SJC-13127

IN THE MATTER OF AN IMPOUNDED CASE.

Suffolk. April 4, 2022. - December 22, 2022.

Present: Budd, C.J., Gaziano, Lowy, Kafker, Wendlandt, & Georges, JJ.

Privileged Communication. Social Worker. Evidence, Privileged record, Communication with social worker, Deposition. Practice, Criminal, Standing, Judicial discretion. Rules of Criminal Procedure.

Civil action commenced in the Supreme Judicial Court for the county of Suffolk on January 12, 2021.

The case was heard by Cypher, J.

Rachel M. Self for the defendant.

Katharine K. Foote (Edmund P. Daley also present) for the child.

Karen A. Palumbo, Assistant District Attorney, for the Commonwealth.

Hartley M.K. West & Taylor Jaszewski, of California, & Brenda R. Sharton, for Jane Doe Inc. & another, amici curiae, submitted a brief.

GEORGES, J. This case presents the novel question whether a court may order the deposition of a social worker as a remedy

for the inadvertent but unlawful destruction of privileged treatment records that a Superior Court judge had found were necessary to a criminal defendant's preparation for trial before learning of the destruction. We conclude that, in these particular and highly unusual circumstances, the motion judge did not abuse his discretion in ordering a limited deposition.

In 2018, Jonathan,[1] then six years old, told his parents that one of his teachers had touched him inappropriately. Subsequently, Jonathan participated in the first of two interviews with the Sexual Assault Intervention Network (SAIN). At the first SAIN interview, however, Jonathan denied any inappropriate touching by the defendant. Following that interview, Jonathan began seeing a licensed social worker for counseling. After completing approximately six sessions with the social worker over the course of roughly six weeks, Jonathan participated in a second SAIN interview, during which he made new and detailed claims that the defendant, among other things, had sexually abused him on numerous occasions. The defendant subsequently was indicted on charges arising from Jonathan's allegations during this second interview. After a hearing on the defendant's motion pursuant to Mass. R. Crim. P. 17, 378 Mass. 885 (1979) (rule 17), and the so-called Lampron-Dwyer

[1] A pseudonym.

protocol, a Superior Court judge determined that the defendant was entitled to examine the social worker's treatment records concerning her work with Jonathan. See Commonwealth v. Dwyer, 448 Mass. 122 (2006); Commonwealth v. Lampron, 441 Mass. 265 (2004).

Eventually, the social worker revealed that she inadvertently had destroyed Jonathan's treatment records while closing her private practice. In response, a different judge of the Superior Court ordered that, as a remedy for the destruction of the records, the defendant would have the opportunity to depose the social worker.[2] Jonathan opposed the deposition in the Superior Court, and also filed a petition in the county court pursuant to G. L. c. 211, § 3, seeking to block the deposition. A single justice of this court vacated the order that the social worker could be deposed, and the defendant appealed. The order of the single justice shall be vacated and

[2] These hearings were conducted by three different judges of the Superior Court; two of the judges retired while litigation on the rule 17 motion and the destruction of the records was proceeding. The first judge allowed the defendant's rule 17 motion after a hearing, the second ordered the initial remedy for the destruction of the treatment records, and the third judge ordered a deposition as an additional remedy for the destruction of the records.

set aside, and an order shall enter in the county court denying Jonathan's petition for extraordinary relief.[3]

1. Background. The following facts are undisputed. In March of 2018, Jonathan, who was then in the first grade, told his parents that the defendant, Jonathan's technology teacher, had taken Jonathan and two other students into a separate classroom and showed them scary and inappropriate video recordings. Jonathan also told his parents that, on one occasion, he had told the defendant that he had a cramp in his leg, and that in response the defendant said he could help if Jonathan would remove his pants. According to a police report, Jonathan's father asked Jonathan if the defendant had touched his "privates," and Jonathan responded affirmatively.

Jonathan's parents contacted police and, later that month, Jonathan participated in the first of two SAIN interviews. During this interview, Jonathan denied that the defendant had touched him; specifically, Jonathan said that, after telling the defendant about the cramp in his leg, he "didn't take [his] pants off. [The defendant] just told me to. I said no."

