

RECEIVED

Dec 08 2022

SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenville County
Honorable G.D. Morgan, Jr., Circuit Court Judge
Appellate Case No. 2022-000374

The State,

Respondent,

vs.

Kathryn Martin Key,

Appellant.

RETURN TO STATE’S MOTION TO DISMISS

Appellant, by and through her undersigned counsel, would respectfully show unto this Court the following:

The State should not have been permitted to appeal to the Circuit Court the magistrate’s denial of the State’s request for medical records in the first place because the magistrate’s ruling did not “‘significantly impair[] the prosecution,’” State v. Looper, 421 S.C. 384, 387, 807 S.E.2d 203, 205 (2017); quoting State v. McKnight, 287 S.C. 167, 168, 337 S.E.2d 208, 209 (1985); see S.C. Code Ann. § 14-3-330(2)(a)(2017) (giving the Court appellate jurisdiction to review an intermediate order that “in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues the action”). This case has already been tried without Key’s medical records, and the State argued as an additional sustaining ground on appeal that “the record is *replete* with evidence of exigent circumstances.” Key, 431 S.C. 336, 342, 848 S.E.2d

315 (2020) (emphasis added). During oral argument, the State proceeded *solely* under its exigent circumstances argument. *Id.* at 342-43 (emphasis added). In its Motion to Dismiss this appeal, the State erroneously argued that this case is “almost exactly” like Looper which involved a State appeal after a magistrate suppressed the results of field sobriety tests and dismissed the DUI charge. Looper, 421 S.C. 384, 997 S.E.2d 203 (2017). Here, the magistrate’s denial of the State’s request for medical records does not dismiss the charge or suppress any evidence. The State’s appeal to circuit court following the magistrate’s denial of the request for medical records was further improper as the State’s proposed Order authorizing the release of Key’s medical records from Prisma Health amounts to a discovery order which is not appealable. See Grosshuesch v. Cramer, 377 S.C. 12, 30, 659 S.E.2d 112, 122 (2008) (explaining that “discovery orders, in general, are interlocutory and are not immediately appealable because they do not, within the meaning of the appealability statute, involve the merits of the action or affect a substantial right.”).

The Circuit Court Order is tantamount to the unsealing of records which makes this appeal proper. Should this appeal be dismissed, no appellate remedy is likely to repair the damage done by the improper disclosure. See Ex Parte Capital U-Drive-It, Inc. 630 S.E.2d 464 (2006) (“Moreover, we agree with courts which have been inclined to find such an order immediately appealable because, after a court file is unsealed and the information released, no appellate remedy is likely to repair any damage done by an improper disclosure. Compelling a party that disputes an unsealing order to forgo an appeal until the conclusion of the underlying litigation would let the cat out of the bag, without an effective way of recapturing it if the district court’s direction was ultimately found to be erroneous.”) (internal citations quotation omitted). As this Court is well aware, the exigent circumstances exception to the warrant requirement may be in-

voked “when the exigencies of the situation make *the needs of law enforcement* so compelling that a warrantless search is objectively reasonable under the Fourth Amendment.” Missouri v. McNeely, 569 U.S. 141, 148-49, 133 S.Ct. 1552 (2013) (emphasis added). The State admittedly cannot prove exigent circumstances in accordance with the South Carolina Supreme Court’s directive and now seeks, among other information, information regarding Key’s treatment at the hospital which was otherwise not known to the trooper. See State’s Brief 11-23-21 (“The denial of access to these records significantly impairs, and in fact completely impairs, the State’s ability to establish the exigent circumstances that existed to support the warrantless blood draw.”). If Key’s medical records are released to allow the State to determine ex post facto whether exigent circumstances existed, there is no appellate remedy likely to repair the damage done by the improper disclosure. Furthermore, the State seeks information from Key’s medical records such as any diagnoses Key received at the hospital, and Key’s privacy interests under Article One Section Ten of the South Carolina Constitution cannot be repaired once her medical records are disclosed.

Denying Key the ability to appeal the Circuit Court’s Order authorizing the release of her medical records absent undergoing another trial and conviction fails to follow the South Carolina Supreme Court’s guidance in this case in parting way with Mitchell v. Wisconsin, based on unconstitutionally shifting the burden to disprove exigent circumstances. Key, 431 S.C 336, 348, 848 S.E.2d 315, 321 (2020) (“We cannot sponsor the notion of requiring a defendant to prove that this right — a right she already possesses— exists in any given case. We must therefore part company with the Mitchell Court, as we will not impose upon a defendant the burden of establishing the absence of exigent circumstances.”); see Mitchell v. Wisconsin, 139 S.Ct. 2525, 204

L.Ed2d 1040 (2019) (“We do not rule out the possibility that in an unusual case a defendant would be able to show that his blood would not have been drawn if police had not been seeking BAC information, and that police could not have reasonably judged that a warrant application would interfere with out pressing needs or duties.”). The State specifically seeks medical records regarding whether Key’s blood was tested for alcohol by the hospital and, if so, what were the results of that test. (State’s 11-23-21 Br.). If Key is forced to undergo another trial for DUI before challenging the pre-trial ruling regarding her medical records, Key will be unconstitutionally forced to disprove exigent circumstances.

As appeal is proper in the present case, the State’s Motion to Dismiss should be denied.

Respectfully submitted,

s/ E. Powers Price
E. Powers Price
PRICE LAW FIRM, P.A.
SC Bar No. 100214
644 E. Washington Street
Greenville, SC 29601
(864) 271-3535 - Office
(864) 242-6560 - Facsimile
Attorney for Appellant

December 8, 2022

RECEIVED

Dec 08 2022

SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenville County
Honorable G.D. Morgan, Jr., Circuit Court Judge
Appellate Case No. 2022-000374

The State,

Respondent,

vs.

Kathryn Martin Key,

Appellant.

PROOF OF SERVICE

I, E. Powers Price, certify that I have served the Return to State's Motion to Dismiss on Joshua A. Edwards <JEdwards@scag.gov> and William Blich <wblitch@scag.gov> by electronic mail to the email addresses listed in AIS.

This 8th day of December, 2022.

s/ E. Powers Price