2021 IL App (3d) 200121

Opinion filed August 31, 2021

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2021

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| THE PEOPLE OF THE STATE OF ILLINOIS,<br><br>Plaintiff-Appellee,<br><br>v.<br><br>ISMAEL GOMEZ-RAMIREZ,<br><br>Defendant,<br><br>(AMITA Health Adventist Medical Center Bolingbrook and Alexian Brothers-AHS Midwest Region Health Company,<br><br>Contemnors-Appellants). | ) | Appeal from the Circuit Court of the 12th Judicial Circuit, Will County, Illinois.<br><br>Appeal No. 3-20-0121<br>Circuit No. 18-CF-1946<br><br>The Honorable Edward A. Burmila, Jr., Judge, presiding. |

PRESIDING JUSTICE McDADE delivered the judgment of the court, with opinion.
Justices Lytton and Wright concurred in the judgment and opinion.

## OPINION

¶ 1 The trial court held AMITA Health Adventist Medical Center Bolingbrook and Alexian Brothers-AHS Midwest Region Health Company (collectively, AMITA Health) in civil contempt for failing to comply with a subpoena order to produce medical records the State requested. AMITA Health challenges the subpoena as unenforceable because it required the

hospital to violate the physician-patient privilege recognized and protected by the Illinois Constitution. The State argues that the privilege does not apply to AMITA Health and that the State's own duty under the United States Constitution requires production of the records. After considering the arguments from the parties and the briefs from the *amici curiae*[1] in this case, we vacate the trial court's contempt order.

¶ 2 I. BACKGROUND

¶ 3 The State charged Ismael Gomez-Ramirez with one count of aggravated battery, in violation of section 12-3.05(a)(1) of the Criminal Code of 2012 (720 ILCS 5/12-3.05(a)(1) (West 2018)), and one count of battery, in violation of section 12-3.2(a)(2) (*id.* § 12-3.2(a)(2)). The bill of indictment alleged that Gomez-Ramirez "knowingly and without legal justification caused great bodily harm to Evelyn Rodriguez, in that [he] stomped [her] about the body." Rodriguez received medical treatment from AMITA Health starting on October 6, 2018. In June 2019, the Will County State's Attorney issued a subpoena requesting that AMITA Health "produce medical records and documents related to Evelyn Rodriguez." AMITA Health responded to the request for the records by stating that it was "unable to comply with [the] request for the disclosure" until certain documents were provided.

¶ 4 On November 7, 2019, the trial court issued a subpoena order to AMITA Health to produce the records. The same day, AMITA Health filed a motion to quash the subpoena, raising two objections to production: (1) the documents are protected under the physician-patient privilege codified in section 8-802 of the Code of Civil Procedure (735 ILCS 5/8-802 (West 2018)) and (2) the State failed to provide Rodriguez the notice and hearing required to overcome the privilege. The court heard arguments on the motion to quash on December 5, 2019.

[1] Three *amici curiae* filed briefs in this case. We are grateful for their interest and participation in facilitating our fully informed consideration of the issues before us.

¶ 5 The State argued that it was obligated to obtain the records. It contended that the defendant's due process and confrontation rights overrode the physician-patient privilege. It also argued that the privilege only applies when the defendant is trying to obtain the records sought. The State contended that because it—and not the defendant—was seeking the records, the privilege did not apply. On December 18, 2019, the trial court denied the motion to quash. The court noted that the "6th Amendment in the United States Constitution says that defendants in criminal cases are entitled to compulsory process." It ordered AMITA Health to produce the records by or on January 15, 2020 "for an in-camera inspection before [ruling] on whether or not the hospital is entitled to the protective order."

¶ 6 On January 7, 2020, counsel for AMITA Health sent a letter to Rodriguez regarding the subpoena and the trial court ruling. The letter notified her of the pending order and the court hearing scheduled for January 15, 2020. Included in the letter were a copy of the subpoena and a Spanish translation of the letter. Counsel requested that Rodriguez contact him or the State Attorney's office to express her wishes concerning disclosure of her records. In closing, the letter stated:

> "If you do nothing, it is possible that the judge will require disclosure of your medical records at the January 15 hearing or hold AMITA Health in contempt of court for refusing to comply with the court's order requiring the records to be disclosed."

AMITA Health received no response from Rodriguez.

