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IN THE

SUPREME COURT

OF THE

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS,

Plaintiff-Appellee,

v.

FRANKLIN R. PEREZ,

Defendant-Appellant.

Supreme Court Appeal Nos. 03-0020-GA & 03-0030-GA
Superior Court Criminal Case No. 02-0124-E

OPINION

Cite as: *Commonwealth v. Perez, 2006 MP 24*

Argued and submitted on February 2, 2005
Saipan, Northern Mariana Islands

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FOR PUBLICATION

BEFORE: MIGUEL S. DEMAPAN, Chief Justice; ALEXANDRO C. CASTRO, Associate Justice; and JOHN A. MANGLONA Associate Justice

PER CURIAM:

¶1 Franklin R. Perez ("Perez"), an indigent individual who was a special education teacher in the Commonwealth Public School System ("PSS"), was convicted of child abuse and assault and battery in the trial court. During the trial, he requested and was denied a state-funded expert witness who would have testified to the Lovaas behavior modification program.

¶2 Perez's case involves three distinct rubrics of behavioral norms: (1) the PSS's regulations for teacher discipline of students; (2) the Commonwealth's criminal statutes; and (3) the Lovaas method of "mirroring" behavior. Each rubric requires Perez to adhere to different standards of behavior. For example, behavior that Perez could use as a parent or guardian (reasonable corporal punishment) he could not as a teacher.[1] Because no expert testimony exists on the Lovaas system, this Court is unable to determine what is and is not allowed under the Lovaas "mirroring" method of behavior modification. Moreover, because each of the rubrics requires a different standard of behavior, Perez's ability to adequately defend himself was jeopardized by the lack of expert testimony. Therefore, the trial court abused its discretion when it rejected his request, and we reverse the conviction and order a new trial.

I.

¶3 Perez is a veteran special education teacher with thirty years of experience and holds degrees in the field of Special Education. PSS hired Perez and, beginning in 2000,

[1] *See* Commonwealth Register, Vol. 19, p. 14943 *et seq.* 1997.

tasked him with responsibility for teaching an autistic 13-year old boy referred to as RJ. Because of his autism, RJ would occasionally slap or hit others, and while under Perez=s care, RJ became increasingly dangerous to himself and others. In September and October of 2001, Perez, apparently unilaterally, implemented a behavioral modification program designed to modify RJ's recent behavior of pinching and hitting. It is unclear whether Perez implemented a complete Lovaas system, or just a Lovaas "style" behavior modification system.

¶4 The Lovaas method is a methodology for the education of children with autism developed by Dr. O. Ivar Lovaas at UCLA. It "involves breaking down activities into discrete tasks and rewarding a child's accomplishments." *MM ex rel. DM v. School District of Greenville County,* 303 F.3d 523, 528 n. 8 (4th Cir.2002). While it "has been widely modified over the years by professionals and parents, . . . common characteristics include intensive training one-on-one, 30-40 hours per week, discrete trial therapy (DTT), and an in-home component (as opposed to therapy in a professional setting)." *Dong v. Board of Ed. of Rochester Community Schools*, 197 F.3d 793, 797 (6th Cir.1999). Federal case law is replete with examples of parents suing school systems in an attempt pay for or force implementation of the Lovaas Method. *See, generally Adams v. State of Oregon,* 195 F.3d 1141, (9th Cir. 1999).

¶5 In this case the only part of the Lovaas method that garners mention is "mirroring." Simply stated, mirroring is a behavioral modification process that requires the instructor to mirror the bad behavior of the subject in an effort to extinguish that bad behavior. In this case, RJ would punch, slap and hit, so mirroring involved Perez hitting RJ when RJ hit. Perez admitted striking RJ four times, but only in the context of

behavioral intervention. Perez claimed that hitting RJ was consistent with established educational techniques and that the purpose behind hitting RJ was to modify aggressive behavior as dictated by the Lovaas method.

