STATE OF MINNESOTA
IN COURT OF APPEALS
A20-0485

State of Minnesota,
Appellant,

vs.

Adam Charles McCoy,
Respondent.

Filed September 8, 2020
Reversed and remanded
Smith, Tracy M., Judge

Cass County District Court
File No. 11-CR-19-1424

Keith Ellison, Attorney General, St. Paul, Minnesota; and

Benjamin T. Lindstrom, Cass County Attorney, Walker, Minnesota (for appellant)

Zachary H. Johnson, Thomason, Swanson & Zahn PLLC, Park Rapids, Minnesota (for respondent)

Considered and decided by Worke, Presiding Judge; Connolly, Judge; and Smith, Tracy M., Judge.

U N P U B L I S H E D O P I N I O N

SMITH, TRACY M., Judge

In this pretrial appeal, appellant the State of Minnesota argues that the district court erred by suppressing statements that respondent Adam Charles McCoy made to his probation officer and polygraph examiner and by dismissing the complaint charging

McCoy with criminal sexual conduct based on those statements. Because we conclude that the statements were not made in violation of McCoy's privilege against self-incrimination, we reverse the district court's orders suppressing the evidence and dismissing the case and remand for further proceedings.

FACTS

In 2019, the state charged McCoy with two counts of first-degree criminal sexual conduct and two counts of second-degree criminal sexual conduct after McCoy disclosed to two different mandatory reporters that, 14 years earlier, he had sexually assaulted a two-year-old child. McCoy moved to suppress his statements.

Following an evidentiary hearing, the district court found the following facts in its omnibus order. At the time that he disclosed the sexual assault at issue in this case, McCoy was on probation in connection with another sexual-assault offense. In that separate case, McCoy had pleaded guilty to third-degree criminal sexual conduct, and the district court had granted a stay of adjudication and placed him on probation. One of the terms and conditions of probation was that McCoy complete sex-offender treatment, which included taking a polygraph examination. As found by the district court, "[f]ailing to partake in sex offender treatment, including the polygraph, could have resulted in a probation violation and possible incarceration."

At the contested omnibus hearing, McCoy's assigned probation officer testified that the district court had ordered McCoy to complete an outpatient sex treatment program, which he started in February 2018. The district court had also required that McCoy complete a psychosexual evaluation and polygraph examination. This was a full-disclosure

polygraph, which typically takes place six months into treatment. The probation officer told McCoy that "he would need to be honest in order to pass the polygraph, and that he would be expected to complete a full disclosure polygraph at some point." According to the probation officer, "a full disclosure polygraph [is] a person talking about their sexual history, so any uncharged victims they've had, any sexual partners, anything regarding sexually deviant behavior." This disclosure is required to successfully complete sex-offender treatment. The record does not show whether the probation officer explained to McCoy whether the identity of the sexual victims needed to be disclosed.

The probation officer testified that, as preparation for the polygraph examination, McCoy had to fill out a sexual-history packet. During a visit with the probation officer, McCoy told her that he was working on the packet and needed to speak with her regarding some disclosures. According to the probation officer, McCoy told her about "a number of other uncharged victims" and "several other sexually deviant or other behaviors in his past that he would need to talk about in his full disclosure polygraph." One of the disclosures that McCoy discussed involved his stepdaughter, who was two years old at the time of the incident. During their next office visit, the probation officer asked McCoy for the first name of the victim, which McCoy provided.

In testifying about the office visit in which McCoy first disclosed other uncharged victims, the probation officer stated, "I believe we discussed . . . during that office visit that I was a mandated reporter, however I don't specifically remember when we would have had those discussions in the past." She also testified that if McCoy "were terminated from treatment as a result of a failure to take a polygraph he could face a violation of his

probation." Finally, she testified that it is normal procedure to discuss the aspects of full disclosure with a probation agent and that probations agents are present at almost all of the treatment sessions.

At the evidentiary hearing, the polygraph examiner also testified about the full-disclosure polygraph examination that he conducted on McCoy. The district court admitted the video recording of the examination as well as the examiner's transcription of the relevant portions of the recording.

