

IN THE COURT OF COMMON PLEAS FOR LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA

v.

**CARL PARKER,
Defendant**

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CR-1476-2015

OPINION AND ORDER

On November 18, 2016, this Court held a hearing on the Defense Motion for Hearing Pursuant to 18 Pa.C.S. § 3104 and Defense Motion in Limine to Preclude Expert Report. Defense Counsel has also filed a Motion for the Production of the Complainant's Medical, Psychological, Psychiatric and Therapy records after the November 18, 2016, hearing was scheduled and the parties agreed to submit the third issue on briefs.

Defense Counsel submitted a Memorandum in Support of Defendant's Motion for the Production of the Complainant's Medical, Psychological, Psychiatric and Therapy in Records on December 2, 2016.

The Commonwealth submitted a brief on the expert testimony and medical records issue on December 5, 2016.

Procedural History

On June 13, 2016, this Court entered an Opinion and Order denying the Commonwealth's Motion to Quash Subpoena and ordered the East Lycoming School District to provide C.P.'s discipline records for an in camera review by this Court. By return letter, dated July 12, 2016, the law firm of McNerney, Page, Vanderlin & Hall

indicated to the Court that its client, the East Lycoming School District, “was unable to locate any disciplinary records for Ms. P.”

Testimony

Testimony of Adam Creasy

Creasy is the East Lycoming School District of Director of Technology. He remembered the student C.P. but did not remember the incident for which he was called to testify. He never spoke with Mr. Renn regarding Ms. P.’s computer use.

Testimony of Steven Renn

Renn, on the date of his testimony, was employed as an assistant principal at Shikellamy School District. From the years of 2012-2106, he was employed as a Business Computer Information Technology Teacher at East Lycoming School District and C.P. was one of his students. It was brought to his attention that Ms. P. was using her classroom computer inappropriately. He was unaware of what the specific inappropriate use was but he did “recover” the computer from C.P. Defendant submitted Defendant’s Exhibit 2, a series of emails from D.P. (C.P.’s mother identified hereafter as “mother”) to the school and between both of Ms. P.’s biological parents (Mrs. P. and Mr. P.).

Email one is an email from mother stating that “All previous computer/internet usage authorizations for C.P. to access electronic devices that connect to the internet have been rescinded.” Page two of the email correspondence is from a teacher at East Lycoming asking mother whether it would be okay for C.P. to do class presentation using his laptop to which her mother replied “As long as she does not have access to the internet, she may use your laptop. I’m curious to know how she has been able to

put together a PowerPoint presentation since she does not have computer access at home". 9/04/2012. The third email exchange provided is mother restricting C.P.'s computer access and the attempts of the school to comply with mother's wishes. The same description applies to the fourth email exchange provided by Defense Counsel. It is a more complete version of the third email exchange, but again reflects the mother's restriction of C.P.'s computer use at school, not the reverse.

The fifth email exchange provided in Defendant's Exhibit #2 is an email from Renn stating that C.P. has been exceptional in Animation class. Additionally Mr. Renn states "I have seen no issue of inappropriate computer usage at all. FYI." 11/18/2012. The fifth email exchange also provides an email from Mr. P. to mother asking if C.P. could use hippocampus.org to learn background on Newton's three laws of motions to which mother replies "As long as Mr. Zerbe, provides close supervision, her internet access is limited in scope and is for the sole purpose of completing her assignment." Mother, 11/19/2013. Email six is an email from mother to Mr. Renn regarding computer usage. Mother asks Mr. Renn to not divulge their conversation nor permit C.P. to have a laptop. Again no response to mother's email is provided that would indicate that the school agrees with mother's allegations against her daughter. Email seven, dated 8/27/2013, is authored by mother and states "she [C.P.] violated their rules and regulations resulting in the school confiscating the laptop". Again, there is no corroborating email message from any school official giving any sort of indicia of truthfulness to Defendant's wife's i.e. mother's statements. An email from Mrs. P. to rlorson@elsd.org on 8/31/2013, reflects her wish that C.P. would not be permitted to use computers and/or internet at school. On 9/3/2012, Principal Lorson did forward

mother's request to all of her teachers but again it was mother's request that the school prohibit C.P.'s use of school computers and the internet.

Testimony of Jeremy Eck

Eck is a guidance counselor at Eastern Lycoming School District. Mother reported to him that C.P. told her about an incident at home. Eck spoke with C.P. and she denied the incident occurring. Eck was unable to recall whether C.P. denied the conversation with her mother but he did say that after his conversation with C.P., no further investigation took place. He called mother to let her know the results of his conversation with her daughter.

Testimony of D.P. (mother)

Mother testified that Renn told her that the school confiscated C.P.'s laptop as she was using it to send sexually explicit messages. She testified that C.P. told her that two males were bullying her at school and a boy grabbed her butt.

