IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Docket No. 11-1386

STATE OF WEST VIRGINIA,

Plaintiff below, Respondent,

v.

MICHAEL J. McGILL,

Defendant below, Petitioner.

PETITIONER'S REPLY TO RESPONDENT'S SUMMARY RESPONSE TO PETITION FOR APPEAL

On Appeal from the Circuit Court of Marshall County
Honorable Mark A. Karl
Circuit Court Case No. 09-F-71

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U.S. CONST. AMD. 4 . . . . . *passim*

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III. REPLY

A. Introduction

The State, in its summary response, *completely and wholly misapprehends Petitioner's argument.* In fact, the entirety of the State's response is a logical non-sequitur to the issues raised in the instant Petition, as *every* case cited by the State in support of its argument for an affirmation of the underlying verdict is substantively and logically inapposite from the issues raised in Petitioner's argument or, in fact, it supports them. Indeed, the State's summary response is so far afield from Petitioner's argument and so completely non-responsive to the same that Petitioner questions whether the State actually read his brief.

The issue at Bar is simply this: **can the circuit court simply order the production of medical records by judicial fiat upon the mere request of the prosecuting attorney in the absence of any allegation whatsoever that a crime has even been committed, in the absence of any pending case, in the absence of any oath or affirmation by the requesting party, and in the complete absence of probable cause?** Despite the crystal clear nature in which Petitioner framed his assignment of error, the State failed utterly to respond to the same.

A very brief recapitulation of the relevant underlying facts is in order. The Marshall County Sheriff's Department ("MCSD") suspected Petitioner might have been involved in an "incident" of an unspecified nature. The MCSD asked the prosecutor to enable it to access Petitioner's medical records. The prosecutor filed a "motion to compel surrender of medical records" and prepared an "order" under the caption of some made-up, fake case ("*State of West Virginia, plaintiff, v. Criminal Investigation*

(Sheriff's Department)"). The circuit judge accommodated the State's request and helpfully signed a blanket order authorizing the MCSD to rummage around in Petitioner's medical records. The "motion to compel" and the "order" don't contain a case number assigned by the Marshall County Circuit Clerk's Office; rather, the "case number" is nothing more than the investigative/incident report number from the MCSD. What did **not** transpire during this series of events was the following: no facts establishing probable cause were offered by the prosecutor; no criminal action relative to *anyone* was described in the State's motion; no oath or affirmation was offered by *anyone*; and no case was pending against *anyone*.

B. Petitioner Enjoys a Right to Privacy in His Medical Records that Is Protected by the Fourth Amendment

The government, in its summary response, appears to maintain that no Fourth Amendment violation occurred despite the fact that the circuit court authorized the MCSD to acquire his medical records when no suggestion had been made by the State to the circuit court that a crime had even been committed. The State asserts that "neither this Court nor the Supreme Court of the United States have held that medical records are entitled to blanket protection under the Fourth Amendment irrespective of the underlying facts of the case." State's Summary Response at p. 5.

Statements like this one in the government's summary response cause Petitioner to question whether anyone read his brief before filing such response, because Petitioner has in no manner suggested that the Fourth Amendment affords "blanket protection" to medical records; rather, Petitioner maintains that such records *are obtainable* only pursuant to a validly issued search warrant, a release or like

authorization, or a subpoena. Certainly, Petitioner executed no such release, and the ridiculous "Motion to Compel" filed by the State cannot, under any construction whatsoever, be construed as a search warrant or a subpoena. Indeed, the State does not even both to suggest that the "order" was either a search warrant or a subpoena. Instead, the State argues simply that no Fourth Amendment protection is extended to medical records.

Contrary to the implication in the State's response, citizens, including Petitioner, do, indeed, enjoy a very strong privacy interest in their medical records. *See, e.g., State ex rel. State Farm Mut. Auto. Ins. Co. v. Bedell,* 226 W. Va. 138, 697 S.E.2d 730(2010) (addressing privacy interest in medical records). Accessing such medical records in the context of a criminal investigation is properly achieved through the issuance of a search warrant, *see, e.g., Lowe v. Cicchirillo,* 223 W. Va. 175, 178, 672 S.E.2d 311, 314 (2008) (officer obtained pre-arrest search warrant for medical records of DUI suspect), or the use of a subpoena, *see, e.g., State ex rel. Allen v. Bedell,* 193 W. Va. 32, 454 S.E.2d 77 (1994) (medical records of DUI offender were subject to subpoena).

The State boldly asserts that the circuit court's actions were justifiable, because "this Court has never applied the Fourth Amendment to statutes authorizing the release of medical records pursuant to W. Va. Code § 57-5-4." *See* Summary Response at p. 8 (footnote omitted). Several comments relative to this statement are warranted.

First, it is likely that this Court has never been called upon before to apply a Fourth Amendment analysis to the acquisition of medical records, because this Court very likely has never encountered so bizarre and ridiculous a set of facts as those at Bar, *i.e.*, a set of facts wherein law enforcement approaches the circuit court and says, in effect and not under oath, "We think John Doe was involved in an 'incident,' and we

need you to give us an order letting us take a peek at his medical records," and the circuit court says, in reply, "Sure."[1]

Second, W. Va. Code § 57-5-4 has absolutely no application whatsoever to the instant matter, as that Code provision addresses the issuance of a subpoena duces tecum to compel production of writings "to be produced before the court . . . ." The subject June 15, 2009, "Order," *see* JA at p. 3, directed that the records be returned to the prosecutor's investigator, Tom Westfall, not the circuit court, and even the Respondent does not appear to suggest that the circuit court's "order" is a subpoena, as it does not emanate from an existing case.

