

HILLSBOROUGH, SS.

THE STATE OF NEW HAMPSHIRE

SUPERIOR COURT

STATE OF NEW HAMPSHIRE

v.

JEFFREY H.

DOCKET NO. 07-S-557

**MEMORANDUM OF LAW IN SUPPORT OF
MOTION FOR IN-CAMERA REVIEW AND DISCOVERY OF
MENTAL HEALTH RECORDS**

I. INTRODUCTION

The Defendant is charged with aggravated felonious sexual assault against Adriana P. The indictment alleges that the charge of sexual assault arose from the Defendant's conduct on or between August 26, 2006 and August 27, 2006 in Hollis, New Hampshire. The Defendant has filed a Notice of Consent Defense. The Defendant has also filed a Motion for In-Camera Review and Discovery in the above captioned matter with respect to the complete mental health records of the complaining witness, including, but not limited to, the psychiatric, psychological and counseling records.

II. FACTUAL BACKGROUND

The allegations made by Adriana P., which form the basis for the charges in this case, were first made on September 19, 2006 to Detective Richard R. Mello of the Hollis Police Department who conducted a recorded interview of the complainant that same day.

During the course of said interview, a transcript of which is attached to this Memorandum, the complainant made an allegation of sexual assault against Defendant, which

allegedly took place on or between August 26, 2006 and August 27, 2006, while the parties were in bed together after an evening of drinking with friends at a mutual friends' home. Adriana P. indicated in the interview that she was intoxicated during the alleged sexual assault. Interview Transcript, 9/19/06, p. 23. Additionally, Adriana P. stated that she suffers from bipolar disorder and depression which requires her to take medication that can make her depressed and irrational when mixed with alcohol. Interview Transcript, pp.3-4. Adriana P. also stated that she went to see her therapist, Sarah Hart, on August 28, 2006, and gave Dr. Hart her recitation of the events of the prior weekend. Interview Transcript, p. 54.

Moreover, during the interview with Detective Mello, Adriana stated that she does not know how to say no because she was raped before when she was five years old. Interview Transcript, p 19. Additionally, in an e-mail sent by the Complainant to the Defendant subsequent to the date of the alleged assault, the complainant indicated that she had been raped four (4) times previously. Facebook.com E-mail to Jeffrey H., 8/29/06, 4:21 PM.

III. LEGAL ANALYSIS

The Defendant's motion seeks discovery in two parts. First, it requests that this Court review the requested material in-camera. Second, it requests the production and discovery of those materials so that it may used by the defendant in his defense. This is the appropriate method to be employed when the defendant seeks materials which are subject to a privilege. See, State v. Gagne, 136 N.H. 101 (1992). Thus, the Court's analysis is also twofold. First, the Court must determine if in-camera review is appropriate. Second, if the Court undertakes in-camera review, it must determine whether the defendant is entitled to use the discovery sought. State v. Gagne, 136 N.H. at 104.

A. The Standard to Allow In Camera Review

In State v. Gagne, 136 N.H. 101 (1992), the New Hampshire Supreme Court recognized that “trial courts cannot realistically expect defendants to articulate the precise nature of the confidential records without having prior access to them.” State v. Gagne, 136 N.H. at 105. The Court went on to hold that a defendant need only establish “a reasonable probability that the records contain information that is material and relevant to his defense.” Id. In determining this standard, the Court relied extensively upon Pennsylvania v. Ritchie, 480 U.S. 39 (1987), a similar case wherein the United States Supreme Court held that the due process provisions of the Federal Constitution required an in-camera review of confidential records. United States Constitution, Amend. 14. The New Hampshire Supreme Court has had occasion to further enunciate the standard necessary to prompt in-camera review under these circumstances. In State v. Graham, 142 N.H. 357 (1997), the Court declared:

The threshold showing necessary to trigger an in-camera review is not unduly high. The defendant must meaningfully articulate how the information sought is relevant and material to his defense. To do so, he must present a plausible theory of relevance and materiality sufficient to justify review of the protected documents, but he is not required to prove that his theory is true. At a minimum, a defendant must present some specific concern, based on more than mere conjecture, that, in reasonable probability, will be explained by the information sought.

