

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Jonathan Bickel,	:	
	:	
Plaintiff-Appellee,	:	
v.	:	No. 14AP-439
	:	(C.P.C. No. 09JU-15291)
Gianna Cochran et al.,	:	(REGULAR CALENDAR)
	:	
Defendants-Appellants.	:	

D E C I S I O N

Rendered on December 9, 2014

Jonathan Bickel, pro se.

Elizabeth N. Gaba, for appellants.

APPEAL from the Franklin County Court of Common Pleas,
Division of Domestic Relations, Juvenile Branch

CONNOR, J.

{¶ 1} Defendants-appellants, Gianna Cochran and Judianne Cochran (collectively "appellants"), appeal from a judgment of the Franklin County Court of Common Pleas, Division of Domestic Relations, Juvenile Branch, denying their motion to quash a subpoena issued to Deputy Inspector Paul Shoemaker of the Ohio Department of Rehabilitation and Corrections ("ODRC"), by plaintiff-appellee, Jonathan Bickel. For the reasons that follow, we affirm the judgment of the trial court.

A. Facts and Procedural History

{¶ 2} Appellee and appellant Gianna Cochran, are the parents of two minor children, M.B., age 10, and L.B., age 6. Appellee and Gianna shared a home but they were never married. On November 18, 2009, appellee filed a complaint for emergency custody

in the Court of Common Pleas, Division of Domestic Relations, Juvenile Branch, alleging that Gianna had physically and psychologically abused the children.

{¶ 3} On April 26, 2010, in a separate criminal proceeding, the Franklin County Grand Jury indicted Gianna on eight counts of felony child endangering and ten counts of misdemeanor child endangering. The victims identified in the indictment included Gianna's own child, L.B., as well as a number of other children for whom Gianna served as a babysitter. On April 1, 2011, a jury found Gianna guilty of three counts of felony child endangering and six counts of misdemeanor child endangering, one of which involved L.B. The trial court sentenced Gianna to a total of 25 years in prison and she is currently serving her prison term at the Ohio Reformatory for Women ("ORW").

{¶ 4} On February 16, 2012, a magistrate issued a decision granting unsupervised visitation to Gianna's mother, appellant Judianne Cochran, pursuant to a certain schedule. Specifically, Judianne was to have the children "[o]n the first and third Sunday of each month from 10 a.m. until 7 p.m." (R. 187.) One of the stipulations in the visitation order is that Judianne "shall not allow the minor children to have contact with * * * Gianna Cochran while they are in her care * * * [or] initiate any discussions with either minor child regarding their mother." (R. 187.) The trial court issued a judgment entry adopting the magistrate's decision as its own.

{¶ 5} On June 20, 2013, appellee filed a motion for modification of the February 16, 2012 visitation order alleging that Judianne had violated several provisions of the order, including the no-contact provision. Appellee also filed a motion seeking the release of telephone recordings pursuant to R.C. 5120.21(D)(7). In his memorandum in support of the motion to release telephone recordings appellee alleges that the "children have stated on numerous occasions that they have spoken with their mother * * * while in the care of Judianne * * * during court ordered visits." (R. 312.) The memorandum in support further provides that "[t]he recorded telephone calls will solidify this as fact." (R. 312.)

{¶ 6} On December 2, 2013, appellee filed a second motion to modify the visitation order and a second motion to release telephone recordings. In his memorandum in support of the motion to release telephone recordings appellee claims that "the very existence or non-existence of phone calls will provide clarity as to whether

or not the current order is being violated." (R. 358.) In connection with the motion, appellee issued a subpoena to ORW Deputy Inspector Paul Shoemaker "requesting a copy of all existing recorded phone calls made by Gianna * * * to phone number * * * that occurred or overlap 10am through 7pm local time on either the first or third Sunday of each month [and] any recorded phone calls made to the same phone number on December 24, 2013 between the hours of 3pm and 7pm local time." (R. 410.) On April 10, 2014, appellants filed a joint memorandum in opposition. The record reveals that the Sheriff served Shoemaker with appellee's subpoena on April 21, 2014. On that same date, ODRC filed a motion to quash the subpoena on Shoemaker's behalf.¹

