[Cite as *State v. Rogers*, 2023-Ohio-2749.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellant,	:	No. 21AP-546
v.	:	(C.P.C. No. 19CR-0092)
Christopher Rogers,	:	(REGULAR CALENDAR)
Defendant-Appellee.	:	
	:	

D E C I S I O N

Rendered on August 8, 2023

On brief: *G. Gary Tyack,* Prosecuting Attorney, and *Paula M. Sawyers*, for appellant. **Argued:** *Paula M. Sawyers*.

On brief: *Samuel H. Shamansky Co., L.P.A., Samuel H. Shamansky, Donald L. Regensburger,* and *Ashton C. Gaitanos*, for appellee. **Argued:** *Donald L. Regensburger*.

APPEAL from the Franklin County Court of Common Pleas

MENTEL, J.

{¶ 1} The State of Ohio appeals from the decision of the Franklin County Court of Common Pleas granting the motion to suppress filed by defendant-appellee Christopher Rogers. For the reasons that follow, we affirm the decision of the trial court.

I. Factual and Procedural Background

{¶ 2} On November 10, 2018, Sergeant Joshua Cohill of the Hilliard Division of Police responded to a report of a traffic crash. (Feb. 8, 2021 Tr. at 7.) On route to the intersection of the accident, he received word that "a witness had followed a vehicle that

had crashed and left the scene," so he changed direction to a residential address, the reported location of the vehicle. *Id.* at 8. There, a trail of vehicle fluid led from the roadway in front of the house to the garage at its rear. *Id.* at 9-10. Several officers already at the scene had received information that "the suspect wanted to hurt himself." *Id.* at 13. At the same time, Sergeant Cohill became aware that "the garage door was opening" and ran back to it. *Id.*

{¶ 3} There, Sergeant Cohill saw Mr. Rogers holding what he believed was a knife up to his throat. *Id.* at 13-14. He later learned that the item was actually a screwdriver. *Id.* at 14. Sergeant Cohill and the other officers drew their firearms and ordered Mr. Rogers to drop the item. *Id.* at 15. Another officer tased Mr. Rogers, who fell to the floor. *Id.* After "a little tussle," the officers "were able to get him handcuffed." *Id.*

{¶ 4} During the altercation, Sergeant Cohill "could smell a strong odor of an alcoholic beverage." *Id.* at 20. He recalled that Mr. Rogers was "emotional," admitted to drinking, and stated that "he didn't want to live." *Id.* at 21. Sergeant Cohill also testified that the car in the garage had "significant front-end damage," was leaking fluid, and had both air bags deployed. *Id.* at 21-22. After the arrest, Mr. Rogers was taken to the hospital. *Id.* at 25.

{¶ 5} Sergeant Cohill also testified about investigators' attempts that evening to obtain a search warrant for a blood test of Mr. Roger's blood alcohol level. Because he had already been admitted to the hospital and the police department's breath analyzer was "a large, stationary object," a blood test was the only investigatory option.[1] *Id.* at 25. "Alcohol dissipates from the blood" in a matter of hours, so the officers attempted to obtain "an electronic warrant to get blood results as fast as possible." *Id.* at 24. The plan was "to go to the hospital to serve the search warrant and get the blood [test]" as soon as the warrant was signed. *Id.* However, when they called the duty judge's number provided by the office of the clerk of courts, they could only reach "a scripted message saying something to the effect of they weren't able to talk right now." *Id.* Sergeant Cohill called the clerk of courts again

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[1] Sergeant Cohill also stated in his direct testimony that they also "attempted a urine sample, but Mr. Rogers had already given urine to the nurses or doctors, * * * [so] that wasn't an option anymore." (Tr. at 25-26.) However, on cross-examination, he admitted that he only "assumed they had taken a urine sample" at the hospital, had no direct knowledge of whether a sample had in fact been taken, and that there was no notation in the report as to whether a urine sample had been requested from Mr. Rogers. *Id.* at 37-38.

to verify the number, which was correct. *Id.* at 24-25. Nevertheless, he was unable to reach the duty judge that night. *Id.* at 25. Sergeant Cohill could not remember if he had asked for another judge's phone number from the clerk of courts, but stated that the duty judge was the only judge he attempted to contact. *Id.* at 25, 36.

