

[Cite as *State v. Boyle*, 2023-Ohio-3161.]

COURT OF APPEALS OF OHIO

**EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA**

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| STATE OF OHIO, | : | |
| Plaintiff- Appellee, | : | |
| v. | : | No. 113045 |
| JAMES BOYLE III, | : | |
| Defendant-Appellee. | : | |
| [Appeal by J.C., | : | |
| Named Victim] | : | |

JOURNAL ENTRY AND OPINION

JUDGMENT: AFFIRMED

RELEASED AND JOURNALIZED: September 5, 2023

Criminal Appeal from the Cuyahoga County Court of Common Pleas
Case No. CR-21-664185-A

Appearances:

Henderson, Mokhtari & Weatherly, and Justin M. Weatherly, *for appellee* James Boyle III.

Ohio Crime Victim Justice Center, Elizabeth A. Well, and Latina Bailey, *for appellant*.

MICHELLE J. SHEEHAN, J.:

{¶ 1} In this case, defendant-appellee, James Boyle III, is under indictment for one count of rape and two counts of gross sexual imposition. Appellant, J.C., the victim named in the indictment, appeals the trial court’s denial of a motion to quash a subpoena. Because we do not find that the trial court abused its discretion in denying the motion to quash, we affirm the judgment.

RELEVANT FACTS AND PROCEDURAL HISTORY

{¶ 2} In December 2021, Boyle was indicted for one count of rape and two counts of gross sexual imposition. J.C. is the named victim in the indictments. In May 2022, Boyle filed subpoenas directed to the Cleveland Rape Crisis Center, the Cuyahoga County Department of Children and Family Services (“CCDCFS”), and Signature Health seeking records regarding J.C. At issue in this appeal are subpoenas issued to Signature Health.¹

{¶ 3} In November 2022, Boyle filed a motion for production of the alleged victim’s psychological records. The state opposed Boyle’s motion. On April 3, 2023, the trial court held an attorney conference. The trial court issued an order on April 4, 2023, granting Boyle’s motion in part, ordering the state to produce records

¹ As to the subpoena to CCDCFS, that agency eventually supplied the trial court records pertaining to J.C. The trial court conducted an in camera review and released records to both the state and Boyle. As to the subpoena issued to the Cleveland Rape Crisis Center, that organization provided a response to the subpoena directly to Boyle indicating it did not possess any privileged documents.

for in camera review and to have Boyle’s counsel forward a subpoena² to the trial court for its signature. On April 19, 2023, J.C.’s counsel filed her notice of appearance, a motion to exercise her rights to be present and to be heard,³ and a brief in opposition to Boyle’s attempt to obtain her medical records.

{¶ 4} On June 28, 2023, Boyle filed a motion to show cause regarding the subpoena. On that same date, J.C. filed a motion to quash the subpoena. On July 14, 2023, the trial court, having signed Boyle’s subpoena, caused the subpoena to be issued to Signature Health. The subpoena sought production of “any and all records pertaining to” J.C. The subpoena did not specify a date/time for the records to be produced but rather directed Signature Health to appear “forthwith” before the trial court.

{¶ 5} On July 21, 2023, J.C. filed a second motion to quash Boyle’s subpoena to Signature Health. On July 26, 2023, the trial court held a hearing on J.C.’s motion. J.C. argued to the trial court that it had to quash the subpoena unless Boyle proved J.C.’s medical and/or psychological records were relevant to the proceedings, not otherwise available through other means, that Boyle could not properly prepare for trial without the production of the documents requested and the failure to obtain the documents may unreasonably delay trial, and the request

² Three subpoenas were issued to be served upon Signature Health at three different addresses. We refer to these subpoenas throughout this opinion in the singular for purposes of clarity.

³ The trial court granted this motion on July 21, 2023.

for documents is made in good faith and not intended as a general fishing expedition.

