Appeal No. 04-1237 **Cir. Ct. No. 04JV000021**

WISCONSIN COURT OF APPEALS
DISTRICT II

IN THE INTEREST OF TYLER J.K.:

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

v.

TYLER J.K.,

RESPONDENT-RESPONDENT.

FILED

JAN 26, 2005

Cornelia G. Clark
Clerk of Supreme Court

CERTIFICATION BY WISCONSIN COURT OF APPEALS

Before Anderson, P.J., Nettesheim and Snyder, JJ.

Pursuant to WIS. STAT. RULE 809.61 this court certifies the appeal in this case to the Wisconsin Supreme Court for its review and determination.

ISSUES

Whether, pursuant to the plain text of WIS. STAT. § 118.125(2)(f) (2003-04),[1] confidential pupil records may be subpoenaed only *after* the witness whose pupil records are the subject of the subpoena has already testified and the materiality of the sought-after records has been evaluated in a separate action.

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[1] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

Whether, as a matter of policy, the court should engraft a ***Shiffra-Green***[2] gloss on WIS. STAT. § 118.125(2)(f) and require that, prior to the statutorily mandated in camera review: (1) the party seeking the disclosure of the confidential pupil records make a preliminary showing that the records contain relevant and material information and (2) the witness who is the subject of the sought-after records receive notice of, and an opportunity to respond to, the request for the records.

FACTS

In February 2004, the State filed a delinquency petition alleging that Tyler J.K. had violated WIS. STAT. § 948.02(1), which addresses the sexual assault of a child under the age of thirteen. According to the petition, Tyler sexually assaulted his young victim sometime between September 2003 and December 2003. On March 16, Tyler served subpoenas on the victim's schools and day care provider. The subpoenas stated:

> Pursuant to §§ 118.125(f) and 805.07 Wis. Stats., you are herby commanded to appear in person before the Honorable Tom R. Wolfgram in his Courtroom at the Ozaukee County Justice Center … on March 29, 2004, at 2:00 p.m., to give evidence in an action between the State of Wisconsin, plaintiff, and [Tyler], a juvenile.
>
> You are further commanded to bring with you certified copies of all of the records relating to [the victim] and his attendance and behavior while enrolled in your school [in your facility].

[2] ***State v. Shiffra***, 175 Wis. 2d 600, 499 N.W.2d 719 (Ct. App. 1993); ***State v. Green***, 2002 WI 68, 253 Wis. 2d 356, 646 N.W.2d 298.

The State moved to quash the subpoenas. After briefing by the parties and a hearing, the trial court denied the State's motion to quash and its subsequent motion for reconsideration. The court ordered that the requested pupil records be produced, but ordered that the records produced should not include those items excepted from the statutory definition of pupil records. The State petitioned this court for leave to appeal and we granted its petition.

DISCUSSION

The Law

Tyler relies upon WIS. STAT. § 118.125(2)(f) as authority for the subpoenas for the victim's school and day care records. Section 118.125(2)(f) provides in pertinent part:

> **(2)** CONFIDENTIALITY. All pupil records maintained by a public school shall be confidential, except as provided in pars. (a) to (p) and sub. (2m). The school board shall adopt regulations to maintain the confidentiality of such records.
>
> ….
>
> (f) Pupil records shall be provided to a court in response to subpoena by parties to an action for in camera inspection, to be used only for purposes of impeachment of any witness who has testified in the action. The court may turn said records or parts thereof over to parties in the action or their attorneys if said records would be relevant and material to a witness's credibility or competency.

The Parties' Arguments

The parties raise several issues of first impression regarding the application of WIS. STAT. § 118.125(2)(f) that are worthy of supreme court review. First, the parties raise compelling issues concerning the proper reading of the plain language of § 118.125(2)(f): (1) whether the witness whose confidential

pupil records are the subject of the subpoena must have already testified and put his or her credibility or competency into play for the court to issue a subpoena and (2) whether the party seeking the confidential records must file an independent action in which the potential relevance and materiality of the confidential records would be evaluated before the records could be subpoenaed. Next, the parties debate whether, as a matter of policy, this court should engraft a ***Shiffra-Green*** gloss onto the statute and require that, prior to the in camera investigation: (1) the party seeking the release of the records make a threshold showing of materiality of the records to the credibility or competency of the witness and (2) the witness who is the subject of the sought-after records receive notice and an opportunity to respond to the request for records. We address each issue in turn.