¶6 On April 22, 2002, the Attorney General's Office filed a three-count information against Perez alleging child abuse, assault and battery, and disturbing the peace. All counts in the information stemmed from Perez's striking of RJ. On November 12, 2002, Perez filed an *Ex Parte* Application for Government Funded Expert pursuant to Rule 44(a) of the Commonwealth Rules of Criminal Procedure. Without a hearing on the matter, the trial court issued an order denying Perez's application.

¶7 There were two trials for Perez, one held on March 20, 2003, and the other held on March 25, 2003. At the end of the Government's case and pursuant to Rule 29(a) of the Rules of Criminal Procedure, Perez moved for a judgment of acquittal. The trial court denied Perez-s motion; Perez renewed it at the end of trial and it was again denied. The trial court entered a Judgment of Conviction on March 26, 2003. On July 30, 2003, however, the trial court entered an Order Vacating Judgment Conviction, but maintained its findings of the guilt of Perez with respect to the crimes of Child Abuse and Assault and Battery. Perez now appeals.

II.

¶8 We have jurisdiction pursuant to Article IV, section 3 of the Commonwealth Constitution and 1 CMC § 3102(a).

III.

A. Standard of Review

¶9 The question of whether Perez was denied effective assistance of counsel when the trial court refused to appoint an expert witness is a mixed question of law and fact and is reviewed *de novo. See Commonwealth v. Esteves,* 3 N.M.I. 447, 453 (1993) (citations omitted). The inquiry, however, does not end there, as whether Perez made an adequate showing that assistance is reasonably necessary for his defense is left to the discretion of the trial judge, and therefore reviewed on an abuse of discretion basis. *See Arizona v. Clabourne*, 690 P.2d 54, 61 (Ariz. 1984); *see also North Carolina v. Phipps*, 418 S.E.2d 178, 190 (1992).

B. Effective Assistance of Counsel

¶10 "Every defendant who is unable to obtain counsel shall be entitled to have counsel assigned to represent him/her at every stage of the proceeding . . ." Comm. R. Crim. Pro. 44(a). Because the trial court denied Perez's request for an expert witness, his trial was fundamentally flawed. As discussed more fully below, without the expert testimony, the standards of conduct required of Perez became blurred to the point that it is unclear from the record whether the trial court found Perez guilty of child abuse because he was a teacher, which is improper, or because there was enough evidence to convict him of child abuse. Our examination of this matter begins with Perez's right to assistance of counsel.

¶11 48 U.S.C. § 1801[2] provides that the Sixth Amendment to the United States Constitution applies in the Commonwealth. The Sixth Amendment affords defendants the "assistance of counsel." "The right to counsel is the right to the effective assistance

[2] Commonly referred to as the Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union With the United Sates of America

of counsel," *McMann v. Richardson,* 397 U.S. 759, 771 & Note 14, and the right to effective assistance of counsel includes the right to expert testimony if the testimony is the gravaman of the defense. *Ake v. Oklahoma,* 470 U.S. 68 (1985). Perez, an indigent, requested the assistance of an expert but the request was denied without a hearing. The question before this Court is whether the absence of a hearing and the subsequent denial of Perez's request was a violation of his right to the effective assistance of counsel.

¶12 In *Ake,* the Supreme Court construed the Fourteenth Amendment=s due process clause to guarantee that, in a prosecution against an indigent defendant, the state Atake steps to assure that the defendant has a fair opportunity to present his defense.@ *Ake,* 470 U.S. at 76. One step the state must take is to ensure that the indigent defendant is provided with effective assistance of counsel. *See Strickland v. Washington,* 466 U.S. 668 (1984). Effective assistance of counsel includes furnishing the indigent defendant=s counsel with all the Abasic tools of an adequate defense.@ *See Ake,* 470 U.S. at 77. The *Ake* court held that a state-funded psychiatric expert is a Abasic tool@ for a defendant=s case. *See id.,* at 83 Subsequently, this right to a psychiatric expert has been expanded to private investigators, *State v. Fletcher,* 481 S.E.2d 418, 420 (N.C.App.,1997), mitigation experts, *Louisiana v. Craig,* 637 So.2d 437, 446-47 (La. 1994), and other types of experts. *See North Carolina v. Moore,* 364 S.E.2d 648 (N.C. 1988). These rulings, however, leave great room for abuse since the government is required to pay the fee of expert witnesses when such testimony is required by indigent defendants. As a result courts have sought to balance the defendant=s rights against those of the taxpayers. *See Craig,* 637 So. 2d. at 446. We are mindful of this problem as the Judiciary, along with all

branches of the Commonwealth Government, currently struggles with inadequate funding.

