

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

| | | |
|-------------------|---|-----------------------------|
| THE STATE OF OHIO |) | CASE NO. CR 08 518919 |
| |) | |
| Plaintiff |) | JUDGE JOHN P. O'DONNELL |
| |) | |
| -vs- |) | <u>JOURNAL ENTRY</u> |
| |) | |
| ANTHONY STEWART |) | |
| |) | |
| Defendant |) | |

JOHN P. O'DONNELL, JUDGE:

Anthony Stewart is charged with ten counts of rape, two counts of gross sexual imposition, and twelve counts of kidnapping with a sexual motivation specification. The State of Ohio alleges that these crimes occurred from February through June, 2008, and involved Jane Doe.¹

The case is set for trial on April 7, 2009, and pre-trial discovery is ongoing. Through discovery the defendant learned that Jane Doe and her family were the subject of an investigation by the Cuyahoga County Department of Children and Family Services because of the allegations giving rise to the indictment. The defendant also learned, or surmised, that Jane Doe had past involvement with the CCDCFS. On February 3, the defendant filed a motion for *in camera*

¹ Jane Doe has a date of birth of November 1, 1994 and is referred to in the Cuyahoga County Department of Children and Family Services records as Karmen K. There are references to several other members of the K. family in the records, all of whom have first names that begin with the letter K, hence it is necessary to include her first name here to distinguish her from the other family members.

inspection of the CCDCFS records.² On March 10, the CCDCFS provided a large box of records to the court.³ The court reviewed all of these records by March 12.

Section 2151.421(H) of the Ohio Revised Code provides that reports of suspected abuse or neglect of a child are confidential. In addition, Section 5153.17 provides that the records of a children's services agency are confidential. The confidentiality of these records, however, is not absolute and access to them may be allowed upon a showing of good cause. *Johnson v. Johnson* (1999), 134 Ohio App. 3d 579, 583.

Good cause in the criminal context would encompass a showing that the records should be produced in order to ensure the defendant's due process rights. The United States Supreme Court addressed a criminal defendant's ability to discover records of a children's services agency in the case of *Pennsylvania v. Ritchie* (1987), 480 U.S. 39. In *Ritchie* the defendant was charged with rape and other sex offenses against his minor daughter. The trial court denied the defendant any access to the files of the children's services agency because the records were statutorily confidential. The trial court did not conduct an *in camera* investigation to determine whether any of the records were subject to disclosure. The Supreme Court found that it was error to deny all access to the records without having conducted an *in camera* inspection. The Supreme Court noted:

It is well settled that the government has the obligation to turn over evidence in its possession that is both favorable to the accused and material to guilt or punishment. *United States v. Agurs* (1976), 427 U.S. 97; *Brady v. Maryland, supra*, at 87.

² The usual procedure is for a defendant to subpoena the records. The CCDCFS will then ordinarily seek to have the subpoena quashed on the basis of confidentiality and the court will thereafter review the records *in camera*. However, the end result is the same.

³ The records are contained in a box that used to hold photocopier paper. The lid has adhesive labels bearing the case caption the word "confidential." Inside the box are 12 separate manila envelopes containing the various records.

* * *

Ritchie is entitled to have the CYS file reviewed by the trial court to determine whether it contains information that probably would have changed the outcome of his trial.

* * *

We find that Ritchie's interest (as well as that of the Commonwealth) in ensuring a fair trial can be protected fully by requiring that the CYS files be submitted only to the trial court for *in camera* review.

* * *

An *in camera* review by the trial court will serve Ritchie's interest without destroying the Commonwealth's need to protect the confidentiality of those involved in child-abuse investigations. *Ritchie, supra*, at 57-60.