{¶ 6} Officer Trevor Gill, who fired the taser at Mr. Rogers, also testified. His description of the encounter tracked Sergeant Cohill's testimony. Officer Gill "believe[d]" that he heard Mr. Rogers admit to drinking to a medic summoned to remove the taser probe.[2] *Id.* at 60. He also described multiple attempts to contact the duty judge to obtain the warrant, stating that they had "called multiple times and ended up just submitting the warrant to the email account as requested and did not get a response back, either by telephone or by email." *Id.* at 63. According to Officer Gill, "the only advice" from the clerk of courts office was to "call the number again." *Id.* at 72. He stated that there was "no procedure in the event that the on-duty judge does not answer the phone." *Id.* at 75. The officers did not attempt to call another judge. *Id.* at 75. Officer Gill did not believe any of the other municipal court judges were available at 1:00 a.m. on a Saturday morning. *Id.* at 76. Mr. Rogers' attorney asked the officer:

> Q. You just determined that one call or two calls to the same number with no answer was all you were going to do, right?
>
> A. Yes.
>
> Q. That was good enough for you, wasn't it?
>
> A. Yes.

Id. at 78.

{¶ 7} Having failed to obtain a warrant, investigators instead obtained an "investigative subpoena" under R.C. 2317.02(B)(2)(a) the following day.[3] The subpoena ordered the medical records department of the hospital where Mr. Rogers had been admitted to produce: "Any and all medical records regarding the emergency room treatment and inpatient treatment that patient Christopher A. Rogers * * * received from

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[2] When cross-examined on what he had actually heard, however, Officer Gill stated: "I cannot recall, specifically, what was stated." (Tr. at 67.)

[3] The "investigative subpoena" actually invokes R.C. 2935.23. (State's Ex. 68.) However, the trial court accepted the state's assertion that the order's reference to that statute was a clerical error. (Oct. 18, 2021 Decision & Entry at 8.)

the time of admission on 11/11/2018 till 23:59 hours on 11/11/2018." (State's Ex. 68.) The subpoena was signed on November 12, 2018 by a judge of the Franklin County Municipal Court. Officer Kyle Bright delivered the subpoena to the hospital and they were duly produced. (Feb. 8, 2021 Tr. at 50.)

{¶ 8} On January 7, 2019, Mr. Rogers was indicted on four counts: aggravated vehicular assault under R.C. 2903.08, vehicular assault under R.C. 2903.08, failure to stop after an accident under R.C. 4549.02, and operating a vehicle under the influence of alcohol under R.C. 4511.19. He filed a motion to suppress the medical records on July 17, 2019.[4]

{¶ 9} After a hearing, the trial court granted the motion on October 18, 2021. In its decision, it stated that the parties did not dispute that the acquisition of Mr. Rogers' medical records was a warrantless search and seizure. (Oct. 18, 2021 Decision & Entry at 3.) Because Mr. Rogers "had a reasonable expectation of privacy in his medical records," the trial court ruled that the officers were required to comply with the Fourth Amendment's warrant requirement. *Id.* at 4. The trial court rejected the state's assertion that the "good faith" exception to the warrant requirement applied because the officers did not rely on the representations of a third party when avoiding the warrant requirement. *Id.* at 5. Additionally, the trial court found that the United States Supreme Court's holding in *Carpenter v. United States*, ___ U.S.___, 138 S.Ct. 2206 (2018) announced a legal rule that prohibited the use of a subpoena to obtain Mr. Rogers' medical records. *Id.* at 5-6. The trial court also rejected the state's argument that a subpoena was authorized under R.C. 2317.02(B)(2)(a), which allows a law enforcement officer to obtain the results of an alcohol or drug test from a health care provider. *Id.* Because that statute applied "except to the extent specifically prohibited by any law of * * * the United States," it did not excuse the Fourth Amendment's warrant requirement to seize items in which an individual has a reasonable expectation of privacy.[5] *Id.* at 7-8.

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[4] The motion also sought suppression of statements made by Mr. Rogers, but the parties eventually agreed to only have the trial court consider suppression of the medical records. (Oct. 18, 2021 Decision & Entry at 1.)