¶ 7 On January 9, 2020, AMITA Health filed a motion to reconsider. Included in the motion was the hospital's request that, if reconsideration were denied, the trial court find it in civil contempt for noncompliance in order to permit an immediate appeal. The court denied the

motion to reconsider and held AMITA Health in civil contempt on February 19, 2020. First, the court found that Gomez-Ramirez had expressed a need for the medical records and that the "State's Attorney had subpoenaed the records, not the defendant." It then reasoned that the "State's Attorney has a continuing and ongoing duty to produce both inculpatory and exculpatory information and they must provide that on an ongoing basis pursuant to Supreme Court Rules on discovery." Finally, it concluded that the State had complied with article I, section 8.1(a)(2) of the Illinois Constitution. Ill. Const. 1970, art. I, § 8.1(a)(2). The court ordered AMITA Health to pay $500 a day until it complied with the subpoena but stayed the order until after AMITA Health secured a decision from this court.

¶ 8 On February 28, 2020, AMITA Health filed its notice of appeal. On June 29, 2021, after briefing was completed and oral argument had been held, the State filed a motion to supplement the record. The State requested that we consider a disclosure authorization form, signed by Rodriguez on June 22, 2020. Included with the form are affidavits from Assistant State's Attorney Alexandra Molesky and Yadira Aparicio, an employee of the Will County State's Attorney's office. Both affidavits averred that the State notified Rodriguez of the litigation regarding her medical records and that she agreed to cooperate with the State. Aparicio averred that she spoke with Rodriguez on June 12, 2020, at which time she agreed to sign the form. Neither Molesky nor Aparicio stated when the State received the signed form or averred that AMITA Health had been made aware of a signed consent at any time prior to the State's disclosure of its existence at oral argument in this court.

¶ 9 II. ANALYSIS

¶ 10 When a party is held in civil contempt "for violating, or threatening to violate, a pretrial discovery order, the discovery order is subject to review." *Norskog v. Pfiel*, 197 Ill. 2d 60, 69

(2001). Thus, our task requires us to review the underlying order whose compliance the civil contempt order is designed to coerce. *Id.* "Where the underlying order cannot be complied with, there can be no finding of civil contempt." *In re Marriage of Pavlovich*, 2019 IL App (1st) 172859, ¶ 29. "In other words, civil contempt exists where (1) the contemnor has the ability to comply with the underlying court order and, (2) so long as the contemnor complies with the underlying order, no further sanctions are imposed." *Id.* If the underlying order turns on the applicability of the law to uncontroverted facts, the question is one of law, which we review *de novo*. *People v. Damkroger*, 408 Ill. App. 3d 936, 940 (2011).

¶ 11 A. The Requirements of Section 8-802

¶ 12 AMITA Health contends that the physician-patient privilege of the Illinois Constitution precludes it from complying with the subpoena order. The privilege is codified in Section 8–802 of the Code of Civil Procedure, which states in pertinent part:

> "No physician or surgeon shall be permitted to disclose any information he or she may have acquired in attending any patient in a professional character, necessary to enable him or her professionally to serve the patient, except [enumerated exceptions]." 735 ILCS 5/8–802 (West 2018).

Thus, this case turns on our construction of section 8–802, a question of law that we review *de novo*. *Palm v. Holocker*, 2018 IL 123152, ¶ 21.

¶ 13 Our primary goal is to give effect to the legislature's intent, taking the language of section 8-802 as the best indication of that intent. *People ex rel. Department of Professional Regulation v. Manos*, 202 Ill. 2d 563, 570–71 (2002). " 'To accomplish this goal, words used in the statutory provision should be given their plain and ordinary meaning.' " *Id.* (quoting *People v. Hicks*, 164 Ill. 2d 218, 222 (1995)). "Where statutory language is clear and unambiguous, it

will be given effect without resort to other aids of construction." *Holocker*, 2018 IL 123152, ¶ 21. The language of section 8-802 is clear and unambiguous: it "provides that information acquired by physicians and surgeons in attending patients may not be disclosed except in the specifically enumerated situations provided in the statute." *Id.* ¶ 37. With this enumeration, "the legislature established a limited number of circumstances in which physicians and surgeons are allowed to produce confidential patient record information." *Manos*, 202 Ill. 2d at 576.

