

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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Sep 23 2020

S.C. SUPREME COURT

Appeal from Lexington County

Honorable Eugene C. Griffith, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

V.

TIMOTHY RAY JONES, JR.

APPELLANT

APPELLATE CASE NO. 2019-001008

REPLY TO STATE'S RESPONSE TO APPELLANT'S
MOTION TO UNSEAL PORTION
OF TRANSCRIPT AND EXHIBITS

Appellant filed a motion to unseal a portion of the trial transcript and accompanying exhibits on September 10, 2020, in the above-referenced case. Thereafter, on September 22, 2020, the state filed its response. Although the state did not “oppose the unsealing of the transcript,” the state “urge[d] the Court to consider the ramifications to Dr. Kruse (a non-party) if the material is unsealed against any harm that would occur if the matter remains sealed.” Resp. at 4. Appellant now files this reply.

As an initial matter, appellant intends to raise on appeal that the trial judge erred by excluding the testimony of Dr. Adriana Flores during the penalty phase of appellant's capital murder trial. Briefly, appellant sought to call Dr. Adriana Flores as a witness in the penalty phase to counter testimony presented by the state's witness, Dr. Kimberly Kruse, during the guilt phase

that appellant was malingering symptoms of psychosis. The state vehemently opposed appellant's request to call Dr. Flores as a witness, and the judge indicated his inclination to grant the state's motion to exclude her testimony. Thereafter, appellant proffered her testimony. Pursuant to the state's request, the judge sealed the record of the proffer and the accompanying exhibits. Appellant plans to seek vacation of his death sentence based upon the trial judge's erroneous exclusion of Dr. Flores' testimony.

The state alleged Dr. Kruse faces "jeopardy" "upon release of accusations made through the testimony of Dr. Flores." Resp. at 2. The state submitted that the portion of the transcript should be sealed because it went "way beyond embarrassment" and was not a battle of the experts. Resp. at 3. The state argued, "[t]his is an accusation that Dr. Kruse is being unethical and intentionally withholding evidence from the defense. These allegations, if they become public, could negatively affect Dr. Kruse without cause." Resp. at 3. Thereafter, the state submitted that "[c]ross-examination of an expert about her expert opinion is one thing; threats affecting livelihood are wholly different." Resp. at 3. According to the state, "Dr. Flores, by affidavit and proffered testimony in the penalty phase, has indicated she would raise ethical allegations against Dr. Kimberly Kruse." Resp. at 2 (emphasis in original). Finally, the state argued the record supported the trial judge's decision to seal the portion of the transcript to protect Dr. Kruse. Resp. at 2-4. Thus, the state argued the trial judge properly sealed the transcript of the proffer of Dr. Flores and the accompanying exhibits in order to protect Dr. Kruse's reputation and conceal from the public that another expert, Dr. Flores, expressed concerns over Dr. Kruse's methodology to the extent Dr. Flores indicated she may file an ethical complaint. The record belies the state's arguments.

At trial, the state sought only that the transcript of the proffer of Dr. Flores and accompanying exhibits be sealed. Tr. 5603, l. 24 – Tr. 5604, l. 2 (prior to the proffer of Dr. Flores'

testimony, the solicitor moved “to have it sealed so that when this goes before the high court that it’s not released to the public to protect the integrity of Dr. Kruse, who is not here, nor is her counsel”). Thus, the arguments related to the admissibility of the proffered testimony were, and remain, unsealed. Without requesting any protections, Solicitor Rick Hubbard first alerted the trial judge to its objection to Dr. Flores testifying after a lunch break on June 10, 2019. At that time, Solicitor Hubbard informed the judge that Dr. Flores’ affidavit was “geared as an attack on Dr. Kruse.” Tr. 5483, ll. 18-22. He then indicated that due to the affidavit, Dr. Kruse was “concerned about whether she can even come back” to testify. Tr. 5484, ll. 3-4. The solicitor argued the affidavit “end[ed] with a threat” that Dr. Flores felt that “under the APA Ethical Guidelines, she has to directly contact Dr. Kruse, confront her about all of her errors and mistakes and potentially report her for ethical violations.” Tr. 5484, ll. 16-20. Later, the solicitor said again, “Dr. Kruse is now concerned there is a threat on her career and her license to testify.” Tr. 5485, l. 25 – Tr. 5486, l. 2.

The following day, the defense sought to proffer Dr. Flores’ testimony. Solicitor Hubbard “strenuously” objected to Dr. Flores testifying. Tr. 5598, l. 24 – Tr. 5599, l. 2. He argued the proposed testimony was “geared to keep” Dr. Kruse “off the stand in [the penalty] phase” because it contained “a threat of filing an ethical grievance with Dr. Kruse.” Tr. 5599, ll. 4-9. According to the solicitor, if Dr. Flores “truly feels something bad happened, she can file her grievance,” but he argued Dr. Flores should not be permitted to tell the jurors about the improper methodology employed by Dr. Kruse or the inaccurate conclusions drawn by Dr. Kruse. Tr. 5599, l. 14 – Tr. 5600, l. 15. The judge then ruled that he would permit a proffer of the testimony, but he would not allow the defense to present Dr. Flores’ testimony to the jury. Tr. 5603, ll. 16-23. It was only

then that the state sought to seal the transcript, and in doing so, requested only that the transcript of the proffer be sealed. Tr. 5603, l. 24 – Tr. 5604, l. 2.

