

Deshawn Tyson # 253494 v. Warden

CV064001202

SUPERIOR COURT OF CONNECTICUT, JUDICIAL DISTRICT OF TOLLAND AT
ROCKVILLE

2007 Conn. Super. LEXIS 2932

November 5, 2007, Decided

November 5, 2007, Filed

NOTICE: THIS DECISION IS UNREPORTED AND MAY BE SUBJECT TO FURTHER APPELLATE REVIEW. COUNSEL IS CAUTIONED TO MAKE AN INDEPENDENT DETERMINATION OF THE STATUS OF THIS CASE.

JUDGES: [*1] Angelo L. dos Santos, J.

OPINION BY: Angelo L. dos Santos

OPINION

Memorandum of Decision

On November 22, 2005, the petitioner entered a plea of guilty under the Alford 1 doctrine to one count of sexual assault in the first degree in violation of General Statutes §53a-70(a)(1). 2 The petitioner was there-after sentenced to eighteen years imprisonment, suspended after nine years, followed by ten years of probation. In the present habeas action the petitioner claims, inter alia, that he was deprived of the effective assistance of trial defense counsel and that he is actually innocent.

1 North Carolina v. Alford, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970).

2 Docket Number CR05 0128443.

On June 14, 2007, the petitioner filed three Applications for Qualified Protective Orders through which he seeks authorization for the disclosure of records kept by the Milford Rape Crisis Center, Griffin Hospital and the Yale Child Sexual Abuse Clinic that concern the victim in the petitioner's underlying criminal case. The petitioner asserts that good cause exists for the disclosure of these records in that "they are necessary as to provide the parties and the Court with pertinent information regarding whether the complainant [*2] was a victim of force." 3 In support of the applications the petitioner relies on the Health Insurance Portability and Accountability Act of 1996 (HIPAA), 42 U.S.C. §1320a-1320d-8. The respondent filed an objection 4 to the applications on June 19, 2007. A hearing on the matter was held on August 29, 2007. Based on a review of the pleadings and relevant law, the court hereby denies the petitioner's Applications for Qualified

Protective Orders.

3 General Statutes §53a-70(a)(1) provides: "A person is guilty of sexual assault in the first degree when such person . . . compels another person to en-gage in sexual intercourse by the use of force against such other person or a third person, or by the threat of force against such other person or against a third person which reasonably causes such person to fear physical in-jury to such person or a third person."

4 The respondent filed a "Motion to Strike" pursuant to Practice Book §10-39(a). Section 10-39(a), however, pertains to a party's desire to contest the legal sufficiency of a complaint. The legal sufficiency of the amended habeas petition is not at issue here; the issue involves whether the court should grant the petitioner's applications [*3] for a protective order. The court will therefore consider the respondent's "Motion to Strike" as an objection to the petitioner's Applications for a Protective Order.

Discussion

In general, HIPAA and its regulations protect the privacy of health-related information. Such information is defined under the regulations as "protected health information." 5 The privacy of health information is also protected under state law though the General Statutes. Section 52-146k(b) creates a privilege for communications between a sexual assault counselor and a victim:

[A] sexual assault counselor shall not disclose any confidential communications made to such counselor at any time by a victim in any civil . . . proceeding . . . unless the victim making the confidential communications waives the privilege . . .

This section covers the records 6 held by the Milford Rape Crisis Center. Section 52-146o(a) creates a privilege for communications or information shared between a physician and his or her patient:

[I]n any civil action . . . a physician . . . shall not disclose (1) any communication made to him by, or any information obtained by him from, a patient . . . with respect to any actual or supposed physical [*4] or mental disease or disorder or (2) any information obtained by personal examination of a patient unless the patient . . . explicitly consents to such disclosure.

5 "Protected health information means individually identifiable health information . . . (i) Transmitted by electronic media; (ii) Maintained in electronic media; or (iii) Transmitted or maintained in any other form or medium." 45 C.F.R. §160.103.

"Individually identifiable health information is information that is a subset of health information, including demographic information collected from an individual, and: (1) Is created or received by a health care provider, health plan, employer, or health care clearinghouse; and (2) Relates to the past, present, or future physical or mental health

or condition of an individual; the provision of health care to an individual; or the past, present, or future payment for the provision of health care to an individual; and (i) That identifies the individual; or (ii) With respect to which there is a reasonable basis to believe the information can be used to identify the individual." 45 C.F.R. §160.103.

6 §52-146k(a)(3), "confidential communication" is defined as "information transmitted between [*5] a victim of . . . a sexual assault and a . . . sexual assault counselor in the course of that relationship and in confidence . . . and includes all information received by, and any advice, report or working paper given or made by, such counselor in the course of the relationship with the victim."

This section covers the records held by Griffin Hospital and the Yale Child Sexual Abuse Clinic.

In the present case, the petitioner seeks disclosure of the victim's private health information without her personal authorization or consent. The petitioner relies on HIPAA regulation 45 C.F.R. §164.512(e)(1)(i), which authorizes a "covered entity" (such as the providers named above) to disclose private health information without an individual's authorization or consent "in the course of any judicial or administrative proceeding . . . [i]n response to an order of a court." The respondent asserts that this provision does not apply because General Statutes §§52-146k and 52-146o provide greater protection against the disclosure of private health information.

