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STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case No. 2011AP2864-CRAC

STATE OF WISCONSIN,

Plaintiff-Appellant-Cross-Respondent,

v.

SAMUEL CURTIS JOHNSON, III,

Defendant-Respondent-Cross-Appellant.

APPEAL FROM INTERLOCUTORY ORDER
ENTERED IN RACINE COUNTY CIRCUIT COURT
THE HONORABLE EUGENE A. GASIORKIEWICZ
PRESIDING

COMBINED BRIEF OF APPELLANT AND CROSS-RESPONDENT

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I. THE CIRCUIT COURT'S ORDER SHOULD BE VACATED BECAUSE JOHNSON DID NOT ESTABLISH A CONSTITUTIONAL RIGHT TO IN CAMERA REVIEW.

This appeal can be resolved simply by applying the constitutional standard the Wisconsin Supreme Court set forth in *State v. Green* for ordering in camera review of privileged records:

> [T]he preliminary showing for an in camera review requires a defendant to set forth, in good faith, a specific factual basis demonstrating a reasonable likelihood that the records contain relevant information necessary to a determination of guilt or innocence and is not merely cumulative to other evidence available to the defendant. We conclude that the information will be "necessary to a determination of guilt or innocence" if it "tends to create a reasonable doubt that might not otherwise exist." . . . This test essentially requires the court to look at the existing evidence in light of the request and determine . . . whether the records will likely contain evidence that is independently probative to the defense.

2002 WI 68, ¶ 34, 253 Wis. 2d 356, 646 N.W.2d 298.

The state explained in its brief-in-chief that Johnson did not make the *Green* showing. Nothing in Johnson's brief alters its position. Johnson's brief only serves to underscore that Johnson neither satisfied *Green* nor established a constitutional right to in camera review.

Johnson falters from start with his discussion of *Green*. Johnson notably does not set forth the actual standard from *Green*. He just quotes the supreme court as saying the standard is "a preliminary showing" and "not intended . . . to be unduly high" (Johnson-Br. 9). That explanation, which the circuit court cited too, is all well and good. But it is not the standard and must be viewed with the standard in mind.

The supreme court made it clear in *Green* that the constitutional standard is more about the quality rather than the quantity of allegations. It requires defendants to set forth facts that logically and sequentially lead to the conclusion that privileged records likely contain information unavailable elsewhere but "necessary to a determination of guilt or innocence." 253 Wis. 2d 356, ¶ 34.

Johnson did not establish such need.

Johnson does not defend the circuit court's reference to T.S.'s ADD as grounds for in camera review. He relies entirely on his mandatory reporter syllogism, which he claims is based on the presumption that people follow the law (Johnson-Br. 11-12). The mandatory reporter syllogism is not based on the presumption that people follow the law however. Johnson uses the presumption in a new way—as evidence of what someone not covered by or presumed to follow a law did.

Johnson's inference is completely unsound.

The state questions Johnson's confidence that mandatory reporters *always* comply with the mandatory reporting statute. The state discussed many reasons in its brief-in-chief why mandatory reporters may not comply with the mandatory reporting statute—from confusion to intentional disregard (State-Br. 12-13).

The state also notes that, contrary to what Johnson assumes, not all allegations trigger the mandatory reporting statute. The statute only applies when mandatory reporters have "reasonable cause to suspect" abuse. Wis. Stat. § 48.981(2). This threshold makes it possible that a victim disclosed abuse, or at least tried to, without triggering the statute. A victim may have made vague, out-of-context, piecemeal allegations a therapist needs to follow-up on to reasonably suspect abuse.

Even if Johnson's confidence in mandatory reporting were warranted, however, Johnson's inference would still not be sound or sufficient.

The absence of a report does not establish anything more than that no report was made. It does not establish *why* no report was made or anything about what a victim said in therapy. Attempts to draw such conclusions involve sheer speculation, the antithesis of the type of logical and sequential showing *Green* requires.

Just take Johnson.

