

**THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
NH CIRCUIT COURT**

Coos County

1st Circuit - District Division - Lancaster

State v. Jeffrey R. Woodburn

451-2018-CR-00297

ORDER ON PENDING MOTIONS

A hearing was held in this matter on October 15, 2018 to address the State's Motion to Seal Defendant's Pleadings, filed October 1, 2018. (Index #23) At the Court's request and without objection the hearing also addressed the Defendant's Motion for Discovery, filed September 27, 2018. (Index #22) The State was represented by Geoffrey W.R. Ward, Esquire and John Kennedy, Esquire. The Defendant, Jeffrey R. Woodburn, was present and was represented by Donna J. Brown, Esquire. The alleged victim, Emily Jacobs (hereinafter "Ms. Jacobs"), was represented at the hearing by Patricia M. LaFrance, Esquire, who both appeared telephonically.

At the outset the Court addressed the numerous exhibits attached to pleadings. The Court indicated its inclination is to return the attachments to the filing party. The State had no objection to the Court's suggestion that the attachments being returned to the filing party. The Defendant argued that the practice of attaching possible exhibits to pleadings is prevalent in the motion practice in the Superior Court. Counsel for the Defendant argued that including the attachments in the instant case was necessary because the Defendant has the burden to show that the information he is seeking is material and relevant to his defense. The Defendant argued that the records are necessary to establish a basis for disclosure of the records.

Attorney LaFrance argued that the Defendant not only quoted the counselor in his motion, but pro-actively sent his motion to the press.

The Court ruled from the bench that henceforth evidence shall not be submitted as an attachment to motions. The Court further ordered that the attachments already submitted shall be separated from the motions and returned to the filing party.

The Court next addressed the issue of whether an alleged victim can file substantive pleadings in a criminal case. Attorney LaFrance has already filed: 1) a General Appearance (Index #24); 2) an Objection to the Defendant's motion for discovery (Index #25); 3) a Motion to Appear Via Teleconference (Index #27); and 4) a Notice of Replacement Attachment to Objection. (Index #28)

The State took no position, but noted there have been cases in the past in which the alleged victim has requested to intervene for a specific motion.

Counsel the Defendant agreed that the presence of Attorney LaFrance creates some confusion as to the level of her involvement as well as the necessity, if any, of the State and Defendant to contact her regarding the various issues that arise in the case.

Attorney LaFrance argued that there is some precedent for victims of domestic violence to be represented in criminal proceedings against the alleged perpetrator.¹ She referred to *Richards'* hearings and communications regarding immunity. Attorney LaFrance argued that at times the interests of the State and the alleged victim are not consistent with each other. Attorney LaFrance argued that victims have rights regarding her privacy.

The Court noted that the filing of a General Appearance by Attorney LaFrance created confusion as to her level of involvement in the case. The Court also noted that Attorney LaFrance did not file any formal motion to intervene setting forth her client's position as to the scope of her involvement in the case. The Court ruled from the bench that Ms. Jacobs was not a full party to this proceeding at this stage of the process. The Court also ruled that Attorney LaFrance's only role in this case at this time is to represent her client's interest in interactions with the State. The Court invited Attorney LaFrance to file a memorandum of law or a formal motion to intervene to enlighten the Court on that issue, but ordered that Attorney LaFrance was to file no further pleadings in this matter without leave from the Court.

1) State's Motion to Seal Defendant's Pleadings, filed October 1, 2018. (Index #23)

The State requested that the hearing on the Motion to Seal be closed to the public. The basis for the request was that confidential records may be discussed in the course of the hearing. The Defendant objected. The State argued that this issue does not involve the public trial issue. The State argued that the reason the hearing should be sealed is that the Court could find that the information sought by the Defendant is not relevant. The State argued that the alleged victim is protected by the Victim's Bill of Rights as well as constitution privacy rights. The State argued that preliminary hearings and the pleadings related to those hearings are always sealed.

Since this issue related to confidential records involving Ms. Jacobs, the Court asked for input from Attorney LaFrance. She agreed with the State.

¹ Counsel failed to cite any specific case.

