

COUNTY COURT : DUTCHESS COUNTY

PRESENT: HON. STEPHEN L. GRELLER  
Dutchess County Court Judge

DECISION AND ORDER

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THE PEOPLE OF THE STATE OF NEW YORK: SCI No. 338/2010

Plaintiff,

- against -

VICTOR TOHOM,

Defendant.

WILLIAM V. GRADY, ESQ.  
District Attorney  
Kristine M. Hawk, Esq.  
Senior Assistant District  
Attorney for Plaintiff

DAVID MARTIN, ESQ.  
Attorney for the Defendant

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Defendant, by indictment #149/2010 is charged with the crime of Predatory Sexual Assault against a child, a Class A-II Felony in violation of §130.96 of the Penal Law. It is alleged that the defendant, as a continuing course of conduct for a period of almost four years, committed the crime of Coercive Sexual Conduct Against a Child in the First Degree as defined in Article 130.75(1)(b) of the Penal Law by engaging in more than two acts of sexual conduct with a child who was less than 13 years of age. The defendant, by the second count of the aforesaid indictment, is charged with Endangering the Welfare of a Child, a Class A Misdemeanor in violation of §260.10(1) of the Penal Law.

The People, by motion, seek an order allowing an assistance dog to accompany the victim on the witness stand when she testifies at trial. The People contend that the dog, who they analogize to a comfort item, will provide a sense of security to the victim and reduce her anxiety, thus permitting her to testify.

The People specifically cite Executive Law §642-a(4), which addresses the "Fair Treatment of Crime Victims as Witnesses", as well as legislative history in support of this application.

Defendant, by his attorney, opposes the People's application on the grounds that there is no New York precedent supporting the allowance of a dog to assist a witness's testimony, that no law exists and that the legislature is the proper authorized body to "create law". (Reply Affirmation, paragraph 2). Furthermore, the defendant argues that the use of a dog to assist this witness in testifying in this particular case would cause definite prejudice since the "message" to the jury by permitting the dog to be next to or in proximity to the witness is that the witness is vulnerable by stress in relating the events. The defendant argues that the use of the dog would create a natural empathy towards the witness and would distract from otherwise contradictory evidence that negates the truth of the witness's accounting, as raised by the defense.

On May 25, 2011, the Court conducted a hearing relative to the issues raised in the People's application. The Court determines the credibility of the witness as set forth below

#### FINDINGS OF FACT

Lori Stella, a New York State licensed Clinical Social Worker, having an LMSW degree, has been the victim's therapist since August of 2010. The victim, now 15 years old, has been diagnosed with Post Traumatic Stress Disorder. She exhibits multiple symptoms, including sleeplessness, numbness, failure to connect, inattention and constant feelings of emotional distress regarding her trauma resulting from the alleged sexual abuse by the defendant. To date,

the victim cannot talk about the events with the therapist. When they attempt to do so, she "shuts down", which is consistent with Post Traumatic Stress Disorder. She has trouble sleeping at night. On some occasions, she indicates that she feels safe, but the therapy engaged in by the child led the therapist to a different conclusion.

The victim cannot articulate much more than "what happened with ....." She provides no details. When questioned, she indicates that she does not want to talk about "it". She has extreme difficulty in verbalizing. When she becomes upset, her anxiety becomes obvious and visible. She picks at her sleeves, she cannot make eye contact and cannot verbalize. The victim has limited contact with her family and her only support system are her paternal grandparents who reside outside of the United States.

The victim is familiar with "Rose", an 11 year old golden retriever companion animal. The dog has been trained to work with victims of Post Traumatic Stress Disorder, traumatized and special needs children, veterans at VA hospitals and other victims. The dog has been trained to sense their anxiety and attempt to reduce their stress or anxiety level by either nuzzling them or wanting to be pet. The victim has worked with "Rose" in a therapeutic setting and the interaction between them has been very positive. The victim becomes significantly more verbal about her activities when she is with the dog and has expressed great anxiety about facing the defendant, who she fears, in open court without the assistance of the dog.

The therapist has indicated that it is her opinion to a reasonable degree of certainty that the child's courtroom testimony

alleging sexual acts committed by the perpetrator, a relative with whom the victim had a long standing relationship, is likely to cause the child to suffer very severe emotional and mental stress. She will be re-traumatized and suffer increased Post Traumatic Stress Disorder, including greater symptomology, without assistance in testifying when she must testify in the presence of the alleged perpetrator. The victim has indicated that she feels a sense of calm with the dog and will feel safer at the trial. In the opinion of the therapist, the dog will help the victim verbalize and will permit her to better express herself. It was further opined that the dog would decrease the child's level of psychological distress and harm.