[5] The state's appeal does not raise, and therefore abandons, two additional arguments made to the trial court: 1) that exigent circumstances justified a warrantless seizure and 2) that Mr. Rogers had impliedly consented to the search under R.C. 4511.191 because officers had advised him of the consequences of a test refusal by reading the text of BMV Form 2255 at the time of arrest.

{¶ 10} Invoking the interlocutory right to appeal a ruling granting a motion to suppress under R.C. 2945.67(A), the state filed a notice of appeal on October 25, 2021. The state's sole assignment of error[6] asserts:

> The trial court erred in granting the Motion to Suppress and in finding that the good faith exception did not apply.

II. Standard of Review

{¶ 11} The appeal of a trial court's ruling on a motion to suppress "presents a mixed question of law and fact" for review. *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, ¶ 8. An appellate court defers to the trial court's resolution of factual disputes and its evaluation of witness credibility if such determinations are "supported by competent, credible evidence." *Id.*, citing *State v. Mills*, 62 Ohio St.3d 357, 366 (1992) and *State v. Fanning*, 1 Ohio St.3d 19 (1982). Once the facts are established, "the appellate court must then independently determine, without deference to the conclusion of the trial court, whether the facts satisfy the applicable legal standard." *Id. See also State v. Harrison*, 166 Ohio St.3d 479, 2021-Ohio-4465, ¶ 11 (holding that the "mixed question of fact and law" presented by a motion to suppress requires accepting "findings of fact if they are supported by competent, credible evidence," but "[q]uestions of law are reviewed de novo without deference to the lower court's legal conclusions."). Given that the parties do not dispute the factual issues in the present matter, the de novo standard applies to our review of the trial court's legal conclusions.

III. Analysis

{¶ 12} The Fourth Amendment of the United States Constitution states: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." In nearly identical language that "affords the same protection as the Fourth Amendment in felony cases," the Ohio Constitution

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[6] The state's brief contains no "statement of the assignments of error presented for review," as required by Appellate Rule 16(A)(3). Because the statement in its brief captioned the "Proposition of Law One" asserts error and refers "to the place in the record" containing the purported error, we construe it an assignment of error. App.R. 16(A)(3).

places the same restraint on governmental searches. *State v. Jones*, 143 Ohio St.3d 266, 2015-Ohio-483, ¶ 12; Ohio Constitution, Article I, Section 14.

{¶ 13} The "basic purpose" of the Fourth Amendment protection from unreasonable searches is "to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials." *Camara v. Mun. Court of San Francisco*, 387 U.S. 523, 528 (1967). *See also State v. Polk*, 150 Ohio St.3d 29, 2017-Ohio-2735, ¶ 18 (quoting *Camara* to describe the "basic purpose" of the Fourth Amendment). Thus, "the application of the Fourth Amendment depends on whether the person invoking its protection can claim a 'justifiable,' a 'reasonable,' or a 'legitimate expectation of privacy' that has been invaded by government action." *Smith v. Maryland*, 442 U.S. 735, 740 (1979). "When an individual 'seeks to preserve something as private,' and his expectation of privacy is 'one that society is prepared to recognize as reasonable,' [the] official intrusion into that private sphere generally qualifies as a search and requires a warrant supported by probable cause." *Carpenter v. United States*, __ U.S. __, 138 S. Ct. 2206, 2213 (2018), quoting *Smith*, 442 U.S. at 740.

{¶ 14} Under the third party doctrine, however, "a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties." *Smith* at 743-44. In such cases, "the Government is typically free to obtain such information from the recipient without triggering Fourth Amendment protections." *Carpenter* at 2216. Nevertheless, "[a] person does not surrender all Fourth Amendment protection by venturing into the public sphere." *Id.* at 2217. In *Carpenter*, the Supreme Court articulated "a two-part analysis for determining when an individual has a reasonable expectation of privacy in information shared with another." *State v. Eads*, 1st Dist. No. C-190213, 2020-Ohio-2805, ¶ 30. First, a court must consider "the nature of the particular documents sought" to determine whether "there is a legitimate 'expectation of privacy' concerning their contents." *Carpenter* at 2219, quoting *United States v. Miller*, 425 U.S. 435, 442 (1976). Second, a court must determine whether the third party's possession of the document resulted from "voluntary exposure" by the person with the asserted privacy interest. *Id.* at 2220.

