RECEIVED
11-04-2019
CLERK OF COURT OF APPEALS
OF WISCONSIN

STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

Case No. 2019AP000664-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

T.A.J.,

Appellant,

v.

ALAN S. JOHNSON,

Defendant-Respondent.

ON APPEAL FROM THE ORDER DENYING TAJ STANDING, ENTERED IN WAUPACA COUNTY CIRCUIT COURT, THE HONORABLE RAYMOND S. HUBER PRESIDING

APPELLANT'S REPLY BRIEF

LEGAL ACTION OF WISCONSIN, INC.

Attorney Andrea K Rufo
State Bar No. 1063962
Attorneys for T.A.J., Appellant

P.O. ADDRESS
LEGAL ACTION OF WISCONSIN, INC.
4900 SPRING ST. SUITE 100
RACINE, WI 53402
(T) 262.635.8836
(F) 262.635.8838
akr@legalaction.org

INTRODUCTION

T.A.J. brings this appeal asking for standing to independently oppose the Defendant's request for T.A.J.'s privileged and confidential records. At the heart of this issue rests two fundamental truths: that a person should have a say in whether their own confidential records are released, and that a crime victim should have the legal authority to be heard in court to assert their rights under Chapter 950.

The *Shiffra-Green* process requires a defendant to meet a materiality threshold before the court will grant any invasion into confidential records. Just as the defendant is required to present evidence to justify their request for an *in camera* review, so should the subject of the record and crime victim have the right to argue against the defendant's position and be heard in court as to why an *in camera* review should not be granted. This is the right to privacy and protection that the Legislature created for crime victims. T.A.J. seeks the standing necessary to make that right meaningful.

The determination of whether a crime victim has standing rests entirely in the statutory interpretation of Wis. Stat. §950.105. T.A.J.'s Brief thoroughly addressed the statutory construction and Legislative intent of

Wis. Stat. §950.105, concluding that it unambiguously guarantees T.A.J. the right to be heard in opposition to the Defendant's motion. The State of Wisconsin also presented a thorough statutory interpretation of Wis. Stat. §950.105 and concluded that Wis. Stat. §950.105 provides crime victims standing to assert their rights.

Despite Wis. Stat. §950.105 being the controlling law in this matter, the Defendant never actually analyzes the language of the statute. The Defendant never contests T.A.J.'s reading of Wis. Stat. §950.105; offers no counter-interpretations; and cites no recent case law in support of the proposition that T.A.J. cannot assert his rights by arguing motions, filing responses, or otherwise communicating his legal position to the court.

In an appeal entirely about whether a crime victim has standing, the Defendant addresses Wis. Stat. §950.105 directly in only one page of his brief. Def. Res. at 4. Instead the Defendant focuses on Wis. Stat. §950.04, and argues that this list of enumerated rights fails to include the right to file motions and make legal arguments. Def. Resp. at 5. According to the Defendant, the fact that Wis. Stat. §950.04 does not explicitly enumerate those rights means victims do not have the ability to be heard in court.

The Defendant makes no effort to harmonize this reading of Wis. Stat. §950.04 with any reasonable interpretation of Wis. Stat. §950.105, which provides crime victims the right "to assert … [their rights] as a crime victim" in any court in which those rights are threatened. The Defendant's argument is fundamentally flawed. How is a victim to assert his rights without making legal arguments and filing motions?

When courts interpret statutes they must "seek the drafters' intent through the plain language … harmonize statutes where necessary and avoid absurd results. *Milwaukee Acad. v. Dep't of Children & Families*, 2018 WI App 13, ¶¶ 27-28, 380 Wis. 2d 227, 244–45, 908 N.W.2d 189, 198, 2018 WL 522445. The Defendant's reading must be rejected because it creates an absurd reading that crime victims have standing to do nothing at all when their rights are being violated in a criminal proceeding.

I. T.A.J. Has Standing to Make Legal Arguments.

In his only reference to Wis. Stat. §950.105, the Defendant acknowledges that Wis. Stat. §950.105 does create standing for T.A.J. to assert his rights. He notes: "because the language of the statute is plain, an alleged crime victim has standing to assert his or her rights as a crime

victim under Chapter 950… Article 1 Section 9m of the Wisconsin Constitution or…elsewhere in the Wisconsin Statutes" Def. Resp. at 4.

The Defendant appears to agree with T.A.J. that Wis. Stat. §950.105 grants standing. Yet, the Defendant goes on to argue that, despite Wis. Stat. §950.105, T.A.J. cannot enforce his rights by making legal arguments, or filings motions. Def. Resp. at 5. Thus, the Defendant's position is predicated not on arguing that Wis. Stat. §950.105 fails to grant standing, but rather that for a party to assert their rights in court, there must be a separate right allowing them to make legal arguments.

