

STATE OF MICHIGAN
IN THE SUPREME COURT

IN THE MATTER OF THE PETITION OF
THE ATTORNEY GENERAL FOR
SUBPOENAS,

Supreme Court No. 159690

Court of Appeals No. 342680

Plaintiff-Appellant,

Ingham Circuit Court
No. 17-000021-PZ

v

VERNON EUGENE PROCTOR, M.D.,

Defendant-Appellee.

REPLY BRIEF OF THE ATTORNEY GENERAL

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INTRODUCTION

In his response, Dr. Vernon Proctor contends that this Court should deny the Department of Licensing and Regulatory Affairs and the Attorney General relief. These arguments are unavailing for three reasons.

First, the federal regulations do not require an evidentiary hearing for disclosure of patient records.

Second, contrary to Dr. Proctor's arguments, the Department's petition and the circuit court's order established good cause to support the authorization of the disclosure of the requested substance abuse treatment records.

Third, the Department's petition and order for subpoena comported with Michigan law under the Public Health Code, and any failure of the Department's petition to note the national opioid crisis as a basis for seeking disclosure of confidential communications was harmless.

ARGUMENT

I. The federal regulations do not require an evidentiary hearing for disclosure of patient records because the request for disclosure is fact-specific to governmental agencies investigating or prosecuting a part 2 program for improper rendering of health care services.

By its very language, 42 CFR 2.66 is specific to a health regulatory or law enforcement agency and it authorizes those agencies to obtain substance abuse treatment records to investigate or prosecute a part 2 program or the person holding the records in connection with a criminal or administrative matter. 42 CFR 2.66(a)(1). Dr. Proctor's medical practice falls within the definition of a part 2 program. 42 CFR 2.12(b).

Specifically, 42 CFR 2.66 is limited to governmental agencies investigating or prosecuting part 2 programs for rendering health care services to patients below the standard of care or not in conformance with applicable law. This regulation affords those governmental agencies who are investigating or prosecuting a part 2 program to obtain disclosure of the subject substance abuse patient treatment records, provided the government's application for disclosure uses fictitious names for the patients and any subsequent public disclosure of the patient records are free from any and all patient identifying information. 42 CFR 2.66.

The purpose of this provision is clear. The patient records of the part 2 program are the best evidence, and in some cases, the only evidence of whether the program is providing care to its patients within the standard of care or in compliance with applicable law. In these cases, the identity of the patient is not the focus of the governmental investigation or prosecution; rather, it is the conduct of the program providing the health care services that is the target of the investigation.

In contrast, applications for disclosure brought pursuant to 42 CFR 2.64 and 42 CFR 2.65 do require an evidentiary hearing because under these provisions any interested person can apply for disclosure of the patient's identity and treatment records if the good cause criteria are met. Generally, under these other provisions, the patient records are being sought because it is alleged that the identified patient's involvement in treatment is relevant in a civil or criminal proceeding. Because the patient's involvement in treatment will be disclosed, the federal

regulations require a trial court to hold an in-camera hearing. 42 CFR 2.64, 42 CFR 2.65. That is not at issue here.

In his supplemental brief, Dr. Proctor now concedes that a hearing prior to issuance of the Ingham County Circuit Court's ex parte order for disclosure was not required. Appellee's Br, p. 6. Instead, he now argues that the Ingham County Circuit Court was required to conduct an evidentiary hearing once he filed his motion seeking modification or revocation of the court's order. Dr. Proctor cites to various Michigan court rules on motion practice to suggest that the hearing should have required the Department's submission of depositions, affidavits or other documentary evidence to support its petition for disclosure once he filed his motion to vacate. Dr. Proctor cites no authority for this assertion. In fact, his argument is contradicted by the very language of 42 CFR 2.66(b), which states a person seeking a "revocation" is "limited" to the presentation of evidence on the basis of the order:

Notice not required. An application under this section may, in the discretion of the court, be granted without notice. Although no express notice is required to the part 2 program, to the person holding the records, or to any patient whose records are to be disclosed, upon implementation of an order so granted any of the above persons must be afforded an opportunity to seek revocation or amendment of that order, *limited to the presentation of evidence on the statutory and regulatory criteria for the issuance of the court order in accordance with § 2.66(c)*. [Emphasis added.]

A plain reading reveals that nothing within this provision envisions a post-motion evidentiary hearing.

In contrast, 42 CFR 2.64(c) and 42 CFR 2.65(c) mandate that a hearing be conducted and that it be conducted in a manner that ensures patient confidentiality and is not open to the public. 42 CFR 2.66(b) contains no similar language. Rather,

by its plain language, the court's review is limited to whether the court's order complies with 42 CFR 2.64(d)-(e). If an evidentiary hearing under 42 CFR 2.66 was intended, language similar to that found within 42 CFR 2.64 could have been included, but it was not. In addition to 42 CFR 2.66 requiring the Department to use fictitious names when seeking an order for disclosure and limiting the scope of the court's review to whether the criteria have been met, section 16238 of the Public Health Code precludes the Department from disclosing information obtained during a confidential investigation. MCL 333.16238.