{¶ 15} In *Eads*, the First District Court of Appeals applied the *Carpenter* test to its review of a ruling denying a motion to suppress with facts very similar to those raised in

this appeal. The defendant was involved in an accident and transported to a hospital for treatment where "hospital staff tested [his] blood and urine for alcohol and drugs." *Eads*, at ¶ 3. Several months after charges were brought against the defendant for operating a vehicle while impaired under R.C. 4511.19, an investigating officer "submitted to the treating hospital's medical records department a request under R.C. 2317.02(B)(2)(a) and 2317.022(B)," allowing the officer to obtain the defendant's test results. *Id.* at ¶ 4-5. The defendant filed a motion to suppress the results, which the trial court overruled. *Id.* at ¶ 6.

{¶ 16} The First District articulated the issue presented in *Eads* as whether the defendant had "a reasonable expectation of privacy in medical records containing the results of blood and urine tests for alcohol and drugs, created by a hospital for medical treatment, that are not privileged under state law and that are the subject of a state statute providing law enforcement with access to the records for criminal investigations without requiring a warrant." *Id.* at ¶ 13. Applying the *Carpenter* test, *Eads* held that the medical records were of a "deeply revealing nature" and "deserving of protection." *Id.* at ¶ 33, quoting *Carpenter* at 2223. The court also held that the defendant had not voluntarily provided the records because although he had consented to treatment, "it was the hospital's protocol to collect the information" in order to treat him. *Id.* at ¶ 36. Thus, the defendant had a legitimate expectation of privacy in his medical records and the investigating officer "was required to obtain a warrant, issued from a neutral and detached magistrate upon a showing of probable cause." *Id.* at ¶ 37.

{¶ 17} In this case, the trial court, citing *Eads*, applied the *Carpenter* test and properly concluded that Mr. Rogers had a legitimate expectation of privacy in his medical records. It is difficult to imagine documents of a more personal nature than medical records, which the law protects in many ways. "In Ohio, an independent tort exists for the unauthorized, unprivileged disclosure to a third party of nonpublic medical information that a physician or hospital has learned within a physician-patient relationship." *Biddle v. Warren Gen. Hosp.*, 86 Ohio St.3d 395 (1999), paragraph one of the syllabus. The Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), an extensive federal statutory and regulatory scheme, protects personal medical records. *See also Menorah Park Ctr. for Senior Living v. Rolston*, 164 Ohio St.3d 400, 2020-Ohio-6658, ¶ 20 (describing provisions of the HIPAA Privacy Rule). Medical records are exempt from public

records requests. Ohio Adm.Code 3701-83-11 (health care providers "shall not disclose individual medical records except as provided by state and federal laws and regulations."). The nature of Mr. Rogers' medical records is indisputably private. *See, e.g.*, *Ferguson v. Charleston*, 532 U.S. 67, 78 (2001) ("The reasonable expectation of privacy enjoyed by the typical patient undergoing diagnostic tests in a hospital is that the results of those tests will not be shared with nonmedical personnel without her consent.").

{¶ 18} When analyzing the nature of the records in *Eads,* the First District also emphasized the expansive scope of the records requested. The officers had sought test results for illicit drugs and controlled substances in addition to any blood alcohol level. *Eads* at ¶ 32-34. Here, as in *Eads*, the officers did not confine their request to the results of Mr. Rogers' blood alcohol test. But their request was broader still, seeking "[a]ny and all medical records regarding the emergency room treatment and inpatient treatment" Mr. Rogers had undergone on the night he was admitted. (State's Ex. 68.) According to the trial court, "the immense amount of information obtained through the subpoena revealed much more about Rogers' life than his alcohol levels, including medical history, sexual history and drug use unrelated to the incident." (Oct. 18, 2021 Decision & Entry at 4.) The nature of the documents sought far exceeded what was relevant to the officers' investigation and could not plausibly have been expected to be approved by a neutral magistrate in a search warrant.

