IN THE COURT OF APPEALS OF THE STATE OF ALASKA

JAMES L. GALAKTIANOFF,

Appellant,

v.

STATE OF ALASKA,

Appellee.

Court of Appeals No. A-12242
Trial Court No. 1CR-12-00236 CR

MEMORANDUM OPINION
On Rehearing

No. 6814 — August 14, 2019

Appeal from the Superior Court, First Judicial District, Craig, David V. George, Judge.

Appearances: Carolyn Perkins, Attorney at Law, Salt Lake City, Utah (opening and reply briefs), and Daniel Bair, Law Office of Daniel Bair, Anchorage (petition for rehearing), both under contract with the Office of Public Advocacy, for the Appellant. Timothy W. Terrell, Assistant Attorney General, Office of Criminal Appeals, Anchorage, and Jahna Lindemuth and Kevin Clarkson, Attorneys General, Juneau, for the Appellee.

Before: Allard, Chief Judge, Wollenberg, Judge, and Mannheimer, Senior Judge.[*]

Judge WOLLENBERG.

[*] Sitting by assignment made pursuant to Article IV, Section 11 of the Alaska Constitution and Administrative Rule 23(a).

In *Galaktianoff v. State*, we affirmed James L. Galaktianoff's conviction for first-degree sexual abuse of a minor, based on his sexual penetration of nine-year-old T.H.[1] We concluded that Galaktianoff had failed to make a sufficient foundational showing to justify *in camera* review of T.H.'s post-assault mental health counseling records.[2]

Following our decision, Galaktianoff filed a petition for hearing in the Alaska Supreme Court. In his petition, Galaktianoff argued that we overlooked one of his claims: namely, that T.H. had waived her evidentiary privilege to keep her mental health counseling records confidential.

The supreme court remanded Galaktianoff's petition to this Court, directing us to treat it as a petition for rehearing.[3]

For the reasons explained in this opinion, we grant Galaktianoff's petition for rehearing, but we deny his claim on the merits. In order to explain why we deny Galaktianoff's claim, we must first provide additional factual background.

The factual background of Galaktianoff's claim

As we discussed in our initial opinion in this case, T.H. did not remember the sexual abuse until years later — at which point, she sought mental health counseling. After Galaktianoff's attorney learned of this mental health counseling, he filed a motion to compel the production of T.H.'s counseling records to the superior court for *in camera* review and, potentially, disclosure to the parties. During the litigation of this motion, the

---

[1] *Galaktianoff v. State*, 2019 WL 994247 (Alaska App. Feb. 27, 2019) (unpublished).

[2] *Id.* at *3-4.

[3] *See* Alaska R. App. P. 506(a)(3).

prosecutor informed the court that T.H. was unwilling to disclose her counseling records, but that she was willing to disclose the fact that she had attended counseling.

The trial judge denied Galaktianoff's motion to compel production of T.H.'s counseling records for *in camera* review, but the court directed the prosecutor to work with T.H. to obtain the records documenting the dates on which she attended counseling. The judge specifically stated, "I would limit [my] *in camera* review to . . . the dates that the counseling began and the dates that it ended."

To provide the court and the parties with the dates of her counseling, T.H. executed a written release for the purpose of authorizing the clinic to disclose these dates. But, as the prosecutor later reported, the clinic sent the district attorney's office "more than was requested" — including records that described some of the statements that T.H. made during counseling, as well as clinical notes regarding her diagnosis and treatment.

When the prosecutor notified the court of this situation, the prosecutor reiterated that T.H. had only agreed to disclose the dates of her counseling. However, the prosecutor transmitted — under seal — both a full copy of what the prosecutor had received from the clinic, and a redacted version that was limited to the information that T.H. was willing to disclose (primarily the dates of her counseling, plus some additional information regarding her reported concerns). Consistent with T.H.'s position on this matter, the prosecutor asked the court to only release the redacted records.

The trial judge disclosed to Galaktianoff's attorney only the redacted records. The judge refused to disclose the other materials that the district attorney's office received from the clinic because these materials "[were not] necessary for the purpose of verifying the dates that T.H. undertook counseling." However, the judge placed these other materials under seal pursuant to Alaska Criminal Rule 16(d)(5).[4]

---

[4] Under Alaska Criminal Rule 16(d)(5), "Material excised pursuant to court order shall (continued...)