By its very language, 42 CFR 2.66 recognizes that law enforcement or health oversight regulatory agencies may be limited in what they can divulge from a confidential investigation either by statute or because it could impact the integrity and effectiveness of an investigation. As noted in *US v Shinderman*, 515 F3d 5, 12 (2008), a case in which the federal government was investigating a physician for improper prescribing practices, the court noted 42 CFR 2.66(b)'s intent is to provide a court with discretion to grant ex parte disclosure orders for law enforcement or health regulatory agency investigations.

II. The Department's petition and the circuit court's order established good cause to support the authorization of the disclosure of the requested substance abuse treatment records.

The petition filed by the Department and the circuit court's order established good cause under federal regulatory law to allow disclosure of the information sought as part of the Department's licensing investigation. Dr. Proctor now argues that the Department's petition and the circuit court's order for disclosure were

defective because they were based upon a Department authorized investigation, did not establish the requested patient records were “material evidence,” did not explore whether other means for obtaining the information or records were available, and did not limit disclosure of the patient records. For the reasons discussed below, Dr. Proctor’s arguments are not supported by federal law.

A. The Department’s petition and the circuit court order satisfy the “good cause” requirement.

As previously stated, an applicant seeking disclosure pursuant to 42 CFR 2.66 must establish that it is a government agency seeking the records as part of an investigation or prosecution of a part 2 program that it has jurisdiction over. 42 CFR 2.66(a)(1). In its petition, the Department advised the circuit court that, as a health oversight agency, it was conducting a health board licensing investigation against Dr. Proctor, it was only seeking patient records necessary to determine whether he was engaged in controlled substance prescription practices that may violate the Public Health Code, and that the records were the most effective means to investigate the matter. (App’x 1–3.) Not only did the Department’s petition satisfy the good cause test, but a similar basis for seeking disclosure was upheld in *In re August, 1993 Regular Grand Jury (Hospital Subpoena)*, 854 F Supp 1380, 1385–1387 (1994). In *In re August*, the court specifically found that a psychotherapist’s patient records were the most effective source of information for investigating the psychotherapist’s billing practices and it did not matter if less effective alternative sources were available. *Id.* at 1386.

Here, Dr. Proctor argues that the Department should have pled in its petition that other ways of obtaining the information were not available. But the *August* Court rejected such an argument, finding that the good cause test for disclosure was satisfied because the government was investigating a psychotherapist for a violation of a criminal statute and it appeared the patient records were needed to provide material evidence in that matter. *Id.* at 1384.

Lastly, Dr. Proctor argues that the Department's petition and the circuit court's order limiting disclosure of the 11 requested patient charts "to those persons whose need for the information is related to the investigation of the licensee or any following administrative action" is too broad and does not comply with 42 CFR 2.66. (App'x 1-3.) Appellee's Br, p 15. Specifically, Dr. Proctor claims that the petition and order do not comply with the federal regulation because 'any limitation is left to an unidentified bureaucrat.' *Id.* However, Dr. Proctor fails to cite any authority in support of his argument. Moreover, he fails to recognize that all department employees, including administrative law judges and health board members, are bound by the confidentiality provisions of the Public Health Code, and that failure to comply subjects them to criminal penalty. MCL 333.16238; MCL 333.16291; MCL 333.16299.

His concern regarding administrative licensing proceedings being open to the public is also without merit because, as specified in the circuit court order, all patient identifying information must be redacted before any records are disseminated in a public proceeding. (App'x 4.)

B. Federal case law relied upon by Dr. Proctor does not support his claim that the circuit court's order did not satisfy the "good cause" requirement.

Dr. Proctor cites several cases in support of his claims; however, they do not support his position that the good cause requirement was not satisfied here. Specifically, Dr. Proctor cites to *Fannon v Johnston*, 88 F Supp 753 (ED Mich 2000), *Mosier v American Home Patient, Inc.*, 170 F Supp 1211 (ND Florida 2001), and *US v Hughes*, 95 F Supp 2d 49 (2000) in support of his argument. In both the *Fannon* and *Mosier* decisions, applicants sought disclosure of treatment records for their civil suits pursuant to 42 CFR 2.64. In *Hughes*, the government sought disclosure of records pursuant to 42 CFR 2.65 as part of its prosecution of the patient. The cases cited by Dr. Proctor are not applicable because they do not address petitions filed under 42 CFR 2.66. In fact, he admits as much in his brief. Appellee's Br pp 5, 8.