It is unknown whether the child can testify without the dog. Certainly, she is better able to testify with the dog present and her art therapy clearly demonstrates her fear of the perpetrator.

Defendant, arguing against the use of the dog, concedes that the child is entitled to her therapist being "accessible", but contends that the therapist should be seated either in the spectator section of the courtroom, or should simply remain in the conference room. Both the plaintiff and the defendant object to the therapist sitting next to or in close proximity to the victim for different reasons, both of which have some legitimacy. The People believe that the child would look at the therapist, thus perhaps giving the jury the impression that she is seeking answers from the therapist and is not truthful. The defendant objects to the proximity as prejudicial for the same reasons as previously alleged.

The Court, during the hearing relative to this matter, had the

unique opportunity to observe the defendant. The defendant's posture and demeanor are threatening. His facial expressions did not change and he glared at the therapist during significant portions of her testimony.

The Court has also observed the dog in the courtroom setting, not only during this hearing, but during a prior jury trial. The dog simply laid down and did not move or sat up when she was petted. She had no reaction to a jury or anyone else. I am also mindful of the victim's total psychological and physical isolation, the allegation that the crimes, as alleged in the indictment and Bill of Particulars, occurred over a period of almost four years, beginning at age 11 and her prior relationship with the alleged perpetrator.

#### CONCLUSIONS OF LAW

The statute relied upon by the prosecution is Executive Law §642-a, which is entitled "Fair Treatment of Child Victims as Witnesses". That statute provides guidelines in the treatment of child victims by various agencies as the child victim traverses the criminal justice system. One such entity enumerated among those in Executive Law §645-a is the Courts, and as such, that statute is applicable to this proceeding.

An initial issue to be decided is whether the victim in this matter, who is currently 15 years old, falls within the parameters of Executive Law §642-a.

This issue is not one that appears to be answerable by a plain reading of the statute.

In Executive Law §642-a(6), the legislature incorporated two terms from CPL §190.32. Those terms are "Child Witness" and

"Special Witness".

Under CPL §190.32(1)(a), "Child Witness" is defined as follows:

"Child Witness" means a person 12 years old or less whom the People intend to call as a witness...to give evidence concerning any crime defined in Article 130...of the Penal Law of which the person was a victim.

A "Special Witness" as defined by CPL §190.32(1)b is:

"Special Witness" means a person whom the People intend to call as a witness... who is either:

- ii. More than 12 years old and who is likely to suffer very severe emotional or mental stress if required to testify in person concerning any crime defined in Article 130... of the Penal Law to which the person was a witness or of which the person was a victim".

Pursuant to this statute, the "Child Witness" may be videotaped for presentation to the Grand Jury. The prosecution, however, is required to make an ex parte application for a "Special Witness" when seeking the same relief.

The use of those two definitions appear to be strictly confined to the particularized assistance proposed in Executive Law §642-a(6), which provides, the opportunity for a person supportive of the victim to be "accessible" during the victim's testimony.

Nowhere else in Executive Law §642-a is the term "Special Witness" used, nor does the term "Child Witness" appear in quotations as it does in Executive Law §642-a(6) when it specifically refers to that term as defined in CPL §190.32.

In the remaining subdivisions of Executive Law §642-a, the term Child Victim and Child Witness are used interchangeably. Neither of those terms are specifically defined in Executive Law §642-a.

When trying to determine the scope of a statute and

interpreting the actions contemplated and faced with a clear ambiguity in the statutes, "the controlling principle in interpreting statutes is the legislative intent." See People v. White, 73 NY2d 468.

While the Court should first look toward the words the legislature used, it may not stop there, but then look to the spirit and purpose of act and the objectives to be accomplished. See Uniformed Firefighters Association v. Beekman, 52 NY2d 463; People v. White, supra.

Because the terms Child Victim and Child Witness are not specifically defined in Executive Law §642-a, and are used throughout the statute in a different manner from the CPL §190.32 terms of "Child Witness" and "Special Witness" referred to only in Executive Law §642-a(6), I feel that, in order to resolve this ambiguity, I must consider the legislative intent when Executive Law §642-a was enacted.