This is fundamentally flawed. To think the Legislature would not grant victims' standing to assert their statutory and constitutional rights without also recognizing that they must have tools to protect those rights is absurd. The right to use one's standing in court is inherent in the idea of standing,

A. The Right to Be Heard Is Inherent in the Granting of a Right.

The Defendant argues that if the Legislature intended to give victims standing to make legal arguments, it would have included that language as a unique right listed in Wis. Stat. §905.04, Article 1 Section 9m of the

Wisconsin Constitution or other statutes. Ignoring for a second that the Legislature did do that in Wis. Stat. §950.105, the Defendant's argument mistakes the substantive rights given to an individual, with the procedural method by which an individual can assert those rights. The authority to speak and be heard regarding a right is inherent in the rights themselves. It is well understood that "where there's a legal right, there is a legal remedy…whenever that right is violated." *Marbury v. Madison*, 5 U.S. 137, 163, 2 L.Ed 60 (1803). It would be an absurd reading of Chapter 950 to argue that the Legislature provided numerous rights but no actual method in which to enforce them.

Wis. Stat. §950.04 contains several rights permitting a victim to make legal arguments, such as the right to object to a continuance under (§950.04(iv)(ar)). Whether that objection is made by oral statement or in writing, it is nonetheless a legal argument. To assert that a crime victim has a right to object to a continuance but no right to literally make that objection to the court either verbally or in writing is an absurd interpretation.

Reciprocally, of all the rights provided to a defendant in the 6th Amendment, the right to "make legal arguments or file motions" is not

listed. Still, it is understood that defendants will file motions to protect their right to confrontation, and for speedy trial. Nor would any court refuse to hear a defendant's Motion to Suppress or a plaintiff's civil action for invasion of privacy on that grounds that the 4th Amendment does not also include a right to make arguments.

The Defendant reads Wis. Stat. §905.04 in isolation from the rest of Chapter 950. When interpreting statutes, both the context of statutory language and the structure of a statute or series of statues are important. "Statutory language is interpreted in the context in which it is used; not in isolation but as part of a whole; in relation to the language of surrounding or closely-related statutes." *State ex rel. Kalal v. Circuit Court for Dane Cty.*, 2004 WI 58, ¶46, 271 Wis. 2d 633, 681 N.W.2d 110.

The Defendant's interpretation of Wis. Stat. §905.04 would render Wis. Stat. §905.105 meaningless and run counter to the Legislative intent of Chapter 950. That Legislative intent is clear in Wis. Stat. §905.01: for the rights of victims to be "honored and protected…in a manner no less vigorous than the protections afforded criminal defendants." To ensure that victim rights are protected, a victim must be able to make legal arguments, and actively assert their rights in criminal proceedings.

Moreover, the Defendant's reliance on "*experssio unius est exclusion alterius*" is also misplaced. The rule of *expressio unius* only applies when looking at a grouping of similar matters, and the act of making legal arguments is not in the same category as the creation of a right. The ability to make legal arguments is not a right, it is the procedural manner in which a right can be enforced. That the Legislature would exclude this procedural language from a list of rights is completely reasonable.

Also, *expressio unius* only applies under certain circumstances to help determine the Legislature's intent when it is not clear. *See N.L.R.B. v SW General, Inc.*, 137 S. Ct. 929, 197 L.ed.2d 263 (2017). There is no question that the legislative intent of Chapter 950 is not just to provide rights for victims of crime, but to ensure those rights are "honored and respected" in court.

B. T.A.J. Has Standing Due to His Personal Stake in the Motion.

The basic question of standing is whether the party seeking standing has a personal stake or injury that deserves protection. *See Wisconsin's Environmental Decade, Inc. v. Public Service Commission of Wisconsin*, et

al, 69 Wis.2d 1 (1975), 230 N.W.2d 243, 6 Envlt. L. Rep. 20, 192. Standing is appropriate when there is a showing that the actions in question have or will cause an injury to the party. *See Foley-Ciccantelli v. Bishops Grove Condominium Association,* 333, Wis.2d 402, 797 N.W.2d 789, 2011 WI 36. Standing does not require that the Legislature also create a specific right granting a party the authority to argue for standing in court.

As the State noted, T.A.J. has an obvious personal stake in the *Shiffra-Green* motion because the motion involves his confidential records. St. Resp. at 5-6. The Defendant's Motion creates the possibility that T.A.J. may be compelled to release his records or be denied the ability to testify at a trial.

