IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

September 1994 Term

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No. 22359

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STATE OF WEST VIRGINIA EX REL.
WILLIAM A. ALLEN,
Petitioner

v.

HONORABLE THOMAS A. BEDELL,
JUDGE OF THE CIRCUIT COURT OF HARRISON COUNTY,
Respondent

Petition for Writ of Prohibition

WRIT DENIED

Submitted: September 13, 1994
Filed: December 9, 1994

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JUSTICE WORKMAN delivered the Opinion of the Court.
RETIRED JUSTICE MILLER sitting by temporary assignment.

CHIEF JUSTICE BROTHERTON did not participate.

JUSTICE CLECKLEY concurs, and reserves the right to file a concurring opinion.

SYLLABUS BY THE COURT

1. West Virginia Code § 17C-5-4 (1991) does not govern the admissibility of the results of a diagnostic blood alcohol test conducted prior to the arrest of a defendant and at the direction of a defendant's treating physician or other medical personnel.

2. Medical records containing the results of blood alcohol tests ordered by medical personnel for diagnostic purposes are subject to subpoena and shall not be deemed inadmissible by virtue of the provisions of West Virginia Code § 57-5-4d (Supp. 1994).

3. "'Rulings on the admissibility of evidence are largely within a trial court's sound discretion and should not be disturbed unless there has been an abuse of discretion.' State v. Louk, [171] W. Va. [639, 643], 301 S.E.2d 596, 599 (1983)." Syl. Pt. 2, State v. Peyatt, 173 W. Va. 317, 315 S.E.2d 574 (1983).

Workman, Justice:

The Petitioner, William A. Allen (hereinafter "the Petitioner"), seeks a writ of prohibition against the Honorable Thomas A. Bedell, Judge of the Circuit Court of Harrison County. By order entered April 13, 1994, the lower court denied the Petitioner's motion to suppress the State's introduction of the results of a blood alcohol test administered upon the Petitioner by the United Hospital Center (hereinafter referred to as "UHC"). The Petitioner argues that the results of the blood test should have been ruled inadmissible and that hospital records relied upon by the State regarding the results of the blood testing should not have been available to the State. We find no error in the decisions of the lower court and hereby deny the requested writ of prohibition.

I.

On November 8, 1992, at approximately 12:17 a.m., the Petitioner was driving an automobile which veered off the highway and overturned. The Petitioner's stepbrother, a passenger in the vehicle, was killed as a result of the accident. The Petitioner was also injured in the accident and was transported to UHC. According to the Petitioner's treating nurse, Rosemary Cain, the

Petitioner's treating physician ordered a blood sample as part of routine medical care and for diagnostic purposes. Ms. Cain also explained that because the odor of alcohol emanated from the Petitioner, standard hospital procedure indicated that a blood alcohol test be performed. According to Ms. Cain, the blood sample was drawn at 1:07 a.m. on November 8, 1992. The results of this test indicated that the Petitioner had a blood alcohol level of 0.14%.

At approximately 2:40 a.m., another blood sample was taken from the Petitioner by Ms. Cain at the direction of Deputy Kevin Haught of the Harrison County Sheriff's Department in conjunction with the issuance of a citation for driving under the influence of alcohol. This second blood sample was tested by the State Police Forensic Laboratory and was found to contain a blood alcohol level of 0.06%. When Deputy Haught requested this second test, he was unaware that UHC had already performed the first test. Deputy Haught also testified that the Petitioner had not been placed under arrest nor had any citation been issued at the time the first blood test was performed.

The Petitioner was subsequently charged with one count of causing a death while driving under the influence of alcohol in

violation of West Virginia Code § 17C-5-2 (1991). The Petitioner filed a motion to suppress, arguing that the results of the first blood test should be ruled inadmissible because the testing was not performed in compliance with West Virginia Code § 17C-5-4 (1991). A suppression hearing was held before the lower court on March 31, 1994, and evidence regarding the blood testing was introduced. The lower court concluded that "the State may introduce proper testimony at trial with respect to the said United Hospital Center blood sample, but shall not seek the admission into evidence of any United Hospital Center documentation or other paperwork relative to that blood sample."

On appeal to this Court, the Petitioner contends that the lower court erred by (1) determining that the results of the Petitioner's

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West Virginia Code § 17C-5-2 was amended in 1994; however, the amendments have no bearing on our decision in this matter.

