Appeal No. 2009AP2907-CR **Cir. Ct. No. 2006CF350**

WISCONSIN COURT OF APPEALS
DISTRICT II

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOSEPH J. SPAETH,

DEFENDANT-APPELLANT.

CERTIFICATION BY WISCONSIN COURT OF APPEALS

Before Brown, C.J., Anderson and Reilly, JJ.

Pursuant to WIS. STAT. RULE 809.61 this court certifies the appeal in this case to the Wisconsin Supreme Court for its review and determination.

ISSUE

In ***Kastigar v. United States***, 406 U.S. 441, 453, 460 (1972), the United States Supreme Court held that the government may compel incriminating testimony so long as it comes with a grant of use and derivative use immunity—that is to say, in any subsequent criminal proceeding, the prosecution has the burden to prove affirmatively that evidence proposed to be used is derived from a "legitimate source wholly independent of compelled testimony." As a standard rule of probation, probationers are required to be honest about their activities and whereabouts with their probation agents. *See* ***State v. Evans***, 77 Wis. 2d 225, 231,

252 N.W.2d 664 (1977). Then, WIS. ADMIN. CODE § DOC 328.04(2)(w) requires probation agents to report any unlawful activities to their supervisor or other appropriate authorities. When combined with ***Kastigar***, WIS. ADMIN. CODE § DOC 328.04(2)(w) sets up a system where compelled statements that are given derivative use immunity are used to initiate criminal investigations.

In the case at bar, Joseph Spaeth made incriminating statements to his probation agent after a polygraph examination. The agent informed police of a possible criminal offense. The police met with Spaeth. After receiving his ***Miranda***[1] warnings and being told by his agent that he did not have to talk to police, he repeated his incriminating statements to the police in an interview. We certify to invite the supreme court to clarify if a statement made to law enforcement following a probationer's honest accounting to an agent may become a "wholly independent source" under ***Kastigar*** and, if so, under what parameters.

BACKGROUND

The facts relevant to the issue we here certify are simple. Joseph Spaeth, a convicted sex offender, was on extended supervision with the standard condition that he must comply with polygraph examinationss as requested by his probation agent. Failure to comply with testing would have been grounds to revoke his extended supervision. On February 15, 2006, Spaeth's probation agent ordered a routine test. After the test, while the agent and examiner were discussing the results, Spaeth disclosed to his agent that he had been "horse-playing" with his nieces and nephews, who were children. His statements

[1] ***Miranda v. Arizona***, 384 U.S. 436 (1966).

indicated a clear violation of his rules of extended supervision, so his agent called the police to take him into custody for a probation hold. After the police were called, Spaeth admitted to his agent that he had been tickling his nieces and nephews and may have brushed their genital and chest areas.

The police came to where Spaeth had been meeting with his agent, handcuffed Spaeth, and put him in the back of a squad car. While Spaeth was present, his agent told the police about Spaeth's statements to her. Spaeth was then transported to the station, where he was given his ***Miranda*** warnings. Spaeth told the police essentially the same thing he had told his agent. The police helped him write a statement summarizing his conduct, which he signed. He said that he had been playing with his siblings' children when he began "tickling" them. He stated that while playing, he had brushed up against their "vaginas, chest, and buttocks" areas and that he had touched them for less than thirty seconds. He also stated that he knew he "ha[d] a problem" and that his actions were "wrong." Spaeth's written and oral statements to police constituted the entire basis for the criminal complaint against him.[2]

Spaeth was charged with four counts of sexual assault of a child as a persistent repeater. After a failed motion to suppress his statement, he eventually pled no contest to a lesser charge. He appeals.

[2] Spaeth was originally convicted in a trial by jury, but that verdict was overturned after it was discovered that one of the jurors recognized Spaeth's address as the address of a registered sex offender and shared that information with the jury. Trial testimony consisted of two officers who spoke with Spaeth on February 15, and two parents of the children involved. Both parents testified that they were present when the "tickling" occurred and did not see anything that they concerned them.

DISCUSSION

Spaeth seeks to suppress his statement to police based on two distinct lines of Fifth Amendment case law. First, he alleges that the statement was a mere extension of his compelled statements to his probation agent, and therefore must be suppressed because it too was compelled. In support of that argument, he cites to ***State v. Mark***, 2008 WI App 44, ¶20, 308 Wis. 2d 191, 747 N.W.2d 727 (hereinafter ***Mark***), which explains that a statement made after a compelled statement is only admissible if a sufficient break has occurred such that the second statement is no longer compelled. Second, he argues that his statement to police was derived from the compelled statements he made to his probation agent under a grant of derivative use immunity and was therefore inadmissible under ***Kastigar***. *See* ***Kastigar***, 406 U.S. at 453. While both arguments are based on the idea that the statement to police was too closely related to the statements to the probation agent, they involve separate inquiries and constitutional standards.