1. Proper Reading of WIS. STAT. § 118.125(2)(f)

Witness testimony. WISCONSIN STAT. § 118.125(2)(f) provides that the pupil records shall "be used only for purposes of impeachment of any witness who has testified in the action." Emphasizing the phrase "who *has* testified," the State maintains that the statute permits the release of the records only *after* a witness has already testified, and here, the victim has not yet testified. Tyler, on the other hand, claims that the requirement that a witness "has testified" applies only to the *use* of the records, not to *when they may be subpoenaed*. Both readings of the plain language of the statute appear reasonable and our review of the case law reveals that the question of whether a witness must first testify has not yet been addressed by the courts.

As a practical matter, the trial court was concerned, and not without good reason, that by adopting Tyler's interpretation of the statute and construing it to provide for the filing and review of school records *before a witness testifies*, it

would be permitting parties to routinely subpoena confidential records in anticipation of a hearing that may never occur, thereby needlessly using scarce judicial resources and infringing upon the privacy interests of a witness. Furthermore, if the witness has already testified, the trial court would be in a better position to judge whether the confidential pupil records would be relevant and material to the impeachment of the witness and, as a result, whether the records even would need to be released to the parties. However, if the statute is understood to permit the release of the records only *after a witness has testified*, the proceeding would have to grind to a halt mid-witness while the subpoenas were prepared and served, responsive records gathered and produced and any motions to quash heard and ruled upon.

Independent action. WISCONSIN STAT. § 118.125(2)(f) provides that "[p]upil records shall be provided to a court in response to subpoena by parties to an action for in camera inspection, to be used only for purposes of impeachment of any witness who has testified in the action." The State hinges its argument on the failure to place a comma after the word "action," such that, in its view, the phrase "in camera inspection" modifies only the word "action." Thus, in the State's view, the action in which a subpoena is sought is *one other than the one in which the pupil records would be used for impeachment*. According to the State, this interpretation is preferable because it provides for a separate hearing where the potential relevance and materiality of the confidential records would be evaluated *before* the records could be subpoenaed and the victim's rights to privacy were infringed upon.

Tyler responds that when reviewed in its entirety, the statute refers to a singular action. Tyler notes that the statute states that the records subpoenaed by parties to "an action" may be used only after a witness has testified in "the

action," and argues that this clearly indicates that "the action" in which the records are to be used is the same as that in which the records are to be subpoenaed. Tyler also maintains that the State's interpretation is problematic because it would require a party seeking pupil records for impeachment purposes to file an independent action and then, after the witness whose records are the subject of the subpoena testifies, suspend that proceeding and file a request for a hearing on the use of the records.[3] Such a result, Tyler maintains, creates a real waste of judicial resources.

In recognition of the fact that the above questions concerning the proper reading of WIS. STAT. § 118.125(2) have not yet been decided by the supreme court and of the impact that the resolution of the questions could have on the process used to obtain pupil records, we conclude that the supreme court as the law-declaring and the law-defining court is the appropriate forum for their resolution.

*2. **Shiffra-Green***

As Tyler observes, the plain language of WIS. STAT. § 118.125(2)(f) does not require that the party seeking release of the confidential records make a preliminary showing in order to be entitled to an in camera review nor does it

[3] The State also argues that "behavioral records" are not "pupil records" and may not be subpoenaed. Were we to decide this case, we would reject the State's argument. WISCONSIN STAT. § 118.125(1)(d) defines "pupil records" as "all records relating to individual pupils maintained by a school" but does not include "[n]otes or records maintained for personal use by a teacher" or other licensed person, if those "notes are not available to others" and are "available only to persons involved in, the psychological treatment of a pupil." Section 118.125(a) defines "behavioral records" as "those *pupil records*, which include psychological tests, personality evaluations, records of conversations, any written statement relating specifically to an individual pupil's behavior." (Emphasis added). It is clear then that the records relating to individual pupils generally listed as "behavioral records" are "pupil records" under the statute.

mandate that the witness whose records are sought be notified or have the opportunity to be heard on the subject. The State, however, urges us, as a matter of policy, to engraft a ***Shiffra-Green*** gloss onto § 118.125(2)(f) and hold that the statute requires the same threshold showing of materiality required in ***Shiffra*** and ***Green*** for psychological records and that the witness whose records are sought be notified and have an opportunity to respond to the request for his or her records.

