STATE OF NEW JERSEY, Plaintiff-Appellant, v. C.M., Defendant-Respondent.

DOCKET NO. A-5087-11T4

SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

2013 N.J. Super. Unpub. LEXIS 1760

March 5, 2013, Submitted
July 16, 2013, Decided

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PLEASE CONSULT NEW JERSEY *RULE 1:36-3* FOR CITATION OF UNPUBLISHED OPINIONS.

PRIOR HISTORY: [*1]
On appeal from the Superior Court of New Jersey, Law Division, Somerset County, Indictment No. 11-12-0817.

COUNSEL: Geoffrey D. Soriano, Somerset County Prosecutor, attorney for appellant (Robin L. Yerich, Assistant Prosecutor, of counsel and on the briefs).

Caruso Smith Edell Picini and Mitzner & Mitzner, attorneys for respondent (Steven J. Kaflowitz, on the brief).

JUDGES: Before Judges Fisher, Alvarez and St. John.

OPINION

PER CURIAM

By leave granted, the Somerset County Prosecutor's Office appeals a May 15, 2012 Law Division interlocutory order denying the State's application to obtain the medical records of defendant C.M. He is charged in two counts of third-degree diseased person committing an act of sexual penetration, *N.J.S.A. 2C:34-5(b)*. Each count corresponds to a separate alleged victim. The disease in question is human immunodeficiency virus (HIV). For the reasons that follow, we affirm in part and reverse in part.

We briefly summarize the facts gleaned from the record. Defendant and Courtney[1] were in a dating relationship from January or February 2011 through August 2011, when she learned that defendant was HIV positive. That month, defendant agreed that Courtney could accompany him to an appointment [*2] with his treating physician. On August 30, 2011, they met with defendant's doctor, who informed Courtney that years earlier defendant had been diagnosed with HIV and that she should be tested because of the risk of infection. Courtney recorded the conversation and turned the tape over to the prosecutor's office. Courtney initially learned about defendant's medical status from a woman he had previously dated, Nancy.

1 Pseudonyms have been used to preserve anonymity and for ease of reference.

Nancy's relationship with defendant came to a close towards the end of 2010 or beginning of 2011[2] when defendant directed her attention to an explanation of his medications. In that fashion, she learned they were prescribed for HIV patients and that defendant was HIV positive.

2 Defendant objects to the use of this information regarding Nancy both on appeal and

> by the trial judge on the basis that it was drawn from a certification by an investigator, and was not taken from a certification or affidavit in compliance with *Rule 1:6-6*, which requires that motions based on facts not of record be supported by "affidavits made on personal knowledge, setting forth only facts which are admissible in evidence [*3] to which the affiant is competent to testify . . . ." As this information does not affect our decision, we do not address his objection.

The trial judge denied the State's pretrial motion to obtain defendant's medical records because he found that the State had not established good cause as required by *N.J.S.A. 26:5C-9(a)*, and because the records were protected by the patient-physician privilege. *See N.J.S.A. 2A:84A-22.1 to -22.7*; *N.J.R.E. 506*. The court ruled that the conversation between Courtney and defendant's treating physician was protected by the privilege as well.

The State raises the following points on appeal:

> POINT I
>
> HIPAA AND STATE LAW ALLOWS FOR THE RELEASE OF THE DEFENDANT'S MEDICAL RECORDS AS THEY PERTAIN TO HIS HIV STATUS AS THERE IS A LEGITIMATE LAW ENFORCEMENT PURPOSE TO BE SERVED BY SUCH DISCLOSURE AND THERE IS GOOD CAUSE WARRANTING DISCLOSURE
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> POINT II
>
> THE DEFENDANT WAIVED THE PATIENT-PHYSICIAN PRIVILEGE OR ALTERNATIVELY THE PRIVILEGE HAD BEEN PIERCED
>
> POINT III
>
> THE CONVERSATION BETWEEN THE DEFENDANT'S DOCTOR AND THE VICTIM IS ADMISSIBLE AS EVIDENCE IN THIS MATTER.

I

We review the trial court's denial of the State's request to obtain defendant's medical records for abuse of [*4] discretion. *See State v. Enright, 416 N.J. Super. 391, 404, 4 A.3d 1027 (App. Div. 2010), certif. denied, 205 N.J. 183, 13 A.3d 1290 (2011)*. We do not disturb the trial court's findings "simply because [we] 'might have reached a different conclusion were [we] the trial tribunal.'" *State v. Handy, 206 N.J. 39, 44-45, 18 A.3d 179 (2011)* (quoting *State v. Johnson, 42 N.J. 146, 162, 199 A.2d 809 (1964)*). Nevertheless, it is well-established that our review of the trial court's legal conclusions is plenary. *Id. at 45*.

II

We affirm the trial court's ruling that defendant's medical records were unavailable. The State's contention is correct that the Federal Health Insurance Portability and Privacy Act of 1996, Public Law 104-191 (HIPAA) authorizes disclosure of medical records for the purpose of prosecutions such as the one here. HIPAA prohibits the disclosure of "protected health information" by a health care provider without the written consent of the individual. *45 C.F.R. § 164.512*. Protected health information is defined as "individually identifiable health information," such as the medical records pertaining to defendant's HIV status. *See 45 C.F.R. § 160.103*.