In ***Mark***, the court of appeals addressed statements made to a parole agent and evidence derived therefrom. ***Mark***, 308 Wis. 2d 191, ¶¶1, 3. While the ***Mark*** case is not dispositive, its reasoning is instructive. Mark was subjected to civil commitment in a WIS. STAT. ch. 980 hearing[3] where both a written and an oral statement to his probation agent, taken at different times, were admitted, as was expert testimony based on information contained in those statements. ***Mark***,

[3] In ***State v. Mark***, 2006 WI 78, ¶2, 292 Wis. 2d 1, 718 N.W.2d 90, our supreme court held that WIS. STAT. § 980.05(1m) grants WIS. STAT. ch. 980 respondents the same rights at the commitment trial as a defendant has in a criminal case. The later court of appeals case (and the only ***Mark*** case cited in the body of this certification) was an appeal from the trial court's actions after the case was remanded by the supreme court ***Mark*** case. *See* ***State v. Mark***, 2008 WI App 44, ¶1, 308 Wis. 2d 191, 747 N.W.2d 727.

308 Wis. 2d 191, ¶¶5, 8. The court of appeals noted that the first (written) statement was compelled because there it was preceded by a statement that failure to answer could be grounds for revocation and advising Mark that none of the information he provided could be used in a criminal proceeding. ***Id.***, ¶¶5, 17.

The court of appeals also held that the second (oral) statement was compelled because there was not a sufficient break between the two. ***Id.***, ¶25. It noted that although the two statements were thirteen days apart and the second statement was spontaneously made by Mark,

> [the second statement] was to the same agent, [and] he was still in jail under the agent's authority…. The circumstances of his restraint had not changed and there [was] no basis for inferring that he did not think he was any longer obligated to give a true and accurate account in order to avoid a revocation on that ground.

Id. The court did not address the effect of ***Kastigar*** on Mark's second statement, presumably because it did not need to do so once it held that the statement was compelled.

The ***Mark*** court did address ***Kastigar***'s effect on expert testimony where the experts had considered information that was only available in Mark's two compelled statements. ***Mark***, 308 Wis. 2d 191, ¶¶40, 44. It held that the expert testimony constituted derivative use under ***Kastigar*** and therefore the testimony was inadmissible. ***Mark***, 308 Wis. 2d 191, ¶¶40, 44. Because the evidence derived from the immunized testimony in that case was so different from the statements made by Spaeth that are at issue here, ***Mark***'s discussion of derivative use immunity has limited relevance to this case other than that it shows that Wisconsin uses the ***Kastigar*** standard to decide when evidence is "derived

from" immunized testimony. *See also* ***State v. Harrell***, 2008 WI App 37, ¶29, 308 Wis. 2d 166, 747 N.W.2d 770.

Both parties agree that Spaeth's statements during the polygraph and his statements to his probation agent were compelled and therefore made under a grant of derivative use immunity. *See* ***Kastigar***, 406 U.S. at 453. Spaeth's agent testified that polygraph exams are routinely compelled on at least an annual basis for sex offenders like Spaeth. Failure to be honest about activities and whereabouts with probation agents constitutes grounds to revoke extended supervision. *See* ***State v. Evans***, 77 Wis. 2d 225, 231, 252 N.W.2d 664 (1977). According to Spaeth's agent, failure to comply with a requested polygraph would have been grounds for revocation as well. Because Spaeth's statements before speaking to police were compelled, his statement to police is only admissible if 1) there was a sufficient break from the compelled statements and 2) the statement to police was not "derived from" the compelled statements under Kastigar.

In ***Mark***, we listed three factors that are relevant in deciding whether a sufficient break has occurred: a change in place of the interrogation, the time that passes between the statements, and a change in the identity of the interrogators. ***Mark***, 308 Wis. 2d 191, ¶22. Here, there was a change in location and interrogators between the first and second statement, and Spaeth was read his ***Miranda*** rights *and* told by his probation agent that he did not have to talk to police. Unlike the facts of ***Mark***, these facts would seem to indicate that there was at least an arguable break between the two statements sufficient to let Spaeth know that his statements were no longer required and he was no longer under a grant of immunity. *Cf.* ***Mark***, 308 Wis. 2d 191, ¶25 (holding that a statement made after a compelled statement was still compelled in part because "there [was] no basis for

inferring that he did not think he was any longer obligated to give a true and accurate account"). But our inquiry does not end there.

As stated above, under WIS. ADMIN. CODE § DOC 328.04(2)(w), Spaeth's probation agent was required to "[r]eport[] all violations of the criminal law by clients to a supervisor or appropriate law enforcement authority." Thus, once Spaeth was compelled to give his incriminating statements to the polygraph examiner and to his agent, his agent had a legal obligation to report those statements to the police. Here, the State did not seek to use Spaeth's statement to his probation agent, presumably because it would have been excluded by ***Kastigar*** and ***Evans***. It did, however, seek to use the statement that Spaeth made to police officers a short time later after he was taken to the station.

