collateral estoppel can be applied to issues of fact and/or law. Mellin v. Flood Brook Union Sch. Dist., 173 Vt. 202, 209 (2001).

First, the petitioner was a party to the delinquency action brought in the Family Division of Superior Court, and preclusion can be properly asserted against the petitioner.

Second, the issue was resolved by a final judgment in the Family Division of Superior Court when the Court found petitioner engaged in a lewd act.

Third, the issue is essentially the same before the Board as before the Family Division. The petitioner argues that prohibited acts are not included in the definition of sexual abuse found at 33 V.S.A. § 4912(8). The list of acts found in 33 V.S.A. § 4912(8) is illustrative as can be seen from the words "included but not limited to".

The issue is whether petitioner sexually molested A.R. and should be placed on the child protection registry. The facts underlying the conviction of a prohibited act of lewdness meet this definition.

Collateral estoppel applies to facts. The Family Division decision established beyond a reasonable doubt that petitioner touched A.R.'s breast and put his hand under her skirt and touched her vaginal area over her underwear in a manner that was offensive and knowing. Such conduct constitutes sexual molestation.

Fourth, there was a full and fair opportunity to litigate the issue before the Family Division. Petitioner was represented by counsel. Petitioner had the opportunity

to confront the witnesses against him and to provide testimony on his own behalf.

Petitioner argues that he was precluded from presenting testimony regarding "scooping", a form of consensual sexual touching that petitioner and fellow students allegedly engaged in over several months. The Family Division judge properly excluded such evidence. The issue before the Family Division as before the Board stems from petitioner's acts towards A.R. on March 18, 2010.

Fifth, the application of collateral estoppel is fair. One of the purposes of collateral estoppel is to prevent relitigation of issues. Doing so preserves judicial or administrative hearing resources and brings finality to the parties.

The Family Division applies "beyond a reasonable doubt" as the standard of proof the State must meet in delinquency cases. In contrast, the Board applies a "preponderance of evidence" standard in substantiation cases.

Here, the Family Division applied a far stricter standard of proof as the judge weighed the credibility of the witnesses and the evidence before him. The petitioner had a fair opportunity to litigate the underlying facts and issues in the Family Division.

The petitioner adds an additional argument. The petitioner was evaluated by a psychologist who found that he did not need treatment. In essence, the petitioner argues that he is not a threat and no purpose is served by placing his name on the child protection registry.

The Vermont Supreme Court provided guidance to the Board in substantiation cases by directing the Board to determine whether substantiation is warranted based upon whether the evidence of the particular incident(s) support the Department's decision to substantiate, not on whether there is an assessment that a person does not pose a risk or has taken actions to ameliorate any ongoing threat to children. In re R.H., 2010 VT 95 (2010) and In re D. McD., 2010 VT 108 (E.O. 2010).

Based on the foregoing, summary judgment based on collateral estoppel is appropriate.

ORDER

The Department's Motion for Summary Judgment based on collateral estoppel is granted, and the Department's decision to substantiate petitioner for sexual abuse is affirmed.

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