The Defendant asserts that while confidential records are treated with sensitivity, "nowhere… within this sensitivity can it be inferred that nonparty alleged victims have the ability to litigate legal issues in criminal court." Def. Resp at 10-11. This is simply false. An individual's medical and mental health records are protected as confidential under Wis Stat. §§146.82, 905.04 and 51.30 and protected from unauthorized release in 45 C.F.R. §146.82. When a defendant files a motion requesting a nonparty provide confidential and privileged materials, the defendant opens the door

for that nonparty to litigate whether they are obligated to provide those records.

The nonparty victim can argue whether the request for their records is valid, just as the medical entity can argue that they will not turn over the records without a proper release. Had the Defendant gone straight to the provider with a *subpoena duces tecum* for the victim's records instead of filing a *Shiffra-Green* motion, the Court would certainly grant the provider the right to challenge the legal basis for that subpoena. *See* Wis. Stat. §§968.135, 805.07, 968.12. Given the importance the Legislature has placed on protecting both records and crime victims, it is illogical to think that a crime victim would lack the same right to object to a request for privileged records that any outside party has when served with a subpoena.

It is the very action of the Defendant requesting T.A.J.'s records that provides T.A.J. standing.

II. Granting T.A.J. Standing Allows Him to Protect His Rights Without Violating the Rights of the Defendant.

A. T.A.J.'s Objection to the Defendant's Motion Is Not Prosecutorial Conduct.

The Defendant argues that T.A.J. should be denied standing because crime victims do not have any right to "participate in the prosecution," and only a district attorney has legal authority to prosecute a crime. Def. Resp. at 5, 19. T.A.J. is not asking to prosecute the criminal case or act as a district attorney. Rather T.A.J. is seeking standing to address the Defendant's *Shiffra-Green* motion which targets T.A.J. by requesting his confidential records. Such action is not prosecutorial.

The rationale behind independent prosecutors is to preserve fairness and justice by limiting the impact of bias, financial influence, and conflicts of interest within the criminal justice system. *State v. Biemel*, 71 Wis. 444, 37 N.W. 244 (1888). District Attorneys have a unique duty to seek the truth, regardless of the desires of a third-party or victim. *Id* at 445. It is this duty, their ethical obligations and the rules of conduct that are essential to protecting a defendant's due process rights.

The district attorney does not, however, represent the victim even if at times their interests are aligned Both T.A.J. and the State's Briefs articulate why it is necessary for a victim to have their own counsel. The Defendant does not respond, but rather simply asserts that "*Jessica J.L.*

remains applicable" 223 Wis.2d 622, 589 N.W.2d 660 (Ct. App. 1998). Def. Resp. at 19. The Defendant never explains why a case decided prior to and in conflict with the passage of Wis. Stat. §905.105 should remain good law.

The Defendant also ignores the core problem created by *Jessica J.L.* In trying to give victims a voice, the Court concludes that district attorneys have to consult with the victim and respond to *Shiffra* motions as the victim directs. *Id. Jessica J.L.* thus deprives district attorneys of their independence by requiring them to handle their case as the victim wants, even when counter to the district attorney's strategy. Wis. Stat. §905.105 simultaneously secures the right *Jessica J.L.* recognizes while fixing that conflict by no longer requiring the district attorney to act as the victim's attorney.

Furthermore, a victim asserting their rights is separate from, and independent of prosecutorial conduct. T.A.J.'s objection to the Defendant's *Shiffra-Green* motion does nothing to prove guilt or innocence, nor does it open a door for participation in the wider prosecution of the case. Precisely because district attorneys and victims have different interests, a victim's position may be just as likely to hinder

the state's efforts to prosecute a defendant.

B. Standing is Necessary to Protect Victim Rights During the *Shiffra-Green* Procedure.

Since the district attorney is not the attorney for the victim, the need for crime victims to independently assert their rights is essential. The Defendant argues that the judicially created procedure for *Shiffra-Green* motions already protects a victim by requiring an *in camera* review and consultation prior to the release of any records. Def. Resp. at 14. But this procedure does not guarantee it is applied properly or that it protects victims' rights.

An *in camera* review is not sufficient protection of a victim's privacy rights. It may protect T.A.J. from having his records immediately provided to the state and defense, but it is still a violation of his privacy rights, and still requires a waiver of confidentiality and privilege.

In creating a federal patient-therapist privilege, the US Supreme Court in *Jaffee v. Redmond*, reasoned that effective treatment "depends upon an atmosphere of confidence and trust in which the patient is willing to make a frank and complete disclosure of facts, emotions, memories, and fears." 518 U.S. 1, 10 (1996), 116 S.Ct.1923, 135 L.Ed 2d 337. The Court

warned that "the mere possibility of disclosure may impede development of the confidential relationship necessary for successful treatment," and that "[m]aking the promise of confidentiality contingent upon a trial judge's later evaluation of the relative importance of the patient's interest in privacy and the evidentiary need for disclosure would eviscerate the effectiveness of the privilege." *Id.* at 17.

