2002

# State of Utah v. Arthur Anthony Gonzales : Unknown

Utah Court of Appeals

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October 5, 2004



Pat Bartholomew
Clerk of the Utah Supreme Court
450 South State Street, 5th Floor
P.O. Box 140854
Salt Lake City, UT 84114-0854

Re: *State v. Arthur Anthony Gonzales*, Case # 20020935

Dear Ms. Bartholomew:

Based on Utah Rule of Appellate Procedure 24(i), I wish to clarify a concern that some of the justices of the Utah Supreme Court expressed yesterday at oral argument in the case listed above. Specifically, some justices asked why neither of the defense attorneys below re-issued a subpoena for the contested psychological records. I argued that Judge McCleve's ruling foreclosed any further requests for in camera review of the psychological records.

In her memorandum decision, Judge McCleve ruled that because she believed that defense counsel obtained the psychological records in bad faith, sanctions were warranted. See Record on Appeal ("R.") at 264-66; Addendum. Accordingly, she ordered "that the information so obtained by subpoena may not be used at trial and the defense counsel will write an apology to the victim for having inappropriately obtained it." R. at 266.

I hope that this passage clarifies any confusion over trial counsels' actions. Should this Court have any further concerns or questions, I would be happy to assist the Court in any way.

Sincerely,

Kent R. Hart

cc: Marian Decker, Assistant Utah Attorney General
Gregory Skordas, Jack M. Morgan, Jr., Liani Jeanheh, and Douglas Beloof, attorneys for amicus curiae

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

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| **THE STATE OF UTAH,** | : | **MEMORANDUM DECISION** |
| **Plaintiff,** | : | CASE NO. 011905307 |
| **vs.** | : | |
| **ARTHUR ANTHONY GONZALES,** | : | |
| **Defendant.** | : | |

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This matter comes before the Court on a Motion to Quash and Sanction pursuant to defendant's obtaining the victim's psychological records without her waiver of privilege and in violation of the Utah Rules of Evidence.

In March of this year defense investigators attempted to serve a subpoena on the victim's mother in order to obtain names of mental health providers where the victim may have obtained treatment. In response, the Assistant District Attorney sent a letter to defense counsel asking that further contact with the victim be made through the District Attorney's Office. Defense counsel was informed that the victim was specifically not waiving any privilege with regard to her mental health records, that she would move to quash any subpoenas designed to gain access to those records and that she would invoke her victim's rights pursuant to statute. On April 8th, entered by Minute Entry, the Court ordered

any contact with the victim's family to be arranged through the District Attorney's Office.

In April, two subpoenas were issued to mental health providers without copies provided to the victim, her guardian or the prosecution. Defense counsel had also obtained mental health records of the victim from University Neuropsychiatric Institute ("UNI") by subpoena, again without sending copies to the victim or the opposing party.

Defense counsel obtained the records from UNI pursuant to a signed, notarized Affidavit executed by defense counsel which stated that the victim had placed her mental and physical health at issue in a case. After complying with the subpoena, UNI informed defense counsel that the records had been given to him in error. At the time of UNI's acknowledgment of error, the Assistant District Attorney was not made aware by defense counsel of the claim of error. The prosecution did discover and bring to the attention of the Court on April 8th that defense counsel had obtained and kept the records.

Defense counsel did not inform the Court of the claim of error, did not return the documents of UNI and did not turn the documents over to the Court until the Court ordered him to do so on April 8th. At that time, defense counsel willingly supplied the records and freely admitted he had already read, marked and

obtained information from the records in preparation for his representation of the defendant. Defense counsel believed that although he had full access to the records, the defendant himself had had limited access to the information his lawyer obtained.

The information which defense counsel has with respect to treatment providers and any conditions from which the victim previously suffered comes directly from these medical records.

Since April 8th, the medical records have been kept under seal and reviewed only by the Court.

Though it may be proper for the Court to review *in camera* the alleged victim's medical records without her waiver of privilege, there is no law, even where an exception to privilege allows a defendant access to otherwise confidential records, that gives a defendant the right to examine all of the confidential information or search through files without supervision.

In this case, defense counsel, without Court knowledge or approval, obtained confidential medical records claimed to be supplied in error and then defense counsel studied them in aid of preparation for his case.