{¶ 6} Boyle argued that the records were relevant because they would contain disclosures regarding the allegations in the indictment that may be exculpatory. Boyle further argued that because J.C. made contradictory statements during the investigation, the Signature Health records would contain contradictory statements that he was entitled to have available for trial for impeachment purposes. He noted that because the records are confidential, he had no other means to obtain the records and stated that he sought the records in good faith.

{¶ 7} In response to Boyle's arguments, J.C. argued that the request was a fishing expedition, as evidenced by the other subpoenas sent by Boyle, one of which went to the Cleveland Rape Crisis Center, an organization from which J.C. did not receive services. Further, J.C. pointed out that the subpoena to Signature Health was overly broad because it sought any and all records without any time limitation. J.C. did not object or mention Boyle's failure to present any evidence to the trial court in support of his arguments.

{¶ 8} During the hearing, as to the protected nature of the records sought, the trial court stated:

That's why I signed an order for a subpoena. It will come to me first. I will review the records and then I will find if they are relevant or exculpatory. At which time, they will be disclosed.

{¶ 9} On August 1, 2023, the trial court issued an order denying J.C.'s motion to quash the subpoena.

LAW AND ARGUMENT

This Court Has Jurisdiction to Determine J.C.'s Appeal

{¶ 10} J.C. appeals the trial court's denial of her motion to quash the Signature Health subpoena. "The denial of a motion to quash a subpoena directed at a nonparty is, in and of itself, a final order." *Blue Technologies Smart Solutions, LLC v. Ohio Collaborative Learning Solutions, Inc.*, 8th Dist. Cuyahoga No. 110501, 2022-Ohio-1935, ¶ 41, citing *Godwin v. Facebook, Inc.*, 2020-Ohio-4834, 160 N.E.3d 372, ¶ 11 (8th Dist.). Boyle asks that the appeal be dismissed, asserting J.C. has no standing to pursue an appeal, citing *State v. Hughes*, 2019-Ohio-1000, 134 N.E.3d 710 (8th Dist.), in which the lead opinion found that a victim had no standing to file an appeal in a criminal case.

{¶ 11} A victim of crime has been granted certain rights in Article I, Section 10a, Ohio Constitution, which section is generally referred to as "Marsy's Law." Marsy's Law provides a victim of crime with "the right to refuse an interview, deposition, or other discovery request made by the accused." Ohio Constitution, Article I, Section 10a(A)(6). Further, Marsy's Law provides that victims may assert their rights in any proceeding involving the criminal offense. Ohio Constitution, Article I, Section 10a(B). When victims exercise their rights, "If the relief sought is denied, the victim or the victim's lawful representative may petition the court of appeals for the applicable district, which shall promptly consider and decide the petition." *Id.*

{¶ 12} Since our decision in *Hughes*, the Ohio Supreme Court clarified that pursuant to Marsy’s Law,

[W]hen a victim of a crime seeks enforcement of his or her constitutional rights by submitting a request to the trial court, the victim has standing to file a direct appeal.

State v. Brasher, Slip Opinion No. 2022-Ohio-4703, ¶ 22. Additionally, pursuant to R.C. 2930.19(A), which became effective April 6, 2023, the legislature codified that a victim has standing to appeal an order denying a victim’s rights. In this case, by filing a motion to quash, J.C. sought to exercise the right to refuse a discovery request. As such, J.C. has standing to appeal the denial of the motion to quash.

Standard of Review

{¶ 13} We review a trial court’s denial of a motion to quash for an abuse of discretion. *State v. Kopniske*, 8th Dist. Cuyahoga No. 112242, 2023-Ohio-2489, ¶ 5. A court abuses its discretion when it “exercises its judgment in an unwarranted way regarding a matter over which it has discretionary authority.” *State v. McFarland*, 8th Dist. Cuyahoga No. 111390, 2022-Ohio-4638, ¶ 20, citing *Johnson v. Abdullah*, 166 Ohio St.3d 427, 2021-Ohio-3304, 187 N.E.3d 463, ¶ 35. “In other words, [a] court abuses its discretion when a legal rule entrusts a decision to a judge’s discretion and the judge’s exercise of that discretion is outside of the legally permissible range of choices.” *Id.* at ¶ 20, quoting *State v. Hackett*, 164 Ohio St.3d 74, 2020-Ohio-6699, 172 N.E.3d 75, ¶ 19. Further, an abuse of discretion implies that the court’s attitude is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