Preliminary showing. In ***State v. Shiffra***, 175 Wis. 2d 600, 499 N.W.2d 719 (Ct. App. 1993), this court addressed the issue of whether a defendant can gain access prior to trial to a complaining witness's psychiatric history and counseling records. ***Id.*** at 605, 607. We began our analysis of the issue by acknowledging the competing rights and interests involved when a defendant seeks discovery of confidential records. ***Id.*** at 605. On the one hand, a criminal defendant's right to due process, in particular, the right to a meaningful opportunity to present a complete defense, is implicated. ***Id.*** On the other hand, the State has an interest in protecting a patient's privileged records from being disclosed. *See* ***id.*** We concluded that an in camera review of the privileged records achieved the proper balance between the competing rights and interests of the State and the defendant. ***Id.*** We next established that to be entitled to an in camera inspection of privileged records before and during trial, the defendant must make a preliminary showing that the sought-after evidence is material to his or her defense. ***Id.*** Recently, in ***State v. Green***, 2002 WI 68, 253 Wis. 2d 356, 646 N.W.2d 298, another case involving a request for an in camera review of counseling records, our supreme court clarified the threshold the defendant must satisfy to be entitled to an in camera review: a defendant must set forth a specific factual basis demonstrating a reasonable likelihood that the records contain relevant information that is necessary to a determination of guilt or innocence and

that is not merely cumulative to other evidence available to the defendant. ***Id.***, ¶34.

Here, because the statute requires the trial court to conduct an in camera review of the records before their release to the parties, the question that remains is whether public policy demands that the party seeking the pupil records make a ***Shiffra-Green*** preliminary showing before being entitled to an in camera inspection. On the one hand, as with the privileged patient records at issue in ***Shiffra*** and ***Green***, the State has a clear interest in protecting a student's confidential pupil records. These records may contain sensitive information concerning the student's behavioral, emotional and mental health. Indeed, the legislature has chosen to make confidentiality of pupil records the rule and disclosure of those records the exception, thereby expressing the legislature's determination that sound public policy requires protecting pupil records from unnecessary disclosure. *See* WIS. STAT. § 118.125(2) ("All pupil records maintained by a public school shall be confidential, except as provided in pars. (a) to (p) and sub. (2m)."). Requiring the party seeking disclosure to make a preliminary showing of materiality and relevance would advance this legislative policy determination. Furthermore, as the State also points out, in cases involving other types of juvenile records, the court has required that the party seeking disclosure of the confidential records make a threshold showing of materiality similar to the ***Shiffra-Green*** standard. *See* ***State ex rel. Herget v. Waukesha County Circuit Court***, 84 Wis. 2d 435, 452-53, 267 N.W.2d 309 (1978) (holding that where a party is seeking disclosure of a child's law enforcement records under WIS. STAT. § 48.396 for use in private litigation, the party "must describe the information sought, the basis for the belief that the information is in the child's police records, its relevance to the plaintiff's action, the probable admissibility of

the information as evidence at trial and efforts made to obtain the information elsewhere"); ***State v. Bellows***, 218 Wis. 2d 614, 633-34, 582 N.W.2d 53 (Ct. App. 1998) (applying ***Herget*** to juvenile court records); ***Courtney F. v. Ramiro M.C.***, 2004 WI App 36, ¶¶28-33, 269 Wis. 2d 709, 676 N.W.2d 545 (applying ***Herget*** and ***Bellows*** to a juvenile's agency records).

On the other hand, as Tyler rightly points out, this case also implicates his right to a fair trial and the statute does offer safeguards for preventing the unnecessary disclosure of pupil records. The statute requires that the trial court conduct an in camera review of the records and authorizes the trial court to release the records only upon a finding of materiality and relevancy to the impeachment of the witness. Furthermore, Tyler asserts that the juvenile cases the State cites are distinguishable. ***Herget***, ***Bellows***, and ***Courtney F.*** involve juvenile court, law enforcement or agency records that are subject to a variety of statutory protections not afforded pupil records. *See* WIS. STAT. §§ 48.396 and 48.293. There is nothing in these cases suggesting that ***Herget***'s rationale and analysis extends to all confidential juvenile records. *See* ***State v. Zanelli***, 223 Wis. 2d 545, 566, 589 N.W.2d 687 (Ct. App. 1998).