Johnson makes all sorts of claims about T.S.'s failure to disclose and criticizes the state for speaking merely in terms of "delay" (Johnson-Br. 10). But Johnson is really just guessing about why T.S.'s therapists did not report. All Johnson knows is that T.S. went to therapy to discuss problems at home and school and that T.S.'s therapists never reported. T.S.'s therapy could have encompassed all sorts of things—from teenage angst, to the issues that led Johnson and T.S.'s mother to marriage counseling, to sexual abuse. The lack of report, in turn, does not establish whether T.S. denied the sexual assaults, or whether T.S. inconsistently described the sexual assaults, or whether the sexual assaults ever even came up.

Johnson claims a case the state cited—*State v. Robertson*, 2003 WI App 84, 263 Wis. 2d 349, 661 N.W.2d 105—establishes that in camera review is warranted anytime privileged records are believed to contain information "relevant to the complaining witness's credibility" (Johnson-Br. 13). That is not true. If Johnson were correct, there would be no limit to defendants' ability to access privileged therapy records.

Credibility is a broad concept, one largely in the eye of the beholder. It is implicated by evidence that a victim denied sexual abuse or made inconsistent statements. It is *also* implicated by evidence a victim did not disclose sexual abuse immediately *and* by a seemingly endless variety of other evidence about everything from a victim's age and cognitive ability to the victim's relationship with a defendant. Given everything credibility encompasses, it is difficult to conceive of how therapy records would not contain something related to credibility unavailable elsewhere.

Johnson illustrates the breadth of his credibility standard. He cites the chance T.S. "described a relationship free of abuse" when "asked about her relationship with [him]" as grounds for in camera review (Johnson-Br. 13). Describing "a relationship free of abuse" could mean anything from a flat-out denial, to T.S.

describing happy events with Johnson, to T.S. expressing affection for Johnson. All of those relate to credibility. And it is quite probable one or all of them happened at T.S.'s therapy, since T.S. went to therapy to address problems at home at Johnson's and her mother's marriage counselor's recommendation. If credibility were really the test, in turn, it is unclear how Johnson could *not* make the *Green* showing.

Johnson also cites this court's decision in *State v. Speese*, 191 Wis. 2d 205, 223-24, 528 N.W.2d 63 (Ct. App. 1995), as support for his mandatory reporter syllogism (Johnson-Br. 6-7). This court's decision in *Speese* is not controlling precedent because the Supreme court overruled it, but it may still be cited as persuasive precedent. *See Barricade Flasher Service, Inc. v. Wind Lake Auto Parts, Inc.*, 2011 WI App 162, ¶ 9, 338 Wis. 2d 144, 807 N.W.2d 697. *Speese* does not help Johnson and, if anything, underscores why Johnson does *not* have a constitutional right to in camera review.

Speese claimed the victim "received inpatient care in a local mental health facility" and that it could be inferred she "never reported the alleged sexual encounters" given the absence of a report from her therapists. *Speese*, 191 Wis. 2d at 215. Speese claimed "[t]he absence of reporting the alleged assaults to medical officials is exculpatory." *Id.* This court agreed and vacated Speese's convictions. *Id*. at 228. The supreme court reversed this court's decision and held any error was harmless. *State v. Speese*, 199 Wis. 2d 597, 545 N.W.2d 510 (1996). It assumed for argument's sake the circuit court erred, without considering this court's analysis or the mandatory reporter syllogism. *Id.* at 600. It reasoned any error was harmless because "evidence in the victim's medical and psychiatric records of her silence regarding the defendant's sexual abuse would have been redundant." *Id.* at 605.

Harmless error analysis is different from the *Green* showing. It places the burden on the state and has the benefit of hindsight. But the supreme court's harmless error analysis is still illuminating. It asks retrospectively what *Green* asks prospectively: whether a defendant needed privileged therapy records for in camera review. The supreme court's conclusion the state proved harmless error in *Speese* casts doubt on Johnson's ability to establish he really needs T.S.'s records.

Johnson can already establish much about T.S.'s disclosure history and credibility without her therapy records. He can establish T.S.'s delay in reporting by comparing the dates alleged in the complaint (2007-2010) with the date of T.S.'s initial allegations (March 2011) (1; A-Ap. 144). He can call friends and family, including his wife (T.S.'s mother), to describe his relationship with T.S. He can call T.S.'s friends, teachers, and coaches to testify about whether the topic of sexual abuse had ever come up and whether T.S. ever suggested he sexually abused her.

