20190049
FILED
IN THE OFFICE OF THE
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JULY 1, 2019
STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

State of North Dakota, Plaintiff and Appellant, vs. Derek James Grzadzieleski, Defendant and Appellee.	)	Supreme Court No. 20190049 Case No. 34-2018-CR-00141

ON APPEAL FROM THE JANUARY 24, 2019 ORDER GRANTING DEFENDANT'S MOTION TO SUPPRESS EVIDENCE

NORTHEAST JUDICIAL DISTRICT
PEMBINA COUNTY, NORTH DAKOTA
THE HONORABLE LAURIE A. FONTAINE, PRESIDING.

BRIEF OF APPELLEE DEREK JAMES GRZADZIELESKI

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STATEMENT OF THE CASE

[¶ 1] The State of North Dakota appeals from the district court's order excluding Mr. Grzadzieleski's medical records, which contained his reported blood alcohol concentration, from evidence. The State charged Mr. Grzadzieleski with Operating an Off-Highway Vehicle While Under the Influence of Alcohol on August 21, 2018, in violation of N.D.C.C. § 39-29-09(5)(c). (Appellant's Appendix (App. 3)). Mr. Grzadzieleski filed a Motion to Suppress and Dismiss on November 9, 2018. (App. 6). Oral arguments on the motion were held January 16, 2019. (App. 2). On January 24, 2019, the district court issued its order granting Mr. Grzadzieleski's motion to suppress based upon the physician-patient privilege, Rule 503 of the N.D.R.Evid. (App. 25).

[¶ 2] The State filed a notice of appeal of the order on February 12, 2019. (App. 29). The State filed its merits brief on May 10, 2019. Supreme Court Docket ID #10. Mr. Grzadzieleski filed a motion to dismiss the appeal on May 15, 2019. Doc. ID #12. The State responded to the motion on May 28, 2019. Doc. ID #28. This Court directed the motion to dismiss be considered with the merits of the appeal. Doc. ID #19.

STATEMENT OF THE FACTS

[¶ 3] The facts of the case are largely undisputed, as identified by the State at a

hearing on Mr. Grzadzieleski's motion. Hr'g Tr. at p. 7, lines 3-5. On July 4, 2018 at approximately 10:30 p.m., Trooper Ryan Mugan and Trooper Nathan Boll were on patrol on Highway 5 in Northeast North Dakota. (App. 21). State radio dispatched a call of a serious injury crash south of Drayton, ND near Highway 44. (App. 21). Pembina County Deputy Spencer Puppe requested the assistance of Troopers Mugan and Boll. (App. 21). Deputy Puppe informed Trooper Mugan the crash involved an ATV and the Defendant, Derek Grzadzieleski. (App. 21). Deputy Puppe additionally informed Trooper Mugan that Mr. Grzadzieleski was being transported to Altru Hospital in Grand Forks, ND. (App. 21).

[¶ 4] Trooper Mugan and Trooper Boll went to Altru Hospital to begin an investigation into the crash. (App. 22). Upon arriving at Altru Hospital, Trooper Mugan was notified that he would not be able to speak with Mr. Grzadzieleski at that time, as he was being intubated and transferred to the critical care unit. (App. 22).

[¶ 5] Approximately two weeks later, on July 20, 2018, Trooper Mugan applied for and obtained a search warrant to search and seize the medical records from Altru from the night in question in order to determine Mr. Grzadzieleski's BAC at the time of the crash. (App. 21). Altru Hospital complied with the warrant and turned over Mr. Grzadzieleski's medical records.

[¶ 6] Mr. Grzadzieleski moved the District Court to "suppress" the medical records and prevent their disclosure at trial. (App. 6). Mr. Grzadzieleski requested the Court exclude the medical records based on the physician-client privilege under Rule 503 of the North Dakota Rules of Evidence, statutory violations grounded upon the implied consent law found in section 39-20-01 of the North Dakota Century Code, and on

constitutional violations. (App. 6). The Court ultimately excluded the medical records from trial based upon Rule 503, N.D.R.Evid. (App. 27). The Court declined to reach any other raised issues. (App. 27).

STANDARD OF REVIEW

[¶ 7] A district court's ruling on a motion in limine is reviewed for abuse of discretion. State v. Bjerklie, 2006 ND 173, ¶ 4, 719 N.W.2d 359. A court has broad discretion in deciding whether to admit evidence and this Court will not reverse a district court's decision to admit or exclude evidence unless the district court abused its discretion by acting in an arbitrary, unreasonable, or unconscionable manner. Rittenour v. Gibson, 2003 ND 14, ¶ 35, 656 N.W.2d 691.