Instead, Dr. Proctor erroneously argues that the cases are instructive for the information the circuit court should have required the Department to produce in assessing whether the Department's application satisfied the good cause test. However, in each of these cases, the authorizing courts were required to hold evidentiary hearings because the applicable provisions required them to do so, the need for disclosure under such provisions is not evident, and orders for disclosure would result in the disclosure of the patient's identity. Since orders obtained pursuant to 42 CFR 2.66 prohibit the public dissemination of patient identities and the need for the request is evident, the only concern for the court is the assurances that the government investigation or prosecution falls within the regulation criteria

and that the government is taking appropriate steps to ensure confidentiality of the information obtained. The Ingham County Circuit Court's order provided these assurances and should be affirmed.

III. The Department's petition and order for subpoena was sought in compliance with section 16235 of the Public Health Code, and any failure of the Department's petition to note the national opioid crisis as a basis for seeking disclosure of confidential communications was harmless error.

A. The Department's petition and order for subpoena was authorized by section 16235 of the Public Health Code

In his supplemental brief, Dr. Proctor raises a new argument and asserts that sections 16231 and 16235 of the Public Health Code, MCL 333.16231 and MCL 333.16235, do not authorize the Department to issue subpoenas as part of a board authorized investigation. Appellee's Br, p 13. Such an argument is without merit.

The Department's authority to issue subpoenas as part of an authorized investigation has been affirmed many times by the Michigan appellate courts. See, e.g., *Attorney General v Bruce*, 422 Mich 157, 163 (1985); *In re Petition of Attorney General for Subpoenas*, 327 Mich App 136, 149 (2019); *In re Petition of Attorney General for Subpoenas*, 282 Mich App 585, 595 (2009). Dr. Proctor's argument otherwise is unsupported in law.

B. Failure to note the national opioid crisis as a basis for seeking disclosure of confidential communications was harmless error.

The Department argued, and the circuit court agreed, that to the extent any patient confidential communications were disclosed when obtaining copies of Dr.

Proctor's patient charts, such disclosure was necessary to protect against the existing threat to life or of serious bodily injury caused by the national opioid epidemic. (App'x 24–25.) Dr. Proctor now argues that because the opioid crisis was not referenced in the Department's petition,¹ it failed to comply with 42 CFR 2.63 and did not establish a basis for obtaining disclosure of the patients' confidential communications.

As permitted by 42 CFR 2.66(b), Dr. Proctor exercised his right to seek revocation of the court's order and require the Department to demonstrate satisfaction of all applicable criteria. (App'x 8–27.) During oral argument on his motion, the Department informed the circuit court that the opioid crisis presented a substantial risk of harm and death to the public, which naturally flows to his patients, and thus satisfied disclosure of confidential communications under 42 CFR 2.63(a)(1). The circuit court agreed and found that disclosure was appropriate to protect Dr. Proctor's patients from risk of threat to life and serious bodily harm. (App'x 24–25.) This ruling was sufficient to support the basis for issuing an order allowing disclosure of the patients' confidential communications. Any error is harmless. When the error does not require reversal and is not inconsistent with substantial justice, it is harmless and should not be modified by a reviewing court. MCR 2.613(A). See *In re Portus*, 325 Mich App 374, 395 (2018) (an error is harmless if it did not affect the outcome of the proceeding).

¹ The Department's petition did reference that the Department was investigating Dr. Proctor for his controlled substance prescribing practices. (App'x 1).

Lastly, Dr. Proctor's cited authority does not support his argument that the circuit court erred in ordering disclosure of the patients' confidential communications. Nor does his cited authority support his argument that Dr. Proctor's patient records cannot be disclosed because appropriate redaction of confidential communications cannot be separated from his documented diagnosis and treatment information. In support of his arguments, Dr. Proctor relies upon the federal court's ruling in *US ex rel Chandler v Cook County*, 277 F3d 969 (2002).

But the *Chandler* decision involved a qui tam action, in which the federal court found the applicant failed to demonstrate it met any of the 42 CFR 2.63 criteria for disclosure of confidential communications. *Id.* at 983. In so holding though, the court noted that the physician's patient records at issue could be separated and disclosed with redactions of confidential communications. *Id.* Thus, Dr. Proctor's argument is without merit.

CONCLUSION AND RELIEF REQUESTED

The Department respectfully requests this Court grant its application for leave to appeal and find that: (1) a court is not required to hold a closed evidentiary hearing in order to issue an order authorizing disclosure of substance abuse treatment records to law enforcement and/or health regulatory agencies investigating or prosecuting the substance abuse treatment provider; (2) the Ingham County Circuit Court's order authorizing disclosure satisfied the good cause test; and (3) the national opioid epidemic justifies the disclosure of confidential communications contained within the protected patient records.

Respectfully submitted,

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