Because Johnson has failed to satisfy the high threshold in *Green*, the state asks this court to vacate the circuit court's order and to hold that Johnson did not establish a constitutional right to in camera review of T.S.'s privileged therapy records. A decision in the state's favor on this issue eliminates the need to consider the state's alternative argument concerning the proper response if a defendant meets the high threshold in *Green*.

II. IF JOHNSON ESTABLISHED A CONSTITUTIONAL RIGHT TO IN CAMERA REVIEW, THE CIRCUIT COURT SHOULD HAVE ORDERED THE RECORDS FOR IN CAMERA REVIEW.

A. Circuit courts have authority to order privileged records for in camera review only when—and precisely because—defendants have a constitutional right to in camera review.

Johnson tries to make the state's argument about circuit courts' authority to order privileged records for in camera review about more than defendants' constitutional rights (Johnson-Br. 18).

Just to be clear, the state does *not* base its position on circuit courts' authority to order privileged records for in camera review on its own needs. It bases its position entirely on defendants' constitutional rights. It explained in its brief-in-chief:

> The state advocates for a very limited authority to order privileged therapy records, one completely dependent on a defendant establishing a constitutional right to in camera review. The state submits that a circuit court has authority to order privileged therapy records for in camera review only when—and precisely because—a defendant has established a constitutional right to in camera review.

(State-Br. 27-28.)

The state's constitutional argument comes straight from *Speese*, in which the Wisconsin Supreme Court identified as unresolved whether (1) "the physician-patient privilege is absolute or, alternatively, must yield to an accused's constitutional right to a meaningful opportunity to present a complete defense" and (2) "a person's refusal to waive the privilege should preclude that person from testifying at trial." *Speese*, 199 Wis. 2d at 608, 614.

Johnson's reliance on *Jaffee v. Redmond*, 518 U.S. 1 (1996), is consequently misplaced. *Jaffee* was a civil rights case in which the United States Supreme Court recognized a psychotherapist privilege under the federal privilege statute, Federal Rule of Evidence 501. *Id.* at 10-12. *Jaffee* did not involve the constitutional question the state presents here and the Wisconsin Supreme Court identified in *Speese* as unresolved regarding whether Wisconsin's privilege statute must yield to a criminal defendant's constitutional right to in camera review.

B. Johnson did not establish a constitutional right to have T.S.'s testimony barred.

Johnson's objection to the state's argument regarding the circuit court's authority to order T.S.'s therapy records is more than a little ironic.

It is Johnson who wants T.S.'s therapy records and Johnson who claimed a constitutional right to them despite T.S.'s statutory privilege. The state sets forth a mechanism for Johnson to get what he sought—in camera review of T.S.'s therapy records. But Johnson now claims T.S.'s statutory privilege trumps his constitutional right.

Johnson claims barring T.S.'s testimony would safeguard his constitutional rights (Johnson-Br. 21-23). Johnson is correct that barring T.S.'s testimony would prevent his rights from being violated. But that does not mean barring T.S.'s testimony is the best, or an appropriate, way to protect Johnson's constitutional rights.

It is not.

There is a disconnect between the protection Johnson seeks and the constitutional right he was deemed to establish. The only right Johnson was deemed to establish is the right to in camera review. That is it. Johnson now seeks something different and far greater: barring T.S.'s testimony. But Johnson never established a right to have T.S.'s testimony barred.

The state's concerns about the constitutional protection matching the constitutional right are not just academic. How a defendant's right to in camera review is protected has very real, very serious practical consequences. When courts allow a victim to assert her privilege after recognizing a defendant's constitutional right to in camera review, they treat the privilege statute as coextensive with or superior to the Constitution. Everything goes smoothly when a victim consents to in camera review. But things break down when a victim does not. Courts have to craft a different protection than the one the defendant established a right to. This leads to the type of collateral consequences the state discussed in its brief-in-chief—not to the happy co-existence of victims' statutory privilege and defendants' constitutional rights Johnson posits (State-Br. 22-25; Johnson-Br. 21-23).

The state recognizes Wisconsin courts have sanctioned the procedure Johnson proposes. But it knows of no other situation in which constitutional rights are protected the same way. As-applied challenges generally lead to statutes not being applied unconstitutionally. Such an approach not only has the benefit of theoretical consistency; it also avoids the collateral consequences caused by divorcing the constitutional protection from the constitutional right being protected.