The Petitioner contends that the following facts adduced at the suppression hearing provide grounds for excluding the blood test from evidence: (1) the nurse who withdrew the blood failed to obtain the Petitioner's permission; (2) the blood sample was not taken at the direction of a police officer; (3) the Petitioner was not given the implied consent warning; (4) the Petitioner was not given an opportunity to consent or refuse to submit to the blood test; (5) the Petitioner was not advised as to the purpose of the blood test; (6) the blood test was not taken incident to a lawful arrest; (7) the evidence failed to indicate that the Petitioner's skin was cleansed with a nonalcoholic antiseptic; and (8) the capability or reliability of the machine used by the UHC lab technician to calculate the percentage of blood alcohol was not established.

first blood test were admissible at trial, and (2) permitting the State, during the suppression hearing, to use evidence obtained from the Petitioner's medical records.

II.

The Petitioner contends that the first blood test was not performed in accordance with the requirements of West Virginia's implied consent statute, West Virginia Code § 17C-5-4, and that the trial court erred in ruling that the results of that test were admissible. West Virginia Code § 17C-5-4, in pertinent part, provides as follows:

> Any person who drives a motor vehicle in this state shall be deemed to have given his consent by the operation thereof, subject to the provisions of this article, to a preliminary breath analysis and a secondary chemical test of either his blood, breath or urine for the purposes of determining the alcoholic content of his blood. . . . A secondary test of blood . . . shall be incidental to a lawful arrest and shall be administered at the direction of the arresting law-enforcement officer having reasonable grounds to believe the person to have committed an offense . . . .

The statute also provides that refusal to submit to a secondary chemical test will result in license revocation for a period of at least one year and up to life. W. Va. Code § 17C-5-4.

In State v. Cribb, ___ S.C. ___, 426 S.E.2d 306 (1992), the treating physician of a defendant hospitalized subsequent to an accident ordered a blood test. ___ S.C. at ___, 426 S.E.2d at 307. Shortly thereafter, the highway patrol officers arrived at the hospital and requested the defendant's treating physician to conduct a blood alcohol test. Id. at ___, 426 at 308. Rather than ordering a second blood sample, the physician ordered that a blood alcohol test be performed on the sample taken from the defendant. The officers later obtained an arrest warrant for the defendant based on the results of the blood alcohol test. Id. The Cribb court concluded that South Carolina's implied consent statute, almost identical to our section 17C-5-4, was inapplicable since an arrest had not been effected at the time the blood test for alcohol was performed. Id. The Cribb court reasoned that the legislature intended to limit the application of the implied consent statute to situations in which blood alcohol content was measured after an arrest had been effected. Id.

The Petitioner in the present case appears to imply that a blood test obtained outside the scope of section 17C-5-4 should be deemed inadmissible. We find no such conclusion implicit within the statute. Section 17C-5-4 simply authorizes a law enforcement

officer to obtain a blood test incident to a lawful arrest where the officer has reasonable grounds to believe that the individual committed an offense and creates an administrative mechanism through which an individual's license may be revoked. The inclusion of such authorization within our statutory scheme certainly does not intimate a legislative intent to disallow in the criminal context evidence of alcohol content obtained by medical personnel in the course of treatment.

The Petitioner's first blood test was ordered by medical personnel for diagnostic purposes. He had not yet been charged with a crime, and the deputy had not even arrived at the hospital to investigate the accident. Thus, West Virginia Code §17C-5-4, which provides guidelines for the manner in which law enforcement officials shall obtain blood alcohol tests, has no application to the facts in this case and does not serve as a prohibition to admissibility. West Virginia Code § 17C-5-4 does not govern the admissibility of the results of a diagnostic blood alcohol test conducted prior to the arrest of a defendant and at the direction of a defendant's treating physician or other medical personnel.1.West Virginia Code § 17C-5-4 requires that a secondary blood test be conducted incident

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There is apparently no dispute that the second test was in compliance with West Virginia Code § 17C-5-4,

to a lawful arrest and be administered at the direction of the arresting law enforcement officer. The provision also requires that the arrestee be "given a written statement advising him that his refusal to submit to the secondary chemical test finally designated as provided in this section, will result in the revocation of his license to operate a motor vehicle in this state for a period of at least one year and up to life." W. Va. Code § 17C-5-4.

It is also important to note that this statute was amended in 1994; however, the amendments do not effect the outcome of this case.

III.

The Petitioner also contends that the lower court erred in allowing the treating nurse to testify at the suppression hearing regarding information contained in the Petitioner's hospital records and that such testimony violated a qualified privilege established

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and that the Petitioner signed a written consent authorizing the deputy to take the second blood sample.

by West Virginia Code § 57-5-4d (Supp. 1994). The Petitioner further maintains that the State has no right to obtain or introduce the medical records.