The Defendant argued that he has a right to a public trial and that denial of that right would be reversible error. The Defendant noted that the N.H. Supreme Court just confirmed a Defendant's right to a public trial in a recent case.²

Attorney Brown argued that the records that they are seeking are not confidential. The Defendant argued that even if the records were confidential the alleged victim waived that confidentiality by discussing the counseling with Paul Donahue in her interview with the police. The Defendant argued that he has a right to a public trial. The Defendant argued that the right to access the records is part and parcel to that right. The Defendant ordered that there is a presumption in favor of open hearing.

Attorney LaFrance argued that her client was speaking to the police about the counseling in a very limited context. Attorney LaFrance argued that merely mentioning counseling in an interview with the police does not constitute a waiver of confidentiality. Attorney LaFrance asked the Court to adopt her proposed protective order. She argued that full disclosure of the records without the *in camera* review by the Court would have a chilling effect on victims coming forward in the future.

Attorney Brown advised the Court that she objected to the proposed protective order submitted to Attorney LaFrance. The Defendant argued that the alleged victim spoke with the police at length as to what was said during some of the counseling sessions.

The State argued that there is a distinction between closing the hearing at this stage in the process and the Defendant's right to a public trial. The State argued that the Defendant does not get to decide whether there has been a waiver. The State argued that the Court can always decide to unseal the record.

After hearing the arguments the Court denied the State's motion to seal the hearing. In doing so the Court cautioned the parties to be circumspect with regard to what is disclosed in the course of the hearing.

On the issue the State's motion to seal the pleadings the State indicated that the same argument made in the context of sealing the hearing apply. The State reiterated, "that this is the way things are done." The State argued that motions related sealing pleadings that reference confidential records are sealed as a matter of course. The State argued that the instant case is even more compelling because it appears that the counselor contacted the Defendant and divulged something he learned in

² *State v. Afshar*, ___ N.H. ___ (decided 10/12/2018) The decision really does not address the right to a public trial, but does reiterate that a, "defendant has the right to be tried by a fair and impartial jury."

counseling with the alleged victim to the Defendant. The State argued that the counselor violated the privilege. The State argued that the Defendant's pleadings contain privileged information under the privileges recognized in our rules of evidence. The State argued that the Defendant's motion also contains other privileged information that is protected by statute – such as the alleged victim's place of employment. The State made it clear that their argument is not impacted at all by the claim that the Defendant is a public figure.

The Defendant argued that there is no statute or court rule that requires his pleading to be sealed. The Defendant argued that orders sealing a pleading or a hearing create an inference that there is something bad to hide. The Defendant argued that because of the parties involved are public figures the hearing should be as open to more public scrutiny. The Defendant argued that the Court must apply a balancing test the Court must apply. The State must overcome the presumption of disclosure. The Defendant reiterated that there should be more public scrutiny when the Defendant is a public figure.³

Attorney LaFrance argued that there is no precedent that establishes special rules for public figures. She argued that the victim has a statutory right to protection of her privacy rights, citing RSA 21-M:8-k.II.

2) Defendant's Motion for Discovery (Index #22)

The Defendant filed this motion to access counseling records of the alleged victim, Emily Jacobs, as maintained by Dr. Paul Donahue, Ph.D., citing due process under both the state and federal constitutions. The Defendant alleged that Dr. Donahue was retained for both individual and couples counseling. The Defendant alleged that on or about July 3, 2018 Dr. Donahue left him a voice mail in which he warned the Defendant to proceed with caution in dealing with Ms. Jacobs. He warned the Defendant that Ms. Jacobs wanted to, "get back at [him], for wanting to end their relationship." The Defendant alleged that Ms. Jacob's obtained a copy of her progress notes from Dr. Donahue but failed to turn them over to the Attorney General's office. The Defendant asked the Court to infer that her failure to disclose the progress notes was because they were inconsistent with her version of events surrounding these charges. The Defendant argued that there was evidence that Ms. Jacobs deleted some text messages between her and the Defendant, again arguing that she did this

³ *In re Special Proceedings*, 842 F.Supp.2d 232, 239 (D.D.C. 2012)

because they were inconsistent with her current version of the events between the two. The Defendant argued that the records sought are material and relevant.

The Defendant filed numerous cases arguing he has established a legitimate basis for an *in camera* review of the records.