Ultimately, then, the state's argument concerning the circuit court's authority to order T.S.'s therapy records for in camera review flows directly from Johnson's initial claim for in camera review. If Johnson really established a constitutional right to in camera review, then protect his right. Give him what he would be entitled to: in camera review. Nothing less, but nothing more either.

C. Barring a victim's testimony is not the only way to protect a defendant's constitutional right to in camera review.

Johnson characterizes barring victims' testimony as the *only* way to protect defendants' constitutional right to in camera review (Johnson-Br. 16-21). But neither case nor statutory law establishes this. No case or statute resolves the issues the supreme court identified in *Speese* and the state presents here concerning whether a victim's statutory privilege must yield to a defendant's constitutional right to in camera review.

Johnson quotes this court's statement in *Speese* that it treated "the privilege as absolute" in *Shiffra* (Johnson-Br. 17). He does not acknowledge the supreme court's recognition in *Speese* that the very issues the state presents here are unresolved. *Speese*, 199 Wis. 2d at 608, 614.

Johnson also quotes the supreme court's statement in *State v. Solberg*, 211 Wis. 2d 372, 564 N.W.2d 775 (1997) that a circuit court should conduct in camera review if a privilege holder consents (Johnson-Br. 17). But neither party in *Solberg* raised the constitutional issue the state raises here and the supreme court identified in *Speese* as unresolved. The supreme court did not somehow decide the constitutional issue in *Solberg* merely by favorably discussing the procedure of conditioning victims' testimony on victims' consent. To decide the constitutional issue, the supreme court would have had to have been presented with it, and actually considered it.

Johnson additionally argues that the specific provisions of the privilege statute, Wis. Stat. § 905.04, trump the more general provisions of the medical records statute, Wis. Stat. § 146.82(2)(a)4.

The state agrees with Johnson that the medical records statute, Wis. Stat. § 146.82(2)(a)4., does not provide a way around the privilege statute, Wis. Stat. § 905.04. Indeed, it cited a supreme court decision—*Crawford v. Care Concepts, Inc.*, 2001 WI 45, ¶ 33, 243 Wis. 2d 119, 625 N.W.2d 876—holding exactly that.

But that starts, rather than ends, the inquiry.

The privilege statute's supremacy over the medical records statute (like HiPPA's supremacy over state statutes) says nothing about the Constitution's supremacy over the privilege statute when a criminal defendant establishes a constitutional right to in camera review.

D. Ordering records for in camera review may protect victims in the context of a criminal prosecution more than enforcing the privilege.

At first glance, the state's position that circuit courts should order records for in camera review when defendants make the *Green* showing may seem anti-victim. But things are not as simple as they first appear.

The state's argument regarding how circuit courts should respond when defendants make the *Green* showing must be understood in terms of the state's argument concerning what the *Green* standard requires. The state maintains the best way to protect victims is to steadfastly hold defendants to the high threshold mandated in *Green*.

Orders for in camera review compromise victims' privilege, regardless of what happens next. Such orders condition justice on victims' consent. By doing so, they force victims to assume responsibility for prosecutions, and all the guilt and blame accompanying such responsibility. They also provide an avenue for defendants and their supporters to pressure victims to block prosecutions and to spurn victims who do not.

The state does not relish the idea of victims' therapy records being ordered for in camera review, any more than it relishes all the other difficulties victims face during criminal prosecutions. But it submits that ordering victims' records for in camera review may afford victims more protection in the context of a criminal prosecution than enforcing the privilege would. This is particularly true when considered in light of prosecutors' ability to dismiss cases or reach plea deals to protect victims.

CONCLUSION

The state asks this court to reverse the circuit court's order for in camera review of T.S.'s privileged therapy records because Johnson did not establish a constitutional right to in camera review.

In the alternative, if this court concludes that Johnson has a constitutional right to in camera review of T.S.'s privileged therapy records, the state asks this court to remand this case to the circuit court with instructions for the circuit court to order T.S.'s records for in camera review pursuant to Wis. Stat. § 146.82(2)(a)4.