{¶ 7} As a result of the non-oral hearing held on May 15, 2014, the trial court granted appellee's motion for the release of telephone records and denied ODRC's motion to quash the subpoena. In its decision, the trial court ordered ODRC to produce recordings of the requested telephone calls to Magistrate Gibson for an in camera inspection no later than May 30, 2014. Appellants filed a timely notice of appeal to this court on May 29, 2014.²

B. Assignments of Error

{¶ 8} Appellants' assignments of error are as follows:

I. THE TRIAL COURT ERRED AS A MATTER OF LAW AND TO THE PREJUDICE OF DEFENDANTS, AND ABUSED ITS DISCRETION, BY NOT HOLDING AN EVIDENTIARY HEARING ON THE THIRD-PARTY MOTION TO QUASH AND DEFENDANTS' MEMORANDA CONTRA PLAINTIFF'S MOTION.

II. THE TRIAL COURT ERRED AS A MATTER OF LAW AND TO THE PREJUDICE OF DEFENDANTS, AND ABUSED ITS DISCRETION, BY GRANTING PLAINTIFF'S MOTION TO RELEASE TELEPHONE RECORDINGS OVER DEFENDANTS' OPPOSITION AND DENYING ODRC'S THIRD PARTY MOTION TO QUASH.

C. Standard of Review

¹ The record shows that appellant served three successive subpoenas on Shoemaker and filed three successive motions seeking the production and/or release of the same telephone recordings.

² Appellants' May 29, 2014 motion to stay execution of the trial court's order remains pending in the trial court.

{¶ 9} Appellate courts generally review discovery rulings, including rulings on motions to quash a subpoena, under an abuse of discretion standard. *Tracy v. Merrell Dow Pharmaceuticals, Inc.*, 58 Ohio St.3d 147, 151-52 (1991). However, where the party resisting a subpoena claims that information sought is confidential and privileged from disclosure, the question is one of law and we review the matter de novo. *Med. Mut. of Ohio v. Schlotterer*, 122 Ohio St.3d 181, 2009-Ohio-2496, ¶ 13; *see also Roe v. Planned Parenthood Southwest Ohio Region*, 122 Ohio St.3d 399, 2009-Ohio-2973, ¶ 29. Because the assigned errors raise a question whether the information sought is protected from disclosure either by privilege or right of confidentiality, we will conduct a de novo review. *Id.*

D. Legal Analysis

{¶ 10} In their first assignment of error, appellants contend that Juv.R. 17(D)(3) required the trial court to hold an evidentiary hearing on ODRC's motion to quash the subpoena. We disagree.

{¶ 11} Juv.R. 17(D)(3) and Civ.R. 45(C) contain identical provisions pertaining to subpoenas. Juv.R. 17(D)(3) provides in relevant part:

(3) On timely motion, the court from which the subpoena was issued shall quash or modify the subpoena, or order appearance or production only under specified conditions, if the subpoena does any of the following:

(b) *Requires disclosure of privileged or otherwise protected matter and no exception or waiver applies;*

(5) If a motion is made under division (D)(3)(c) or (D)(3)(d) of this rule, *the court shall quash or modify the subpoena unless the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated.*

(Emphasis added.)

{¶ 12} There is no requirement that the trial court hold an evidentiary hearing on a motion to quash a subpoena brought pursuant to Civ.R. 45(C). Appellants, however, urge us to adopt the reasoning employed by the Supreme Court of Ohio in reviewing a motion

to quash brought pursuant to Crim.R. 17(C). In the case of *In re Subpoena Duces Tecum Served Upon Atty. Potts*, 100 Ohio St.3d 97, 2003-Ohio-5234, the court ruled that Crim.R. 17(C) requires a trial court to hold an evidentiary hearing when deciding a motion to quash a subpoena requesting the production of documents prior to trial. *Id.* at ¶ 16. The court further determined that Crim.R. 17(C) requires a trial court to hold a separate evidentiary hearing to determine whether a subpoena is unreasonable or oppressive in addition to conducting an in camera review to determine whether the documents produced are protected by a privilege. *Id.* at ¶ 14-15.