¶ 14 The State contends that, because there are statutory exceptions, section 8-802 creates only a qualified prohibition and thus allows courts to examine the records *in camera*. We need not determine whether section 8-802 created an absolute or qualified prohibition to reject the State's contention. None of the 14 enumerated statutory exceptions limited the prohibition by requiring or permitting courts to first determine the relevance of the records through an *in camera* evaluation. See generally 735 ILCS 5/8–802 *et seq.* (West 2018). The applicability of each exception turns on the nature of the cases raising the privilege—not the content of the records themselves. "Courts must apply these existing exceptions and cannot create additional exceptions to the privilege." *Manos*, 202 Ill. 2d at 576.

¶ 15 At oral argument and for the first time in this case, the State disclosed that Rodriguez was cooperating with the State and had consented to the release of her records. It suggested—quite hesitantly—that because consent occurred the issue is moot. But it failed to clarify when or if Rodriguez (or the State itself) communicated her consent to AMITA Health. Subsequently, the State sought leave of this court to supplement the record on appeal with a signed consent form and asked that we consider it. "Rule 329 [citation] allows the record on appeal to be supplemented only with evidence actually before the trial court." (Internal quotation marks omitted.) *Maier v. CC Services, Inc.*, 2019 IL App (3d) 170640, ¶ 17; Ill. S. Ct. R. 329 (eff. July.

1, 2017). The release form was not signed until June 22, 2020, four months after the trial court entered its contempt order (February 19, 2020) and AMITA Health filed its notice of appeal (February 28, 2020). The trial court never considered the consent form because the form did not exist while the disclosure issue was before it. Neither the form nor the attached affidavits establish whether the existence of a written consent was communicated to AMITA Health. We will consider neither in reviewing the trial court's order.[2]

¶ 16 Instead, we hold that the hospital was mandated to assert the physician-patient privilege to ensure that Rodriguez's records would be protected in accordance with section 8-802. Unless the State can establish the existence of a section 8-802 exception, AMITA Health must comply with the statutory prohibition against disclosure. *Parkson v. Central DuPage Hospital*, 105 Ill. App. 3d 850, 853-54 (1982). The State contends that *Parkson* is distinguishable because Rodriguez had "notice" of the proceedings concerning her records. It argues that AMITA Health has no standing to assert the physician-patient privilege on her behalf. The State is incorrect. The *Parkson* court ruled that the hospital had to assert the privilege because it was the only entity from whom the records were sought. *Id.*[3] Similarly here, the State served its subpoena solely on AMITA Health and offered no evidence before the trial court that Rodriguez consented to

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[2]Subsection 8-802(3) allows disclosure in a case in which "the expressed consent of the patient" is obtained. 735 ILCS 5/8-802(3) (West 2018). Without any indication that the trial court knew of and considered the signed form, we cannot determine that this exception applies. We note that Aparicio averred that Rodriguez began cooperating in October 2018 and was made aware of the issue regarding disclosure of her medical records. However, Rodriguez did not respond to AMITA Health's inquiries on her wishes on the issue, and the State did not surrender her signed consent form until after briefing was completed and oral argument had been held in this appeal. Therefore, the State could have obviated the need for this appeal and its associated costs by promptly notifying the hospital of Rodriguez's cooperation and signed consent.

[3]The *Parkson* court also discussed section 8-802(2), which allows disclosure "in actions, civil or criminal, against the physician for malpractice." 735 ILCS 5/8-802(2) (West 2018). It concluded that section 8-802(2) was inapplicable because the records were of nonparty witnesses. Although the parties mentioned this discussion, there is no claim in this case against a physician for malpractice, and therefore, we find section 8-802(2) irrelevant to the case and issue before us.

disclosing her records. No section 8-802 exceptions are predicated on whether the patient received notice of the State's request.

¶ 17 B. The State's Duty to Obtain the Records

¶ 18 The trial court found that the State "has a continuing and ongoing duty to produce both inculpatory and exculpatory information." It concluded that AMITA Health could not avail itself of section 8-802. We find that the trial court misconstrues the State's duty under *Brady v. Maryland*, 373 U.S. 83 (1963), and Illinois Supreme Court Rule 412 (eff. Mar. 1, 2001). The *Brady* rule and Rule 412, which codifies *Brady*, do not allow the State to circumvent the privilege in this way.

