STATE OF WISCONSIN

COURT OF APPEALS – DISTRICT III

Case No. 2020AP001876-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

TOMAS JAYMITCHELL HOYLE,

Defendant-Appellant.

Appeal of a Judgment of Conviction and an Order Denying Postconviction Relief in Chippewa County Circuit Court, the Hon. James M. Isaacson, Presiding

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APPELLANT'S SUPPLEMENTAL BRIEF REGARDING POSTCONVICTION DISCOVERY

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BACKGROUND

Defendant-Appellant Tomas Hoyle is appealing the convictions arising from his alleged sexual assault of "Hannah."[1] Among the claims raised by Hoyle was that he was entitled to postconviction discovery of records related to the counseling for sexual assault that Hannah claimed at trial explained her unemotional demeanor. (Hoyle Br. at 26-29). According to the writer of the pre-sentence investigation (PSI), Hannah informed the writer that, contrary to her trial testimony, her counseling was limited to her substance abuse issues, and that she did not receive any counseling for her sexual assault. (R. 31:4-5).

Citing this discrepancy between Hannah's trial testimony and post-trial statements to the PSI writer, and the significance of this "demeanor" evidence in light of the State's failure to introduce any sort of corroborating evidence, Hoyle sought postconviction discovery of Hannah's counseling records under *State v. Shiffra*, 175 Wis. 2d 600, 499 N.W.2d 719 (Ct. App. 1993) and *State v. Robertson*, 2003 WI App 84, ¶ 26, 263 Wis. 2d 349, 365, 661 N.W.2d 105, 113. However, while this appeal was pending, the Wisconsin Supreme Court overturned *Shiffra* in *State v. Alan Johnson*, 2023 WI 39 (decided May 16, 2023). This court then granted Hoyle's request to file a supplemental brief addressing Hoyle's postconviction discovery claim in light of *Johnson*.

Hoyle's brief-in-chief includes a full statement of the procedural background and relevant facts. For

[1] Hoyle is using the pseudonym for Hannah employed by the court of appeals in its earlier decision in this case.

convenience' sake, the portions of the trial testimony and PSI relevant to the postconviction discovery issues are set out below.

The following passage concludes Hannah's direct testimony:

> **DA:** You mentioned that it's traumatic to you today and upsetting to you today. Is there a reason why you are not crying now?
>
> **Hannah:** I have gotten counseling to help with dealing with this.
>
> **DA:** So because it has happened so long ago, you've had professional help in dealing with the repercussions of what occurred.
>
> **Hannah:** Correct.
>
> **DA:** So it's not that it doesn't affect you; it's that you are now better able to deal with it.
>
> **Hannah:** Correct.
>
> **DA:** So just because you're not crying here today doesn't mean you're not sad about what occurred to you.
>
> **Hannah:** Correct.
>
> **DA:** Do you still go to counseling for this?
>
> **Hannah:** Yes.
>
> **DA:** And your counseling, is it related to just this or everything that's gone on in your life, like the stuff with your mom?
>
> **Hannah:** Correct, everything.
>
> **DA:** So it's everything. So you talk both about issues with your mom, life in general, and this assault.
>
> **Hannah:** Yes.

> **DA:** Are they able to help you process through this?
>
> **Hannah:** Yes.
>
> **DA:** So as you mentioned, your ability to deal with it gets better and better as you deal with it professionally?
>
> **Hannah:** Correct.

(R.91:167-168).

The PSI writer reported the following regarding Hannah's counseling:

> She attends counseling once a week and feels this has helped her a lot. The counseling Hannah attends is for substance abuse. She admits she has not discussed the sexual assault with her counselor because she does not want to constantly relive the assault.

(R. 31:4-5).

ARGUMENT

I. If Hoyle is not granted a new trial, the case should be remanded for a new evidentiary hearing on Hoyle's newly discovered evidence claim so Hoyle may subpoena Hannah and her counseling records to the hearing.

When an appellate court announces a new rule that affects other pending appellate cases, the standard practice is to remand the pending case to the circuit court so it may apply the new rule. *See, e.g., Kenyon v. Kenyon*, 2004 WI 147, ¶ 36, 277 Wis. 2d 47, 72, 690 N.W.2d 251, 263.

Here, Hoyle sought postconviction discovery of the counseling records Hannah referenced at trial and to the PSI writer, under the procedure set out by *State v. Shiffra*, 175 Wis. 2d 600, 499 N.W.2d 719 (Ct. App. 1993) and *State v. Robertson*, 2003 WI App 84, ¶ 26, 263 Wis. 2d 349, 365, 661 N.W.2d 105, 113. That is, Hoyle filed a postconviction motion that included a request for *in camera* review of Hannah's counseling records based on their materiality to a newly discovered evidence claim.

The circuit court denied the motion, and while this appeal was pending, the Wisconsin Supreme Court reversed *Shiffra*. *State v. Johnson*, 2023 WI 39. The *Johnson* court did not announce any other procedure in its place, ostensibly leaving the matter up to the statutory rules of privilege.

