

IN THE COURT OF COMMON PLEAS IN THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

STATE OF DELAWARE

v.

ALEXANDER HICKS

Defendant.

)  
)  
)  
)  
)  
)  
)  
)  
)  
)  
)

Case No.: 1007025182  
Cr.A. No.: K10-07-2060

Lindsay Taylor, Esq.  
Deputy Attorney General  
Department of Justice  
102 West Water Street  
Dover, DE 19901  
Attorney for the State

Valerie Dunkle, Esq.  
Assistant Public Defender  
Sykes Building  
45 The Green  
Dover, DE 19901  
Attorney for the Defendant

**DECISION ON STATE'S MOTION IN LIMINE**

Defendant has been charged with one count of Menacing in violation of 11 Del. C. Section 602(a). Prior to the trial for this matter, the State filed a Motion in Limine to exclude the testimony of the alleged victim's primary physician from trial pursuant to the physician-patient privilege provided by Rule 503 of the Delaware Uniform Rules of Evidence. The defendant contends that he needs the physician's testimony to impeach the testimony of the alleged victim, as is his right pursuant to the

Confrontation Clause of the Sixth Amendment to the United States Constitution. The court conducted a hearing for the State's motion and accepted proffers of proof from the State and defense. After applying the *Wood* and *Burns* test to determine whether a court should conduct an *in camera* review of confidential medical evidence to determine whether it should be provided for trial, the court has decided to conduct such an *in camera* review.

### FACTS

The defendant has been charged with Menacing in violation of 11 *Del. C.* Section 602(a). In the Information filed by the State, the State alleges that the defendant placed the alleged victim ("victim") in fear of imminent physical injury by grabbing a chair and holding it over his head as a means of intimidating her. Its primary witness appears to be the victim. The defense has subpoenaed the primary physician for the victim for trial. It contends that the physician will testify that the victim suffers from "severe" dementia, that this condition causes her to hallucinate and that her allegations could be such a hallucination. If the physician does not testify, the defense can rely on other testimony of individuals who have personal knowledge of the victim's hallucinations. However, these individuals are not medical experts. The State contends that if called, the physician will testify that the victim suffers from a "mild" form of dementia. The State also concedes that the victim will not consent to the release of her confidential medical information by the physician.

The State filed a Motion in Limine to exclude the testimony of the victim's personal physician from trial pursuant to Rule 503 of the Delaware Uniform Rules of Evidence and the physician-patient privilege that it provides. The defense opposes the

State's motion on the grounds that the testimony of the physician is needed for impeachment purposes for the State's primary witness, as is the defendant's right pursuant to the Confrontation Clause of the Sixth Amendment to the United States Constitution.<sup>1</sup> In rebuttal, the State contends that the defendant's right to confrontation will not be violated as he will be able to cross-examine the victim. Additionally, he can also attempt to impeach the testimony of the victim through other witnesses that have knowledge of her medical condition and her "alleged" hallucinations.

## DISCUSSION

### **I. Physician-Patient Privilege**

Rule 503 of the Delaware Uniform Rules of Evidence provides, in pertinent part as follows:

(b) *General rule of privilege.* A patient has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of diagnosis or treatment of the patient's physical, mental or emotional condition, including alcohol or drug addiction, among the patient, the patient's mental health provider, physician or psychotherapist, and persons who are participating in the diagnosis or treatment under the direction of the mental health provider, physician or psychotherapist, including members of the patient's family.

Rule 503(a)(1) defines a "confidential communication" as follows:

A communication is "confidential" if not intended to be disclosed to third persons, except persons present to further the interest of the patient in the consultation, examination or interview, persons reasonably necessary for the transmission of the communication or persons who are participating in the diagnosis and treatment under the direction of the mental health provider, physician or psychotherapist, including members of the patient's family.

It is the claimant's burden to establish the elements of the physician-patient privilege. *Secrest v. State*, 679 A.2d 58, 62 (Del. 1996).

---

<sup>1</sup> The Sixth Amendment to the United States Constitution applies to the states through the Fourteenth Amendment to the United States Constitution.

The physician-patient privilege as provided by Rule 503 is at issue in this case because the defense seeks to call the victim's primary physician to testify that the victim suffers from "severe" dementia and that her allegations could be a hallucination. The physician's purported diagnosis stems from confidential communications made to him by the victim while she was being treated for a physical, mental or emotional condition. Therefore, the court is satisfied that the victim has established all the elements of the physician-patient privilege and may properly invoke it in this proceeding.<sup>2, 3</sup>

## II. Sixth Amendment Right to Confrontation

"The Sixth Amendment's Confrontation Clause provides that, '[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.'" *Crawford v. Washington*, 541 U.S. 36, 42 (2004). "The right of a defendant to confront the witnesses against him and to effectively cross-examine them is fundamental to a fair trial under the United States Constitution." *State v. Rogers*, Del.Super., Cr.A. Nos. IK89-04-0032, IK89-05-0833, Steele, J. (May 11, 1990) (Mem.Op.). A defendant's right to confrontation includes his or her right to present evidence for impeachment purposes. *See State v. Patterson*, 1998 WL 438673 (Del. Super.).

---

<sup>2</sup> The victim's daughter was present while the victim was examined by her physician. However, the presence of the victim's daughter during the consultation with the physician does not waive the physician-patient privilege. During the hearing for the State's motion, the court found that due to the victim's medical condition, it was necessary for her daughter to be present at the consultation to further the victim's interest as a patient during it. Thus, the communications during the consultation remain confidential pursuant to Rule 503(b).

