

STATE OF VERMONT

HUMAN SERVICES BOARD

In re) Fair Hearing No. 17,790
)
Appeal of)

INTRODUCTION

The petitioner appeals to the Human Services Board for an order expunging from the "registry" maintained by the Department of Social and Rehabilitation Services (SRS) a report of child sexual abuse allegedly perpetrated by him. The issue is whether the report was "substantiated" within the meaning of the pertinent statutes.

FINDINGS OF FACT

1. In December of 1993, K.J., a then fourteen-year-old girl, reported to a counselor at a residential treatment center for adolescents that she had been repeatedly sexually abused by her uncle during a three year period from the time she was seven to the time she was ten. Her uncle, the petitioner, was a teenager during this period of time.

2. The director of the center reported that allegation to SRS which conducted an investigation into the matter and concluded that the allegation was true and entered a substantiation of sexual abuse against the petitioner in its

registry. The petitioner was notified of the substantiation but did not appeal at that time.

3. Some years later, the substantiation came up when SRS discovered that three girls in its custody were spending time in the presence of the petitioner because their mother was his girlfriend. They ordered her to keep the girls away from him as a condition of her retaining physical custody. The petitioner decided to request expungement of the substantiation against him at that time.¹

4. SRS presented the testimony of K.J. at the hearing, although at K.J.'s request, her testimony was heard and seen by the petitioner through a two-way mirror based on her desire not to be in the same room with him. She is now twenty-four and lives and works in Connecticut. She said that she lived with her mother and sister in Burlington from the time she was seven to ten years old. She said that her mother often left her and her younger sister at her grandmother's house for

¹ The original request for expungement involved three different substantiations involving three different persons. Because SRS had difficulties obtaining the testimony of one of the girls, it agreed to expunge that substantiation. SRS asked to defer the expungement hearing involving the third girl until after a decision was rendered in this case.

babysitting. The petitioner, her grandmother's teenage son (who was her mother's brother), lived there as well.

5. K.J. could not recall exactly how often she was at her grandmother's house because her memory has been "fogged" by time but said it was probably at least weekly. She does remember clearly that whenever her uncle was there, he took her into his bedroom and took off her pants, and sometimes all her clothes. He would then insert his fingers into her vagina. Once he tried to put his penis into her vagina. This behavior occurred both when her grandmother was in the house and when she was left alone with her uncle. She also observed her uncle taking her younger sister into his bedroom and closing the door although she never observed him sexually abusing her.

6. The petitioner said that this behavior upset her very much but that she could not tell anyone or get it to stop because the petitioner threatened to hurt her if she told anyone. In any event, she did not feel that her mother or grandmother would believe her if she told them. The behavior stopped when the family moved too far away to go to her grandmother's regularly. The petitioner says she has avoided her uncle ever since. She did tell her father about the incidents when she was eleven or twelve but although she

thinks he believed her she said at the time he did not know how to react to the information.

7. The petitioner's father at some point did report her allegations to an SRS caseworker involved with the petitioner. When the caseworker approached her about this, the petitioner became very upset. She was shocked that her father had told anyone and was fearful of reprisals. She reacted by saying that what she told her father didn't really happen. Later on, however, when she was living at the residential treatment center, she decided to tell the entire story to her counselor and to SRS. She explained why she had initially reacted with a denial in a letter she wrote to the SRS worker which was introduced into evidence.

8. Shortly after she reported the alleged abuse, K.J. wrote a letter to the petitioner in which she confronted him about the alleged abuse, told him that he had taken away her trust when he took her into his bedroom and that she hated him. She said that in spite of his directions "not to tell" she finally did tell and was taking his power away. She called him a "sick and disgusting man" and said that he needed help. She concluded by saying she wanted him out of her life forever.

9. The director of the adolescent treatment facility where K.J. lived at the time she reported the abuse, confirmed that the petitioner came from a chaotic family situation and was placed in the residential facility because of difficulties at home and school, including constantly running away. She thrived while in the program and was able to return to live with her family. She said that after K.J. left the center she kept in touch with her while she was in high school. On one occasion, K.J. called her very upset and told her that she did not want to stay at her mother's house that night because her uncle, the petitioner, was going to be staying there. The director intervened with the mother to allow K.J. to stay with her that night. She described K.J. as a "good" kid who had succeeded as an adult in overcoming her dysfunctional childhood environment.

10. The petitioner² denies that he ever performed any of these actions and says that he was never left alone with the petitioner to have had such an opportunity. He claims that he and K.J. have a good relationship and that she even approached him at a family function subsequent to 1993 and hugged him and

² The petitioner appeared pro se in this matter. At a status conference some months prior to the hearing, the law and evidence to be offered against him was explained to the petitioner and he was advised to get an attorney.

said she loved him. He says he received the 1994 letter from K.J. which hurt him but he never discussed it with her. He suspected that she had written the letter because she had a "hard childhood" and because family members often targeted him because he was "the fat one." He could offer no other motive that K.J. might have for fabricating such a story.

11. It is found after weighing all of the evidence that K.J.'s version of the events is entirely credible. Even though over fourteen years have passed, she still recalls the salient events and testified to them in obvious pain and with the demeanor of one who has been through a traumatizing experience. The hearing officer could discern no gain or motive for fabricating any of the alleged facts. K.J.'s testimony is adopted as fact herein and the petitioner's testimony to the contrary is rejected as not credible.

ORDER

The petitioner's application to expunge the report of child sexual abuse made against him with regard to K.J. is denied.

REASONS

The petitioner has made application for an order expunging the record of the alleged incidents of child abuse

from the SRS registry. This application is governed by 33 V.S.A. § 4916 which provides in pertinent part as follows:

- (a) The commissioner of social and rehabilitation services shall maintain a registry which shall contain written records of all investigations initiated under section 4915 of this Title unless the commissioner or the commissioner's designee determines after investigation that the reported facts are unsubstantiated, in which case, after notice to the person complained about, the records shall be destroyed unless the person complained about requests within one year that it not be destroyed.

. . .

- (h) 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 unsubstantiated 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.

Pursuant to this statute, SRS has the burden of establishing that a record containing a finding of child abuse should not be expunged. SRS has the burden of demonstrating by a preponderance of the evidence introduced at hearing not only that "the report is based upon accurate and reliable information", but also that the information "would lead a reasonable person to believe that a child has been abused or neglected." 33 V.S.A. § 4912(10) and Fair Hearing Nos. 13,154, 12,761, 12,499, 11,660, 11,322, and 10,136.

"Sexual abuse" is defined by 33 V.S.A. § 4912(8) 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 this case, accurate and reliable information exists that the petitioner forced a child of between seven and ten years of age to disrobe and placed his fingers in her vagina on several occasions. There is also reliable information that on at least one occasion, the petitioner attempted to put his penis in her vagina. It is reasonable, therefore, to conclude that the petitioner molested and exploited K.J. within the meaning of the above statute. Inasmuch as SRS has met its burden of showing that the report in question is "substantiated", the petitioner's request for an order of expungement of this record from the SRS registry is denied.

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