It certainly is reasonable to conclude that the defendant would also have to be informed regarding the information in order to participate in his own defense. Further, it is impossible to divorce defense counsel's knowledge obtained from the privileged

information from his knowledge of the rest of the case or to determine or monitor how that knowledge of privileged information has affected the strategy and knowledge of the rest of the case.

Additionally, defense counsel obtained the medical records by representing that the victim/patient had "placed mental or physical condition at issue as a claim or defense in a lawsuit (emphasis added)." Nothing factually supports this representation. The patient is the alleged victim of the crime, not a party raising a claim or defense. Rather, it is the defendant who seeks the information for possible impeachment purposes in aid of his defense.

To interpret the language relied upon by defendant in the Affidavit to mean that such privileged information could be intended to be obtained for possible purposes of impeachment as part of a "defense," without anything factually in support of piercing the privilege, would eliminate the privilege altogether since any defense, indeed any case, always allows possible impeachment of any witness. The language upon which defendant relies on its face and by its plain meaning in the context of the phrase cannot be so broadly read. The patient must "place mental or physical condition at issue as a claim or defense in a lawsuit." Merely by being required to take the stand as a witness, the victim

has not placed her mental condition at issue as a claim or defense in a lawsuit.

Having obtained access to very personal and possibly embarrassing information about the victim, the defendant asserts but has not shown that the victim is "an emotionally unstable and troubled young girl who is pathologically dishonest and manipulative who fabricated her story in order to prevent her mother from marrying Mr. Gonzales." But whether that assertion could justify an order requiring health care providers to submit privileged records to the Court for an *in camera* review in aid of impeachment is not the issue here. That issue was not timely or appropriately brought to the Court.

The facts here are that defendant, by subpoena, erroneously (plaintiff asserts deceptively) obtained, and UNI erroneously provided, privileged information without waiver of privilege. And most importantly, once error in providing privileged information was asserted by UNI, defense counsel did not immediately submit the records to the Court to be kept under seal until the issue of error could be determined. Instead, he maintained and studied them until the prosecution's Motion to Quash came before the Court.

If the defendant relies on State v. Cardall, 982 P.2d 79 (Utah 1999), as the basis for his right to access to victim's records, as it appears he does, then he must also accept that the determination

of privileged records' discoverability, according to that case, was to have been determined by the Court's *in camera* review before he could have acquired access to their contents. Accordingly, in this case at the service of the subpoena he could have directed the recipients of the subpoenas to turn over the records under seal to the Court before he read and studied them.

Certainly, defense counsel knew the privilege existed. Certainly he knew that the prosecution claimed the privilege and would strongly oppose any exception to be taken to it. Certainly he knew, as well, that UNI asserted error in having complied with defendant's subpoena. And before he issued the subpoenas, certainly he knew or should have known, that without waiver of privilege, the Cardall case implied and required Court scrutiny of the information sought prior to piercing the privilege. Finally, how could counsel not have known or realized that once he had obtained and reviewed the privileged information it would become impossible to remove the taint of that knowledge from his representation in the case?

Clearly, the Motion to Quash the subpoenas must be granted. Even assuming the defendant's erroneous interpretation (that victim's mental state is an element of a claim or defense in the criminal trial) is a good faith interpretation of law, still he evidences a suggestion of a lack of good faith here by having

reviewed the privileged information prior to Court scrutiny. This conclusion is supported by the fact that he relies upon the Cardall case to claim access to the records which itself also prerequisites Court scrutiny prior to access.

As sanctions, the Court orders that the information so obtained by subpoena may not be used at trial and the defense counsel will write an apology to the victim for having inappropriately obtained it.

Despite his good character and reputation, by having obtained knowledge of the witness which cannot now be erased, defense counsel has inserted a question whether the trial can be a fair one which is not able to be resolved. Of equal concern, by tainting his knowledge of the case with irretractable, impermissible, privileged information about the witness, counsel appears to have created a conflict that calls into question the professional ethics of his continued representation of the defendant.

Dated this 14th day of June, 2002.

SHEILA K. MCCLEVE
DISTRICT COURT JUDGE

STATE OF UTAH DISTRICT COURT