

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

DAPHNE GLENN MURRAY,

Defendant-Appellee.

UNPUBLISHED

May 9, 1997

No. 184477

Recorder's Court

LC No. 94-011084

Before: Holbrook, Jr., P.J., and White and A. T. Davis*, JJ.

PER CURIAM.

Plaintiff appeals by leave granted the trial court's order allowing the disclosure of the complainant's psychiatric records to defendant for use at trial. We reverse in part.

A

Defendant was charged with one count of aggravated stalking, MCL 750.411i; MSA 28.643(9). Defendant filed a motion for discovery of the psychiatric records of the complainant.¹ The court ruled that an in camera review should be conducted for purposes of determining whether the records were necessary to the defense. The complainant signed a document authorizing the release of her medical and psychiatric records for the judge's review. Thereafter, the case was reassigned to a different judge.

A hearing was held regarding defendant's discovery motion. At the hearing, the court stated that it had reviewed the complainant's psychiatric records. The court found that the records contained exculpatory information and ordered the records to be released to the parties for use in this case. The court also entered a protective order prohibiting the dissemination of the complainant's medical records "outside of trial."

B

* Circuit judge, sitting on the Court of Appeals by assignment.

Privilege is governed by common law, except as modified by statute or court rule. MRE 501.
The psychiatrist-patient privilege, MCL 330.1750; MSA 14.800(750), establishes an

evidentiary privilege in court proceedings unless the patient has waived the privilege.² *People v Stanaway*, 446 Mich 643, 660; 521 NW2d 557 (1994). The privilege extends to any communication made in the course of examination, diagnosis, or treatment, as well as the fact of treatment. *Id.*; MCL 330.1750(1)(c); MSA 14.800(750)(1)(c).

The psychiatrist-patient privilege is an absolute privilege. *Stanaway, supra* at 683. A communication protected under the psychiatrist-patient privilege is not intended for use as evidence, either for impeachment or as exculpatory evidence, in a civil or criminal trial. *Id.* at 660. The state's interest in protecting the confidentiality of counseling records, however, may conflict with the defendant's federal and state constitutional rights to obtain evidence necessary to the defense. *Id.* at 649. In order to balance these competing interests, our Supreme Court set forth the procedure for determining when privileged records should be discoverable by the accused in a criminal trial.

In *Stanaway, supra* at 681, the Supreme Court held that a defendant's right to discovery, confrontation, and effective cross-examination does not compel that the defendant be granted an opportunity to discover any potentially exculpatory evidence. Rather, the defendant must show a good-faith belief that there is a reasonable probability that the requested confidential documents contain information necessary to the preparation of the defense. *Id.* at 649-650, 677. This showing must be grounded on specific, demonstrable and articulable facts. *Id.* at 677, 681. Where a defendant can satisfy this threshold requirement, the trial court must conduct an in camera review of those records to ascertain whether they indeed contain evidence that is reasonably necessary, therefore essential, to the defense. *Id.* at 649-650. "Only when the trial court finds such evidence, should it be provided to the defendant." *Id.* at 650.

C

On appeal, plaintiff argues that the trial court erred in ordering an in camera inspection of the complainant's psychiatric records. However, the propriety of the decision to order an in camera inspection of the complainant's records is moot because the inspection has already occurred. Accordingly, we turn to the issue whether the court properly ordered the release of the records.

Plaintiff contends that the trial court erred in finding that complainant's psychiatric records contained evidence reasonably necessary to the defense. Plaintiff asserts that the trial court improperly relied on the fact that the records contained no reference to the alleged stalking. The Supreme Court in *Stanaway, supra* at 681, n 41, held that such negative evidence is not sufficient to justify the disclosure of a complainant's records. "Silence in this circumstance would not prove that the offense did not occur." *Id.*

The record does not establish the basis for the trial court's decision to release the documents. This Court, however, has conducted an independent review of the complainant's psychiatric records to determine whether the records were "reasonably necessary, therefore essential, to the defense." *Stanaway, supra*, 446 Mich 649-650.

We conclude that the court erred in ordering the release of all the records. The vast majority of the records have no conceivable use relative to this case. We have identified only four entries that may be deemed reasonably necessary. A copy of these entries will be attached to the prosecutor's and trial court's copies of this opinion in a sealed envelope. The prosecutor shall inform the trial court within fourteen days whether the complainant waives her privilege as to these records. If the complainant declines to do so, her testimony will be suppressed. *Stanaway* at 584. The copy of complainant's records submitted to this Court will be sealed and will be available for retrieval by the prosecutor at the Court's Detroit Clerk's Office for twenty-one days after the release of this opinion.

We reverse in part, and remand for further proceedings. We do not retain jurisdiction.

/s/ Donald E. Holbrook, Jr.

/s/ Helene N. White

/s/ Alton T. Davis

¹ In addition, defendant sought an order compelling the complainant to undergo an independent medical examination. This motion was denied.

² Section 750(1) of the statute provides:

Privileged communications shall not be disclosed in civil, criminal, legislative, or administrative cases or proceedings, or in proceedings preliminary to such cases or proceedings, unless the patient has waived the privilege, except in the circumstances set forth in this section. [MCL 330.1750(1); MSA 14.800(750)(1).]