LAW AND ARGUMENT

I. The State's appeal is not authorized by statute.

[¶ 8] As a threshold matter, this Court must determine whether the State is authorized to appeal the district court's order. State v. Powley, 2019 ND 51, ¶ 7, 923 N.W.2d 123. Section 29-28-07(5), N.D.C.C. allows the State to appeal from:

> An order granting the return of property or suppressing evidence, or suppressing a confession or admission, when accompanied by a statement of the prosecuting attorney asserting that the appeal is not taken for purpose of delay and that the evidence is a substantial proof of a fact material in the proceeding. The statement must be filed with the notice of appeal.

In a criminal action, the State's right to appeal is limited by statute. State v. Counts, 472 N.W.2d 756, 757 (N.D. 1991). "The State's right to appeal in a criminal action is governed by Section 29-28-07, N.D.C.C., and is a jurisdictional matter." State v. Simon, 510 N.W.2d 635, 636 (N.D. 1994). In *Simon*, this Court held N.D.C.C. § 29-28-07(5) authorizes

"appeals by the State only from orders granting a motion to suppress evidence under Rule 12(b)(3), N.D.R.Crim.P., and from orders granting a motion to return evidence under Rule 41(e), N.D.R.Crim.P." Id., at 636 (quoting State v. Miller, 391 N.W.2d 151, 155 (N.D. 1986)).

[¶ 9] In Counts, this Court indicated section 29-28-07(5) allows the State to appeal an order excluding evidence only if the trial court suppressed the evidence on grounds that it was illegally obtained. *See* 472 N.W.2d at 757.

> We noted that the plain language and the legislative history of subsection (5) indicated that it was intended to relate to "the exclusion, by virtue of constitutional law, of evidence following a motion to suppress." We said that the legislature intended subsection (5) to authorize a narrow right to appeal for the State and we declined to construe the word "suppressing" generically to mean any form of exclusion of evidence because that interpretation would allow appeals from every evidentiary ruling that resulted in the exclusion of evidence, including rulings made during trial.

See Id. (citing State v. Miller, 391 N.W.2d at 152 (N.D. 1986)). This Court has consistently held an order excluding evidence based upon the rules of evidence is not appealable by the State.

[¶ 10] For additional guidance, this Court can look to State v. Powley, holding that a district court's order on a motion in limine excluding evidence under the rules of evidence is not appealable under N.D.C.C. § 29-28-07(5). *See* Powley, 2019 ND 51 at ¶ 11. The Court distinguished between an order suppressing evidence and an order in limine and stated the distinction turns on whether the evidence is excluded based on illegality or a violation of the rules of evidence. Id. at ¶ 10 (citing City of Fargo v. Cossette, 512 N.W.2d 459, 460 (N.D. 1994)). In Powley, this Court concluded the district court excluded the evidence in question under Rule 412, N.D.R.Evid., rather than on constitutional grounds,

and therefore dismissed the State's appeal. Id. at ¶ 11.

[¶ 11] In determining the relief requested, a court is "not bound by a party's label and may look at the substance to determine proper classification." Tuhy v. Tuhy, 2018 ND 53, ¶ 20, 907 N.W.2d 351. Here, the District Court did not suppress the medical records on grounds that they were illegally obtained. The District Court excluded the records based upon the physician-client privilege in Rule 503, N.D.R.Evid. (App. 27). The Court specifically stated, "The results of the test are inadmissible at trial based on the physician-client privilege set out in Rule 503 of the North Dakota Rules of Evidence. This is a ruling on a motion in limine, essentially, not a suppression based on constitutional grounds." (App. 27). Although Mr. Grzadzieleski motioned the district court to suppress evidence based on constitutional grounds, the court declined to reach those issues; therefore, the only basis for exclusion was grounded in the North Dakota Rules of Evidence. The Court properly concluded its ruling was on a motion in limine, rather than a motion to suppress on constitutional grounds. Based upon its holding in Powley, this Court should dismiss the State's appeal.