<sup>3</sup> It is noted that Rule 503(d) includes exceptions to the physician-patient privilege. However, none of the exceptions listed are applicable in this case.

### III. *Wood/Burns* Test

In this case, the defendant's right to confront the witnesses testifying against him, to conduct an effective cross-examination of them and to impeach their testimony, as guaranteed by the Sixth Amendment to the United States Constitution, conflict with the victim witness' right to keep her medical information private under the physician-patient privilege as provided by Rule 503 of the Delaware Uniform Rules of Evidence. In Delaware, when such a conflict occurs, the court will normally perform an *in camera* review of the evidence protected by the physician-patient privilege to determine whether the evidence is necessary for an effective cross-examination of any witness against him or her and for impeachment purposes. The review should focus upon whether the evidence is relevant and sufficiently material to the defendant's case that it should be presented at trial. *See State v. Wood*, 2007 WL 441953 (Del. Super.). However, before such an *in camera* review of the privileged information is performed by the court, it must perform a test as outlined by the Superior Court in *State v. Wood*, 2007 WL 441953 (Del. Super.) and the Delaware Supreme Court in *Burns v. State*, 968 A.2d 1012 (Del. 2009) to determine whether the review should be performed at all .

The Superior Court in *State v. Wood* faced a similar issue to the one before this court. In *Wood*, the defendant sought the confidential medical records of two alleged victims who were expected to testify for the State. *Id.* at \*1. The Superior Court acknowledged the conflicting interests between the witnesses' physician-patient privilege and the defendant's Sixth Amendment right to confrontation. *Id.* at \*3-4. The court recognized that earlier Delaware decisions concluded that in some cases an *in camera* review of privileged evidence is necessary to allow a court to preserve a witness' right to

privacy and confidentiality, while justifying the breach of those rights only in cases where the defendant should be allowed to view the evidence because the review is necessary to protect his or her right to confrontation. *Id.* at \*6. The *Wood* court outlined the following test to determine whether a court should conduct an *in camera* review of confidential medical evidence:

First, the defendant must be able to identify precisely the evidence he or she is seeking, and assert a “compelling basis” for the request. The court should not permit a “fishing expedition” into the witness’ medical or psychological history.

Second, the defense should attempt to procure the consent of the State’s witness for the release of the confidential evidence. Only in the event the witness refuses the consent should the defendant make an application to the court for the issuance of a subpoena for the evidence to be reviewed by the court.

Third, the defendant must . . . demonstrate to the court, with specificity, that the information he or she is seeking is relevant and material to his or her defense.

*Id.* at \*5-6.

The Delaware Supreme Court in *Burns v. State* adopted the *Wood* test to determine whether a defendant is entitled to an *in camera* review of confidential medical records by a court. However, the court altered the third prong of the test. The Supreme Court stated that a defendant is only required to make a “plausible showing” that the information he is seeking is relevant and material, rather than having to establish relevance and materiality with specificity.” *Id.* The court found it impossible in most cases for a defendant to establish materiality and relevance with specificity as contemplated by the *Wood* Court. *Id.* The *Burns* court also cautioned that the change made to the *Wood* test does not mean that every defendant is entitled to an *in camera*

review. The court stated that “[d]efendants must still establish specifically what kinds or categories of records they are seeking, and must articulate a compelling basis for the request.” *Id.*

Although the court decisions in *Wood* and *Burns* involved a defendant’s request for medical records and not of actual medical testimony by a physician, this court adopts the application of the same standard to determine whether medical testimony involving information protected by the physician-patient privilege should be permitted in a criminal trial. Upon application of the test as outlined by *Wood* and *Burns* to determine whether a court should perform an *in camera* review of confidential medical information to determine whether it is needed by the defense at a criminal trial, the court concludes that the defendant is entitled to such an *in camera* review of the victim’s primary physician’s potential testimony to determine whether the testimony will be necessary at trial to impeach the credibility of the victim witness.

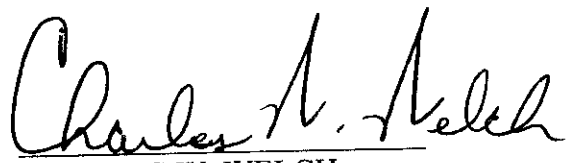
First, the defendant has identified with particularity the information that he is seeking from the physician and has asserted a “compelling basis” for the request. There is sufficient evidence to believe that the physician’s testimony could show that the victim suffers from a medical condition, dementia, that could result in significant risk that the incident involved in this case was a hallucination. The testimony of a medical expert is needed to place such a diagnosis on the record. Therefore, the relevance of testimony of other witnesses who are not medical experts needs to be discounted as they cannot provide medical expert testimony. Second, the defense has attempted to procure the consent of the victim for the release of the confidential evidence, which request has been

denied. Third, the defendant has made a “plausible showing” that the information he is seeking is relevant and material to his defense.

**CONCLUSION**

Based on the court’s finding of fact and conclusions of law as contained in this opinion, the court will not rule on the State’s Motion in Limine until it has conducted an *in camera* review of the confidential medical evidence that the defense desires to present at trial to impeach the credibility of the testimony of the alleged victim of this case, who the State plans to call as its primary witness.

**IT IS SO ORDERED this 26<sup>th</sup> day of January, 2011.**

  
CHARLES W. WELCH  
JUDGE