State v. Graham, 142 N.H. at 363. Finally, the Graham Court recognized that “setting the bar too high” risks violation of the right to due process as guaranteed by Part I Article 15 of the New Hampshire Constitution. State v. Graham, 142 N.H. at 363. In this case, there is no question that the facts and arguments asserted in Defendant’s Motion support the request for in-camera review.

B. Reasons for In-Camera Review

In the instant matter, in-camera review is appropriate because there is a reasonable probability that the review will provide evidence that is relevant and material to the defense. The Defendant asserts that he had consensual sexual intercourse with Adriana P. His defense will, thus, rely upon undermining the credibility of the complainant.

In this regard, there is a reasonable probability that in-camera review will reveal relevant information. For example, information regarding the complaining witness' course of treatment, nature of medications and therapy prescribed for her bi-polar disorder is highly relevant to the case at bar. The Complainant admitted to the police that her illness and her medication have an effect on her actions. Interview Transcript, pp. 3-4. The complainant's illness and its effects on her faculties, rationality and ability to distinguish fact from fantasy, especially after the consumption of alcohol, are especially relevant in this case, as only the Complainant and the Defendant have actual knowledge of the events that constitute the allegation of sexual assault. Thus, the Defendant seeks discovery regarding the extent and nature of the complainant's mental illness in order to determine if that illness has influenced the allegations made.

Additionally, the complainant indicated in her interview that she discussed the events which gave rise to the allegations made against defendant with her therapist the day after they allegedly took place. Interview Transcript, p. 54. As such, the Defendant has a legitimate desire to review those statements regarding allegations in order to determine if they are consistent with other statements she has made to the police and other individuals.

Each of the aforementioned reasons suggested by the Defendant is a viable reason to require in-camera review of the requested materials. The complainant's mental health can bear

on the credibility of her allegations. See State v. Johnson, 144 NH 175, 181 (1999). In State v. Dewitt, 143 NH 24 (1998) the Court opined:

Information pertaining to a witness's mental stability may be relevant to credibility, see State v. Cook, 135 N.H. 655, 663, 665, 610 A.2d 800, 805-07 (1992) (recognizing that mental stability may be relevant to credibility of witness), and therefore useful as impeachment evidence at trial, see Bagley, 473 U.S. at 676, 105 S.Ct. 3375 (rejecting distinction between impeachment evidence and exculpatory evidence); Laurie, 139 N.H. at 330-32, 653 A.2d at 552-53 (favorable evidence includes impeachment material). Alternatively, it might lead to the discovery of other relevant evidence. The usefulness of impeachment evidence is particularly apparent in this case where only the complaining witness and the defendant have actual knowledge of the circumstances surrounding the alleged assault. As we have noted, "when the reliability of a given witness may well be determinative of guilt or innocence, non-disclosure of evidence affecting credibility" may violate due process.

State v. Dewitt, 143 N.H. at 34. As the discovery items sought in this case go to the mental health of the complainant, they are likely to be relevant to her credibility.

Similarly, the consistency of a complainant's statement has been recognized as a valid justification for in-camera review by the New Hampshire Supreme Court. State v. Hoag, 145 N.H. 47 (2000). Indeed, in State v. Gagne, supra, the Court recognized one of the reasons to allow in-camera review was to determine if the "ongoing statements" of the victims contained inconsistencies which could be used for impeachment. State v. Gagne, 136 N.H. at 103.

III. CONCLUSION

It is reasonably probable that the requested discovery items concerning the complainant's mental health will contain materials relevant to the defense. Therefore, the Court, in accordance with the due process provisions of the State and Federal Constitutions and the legal argument

discussed above, must undertake an in-camera review and thereupon allow discovery by the Defendant of the mental health records of Adriana P.

Respectfully submitted,
Jeffrey H., Defendant
By his Attorneys,
BRENNAN CARON LENEHAN & IACOPINO

Date: November 7, 2007

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Memorandum has been forwarded, even date herewith, postage prepaid, to Assistant County Attorney Kent Smith.

Michael J. Iacopino, Esq.