IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

STATE OF OHIO	)	**CASE NO. CR 12 562192**
	)	
Plaintiff,	)	**JUDGE JOHN P. O'DONNELL**
	)	
vs.	)	
	)	
MATTHEW McMULLEN	)	**<u>JOURNAL ENTRY</u>**
	)	
Defendant.	)	

John P. O'Donnell, J.:

STATEMENT OF FACTS

Defendant Matthew McMullen is charged in a four-count indictment with the kidnapping and gross sexual imposition of K.P., a girl born on June 5, 2001. These crimes are alleged to have been committed on January 1, 2012.

Based upon the available discovery, it appears that the defendant is the companion of a young adult relative of K.P. All of them were at a family party in Pepper Pike for New Year's Eve on December 31, 2011. After midnight, the defendant and his companion offered to put K.P. and her brother to bed. K.P. later reported that the defendant fondled her in her bedroom.

Before and since January 1, 2012, K.P. was a patient of John W. Hertzer, M.D., a child psychiatrist. The prosecutor, as part of his investigation before presenting the case to a grand jury, subpoenaed Dr. Hertzer's records. The subpoena included an authorization to release the records signed by K.P.'s parents. Therefore, Dr. Hertzer produced his complete chart to the prosecutor before the case was ever presented to the grand jury.

On June 20, 2012, the prosecutor filed a "submission of medical records under seal" with a request "that the court review [Dr. Hertzer's chart] *in camera* and inform the parties if any exculpatory material is found."

On September 14, 2012, the defendant subpoenaed Dr. Hertzer's records.[1] The subpoena requests that "any and all medical records" pertaining to K.P. be produced "to the chambers of Judge John P. O'Donnell" by September 21, 2012. Dr. Hertzer produced the chart to the court as directed by the subpoena.

The court has reviewed *in camera* Dr. Hertzer's entire chart and this entry follows.

LAW AND ANALYSIS

In general, a person's medical records are confidential. *Hageman v. Southwest Gen. Health Ctr.*, 119 Ohio St. 3d 185, 2008-Ohio-3343, ¶9. Because they are confidential, medical records of a complaining witness are not ordinarily available to a criminal defendant. However, if the records are in the possession of the prosecutor – as in this case – they might be discoverable under any of several divisions of Rule 16 of the Ohio Rules of Criminal Procedure: section 16(B)(3), covering laboratory and hospital reports; 16(B)(4), results of physical or mental examinations; 16(B)(5), evidence favorable to the defendant and material to guilt or punishment; 16(B)(7), the written or recorded statement of a witness; or 16(E), records in the case of sexual assault.

Where a prosecutor has records that fall within any of those categories the prosecutor must either produce them or certify to the court under Criminal Rule 16(D) the reason for non-disclosure. The justification for withholding the materials must be one or more of the five grounds listed in Rule 16(D), subparagraphs 1 through 5.

[1] Subpoena No. DS 858568.

In this case the prosecutor admits having the records and has not disclosed them. But nor has the prosecutor certified a reason for non-disclosure pursuant to Rule 16(D). This suggests to the court that the prosecutor believes that the records do not fall within any of the categories of items that Rule 16(B) requires the plaintiff to produce in discovery. That determination is one that the prosecutor makes in many cases every day and it does not involve the trial court. Indeed, unless the prosecutor has identified material that falls within the ambit of Rule 16(B) and then certified under 16(D) that the material is not discoverable, the rules of procedure do not allow the court's involvement in deciding what the prosecutor should or should not produce in discovery.

Since the prosecutor has not made a Rule 16(D) certification of reasons for non-disclosure the issue of whether Dr. Hertzer's medical records must be disclosed to the defendant as Rule 16(B) material is not before the court.

Yet the prosecutor has filed a "submission" asking the court to review the records "and inform the parties if any exculpatory material is found relative to the indicted counts of kidnapping and gross sexual imposition."[2] A prosecutor has a duty, even in the absence of a specific discovery request, to turn over exculpatory evidence. *State v. Geeslin*, 116 Ohio St. 3d 252, 2007-Ohio-5239, ¶8. When the prosecution withholds material, exculpatory evidence in a criminal proceeding, it violates the due process right of the defendant under the Fourteenth Amendment to a fair trial. *State v. Johnston*, 39 Ohio St. 3d 48, 60 (1998). But it is the prosecutor's duty, not the trial court's, to decide what is exculpatory and then turn it over. Neither the plaintiff nor the defendant has provided the court with any rule, statutory or decisional authority giving the trial court the ability to look over the prosecutor's file and give what amounts to an advisory decision on whether evidence is exculpatory. It appears to the

[2] Plaintiff's 06/20/2012 submission, cover page.

court that the prosecutor is torn by competing instincts – to preserve the confidentiality of the complaining witness's medical record on the one hand and to discharge the duty to disclose exculpatory evidence on the other – and wants the court to break the tie. While this court recognizes its obligation to make this kind of difficult decision, it can only do so when there is a justiciable question before the court. Since there is not, the court, being without authority to examine the prosecutor's file and declare whether the evidence in the state's possession is exculpatory, declines to do so.

Another means for a defendant to procure a complaining witness's medical record is to subpoena them from the physician. Upon receipt of such a subpoena, the physician has several options. The first is to simply produce the records without objection. Or, the physician could interpose a written objection under Rule 45(C)(2)(b) of the Ohio Rules of Civil Procedure. In that event, the burden is on the party issuing the subpoena to file a motion to compel with the court. Alternatively, the physician could file a motion to quash or for a protective order under Civil Rule 45(C)(3)(b). Once a motion to compel or a motion to quash is filed, then the question of whether the records must be produced is ripe for the court to decide.

The defendant in this case did serve Dr. Hertzer with a subpoena for his records but, apparently in anticipation of a claim of privilege, the subpoena ordered that the records be produced to the court. Yet the court is not empowered to consider a claim of privilege that has not been made. Here, no justiciable question exists: the subpoenaed party has not resisted the subpoena by written objection or a motion to quash or modify, and the party issuing the subpoena has not filed, and has no grounds for, a motion to compel.

CONCLUSION

The prosecutor has not certified a reason for non-disclosure of discoverable material pursuant to Criminal Rule 16(D), the court has no authority to review the contents of the prosecutor's file to decide what is exculpatory and therefore must be produced to the defendant, and Dr. Hertzer has made no claim that his records are not properly subject to the defendant's subpoena. Therefore, the court will not make any orders respecting the production of Dr. Hertzer's records concerning K.P. until and unless a justiciable controversy exists.

IT IS SO ORDERED:

______________________________ Date: ______________________

Judge John P. O'Donnell

SERVICE

A copy of this journal entry was sent by email, this 16th day of October, 2012, to the following:

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Judge John P. O'Donnell