II. The State failed to properly request a supervisory writ.

[¶ 12] This Court's authority to issue supervisory writs derives from Art. VI, § 2, of the North Dakota Constitution and section 27-02-04 of the North Dakota Century Code. Roe v. Rothe-Seeger, 2000 ND 63, ¶ 5, 608 N.W.2d 289. "We exercise our authority to issue supervisory writs rarely and cautiously, and only to rectify errors and prevent injustice in extraordinary cases in which there is no adequate alternative remedy." Id. (citing State ex rel. v. Hagerty, 1998 ND 122, ¶ 6, 580 N.W.2d 139). Rule 21 of the North

Dakota Rules of Appellate Procedure requires a party seeking a writ to file a petition with the clerk of the supreme court and serve the petition on all parties to the proceeding in the district court. N.D.R.App.P. 21(a)(1). The petition must state: (1) the relief sought; (2) the issues presented; (3) the facts necessary to understand the issues presented; and (4) the reasons why a writ should issue.

[¶ 13] Not only did the State not properly petition this Court for a supervisory writ, the State didn't even mention the need or want for a supervisory writ in its initial pleadings. It wasn't until its response to Mr. Grzadzieleski's Motion to Dismiss did the State request a supervisory writ. *See* Doc. ID # 16 at ¶ 10. The State's request for a supervisory writ is so cursory it can't possibly meet the high threshold necessary for this Court to exercise its supervisory authority. Because the issue wasn't properly presented, Mr. Grzadzieleski respectfully requests this Court decline to exercise its supervisory authority.

III. The District Court properly excluded Mr. Grzadzieleski's medical records.

[¶ 14] At common law, there was no physician-patient privilege. Booren v. McWilliams, 26 ND 558, 145 N.W. 410 (1914). Because the physician-patient privilege did not exist at common law and is a creature of statute or rule, its existence and scope depends upon the specific language of the statute or rule authorizing it. State v. Schroeder, 524 N.W.2d 837, 840 (N.D. 1994). Some rules preclude the admission into evidence of a patient's "confidential communications" to a physician, while others preclude the admission of confidential "information acquired [by the physician] in attending the patient which was necessary to enable him to prescribe or act for the patient. Id. (quoting 1 McCormick on Evidence § 100 (4th ed. 1992)).

[¶ 15] Rule 503(b) of the North Dakota Rules of Evidence provides an individual a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of diagnosis or treatment of the patient's medical, mental, or emotional condition, including chemical dependency, among the patient and the patient's physician. This Court determined in State v. Schroeder, *supra*, what precisely "communication" entailed. In a thorough analysis, the Court outlined its reasoning. In 1965, the Legislature changed the scope of the former physician-patient privilege to preclude the admission into evidence of "any information acquired in attending the patient or as to any communication made by the patient to him in the course of professional employment." Schroeder, 524 N.W.2d at 841. The Court stated that when it adopted the "communication" language in Rule 503, there was no indication it intended to otherwise narrow the scope of the privilege except, as noted in the explanatory note, that the communications must be for the purpose of diagnosis or treatment instead of in the course of professional employment.

[¶ 16] This Court further noted that, in the context of evidentiary privileges, other courts had not limited communications to written or verbal statements. Id. at 842 (citing Hazelwood v. State, 609 N.E.2d 10 (Ind. Ct. App. 1993) [communication protected by marital privilege not limited to written or spoken words]; State v. Dist. Court of Iowa, 218 N.W.2d 641 (Iowa 1974) [communication protected by physician-patient privilege means all knowledge and information gained by physician in observation and personal examination of patient in discharge of physician's duties]; Commonwealth v. Clancy, 524 N.E.2d 395 (Mass. 1988) [communication protected by patient-psychotherapist privilege

includes conversations, correspondence, actions, occurrences, memoranda, or notes relating to diagnosis or treatment]; Matter of Doe, 649 P.2d 510 (N.M. App. Ct. 1982) [communication protected by psychotherapist privilege includes verbal communication, information or knowledge gained by observation and personal examination of patient, inference and conclusions drawn therefrom, and exhibiting the body or a part thereof for an opinion, examination, or diagnosis]; State v. Dress, 461 N.E.2d 1312 (Ohio Ct. App. 1982), [physician ordered blood-alcohol test administered for purposes of diagnosis in connection with emergency room examination constituted a communication for purposes of physician-patient privilege]; *but compare* Oxford v. Hamilton, 763 S.W.2d 83 (Ark. 1989) [result of physician ordered blood test not a communication]; Snow v. State, 744 P.2d 980 (Okla. Crim. App. 1987) [odor of alcohol on patient's breath and behavior at hospital not a "confidential" communication for purposes of physician-patient privilege]).