Nevertheless, disclosure is permissible, "for a law enforcement purpose to a law [*5] enforcement official" if certain conditions are met. *45 C.F.R. § 164.512(f)*. Under this section, disclosure is permitted

> [i]n compliance with and as limited by the relevant requirements of: (A) A court order . . . provided that: (1) The information sought is relevant and material to a legitimate law enforcement inquiry; [and] (2) The request is specific and limited in scope to the extent reasonably practicable in light of the purpose for which the information is sought.
>
> [*Ibid.*]

If defendant's records are disclosed it would be pursuant to a court order for a law enforcement purpose, and HIPAA therefore does not bar their disclosure.

But our State statute on the subject, however, bars release, contrary to the State's argument that *N.J.S.A. 26:5C-9(a)* authorizes disclosure where the public's need

establishes good cause. The statute reads in relevant part as follows:

> (a) The record of a person who has or is suspected of having AIDS or HIV infection may be disclosed by the order of a court of competent jurisdiction which is granted pursuant to an application showing good cause therefor. At a good cause hearing the court shall weigh the public interest and need for disclosure against the injury [*6] to the person who is the subject of the record, to the physician-patient relationship, and to the services offered by the program. Upon the granting of the order, the court, in determining the extent to which a disclosure of all or any part of a record is necessary, shall impose appropriate safeguards to prevent an unauthorized disclosure.
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> (b) A court may authorize disclosure of a person's record for the purpose of conducting an investigation of or a prosecution for a crime of which the person is suspected, only if the crime is a first degree crime and there is a reasonable likelihood that the record in question will disclose material information or evidence of substantial value in connection with the investigation or prosecution.
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> (c) Except as provided in subsections a. and b. of this section, a record shall not be used to initiate or substantiate any criminal or civil charges against the person who is the subject of the record or to conduct any investigation of that person. . . .

First, we do not believe that the legislature intended *subsection (a)* to apply to criminal prosecutions. *Subsection (b)*, which permits disclosure only for the investigation or prosecution of "a first degree [*7] crime," would be rendered meaningless if the investigation or prosecution of lesser crimes could constitute good cause under *subsection (a)*. We read statutory provisions "in context with related provisions so as to give context to the legislation as a whole." *DiProspero v. Penn, 183 N.J. 477, 492, 874 A.2d 1039 (2005)*.

Turning to *subsection (b)* of the statute, it is clearly inapplicable here, as defendant is only charged with third-degree offenses. Finally, *subsection (c)* of the statute states that "[e]xcept as provided in subsection a. and b. of this section, the record shall not be used to initiate or substantiate any criminal or civil charges against the person who is the subject of the record or to conduct any investigation of that person . . . ." Since neither *subsection (a)* or *(b)* are applicable, it follows that defendant's medical records are unavailable to the State as section (c) specifically bars use of medical records to pursue criminal charges against a defendant.

Additionally, the State cannot obtain the records, as the trial judge ruled, because of the physician-patient privilege embodied in *N.J.R.E. 506* and *N.J.S.A. 2A:84A-22.1 to -22.7*. Defendant was a "patient" within the meaning of [*8] the rule, and the State points to no exception which makes the information accessible. *N.J.R.E. 506*; *N.J.S.A. 2A:84A-22.1*. We therefore find, as did the trial judge, that the State cannot compel disclosure of defendant's medical records. We do not reach the State's additional points on the subject as we consider them so lacking in merit as to not warrant discussion in a written opinion. *R. 2:11-3(e)(2)*.

III

We now reach the State's contention that defendant's invitation to Courtney to accompany him to a doctor's visit waived any privilege regarding his physician's statements. We agree. *N.J.R.E. 530* states that the privilege is waived where a person has "without coercion and with the knowledge of his right or privilege, made disclosure of any part of the privileged matter or consented to such disclosure made by anyone." That is precisely what occurred when defendant permitted his treating physician to meet with Courtney, answer her questions, and speak to her regarding his condition. But we cannot fairly construe defendant to have waived his privilege as to his medical records by virtue of having taken Courtney with him to one doctor's visit and having allowed her to question his treating [*9] physician as to his condition and her own treatment. *See State v. Mauti, 208 N.J. 519, 532, 33 A.3d 1216 (2012)*.

As reiterated in *Mauti*, "'waiver is the voluntary

relinquishment of a known right evidenced by a clear unequivocal decisive act from which an intention to relinquish the right can be based.'" *Id. at 539* (quoting *Mitchell v. Alfred Hofmann, Inc., 48 N.J. Super. 396, 405, 137 A.2d 569 (App. Div.), certif. denied, 26 N.J. 303, 139 A.2d 589 (1958)*). No privilege exists as to the doctor's visit. But defendant would have had no reason to believe that his waiver stretched beyond the parameters of that visit and that dialogue with his doctor. The physician-patient privilege is narrowly construed, but not so narrowly as to be meaningless. *See Mauti, supra, 416 N.J. Super. at 188*; *State v. Phillips, 213 N.J. Super. 534, 545, 517 A.2d 1204 (1986)* ("there need not be wholesale invasion of the privilege."). Therefore, we hold that the State may play the recording of the visit to the jury as defendant waived the privilege with regard to the meeting.

Affirmed in part; reversed in part.