The HIPAA regulations supersede contrary state law relating to private health information 7 unless the state law is "more stringent" than a standard [*6] adopted under the regulations. 45 C.F.R. §160.203(b). A state law is "more stringent" if "[w]ith respect to a disclosure, the law prohibits or restricts a use or disclosure in circumstances under which such use or disclosure would be permitted under" the regulations. 45 C.F.R. §160.202.

7 A state law "[r]elates to the privacy of individually identifiable health information" when it has the "specific purpose of protecting the privacy of health information or affects the privacy of health information in a direct, clear, and substantial way." 45 C.F.R. §160.202. General Statutes §§52-146k and 52-146o clearly fall under this definition.

As stated above, the provision relied upon by the petitioner allows for the disclosure of private health information in the course of any judicial proceeding in response to a court order. 45 C.F.R. §164.512(e)(1)(i). No further specifications are made. Disclosure without patient authorization, therefore, is broadly permitted. To the contrary, §§52-146k and 52-146o permit disclosure without patient authorization only in very limited circumstances.

Under §52-146k(e), the privilege established by the statute does not apply "(1) In Matters of proof concerning [*7] chain of custody evidence; (2) in matters of proof

concerning the physical appearance of the victim at the time of the injury; or (3) where the . . . sexual assault counselor has knowledge that the victim has given perjured testimony . . ." These are the only times, provided by the statute, that a sexual assault counselor may disclose information absent a waiver from the victim.

Similarly, under §52-146o(b), explicit consent of the patient is not required for the disclosure of privileged information in only certain circumstances: "(1) pursuant to any statute or regulation of any state agency or the rules of court, (2) by a physician . . . against whom a claim has been made, or there is a reasonable belief will be made, in such action or proceeding, to his attorney or professional liability insurer . . . for use in the defense of such action or proceeding, (3) to the Commissioner of Public Health for records of a patient of a physician . . . in connection with an investigation of a complaint, if such records are related to the complaint, or (4) if child abuse, abuse of an elderly individual, abuse of an individual who is physically disabled or incompetent or abuse of an individual with [*8] mental retardation is known or in good faith suspected." It is clear to this court that §§52-146k and 52-146o prohibit disclosure where the HIPAA regulation relied upon by the petitioner would allow it. Sections 52-146k and 52-146o provide greater protection of the victim's private health information and are therefore not preempted by HIPAA. 8

8 Courts in other jurisdictions have come to the same conclusion after a comparison of state laws that create a physician-patient privilege and 45 C.F.R. §164.512(e). See *In Re Matter of Antonia*, 16 Misc.3d 637, 838 N.Y.S.2d 872 (2007); *Grove v. Northeast Ohio Nephrology Assoc.*, 164 Ohio App.3d 829, 844 N.E.2d 400 (2005).

The petitioner also argues in his Supplemental Memorandum in Support of the Applications for Protective Orders that the requested disclosures are permissible under the exception to the sexual assault counselor-victim privilege provided by §52-146k(e)(2) and the exception to the physician-patient privilege provided by §52-146o(b)(1). The court is not persuaded.

As noted above, §52-146k(e)(2) allows disclosures by sexual assault counselors "in matters of proof concerning the physical appearance of the victim at [*9] the time of the injury." (Emphasis added.) The petitioner has given no indication, however, that the victim had contact with a sexual assault counselor "at the time of the injury" or anytime soon thereafter. Thus, there is absolutely no basis under subsection (e)(2) to allow the disclosure of the victim's Milford Rape Crisis records.

Under §52-146o(b)(1), a physician need not obtain the consent of his or her patient for the disclosure of privileged information "pursuant to any . . . rules of court." The petitioner is correct that Practice Book §23-38(c) allows the court to order limited discovery in habeas matters as "will enhance the fair and summary disposal of the

case." The petitioner's arguments pertaining to the disclosure of the victim's privileged health information, however, have not convinced this court that a legal basis exists to order the discovery of such sensitive materials.

Finally, the petitioner asserts that he has made a sufficient offer of proof to allow the disclosure of the victim's records under §54-86f, 9 Connecticut's rape shield statute.

9 The petitioner relies on §54-86f(4), which provides: "In any prosecution for sexual assault under sections 53a-70, 53a-70a, [*10] and 53a-71 to 53a-73a, inclusive, no evidence of the sexual conduct of the victim may be admissible unless such evidence is . . . otherwise so relevant and material to a critical issue in the case that excluding it would violate the defendant's constitutional rights."

Petitioner's reliance on §54-86f is inappropriate. Under §54-86f, the admissibility of evidence of the victim's sexual conduct is determined "only after a hearing on a motion to offer such evidence containing an offer of proof." First, the admissibility of evidence is not at issue here; it is the disclosure of privileged information that the petitioner seeks. Second, the transcript from the victim's interview at the Yale Child Sexual Abuse Clinic is not, as the petitioner asserts, devoid of any indication that the petitioner used force or the threat of force against the victim. 10

10 According to §53a-65(7), "use of force," as relevant in the petitioner's case, means the "use of actual physical force or violence or superior physical strength against the victim." See also *State v. Williams*, 16 Conn.App. 75, 79-81, 546 A.2d 943 (1988).

Based on the foregoing, the petitioner's Applications for a Protective Order with reference [*11] to the Milford Rape Crisis Center, Griffin Hospital and the Yale Child Sexual Abuse Clinic are denied.

Angelo L. dos Santos, J.