Following this interview, Jonathan began treatment with the social worker. During April and the first part of May of 2018, Jonathan and the social worker met for approximately six

[3] We acknowledge the amicus brief submitted by Jane Doe Inc. and Independence House Inc.

treatment sessions.[4] On May 7, Jonathan participated in a second SAIN interview. This interview was markedly different from the first. During this interview, Jonathan said that the defendant had inserted his finger into Jonathan's anus on three separate occasions, and once had punched Jonathan in the abdomen with such force that Jonathan later urinated blood. Jonathan had not previously made similar allegations either to his parents or during the first SAIN interview. During this second interview, Jonathan repeatedly emphasized that he was telling the truth.

In August of 2018, the defendant was arrested and indicted on five counts of statutory rape of a child, G. L. c. 265, § 23A (c) (mandated reporter); eight counts of aggravated indecent assault and battery on a child under fourteen years, G. L. c. 265, § 13B 1/2; one count of assault and battery on a child causing bodily injury, G. L. c. 265, § 13J (b), and two counts of witness intimidation, G. L. c. 268, § 13B.

About one year after his indictment, in July of 2019, the defendant filed a motion pursuant to rule 17 to view the privileged treatment records created during Jonathan's treatment with the social worker. See G. L. c. 112, § 135B. The crux of the defendant's argument was that the therapy sessions likely contributed to the significant discrepancies between the

[4] The precise number of treatment sessions is unknown, in large part because Jonathan's treatment records were destroyed.

allegations made by Jonathan during his first and second SAIN interviews, and that access to the treatment records therefore was essential for the preparation of his defense; Jonathan objected. After a hearing, a judge of the Superior Court issued a notice and summons to the social worker ordering her to produce the records by October 4, 2019. Following an additional hearing, the judge modified the scope of the order, requiring the social worker to produce only the treatment records she compiled between April 2 and June 30 of 2018.[5]

The social worker, however, did not respond to three separate summonses; on January 9, 2020, a hearing was held to address her lack of response. The social worker was not present at the hearing, but later that day the court received a letter from her that read:

> "I, [an] LICSW[,] closed my private practice during the Fall of 2018. In the course of closing the office, [Jonathan's] record was shredded in error. As a result, I am unable to provide the court with the requested treatment records from 4/2/18-6/30/18. I am able to communicate verbally and/or write a treatment summary regarding my recollections of what occurred during this time period in treatment. My apologies to the court for this error."

Over the remainder of that year, Jonathan, the defendant, the Commonwealth, and the social worker participated in numerous

[5] Maintenance of social worker treatment records is mandatory in the Commonwealth. See 258 Code Mass. Regs. § 22.02 (2017).

hearings regarding the social worker's revelation and the appropriate remedy for the destruction of the treatment records. In July of 2020, a Superior Court judge (who was not the judge who ordered the deposition) found that the social worker's destruction of the records had been inadvertent. As a remedy, the judge ordered, over objections from Jonathan and the Commonwealth, that the social worker both produce a written summary of her treatment of Jonathan and share with the court copies of two treatment updates regarding Jonathan that the social worker had sent to Jonathan's mother during the summer of 2018.[6]

The defendant subsequently reviewed the treatment summary and treatment updates pursuant to the procedures set out in rule 17 and the Lampron-Dwyer protocol. After doing so, he filed a motion for relief in which he requested that the judge either exclude from admission at trial any of the statements

[6] The social worker had come across these messages to Jonathan's mother after having informed the court that the original treatment records had been destroyed. The precise medium of this correspondence is not entirely clear from the record. At a hearing in July of 2020, the social worker testified that "after [the] last court appearance" she "went through" her "past emails" and found "two letters that I wrote that I emailed, but those are actually typed up." At other times during the hearing, the social worker described this correspondence as two "letters," while the order allowing the deposition refers to this correspondence as comprising "an email from June 2018 and a letter from August 2018." For simplicity, we refer to this correspondence as the "treatment updates."

Jonathan made during the second SAIN interview or, in the alternative, order the social worker to "participate in a pretrial deposition or voir dire so that" the defendant could receive "a fair opportunity to investigate the credibility of [Jonathan's] allegations and propriety of [the social worker's] techniques." Such a remedy was necessary, the defendant argued, because the "facts in this case are strongly indicative of false allegations due to suggestive and coercive questioning, first from [Jonathan's] parents, and later from [the social worker's] treatment."

