STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from York County
Daniel B. Hocker, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

MICHAEL RAMEY,

APPELLANT.

APPELLATE CASE NO. 2013-002459

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

During the sentencing of Appellant, the Trial Court erred by considering confidential communications between Appellant and his court-ordered therapist which are privileged under the psychotherapist-patient privilege set forth in S.C. CODE ANN. § 19-11-95.

STATEMENT OF THE CASE

On July 18, 2013, Appellant Michael Ramey was indicted by the York County Grand Jury for one count of criminal sexual conduct with a minor, second degree in violation of S.C. CODE ANN. § 16-3-655(B)(2). R. 44.

On November 7, 2013, Appellant pled guilty to assault with intent to commit criminal sexual conduct with a minor, second degree in violation of § 16-3-656[1] before the Honorable Daniel B. Hocker. R. 1-34. Appellant was represented by Harry A. Dest, and the State was represented by Assistant Solicitor Erin M. Joyner. R. 1. At the conclusion of the hearing, Judge Hocker sentenced Appellant to twelve years imprisonment. R. 33, l. 23 – 34, l. 2; R.43 [Sentencing sheet].

On November 15, 2003, Appellant timely filed and served a Notice of Appeal. In this Notice, Appellant raised the following issue:

> During the plea hearing on November 7, 2013, Appellant's counsel objected on the record to the State presenting confidential information that the Appellant revealed to a court ordered therapist during treatment while under the authority of the North Carolina Department of Juvenile Justice. The Court overruled the objection and allowed the State to use this information as an aggravating factor to argue for a severe sentence at [the] sentencing phase of the plea.
>
> As a result, the Appellant received a sentence of twelve (12) years. The Appellant contends that allowing this type of evidence for consideration in determining an appropriate sentence was an error of law and abuse of discretion.

[1] Appellant was indicted under the wrong subsection of the statute. He pled guilty to a direct indictment for assault with intent to commit criminal sexual conduct with a minor in the second degree. R. 4, ll. 16-25.

ARGUMENT

During the sentencing of Appellant, the Trial Court erred by considering confidential communications between Appellant and his court-ordered therapist which are privileged under the psychotherapist-patient privilege set forth in S.C. CODE ANN. § 19-11-95.

Prior to the sentencing of Appellant, plea counsel objected to the Solicitor's use of any information revealed by Appellant to a therapist as a result of court-ordered therapy relating to a juvenile offense committed by Appellant in the State of North Carolina when he was fifteen years old. R. 19, l. 6 – 20, l. 5; R. 36 [Court's Exhibit 1 (N.C. Juvenile Adjudication)]. Plea counsel argued that Appellant revealed very sensitive information and if such information did not remain confidential, it "would have a chilling affect for future cases for those who are similarly situated to my client in trying to get treatment." R. 19, ll. 15-20. Plea counsel also pointed out that details revealed by Appellant to his therapist were situations that did not result in a charge or conviction such that those prior incidents should not be considered in the court's sentencing. R. 19, l. 20 – 20, l. 1.

Judge Hocker ruled that he was "not going to handicap whatever the State wants to present to me or what the defense wants to present to me concerning the sentencing, and it would boil down to whatever weight that I would give that information that the Solicitor presents to me concerning sentencing, and certainly the weight that I give it, I will certainly take that into account what you have just informed me in support of your objection." R. 21, ll. 6-17.

The Solicitor argued for a sentence at the upper end of the maximum sentencing range and called Appellant "a tremendous danger to the community." R. 25, ll. 13-17. The Solicitor then described two prior incidents in which Appellant was involved. In 2006, Appellant, who was fifteen at the time, was adjudicated as a juvenile in North Carolina for a

sexual offense upon a six year old child. R. 25, l. 25 – 26, l. 16; R. 36 [Court's Exhibit 1 (N.C. Juvenile Adjudication)]. Appellant was ordered into counseling for that offense. R. 26, ll. 16-18. In 2008, Appellant was disciplined at school – either an expulsion or a suspension – for allegedly touching a female student twice in her private parts. R. 26, ll. 20-23.