BRIEF OF CROSS-RESPONDENT

ARGUMENT

IF JOHNSON ESTABLISHED A CONSTITUTIONAL RIGHT TO IN CAMERA REVIEW, THE PROPER WAY FOR THE CIRCUIT COURT TO PROTECT JOHNSON'S RIGHT WOULD HAVE BEEN TO ORDER T.S.'S THERAPY RECORDS FOR IN CAMERA REVIEW.

The parties agree the circuit court erred in how it tried to protect the constitutional right to in camera review it deemed Johnson to have established (State-Br. 28-29; Johnson-Br. 28-31). They disagree, however, about whether Johnson established a constitutional right to in camera review and about what the circuit court should have done to protect Johnson's right if he did.

The state maintains as its primary position that Johnson did not establish a constitutional right to in camera review. Johnson did not come close to satisfying the high threshold the supreme court mandated in *State v. Green*, 2002 WI 68, ¶ 34, 253 Wis. 2d 356, 646 N.W.2d 298. The mandatory reporter syllogism Johnson sets forth depends on an unsound inference. Johnson assumes that all sexual abuse allegations lead to a report *and* that the absence of a report establishes what a victim said or did in therapy. The state explained in its appellant's reply brief that neither assumption is correct (State Reply-Br. at 3-5).

The state alternatively argues that the proper way to protect Johnson's constitutional rights *if* Johnson had established a constitutional right to in camera review of T.S.'s therapy records would be to give Johnson what he would be entitled to: in camera review of T.S.'s therapy records. The state bases its position entirely on the bedrock principle that the Constitution trumps statutes.

Johnson claims the *only* way to protect his right to in camera review is to bar T.S.'s testimony (Johnson-Br. 25-28). He notably fails to so much as acknowledge the supreme court's identification in *State v. Speese*, 199 Wis. 2d 597, 608, 614, 545 N.W.2d 510 (1996), as unresolved whether (1) "the physician-patient privilege is absolute or, alternatively, must yield to an accused's constitutional right to a meaningful opportunity to present a complete defense" and (2) "a person's refusal to waive the privilege should preclude that person from testifying at trial."

That is a major omission.

How can barring T.S.'s testimony be the only possible way to protect Johnson's rights given the supreme court's identification of unresolved issues in *Speese*, not to mention the Constitution's supremacy over statutes? Johnson cites cases discussing the procedure of conditioning victims' testimony on their consent. But just because courts have described this procedure, even approvingly, does not establish anything more than "that's how it's been done." The fact remains that no court has resolved the issues the state presents here and the supreme court identified as unresolved in *Speese* concerning whether victims' statutory privilege must yield to defendants' constitutional right to in camera review.

If anything, experience only highlights the problems with asking victims to consent to in camera review and barring their testimony if they do not. The choice about in camera review is about much more than privacy. Letting victims choose gives victims unprecedented control over prosecutions, essentially the ability to decide if prosecutions go forward or not. By giving victims such control, the choice forces victims to assume responsibility, and guilt, and blame for prosecutions. It also creates a vehicle for defendants and their supporters to pressure and coerce victims into blocking prosecutions. Such problems are particularly likely in an intra-family child sexual assault case like this.

The state does not base its position concerning circuit courts' authority to order records for in camera review on these collateral consequences. Again, and just to be clear, the state bases its position entirely on defendants' constitutional rights. But the collateral consequences are a direct result of—and demonstrate the problems with—divorcing the constitutional protection from the constitutional right in the way Johnson advocates. It is unclear why we would accept such consequences when not required by statutory or case law and when commanded otherwise by the Constitution.

CONCLUSION

The state asks this court to reverse the circuit court's order for in camera review of T.S.'s privileged therapy records because Johnson did not establish a constitutional right to in camera review.

In the alternative, if this court concludes that Johnson has a constitutional right to in camera review of T.S.'s privileged therapy records, the state asks this court to remand this case to the circuit court with instructions for the circuit court to order T.S.'s records for in camera review pursuant to Wis. Stat. § 146.82(2)(a)4.

Dated: March 29, 2012.

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. (Rule) §§ 809.19(6)(c) and 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of the appellant's reply brief is 2981 words. The length of the cross-respondent's brief is 742 words.

____
Rebecca Rapp St. John
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated: March 29, 2012.

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