

Legal Letters by Andrew Agatston -- The Legal List 12/21/12

The Legal Support for Facility Dogs at Trial

I had the great pleasure of training in Ohio recently. At the lunch break, I decided to wolf down my food so I could have time to sit with Nanook, a perfect yellow lab who works at Michael's House in Fairborn, Ohio. The lucky forensic interviewer who gets to take him home every night is Cynthia Gevedon.

As I recall our conversation, Nanook is introduced to the young children who arrive at the facility, in the lobby. The children are able to interact with Nanook, and also learn commands that Nanook knows once the children feel safe around him.

I started reading more about facility dogs afterward, including looking up some legal cases. This much is clear: the facility dogs allow the children to experience less anxiety and fear. The issue for me is what the cases would say about the use of facility dogs during the trial process.

Today's case does not involve a child molestation case, but instead the case of a developmentally disabled adult victim of theft and other crimes. The legal framework to analyze the use of the prosecutor's office's "facility" dog is instructive.

Case: *State v. Dye*, Washington Court of Appeals, Case No. 66549-9-1 (Decided August 27, 2012).

Facts: The victim in the case met a woman ("Alesha") who eventually became his "girlfriend." Shortly after, the woman, her mother, and two others moved into the victim's apartment. Alesha started using the victim's money, including money to buy a car. She also convinced the victim to withdraw \$59,000.00 from his retirement account. There was an additional litany of criminal acts perpetrated upon the victim by Alesha

Ultimately, Alesha's boyfriend, the Defendant, broke into the victim's home and took several items from the apartment. He was charged with residential burglary, and the State alleged that the victim was a "particularly vulnerable victim." Alesha pled guilty to theft in the first degree with a vulnerable victim aggravator.

Prior to trial, the State sought permission for a dog named Ellie to sit with the victim during his testimony. Ellie was the prosecutor's office's facility dog. The court granted the motion over the Defendant's objection. At trial, the trial judge instructed the jury to disregard the dog's presence. The defendant was found guilty of residential burglary. He appealed, citing numerous errors, including that the trial judge erred by allowing Ellie to be present at trial.

Result: Conviction affirmed.

Discussion: Today's case provides a look into the variety of arguments used by Defendants to try to keep facility dogs out of the courtroom, and how courts determine the appropriate balance between a witness's emotional need for an environment susceptible to testifying and a Defendant's due process rights.

The analysis in past cases has involved child witnesses and their ability to have "comfort" items with them while testifying on the stand. Today's case has significant similarities, as it involved a developmentally delayed adult who the State asserted had "significant anxiety regarding his upcoming testimony."

Laying the Foundation

It appears that the State's request for Ellie to sit with the victim was textbook. The State filed a pre-trial motion asserting that the use of Ellie was required based upon the facts of the case. It further urged that the trial court could grant the motion by exercising Court discretion to control courtroom proceedings and witness examination under the state's evidence code. Finally, the

State cited a previous Washington court of appeals decision as authority, which allowed a child witness in a child molestation trial to hold a doll while testifying.

Defense objections

The Defendant responded to the State's request on multiple grounds. First, he argued that Ellie's presence would distract the jury. He argued that it would deprive him of the right to a fair trial by interfering with his right to confront the victim. He argued that Ellie would create jury sympathy. He argued that Ellie's presence would encourage the jury to infer the victim's "victimhood." He argued that Ellie would give the victim incentive to testify in the State's favor. He argued allergies.

Notice that none of these reasons go to whether the victim in some way *needed* Ellie's presence. Rather, they all went to whether the trial court struck a proper balance between the victim's need for Ellie and the Defendant's right to a fair trial. I'll take the Defendant's "balancing" arguments in turn.

- (1) *Interference with cross-examination.* Here, the Defendant argued that Ellie effectively "screened" the defense attorney from the victim during cross-examination, akin to an *actual* screen placed between the defendant and a complaining witness. The latter situation was ruled by U.S. Supreme Court to interfere with a Defendant's Sixth Amendment right to a face-to-face confrontation. This argument was rejected, because in fact the dog's presence did not prevent the defendant from a face-to-face confrontation with the victim.
- (2) *Ellie's presence "foiled the mission" of cross-examination.* That dog won't hunt. (Sorry, I had to write that.) The Defendant was arguing here that Ellie's presence invaded the jury's province, and undermined the presumption of innocence. The Defendant also raised the specter that the dog could be seen as an "unsworn" witness.

Allow me to try to explain this latter argument. The theory is that dogs can react to human stress,

and thus will react (thus, be unsworn) to a victim who is upset because her or she is telling the truth.

The court of appeals was not persuaded, and instead looked to the purpose of the Confrontation Clause. *“The confrontation clause is normally satisfied if defense counsel receives wide latitude at trial to question the witnesses. The defense engaged in a lengthy and thorough cross-examination of (the victim), highlighting his memory problems and eliciting several inconsistent statements. There is no indication that the dog compromised Dye’s right of cross examination.*

(3) *The victim was biased or more suggestible because Ellie belonged to the prosecutor’s office.*

The Defendant sought to support this theory by arguing that the prosecutor’s office “orchestrated” the appearance of Ellie in order to create sympathy for the victim. The Defendant cited a Connecticut Supreme Court case, *State v. Aponte [249 Conn. 735 (1999)]*, which held that a prosecutor committed misconduct by giving a child witness a stuffed dinosaur to hold during her testimony. Had the child brought her own favorite item from her home, the Connecticut court wrote, there would be no basis for the objection. However, because the prosecutor provided the stuffed animal to the child, compounded with the trial court’s failure to permit cross-examination to *“explore the child’s possible bias or suggestibility,”* the Defendant was deprived his constitutional due process rights.

Here, the prosecutor did not give the victim any such toy or gift, and there was no allegation of prosecutorial misconduct. *“Further, even if Ellie’s temporary companionship was sufficient to create bias or sympathy, Dye does not allege any restriction on the defendant’s ability to expose the witness’s suggestibility deprived the defendant of due process.*

(1) *The trial judge failed to weigh emotional need against possibility of prejudice.* Both parties to the appeal analogized this case to cases involving child witnesses due to the adult victim’s developmental disabilities. As such, the cases involving children and “comfort” items for emotional support provided the authority necessary for the Washington court to deny

Defendant’s appeal. Specifically, *“a court may allow a child witness to hold a comfort item*

during testimony where the witness's need for emotional support outweighs the possibility of prejudice.

Here, the trial court found that Ellie would not distract the jury, and that Ellie was “very unobtrusive and will just simply be next to the individual, not laying in his lap.” This, combined with the court’s finding that the victim might suffer significant emotional trauma due to the courtroom experience, allowed the trial judge to conclude that Ellie’s presence was appropriate.

Finally, the judge charged the jury at the end of the evidence “*not to make any assumptions or draw any conclusions based on the presence of this service dog.*” The rule of law on this is that jurors are presumed to follow the jury instructions absent evidence to the contrary.

Best regards.

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