In December of 2020, after a hearing on the defendant's motion, a different judge from the one who had issued the order to produce the treatment records ordered that the defendant be permitted to depose the social worker. In his order, the judge stated that, although he did "not agree that the record before the court warrant[ed]" the exclusion of any statements made by Jonathan during the second SAIN interview, he agreed that "the defendant is entitled to more than the [treatment update e-mail messages] and summary prepared by [the social worker]." The order also stated that the "deposition shall be limited to the treatment period between April 2, 2018 and May 7, 2018," and that if the parties could not agree to additional specific terms for the taking of the deposition, the judge would issue an order specifying the terms.

The parties were unable to agree on terms for the taking of the deposition. On December 31, 2020, the defendant submitted to the court a proposed deposition protocol that included the exclusion of the Commonwealth from attendance at the deposition, and an order that "[the social worker] may not refuse to answer questions related to [Jonathan's] treatment during this time period on the grounds of the social worker privilege," see G. L. c. 112, § 135B. Jonathan did not propose any alternative terms; rather, on January 12, 2021, he moved to stay the deposition and any filings related to it, in a detailed motion objecting to the taking of the deposition in the first instance. Three days later, he filed a "motion for extension of time to propose protocols," which again presented Jonathan's objections to the taking of the deposition. At the same time, Jonathan filed a petition for relief pursuant to G. L. c. 211, § 3, in the county court, seeking to block the deposition. Two weeks later, Jonathan filed a motion in the county court asking that the proceedings in the Superior Court be stayed pending resolution of the petition for extraordinary relief.

A single justice of this court allowed the motion to stay, and subsequently vacated the order allowing the taking of the deposition, because she concluded that such a deposition was not permissible under either rule 17 or Mass. R. Crim. P. 35, 378 Mass. 906 (1979) (rule 35), which governs the taking of

depositions in criminal cases. The defendant appealed to the full court, arguing both that Jonathan lacked standing to file a petition under G. L. c. 211, § 3, and that the single justice abused her discretion in vacating the order allowing the deposition.

2. Discussion. a. Standard of review. "It is well settled that this court will not reverse an order of a single justice in the absence of an abuse of discretion or clear error of law." Greco v. Suffolk Div. of the Probate & Family Court Dep't, 418 Mass. 153, 156 (1994). An abuse of discretion exists when a judge makes "a clear error of judgment in weighing" the relevant factors, "such that the decision falls outside the range of reasonable alternatives" (citations omitted). L.L. v. Commonwealth, 470 Mass. 169, 185 n.27 (2014).

b. Whether Jonathan had standing to seek appellate review in the county court. As a threshold matter, the defendant argues that the single justice abused her discretion by considering the merits of Jonathan's challenge to the deposition order because Jonathan lacked standing to bring a petition under G. L. c. 211, § 3. We do not agree.

It is undisputed that Jonathan had standing to challenge the defendant's original rule 17 motion seeking to review the social worker's treatment records. See Dwyer, 448 Mass. at 145. The defendant argues, however, that Jonathan's initial, valid

challenge precludes any additional challenge relating to information in the treatment records. In the defendant's view, because Jonathan already "had his opportunity to address the court," and a Superior Court judge "heard [Jonathan] and decided that the defendant was entitled to [the social worker's] treatment records within a specific set of dates -- despite [Jonathan]'s objection," Jonathan should now be precluded from challenging the order permitting the deposition. This argument, however, disregards the fact that the initial order allowing examination pursuant to rule 17, and the subsequent order allowing the taking of the deposition, are separate and distinct orders; the second order was fashioned as a remedy for the destruction of the documents referenced in the first order. The two orders also encompass potentially different intrusions into the privilege of confidentiality held by clients of social workers. See discussion, infra.

