

STATE OF VERMONT

HUMAN SERVICES BOARD

In re) Fair Hearing No. 15,055
)
Appeal of)

INTRODUCTION

The petitioner requests expungement of a finding by the Department of Social and Rehabilitation Services (SRS) that her son, J.F., who was twelve years old when the incident that is the subject of these proceedings took place, sexually abused three younger children for whom he was babysitting.

FINDINGS OF FACT

1. In early March, 1995, J.F., who was twelve years old at the time, was babysitting for three younger boys who lived in his neighborhood. At the time, these boys were ages 7, 6, and 4 respectively.
2. J.F. had babysat for these three boys in the past. Beginning in November of 1994, he had babysat for them on an average of twice a month.
3. The children enjoyed having J.F. as a babysitter and the boys' parents were aware of no problems prior to the incident in question in this matter.
4. During a school vacation the first week of March, 1995, the boys' parents were working during part of the day, and J.F. would usually arrive at their residence to babysit at approximately 10:30 A.M. On the suspected day in question, March 4, a Saturday, the

parents left for work about 30 minutes after J.F. arrived.

5. On that day the parents recall that J.F. called them a number of times while at work to inquire as to when they would be home. The parents testified that it was unusual for J.F. to call them and ask such a question.

6. The boys' mother testified that on March 6, 1995, she was watching television with the six-year-old boy (the middle child) when he asked her if she knew what a "condo" was. After the mother gave what she thought was the appropriate reply, the boy told her it was something a man "puts on his dick when he has sex". The mother had never heard her son use the term "dick", nor had she ever heard him talk about condoms.

7. The mother states that the boy then told her that J.F. had told him about this, and that J.F. had "had sex" with his older and younger brothers. The mother testified that the boy also told her that J.F. had threatened to kill them if they told anyone.

8. The mother stated that the boy told her that J.F. had tried to put his "wiener" into his older brother's "butt", but that he had stopped when the older brother told him it hurt. He told her that J.F. then put his penis in the older brother's mouth.

9. The mother testified that at this point in the conversation, the youngest child came into the room and the middle child immediately stopped talking. The mother then called her husband at work and asked him to come home immediately.

10. The father testified that when he came home his wife told him what the middle child had told her. The parents then called the children's pediatrician, who advised them to talk with the oldest boy to see if he confirmed what the middle boy had told them.

11. When parents questioned the oldest boy about what the mother had heard he

denied it. The middle boy was present and called the oldest boy a liar. The oldest boy then started crying and ran to his room.

12. The parents again called the pediatrician who advised them to call SRS. The parents then called SRS and reported what the middle boy had told them.

13. On March 9, 1995, a town police officer and an SRS investigator went to the boys' home to interview the children. They first spoke with the parents about the allegations, and then the police officer interviewed the boys. The interviews were not recorded but the officer made handwritten notes after each interview.

14. The police officer had experience interviewing witnesses during investigations of suspected crimes, but he had no training specific to the interviewing of suspected victims of child sexual abuse.

15. The police officer first interviewed the oldest boy (then age 7) in an upstairs bedroom. The boy was upset and adamantly denied anything had happened, but when the officer persisted, the boy tearfully admitted that his brother had told the truth. The boy told the officer that J.F. had tried to put his penis in his and the middle boy's "butts", had sucked his (the oldest boy's) penis, and had threatened all the boys if they told anyone. The boy also told the officer that this had happened in their bedroom and that J.F. had taken down both their pants.

16. The police officer then spoke with the middle boy (age 6). The boy was fearful and upset, but told the officer that J.F. had told the boys he was going to "have sex" with them, told them about condoms, and told them not to tell anyone. The boy then told the officer that he saw J.F. try to put his penis in his older brother's butt and that J.F. had put his

mouth on his older brother's penis.

17. The police officer next interviewed the youngest boy (age 4) who volunteered, with less trepidation than the others, that he had seen J.F. put his "wiener" in his oldest brother's "butt" and touch his oldest brother's penis; and that J.F. "put his dick in my mouth".

18. The police officer and the SRS investigator then interviewed J.F. at his home on March 16, 1995. At the outset of the interview J.F.'s mother told them nothing had happened. J.F. appeared angry at both his mother and the investigators and at first ran from the room as soon as they began questioning him. However, he returned to the interview and denied the boys' allegations.

19. Several months later, the three boys were deposed by J.F.'s attorney in connection with a delinquency matter that was filed regarding J.F. as a result of the incident. These depositions have been admitted into evidence in this case by agreement of the parties.

20. At his deposition on December 6, 1995, the oldest boy (then 8) stated that on the last day that J.F. had babysat him and his brothers he and J.F. had taken their clothes off and that J.F. touched him on his "privates" and "sucked on my penis".