Importantly, the direct examination of Dr. Flores never touched upon her concern that she would need to contact Dr. Kruse directly or file an ethical complaint against Dr. Kruse. However, Solicitor Hubbard's cross-examination questioned why Dr. Flores had not contacted Dr. Kruse personally prior to her proffered testimony. Tr. 5634, ll. 8-12. Dr. Flores responded that she had not because the case was ongoing, but that she would contact Dr. Kruse. She had an ethical obligation to do so. Tr. 5634, ll. 13-15. Then, the solicitor asked a series of questions drilling deeper into Dr. Flores' comment in her affidavit that she would contact Dr. Kruse and file a complaint if necessary. Tr. 5634, l. 16 – Tr. 5638, l. 24. In fact, the solicitor asked no questions regarding the methodology employed by Dr. Flores, which showed the errors and omissions of Dr. Kruse. The entire cross-examination centered on Dr. Flores' intimation that she was required to contact Dr. Kruse and potentially file an ethical complaint. He asked no questions of substance.

After the proffer, Solicitor Hubbard requested the court's exhibits that were admitted during the proffer be sealed as well. Tr. 5639, ll. 4-9. Thereafter, the parties continued to argue the admissibility of Dr. Flores' testimony, which was not sealed. Again, the solicitor argued the testimony should not be allowed because "a threat of an ethical violation" prevented him from replying. Tr. 5642, ll. 13-15; Tr. 5644, ll. 6-9. The judge questioned defense counsel about Dr. Flores' statement that she was obligated to contact Dr. Kruse and file a complaint if the conversation failed to produce satisfactory answers. The judge viewed Dr. Flores' statement as a threat, despite the testimony and argument that it was simply an obligation under the professional standards for psychologists which govern both Dr. Flores and Dr. Kruse. Tr. 5644, l. 13 – Tr. 5645, l. 17.

Thus, while the state argued in its Response that Dr. Kruse faces harm if the transcript and accompanying exhibits are unsealed, a review of the transcript demonstrates that the portions of the transcript that are unsealed reveal the very information the state now suggests needs to be hidden from public view due to some alleged jeopardy faced by Dr. Kruse. Further, the portion of the sealed transcript that delved into the obligation of Dr. Flores to make an ethical complaint regarding Dr. Kruse's conduct was evidence presented through Solicitor Hubbard's cross-examination of Dr. Flores. In essence, the solicitor presented the very evidence it now alleges could harm its own witness if revealed publicly. Finally, the state's Response revealed the information -- Dr. Kruse's potential ethical violation that Dr. Flores felt duty-bound to report -- which the state alleged served as the basis for the trial judge's sealing of the portion of the transcript and accompanying exhibits.

The information the state alleged supported sealing the record -- the prospective ethical complaint against Dr. Kruse -- exists outside the sealed record. Therefore, not unsealing the record does nothing to further any alleged protections afforded Dr. Kruse, or her reputation. Quite simply, the only conclusion to be drawn is that the state seeks to avoid the embarrassment of its expert because all that remains unknown due to the sealing of the transcript and exhibits is Dr. Flores' testimony about her exacting challenge to Dr. Kruse's methodology and conclusions. While the unsealed portion alludes to the fact that Dr. Flores found numerous flaws in Dr. Kruse's testing procedures and the opinions she drew from those tests, the sealed transcript and accompanying exhibits provide details of the rigorous and thorough review of Dr. Kruse's work conducted by Dr. Flores and the countless errors she determined Dr. Kruse made. In short, the sealed transcript contains the quintessential "battle of the experts," which defense counsel is obligated to present to the jury. See Life Ins. Co. of Virginia v. Rhodes, 71 F.2d 413, 414 (4th Cir. 1934) (describing the

“battle of the experts” as a scenario in which two experts offer different opinions to explain the same factual scenario); McKnight v. State, 378 S.C. 33, 661 S.E.2d 354 (2008) (holding a trial lawyer’s failure to “investigate medical evidence contradicting the state’s experts’ testimony on the link between cocaine and stillbirth, and in further failing to investigate methods to challenge [the state’s expert]’s conclusions ruling out natural causes of death” constituted ineffective assistance of counsel).

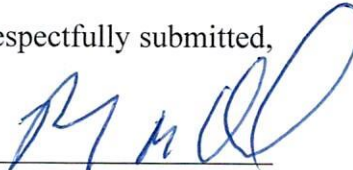
Unlike other cases in which this Court has required sealed records on appeal and redacted briefs, the instant case does not involve any type of privileged matter. Cf. State v. Blackwell, 420 S.C. 127, 801 S.E.2d 713 (2017). Blackwell challenged the trial judge’s refusal to allow him to cross-examine the state’s star witness with her mental health records. Id. at 150, 801 S.E.2d at 725. The trial court found the witness had not waived her statutory privilege to release the records. Id.

On appeal, this Court addressed “the novel question of whether a criminal defendant’s constitutional right to confront a witness trumps a witness’s state constitutional right to privacy and statutory privilege to maintain confidential mental health records.” Id. at 151, 801 S.E.2d at 725. After outlining a procedure for litigants to follow to obtain confidential mental health records, this Court noted the trial court accepted the records under seal. Id. at 156, 801 S.E.2d at 728. Further, this Court noted it had “thoroughly reviewed the contents of the records,” in rendering its opinion. Id. Placing privileged mental health records under seal at the trial court and on appeal maintains the statutory confidentiality due to such records. During the proffer of Dr. Flores, neither confidential nor privileged information was revealed. Neither at trial nor its return has the state provided this Court with any source of privilege attached to this testimony -- nor could it. Thus,

unlike the circumstances presented in Blackwell, in which the necessity of protecting the confidentiality of privileged information existed, the instant case presents no such need.

WHEREFORE, undersigned counsel respectfully moves that this Court unseal the portion of the transcript and accompanying exhibits pertaining to the proffer of the testimony of Dr. Adriana Flores so that they may be cited to in the briefs and contained in the Record on Appeal to be filed with this Court.

Respectfully submitted,



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September 23, 2020.