Assignments of Error

{¶ 14} J.C. appeals the denial of her motion to quash, raising three assignments of error:

1. The trial court erred, abusing its discretion, when it denied Victim-Appellant J.C.'s Motion to Quash Defendant's Subpoenas Duces Tecum for Victim Records without conducting an evidentiary hearing.
2. The trial court erred, abusing its discretion, by ordering the release of Victim-Appellant J.C.'s privileged records when there is no applicable statutory privilege exception that would permit release.
3. The trial court erred, abusing its discretion, when it ordered privileged documents be directly released to Defendant-Appellee without conducting an in camera review.

The trial court did not abuse its discretion by denying the motion to quash

{¶ 15} Within the first assignment of error, J.C. argues that the trial court abused its discretion by not holding an evidentiary hearing on the motion to quash. In making the argument J.C. relies on *In re Subpoena Duces Tecum Served upon Potts*, 100 Ohio St.3d 97, 2003-Ohio-5234, 796 N.E.2d 915. In *Potts*, the Ohio Supreme Court held that

[p]ursuant to Crim.R. 17(C), when deciding a motion to quash a subpoena duces tecum requesting the production of documents prior to trial, a trial court shall hold an evidentiary hearing. At the hearing, which may be held in camera, the proponent of the subpoena must demonstrate that the subpoena is not unreasonable or oppressive by showing “(1) that the documents are evidentiary and relevant; (2) that they are not otherwise procurable reasonably in advance of trial by exercise of due diligence; (3) that the party cannot properly prepare for trial without such production and inspection in advance of trial and that the failure to obtain such inspection may tend unreasonably to delay the trial; and (4) that the application is made in good faith and is not intended as a general ‘fishing expedition.’” (*United States*

v. Nixon [1974], 418 U.S. 683, 699-700, 94 S.Ct. 3090, 41 L.Ed.2d 1039, followed.)

Id. at paragraph one of the syllabus.

{¶ 16} Boyle argues that the trial court did conduct a hearing in which he presented arguments as to why the subpoena was not unreasonable or oppressive, addressing each element of the test set forth in *Potts*.

{¶ 17} At the hearing on the motion to quash, J.C. argued that Boyle had not met the factors that would entitle him to have a subpoena issued under the test set forth in *Potts*. During the hearing, victim's counsel informed the court of her objections to the subpoena and indicated the standards Boyle was required to meet in order to have the subpoena issued at which time the following exchange took place

Victim's Counsel: * * * At this time, we are requesting that the Defendant does his part and meet his burden in order to get these records.

The Court: What does he have to show to get the records?

Victim's Counsel: He has to show, * * * one, that it's relevant; two, that they are not otherwise reasonably procurable in advance of the trial by due diligence; three, that the Defendant cannot properly prepare for trial without production and inspection of the documents, and the failure to obtain the documents may tend to unreasonably delay trial, and four; that the subpoena is made in good faith and is not intended as a general fishing expedition.

* * *

Defense Counsel: Your Honor, I am prepared [to] make those arguments today if the Court would be so inclined.

The Court: Let's get it done.

Tr. 12 – 14.

{¶ 18} During the hearing, J.C. did not raise to the trial court any issue that Boyle did not present evidence or otherwise object to the trial court's failure to receive evidence during the hearing. J.C. now raises this argument as an assignment of error. "A failure to object waives all but plain error." *State v. Powell*, 8th Dist. Cuyahoga No. 111672, 2023-Ohio-2770, ¶ 112. Crim.R. 52(B) provides that "plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." Further, "[a] court of appeals is not required to construct a plain-error argument on behalf of a party." *Powell*, 8th Dist. Cuyahoga No. 111672, 2023-Ohio-2770, at ¶ 112.