{¶ 19} The second question under *Carpenter* asks whether the defendant "voluntarily exposed" the information in question. *Carpenter* at 2220. In *Eads*, the First District did not consider the disclosure voluntary because "it was the hospital's protocol to collect the information so that it could provide the appropriate medical treatment." *Eads* at ¶ 36. Here, the trial court found "no evidence" showing that the testing was "anything other than a routine test required for treatment, or that by providing a sample he was waiving his Fourth Amendment rights." (Oct. 18, 2021 Decision & Entry at 4.) The state has pointed to no evidence suggesting otherwise. Under *Carpenter*, Mr. Rogers had a legitimate expectation of privacy in his medical records.

{¶ 20} The state posits two reasons why Mr. Rogers "had no Fourth Amendment right to privacy regarding his medical records in the current case." (Brief of Plaintiff-Appellant at 17.) First, because Mr. Rogers "was under arrest at the time he was taken to

the hospital," the state asserts that "he did not have a reasonable expectation of privacy" in the records. *Id.* The state's sole support for this contention is *State v. Saunders*, 5th Dist. No. 17CA0001, 2017-Ohio-7348, in which the state asserts that the Fifth District Court of Appeals "implied that such a circumstance would qualify as an exigent circumstance that would allow the accessing of hospital records without a search warrant." (Brief of Plaintiff-Appellant at 17.) But in *Saunders*, the court simply listed the "enumerated exceptions to the warrant requirement," one of which is "a search incident to a lawful arrest," before noting that "[t]he state does not argue any of these enumerated exceptions apply in this case." *Saunders* at ¶ 20-30. Here, as well, the state does not argue that a search incident to arrest occurred. That exception to the warrant requirement is only justified "in order to remove any weapons that the [defendant] might seek to use in order to resist arrest or effect his escape. Otherwise, the officer's safety might well be endangered, and the arrest itself frustrated." *Chimel v. California*, 395 U.S. 752, 763 (1969.) The exception also allows "the arresting officer to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction." *Id.* None of those circumstances apply in this case and the state does not even argue for the exception.

{¶ 21} Furthermore, *Saunders* does not support the state's position. Its facts are nearly identical to the case before us. The defendant was transported to a hospital after crashing his car, where a doctor "ordered blood work to determine [his] blood alcohol level." *Saunders* at ¶ 4. The next day, an officer requested the test results under R.C. 2317.02 from the hospital, obtained them, then charged the defendant with an OVI. *Id.* at ¶ 5. The Fifth District affirmed the trial court's ruling granting the defendant's motion to suppress, holding that the defendant had a reasonable expectation of privacy in the records. *Id.* at ¶ 17 citing *Ferguson*. As in this case, the state articulated no exception to the Fourth Amendment's warrant requirement. *Id.* at ¶ 30. *Saunders* illustrates that even under pre-*Carpenter* Fourth Amendment law, courts recognized a person's expectation of privacy in personal medical records. *See also State v. Clark*, 3rd Dist. No. 5-13-34, 2014-Ohio-4873, ¶ 40 ("While R.C. 2317.02(B)(2)(a) and R.C. 2317.022 waive the physician-patient privilege, they do not strip an OVI defendant of his or her expectation of privacy in his medical records"); *State v. Little*, No. 2-13-28, 2014-Ohio-4871, ¶ 40 (holding that "an OVI suspect in Ohio enjoys a reasonable expectation of privacy in his or her medical records"

and "prior to obtaining such medical records" under R.C. 2317.02, "a law enforcement officer must comply with the warrant requirement of the Fourth Amendment"); *State v. Hepler*, 6th Dist. No. WD-15-012, 2016-Ohio-2662, ¶ 25 ("In no circumstance is an R.C. 2317.022 request a substitute for a warrant for a blood draw for a blood-alcohol test nor is it a recognized exception to the warrant requirement").[7]