¶13 "Although the [United States] Supreme Court has not specifically stated what 'threshold showing' must be made by the indigent defendant with regard to the need for an expert, the Court refused to require the state to pay for certain experts when the indigent defendant "offered little more than undeveloped assertions that the requested assistance would be beneficial." *Caldwell v. Mississippi*, 472 U.S. 320, 323 n.1 (1985). This language has led to a threshold test used by many courts in an effort to combat abuse.

¶14 For a court to grant an indigent defendant the services of an expert at the expense of the state, he must establish that there exists a reasonable probability that (1) an expert would be of assistance to the defense and (2) the denial of expert assistance would result in a fundamentally unfair trial. *See Frank*, 803 So.2d at 15; *see also North Carolina v. Coffey*, 389 S.E.2d 48, 58 (N.C. 1990); *see also Ohio v. Mason*, 694 N.E.2d 932 (Ohio 1998). Today, we adopt this test for the Commonwealth, and the relevant inquiry for this court is whether Perez satisfied this test.

¶15 Perez's attorney stated, in his affidavit supporting the request for a government funded expert, that there were "legal issues as to whether the alleged striking was unlawful in the context of special education instruction and whether the alleged striking was reasonable corporal punishment." While such statements generally will not qualify under the above standard, in this rare instance it does because of the different standards of behavior required of Perez.

C. Standards of Behavior *Vis-à-vis* Child Abuse, PSS Regulations, and the Lovaas Method

1. Child Abuse

¶16 The people of the Commonwealth, through the Legislature, have determined the appropriate standard of behavior around children. Enshrined in our law is the prohibition on child abuse, which occurs when any individual:

> Willfully and intentionally strikes, beats or by any other act or omission inflicts physical pain, injury or mental distress upon a child under the age of 18 who is in the person's custody, such pain or injury being clearly beyond the scope of reasonable corporal punishment, with the result that the child's physical or mental health and well-being are harmed or threatened.

6 CMC § 1202. This law applies to all individuals in our commonwealth and is designed to ensure a minimum level of behavior everyone must follow. Reasonable corporal punishment is allowed in the Commonwealth. However, public schools have their own standards apart from our criminal code.

2. PSS Regulations

¶17 PSS is in charge of educating the children of the Commonwealth. This is a huge responsibility, and PSS has to oversee not only the children in its care, but the employees it has placed in authority over the children. The standard of conduct for professional teachers is much higher, as it should be, than what is expected from the general population. To wit, PSS has a regulation in place that forbids all corporal punishment. *See* Commonwealth Register, Vol. 19, p. 14943 *et seq.* 1997. Accordingly, no matter how reasonable, corporal punishment is not allowed in a Commonwealth public school. Presumably, this includes the Lovaas "mirroring" behavioral intervention.

3. Lovaas Method

¶18 A review of case law indicates the Lovaas method is a much broader program than the Lovaas "mirroring" method. *See e.g.,. Dong*, 197 F.3d at 797 (the Lovaas method includes intensive one-on-one training, 30-40 hours per week, discrete trial therapy, and an in-home component). Because there was no expert testimony on the Lovaas method, it is unclear if: (1) the Lovaas method is an accepted method in other school districts; (2) it can be implemented using only the "mirroring" part of the Lovaas system; and (3) if Perez's actions were within the accepted standard of behavior for the Lovaas system.