"As a general rule, only parties to a lawsuit, or those who properly become parties, may appeal from an adverse judgment" (citations omitted). Randolph v. Commonwealth, 488 Mass. 1, 6 (2021), quoting Corbett v. Related Cos. Northeast, 424 Mass. 714, 718 (1997). In narrow circumstances, courts may allow exceptions to this rule. For instance, "[t]here are limited circumstances in which a nonparty has been permitted to appeal from a judgment, despite its failure to intervene, . . . where a

nonparty has a direct, immediate and substantial interest that has been prejudiced by the judgment, and has participated in the underlying proceedings to such an extent that the nonparty has intervened 'in fact.'" Randolph, supra, quoting Corbett, supra.

Such is the case here. A "judge's discovery order is not reviewable under any established procedure" and the deposition order encroaches upon the substantial interest of Jonathan's social worker's privilege. See Commonwealth v. Bing Sial Liang, 434 Mass. 131 133 (2001); Commonwealth v. Wojcik, 43 Mass. App. Ct. 595, 608 (1997). Our jurisprudence makes clear that this privilege qualifies as a "substantial interest." See Randolph, 488 Mass. at 6; Commonwealth v. Hunt, 462 Mass. 807, 817 (2012). See also Jaffee v. Redmond, 518 U.S. 1, 10, 15 (1996). In addition, Jonathan apparently has intervened "in fact" in the Superior Court case, see Randolph, supra; prior to filing his emergency petition, Jonathan filed an opposition in the Superior Court challenging the order requiring the social worker to produce a treatment summary, participated in the show-cause hearing on the destruction of the records, and challenged the order requiring the deposition. Accordingly, the single justice did not abuse her discretion in reaching the merits of Jonathan's challenge to the order permitting the deposition.

c. The deposition order. The defendant also challenges the single justice's decision to vacate the order allowing the

deposition as an abuse of discretion. In his challenge, the defendant asserts that the "summary submitted by [the social worker]" is roughly one and one-half pages long, covering a treatment period of approximately two months, and is "devoid of specific information about her treatment methods or how the treatment progressed over her" sessions with Jonathan.

During one hearing on the proper remedy to be imposed for the destruction of the records, the social worker testified on cross-examination that she did not know the difference between a "clinical treatment record and a criminal treatment summary," a statement that indicated a possible lack of familiarity with the professional and regulatory obligations of clinical social workers in Massachusetts. See 258 Code Mass. Regs. § 22.02 (2017).[7] The social worker's counsel objected to this line of questioning, but the judge allowed it on the ground that the social worker's answer could "hel[p] [him] understand what it might mean to her in terms of what a summary would look like."

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[7] These regulations provide that clinical social workers "shall establish and maintain a separate, legible, adequate and accurate written clinical treatment record for each client receiving such services," and mandate that those records "shall contain" an enumerated list of subjects, including, inter alia, "[d]ocumentation of any changes or revisions in the assessment or diagnosis of the client's mental, emotional or behavioral condition, disorder or diagnosis which occur during the provision of clinical social work services," and "[d]ocumentation of any changes or revisions in the treatment plan which occur during the provision of clinical social work services to that client."

The judge's subsequent order that the social worker create a summary, however, was untethered from any of the regulatory requirements for the content of such records, and devoid of any guidance regarding what the summary should include. After the social worker submitted the document the defendant challenges, and following a hearing on the defendant's motion for relief, a different judge concluded that this remedy was inadequate, and ordered a limited deposition of the social worker.

The single justice vacated the deposition order on the grounds that it was supported by neither rule 17 nor rule 35, and "contradict[ed] the purpose of the Dwyer protocol." She emphasized that the plain language of rule 17 "makes no reference to the creation of documents or other records by means of depositions or interrogatories, and, notably, depositions are governed by other rules of criminal procedure," namely rule 35.

We agree with the single justice that the deposition order is not supported by rule 17 and the Lampron-Dwyer protocol, or by rule 35. Pursuant to Mass. Rule Crim. P. 17 (a) (2), a judge may issue a summons ordering an individual to produce "books, papers, documents, or other objects" prior to trial, and may "permit" such objects "or portions thereof to be inspected and copied by the parties and their attorneys if authorized by law." The "limited purpose of rule 17 (a) (2) is to authorize the court 'to expedite the trial by providing a time and place

before trial for the inspection of the subpoenaed materials.'" Dwyer, 448 Mass. at 142, quoting United States v. Nixon, 418 U.S. 683, 698-699 (1974). The process by which rule 17 documents may be viewed is governed by the protocol established in Lampron, 441 Mass. at 270-271, and Dwyer, 448 Mass. at 139-140.