[¶ 17] Medical records are undoubtedly "communications" within the meaning of Rule 503 based upon this Court's interpretation. "We follow the ordinary meaning of "communications" and hold that the physician-patient privilege authorized by N.D.R.Evid. 503 applies to information and observations made by a physician for purposes of diagnosis or treatment of the patient's medical condition." Schroeder, 524 N.W.2d at 842. Generally, a physician may not disclose medical information acquired in treating a patient. Tehven v. Job Service of North Dakota, 488 N.W.2d 48, 51 (N.D. 1992). The patient's privilege against disclosure of medical information generally extends to hospital records. Id.

[¶ 18] Based upon North Dakota's interpretation of Rule 503, Mr. Grzadzieleski

retains the privilege to prevent the introduction of his confidential medical records so far as they pertain to diagnosis or treatment of his medical condition even though the records have already been disclosed because North Dakota further recognizes that a claim of privilege is not waived by a disclosure that was compelled erroneously or made without an opportunity to claim the privilege. N.D.R. Evid. 510 (b). Mr. Grzadzieleski was never given the opportunity to object to the search warrant of his medical records, and therefore did not waive his privilege. Because Mr. Grzadzieleski could not prevent the disclosure of his medical records, he motioned the court for the only relief available to him—exclusion of his confidential medical records from trial.

[¶ 19] Mr. Grzadzieleski has a privilege to prevent the introduction at trial of his disclosed medical records. For guidance, the district court looked to a similar fact pattern from Minnesota. *See* State v. Atwood, 914 N.W.2d 422 (Minn. Ct. App. 2018), aff'd, 926 N.W.2d 626 (Minn. 2019). In Atwood, a Deputy Sheriff responded to an ATV accident and observed Heath Allen Atwood bleeding from his head and lying on the street in a pool of blood. Id. at 423. An ambulance transported Mr. Atwood to the hospital. Id. On his way to the hospital, the deputy stopped at the sheriff's office to get a copy of the Minnesota implied-consent advisory form. Id. At the hospital, a doctor asked the deputy to refrain from reading the implied-consent advisory to Mr. Atwood because the doctor was attempting to keep him calm. Id. The deputy learned the hospital was storing a vial of Mr. Atwood's blood. Id. The Deputy obtained a search warrant to seize the vial and submit it for testing. Id. Mr. Atwood moved the district court to suppress the results, invoking the physician-patient privilege under Minnesota law. Id. The district court granted the motion,

reasoning that the blood sample constituted "information" subject to the privilege. Id. The state appealed. Id. On appeal, the issue for the Minnesota Court of Appeals to decide was whether a blood sample is considered "information".

[¶ 20] The Minnesota Court of Appeals reversed the district court, holding the actual blood sample was not "information" as contemplated under Minnesota law. Id. at 427. "Thus, information, by nature, is not physical and is about something." Id. However, the Court also noted that at oral argument, the state conceded that if the hospital had analyzed the blood, then those test results would be covered by the privilege because that would contain information communicating a blood test result and the Court agreed. Id. The Supreme Court affirmed the Court of Appeals holding that a blood sample itself is not information, and that information can only be derived from the blood by first acting upon the sample through testing or analysis of it. State v. Atwood, 925 N.W.2d 626, 633 (Minn. 2019).

[¶ 21] The State essentially argues the district court erred in reviewing Atwood and applying its overarching principles to this case. Even though Minnesota's and North Dakota's privileges differ, Atwood is still persuasive authority because this Court has found "communications" to include information, the precise issue litigated in Atwood. Had the hospital completed the analysis of blood in Atwood, that information would have been subject to the physician-client privilege. That situation is exactly what occurred in this case. The hospital completed an analysis of Mr. Grzadzieleski's blood in order to diagnose and treat him, rendering the results a product of the physician-patient privilege. Mr. Grzadzieleski did not request the blood test. Law enforcement did not request the

blood test, nor did law enforcement seek to re-analyze the blood. The doctor ordered the blood test lending credence to the fact it was necessary for diagnosis and treatment of Mr. Grzadzieleski. The district court correctly excluded the records based on the physician-client privilege and did not abuse its discretion or act in an arbitrary, unreasonable, or unconscionable manner. The district court's decision was the product of a rational mental process leading to a reasoned determination—the medical records containing Mr. Grzadzieleski's blood analysis result is clearly subject to the physician-patient privilege and Mr. Grzadzieleski respectfully requests this Court affirm the order of the district court.