To be required to provide confidential records to the court, without having any say in the matter, shatters a victim's confidence in treatment. One cannot underestimate the embarrassment a victim must endure at each hearing or when testifying, knowing that the judge has read their private records, even if the judge did not release them. If an *in camera* review was sufficient to protect a victim, there would be no need to require a defendant meet any materiality test under *Shiffra-Green*. It is precisely because an *in camera* review is itself a significant violation of a victim's privacy, that *Shiffra-Green* motions must meet threshold requirements before an *in camera* is granted. And it is precisely here that the need for victims to be heard is most important. Once an *in camera* review is granted, a victim's ability to protect their privacy is gone.

The Defendant also argues that asking T.A.J. whether he consents to the production of records is sufficient protection. Def. Resp. at 15. That is simply wrong. Asking the victim is a procedural necessity since a signed release is required; while the question itself reduces a victim's involvement to a single "yes" or "no" where he is forced to choose between protecting his privacy and seeking justice.

C. Victim Standing Does Not Impair a Defendant's Due Process Rights.

Although the Defendant asserts that granting T.A.J. standing would violate the due process rights of defendants, he fails to identify what rights are at risk or how enforcing victims' rights would cause violations. Def. Res. at 15.

The Defendant's argument is based on the false premise that granting T.A.J. standing to respond to a motion requesting his confidential records would mean granting victims standing in all circumstances that might arise in a criminal case. T.A.J. seeks only standing to assert his rights as a crime victim. It is the Defendant who has brought T.A.J. into this case by stepping outside of traditional discovery procedures and requesting records that necessitate T.A.J. assert his privilege and rights.

There is no basis to believe that granting T.A.J. standing violates this Defendant's due process rights, much less that it risks violations of all defendants' due process rights.

CONCLUSION

The Wisconsin Legislature did not create Chapter 950 or pass Article 1 Section 9m of the Wisconsin Constitution to merely give lip service to victim rights. Their clear intent was to ensure the rights of crime victims be honored and protected "in a manner no less vigorous than the protections afforded criminal defendants." Wis. Stat. §950.01. Wis. Stat. §950.105 is the enforcement mechanism essential to making that intent possible. It is the unambiguous authority that grants victims like T.A.J. standing to assert and protect their rights in court proceedings.

Therefore, T.A.J. respectfully asks this Court to vacate the order denying T.A.J. standing to participate in and independently object to the Defendant's *Motion for In camera Review of* T.A.J.*'s Confidential and Private Mental Health Records*.

Dated this 4th of November 2019.

Respectfully submitted,

LEGAL ACTION OF WISCONSIN
ATTORNEYS FOR TAJ
ANDREA K RUFO
State Bar No. 1063962

Legal Action of Wisconsin, Inc.
4900 Spring St., Suite 100
Racine, WI 53406
(T) 262.635.8836
(F) 262.635.8838

CERTIFICATION OF FORM/LENGTH

Andrea K Rufo herein certifies that this motion meets the form and length requirements of Wis. Stat. §809.19(8)(b) and (c) for a reply brief produced with proportional serif font. The length of the brief is 2,979 words.

Dated this 4h day of November 2019.

Andrea K Rufo

CERTIFICATION OF COMPLIANCE WITH WIS. STAT. § 809.19(12)

Andrea K Rufo herein certifies the following:

I have submitted an electronic copy of this reply brief, which complies with the requirements of Wis. Stat. § 809.19(12). I further certify that the electronic reply brief is identical in content and format to the printed form of the reply brief filed on this date. A copy of this certificate has been served along with (10) paper copies of this reply brief with the court and (3) paper copies to all attorneys of record.

Dated this 4th day of November 2019.

Andrea K Rufo

CERTIFICATION OF SERVICE

I, Andrea K Rufo, herein certify that I am employed by Legal Action of Wisconsin, which is located at 4900 Spring St., Suite 100 Racine, WI 53402 and that on the 19th day of August, 2019 10 copies each of Appellant's Reply Brief were hand delivered to the Office of the Clerk of the Court of Appeals at 110 E. Main St., Suite 215 Madison, WI, 53707. I hereby certify that three (3) copies each of the Appellant's Reply Brief were also hand delivered to the Plaintiff-Respondent State of Wisconsin at the offices of the Department of Justice at 17 W Main St. Madison, WI 53707. I further certify that three (3) copies each of the Appellant's Brief and Appellant's Appendix were deposited on November 4, 2019 in the U.S. Mail, securely enclosed, the postage prepaid for first class mail and addressed to:

Attorney Nathaniel Wojan
1650 Midway Road
Menasha, WI 54952

Dated this 4th of November, 2019.

Andrea K Rufo