{¶ 13} Appellants acknowledge that Crim.R. 17(C) does not apply to juvenile court proceedings.³ Thus, the cases decided under Crim.R. 17(C), have no application herein. Moreover, appellant has cited no case authority requiring a trial court to conduct an evidentiary hearing on either a Juv.R. 17(D)(3) or a Civ.R. 45(C) motion to quash a subpoena and this court has found none. Although the rule does not prohibit the trial court from conducting an evidentiary hearing, we hold the trial court did not abuse its discretion by refusing to do so in this case.

{¶ 14} For this reason, appellants' first assignment of error is overruled.

{¶ 15} In their second assignment of error, appellants argue that the trial court erred by compelling ODRC to disclose confidential telephone communications between Judianne and Gianna. Appellants claim that the disclosure violates their statutory and constitutional rights. We disagree.

{¶ 16} Appellants' threshold contention is that ODRC's policy authorizing ORW to intercept appellants' telephone conversations violates the constitutional rights of the ORW inmates as well as their protections under federal and state wiretapping laws.⁴ In our view, however, the question whether ODRC's policy of monitoring and recording

³ We also note that the relevant provisions of Juv.R. 17(D)(3) do not correspond to those of Crim.R. 17(C) which provides as follows: "A subpoena may also command the person to whom it is directed to produce the books, papers, documents or other objects designated therein; but the court, upon motion made promptly and in any event made at or before the time specified in the subpoena for compliance therewith, *may quash or modify the subpoena if compliance would be unreasonable or oppressive*. The court may direct that the books, papers, documents or other objects designated in the subpoena be produced before the court at a time prior to the trial or prior to the time they are offered in evidence, and may, upon their production, permit them or portions thereof to be inspected by the parties or their attorneys." (Emphasis added.)

⁴ The Federal Electronic Communications Privacy Act, commonly known as Title III of the Omnibus Crime Control Act under 18 U.S.C. 2510-22 ("Title III") and R.C. 2933.52(A).

inmate telephone conversations passes constitutional muster and complies with wiretapping laws is not a legitimate issue raised by this appeal.

{¶ 17} Appellants acknowledge that the monitoring and recording of inmate telephone calls is constitutionally permissible if the monitoring and recording is conducted pursuant to an established policy that is related to security and orderly administration. (Appellants' brief, 13, citing *United States v. Van Poyck*, 77 F.3d 285, 291 (9th Cir.1995).) Similarly, in arguing that ODRC's policy may violate federal and state wiretapping laws, appellants acknowledge that the monitoring and recording of inmate calls is exempt from such laws under the "ordinary course of duty" exception so long as it is "conducted pursuant to an established policy that is related to institutional security." (Appellants' brief, 15, citing *United States v. Lanoue*, 71 F.3d 966, 982 (1st Cir.1995).)

{¶ 18} In its memorandum in support of the motion to quash the subpoena, ODRC states that "inmate phone calls are monitored by ODRC personnel and recorded in order to enhance the security of the prison. This is done to monitor the possible relaying/forwarding of information concerning any illegal activities that may occur within the prison walls or outside the prison." (R. 466.) Appellants do not allege that ORW monitored and recorded Gianna's telephone calls for any reason other than the established ODRC policy related to prison security. Appellants do not allege that the established ODRC policy applies only to certain inmates or that she was singled out by ORW. Thus, while it is clear that appellee intends to use the previously recorded conversations for purposes unrelated to prison security, there is no question that ODRC recorded the calls for just that purpose. *See State v. Smith*, 117 Ohio App.3d 656, 691 (8th Dist.1997) ("With near unanimity, federal and state courts have upheld the practice" of monitoring and recording inmate phone calls). *See also United States v. Paul*, 614 F.2d 115, 116 (6th Cir.), *cert. denied*, 446 U.S. 941 (1980) ("[i]t still appears to be good law that so far as the Fourth Amendment is concerned, jail officials are free to intercept conversations between a prisoner and a visitor"). For these reasons, appellants' Fourth and Eighth Amendment challenges to the monitoring and recording of appellants' telephone conversations by ORW are unavailing in this appeal. For these same reasons, appellants' argument predicated upon ORW's alleged violations of state and federal wiretapping laws is also misplaced.