A trial court must therefore review the records *in camera* to determine whether they are material or exculpatory. Evidence is material, and should be produced to the defendant, if in its absence the defendant will not receive a fair trial, understood as a trial resulting in a verdict worthy of confidence. *Kyles v. Whitley* (1995), 514 U.S. 419, 429. Evidence is material if its non-production undermines confidence in the outcome of the trial. *Id.* Exculpatory evidence is defined as evidence favorable to the accused which, if disclosed and used effectively, may make the difference between conviction and acquittal. *State v. Drake* (2001), Cuyahoga App. No. 77460, unreported.

An additional consideration in this case is whether evidence should be produced to the defense that will ultimately be inadmissible because of Ohio's rape shield law. The defendant asserts that pre-trial discovery has revealed that Jane Doe made a statement to the effect that she learned of various sexual positions through the criminal conduct of the defendant. The defendant believes that the CCDCFS files may contain evidence of prior sex abuse or sex abuse

allegations by Jane Doe and, if so, that evidence should be produced to allow for a thorough cross-examination to test the credibility of her assertion that she learned types of sex acts only by the defendant's conduct. The defendant has also implied that any records of past sexual abuse claims are necessary to allow for cross-examination of Jane Doe as to prior false accusations of sexual abuse.

Revised Code § 2907.02(D) provides that evidence of specific instances of the victim's sexual activity shall not be admitted in a rape trial unless it involves certain kinds of evidence that do not appear to be at issue in this case. The argument that a defendant should be allowed to tear down the shield provided by this statute in order to show that a victim's advanced sexual awareness came from somewhere other than the defendant was rejected by the Cuyahoga County Court of Appeals in *State v. Smelcer* (1993), 89 Ohio App. 3d 115, at 122. (See also *State v. Guthrie* (1993), 86 Ohio App. 3d 465, at 467-468, upholding the trial court's decision to exclude evidence of prior sexual abuse claims where it was offered to show the victim's ability to describe sexual activity may have resulted from an experience other than the alleged offense.)

As to the claim that the CCDCFS files may contain information of prior false sex abuse accusations, the court is confident that, should this issue arise at trial, the procedure set out by the Ohio Supreme Court in *State v. Boggs* (1992), 63 Ohio St. 3d 418, is sufficient to protect the rights of the accused.

With all of the foregoing considerations in mind, upon *in camera* review of the entire box of CCDCFS records, the court hereby orders that the defendant⁴ is entitled to production of the following:

⁴ With copies to the assistant county prosecutor on the criminal charges.

1. Summary of social worker's 1/7/09 3:20 p.m., interview with A.S., Jane Doe's cousin;
2. Summary of social worker's 1/7/09 3:05 p.m., interview with M.S., Jane Doe's cousin;
3. Summary of social worker's 1/7/09 3:00 p.m., interview with Jane Doe;
4. Summary of social worker's attempted 12/12/08 2:00 p.m. interview of the defendant; and
5. June 27, 2008 two-page magistrate's decision in Juvenile Court Case No. CU06101525.

These documents are attached to the service copies of this entry but are not attached to the journalized copy of this entry.

Depending on the evidence introduced at trial some of the other documents contained in the CCDCFS records may become material, hence the court will hold the entire box of records. Upon the conclusion of the trial, the records will be sealed for preservation as part of the appellate record.

IT IS SO ORDERED.

JOHN P. O'DONNELL, JUDGE

SERVICE

A copy of the foregoing Journal Entry (with documents attached) was mailed this ____ day of March, 2009 to:

Pinkey Carr, Esq.
Assistant Prosecuting Attorney
The Justice Center
1200 Ontario St., 9th Fl.
Cleveland, OH 44113
Counsel for Plaintiff

William L. Summers, Esq.
Aaron T. Baker, Esq.
The Illuminating Bldg., Suite 2000
55 Public Square
Cleveland, OH 44113
Counsel for Defendant

Steven W. Ritz, Esq.
Assistant Prosecuting Attorney
Civil Division
Jane Edna Hunter Soc. Serv. Bldg. – 305-E
3955 Euclid Ave.
Cleveland, OH 44115
Counsel for CCDCFS