[¶ 22] The State attempts to subvert the physician-patient privilege using two exceptions enumerated in Rule 503: (2) made in the course of a court-ordered investigation or examination of the physical, mental, or emotional condition of a patient, and (8) that is subject to a duty to disclose under rule or statute. Appellant's Brief at ¶ 9. Neither exception applies here. Mr. Grzadzieleski's medical records were not disclosed in the course of a court-ordered investigation or examination, i.e. a court-ordered competency evaluation. The records were disclosed pursuant to a search warrant—not an investigation or examination. Additionally, the State misreads N.D.C.C. § 23-01.3-06 and § 43-17-41.

[¶ 23] Altru Hospital is not a public health authority as defined by N.D.C.C. § 23-01.3-01(8). Under section 23-01.3-06, a **public health authority** may disclose protected health information to a law enforcement authority if two conditions are met. Even if Altru were to be considered a public health authority, no evidence was presented to satisfy the two conditions necessary before disclosure: that the state health officer determined that (1) the protected health information is necessary to a legitimate law

enforcement inquiry that has begun or may be initiated into a particular violation of a criminal law or public health law being conducted by the authority; and (2) the investigative or evidentiary needs of the law enforcement authority cannot be satisfied by nonidentifiable health information or by any other information. Because neither of the conditions were satisfied and Altru is not a public health authority, section 23-01.3-06 is inapplicable in this case.

[¶ 24] The State also expansively reads N.D.C.C. § 43-17-41. This section deals with a physician's duty to report any wound, injury, or other physical trauma to law enforcement if the wound was by means of a knife, gun, or pistol; or, the physician has reasonable cause to believe the wound, injury, or other physical trauma was inflicted in violation of any criminal law of this state. The State would like this Court to conclude that any time a physician is required to report an injury, that individual's medical records should accompany the report. The statute clearly states a physician has a duty to report an injury to a law enforcement agency, not a duty to disclose medical records. A physician is not required to turn over medical records every time the physician reports an injury to law enforcement.

[¶ 25] Because the district court did not act in an arbitrary, unreasonable, or unconscionable manner and the court's decision was the product of a rational mental process leading to a reasoned determination, this Court should affirm the order excluding Mr. Grzadzieleski's medical records.

CONCLUSION

[¶ 26] The State's appeal is not authorized by statute because the district court did

not exclude the medical records on any constitutional grounds. Additionally, this Court should refrain from exercising its supervisory authority because the State failed to adequately request this Court exercise such authority. Finally, if this Court does reach the merits, Mr. Grzadzieleski respectfully requests this Court **AFFIRM** the January 24, 2019 Order granting Defendant's Motion because the district court did not abuse its discretion in excluding Mr. Grzadzieleski's medical records from evidence.

Dated this 1st day of July, 2019.

REICHERT LAW OFFICE

/s/Alexander F. Reichert

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CERTIFICATE OF COMPLIANCE

[¶ 1] The undersigned, as the attorney representing Appellee, Derek James Grzadzieleski, and the author of the Brief of Appellee, hereby certifies that said brief complies with Rule 32(a)(8)(A) of the North Dakota Rules of Appellate Procedure (2018), in that it contains 3549 words from the portion of the brief entitled "Statement of the Issues" through the signature line. This word count was done with the assistance of the undersigned's computer system, which also counts abbreviations as words.

Dated this 1st day of July, 2019.

REICHERT LAW OFFICE

/s/Alexander F. Reichert

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State of North Dakota, Plaintiff/Appellant, vs. Derek James Grzadzieleski, Defendant/Appellee.	)	Supreme Court No.: 20190049 District Court Case No.: 34-2018-CR-00141

State of NORTH DAKOTA)
) ss
County of GRAND FORKS)

[¶ 1] **CHALLIS WILLIAMS,** being first duly sworn, says that he is at least 18 years of age and that on the 19th day of July, 2019 he served a copy of the following:

- **Brief of Appellee**

in the above entitled case by e-mailing a true and correct copy of the same through the Court's e-filing system to:

Rebecca Flanders, ND ID #07478
Pembina County State's Attorney
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Cavalier, ND 58220
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CHALLIS WILLIAMS

Subscribed and sworn to before me, a Notary Public, this 1st day July, 2019.

JADE EMBURY
Notary Public
State of North Dakota
My Commission Expires Feb. 27, 2023

Notary Public