Discussion

I. Motion for Hearing Pursuant to 18 Pa.C.S. § 3104

Defendant is charged with Aggravated Indecent Assault¹, complainant less than 16 years of age, a felony of the second degree; Aggravated Indecent Assault² without consent, a felony of the second degree; Indecent Assault³, two counts, both misdemeanors of the second degree; Endangering the Welfare of Children⁴ –

¹ 18 Pa. C.S. § 3125(a)(8).

² 18 Pa. C.S. § 3125(a)(1).

³ 18 Pa. C.S. § 3126(a)(8) and 3126(a)(1).

⁴ 18 Pa. C.S. § 4304(a)(1).

parent/guardian/other, a felony of the third degree; and Corruption of Minors⁵ – sexual offenses, a felony of the third degree.

The first four counts are charges under Chapter 31, Sexual Offenses in Pennsylvania's crimes and offenses statutory law. In order to submit evidence in a trial under Chapter 31, Sexual Offenses, the moving party must comply with Pennsylvania's Rape Shield Law: To Wit:

§ 3104. Evidence of victim's sexual conduct.

(a) General rule. --

Evidence of specific instances of the alleged victim's past sexual conduct, opinion evidence of the alleged victim's past sexual conduct, and reputation evidence of the alleged victim's past sexual conduct shall not be admissible in prosecutions under this chapter except evidence of the alleged victim's past sexual conduct with the defendant where consent of the alleged victim is at issue and such evidence is otherwise admissible pursuant to the rules of evidence.

(b) Evidentiary proceedings. --

A defendant who proposes to offer evidence of the alleged victim's past sexual conduct pursuant to subsection (a) shall file a written motion and offer of proof at the time of trial. If, at the time of trial, the court determines that the motion and offer of proof are sufficient on their faces, the court shall order an in camera hearing and shall make findings on the record as to the relevance and admissibility of the proposed evidence pursuant to the standards set forth in subsection (a).

18 Pa.C.S. § 3104.

The Rape Shield Law does not allow evidence of victim's past sexual conduct unless it concerns past sexual conduct with the accused. The Defense team has tried to portray for the Court evidence of C.P.'s past sexual behavior. The Defense Team has failed to provide any evidence of C.P.'s past sexual conduct. The Court does not even reach the questions of relevance or admissibility because it finds no evidence of past sexual behavior with Defendant or otherwise that would require closer scrutiny by

⁵ 18 Pa. C.S. § 6301(a)(1)(ii).

the Court. What Defense Counsel has provided is that mother would not allow her daughter to use the computer or internet and contacted the school repeatedly regarding her wishes. The school complied with mother's wishes; Mr. P. complied with mother's wishes.

II. Motion in Limine to Preclude Expert Report

The Commonwealth seeks to offer the expert testimony of Sharon K. Beirne, Legal Advocate from the Abuse and Rape Crisis Center in Towanda, Pennsylvania. The Commonwealth seeks to admit such expert testimony based upon the statutory authority of 42 Pa.C.S. § 5920 (expert testimony in certain criminal proceedings), which provides *inter alia* that in a criminal proceeding for an offense under 18 Pa.C.S. Chapter 31 (as is the case at bar),

- (1) a witness may be qualified by the court as an expert if the witness has specialized knowledge beyond that possessed by the average layperson based on the witness's experience with, or specialized training or education in....victim services issues, related to sexual violence, that will assist the trier of fact in understanding the dynamics of sexual violence, victim responses to sexual violence and the impact of sexual violence on victims during and after being assaulted.
- (2) If qualified by an expert, the witness may testify to facts and opinions regarding specific type of victim responses and victim behaviors.
- (3) The witness's opinion regarding the credibility of any other witness, including the victim, shall not be admissible.
- (4) A witness qualified by the court as an expert may be called by the attorney for the Commonwealth or the defendant to provide the expert testimony.

42 PA.C.S. § 5920. EXPERT TESTIMONY IN CERTAIN CRIMINAL PROCEEDINGS (2012).

The Supreme Court of Pennsylvania, in 2015, considered whether Section 5920's provision allowing for expert testimony regarding victim responses to sexual assaults violates its exclusive constitutional "power to prescribe general rules governing practice, procedure and the conduct of all courts" under Article V, Section

10(c) of the Pennsylvania Constitution. The Supreme Court of Pennsylvania concluded that Section 5920 does not constitute an impermissible procedural rule but rather is a proper exercise of legislative authority to enact a rule of evidence. COMMONWEALTH V. OLIVO, 127 A.3D 769, 777 (PA. 2015). In his dissent, then Mr. Justice Eakin explained why he believed Section 5920 was an impermissible vouchsafing of an expert testifying to credibility, precisely what Defense Counsel complains of in her motion to exclude the testimony. Based upon the statutory authority and the approval of that statute by the Supreme Court of Pennsylvania, however, the Court must deny the motion to preclude the expert testimony of Ms. Beirne. The Commonwealth's expert witness will not be able to testify regarding the credibility of C.P. in accordance with the statute.