D. Legality of Lovaas

¶19 All three of the above rubrics, Commonwealth Criminal Code, PSS regulations, and Lovaas, require different minimum behavior standards from the individuals they apply to. For example, a parent may spank a child for disobedience, but a teacher cannot take the same action without violating PSS procedure. If a teacher engages in the same spanking, assuming he took exactly the same actions taken by the parent, it is legal, but a violation of PSS's regulations. Similarly, and more in line with the facts in this case, depending on the legitimacy of the Lovaas system, a parent or caregiver might very well use the Lovaas method to a great degree of success at home, but such actions could not be done in a school setting because PSS doesn't allow corporal punishment.[3] That does not mean, however, that using the Lovaas system is child abuse.

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[3] This, of course, assumes that the Lovaas method of mirroring bad behavior is corporal punishment. Although it certainly seems to fit the standard definition, it is possible that practitioners do not consider "mirroring" corporal punishment.

E. Child Abuse and the Lovaas Method

¶20 The trial court convicted Perez of Child Abuse, 6 CMC § 5312(a)(1), and Assault and Battery, 6 CMC § 1202(a). For the Government to obtain a conviction for child abuse, it must demonstrate, beyond a reasonable doubt, that the defendant:

> Willfully and intentionally strikes, beats or by any other act or omission inflicts physical pain, injury or mental distress upon a child under the age of 18 who is in the person's custody, such pain or injury ***being clearly beyond the scope of reasonable corporal punishment***, with the result that the child's physical or mental health and well-being are harmed or threatened.

6 CMC § 5312(a)(1) (emphasis added). In its judgment, the trial court noted that the evidence it used to establish what qualified as reasonable corporal punishment was: (1) PSS's regulations forbidding such punishment; (2) federal authority governing the applicability of Individual Educational Plans ("IEP"); (3) testimony of aides who did not "feel right" about mirroring RJ's behavior; (4) testimony from RJ's mother; and (5) Perez's own opinion that he struck or pinched RJ with equal force.

¶21 Beyond the equal protection problem presented by this analysis,[4] it seems the trial court overlooked some problems.[5] To be convicted of child abuse, the Government must establish that the defendant's conduct was "beyond the scope of reasonable corporal

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[4] We are troubled that the trial court in this case used PSS's regulations as part of the determining factors in finding child abuse. The use of the regulations is problematical because they forbid all corporal punishment. To use such a standard gives the appearance that different individuals could receive different outcomes for the same acts. Using PSS's regulations gives the appearance of a heightened **legal standard,** *vis-à-vis* the criminal statutes**,** for teachers when only a heightened **professional standard** exists. While parents and teachers can and are subject to differing standards of conduct in a public school setting, they should not be subject to different standards in the eyes of the law as it pertains to what is, and is not, child abuse. To do so would allow a parent or nanny to engage in conduct that is legal while, simultaneously, illegal for a teacher, or other PSS employee. While PSS would be well within its rights to fire an individual for breaking established regulations, the Government cannot use a heightened bar (PSS allows no corporal punishment but the general population may use reasonable corporal punishment) to gain convictions against members of the teaching profession.

[5] As explained below, we note that although Perez's request for a government funded expert was sufficient due to the circumstances, similarly thinly worded requests will, generally, not carry the day with a trial court and certainly not with this Court.

punishment." 6 CMC § 5312(a)(1). This requires two steps: (1) were the acts corporal punishment, and (2) were they reasonable? For a conviction, the trial court cannot simply assume there was corporal punishment and skip ahead to a flawed reasonableness determination. At trial, nobody addressed whether or not the Lovaas Method of mirroring is corporal punishment and whether or not it is reasonable outside the PSS setting. These are legal issues where an expert could have assisted the trial court, and the trial court's denial hampered Perez's defense. Thus, the trial court abused its discretion.

¶22 The record in this case indicates that the line between illegal conduct (as defined as Child Abuse) and a termination offense (PSS's corporal punishment ban) were blurred. While it is possible that Perez acted in a way that was both illegal and required termination,[6] it is also possible that Perez's actions were legal but still required, or at the very least suggested, termination. We note that while Perez's acts might still cost him his job, that does not mean that such acts were child abuse as defined by 6 CMC § 5312(a)(1).