21. At his deposition on December 6, 1995, the youngest boy (then 5) stated that the last time J.F. came to their house: "He had sex and he felt (oldest brother's) wiener, put his mouth in it". He also said that J.F. had touched him "where my wiener is", and had also touched his other brother's "wiener".

22. At his deposition on January 26, 1996, the middle boy (then almost 7) stated that on the last day that J.F. babysat for them, J.F. "had sex with us". He stated that J.F. and his brothers were touching each other and that his older brother and J.F. had taken their clothes

off.

23. J.F. has consistently denied any sexual touching of the boys. At the hearing (he is now 15) he testified that previous to the day in question he had found the two younger boys touching each other sexually on the upstairs waterbed and that he had told them to put their clothes on and go downstairs. He stated that he usually left notes to the parents describing any problem behavior by the boys when he babysat for them, but that he never told the parents about finding the younger two boys on the waterbed.

24. J.F. also testified that there was a pornographic video next to the television in the boys' house. The parents testified that they had some sexually explicit materials in the house but that they were always kept on a high shelf in their bedroom closet. The parents' testimony in this regard was credible.

24. The hearing officer finds that each boy's versions of the events of that day as reported by their parents and the investigating officer immediately after the events in question and then recorded in their own depositions several months later were credible in that they were consistent over time and with each other in most of the essential details, especially as regarding J.F. and the oldest boy undressing and J.F. touching and putting his mouth on the oldest boy's penis. J.F.'s flat out denial that anything at all happened in which he was involved was not convincing.

25. The hearing officer is also not persuaded that this was merely a matter of "four juveniles engaging in sexual experimentation". First, J.F., though only 12 himself, was in a position of trust and authority over the younger boys. There is no indication in the record or in his demeanor that J.F. would not have been aware that this type of conduct was highly

inappropriate. Also, the boys' allegations that J.F. had threatened them if they told anyone, which the hearing officer finds credible, takes the behavior out of the realm of a child's sexual experimentation.

ORDER

The petitioner's application for expungement is denied.

REASONS

The Department of Social and Rehabilitation Services 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.

The statute further provides:

A person may, at any time, apply to the human services board for an order expunging from the registry a record concerning him or her on the grounds that it is not substantiated or not otherwise expunged in accordance with this section. The board shall hold a fair hearing under section 3091 of Title 3 on the application at which hearing the burden shall be on the Commissioner to establish that the record shall not be expunged.

33 V.S.A. § 4916(h)

In order to sustain its burden of proof in these matters, SRS is required to show that the registry report is based upon accurate and reliable information that would lead a reasonable person to believe that a child is abused . . ." See 33 V.S.A. § 4912(10).

In affirming a prior decision by the Human Services Board in another case involving a perpetrator who was a minor, the Vermont Supreme Court held that child victim's statements to parents and investigators are, by themselves, a sufficient evidentiary basis for upholding a finding of child sexual abuse. In Re Selivonik, 164 Vt. 383, 390 (1995). As noted above, in this case, unlike in Selivonik, similar hearsay statements were supplemented by and essentially consistent with the deposition testimony of the children themselves, which was admitted without objection.

"Sexual abuse" is defined by 33 V.S.A. § 4912 as follows:

"Sexual abuse" consists of any act by any person involving sexual molestation or exploitation of a child including but not limited to incest, prostitution, rape,

sodomy, or any lewd and lascivious conduct involving a child. Sexual abuse also includes the 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 a sexual conduct, sexual excitement or sadomasochistic abuse involving a child.

In its "Casework Manual", provided to all its social workers and investigators, SRS has attempted to define further the requirements of the above statutes. Pertinent sections (see Manual No. 1215) include the following:

- C. Sexual abuse - The statutory definition is quite explicit and all-encompassing, but provides little clarity around abuse by children and by adolescents on children. The Department differentiates sexual abuse by adolescents and children from other types of sexual exploration according to the following criteria:
1. The perpetrator used force, coercion, or threat to victimize the child, or
 2. The perpetrator used his/her age and/or developmental differential and/or size to victimize the child.

As noted above, the evidence in this case establishes that J.F., while he was babysitting the boys in question in March, 1995, exposed himself and engaged in oral and attempted anal sex with at least one of the boys in the presence of all three boys. It is also found that he threatened the boys if they told anyone. Although J.F. was, himself, only twelve years old at the time, it cannot be concluded that his behavior constituted "exploration" within the meaning of the above provisions.

Inasmuch as it is concluded that J.F. sexually abused the three boys in question within the meaning of the above statute, the petitioner's application to expunge the report of child sexual abuse made against her son, J.F., is denied.

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