COURT OF APPEALS
DECISION
DATED AND FILED

October 8, 2008

David R. Schanker
Clerk of Court of Appeals

NOTICE

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2008AP1311-FT **Cir. Ct. No. 2008JV7**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

IN THE INTEREST OF WILLIAM Z.,
A PERSON UNDER THE AGE OF 17:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

WILLIAM Z.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Ozaukee County: THOMAS R. WOLFGRAM, Judge. *Affirmed*.

¶1 BROWN, C.J. We accepted review of this nonfinal order denying William Z.'s motion for an in camera review of the alleged victim's confidential psychological and counseling records pursuant to ***State v. Green***, 2002 WI 68, 253

Wis. 2d 356, 646 N.W.2d 298, and ***State v. Shiffra***, 175 Wis. 2d 600, 499 N.W.2d 719 (Ct. App. 1993), colloquially known as a ***Shiffra/Green*** motion. We determine that William has not shown a specific factual basis demonstrating a reasonable likelihood that the records contain relevant information necessary to a determination of guilt or innocence, and that the evidence is not cumulative and not otherwise available to him. Accordingly, we affirm.

¶2 William is charged with having sexual contact when he was twelve with a seven-year-old boy. His ***Shiffra/Green*** motion is based on factual statements contained in discovery that he obtained from police reports. The seven-year-old has been in counseling since age three, involving sexual issues. At age two, he was found in a closet touching a girl about the same age. At age five or six, he stuck out his penis while emerging from the bathtub and told his mother to "eat it." The mother changed counselors as a result of this episode to more directly address her child's sexual issues. The boy has accused William's two sisters of the same type of touching conduct, but charges have not been brought against the sisters. The defense issues are credibility and the source of the sexual knowledge. There is no physical evidence.

¶3 Before the juvenile court, William asserted that he had met the prerequisites under ***Shiffra/Green*** for an in camera review by the court. First, he pointed to the fact that the sisters have not been charged and suggested that this means the boy may have made false accusations against these sisters. He claimed that, if it was true that the allegations against the sisters were false, then the allegation against William may likewise be false. William posited that the confidential records might well show the boy's penchant for falsifying sexual contacts.

¶4 Second, William argued, the fact that this boy has been sexually acting out since such an unusually early age indicates that he may well have been the subject of sexual abuse by others which he might be transferring to William. He argued that the records might show how well the boy is able to keep the events separated in time and perpetrator.

¶5 Third, William thought it obvious—most blatantly from the bathtub incident—that the boy has knowledge of sexually-related language that is typically beyond the ken of the normal child of that age. William asserted that the confidential records might well show that the boy has some other source of knowledge of sexual matters other than from either William or William's sisters.

¶6 In making its decision, the juvenile court correctly noted that, just because the seven-year-old is in counseling, does not, in and of itself, require disclosure of confidential records in camera, to the court. *See* ***Green***, 253 Wis. 2d 356, ¶33. It found that William already had access to information that the victim presented his penis to his mother and the allegations against the sisters. Agreeing with the assistant district attorney's argument, the juvenile court rejected the idea that any inference could be drawn from the fact that the sisters had not been charged or that the allegations against the sisters had been shown to be false. The court concluded that William had not met his burden because there was no indication that counseling was addressing something relating to the child's ability to perceive and relate the events that occurred. From this decision, William has appealed.

¶7 We find it necessary to first relate what ***Shiffra/Green*** is not about. Contrary to what the juvenile court seemingly suggests, the law does not put the burden on William to show that the counseling was addressing the child's ability

to perceive and relate events around him. How would the defendant get such information if the victim, or the family of the victim, is not forthcoming about the psychological history—which is almost always the case? It would be impossible or nearly so. ***Shiffra/Green*** is not about adducing evidence that will put a label on what psychological disorder a victim might be suffering and how that disorder will affect the ability to perceive or relate what occurred. Neither ***Shiffra*** nor ***Green*** makes that statement.

¶8 Instead, the defendant must just "set forth, in good faith, a specific factual basis demonstrating a reasonable likelihood that the records contain relevant information" to his or her theory of defense. ***Green***, 253 Wis. 2d 356, ¶34. The defense must provide some evidence outside the counseling record that the alleged victim has a sexual history that shows confusion about details as to time, has accused multiple perpetrators, or has made false accusations in the past. *See* ***id.***, ¶¶26-27, 35; ***Shiffra***, 175 Wis. 2d at 610-12. This evidence must show more than a mere possibility that the evidence will not be merely cumulative to existing evidence and that it will be helpful to the defense. ***Green***, 253 Wis. 2d 356, ¶33. And then, when there is knowledge, on top of this evidence, that the victim is in counseling and that it concerns sexual behavior, an in camera inspection allows the court, and the court alone, to review the materials to see if there is a nexus between the facts as known and the counseling sessions. That is what ***Shiffra/Green*** is all about.

¶9 This court also does not accept the juvenile court's admonition (parroting an argument made a few moments beforehand by the assistant district attorney) that although the law deems the trial court to be the gatekeeper in ***Shiffra/Green*** motions, "by its very nature an in camera inspection involves a breach of … confidentiality that can be expected by virtue of having looked at it.

Even if … I determine that … there's nothing available that would be helpful … the confidentiality is breached." This statement smacks of a presumption against in camera review. In truth, there is no presumption. The whole underpinning of ***Shiffra***, as largely confirmed in ***Green***, is that somebody in authority must be able to balance a defendant's constitutional right to mount a defense by providing to the fact-finder all relevant evidence and the right to keep psychological records confidential. *See* ***Shiffra***, 175 Wis. 2d at 605; ***Green***, 253 Wis. 2d 356, ¶23. That balancing is properly reserved for the trial courts in Wisconsin. *See* ***Shiffra***, 175 Wis. 2d at 605. While it is true that confidentiality is pierced in that instance, it is hardly a "breach." Citizens promote people to the Bench and have them don the robe precisely because someone must be entrusted with making these hard balancing decisions with the assurance that only one pair of eyes makes that call. *See* ***id.*** at 611.

¶10 Having discussed what ***Shiffra/Green*** is and is not, we can now go to the merits. First, the fact that the sisters have not been charged means nothing. As any practitioner of criminal law would know, there are a plethora of reasons why an allegation does not find its way into a criminal complaint. True, one reason might be that the prosecutor does not believe the accuser. But it could also be a question of efficient use of resources or some other equally reasonable explanation. Frankly, there is no evidence that the boy has made any of his sexual experiences up. Had there been such evidence, then, coupled with the knowledge that the boy was in counseling for sexual problems, this would be a real issue. But the facts are just not on William's side here.

¶11 Second, while it is true that the boy has been sexually acting out at such an early age, and while this creates a reasonable inference that this is possibly due to sexual abuse by others, such an inference means nothing by itself. Absent

is any hint that his previous sexual experiences might have been "transferred" to William. Again, had there been some evidence showing confusion as to time and perpetrator, this would be a different case.

¶12 Third, while it is obvious that this boy has sexual knowledge way beyond the normal child of that age, and while William can mount a defense on the grounds that this is learned behavior—from other people, not William—the fact is that he already has this information from the police records. He already knows what the boy said to his mother, what he was doing in the closet and that he alleged certain incidents with William's sisters. He does not need the psychological and counseling records to prove that the boy could have gained his sexual knowledge from people other than William. The use of psychological and counseling records for such a purpose would be cumulative.

¶13 In sum, we agree with the juvenile court that William has not met his ***Shiffra/Green*** burden. This court affirms.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.