Using the confidential therapist records, the Solicitor stated that while Appellant was in counseling at New Hope[2] in 2010, the counselor apparently expressed "serious concern about [Appellant], that he had made no progress in two years, had continued to act-out by touching of classroom peers while in the facility, had demonstrated anti-social personality and stated that he couldn't control himself and he wanted to continue acting out sexually." R. 27, ll. 15-22.

Plea counsel advised the court that Appellant is twenty-three years old. At seven years old, he was characterized as mentally disabled and placed in special classes his entire academic career. His level of intellectual functioning is above mental retardation but not much above. His IQ score is in the range between 71 and 80. Appellant receives Social Security disability benefits for "chronic brain syndrome." Appellant had a very unstable and dysfunctional family life. His father left when Appellant was five years old, leaving Appellant's mother alone to raise him and two sisters. His mother was diagnosed with cancer when Appellant was around fourteen years old, and she died while Appellant was committed in North Carolina for his juvenile offense. His sisters are now in the North Carolina Department of Corrections for drug offenses. R. 21, l. 10 – 23, l. 5.

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[2] New Hope Treatment Center is located in Rock Hill, South Carolina. See www.newhopetreatment.com/about.

When Appellant was nine years old, he was forced to perform oral sex upon and anally raped by a fifty-six year old man. He was also forced to watch pornography by this man. Appellant was taken to the emergency room where documentation shows that he had a torn rectum. The perpetrator of that offense was sentenced to three years in the North Carolina Department of Corrections. R. 23, ll. 8-19.

The sexual assault of Appellant when he was nine years old led to a number of emotional problems. Appellant has been diagnosed with PTSD and has anxiety issues. R. 23, ll. 19-22.

Plea counsel also advised the court that Appellant has no prior record as an adult. R. 24, l. 13. Plea counsel asked the court for probation – "a very restrictive probation where he would have to report almost daily, wear a monitor" – with a substantial amount of time over his head. R. 24, ll. 20-25. In the alternative, plea counsel asked the court for a "split sentence of significant time hanging over his head with probation to follow." R. 25, ll. 1-3.

After stating that he had "considered everything that's been presented to me from both sides" and has a "responsibility to protect the community," Judge Hocker sentenced Appellant to twelve years. R. 33, ll. 7-18; 33, l. 20 – 34, l. 2.

The Trial Court erred in considering the confidential and privileged communications between Appellant and his therapist when sentencing Appellant. In sentencing Appellant, the Trial Court should not have considered the therapist's opinion that Appellant had made no progress in two years, had continued to act out by touching classroom peers in the facility, and had made statements that he could not control himself and wanted to continue acting out sexually. R. 27, ll. 15-22.

Under S.C. CODE ANN. § 19-11-95, a provider, including psychologists, professional counselors, therapists, licensed social workers and certain registered nurses who enter into a relationship with a patient to provide diagnosis, counseling, or treatment of a mental illness or emotional condition, "knowingly may not:

(1) reveal a confidence of his patient;

(2) use a confidence of his patient to the disadvantage of the patient;

(3) use a confidence of his patient for the advantage of himself or of a third person, unless the patient gives written authorization after disclosure to him of what confidence is to be used and how it is to be used.

§ 19-11-95(A)(1), (B).

Confidence is defined as "a private communication between a patient and a provider or information given to a provider in the patient-provider relationship." § 19-11-95(A)(3).

A privilege is a limitation on a court's ability to compel testimony regarding confidential communications that occur in certain relationships. 8 WIGMORE § 2285 at 527 (McNaughton rev. 1961). There are generally four primary characteristics of a privileged communication: (1) it must originate in confidence; (2) confidence must be essential to the continued vitality of the relationship; (3) the relationship must be one society is prepared to recognize; and (4) any injury to the relationship caused by the revelation of the confidential communication must be greater than the benefit that results from revealing the confidential information. Id.

Under § 19-11-95, the General Assembly has statutorily recognized that communications between providers and patients of mental illness or emotional conditions are privileged. This statute encourages full and frank disclosures between patients and providers for the purpose of effective diagnosis, evaluation, and treatment. This privilege is

justified because "(1) counseling relationships would suffer if people chose not to communicate essential information to professionals because they feared that the professionals would be compelled to disclose such information in court and (2) such relationships involve the professional and the individual in an intimate relationship in which personal information is communicated that should be protected from public disclosure." Cooper v. State, 46 P.3d 884, 888 (Wyo. 2002).