Executive Law §642-a was enacted in 1986 as part of Chapter 263 of the Session Laws of that year. When the law was proposed, the "legislative intent" that accompanied the bill provided as follows:

"The legislature recognizes that a significant number of children under 16 years of age are victimized by crime, and that these children are particularly vulnerable to criminal attacks by adults, including family members. The legislature further recognizes that children who are called upon to testify as witnesses in criminal proceedings involving crimes allegedly committed against them may suffer additional trauma. The legislature finds and declares that special protection, consideration and assistance must be provided child victims and witnesses to minimize such trauma and any ensuing problems occurring later in life that such trauma may cause.

This act ... accords child victims and witnesses additional rights, protections and services during their involvement with the criminal justice system ..."

It is clear that the purpose of Executive Law §642-a is to protect children under 16 years of age who are victimized by crime.

Therefore, I find that Executive Law §642-a, which establishes guidelines for the "Fair Treatment of Child Victims as Witnesses" is applicable to the 15 year old victim in this case. (emphasis supplied)

The second issue to be resolved is whether the victim in this matter suffers or would suffer very serious emotional or mental distress were she to testify in the defendant's presence at trial.

I accept the expert testimony of the People's witness who was recognized by this Court for her expertise in the field of Clinical Social Work. Ms. Stella's testimony establishes that the victim in this case currently suffers from serious emotional and psychological distress, including Post Traumatic Stress Disorder. As a result of very severe trauma beginning at age 11, the victim has great difficulty and may not be able to reasonably testify as a result of that stress. Likewise, since the victim's testimony is likely to cause severe emotional, mental and psychological stress, same necessitates the consideration of procedures to protect the victim's mental and emotional well-being while testifying. See Maryland v. Craig, 497 US 836.

The last issue to be decided is what, if any, special consideration this Court may give in providing protections under Executive Law §642-a when the victim testifies. The People have proposed that the child victim be permitted to utilize the services

of a companion dog at the time she testifies, pursuant to Executive Law §642-a.

The People argue that the use of "Rose", a companion dog, is permitted under Executive Law §642-a(4).

That statute states:

"The Judge presiding should be sensitive to the psychological and emotional stress a child witness may undergo when testifying."

The only reported case in New York regarding the application of this statute is a case of a similar nature, People v. Gutkaiss, 206 AD 628 (3rd Dept. 1994). In Gutkaiss, supra, the Appellate Division upheld the trial court's decision allowing a child victim to hold a teddy bear while testifying. The trial court's decision was found to be "entirely appropriate in view of Executive Law §642-a(4), which directs the judge presiding at a trial of this type (Sodomy in the First Degree) to be sensitive to psychological and emotional stress a child witness may undergo when testifying." Gutkaiss, (at page 631).

Having previously decided that the victim in this case is a person suffering from serious emotional and mental distress from the events alleged in the indictment and the bill of particulars, I find Executive Law §642-a(4) to be applicable. As such, it is the court's obligation to be sensitive to the psychological and emotional stress this victim will be subjected to while testifying against the alleged perpetrator.

While I do not accept defendant's claim of substantial prejudice, I do not take the defendant's argument lightly that to permit "Rose" to accompany the victim while she is testifying may be

prejudicial.

With an appropriately fashioned instruction to the jury, any possible prejudice will be minimized, if not eliminated. In this regard, I invite defense counsel to prepare proposed limiting and curative instructions. If appropriate, same will be adapted by the Court.

I find that the nature of the charges in the accusatory instruments, the victim "qualifying" as a child victim under Executive Law §642-a, the expert's opinion regarding the very severe emotional and psychological stress that the victim will undergo while testifying and my observations, permits, if not compels, the use of "Rose", a companion dog, during the victim's testimony.

This shall constitute the decision and order of this Court.

Dated: Poughkeepsie, New York  
June 1, 2011



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HON. STEPHEN L. GRELLER  
COUNTY COURT JUDGE

TO: WILLIAM V. GRADY, ESQ.  
Dutchess County District Attorney  
Kristine M. Hawlk, Esq.  
Senior Assistant District Attorney  
236 Main Street  
Poughkeepsie, NY 12601

David Martin, Esq.  
Senior Assistant Public Defender  
22 Market Street  
Poughkeepsie, NY 12601