After Galaktianoff's attorney received the judge's order, he filed a renewed motion to compel disclosure of the other materials. The defense attorney argued that, because the records had been disclosed to the district attorney's office, the records were no longer protected by T.H.'s psychotherapist-patient privilege. Rather, Galaktianoff argued, Alaska Evidence Rule 510 applied. Under Rule 510, a person who holds a privilege against disclosure of information waives the privilege if the person "voluntarily discloses or consents to disclosure of any significant part of the matter or communication."

The trial judge denied Galaktianoff's request for additional disclosure of T.H.'s counseling records.

When Galaktianoff argued this matter to us on appeal, his brief focused on the assertion that disclosure of T.H.'s counseling records was governed by the test for disclosure of personnel records set out in *Booth v. State*, and that he (Galaktianoff) had satisfied this test.[5] (We rejected this argument in our original opinion in this case.)

Then, in a two-sentence paragraph at the end of this section of his brief, Galaktianoff conclusorily asserted that T.H. no longer had any claim of privilege with respect to her counseling records because the prosecutor had waived T.H.'s psychotherapist-patient privilege when the prosecutor provided those records to the trial court under seal:

> Similar to the circumstances in *Spencer* [*v. State*, 642 P.2d 1371 (Alaska App. 1982)], T.H.'s counseling records are [in the possession of] the prosecutor. Here, though, the prosecutor then submitted the records to the court, and in so

---

[4] (...continued)
be sealed and preserved in the records of the court, and shall be made available to the court of appeals and the supreme court in the event of an appeal."

[5] *See Booth v. State*, 251 P.3d 369, 374 (Alaska App. 2011).

doing, implicitly or even explicitly waived T.H.'s claim of privilege.[6]

Why we reject Galaktianoff's claim on rehearing

As an initial matter, we note that Galaktianoff has inadequately briefed this issue on appeal.

Alaska Evidence Rule 510 states that a person who holds a privilege against disclosure of information waives the privilege if the person *voluntarily discloses* or *voluntarily consents to disclosure* of any significant part of the matter or communication covered by the privilege. The record does not support a finding that T.H. voluntarily consented to disclose the details of her diagnosis and treatment.

Rather, the record shows that T.H. consented to disclose only a specific, limited aspect of her counseling records: namely, the information about the dates of her counseling. Without T.H.'s knowledge or her consent, the clinic then sent much more information to the district attorney's office, including records that disclosed details of T.H.'s diagnosis and treatment.

It is unclear whether T.H. was aware of or consented to the prosecutor's decision to provide these additional materials to the trial judge. But in any event, the prosecutor filed these materials under seal, and the prosecutor expressly reminded the judge that T.H. had not consented to disclose anything about her treatment other than the information contained in the redacted records.

---

[6] Citing Alaska R. Evid. 510.

Given this record, Galaktianoff's briefing of this issue — his two-sentence, conclusory assertion that the prosecutor waived T.H.'s psychotherapist-patient privilege — is simply inadequate to raise this point on appeal.[7]

But even assuming that Galaktianoff had not forfeited his claim through inadequate briefing, we would nonetheless reject the claim on its merits.

Galaktianoff's brief could conceivably be presenting one of two different theories: either the *clinic* waived T.H.'s privilege in her counseling records by sending the records to the district attorney's office, or alternatively, the *prosecutor* waived T.H.'s privilege by submitting the records to the superior court under seal.

But T.H. is the holder of the privilege, not the clinic and not the district attorney's office.[8] Neither the clinic nor the prosecutor had any authority to waive the privilege; only T.H. could do that.[9]

With respect to Galaktianoff's theory that the *clinic* waived T.H.'s privilege when it sent T.H.'s records to the prosecutor's office, Galaktianoff argues that his case

---

[7] *See Petersen v. Mut. Life Ins. Co. of New York*, 803 P.2d 406, 410 (Alaska 1990) ("Where a point is not given more than a cursory statement in the argument portion of a brief, the point will not be considered on appeal.").

[8] *See* Alaska R. Evid. 504(c) ("The privilege may be claimed by the patient, by the patient's guardian, guardian ad litem or conservator, or by the personal representative of a deceased patient."). Evidence Rule 504(c) also states that "[t]he psychotherapist or physician at the time of the communication is presumed to have authority to claim the privilege but only on behalf of the patient."