Under the Lampron-Dwyer protocol, a moving party must demonstrate good cause for a summons to issue. Good cause is established by a showing:

> "(1) that the documents are evidentiary and relevant; (2) that they are not otherwise procurable reasonably in advance of trial by exercise of due diligence; (3) that the party cannot properly prepare for trial without such production and inspection in advance of trial and that the failure to obtain such inspection may tend unreasonably to delay the trial; and (4) that the application is made in good faith and is not intended as a general fishing expedition" (quotations omitted).

Dwyer, 448 Mass. at 140-141, quoting Lampron, 441 Mass. at 269. These requirements have been summarized as "relevance, admissibility, necessity, and specificity." Commonwealth v. Mitchell, 444 Mass. 786, 792 (2005). If a defendant demonstrates good cause, a summons is issued to the record-holder, and the records are held under seal by the court and subject to "stringent nondisclosure provisions." See Dwyer, 448 Mass. at 146. Only the moving party is permitted to view the records at this stage. Id.

Rule 17 and the Lampron-Dwyer protocol thus represent a careful balancing. They establish not only that a statutory privilege sometimes must yield to a defendant's need for information to mount a defense and thus obtain a fair trial, but also that, in such circumstances, the intrusion must be made with great care and pursuant to exacting procedures. Rule 17 contemplates only the examination of existing objects, not the creation of new evidence. See, e.g., Lampron, 441 Mass. at 269.

For instance, in Commonwealth v. Matis, 446 Mass. 632, 635-636 (2006), we concluded that rule 17 (a) (2) permitted a defendant in a rape case to inspect, measure, and photograph a three-bedroom home that was the scene of the alleged crime. While we acknowledged that "the object here cannot be physically brought to court by the third party," and in that way "may be different in its portability from other objects subject to summons under rule 17 (a) (2)," we concluded that it "ma[de] no difference" in the analysis whether the order was permissible under rule 17. Matis, supra at 634-635. We have reached the same conclusion where the object in question did not exist at the time of issuance of the order, but could be made tangible, such as a buccal swab. See Jansen, petitioner, 444 Mass. 112, 116-118 (2005) (allowing rule 17 motion to take buccal swab of third party for deoxyribonucleic acid analysis prior to trial after concluding that saliva was object within meaning of

rule 17). See also Matis, supra at 634 (describing case as "not far removed from the circumstances in Jansen"). A deposition, by contrast, is not a tangible object. Accordingly, rule 17 does not support the order that the social worker be deposed.

The single justice also concluded that the deposition order was unsupported by rule 35. That rule provides that "[w]henever due to exceptional circumstances, and after a showing of materiality and relevance, it is deemed to be in the interest of justice that the testimony of a prospective witness of the defendant or the Commonwealth be taken and preserved, the judge may . . . order that the testimony of the witness be taken by deposition." Depositions under rule 35 ordinarily are reserved for situations in which a witness likely will be physically unavailable for trial. See, e.g., Commonwealth v. Tanso, 411 Mass. 640, 645-646 (1992) (no abuse of discretion in allowance of Commonwealth's rule 35 motion for deposition of witness who reasonably feared that his testifying would provoke violent retribution from defendants). See also Commonwealth v. Ross, 426 Mass. 555, 557-559 (1998) (ordering new trial after Commonwealth took deposition of witness who had been living abroad but did not demonstrate witness's inability or unwillingness to return for trial, thus failing "to demonstrate her unavailability within the meaning of rule 35").

Nothing in the record suggests that, if the trial judge were to decide that the social worker could testify as to her privileged records of her treatment of Jonathan at trial, and if one of the parties then chose to call her, the social worker would be unavailable to testify. The record shows that she was living and working in Massachusetts when she produced the treatment summary, and nothing in the record suggests that she since has left the Commonwealth. Although the social worker failed to respond to the first three summonses, she since has attended hearings, written the requested summary, produced the two e-mail messages to Jonathan's mother that she told the court she had found, and offered to provide oral responses about her treatment of Jonathan;[8] she has given no indication that she would refuse to appear for trial. Accordingly, the single justice did not abuse her discretion in concluding that neither rule 17 nor rule 35 supported the order allowing the defendant to depose the social worker.