The transcript shows that the examiner began the examination by stating:

> Today during the discussion you don't need to use the name of anyone that would identify a victim of a crime, for instance if there is anyone like that we can just use ages and say how old you were and how old they were and what happened, so there is no need to worry about any additional charges or anything like that. Now if a person gets carried away in a description of something and they identify a victim then that's a problem and that goes to the authorities and you could get charged. So, you need to be careful that you don't use names of juveniles are (sic) anything like that if there is anything involving a minor.

McCoy confessed about the incident with the two year old to the examiner, and the examiner mentioned the victim's name after reviewing the victim form McCoy filled out prior to the examination. McCoy passed the examination.

A month later, the state filed charges against McCoy. McCoy moved to suppress the statements as a coerced confession under Minn. Stat. § 634.03 (2018). His motion did not explicitly mention his privilege against self-incrimination. The district court granted McCoy's motion and suppressed his statements to his probation officer and the examiner under Minn. Stat. § 634.03 because, it concluded, the statements were obtained in violation

of his right against self-incrimination. McCoy subsequently filed a motion to dismiss the charge, and the state filed a motion for reconsideration. The district court denied the state's motion for reconsideration and granted McCoy's motion to dismiss.

The state appeals.

D E C I S I O N

As an initial matter, we note that the state suggests that the question of self-incrimination is not at issue because McCoy sought suppression not on constitutional grounds but on the basis of Minn. Stat. § 634.03's prohibition against the admission of confessions made under threat. But, because the district court concluded that violation of the constitutional right against self-incrimination constituted a violation of the statute, we address the constitutional question.[1]

Both the Fifth Amendment to the United States Constitution and article I, section 7 of the Minnesota Constitution protect a defendant from being "compelled in any criminal case to be a witness against himself." "[T]he constitutional foundation underlying the privilege is the respect a government—state or federal—must accord to the dignity and integrity of its citizens." *Miranda v. Arizona*, 384 U.S. 436, 460, 86 S. Ct. 1602, 1620 (1966). The privilege against self-incrimination is "fulfilled only when the person is guaranteed the right to remain silent unless he chooses to speak in the unfettered exercise of his own will." *Id.* (quotation omitted). The privilege "bars the state from (1) compelling

[1] McCoy does not dispute that the district court's ruling had critical impact on the case. *See State v. Rosenbush*, 931 N.W.2d 91, 94 n.2 (Minn. 2019) (citing *State v. Stavish*, 868 N.W.2d 670, 674 (Minn. 2015)) (observing that, to appeal a district court's pretrial order, the state bears the burden of showing that the order had a critical impact on its case).

the defendant (2) to make a testimonial communication to the state (3) that is incriminating." *State v. Diamond*, 905 N.W.2d 870, 873 (Minn. 2018).

The district court concluded that McCoy's incriminating disclosures were unconstitutionally compelled, reasoning that, if McCoy had "refused to take part in the sex offender treatment, he would have been subject to a probation violation which could have resulted in his loss of the stay of adjudication, placing a criminal sexual conduct conviction on his record, and possibly could have subjected him to incarceration." When appellate courts review a district court's pretrial order on a motion to suppress evidence, we "review the district court's factual findings under a clearly erroneous standard and the district court's legal determinations de novo." *State v. Gauster*, 752 N.W.2d 496, 502 (Minn. 2008) (quotation omitted).

The state argues that the district court's determination conflicts with federal and state precedent. In *Minnesota v. Murphy*, the defendant Murphy made incriminating statements to his probation officer while participating in court-mandated sex-offender treatment. 465 U.S. 420, 422, 104 S. Ct. 1136, 1140 (1984). Murphy's terms of probation included, in addition to treatment, that he "report to his probation officer as directed, and be truthful with the probation officer 'in all matters.'" *Id.* at 422, 104 S. Ct. at 1139. Failure to comply could have resulted in a probation revocation. *Id.* While he was in treatment, Murphy disclosed to his counselor that he had been involved with a rape and murder, and that information was then conveyed to his probation officer, who raised the disclosure with Murphy. *Id.* at 423, 104 S. Ct. at 1140. Murphy confessed that he had committed the crimes, and the probation officer told him that she would be relaying the information to the

authorities. *Id*. at 424, 104 S. Ct. at 1140. Murphy was indicted for first-degree murder and moved to suppress his confession. *Id.* at 425, 104 S. Ct. at 1141. The district court denied the motion. *Id.* Following Murphy's conviction, the Minnesota Supreme Court reversed, concluding that, because of the conditions of his probation, Murphy's statements to his probation officer were compelled in violation of his Fifth Amendment privilege against self-incrimination. *Id.*