The State filed an Objection to Defendant's Motion for Discovery on October 11, 2018. The State argued in the first instance that the records are subject to psychologist-patient privilege pursuant to RSA 329:26.⁴ The State cited the three prong test articulated in *Petition of the State of New Hampshire*, 162 N.H.67 (2011), which entails a showing that:

1. That there is a reasonable probability that the records contain relevant and material;
2. That the information is unavailable from another source; and
3. That there is a compelling justification for disclosure.

Id. at 70

The State argued that the Defendant has failed to show that there is anything material or relevant in Dr. Donahue's counseling records. The State noted that the alleged waring in Dr. Donahue's voicemail made no mention of the records. The State argued that the Defendant already has Dr. Donahue's voicemail, which is an alternative source to the information being sought. The State also argued that should the Court order an *in camera* review of the records, the records from both the individual counseling and the couples counseling should be produced.

The Defendant agreed that the counseling records should be reviewed by the Court *in camera* review prior to disclosure to the parties. The Defendant argued that the emails between the parties were attached to his motion to establish the context for the alleged victim's threat to get back at the Defendant. The Defendant argued that they have met their burden based on the phone call from Paul Donahue to the Defendant, which is exculpatory.

The State argued that the Defendant already has the recording of the phone call from Dr. Donahue. However, there is nothing in the phone call referring to counseling records. The question then becomes whether there is any exculpatory evidence in the counseling records. The State argued

⁴ The State also cited the physician-patient privilege pursuant to RSA 329:26. However, Dr. Donahue is not a medical doctor and was not interacting with Ms. Jacobs to treat a medical condition. The Court finds that privilege does not apply.

that the Defendant has failed to meet his burden with respect to those records. The State argued that if the Court is going to review any of the counseling records then it should review all of them.

The State argued that paragraph twelve of the Defendant's motion actually references inculpatory evidence and thus does not meet the Defendant's burden to show the records include exculpatory information.

At the end of the hearing the Court took the issues presented under advisement, but made a temporary order sealing the Defendant's Motion for Discovery subject to this order.

Attorney LaFrance argued that her client did not initiate contact with the police. She argued that the investigation started based on an inquiry from the General Court.

Based on the arguments presented the Court orders the following:

1. The State's Motion to Seal Defendant's Pleading (filed October 1, 2018) is granted, subject to further orders. The Defendant's filings are permeated with quotes from confidential records and other materials that may or may not be admitted into evidence. As such, the Defendant's Motion for Discovery (filed September 27, 2018), as well as the Defendant's Objection to State's Motion to Seal (filed October 4, 2018) are sealed pending further court orders.
2. The Defendant's Motion for Discovery (filed September 27, 2018) is granted. The Court finds that: 1) There is a reasonable probability that the records contain relevant and material in that the Defendant has made the necessary showing that that records may contain information that impacts the alleged victim's credibility; 2) The information is unavailable from another source in that the information requested consists of confidential counseling records; and 3) there is a compelling justification for disclosure in that the information contained in the records may be exculpatory.
3. The entirety of the counseling records related to the Defendant and the alleged victim, Emily Jacobs, shall be submitted to the Court for an *in camera* review to determine which, if any, contain exculpatory information that should be provided to the Defendant.
4. The use of any such records deemed by the Court to be discoverable shall be subject to further protective orders as the Court deems necessary and appropriate.
5. "Attachment C" to the Defendant's Objection to State's Motion to Seal (filed October 4, 2018) was marked as **Exhibit A** at the hearing and shall remain as part of the record.
6. The Clerk shall make a copy of the Defendant's Motion for Discovery (filed September 27, 2018) and the Defendant's Objection to State's Motion to Seal (filed October 4, 2018) as it was filed and place it in a sealed envelope to preserve the record as filed. The Clerk shall

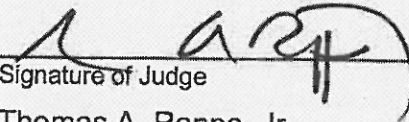
then remove all of the attachments to those pleadings and return them to the Defendant's attorney (with the exception of **Exhibit A** as discussed above).

7. While this order was pending the Court received an Assented Motion to Transfer Case to Superior Court was filed and granted. This matter is transferred to the Coos County Superior Court for further proceedings. All further pleadings should be filed in that venue.

So Ordered.

November 26, 2018

Date



Signature of Judge

Thomas A. Rappa, Jr.

Printed Name of Judge