{¶ 19} The real question in this case is whether the release of legally recorded inmate telephone conversations for appellee's use as evidence in these proceedings will result in an unwanted disclosure of confidential material that cannot be prevented by an in camera review. For the answer to this question, we turn first to R.C. 5120.21 which governs ODRC's obligations with respect to inmate records, including recorded telephone conversations. The statute provides in relevant part as follows:

(D) Except as otherwise provided by a law of this state or the United States, the department and the officers of its institutions shall keep confidential and accessible only to its employees, *except by the consent of the department or the order of a judge of a court of record*, all of the following:

* * *

(7) *Conversations recorded from the monitored inmate telephones that involve nonprivileged communications.*

* * *

(E) *Except as otherwise provided by a law of this state or the United States, the department of rehabilitation and correction may release inmate records to the department of youth services or a court of record, and the department of youth services or the court of record may use those records for the limited purpose of carrying out the duties of the department of youth services or the court of record. Inmate records released by the department of rehabilitation and correction to the department of youth services or a court of record shall remain confidential and shall not be considered public records as defined in section 149.43 of the Revised Code.*

(Emphasis added.)

{¶ 20} Consistent with its obligations under R.C. 5129.21, ODRC refused to produce the records pursuant to the subpoena issued by appellee. The legal basis asserted by ODRC for resisting the subpoena were twofold: (1) R.C. 5129.21 requires ODRC to keep such recordings confidential and accessible only to its employees except by the order of a judge of a court of record; and (2) the document request, as written, is vague and unduly burdensome. In its memorandum in support of the motion to quash the subpoena, ODRC asserted that "[t]he release of the requested inmate phone recordings in response to

[appellee's] subpoena would be unrelated to prison security and administration, possible illegal activity, and would not be disclosed to a law enforcement official as per ODRC policy."

{¶ 21} In denying the motion to quash, the trial court order addressed both of ODRC's objections by more specifically identifying the recordings subject to the subpoena and by ordering ODRC to produce the requested recordings to Magistrate Gibson for an in camera inspection no later than May 30, 2014. Thus, to the extent that appellants' second assignment of error challenges the trial court's ruling on ODRC's motion to quash, the challenge is unfounded.

{¶ 22} The trial court also granted appellee's motion seeking the release of the recordings for his use as evidence in this case. Accordingly, we will now address the issue whether the order requiring ODRC to produce the recordings to the magistrate for an in camera inspection will result in a violation of a protected privilege or right of confidentiality belonging to appellants. For the following reasons, we find that it does not.

{¶ 23} Appellants do not claim that the content of their recorded telephone conversations fall within any of the privileges specifically recognized under Ohio statutory law. Examples of such privileges include the attorney-client privilege, physician-patient privilege, counselor-patient privilege and marital privilege. *See* R.C. 2317.02. Although R.C. 5120.21(E) recognizes that inmate records released by ODRC pursuant to a court order "remain confidential and shall not be considered public records as defined in section 149.43 of the Revised Code," the statute also provides that "the court of record may use those records for the limited purpose of carrying out the duties * * * of the court."

{¶ 24} In this instance, appellee has moved the court to release the records for their use as evidence in support of his pending motion to amend the current visitation order. To that end, this court has previously stated that the most appropriate way to determine whether a privilege applies to materials sought in discovery is for the trial court to conduct an in camera inspection. *State ex rel. Fisher v. PRC Pub. Sector, Inc.*, 99 Ohio App.3d 387, 393 (10th Dist.1994). *See also Chasteen v. Stone Transport, Inc.*, 6th Dist. No. F-09-012, 2010-Ohio-1701, ¶ 25 ("Many Ohio appellate courts approve of an in camera inspection of records when there is a factual dispute over the scope of discovery."). The trial court order in this case does not specify the scope of the Magistrate's inspection.