On the one hand, this means that this court cannot order an *in camera* review of Hannah's counseling record. On the other hand, Hoyle is now free to simply serve Hannah with a subpoena duces tecum to produce the counseling records at a hearing on Hoyle's motion for postconviction relief. Whether Hannah wishes to assert a privilege – and whether Hannah waived the privilege by extensively discussing her counseling at trial – are issues that must first be resolved in the circuit court. Accordingly, if the court does not grant a new trial on Hoyle's other issues, the case must be remanded to the circuit court so Hoyle may pursue the avenue of relief defendants must pursue after *Johnson*.

A. Shiffra and Robertson required Hoyle to pursue Hannah's medical records by filing a motion for postconviction discovery.

In *State v. Shiffra*, 175 Wis. 2d 600, 499 N.W.2d 719 (Ct. App. 1993), this court recognized the tension between a defendant's constitutional right to present a defense and a witness's statutory right to keep certain health records privileged and confidential. The court provided that once a defendant showed that a witness's medical records met a threshold of "materiality," the circuit court would conduct an *in camera* review of the records, and provide the defendant with any records that were actually material. *Id.* If the witness refused to disclose the records, the witness would not be allowed to testify. *Id.* at 612. The Wisconsin Supreme Court later modified the "materiality" requirement under *Shiffra. State v. Green*, 2002 WI 68, ¶34, 253 Wis. 2d 356, N.W.2d 298.

In *Robertson,* the court of appeals explained how the *Shiffra/Green* framework is applied when treatment records are sought as postconviction discovery in support of a newly discovered evidence claim. 2003 WI App 84, ¶ 26. Under *Robertson,* the circuit court applies the four criteria for newly discovered evidence: that the evidence was discovered after trial, was not negligently ignored before trial, is material, and is not cumulative. *Id.* Rather than the standard test for "materiality," the test set out in *Green* is used. *Id.* Next, if the four steps of the combined tests are met, then the court conducts an *in camera* review of the treatment records. The court must then release to the defendant any treatment records that meet the standard for postconviction discovery, *i.e.* that it is "consequential to an issue in

the case." *State v. O'Brien*, 223 Wis. 2d 303, 323, 588 N.W.2d 8, 16 (1999); *Robertson,* 2003 WI App 84, ¶ 26.

Importantly, a motion seeking postconviction discovery must also include the other grounds for postconviction relief the defendant is seeking. A defendant cannot litigate a postconviction discovery motion through the appellate courts, and then later file a motion seeking other forms of postconviction relief when the request for discovery is ultimately denied. *State v. Kletzien*, 331 Wis. 2d 640, 645, 794 N.W.2d 920, 923 (Ct. App. 2011) (*citing State v. Escalona–Naranjo*, 185 Wis.2d 168, 185, 517 N.W.2d 157 (1994)).

Accordingly, Hoyle filed a postconviction motion that included, *inter alia*, a claim for a new trial based on newly discovered evidence – Hannah's inconsistent statements about whether she received counseling for the alleged assault – as well as a claim under *Robertson* for postconviction discovery of the counseling records alluded to in her trial testimony. (R. 63:3-13). Hoyle's motion explained how the records would be material is they showed that contrary to her trial testimony explaining the basis for her unemotional demeanor, she had not received any treatment for her counseling records. (Id. at 6-10). Hoyle further noted that if an *in camera* review of the records resulted in the production of material records, Hoyle would file an amended motion accordingly. (*Id*. at 8). *Escalona-Naranjo*, 185 Wis. 2d at 184 (grounds for relief must be raised in a defendant's "original, supplemental or amended postconviction motion.")

B. With Shiffra overturned, Hoyle may subpoena Hannah and her medical records to a postconviction hearing on his newly discovered evidence claim.

In *State v. Johnson*, the defendant filed a *Shiffra* motion seeking an *in camera* review of the mental health and counseling records of a complaining witness, T.A.J. *State v. Johnson*, 2023 WI 39, ¶ 2, 407 Wis. 2d 195, 199, 990 N.W.2d 174, 176. The State did not oppose the motion, but T.A.J. did. *Id*. While the circuit court and the court of appeals differed on whether T.A.J. had standing to oppose the *Shiffra* motion, the supreme court resolved the issue by simply overturning *Shiffra*. The court's reasoning was threefold: *Shiffra* misread Supreme Court precedent as requiring production of privileged documents in the possession of third-parties, instead of just confidential records already in the government's possession; the Shiffra standard is "unworkable" in practice; and various legal developments regarding victim rights.

The *Johnson* dissenters pointed out that by overturning *Shiffra*, the court left "nothing" "in its place" to balance the rights of defendants and victims. 2023 WI 39 at ¶ 108 (Ann Walsh Bradley, J., dissenting). A concurrence rejoined that "[o]n the contrary, the majority has restored a statutory privilege unaltered by the judicial pen." 2023 WI 39 at ¶ 67 (Rebecca Grassl Bradley, J., concurring).