Finally, merely because this Court has never previously addressed a case on all fours with the instant case does not, by any stretch of the imagination, mean there does not exist ample related authority to conclude that the State's actions were wrongful.

C. The State Has Tacitly Conceded that the Circuit Court Erred in Issuing Its "Order"

The State, by failing to even address Petitioner's assertions that the judicial command of the Marshall County Circuit Court was an illegal order and did not constitute a search warrant or subpoena, has tacitly agreed with Petitioner's argument. As *Cicchirillo* and *Allen* demonstrate, a criminal suspect's medical records are not entitled to a "blanket privilege;" rather, they are discoverable through the use of a properly issued search warrant or a properly issued subpoena.

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1 At least once court recently addressed this issue. *See Willoughby v. State*, --- S.E.2d ----, 2012 WL 1130168 (Ga.App. 2012) (reversing trial court's denial of defendant's motion to suppress medical records seized by state pursuant to a search warrant, because the affidavit failed to establish probable cause).

However, neither a search warrant nor a subpoena was used by the MCSD to obtain Petitioner's medical records in the instant matter. Indeed, the State, in filing its make-it-up "motion to compel," didn't even pretend that it was seeking a search warrant or a subpoena. The circuit court, abandoning its role as a detached and neutral arbiter of the evidence, failed to cast any critical eye whatsoever on the State's application and helpfully accommodated law enforcement by issued an "order" granting blanket access by the MCSD to Petitioner's medical records. The State's summary response fails to address these arguments.

Moreover, because no probable cause was described in whatever, exactly, it was that the State placed in front the circuit court, it could not, by any means, be described as a search warrant. *See Maryland v. Pringle*, 540 U.S. 366, ___, 124 S. Ct. 795, 799, 157 L.Ed.2d 769 (2003) (a search warrant not supported by probable cause is constitutionally defective). The United States Supreme Court has described the rationale behind the necessity of probable cause:

> A search warrant . . . is issued upon a showing of probable cause to believe that the legitimate object of a search is located in a particular place, and therefore safeguards an individual's interest in the privacy of his home and possessions against the unjustified intrusion of the police.

Steagald v. United States, 451 U.S. 204, 212-213, 101 S. Ct. 1642, ___, 68 L.Ed.2d 38, ___ (1981). Petitioner's medical records are his "possessions" and are, as noted, he enjoys a privacy interest in them and they are entitled to constitutional protection from unwarranted intrusion by the police.

Further buttressing the conclusion that the State's motion and its fake case style were not a search warrant is the total absence of any sworn statement. *See* J.M. Burkoff, SEARCH WARRANT LAW DESKBOOK, § 6:3 (Thompson/West, 2006 ed.) ("the failure to

swear to statements put forward to the magistrate to support the issuance of a search warrant . . . render the warrant unconstitutional . . . .").

In no manner does the State's summary response address these concerns. However, the State appears to actually concede that the circuit court erred by positing in its summary response that, *"[a]rguably, the action taken by investigators to obtain Petitioner's medical records could be vulnerable to challenge under a fact-based analysis where legitimately prejudicial evidence had been obtained."* *See* Summary response at p. 8. In a logical disconnect, however, the State goes on to conclude that no Fourth Amendment violation occurred. *Id.* Petitioner is unaware of any authority, nor is any cited by the State, that indicates that the Fourth Amendment only applies where "legitimately prejudicial evidence" is obtained. If the Fourth Amendment was violated, it was violated, a point that the State's appears all but willing to actually state.

D. This Court Should Pronounce that the Actions of the Circuit Court Were Erroneous Even if this Court Concludes That Such Error Was Harmless

As noted in his Petition, Petitions asserts that the so-called "Order" issued by the trial court requiring Reynolds Memorial Hospital to turn over Petitioner's medical records acted to his prejudice, because the admission into evidence of such illegally obtained medical records must have diminished the likelihood that the petit jury would have returned a "not guilty" verdict inasmuch as juror's compromise their verdict, particularly where lesser included offenses are offered (a fact of which this Court has taken note). *See State v. Demastus*, 165 W. Va. 572, 584, 270 S.E.2d 649, 657 (1980). Accordingly, this Court should reverse Petitioner's conviction based upon the admission of illegally seized evidence.

However, while Petitioner does not believe such error was harmless, Petitioner concedes that reasonable minds could differ on this point and conclude otherwise, *i.e.* that such error may have been harmless. In the event that this Court would deem such error to harmless, this Court should, nevertheless, make a clear pronouncement to the Marshall County Circuit Court that the warrant requirement under the Fourth Amendment means something. As noted by Petitioner in his instant Petition at p. 16, "*the judicial branch of government should not sully itself by abandoning its independence and permitting itself to be used as an investigative tool for law enforcement to fish for evidence in the absence of any rules or constitutional standards.*" This practice is anathema to a neutral judiciary in which public confidence rests and must be halted by this Court.

III. CONCLUSION AND RELIEF REQUESTED

For the foregoing reasons, and any others that may be apparent to this Court, your Petitioner, Michael J. McGill, respectfully prays that this Court grant his Petition, admit him to the Rule 20 argument docket for the reasons herein stated, and, following argument in this matter, thereafter reverse the Circuit Court and vacate his conviction and grant him such other relief to which he may be entitled.

Respectfully submitted,

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Petitioner,

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IV. CERTIFICATE OF SERVICE

On Appeal from the Circuit Court of Marshall County
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Circuit Court Case No. 09-F-71

Service of the foregoing **Petitioner's Reply to Respondent's Summary Response to the Petition for Appeal** was had by delivering true and correct copies thereof to the following persons via First Class U.S. Mail, postage prepaid, to their last known address this 10th day of May, 2012.

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