{¶ 19} J.C. has not asserted that the trial court's hearing procedure was plain error. As such, we decline to construct a plain error argument to determine whether the form of the hearing was plain error and whether such error, if any, affected a substantial right in this case, especially where the record does not indicate that Signature Health produced any records to the trial court or that any disclosure of any records concerning J.C. has been made.

{¶ 20} The first assignment of error is overruled.

{¶ 21} We address the second and third assignments of error concurrently because the issues raised are related. In the second assignment of error, J.C. argues that the trial court abused its discretion by denying the motion to quash and ordering the release of medical records for which no exception to privilege is

applicable. Within the third assignment of error, J.C. similarly contends that the denial of the motion to quash was an order to release medical records directly to Boyle.

{¶ 22} Following the adoption of Marsy's Law in our constitution, victims have been granted certain constitutional rights. Courts have been confronted with determining the manner in which a victim of crime may assert and enforce rights without a statutory framework or legal precedent. This led to decisions such as the lead opinion in *Hughes* in 2019, in which it was determined that a victim of crime had no standing to file an appeal in a criminal case. *Id.*, 2019-Ohio-1000, 134 N.E.3d 710. But by 2022, the Ohio Supreme Court clarified that victims have standing to file an appeal in a criminal case to enforce their rights granted under Marsy's Law. *Brasher*, Slip Opinion No. 2022-Ohio-4703, at ¶ 22; R.C. 2930.19(A).

{¶ 23} In this case, we also have the benefit of R.C. 2930.071, a statute enacted after the adoption of Marsy's Law, which provides a procedure a court is to follow when a motion to quash a subpoena concerning a victim of crime is filed. R.C. 2930.071(A) provides in pertinent part:

(2)(a) Pursuant to Criminal Rule 17, the court, on a motion made promptly and at or before the time specified in the subpoena for compliance, may quash or modify the subpoena if compliance would be unreasonable or oppressive.

(b) Upon the filing of a motion to quash, the court shall conduct a hearing in which the proponent of the subpoena shall prove all of the following:

(i) That the documents are evidentiary and relevant;

(ii) That the documents are not otherwise procurable reasonably in advance of trial by exercise of due diligence;

(iii) That the party cannot properly prepare for trial without such production and inspection in advance of trial and that the failure to obtain such inspection may tend unreasonably to delay the trial;

(iv) That the application is made in good faith and is not a violation of Ohio Rules of Criminal Procedure.

(3) If the court does not quash the subpoena, the court shall conduct an in-camera review of any records as to which a right of privilege has been asserted.

(4) If the court determines that any of the records reviewed in camera are privileged or constitutionally protected, the court shall balance the victim's rights and privileges against the constitutional rights of the defendant. The disclosure of any portion of the records to the prosecutor does not make the records subject to discovery, unless the material is such that due process requires that the prosecutor provide it to the defendant pursuant to the Brady Rule.

{¶ 24} In this case, the trial court authorized a subpoena to be issued to Signature Health. The subpoena requires Signature Health to appear before the trial court with records concerning J.C. Moreover, the subpoena does not contain any instructions that Signature Health could avoid appearing before the trial court by providing the records directly to Boyle's counsel. In the motion to quash and at the hearing, J.C. raised the issue that the records sought by Boyle were privileged. The trial court recognized that claim of privilege and indicated at the hearing that it would conduct an in camera review of the Signature Health records.

{¶ 25} Further, pursuant to R.C. 2930.071, when an issue of privilege is raised in a motion to quash a subpoena seeking records concerning a victim of crime,

the trial court is required to conduct an in camera inspection and determine whether any records produced are privileged or otherwise constitutionally protected pursuant to R.C. 2930.071(A)(3), and then, before any disclosure of the records is made, conduct a balancing test of the victim's and defendant's respective rights pursuant to R.C. 2930.071(A)(4). As such, to the extent that J.C. argues that the trial court abused its discretion by ordering the release of privileged material directly to Boyle's counsel and without conducting an in camera review of the records within the second and third assignments of error, we find those arguments inapposite to the record and unpersuasive.