Kastigar explicitly states that once incriminating testimony is compelled, the prosecution's burden of proof "is not limited to a negation of taint." ***Kastigar***, 406 U.S. at 460. Instead, a higher burden applies: the prosecution has an affirmative duty to prove that the evidence it proposes is "derived from a legitimate source wholly independent of the compelled testimony." ***Id.*** Therefore, it is not sufficient to say that Spaeth's confession was admissible because it was not compelled. It must also be found to come from a "wholly independent" source.

In its brief, the State makes a compelling policy argument: that if Spaeth's statement to police is considered derived from the immunized testimony, it would "place the State's probation system at odds with itself" because of the cooperation that is necessary between probation agents and law enforcement. It argues that a rule making statements like Spaeth's inadmissible would cause law enforcement to avoid communication between probation agents and police so as to

avoid tainting the investigation. The State's concern, which we share, appears to be that a holding that excludes statements like Spaeth's may have the effect of rendering WIS. ADMIN. CODE § DOC 328.04(2)(w) and other provisions encouraging cooperation between agents and police useless.

Spaeth's answer to the State's argument is simple: regardless of the effect it may have on the operations of the extended supervision system, defendants have the constitutional right to derivative use immunity for compelled statements to probation agents.[4] *See* ***Kastigar***, 406 U.S. at 460; *see also* ***Evans***, 77 Wis. 2d at 227-28. This includes protection from "any use, direct or indirect, of the compelled testimony and any information derived therefrom." ***Kastigar***, 406 U.S. at 460. It also includes use of the statement as an "investigatory lead." ***Id.***; *see also* ***State v. Hall***, 207 Wis. 2d 54, 78, 557 N.W.2d 778 (1997). As Spaeth points out, Spaeth's interview with his probation agent was *the* lead that initiated the case. Without those statements, or even if those statements had been made but not shared with the police, the police would not have had a reason to interrogate Spaeth. It is undisputed that Spaeth did not initiate contact with police; the police initiated contact with him based on what his agent told them.

[4] Spaeth also argues that suppression of statements like his would not be overly burdensome to the probation system in part because a probation agent may still compel the incriminating statements and use them to revoke probation. She also points out that a probation agent may also share the information with officers, but the officers should then "wall off the statements from their investigation."

Spaeth is not alone in seeing creative ways to get around the burden ***Kastigar*** imposes on investigations of crimes admitted to in probation revocation hearings. In her concurrence to ***State v. Evans***, 77 Wis. 2d 225, 252 N.W.2d 664 (1977), Justice Abrahamson noted that giving derivative use immunity could hamper investigations and pointed out that one way to deal with that might be to delay probation proceedings until after criminal prosecution. ***Id.*** at 238, 240-41 (Abrahamson, J., concurring). Obviously, such a delay would not have worked in this particular circumstance because the criminal investigation was a direct result of the statements to Spaeth's agent.

It seems to us that if we agree with the trial court that Spaeth's statement to police was not compelled, then we are saying that the *statement* (not necessarily the source) was independent. *See* ***Mark***, 308 Wis. 2d 191, ¶¶21-22 (statements made after compelled statements are admissible if there is a "sufficient break"). Arguably, an independent statement *is* an independent source for the purpose of investigation—but such a holding would seem to conflate the ***Kastigar*** standard with the standard set forth in ***Mark*** outlining when a sufficient break has occurred between a compelled statement and a subsequent statement. ***Kastigar*** explicitly rejects that sort of approach by stating that the prosecution's burden is *not* limited to the negation of taint. *See* ***Kastigar***, 406 U.S. at 460. Furthermore, if our inquiry were limited to question of whether Spaeth's statement to police was compelled, it would go directly against the body of case law explaining that use immunity alone is insufficient to compel incriminating testimony. *See* ***id.*** at 449-50 (discussing ***Counselman v. Hitchcock***, 142 U.S. 547 (1892)).

It also seems to us that if Spaeth had initiated his statement to police—by going to the station of his own volition the next day, for example—the statement *would* satisfy the ***Kastigar*** "wholly independent source" standard without question. Likewise, if the police had interviewed Spaeth for an unrelated reason (without knowledge of his statements to his agent), and Spaeth had volunteered the information to them, use of the statement would not be problematic under ***Kastigar***. But when the questions prompting the "independent" statement were instigated by the first statement, it would seem to go against the spirit of ***Kastigar*** to say that the second statement was not "derived from" the first.

We are mindful, however, of the State's policy argument as to the effect of a rule suppressing statements like Spaeth's. Indeed, the combination of ***Kastigar*** and WIS. ADMIN. CODE § DOC 328.04(2)(w) lead us to believe that this

is a fact pattern that will continue to occur with frequency. This case is a prime example of why this area of law is in need of clarification: it is clear that everyone from the lie detector examiner to the probation agent to the police officers followed protocol to ensure Spaeth's statement to police would be admissible. Yet we are left to unravel this issue on appeal nearly five years after the investigation was initiated. Because of the tension between ***Kastigar*** and the needs and policies of the DOC (as illustrated in WIS. ADMIN. CODE § DOC 328.04(2)(w)), we believe this case is most appropriately decided by the state supreme court.