The rule with respect to privileges applies at all stages of all actions, cases, and proceedings, including sentencing proceedings. Rule 1101(c), SCRE. The Trial Court's ruling permitting the Solicitor to present the confidential communications between Appellant and his therapist in support of the State's argument for severe sentencing of Appellant was a violation of the privilege set forth in § 19-11-95. Appellant never gave

written authorization for such disclosure and no statutory exception to the privilege was applicable.[3]

Appellate courts from other jurisdictions have found error in a trial court's consideration of confidential information in violation of the psychotherapist-patient privilege for purposes of sentencing or other judicial determinations. In Cooper v. State, 46 P.3d 884, 886-89 (Wyo. 2002), the Supreme Court of Wyoming held that a substance abuse therapist's testimony that the defendant had told her he sold controlled substances was not admissible at the sentencing hearing where the defendant had not waived the psychotherapist-patient privilege.

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[3] Under § 19-11-95(C): **A provider may reveal**: (1) confidences with the written authorization of the patient or patients affected, but only after disclosure to them of what confidences are to be revealed and to whom they will be revealed; (2) confidences when allowed by statute or other law; (3) the intention of the patient to commit a crime or harm himself and the information necessary to prevent the crime or harm; (4) confidences reasonably necessary to establish or collect his fee or to defend himself or his employees against an accusation of wrongful conduct; (5) in the course of diagnosis, counseling, or treatment, confidences necessary to promote care within the generally recognized and accepted standards, practices, and procedures of the provider's profession; (6) confidences in proceedings conducted in accord with Sections 40-71-10 and 40-71-20; (7) confidences with the written authorization of the patient or patients affected for processing their health insurance claims, but only after disclosure to them of what confidences are to be revealed and to whom they will be revealed. Under § 19-11-95(D): **A provider shall reveal**:(1) confidences when required by statutory law or by court order for good cause shown to the extent that the patient's care and treatment or the nature and extent of his mental illness or emotional condition are reasonably at issue in a proceeding; provided, however, confidences revealed shall not be used as evidence of grounds for divorce; (2) confidences pursuant to a lawfully issued subpoena by a duly constituted professional licensing or disciplinary board or panel; (3) confidences when an investigation, trial, hearing, or other proceeding by a professional licensing or disciplinary board or panel involves the question of granting a professional license or the possible revocation, suspension, or other limitation of a professional license.

In People v. Sagstetter, 532 N.E.2d 1029 (Ill. App. Ct. 1988), the Appellate Court of Illinois held that written statements made by the defendant in response to his therapist's suggestion that he put down his thoughts were confidential elements of his treatment program that could not be considered at sentencing for his conviction of aggravated criminal sexual abuse. Where the trial court erred in considering material elicited from the defendant solely for the purpose of treatment and where this confidential information should not have been considered at the sentencing hearing without the defendant's express approval, the appellate court remanded the case for a new sentencing hearing before a different judge Id. at 1032, 1034-35.

In M.R.S. v. State, 897 P.2d 63, 64 (Alaska 1995), the trial court held a juvenile waiver hearing to determine if a juvenile accused of robbery should be tried as a juvenile or an adult. In authorizing the State to proceed against the juvenile as an adult, the trial court relied in part on a psychotherapist's testimony regarding his 1990 psychological examination of the juvenile, which had been ordered by the children's court in the disposition phase of an earlier, unrelated delinquency proceeding. The juvenile appealed, arguing that the admission of this evidence violated his evidentiary psychotherapist-patient privilege. The Supreme Court of Alaska agreed, holding the admission of the 1990 court-ordered psychological examination at the 1992 waiver hearing was a violation of the juvenile's psychotherapist-patient privilege. Id.

At the 1992 waiver hearing, the psychotherapist expressed doubt that the juvenile would be successfully rehabilitated before reaching his twentieth birthday. The psychotherapist based this opinion on his 1990 examination of the juvenile. Another forensic psychologist also confirmed that the juvenile was not amenable to treatment as a

minor and based this conclusion in part on the 1990 examination by the psychotherapist. Id. at 65. After considering the two doctors' testimony, the trial court concluded the juvenile was not amenable to treatment as a minor and authorized the State to proceed against the juvenile as an adult. Id.