{¶ 26} Under the second assignment of error, J.C. argues that the trial court abused its discretion by denying the motion to quash because the records are privileged pursuant to R.C. 2317.02. Boyle admits that the records sought from Signature Health contain privileged information but argues that not all the information in the records is privileged. Because of this, he asserts that both R.C. 2317.02(G)(1)(e) and 2930.071 require the trial court to review records to determine whether they are privileged when such claim is made.

{¶ 27} The trial court held a hearing on J.C.'s motion to quash and was to determine whether compliance with the subpoena would be unreasonable or oppressive, using the test identified in *Potts* and as codified in R.C.

2930.071(A)(2)(b)(i) through (iv).⁴ The test to determine whether to quash the subpoena as being unreasonable or oppressive is focused on issues of evidentiary value and relevancy, necessity, and the motives in seeking the information by subpoena. R.C. 2930.071 further requires that if the trial court determines that the subpoena is not unreasonable or oppressive and denies the motion to quash, the trial court is to then make additional determinations of whether the material is privileged and if so, whether disclosure of any material is to be made.

{¶ 28} In further support of the argument that the trial court was required to quash the subpoena because it sought privileged medical records, J.C. refers this court to *State v. Johnson*, 407 Wis.2d 195, 2023 WI 39. In *Johnson*, the Wisconsin Supreme Court found that a defendant could not obtain an in camera review of a crime victim’s health records. *Id.* The basis for the Wisconsin Supreme Court’s decision was because 1) Wisconsin statutes provide a specific statutory privilege for patients to prevent disclosure of medical records, 2) the prior standard for providing an in camera review was unworkable, and 3) after the adoption of victims’ rights laws, allowing defendants to obtain victim’s medical records was “detrimental to coherence in the law.” *Id.* at ¶ 23. Of note, the holding in *Johnson* is based in part on a specific statutory privilege not contained in the Revised Code, and we decline

⁴ The factors to be proven in R.C. 2930.071(A)(2)(b)(i) through (iv) are substantially the same as those listed in *Potts*.

to extend the protections for victim's medical records, based in part on Wisconsin law to the procedure established by our precedent and within R.C. 2930.071.

{¶ 29} At the hearing before the trial court, Boyle argued that the records he seeks are of evidentiary value and relevant because they contain disclosures regarding the allegations in the indictment. He states that because J.C. made contradictory statements during the investigation to the police and to representatives of CCDCFS, the Signature Health records would necessarily contain contradictory statements that he was entitled to have available for use at trial. He argued he has no other means to obtain the records and stated that he sought the records in good faith and was not engaging in a fishing expedition. J.C.'s argument that the trial court abused its discretion because the documents contain privileged material is not well taken at this juncture of the proceedings. The trial court did not receive the documents requested, had no opportunity to review them, and could not make the determinations contained in R.C. 2930.071 as to whether the materials are privileged and if so, whether they should be disclosed.

{¶ 30} The second and third assignments of error are overruled.

CONCLUSION

{¶ 31} As a victim of crime, J.C. has standing to appeal the trial court's denial of the motion to quash a subpoena that sought medical records from a healthcare provider. The subpoena duces tecum directed Signature Health to provide records to the trial court, and the trial court indicated that it would review the records in camera and balance the victim's rights and privileges against the constitutional

rights of the defendant before disclosure of any of the records. Further, the trial court's judgment denying J.C.'s motion to quash the subpoena was not unreasonable, arbitrary, or capricious and was not an abuse of discretion.

{¶ 32} Judgment affirmed.

It is ordered that appellee recover of appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

MICHELLE J. SHEEHAN, JUDGE

FRANK DANIEL CELEBREZZE, III, P.J., and
KATHLEEN ANN KEOUGH, J., CONCUR