{¶ 22} The state also argues that "the blood draw was not done at law enforcement's request" and was "done for medical purposes, not for law enforcement purposes." (Brief of Plaintiff-Appellant at 17.) This assertion seeks to distinguish Mr. Rogers' medical records from those in *Ferguson*, in which the Supreme Court held that pregnant patients at a state hospital had a reasonable expectation of privacy in test results of nonconsensual and warrantless drug screens performed on them pursuant to a hospital policy that disclosed the results to law enforcement for prosecution. *Ferguson*, 532 U.S. at 78. But the state does not explain why it believes Mr. Rogers should have a diminished expectation of privacy in records created by a private hospital. Furthermore, the Supreme Court's broadly worded reference to "[t]he reasonable expectation of privacy enjoyed by the typical patient undergoing diagnostic tests in a hospital" is not limited to patients in a state hospital. *Ferguson* further observed that the court had never recognized "any intrusion upon that kind of expectation." *Id.* The state has not demonstrated that Mr. Rogers lacked a reasonable expectation of privacy in his medical records, which officers obtained without a warrant.

{¶ 23} Because "searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment," they are subject to the exclusionary rule unless one of the "few specifically established and

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[7] An Ohio appellate court holding that a defendant's medical records were "not protected within the constitutional right of privacy," *State v. Tomkalski,* 11th Dist. No. 2003-L-097, 2004-Ohio-5624, ¶ 27 , relied upon *State v. Desper*, 151 Ohio App.3d 208, 2002-Ohio-7176, ¶ 34 (7th Dist.) and *Mann v. Univ. of Cincinnati*, 6th Cir. No. 95-3195, 1997 U.S. App. LEXIS 12482, *10 (May 27, 1997), an unpublished decision of the Sixth Circuit Court of Appeals. *Desper* also cited *Mann*. *Desper* at ¶ 34 (stating that in *Mann*, the Sixth Circuit had "specifically rejected the proposition that medical records [implicate] a constitutional privacy right"). However, *Mann* was decided before the Supreme Court's *Ferguson* opinion and relied upon *J.P. v. Desanti*, 653 F.2d 1080, 1088 (6th Cir.1981), a case refusing to recognize "a constitutional right to nondisclosure of juvenile court records." *Tomkalski* did not consider *Ferguson*. *Desper*'s privacy interest analysis considered only whether *Ferguson* had recognized "that the physician-patient privilege is a constitutional privacy right" and distinguished it factually because *Desper* involved "pharmaceutical records." *Desper* at ¶ 21, 33. These holdings are of limited utility, particularly in the wake of *Carpenter*.

well-delineated exceptions" applies. *Katz v. United States*, 389 U.S. 347, 357 (1967). "The United States Supreme Court crafted the exclusionary rule to deter violations of the rights guaranteed by the Fourth Amendment to the United States Constitution, but it has recognized that the costs to society outweigh any deterrent benefit of excluding evidence obtained in a search that appeared to police to be constitutional." *State v. Johnson*, 141 Ohio St.3d 136, 2014-Ohio-5021, ¶ 2. For example, the exception applies if "an officer act[s] in objectively reasonable reliance on a statute," even if that statute is later declared unconstitutional, because exclusion "would have as little deterrent effect on the officer's actions as would the exclusion of evidence when an officer acts in objectively reasonable reliance on a warrant." *Illinois v. Krull*, 480 U.S. 340, 349 (1987). However, the good-faith exception to the exclusionary rule does not apply "in cases in which officers, conducting warrantless searches, relied on their own belief that they were acting in a reasonable manner, as opposed to relying upon another's representations." *State v. Thomas*, 10th Dist. No. 14AP-185, 2015-Ohio-1778, ¶ 46.

{¶ 24} In *Eads*, the First District applied the good-faith exception to the exclusionary rule because it concluded that it was objectively reasonable for the officers to rely on R.C. 2317.02 to obtain the medical records with a warrant. *Eads*, 2020-Ohio-2805 at ¶ 41-43. The court noted the "uncertainty of the law" at the time of the incident, citing conflicting holdings of Ohio appellate courts, as well as the fact that the "the conduct predated the United States Supreme Court's 2018 decision in *Carpenter*, a decision clarifying the third-party doctrine and privacy protection." *Id.* at ¶ 41. In addition, the court noted that the law enforcement agency in question "no longer obtains these types of medical records without a warrant." *Id.* Thus, "suppression of the evidence obtained as a result of the statutorily-based records request would have no appreciable effect in deterring a violation of the Fourth Amendment." *Id.* at ¶ 42.