We note, however, that the challenged deposition order was not issued pursuant to rule 17. Rather, it was a remedy for the unfortunate -- and, we anticipate, exceedingly rare -- situation

[8] We note, however, that since the social worker's initial offer to the court, she repeatedly has attempted to avoid being deposed, on the ground that the subject matter of any deposition would go beyond the information contained in the now-destroyed treatment records.

in which a defendant was deemed entitled to inspect privileged documents, only for the ostensible keeper of those documents to reveal that she unlawfully (but accidentally) had destroyed them, and had done so even before the defendant's rule 17 motion was filed. Moreover, the deposition order was not the first remedy crafted by the Superior Court judges to address the destruction of the statutorily mandated treatment records. Rather, the deposition was ordered as an additional remedy after a Superior Court judge found "that the defendant is entitled to more than the email and letter produced and the summary prepared by [the social worker]."

To our knowledge, we have not before considered a case involving circumstances such as these. We recognize that extraordinary fact patterns may require courts to exercise their "inherent authority" to "ensure fair trials, promulgate rules, and administer the courts." See Sullivan v. Chief Justice for Admin. & Mgt. of the Trial Court, 448 Mass. 15, 24 (2006). Courts "have the inherent power to do whatever may be done under the general principles of jurisprudence to insure to the citizen a fair trial, whenever his [or her] life, liberty, property or character is at stake." Beit v. Probation & Family Court Dep't, 385 Mass. 854, 859 (1982), quoting Crocker v. Justices of the Superior Court, 208 Mass. 162, 179 (1911). "Simply stated, implicit in the constitutional grant of judicial power is

'authority necessary to the exercise of . . . [that] power.'" Beit, supra, quoting O'Coin's, Inc. v. Treasurer of the County of Worcester, 362 Mass. 507, 510 (1972).

The single justice understandably did not evaluate the deposition order in the context of this broader discretion, and instead focused only on the claims under rules 17 and 35 that Jonathan raised in his G. L. c. 211, § 3, petition. Viewed through this broader lens, however, we cannot say that the motion judge abused his discretion in determining that "the defendant is entitled to more than the email and letter produced and the summary prepared by [the social worker]," and in concluding that this remedy could take the form of a limited deposition.

As discussed supra, the defendant's initial rule 17 motion resulted in the finding that he was entitled to review the social worker's treatment records. At the time of this finding, there was no reason for the parties to believe that these records no longer existed. After failing to respond to a number of summonses, however, the social worker revealed, approximately three months after production of the records had been ordered, that she had, in violation of her regulatory obligations, destroyed all of Jonathan's treatment records. Subsequently, the motion judge concluded that the (allegedly very brief) treatment summary and the two e-mail messages to Jonathan's

mother concerning treatment updates that the social worker did produce were inadequate as a remedy for the destruction of the original records. Taken together, these factors present a situation in which it was not an abuse of discretion for the motion judge to order that the social worker be subjected to a limited deposition.

Finally, we note that the motion judge issued the order that the social worker be deposed with instructions that the precise terms of the deposition would be decided at a later date, either by the parties' agreement or, if they were unable to agree, by the judge himself. This meant that the order did not, on its face, explicitly limit the scope of the deposition, or provide protocols by which the court could ensure that the deposition would be cabined appropriately. Although this aspect of the deposition order did not, in and of itself, amount to an abuse of discretion on the part of the motion judge, we emphasize that, in light of the nature of the relief that originally was allowed under rule 17, any deposition of the social worker must be confined to the parameters of the destroyed treatment records, with adequate protocols and safeguards to ensure that the deposition is so limited, in order to effectuate its intended purpose.

3. Conclusion. The decision of the single justice vacating the order that the social worker be deposed is vacated

and set aside. The matter is remanded to the county court for entry of an order denying Jonathan's petition under G. L. c. 211, § 3, and remanding the matter to the Superior Court for further proceedings consistent with this opinion.

So ordered.