¶ 19 "The *Brady* rule is based on the requirement of due process," serving "to ensure that a miscarriage of justice does not occur." *United States v. Bagley*, 473 U.S. 667, 675 (1985). Under *Brady*, the State must disclose favorable, material evidence "in its possession" to the defendant. *Pennsylvania v. Ritchie*, 480 U.S. 39, 57 (1987). The rule enshrines our constitutional understanding that prosecutors play a crucial role in ensuring that justice is served not merely for crime victims but in upholding defendants' constitutional rights to a fair trial. To this end, the rule seeks to eliminate any asymmetry of information between the State and the accused. Prosecutors cannot feign ignorance of material, favorable evidence that is well within their power to obtain. "To comply with *Brady*, the prosecutor has a duty to learn of favorable evidence *known to other government actors*, including the police." (Emphasis added.) *People v. Beaman*, 229 Ill. 2d 56, 73 (2008) (citing *Kyles v. Whitley*, 514 U.S. 419, 437 (1995)). Therefore, the rule applies to evidence within prosecutors' actual or constructive possession.

¶ 20 At its core, however, the *Brady* rule is one of disclosure whereby the most vulnerable party receives information relevant and material to its cause. It assists defendants in conducting

"reasonable and diligent investigation," which would have otherwise been impeded "when the evidence is in the hands of the State." (Internal quotation marks omitted.) *Strickler v. Greene*, 527 U.S. 263, 287-88 (1999). But the rule requires disclosure only under certain circumstances, meeting specific requirements. *Id.* at 281–82 (ruling "[t]here are three components of a true *Brady* violation"); see also *United States v. Agurs*, 427 U.S. 97, 109 (1976) (concluding "the Constitution surely does not demand" a broad rule of discovery). It prohibits actual or inadvertent suppression by the State of evidence that is in its control. *Greene*, 527 U.S. at 282. It "does not apply to evidence not in the possession of the government that a defendant would have been able to discover himself through reasonable diligence." *United States v. Tadros*, 310 F.3d 999, 1005 (7th Cir. 2002).

¶ 21 In this case, *Brady*'s aims are fully satisfied because the parties are under the same constraint in obtaining the records. The trial court found that Gomez-Ramirez had expressed a need for the records and that the "State's Attorney had subpoenaed the records, not the defendant." Both parties are aware of the records and are equally hindered by section 8-802 from obtaining them. Thus, the State has no *Brady* duty to provide the records to Gomez-Ramirez because it never possessed them and has no greater ability to obtain them.

¶ 22 Similarly, the State has no duty to obtain the records under Rule 412. Much like the *Brady* rule, Rule 412 is one of disclosure, protecting defendants "against surprise, unfairness and inadequate preparation." *People v. Robinson*, 157 Ill. 2d 68, 79 (1993). It "provides for the disclosure of materials and information within the State's possession." *Id.* It does not require the State to seek out information not within its possession or control. See, *e.g.*, *People v. Dixon*, 228 Ill. App. 3d 29, 40 (1992) (refusing to find "it *** the responsibility of the State's Attorney to obtain information which is in the possession of the United States Attorney").

¶ 23 C. Gomez-Ramirez's Sixth Amendment Rights

¶ 24 The sixth amendment right to compulsory process "is an essential attribute of the adversary system itself." *People v. McLaurin*, 184 Ill. 2d 58, 88 (1998) (citing *Taylor v. Illinois*, 484 U.S. 400, 408 (1988)). However, the right is not absolute, nor does it grant the defendant unfettered authority in obtaining witnesses in his favor. *Id.* at 89. "The defendant must make at least some plausible showing of how" witness testimony or evidence sought to be offered "would have been both material and favorable to his defense." *Id.* (citing *United States v. Valenzuela-Bernal*, 458 U.S. 858, 867 (1982)). Although the State cannot take any action designed to hinder the attendance of such witnesses, the burden of establishing a witness's materiality falls on the defense. See *id.* at 89-90 (finding "defendant has failed to satisfy the requirement of materiality [citation] necessary to establish a violation of the right to compulsory process guaranteed by the sixth amendment").