Upon review of West Virginia Code §§ 57-5-4a to -4j (Supp. 1994), we conclude that the objective of these provisions is the establishment of guidelines for hospitals regarding the proper method for furnishing subpoenaed hospital records. West Virginia Code § 57-5-4d does direct the judge or court to "first ascertain that either: (1) The records have been subpoenaed at the insistance (sic) of the patient involved or his counsel of record; or (2) the patient involved or someone authorized in his behalf to do so for him has consented thereto and waived any privilege of confidence involved[,]" prior to opening sealed hospital records. However, nothing in section 57-5-4d should be interpreted to limit the State's

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West Virginia Code § 57-5-4d provides, in pertinent part, that when dealing with sealed hospital records

> [b]efore directing that such inner-envelope or wrapper be opened, the judge, court, officer, body or tribunal shall first ascertain that either: (1) The records have been subpoenaed at the insistance (sic) of the patient involved or his counsel of record; or (2) the patient involved or someone authorized in his behalf to do so for him has consented thereto and waived any privilege of confidence involved.

subpoena power over medical records, nor should that section be considered tantamount to a physician/patient privilege. We have no statutory scheme establishing a physician/patient privilege, nor has this Court judicially recognized such a privilege.

Even in some jurisdictions which recognize a physician/patient privilege pursuant to Rule 503 of the Uniform Rules of Evidence, only confidential disclosures by the patient have been protected by the privilege, thus permitting introduction of routine blood tests evidencing intoxication. Oxford v. Hamilton, 297 Ark. 512, 763 S.W.2d 83 (1989). In Oxford, where a motorist brought a civil action against an individual allegedly driving under the influence of alcohol, the court ruled that blood test results indicating intoxication were admissible despite the applicability of Rule 503 of the Arkansas Rules of Evidence providing a physician/patient privilege. Id. at 514, 763 S.W.2d at 84; see Edward W. Cleary, McCormick on Evidence § 105, at 258-60 (3rd ed. 1984); 8 John H. Wigmore, Evidence in Trials at Common Law § 2380a, at 828-32 (McNaughton Rev. 1961). The Arkansas court reasoned that the physician/patient privilege is designed to protect only confidential communication between the patient and his physician and is not intended to shield the patient from disclosure of medical records devoid of confidential communication. Oxford, 297 Ark. at 514, 763

S.W.2d at 84; see also McVay v. State, 312 Ark. 73, 847 S.W.2d 28 (1993).

Other jurisdictions have rationalized the introduction of evidence of intoxication contained in medical records under the exception to the hearsay rule for "[r]ecords of [r]egularly [c]onducted [a]ctivity." See W.Va.R.Evid. 803(6). In Andres v. Gilberti, 592 So.2d 1250 (Fla.Dist.Ct.App. 1992), for example, a bicyclist brought a personal injury action against a motorcyclist allegedly driving under the influence. Id. at 1251. A blood alcohol test performed in the emergency room immediately after the accident as standard procedure was ruled admissible under the "records of regularly conducted activity" exception to the hearsay rule, Section 90.803(6), Florida Statutes (1987). Id.

In Commonwealth v. Dube, 413 Mass. 570, 601 N.E.2d 467 (1992), a defendant seeking exclusion of blood test results argued that the release of medical records violated his right to privacy. Id. at 572, 601 N.E.2d at 468. The blood test in Dube had been conducted in the course of routine treatment of the defendant during his hospitalization after the accident. Id. The Massachusetts court ruled that the admission of hospital records "for the purpose of showing that a criminal defendant had consumed intoxicating liquor

shortly before events that led to a charge of operating a motor vehicle while under the influence of intoxicating liquor" had been admissible for "more than a decade" and would be admitted in Dube. Id. at 574, 601 N.E.2d at 469. Concluding that no violation of privacy had occurred, the court similarly found no impediment to the introduction of the incriminating blood test evidence. Id.

The blood tests in the present case were ordered by the medical personnel attending to the Petitioner subsequent to the accident. Such tests are not subject to exclusion based upon lack of conformity to the administrative requirements of West Virginia Code § 17C-5-4, and the hospital records evidencing the blood results are not subject to exclusion based upon any regulatory scheme for the handling of hospital records. We conclude that medical records containing the results of blood alcohol tests ordered by medical personnel for diagnostic purposes are subject to subpoena and shall not be deemed inadmissible by virtue of the provisions of West Virginia Code § 57-5-4d.

As we have often recognized, "'[r]ulings on the admissibility of evidence are largely within a trial court's sound discretion and should not be disturbed unless there has been an abuse of discretion.' State v. Louk, [171] W. Va. [639, 643], 301 S.E.2d 596, 599 (1983)." Syl. Pt. 2, State v. Peyatt, 173 W. Va. 317, 315 S.E.2d 574 (1983). We find no abuse of discretion, and the Petitioner's request for a writ of prohibition is hereby denied.

Writ denied.