In concluding that the psychotherapist-patient privilege should have prevented the psychotherapist's 1990 court-ordered examination of the juvenile from being utilized as evidence or a source of evidence in the waiver proceeding, the Supreme Court of Alaska considered the strong policy considerations, particularly in the context of juvenile proceedings, in including these types of court-ordered examinations within the psychotherapist-patient privilege, citing the reasoning of Justice Bistline of the Idaho Supreme Court in his concurring opinion in State v. Brown, 825 P.2d 482, 492-93 (Idaho 1992):

> [W]hen defense attorneys realize that their juvenile clients' social and clinical studies will probably be available to those outside the juvenile system, they may advise their clients to not participate in those evaluations. It would be malpractice, in the view of some, for attorneys to fail to at least advise their juvenile clients of this possibility and some children may decide not to participate in those studies even though their attorneys think it may be in the child's best interest to obtain such an evaluation.
>
> . . .
>
> Children who now fully cooperate with the mental health professionals will be running the risk of increased confinement, should they commit an offense when they become adults. Those who do not cooperate will risk having juvenile jurisdiction waived. One of the factors used in deciding whether to waive juvenile jurisdiction is "[t]he likelihood of rehabilitation of the child...." In other words, the majority places children in a Catch–22 by discouraging them from being honest and forthright with those who have their best interest at heart for fear that their confidences will be automatically accessible to those who may later seek to punish them.
>
> . . .

> Children will be more likely to fully and honestly participate in the studies if they know their records are not automatically accessible by the adult system. This will increase the chances that a youthful offender will be successfully handled within the juvenile system.

M.R.S., 897 P.2d at 67-68 (citing Brown, 825 P.2d at 492-93).

Similar to the facts of the M.R.S. case, Appellant was ordered to receive treatment as a result of acts he committed as a juvenile. R. 26, l. 16 – 27, l. 11; R. 36 [Court's Exhibit 1 (N.C. Juvenile Adjudication)]. During that treatment, Appellant revealed confidential information to his therapist, including statements that he could not control himself and wanted to continue acting out sexually. R. 27, ll. 16-22. In violation of South Carolina's psychotherapist-patient privilege codified under § 19-11-95, the State then used this confidential and privileged information against Appellant during his sentencing hearing for his adult conviction. R. 27, ll. 16-22.

If this Court sanctions the use of confidential therapist-patient communications in sentencing proceedings, this will certainly chill communications between individuals and their providers. The State has an interest in seeing that people with emotional, mental, and substance abuse problems seek treatment. That treatment can only be effective where patients know that what they reveal to treatment professionals will remain confidential and will not be used against them in the future. The General Assembly passed this confidentiality statute to ensure that persons seeking treatment for emotional and substance abuse problems do so confident their secrets will not be disclosed to harm them.

Accordingly, the Trial Court erred in considering at sentencing the confidential communications made by Appellant to his therapist while in treatment because such communications were privileged under the psychotherapist-patient privilege set forth in §

19-11-95. Where the sentence was based in part on these confidential communications, Appellant is entitled to re-sentencing before a different judge. R. 33, l. 7 – 34, l. 2.

CONCLUSION

For the reasons set forth herein, Appellant Michael Ramey respectfully requests this Court to vacate his sentence for assault with intent to commit criminal sexual conduct with a minor, second degree and remand the case for a new sentencing hearing before a different judge.

Respectfully submitted,

Carmen V. Ganjehsani
Appellate Defender

ATTORNEY FOR APPELLANT

This 19th day of August, 2014

CERTIFICATE OF COUNSEL FOR APPELLANT

The undersigned certifies that to the best of my ability the Final Brief complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

August 19, 2014

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IN THE COURT OF APPEALS

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THE STATE,

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APPELLATE CASE NO. 2013-002459

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Deborah R. J. Shupe, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 19th day of August, 2014.

Carmen V. Ganjehsani
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 19th day of August, 2014.

(L.S.)
Notary Public for South Carolina
My Commission Expires: October 24, 2021.