III. Motion for Production of the Complainant's Medical, Psychological, Psychiatric & Therapy Records

Defense Counsel argues that because C.P.'s medical records will show that she never told any health care providers that she was sexually abused by the Defendant⁶, that is exculpatory evidence and the Commonwealth is obligated to provide it to her. Brady v. Maryland⁷ held that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution. The Court does not believe that this duty to produce exculpatory evidence extends to the Commonwealth finding exculpatory evidence for the Defense. The ability to question adverse witnesses (i.e. the Confrontation Clause) does not include the power to require pretrial disclosure of any and all information that might be useful to

⁶ But see paragraph 25 of Defendant's motion, where Counsel states that Dorothy Ashman, MA made a report to Children and Youth Services regarding sexual abuse after seeing complainant on January 15, 2015.

⁷ 373 US 83 (1963).

contradicting unfavorable testimony. Pa. v. Ritchie, 480 U.S. 39, 51 (1987). Moreover, the Commonwealth is willing to stipulate to the fact that there was a gap in time between the alleged abuse and the reporting of the alleged abuse. Further evidence of that fact is not necessary. Lastly, there is an absolute privilege against producing these types of records. See Title 42 Section 5944 (confidential communications to psychiatrists or licensed psychologists):

No psychiatrist or person who has been licensedto practice psychology shall be, without written consent of his client, examined in any civil or criminal matter as to any information acquired in the course of his professional services in behalf of such client. The confidential relations and communications between a psychologist or psychiatrist and his client shall be on the same basis as those provided or prescribed by law between an attorney and client.

42 PA.C.S. § 5944. CONFIDENTIAL COMMUNICATIONS TO PSYCHIATRISTS OR LICENSED PSYCHOLOGISTS (1989).

In United States ex rel. Patosky v. Kozakiewicz, 960 F. Supp. 905 (W.D. Pa. 1997) an indecent assault victim's psychiatric records were protected by an absolute privilege under 42 Pa. C.S. Section 5944, and not subject to disclosure under any circumstances absent the victim's consent. Moreover, the denial of defendant's access to the records did not violate the federal due process clause or defendant's federal right to confrontation.

Defense Counsel cites Pa. v. Ritchie, 480 U.S. 39 (1987) in support of its Motion that the Court Order Production of Medical Records, etc. The Supreme Court of the United States remanded a case to the Court of Common Pleas to review Children and Youth records in camera. The Pennsylvania Supreme Court held that Ritchie, through his lawyer, has the right to examine the full contents of CYS records. The court found that this right to access is required by both the Confrontation Clause and the

Compulsory Process Clause. Pennsylvania at 51. The Supreme Court of the United States did not accept the Supreme Court of Pennsylvania's ruling saying that such acceptance would "transform the Confrontation Clause into a constitutionally compelled rule of pretrial discovery" if Defense Counsel was able to view all of the records and make its own determination regarding what was relevant. Id. at 52. Rather, the Supreme Court of the United States remanded the matter to the Common Pleas Court to make an in camera determination of the relevance of Children and Youth Records.

In Commonwealth v. Guy, 454 Pa. Super. 582 (1996) (Petition for Allowance of Appeal Denied), the Superior Court did not reach the issue of whether medical records were subject to absolute statutory privilege because it determined the first question to ask was "are those records relevant?" Mother, because she provided health insurance for C.P., is able to determine where her daughter received medical care and lists these places in paragraph 7, paragraph 12, paragraph 15, paragraph 19, paragraph 20, paragraph 22, paragraph 25, paragraph 26, paragraph 27, and paragraph 28 of her Motion for the Production of the Complainant's Medical, Psychological, Psychiatric and Therapy records. Forensic Psychologist Leigh Hagan proposes that she review the medical records so she can separate "the wheat from the chaff." Affidavit of Dr. Hagan, pg. 4 of 5. The Court will not require her services in this regard because like in Guy, the Court finds the medical records evidence to be irrelevant to any of the elements of the crimes charged.

ORDER

AND NOW, this 8th day of February, 2017, after testimony, argument and briefing, the following is ORDERED AND DIRECTED

1. The evidence proffered at the 11/18/2016 hearing is inadmissible at trial.
2. The Motion in Limine to Preclude Expert Report is DENIED.
3. The Motion for the Production of the Complainant's Medical, Psychological, Psychiatric and Therapy records is DENIED.

BY THE COURT,

Nancy L. Butts, P.J.

cc. ADA (MK)
Mary Kilgus, Esq. Defense Counsel
Gary Weber, Esq. Lycoming Law Reporter
Susan Roinick (work file)