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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

In re ANDREW H., a Person Coming  
Under the Juvenile Court Law.

THE PEOPLE,

Plaintiff and Respondent,

v.

ANDREW H.,

Defendant and Appellant.

A131845

(Mendocino County Super.  
Ct. No. SCUKJDSQ11-15054)

Andrew H., a ward of the juvenile court (Welf. & Inst. Code, § 602), appeals a postdisposition order of April 19, 2011, that denied, as not ripe for adjudication, his request for certain protections against potential use of polygraph testing as part of sex offender therapy he was receiving at an out-of-home placement, Teen Triumph. We affirm the order.

**BACKGROUND**

Andrew's juvenile court history began at age 14, with a 2007 petition filed for theft offenses. The current matter came on the heels of his completing an outpatient program and informal probation for further theft offenses. A reopened petition filed in September 2010, when Andrew was 17 and a half, charged him with five counts of nonforcible lewd and lascivious acts with a child under age 14 (Pen. Code, § 288, subd. (a))—his 10-year-old sister, with whom he had been living in Ukiah since his termination from probation.

After a psychological evaluation approved a more supervised, residential setting like Teen Triumph in Stockton, Andrew admitted the first count of the petition in return for dismissal of the others. At disposition, the court declared wardship with placement in the control of probation, and Andrew was placed in Teen Triumph on November 4, 2010. He does not appear to have appealed the disposition.

At a six-month review on April 5, 2011 (unstated further dates are in 2011), the court continued the placement. Its order rested in part on a probation report that Andrew was doing “fairly well” and should remain at Teen Triumph despite difficulty in taking full responsibility for his offense. A report from Teen Triumph assessed Andrew as a “moderate risk” of sexual reoffense and recommended that he “continue to receive intensive sex offender treatment” in the supervised setting. It noted that he could be manipulative and distrustful toward staff, and “often takes light of a situation and does not take responsibility for his inappropriate actions.” Those concerns echoed the earlier psychological evaluation that Andrew downplayed his sexual offense, using “denial, avoidance, and blocking as psychological defenses to a massive extent.”

The expectation was that Andrew, now 18 years old with his father deceased and his mother supportive but unwilling to have him return home where the molested sister lived, would need to transition to independent living once he was ready to leave Teen Triumph. The court ordered him to comply with all aspects of his case plan, a plan that required in part that he complete his sex offender treatment and prepare for independent living.<sup>1</sup>

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<sup>1</sup> The case plan, pending a 12-month review set for September 22, set these goals for Andrew’s juvenile sex offender (JSO) treatment: “Eliminate all inappropriate sexual behaviors to be achieved by full disclosure in individual, group and milieu therapy. Take full responsibility for actions and explore underlying causes, including possible victimizations against Andrew. Develop victim empathy and relapse prevention plan. Develop an understanding of age appropriate male/female relationships.” His progress at the six-month mark was stated as: “Minor is participating in both group and individual therapy for JSO issues. He is beginning to understand the impact on his victim and family. Developing empathy and relapse prevention plan.”

Also at the six-month review, Andrew's counsel, Lorraine Purviance, raised for the first time concern about possible use of polygraph tests in the sex offender program. The court ordered briefing and set a hearing for April 19.

A filing by Purviance disclosed that Andrew had not yet been offered polygraph tests and that probation had assured her it was their policy not to make any use of test disclosures beyond therapy. Nevertheless, counsel had heard of a past instance where " 'therapeutic' disclosures resulted in several additional charges being filed." Concerned that a "polygraph condition of probation" could be overbroad if not restricted as to what could be asked or otherwise tailored to therapeutic purposes, Purviance sought orders that: (1) Andrew not be required to participate absent immunity; (2) his counsel be notified in advance so that Andrew could be advised of his rights and have a hearing on whether he should be required to submit; (3) neither his probation nor "any program length" be based on refusal to comply with such testing; (4) "any statements" made during them "be deemed coerced admissions and inadmissible for any purpose"; (5) all reference to statements or testing be "struck from the record" and (6) any reports referencing polygraph statements be sealed.

Record discussion on April 19 confirmed that Andrew still had not been asked to take the tests. A probation officer confirmed that Teen Triumph "does use polygraphs in treatment sometimes," but opposed having counsel involved if they were to be used. Andrew had entered Teen Triumph at age 17, could not stay there very long, would be leaving at age 18 and a half or 19, and had been doing quite well. If used, the officer felt, the tests could "help him through this last little bit of his treatment" and hasten his return to the community.

Purviance urged that ordering immunity or restricted uses was needed to enforce assurances given to wards that the tests were used only for treatment purposes. She said her delay in raising the issue was because she had just learned of the program's use of polygraph tests. The deputy district attorney urged that the issues were not ripe, given lack of any such tests or orders to take them, and opposed as "illegal" keeping any results out of reports.

The court found the matter not ripe for adjudication. It observed that case law recognized such tests as a valuable treatment tool for sex offenders in the context of probation conditions. But the court noted that there was no such condition in this case, thus distinguishing cases cited by Purviance as requiring court-ordered restrictions, that it was not ordering one, and that it did not know whether polygraph tests would be offered to Andrew. It added: “I would not allow testimony from a polygraph examination in this court. I don’t think any court would.” The court summarized that the tests were “approved treatment,” that their use was “another issue,” and: “[W]hen that comes before the court, the court will deal with it, but at this time I’m not faced with that issue.”