¶ 25 The trial court noted that the "6th Amendment in the United States Constitution says that defendants in criminal cases are entitled to compulsory process." Relying on this brief remark, the State contends that Gomez-Ramirez's sixth amendment right should be considered in determining the reach and applicability of the physician-patient privilege. The State essentially argues that its investigative authority should be expanded to circumvent a privilege because it aims to protect a right the defendant had not yet asserted. We choose not to do so. Although Gomez-Ramirez expressed a need for the records, he did not attempt to secure them and did not assert his sixth amendment rights. Gomez-Ramirez did not intervene on the State's behalf—or his own. Nor did he argue in favor of either position taken on the issues before us. Without Gomez-Ramirez raising the issue and successfully meeting the materiality requirement for a

violation of the right to compulsory process, our decision properly rests solely on the plain language of section 8-802.

¶ 26 D. Rodriguez's Rights to Notice and a Hearing

¶ 27 Finally, the trial court concluded that the State had complied with article I, section 8.1(a)(2), of the Illinois Constitution. In relevant part, that section states:

> "(a) Crime victims, as defined by law, shall have the following rights:
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> ***
>
> (2) The right to notice and to a hearing before a court ruling on a request for access to any of the victim's records, information, or communications which are privileged or confidential by law." Ill. Const. 1970, art. I, § 8.1(a)(2).

Whether section 8.1(a)(2) allows the State to bypass the physician-patient privilege is a question of constitutional law, which we review *de novo*.

¶ 28 In *People v. Nestrock*, the State enlisted two of the defendant's friends to record her admitting to an element of the State's theory. *People v. Nestrock*, 316 Ill. App. 3d 1, 4–5 (2000). While the defendant was on the phone with one, unbeknownst to her, the other listened in and recorded the conversation. *Id.* at 5. The defendant argued that the evidence was inadmissible under Illinois's eavesdropping statute. *Id.* The State contended that, even if the statute was applicable, the evidence should be admissible under article I, section 8.1, of the Illinois Constitution (Ill. Const. 1970, art. 1, § 8.1) and section 4(a)(1.5) of the Rights of Crime Victims and Witnesses Act (725 ILCS 120/4(a)(1.5) (West 2018)). *Nestrock*, 316 Ill. App. 3d at 10. The appellate court rejected the State's argument, finding that "the Act and [Section 8.1(a)(2)] do not

alter the fundamental principles on which our legal system is based." *Id.* We agree with the *Nestrock* court.

¶ 29 Section 8.1(a) was "intended *** to serve as a shield to protect the rights of victims." (Internal quotation marks omitted.) *People v. Richardson*, 196 Ill. 2d 225, 231 (2001). It offers crime victims an avenue by which they can assert their rights. Section 8.1(a)(2) ensures victims the right to argue against the disclosure of privileged information; it does not grant the State authority to obtain said information by simply notifying the victims of a hearing on the matter. Moreover, section 8.1(b) of article I states that "[n]othing in [Section 8.1 *et seq.*] shall be construed to alter the powers, duties, and responsibilities of the prosecuting attorney." Ill. Const. 1970, art. I, § 8.1(b). A fundamental principle of our legal system requires that clear and unambiguous statutory language "be given effect without resort to other aids of construction." *Holocker*, 2018 IL 123152, ¶ 21. There is nothing in section 8-802 that allows for disclosure of a patient's medical records upon a mere showing that the patient was given notice of a hearing on the matter.[4]

¶ 30 III. CONCLUSION

¶ 31 The judgment of civil contempt entered by the circuit court of Will County is vacated.

¶ 32 Judgment vacated.

[4] Section 8-802(13) allows for disclosure "upon the issuance of a grand jury subpoena pursuant to Article 112 of the Code of Criminal Procedure of 1963." 735 ILCS 5/8-802(13) (West 2018). However, the State does not argue that compliance with article I, section 8.1(a)(2), satisfies this exception.

No. 3-20-0121

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| **Cite as:** | *People v. Gomez-Ramirez*, 2021 IL App (3d) 200121 |
| **Decision Under Review:** | Appeal from the Circuit Court of Will County, No. 18-CF-1946; the Hon. Edward A. Burmila Jr., Judge, presiding. |
| **Attorneys for Appellant:** | Steven F. Pflaum and Dana V. M. Engel, of Neal, Gerber & Eisenberg LLP, and John W. Whitcomb, Joseph T. Monahan, and Monique C. Patton, of Monahan Law Group, LLC, both of Chicago, for appellants. |
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