However, based upon our review of the record and the briefs of the parties, it is understood that the magistrate is to identify the recordings, or portions thereof, that contain conversations between the minor children and Gianna. In our opinion, the court order adequately protects appellants' right of confidentiality in the content of the recorded conversations by requiring the magistrate to conduct an in camera inspection to determine whether the recordings released by ODRC contain conversations that remain confidential and exempt from disclosure.

{¶ 25} Appellants argue that the release of any of the recorded conversations will have a chilling effect upon appellants' right of free speech under the First Amendment. In our view, the chilling effect to which appellants refer arise directly from the limitations placed upon Judianne's right of visitation under the prior court order, not the release of the recorded conversations for their use as evidence in this case. Although appellants may disagree with the "no-contact" restriction placed upon them by the order, they do not contend that the trial court was without jurisdiction to issue the visitation order in question.

{¶ 26} Appellants also argue that allowing the magistrate to hear the recordings, in camera, might prejudice appellants' in future proceedings in this case inasmuch as Judianne or Gianna might have disclosed previously unknown facts related to the case or expressed their personal views regarding the competency of the judge or magistrate. We find such fears to be unfounded given the fact that the magistrate and the trial judge must conform to the rules of evidence when admitting evidence and in determining factual issues. Moreover, the Rules of the Code of Judicial Conduct requires a judicial officer to "disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned." Jud.Cond.R.2.11. In fact, Jud.Cond.R.2.11(A) requires disqualification if "[t]he judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of facts that are in dispute in the proceeding."

{¶ 27} Appellants' final contention is that appellee has not demonstrated that the telephone recordings contain any discoverable evidence and that there is no need for the trial court to conduct an in camera review. We disagree.

{¶ 28} As a general rule, it is the party opposing discovery that has the initial burden of establishing a factual basis for the court to believe that a privilege prevents the

disclosure of otherwise discoverable evidence. *See Chasteen* at ¶ 27. Moreover, in appellee's June 20, 2013 motion, appellee alleges that "the children have stated on numerous occasions that they have spoken with their mother * * * while in the care of Judianne * * * during court ordered visits." Additionally, on May 10, 2013, the guardian submitted a recommendation to the court wherein the guardian stated: "While I do not believe that the children have spoken to their mother in violation of the Court Order, I think they know that their mother has been on the phone with [Judianne] while at visitations. Again, there is a fine line and I am not sure why we are anywhere near that line." (R. 313.) Thus, to the extent that it is necessary, appellee has provided a factual basis for the court to believe that the recordings may contain evidence of a violation of the court order.

{¶ 29} Having determined that the in camera inspection of the recordings by the magistrate provides adequate protection of appellants' right of confidentiality in the content of the recorded conversations, we need not address appellee's contention that appellants' right to confidentiality is outweighed by a "substantial need for the recordings that cannot be otherwise met without undue hardship." *See Juv.R. 17(D)(5)*. Moreover, the trial court did not address the issue in ruling upon the motion to quash and we will not address it for the first time in this appeal.

{¶ 30} For the foregoing reasons, appellants' second assignment of error is overruled.

E. Conclusion

{¶ 31} Although we have determined that the in camera review by the magistrate will prevent the unwanted disclosure to appellee of any conversations that are protected from disclosure by a right of confidentiality, the trial court is cautioned to take whatever further steps are necessary in order to limit the use of the recordings as required by R.C. 5120.21(E). Having overruled each of appellants' assignments of error, we affirm the judgment of the Franklin County Court of Common Pleas, Domestic Relations, Juvenile Branch.

Judgment affirmed.

BROWN and LUPER SCHUSTER, JJ., concur.