The United States Supreme Court reversed the Minnesota Supreme Court. *Id.* It concluded that Murphy's statements were not compelled statements in violation of his privilege against self-incrimination, even though his probation officer gave him no prior warning regarding his privilege. *Id.* at 440, 104 S. Ct. at 1149. The Supreme Court stated that "a witness confronted with questions that the government should reasonably expect to elicit incriminating evidence ordinarily must assert the privilege rather than answer if he desires not to incriminate himself." *Id.* at 429, 104 S. Ct. at 1143. "But if he chooses to answer, his choice is considered to be voluntary since he was free to claim the privilege and would suffer no penalty as the result of his decision to do so." *Id.* The Supreme Court concluded that, even though the defendant "was informed that he was required to be truthful with his probation officer in all matters and that failure to do so could result in revocation of the probation," this level of compulsion was no more than a witness's requirement to give truthful testimony in trial under threat of perjury. *Id.* at 436-37, 104 S. Ct. at 1147. For that reason, Murphy needed to assert his right not to incriminate himself. *Id.* Because he did not, the Supreme Court concluded, Murphy's Fifth Amendment right was not violated. *Id.* at 439, 104 S. Ct. at 1148. When Murphy's case returned to the

Minnesota Supreme Court following his subsequent conviction, the supreme court held that Murphy's privilege under the Minnesota Constitution likewise was not violated. *State v. Murphy*, 380 N.W.2d 766, 771 (Minn. 1986).

Applying *Murphy* to the record here, we conclude that the district court's determination of compulsion was error. McCoy did not assert his right against self-incrimination to either his probation officer or the polygraph examiner. Although required to honestly complete sex-offender treatment, McCoy approached his probation officer on his own volition and included incriminating details while discussing his prior sexual history. He also filled out a victim form in his sexual-history packet that included the victim's first name. He later raised and discussed the disclosure made on this form in the polygraph examination after receiving clear instructions that the examiner was a mandatory reporter and that McCoy should not reveal any incriminating information in his examination. McCoy did not assert the privilege, and, under *Murphy*, his disclosures were therefore not compelled.

McCoy argues that *Murphy* is distinguishable and that this case is governed instead by *Johnson v. Fabian*, 735 N.W.2d 295 (Minn. 2007)—the case primarily relied upon by the district court in suppressing his statements. In *Fabian*, two inmates sought habeas relief, arguing that the extension of their terms of incarceration as a disciplinary measure for failing to participate in sex-offender treatment violated their Fifth Amendment privilege against self-incrimination. *Johnson*, 735 N.W. at 298. Both inmates had invoked their right against self-incrimination rather than participate in mandated sex-offender treatment. *Id.* Participating in treatment would have required them to admit sexual acts that, for one

inmate, would have adversely affected his pending appeal and, for the other, would have exposed him to perjury charges based on his trial testimony. *Id.* at 310-11. The supreme court concluded that the inmates' Fifth Amendment rights were violated. *Id.* at 311-12.

But the facts here are unlike those in *Fabian* and not meaningfully different from those in *Murphy*. In *Fabian*, both inmates invoked their privilege against self-incrimination and were punished for it. Here, as in *Murphy*, McCoy did not invoke the privilege and any consequence that he would have faced had he invoked the privilege remains uncertain. Because McCoy's confessions were not compelled, the district court's suppression order and its order dismissing charges are reversed and the case is remanded.[2]

Reversed and remanded.

[2] The state makes a separate argument regarding the statements to the polygraph examiner, asserting that McCoy's statements to the examiner were admissible because the examiner was an independent contractor, not a governmental agent, and McCoy's statements were voluntary. Because we conclude that McCoy's statements to the examiner did not violate the Fifth Amendment under *Murphy*, we need not address the state's alternative argument.