COURT OF APPEALS
DECISION
DATED AND FILED

November 9, 2010

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2009AP2877 **Cir. Ct. No. 2009CV192**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

STATE OF WISCONSIN EX REL. DAVID A. BLECKER,

PETITIONER-APPELLANT,

V.

DAVID H. SCHWARTZ,

RESPONDENT-RESPONDENT.

APPEAL from a judgment of the circuit court for Chippewa County: STEVEN R. CRAY, Judge. *Affirmed.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. David A. Blecker appeals a judgment affirming the revocation of his probation. He contends the revocation was based on insufficient evidence that was not credible, probative or substantial, in part because it depended on statements that should be considered part of a polygraph

examination, and it was unfair to require him to report conduct that he did not know was wrong and of which he had not been given a fair warning.[1] We reject these arguments and affirm the judgment.

¶2 In 2005, Blecker was convicted of one count of conspiracy to expose a child to harmful materials. Blecker talked to a woman he met on the internet about getting the woman's two teenage daughters involved in sexual activity with them. He was arrested as he arrived at the meeting place. Charges of conspiring to commit first-degree sexual assault of a child, multiple counts of first-degree sexual assault of a child, second-degree sexual assault of a child and child enticement were dismissed as a result of a plea agreement. He was placed on probation with conditions that he undergo sex offender assessment and treatment counseling. In 2008, the court ordered a one-year extension of probation. Six months later, Blecker admitted violating his probation and was granted an alternative to revocation. Five months after that, he failed a polygraph examination for the seventh time. When asked about the failed polygraph examinations, he revealed that he had touched his daughters' vaginas with his hand two years earlier. Blecker's probation was revoked for violating the first rule of his probation which, in relevant part, requires him to avoid all conduct which is not in the best interest of the public welfare or his rehabilitation.

[1] Blecker also contends his probation was revoked because of violation of rule twenty, which prohibited contact with minors except for supervised contact with his own children. He contends that rule is impermissibly vague. We need not address that issue because rule twenty was not the basis for the revocation.

¶3 Although the results of polygraph tests are not admissible in revocation proceedings and this prohibition also applies to interviews that are closely associated with the mechanical test in both time and content, *see* ***State v. Schise***, 84 Wis. 2d 26, 43-44, 271 N.W.2d 619 (1978), Blecker's argument regarding admissibility of his admission that he touched his daughters' vaginas fails for two reasons. First, Blecker did not object to the introduction of the statement. Therefore, he forfeited his right to raise the issue on appeal. *See* ***State v. Carprue***, 2004 WI 111, ¶46, 274 Wis. 2d 656, 683 N.W.2d 31. Second, the record does not show where the polygraph test was administered or at what time of day. The statement was made on the same day as the polygraph test, but not to the polygraph examiners. Nothing in the record shows this statement was closely associated with the polygraph test.

Substantial evidence supports the finding that Blecker violated rule one of his probation. Blecker's agent testified Blecker did not timely disclose his conduct to her. Blecker contends he was not required to disclose touching his daughters' vaginas because it is not prohibited by the rules of his supervision. The touchings occurred on several occasions when Blecker was playing "sack of potatoes" with his daughters, sometimes when they were naked. He would touch their vaginas when he picked them up. He contends the provision that allowed him to have contact with his daughters, including playing with them, allowed this type of activity and therefore he was not required to report the activity to his probation officer. Repeated hand-to-vagina contact with his daughters is not appropriate conduct, particularly for a person on probation for sex crimes involving children. This conduct and Blecker's failure to report the conduct violate rule one of his probation.

¶4 A condition of probation must be sufficiently precise to warn the probationer what conduct is prohibited and to provide an objective standard for enforcement if the condition is violated. ***State v. Koenig***, 2003 WI App 12, ¶9, 259 Wis. 2d 833, 656 N.W.2d 499. A condition of probation need only sufficiently warn probationers who want to comply with their conditions that their conduct comes close to the proscribed area. ***Id.*** Although the conditions of Blecker's probation did not expressly prohibit him from touching the genital area of his naked daughters, many conditions of his probation limited his contact with children and adults who had children. He had adequate warning that this conduct with his daughters would at least come near the proscribed area, and therefore should have known there was a substantial risk that it crossed the line. The conduct obviously was not in the best interest of his rehabilitation.

¶5 Blecker cross-examined his agent, asking her whether she could identify a law that Blecker had supposedly violated by touching his daughters. He contends the touching was not intentional and was not for the purpose of sexual arousal or gratification, and therefore does not constitute sexual assault. Blecker's agent was not required to identify a specific statute that Blecker violated. Conduct detrimental to his rehabilitation does not necessarily entail a violation of a statute. Touching his daughters' vaginas during play is not appropriate conduct for a probationer convicted of a sex crime involving children regardless of whether it constitutes sexual assault.

¶6 Blecker also asserts that his belated disclosure of the sexual contact was in the interest of rehabilitation, and therefore not a violation of the rule. His probation was not revoked because of the disclosure itself, but because of the

conduct and his failure to disclose until he failed the polygraph examination for the seventh time.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.