Notice and opportunity to be heard. It appears that the trend in Wisconsin is to give the subject of the sought-after confidential records notice and an opportunity to respond to a request for their disclosure. In both ***Shiffra*** and ***State v. Maday***, 179 Wis. 2d 346, 507 N.W.2d 365 (Ct. App. 1993), the courts recognized that the subject of the sought-after confidential record had a right to prevent the disclosure of the information contained in those records. *See* ***Shiffra***, 175 Wis. 2d at 612 (noting that the victim had the right to confidentiality of the mental health records and was under no obligation to disclose them); ***Maday***, 179 Wis. 2d at 361 ("In order to protect the privacy of the victims in cases of alleged

sexual assault, the ultimate decision of whether to undergo an examination is to be left in the hands of the victim. The victim is free to refuse for whatever reason."). Furthermore, the aforementioned juvenile records cases all stress the importance of granting the subject of the confidential records the opportunity to respond to the request. *See* ***Herget***, 84 Wis. 2d at 452 (implying that the child must be notified that the records are being sought and the child must be given an opportunity to respond); ***Bellows***, 218 Wis. 2d at 630 (citing ***Herget***); ***Courtney F.***, 269 Wis. 2d 709, ¶31 (citing ***Herget***). Finally, in certain circumstances, the individual whose records are subject to a request under the open records law must be given notice and an opportunity to be heard. *See*, *e.g.*, ***Woznicki v. Erickson***, 202 Wis. 2d 178, 187, 193, 549 N.W.2d 699 (1996) (holding that because statutory and case law has consistently recognized the legitimate interests of citizens to privacy and the protection of their reputational interests, before a district attorney may release records pertaining to an individual, the individual must be given notice and the opportunity to litigate the release.).[4]

However, WIS. STAT. § 118.125(2)(f) by its plain language does not require that notice and an opportunity to respond be given to the subject of the sought-after records and the above-cited cases do not involve school records and

[4] In response to the supreme court's holdings in ***Milwaukee Teachers' Education Ass'n v. Milwaukee Board of School Directors***, 227 Wis. 2d 779, 596 N.W.2d 403 (1999), and ***Woznicki v. Erickson***, 202 Wis. 2d 178, 549 N.W.2d 699 (1996), the legislature enacted 2003 Wis. Act 47. *See* Joint Legislative Council Prefatory Note to 2003 Wis. Act 47. The act provides, among other things, that if a public authority decides to release certain employee-related records to someone who has requested access to them under WIS. STAT. § 19.35, before doing so, the authority must give notice to the "record subject," who may then commence an action in circuit court to prevent their release. *See* WIS. STAT. § 19.32(2g) (defining "record subject" as "an individual about whom personally identifiable information is contained in a record"); WIS. STAT. § 19.356 (prescribing procedures for a record subject to bring an action to enjoin release of the records).

therefore are not directly on point. Further, we have repeatedly stated that we have complete confidence in the circuit court's ability, through in camera review, to properly balance the State's interest in protecting its citizens' rights to confidentiality against the defendant's right to present a defense. ***Shiffra***, 175 Wis. 2d at 611; ***Green***, 253 Wis. 2d 356, ¶35. For these reasons, Tyler argues we should not adopt the State's position.

Although we find support in other records cases for both requiring that the party seeking disclosure of the confidential records make a ***Shiffra-Green*** threshold showing of materiality and giving an individual notice and an opportunity to respond to the records request, the statute itself imposes no such requirements. Thus, while we share many of the State's concerns about upholding the privacy interests of individuals in their school records, the question of whether to engraft such requirements onto the statute is better resolved by the supreme court in its position as the policy-making and law-declaring court.

CONCLUSION

WISCONSIN STAT. § 118.125(2)(f) and its application to this case implicate important legal and policy questions regarding the rights of an individual to the privacy of his or her confidential pupil records and the rights of a defendant to a fair trial. As pupil records are routinely sought, the issues concerning the proper procedures for their disclosure are likely to recur. Accordingly, we respectfully ask the supreme court to accept review of this case.