The upshot is that after *Johnson*, a defendant's access to a witness's health care records will largely be a question of statutory privilege law, which in turn will usually consist of three questions: Is the witness claiming the privilege? Are the records within the

scope of the privilege? And has the witness waived the privilege?

First, the health care privilege "may be claimed by the patient"; by the patient's guardian or conservator; or, if deceased, by the patient's personal representative. Wis. Sat. § 905.04(3). In the absence of evidence to the contrary, certain enumerated medical professionals may presume they have the authority to "claim the privilege but only on the patient's behalf." *Id*. Accordingly, the *State* cannot claim the health care privilege on a witness's behalf. It is up to the holder of the privilege to assert it in a given proceeding. For this reason alone, it would be inappropriate for this court to address any potential privilege issues.

Second, the scope of the privilege will depend on a detailed examination of the contents, participants, and circumstances of the communications at issue. Subsection (2) sets out the "general rule" of the privilege, and requires that the communications be "confidential" and for the "purposes of diagnosis or treatment of the patient's physical, mental or emotional condition." Not all statements to medical professionals are meant to be confidential, or for "diagnosis or treatment." *See Int. of Joy P.*, 200 Wis. 2d 227, 234, 546 N.W.2d 494, 498 (Ct. App. 1996) (privilege holder "must show that he had an objectively reasonable belief that the discussions were confidential and made for the purposes of diagnosis or treatment.") (cleaned up).

Subsection (2) also limits the privilege to communications with specific, enumerated medical providers. The privilege holder must show that the

provider is listed in Subsection (2), and that the holder had the requisite relationship with that provider.

Subsection (4) lists 11 different exceptions to the privilege, such as when the communication is relevant to "an issue of the physical, mental or emotional condition of a patient in any proceedings in which the patient relies upon the condition as an element of the patient's claim or defense."

Once a court determines that the witness has claimed the privilege, and that the communications are within the privilege's scope, the court may have to determine if the witness has nonetheless waived the privilege. Wis. Stat. § 905.11 provides that any privilege holder under Chapter 905 "waives the privilege if the person … voluntarily discloses or consents to disclosure of any significant part of the matter or communication." Thus, if a witness discusses their medical treatment before or even during a proceeding, they may have waived any privilege to withhold from disclosure any communications related to the treatment.

But even if the Wisconsin rules of evidence deem a communication privileged, "the application of an evidentiary rule may … impermissibly abridge an accused's [constitutional] right to present a defense in certain circumstances." *State v. St. George*, 2002 WI 50, ¶ 51, 252 Wis. 2d 499, 526, 643 N.W.2d 777, 788. Thus, even if the statutory privilege requirements are met, constitutional considerations may take precedence and pierce the privilege.

Turning to the case at hand, if Hoyle had filed his postconviction motion in a post-*Johnson* world, with *Shiffra* overturned, he could not include a claim

for postconviction discovery. However, he could simply serve Hannah with a subpoena duces tecum to appear, with her counseling records, at the postconviction hearing on Hoyle's newly discovered evidence claim. Again, the basis for Hoyle's claim is the discrepancy between her claim at trial that her lack of emotion while testifying was due to the counseling she received regarding the alleged assault, and her claim to the PSI writer that she did not go through any counseling regarding the alleged assault. Thus, the counseling records, and Hannah's testimony about her counseling, is relevant to Hoyle's claim.

The circuit court would then sort out numerous factual issues related to privilege: whether Hannah wishes to claim the health care privilege, whether the records and/or any communications with her counselor are within the scope of the privilege, and whether Hannah waived the privilege with her trial testimony.

Hoyle maintains that he is still entitled to a new trial simply based on Hannah's inconsistent statements about her counseling, as set out in Section I of his opening brief. Hoyle also maintains that he is entitled to a new trial due to the discovery issues raised in Section IV of his brief.

But if this court does not grant a new trial, then the case should be remanded to the circuit court so that Hoyle may pursue his newly discovered evidence claim under the new standard; that is, based on the rules of privilege rather than the balancing test of *Shiffra*. This is the normal procedure when an appellate court announces a new rule while an appeal is pending. *See, e.g., Kenyon v. Kenyon*, 2004 WI 147, ¶ 36, 277 Wis. 2d 47, 72, 690 N.W.2d 251, 263. Indeed,

any other decision would violate Hoyle's due process right to meaningful judicial review under the Fourteenth Amendment and his right to a meaningful appeal under Article I, Section 21 of the Wisconsin Constitution. *State v. Raflik*, 2001 WI 129, ¶ 16, 248 Wis. 2d 593, 609, 636 N.W.2d 690, 695.

CONCLUSION

For the reasons stated above and in his prior submissions to the court, Hoyle is entitled to a new trial, or in the alternative, a remand for a rehearing on his newly discovered evidence claim with an opportunity to subpoena Hannah and her counseling records.

Dated this 26th day of June, 2023.

Respectfully submitted,

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