### **DISCUSSION**

“The ripeness requirement, a branch of the doctrine of justiciability, prevents courts from issuing purely advisory opinions. [Citation.] It is rooted in the fundamental concept that the proper role of the judiciary does not extend to the resolution of abstract differences of legal opinion. It is in part designed to regulate the workload of courts by preventing judicial consideration of lawsuits that seek only to obtain general guidance, rather than to resolve specific legal disputes. However, the ripeness doctrine is primarily bottomed on the recognition that judicial decisionmaking is best conducted in the context of an actual set of facts so that the issues will be framed with sufficient definiteness to enable the court to make a decree finally disposing of the controversy.” (*Pacific Legal Foundation v. California Coastal Com.* (1982) 33 Cal.3d 158, 170.) “ ‘The controversy must be definite and concrete, touching the legal relations of parties having adverse legal interests. [Citation.] It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.’ ” (*Id.* at pp. 170-171, quoting *Aetna Life Ins. Co. v. Haworth* (1937) 300 U.S. 227, 240-241.)

Ripeness appears to be a question of law for our independent review. (*U.S. v. Antelope* (9th Cir. 2005) 395 F.3d 1128, 1132 (*Antelope*)).) But first, a justiciability question unaddressed by either party is whether the issues are now moot. The April 19 ruling came when Andrew was already 18 years old, had been at Teen Triumph for five

and a half months, without polygraph testing, had progressed quite well in his treatment, and was expected to be released by age 18 and a half or 19. Despite expeditious briefing on this appeal, Andrew turned 19 years old in March 2012, and we have no word from the parties whether he is still in treatment at Teen Triumph. It appears highly likely that he is not, that the issues are therefore moot (*Finnie v. Town of Tiburon* (1988) 199 Cal.App.3d 1, 10), and that they cannot recur in the juvenile court setting now that he is an adult. Nor are we apprised that he ever *was* asked to have polygraph tests while at Teen Triumph. It seems that there is no effective relief this court could fashion. (*Paul v. Milk Depots, Inc.* (1964) 62 Cal.2d 129, 132.)

But if for sake of argument Andrew remains in treatment there and subject to some lingering prospect of polygraph testing, we agree with the trial court's view that the issues were not ripe for decision.

As the trial court noted, the use of polygraph tests, while not yielding results admissible in court as evidence, is a valid rehabilitative tool in therapy and thus can be a reasonable condition of probation in a proper case, particularly to address issues of denial in sex offender and related cases. (*Brown v. Superior Court* (2002) 101 Cal.App.4th 313, 319-321 (*Brown*); *Antelope, supra*, 395 F.3d at pp. 1137-1138.) Andrew's counsel made clear that she did not oppose therapeutic use of polygraph tests for Andrew, saying, "I'm not opposing the treatment."

As the trial court was also aware, overbreadth is a potential problem for court-ordered polygraph tests as a condition of probation, and may require limiting questions to those reasonably related to the offense and needed to complete treatment. (*Brown, supra*, 101 Cal.App.4th at pp. 322-323.) But there was no court-ordered testing here, only an order to comply with a case plan that, in turn, required open participation in therapy, without specific mention of polygraph tests (fn. 1, *ante*). Andrew seems to argue that this was much the same for purposes of ripeness and his Fifth Amendment concerns because, if the tests *were* used, his refusal to take them could have resulted in failed treatment and consequent failure at probation.

We disagree for several reasons. First, compliance with the tests was not made a specific component of his plan or his successful completion of probation, and all that was shown to the court was that the Teen Triumph program “sometimes” utilized polygraph tests but that none had been offered Andrew in over five months of treatment. This was not a case where a probationer had been expressly or implicitly compelled “to ‘choose between making incriminating statements and jeopardizing his conditional liberty by remaining silent.’ [Citation.]” (*U.S. v. Saechao* (9th Cir. 2005) 418 F.3d 1073, 1081; *Antelope, supra*, 395 F.3d at p. 1035.)

Second, any issue of failure at probation would have come back to the juvenile court, which specified that it would not tolerate non-therapeutic use of test results. We presume that the court would have been just as sensitive to equating a failure to answer polygraph questions as a failure at probation, and this highlights how unwise it would have been to try to fashion protective orders without a concrete factual setting.

Third, the Fifth Amendment is not self-executing; it must be invoked, and in response to a realistic threat of self-incrimination. (*Brown, supra*, 101 Cal.App.4th at p. 320.) “[I]f the questions put to the probationer are relevant to his probationary status and pose no realistic threat of incrimination in a separate criminal proceeding, the Fifth Amendment privilege would not be available and the probationer would be required to answer those questions truthfully.” (*Ibid.*, citing *Minnesota v. Murphy* (1984) 465 U.S. 420, 435, fn. 7.) The umbrella of the privilege does not shelter blanket refusal to answer questions or responses “whose ability to incriminate is ‘highly unlikely.’ ” (*Antelope, supra*, 395 F.3d at p. 1134.) Given the subtleties involved, the court was in no position to fashion specific relief. Andrew’s counsel said she was going to advise Andrew that he was not being ordered to take a polygraph test, and of “the consequences of disclosing.” That was her arguable duty, but there was nothing before the court indicating that such a test would be offered, much less a concrete scenario on which to predicate advance rulings on what questions and responses would be covered by the privilege.

**DISPOSITION**

The order is affirmed.

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Richman, J.

We concur:

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Haerle, Acting P.J.

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Lambden, J.