{¶ 25} The circumstances of this case invert each of those considerations. First, as the trial court noted, the Supreme Court decided *Carpenter* on June 22, 2018, nearly five months before the date that the officers obtained the subpoena. (*Compare Carpenter*, 138 S.Ct. 2206 *with* State's Ex. 68 (investigative subpoena dated November 12, 2018)). Nevertheless, the state maintains that the trial court's reasoning is "faulty," citing the decision of this court in *State v. Jones*, 10th Dist. No. 18AP-33, 2019-Ohio-2134. (Brief of

Plaintiff-Appellant at 20.) In *Jones*, we held that a trial court had not erred when admitting cell phone data obtained pursuant to a court order before *Carpenter* was decided because the Supreme Court had not yet recognized a legitimate expectation of privacy in such data held by a third party. *Jones* at ¶ 46. We stated that "[w]hile *Carpenter* is controlling going forward, it does not apply retroactively to appellant's case," the operative facts of which had occurred in 2015. *Id.* at ¶ 45. Thus, *Carpenter* is controlling, so we apply it now. In doing so, we conclude that the officers could not have objectively relied on R.C. 2317.02(B)(2)(a) when obtaining a subpoena for the records instead of a warrant. The statute applies "except to the extent specifically prohibited by any law of this state or of the United States," which encompasses the Fourth Amendment of the United States Constitution. R.C. 2317.02(B)(2)(a). Unreasonable searches are specifically prohibited by the Fourth Amendment. As discussed, the subpoena was unreasonable under *Carpenter*.

{¶ 26} We also reject the state's contention that *Carpenter* is inapplicable because it "involved a very specific issue regarding the need for search warrants when obtaining cell phone location data." (Brief of Plaintiff-Appellant at 20.) We agree with the First District's assessment in *Eads* that *Carpenter* had the effect of "clarifying the third-party doctrine and privacy protection" when applying its test to medical records. *Eads* at ¶ 41. *Carpenter* located itself in the historical context of the Supreme Court's Fourth Amendment cases recognizing an individual's privacy interests, discussed at length the "set of decisions" out of which its third party doctrine grew, and presented a two-part test for determining whether a legitimate expectation of privacy exists in evidence obtained from a third party. *Carpenter* at 2216. Although the court concluded with its customary limiting language stating that its decision was "narrow," nowhere did it state that its holding was limited only to cell phone records or otherwise attempt to arrest the evolution of the common law test it had set forth. *Id.* at 2220. Nor will we. It expressly stated its holding as follows: "We hold only that a warrant is required in the rare case where the suspect has a legitimate privacy interest in records held by a third party." *Id.* at 2222. This is such a case.

{¶ 27} Finally, unlike in *Eads*, deterrence is a consideration here. As the trial court noted, the officers "disregarded the warrant requirement after they failed to obtain one. If anything, the officers' attempt to secure a warrant demonstrates that they believed one was required to obtain Rogers' medical records from Riverside [Hospital]." (Oct. 18, 2021

Decision & Entry at 6.) The trial court further noted that "instead of applying for a warrant on November 12, which nothing prevented them from doing, the officers inexplicably decided to abandon the warrant and obtain a subpoena from the same judge they were unable to reach the night before." *Id.* "If the choice to proceed by subpoena provided a categorical limitation on Fourth Amendment protection, no type of record would ever be protected by the warrant requirement." *Carpenter* at 2222. The trial court's findings are incompatible with an assertion of good faith. Our previous discussion of the unjustified scope of the records sought in the subpoena in comparison to what a warrant would have allowed is another factor supporting an outcome favoring deterrence.

IV. Conclusion

{¶ 28} Mr. Rogers had a legitimate expectation of privacy in the medical records that law enforcement officers obtained from the hospital that treated him. Because the officers procured the records without a warrant, they violated his Fourth Amendment right to be free from an unreasonable search. Furthermore, no good-faith exception justified the officers' conduct. Consequently, the records they obtained are inadmissible as evidence in the trial court against Mr. Rogers. For these reasons, we overrule the state's sole assignment of error and affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

BEATTY BLUNT, P.J. and JAMISON, J., concur.