¶23 The trial court needed to examine Perez's behavior under the rubric of the Commonwealth's law against child abuse. The Judgment indicates that the trial court found Perez guilty of child abuse *vis-à-vis* Perez's position as a teacher. It is improper to use Perez's status as a teacher to make it easier to convict him of a crime. An expert witness in the Lovaas behavior modification system might have been able to introduce evidence of the acceptance of the method. Indeed, an expert witness might have testified that the Lovaas method as applied by Perez does not constitute corporal punishment. If the Lovaas method, as implemented by Perez, is not child abuse in a non-PSS setting, it is

[6] For example, stabbing a child would be both illegal and a violation of PSS regulations for all individuals in the Commonwealth. The Court is not convinced that the complained of acts are child abuse outside the public school setting.

improper to convict a man for the same actions because they were done in a PSS setting. We, however, cannot determine if a parent or other authorized caregiver may implement the Lovaas behavior modification system legally because there was no expert testimony. And because there was no testimony, Perez did not receive a fair trial.

¶24 Again, Perez, as any indigent defendant, is only entitled to funds once the trial court, in its sound discretion, finds that the defendant made a particularized showing (1) of a reasonable probability that the requested expert would aid in his defense, and (2) that the denial of the requested expert assistance would result in an unfair trial. *State v. Mason* 694 N.E.2d 932 (Ohio 1998). Perez requested an expert to testify regarding "legal issues as to whether the alleged striking was unlawful in the context of special education instruction and whether the alleged striking was reasonable corporal punishment." Generally, such a non-specific statement about his need for expert assistance would be insufficient. Many courts have held that due process does not require the government to provide expert assistance to an indigent defendant in the absence of a particularized showing of need. *See, id.* [The] defendant must show a reasonable probability that an expert would aid in his defense[.]" *State v. Broom* 533 N.E.2d 682 (Ohio 1988). Fortunately for Perez, and his attorney, the legal issues surrounding a child with special needs are apparent. Even though Perez failed to make a particularized showing to the trial court, we are of the opinion that, for this specific case, he did just enough. While Perez's request would almost certainly fail under any other fact pattern, it passed in this instance.[7]

[7] Future litigants would do well to examine this standard and make sure they are able to make a particularized showing.

¶25 Intertwined with his complaint regarding an expert witness, Perez complains that he did not receive a hearing. Perez did not request a hearing on the motion so that he could argue more completely. The trial court need not honor any and all requests by indigent defendants in a "fishing expedition" with the remote hope of uncovering some justification for reasonable doubt. *State v. McLaughlin*, 562 N.E.2d 1387 (Ohio 1988). To ensure a hearing, a defendant should precisely explain how the expert testimony would aid her defense and how, exactly, she would be harmed by the denial of the request. Finally, she should request a hearing on the matter. Failure to take these steps could very well result in a legitimate denial that this Court will not overturn.

F. Perez's Trial Was Unfair

¶26 Because we find that the trial court abused its discretion when it denied Perez's request for a government funded expert witness, we see no need to comment on Perez's remaining complaints. Although Perez was also convicted of assault and battery, we are convinced that the underlying trials were unfair and that he is entitled to a new one. The trial court's denial of his request was an abuse of discretion and it interfered with Perez's ability to receive a fair trial.

III.

¶27 Perez's request in almost any other instance could only be described as a generally deficient request for a government funded expert witness. However, due to the legal issues involved with educating a special needs child, and due to the trial court's blurring the distinction between the laws of the Commonwealth and the regulations of the Public School System, Perez's request was just enough to warrant an expert witness.

Because he was denied an expert witness, Perez did not receive a fair trial and, therefore, the judgment is REVERSED and a NEW TRIAL ORDERED.

SO ORDERED THIS 14TH DAY OF DECEMBER 2006.

/s/ Miguel S. Demapan
MIGUEL S. DEMAPAN
CHIEF JUSTICE

/s/ Alexandro C. Castro
ALEXANDRO C. CASTRO
ASSOCIATE JUSTICE

/s/ John A. Manglona
JOHN A. MANGLONA
ASSOCIATE JUSTICE