[9] *See* Alaska R. Evid. 510 (setting out the circumstances under which a privilege-holder "waives the privilege"); *see also Mavroudis v. Superior Court*, 102 Cal.App.3d 594, 602, 162 Cal.Rptr. 724, 731 (Cal. App. 1980) (recognizing that "[o]nly the 'holder' of a privilege may waive" the privilege and citing California Evidence Code § 912, which is similar to Alaska Evidence Rule 510); *cf. Spencer v. State*, 642 P.2d 1371, 1376 & n.3 (Alaska App. 1982) (noting that the right to invoke a privilege against disclosure is personal to the privilege holder).

is analogous to the facts of *Spencer v. State*.[10] But *Spencer* is distinguishable from this case.

In *Spencer*, the defendant moved for discovery of a witness's mental health treatment records.[11] After the witness signed a waiver releasing her records to the district attorney's office, the prosecutor submitted the treatment records to the court for an *in camera* review.[12] Thus, the only issue actively litigated in *Spencer* regarding this witness was whether the treatment records were sufficiently relevant to justify disclosure.

In Galaktianoff's case, on the other hand, there is nothing to suggest that T.H. waived her privilege to maintain the confidentiality of records pertaining to her diagnosis and treatment, or the confidentiality of statements she may have made to her treatment providers. T.H. only consented to disclosure of the information contained in the redacted records — namely, the fact that she attended counseling and the dates of her counseling.

To the extent that any more of T.H.'s counseling records came into the possession of the district attorney's office, those records arrived mistakenly, and without T.H.'s consent. The record does not show that T.H. waived her privacy rights with respect to this material.

With respect to Galaktianoff's theory that the *prosecutor* waived T.H.'s psychotherapist-patient privilege by filing the treatment records under seal with the court, Galaktianoff did not raise this contention when this matter was litigated in the

---

[10] *Spencer*, 642 P.2d 1371.

[11] *Id.* at 1373.

[12] *Id.* at 1374.

superior court, and the superior court issued no ruling regarding this contention. Accordingly, Galaktianoff is not entitled to advance this new theory on appeal.[13]

Moreover, to the extent that Galaktianoff relies on Alaska Evidence Rule 510, his claim has no merit. Under Evidence Rule 510, an evidentiary privilege is waived if the *privilege holder* voluntarily discloses or allows someone else to disclose a significant part of the protected matter or communication. But as we have already explained, there is no indication in the record that T.H. voluntarily consented to disclosure of her counseling records.

In his petition for rehearing, Galaktianoff raises yet another theory regarding T.H.'s purported waiver of the psychotherapist-patient privilege. Galaktianoff argues that T.H. may have unintentionally waived her privilege when she signed the release that allowed the clinic to send some of her records to the district attorney's office.

More specifically, Galaktianoff argues that even though T.H. may only have intended to release her treatment dates, she inadvertently "consented" to a release of *all* her records — because the release form may have been worded in such a way that it potentially included all of T.H.'s records, and because (according to Galaktianoff) "a waiver of privilege . . . is controlled by the four corners of [the] executed waiver[.]"

We reject this last argument for three reasons.

First, Galaktianoff did not raise this argument in the trial court or in his briefing on appeal. Accordingly, it is not preserved for our review.

Second, Galaktianoff cites absolutely no authority for his legal assertion that, regardless of T.H.'s intentions, and regardless of her understanding of the release

---

[13] *See Zeman v. Lufthansa German Airlines*, 699 P.2d 1274, 1280 (Alaska 1985) ("As a general rule, a party may not present new issues or advance new theories to secure a reversal of a lower court decision."); *Mahan v. State*, 51 P.3d 962, 966 (Alaska App. 2002) ("To preserve an issue for appeal, an appellant must obtain an adverse ruling.").

form, T.H. might have involuntarily waived her psychotherapist-patient privilege if she signed a release that was worded more broadly than she understood or intended. The truth of this assertion is not self-evident, and Galaktianoff's position appears to be at odds with principles of equity. Because Galaktianoff offers no legal support for this assertion, his briefing of this point is inadequate.

Third, the record in this case does not include a copy of the release that T.H. signed. Although Galaktianoff argues in his petition for rehearing that "[T.H.'s] executed release is one of the more important, if not the most important, document on the waiver issue," Galaktianoff's defense attorney never sought to have the release form made part of the record. In fact, it is not clear from the record whether the defense attorney ever asked the prosecutor for a copy of the release.

An appellant has the duty to present the reviewing court with a record adequate to permit meaningful appellate review of the appellant's contentions — and, in the absence of an adequate record, a reviewing court will refuse to address the appellant's contentions.[14] Because the record in this case does not contain the release form that T.H. signed, the record is inadequate to allow review of Galaktianoff's claim regarding the legal effect of that release.

Conclusion

For these reasons, we GRANT Galaktianoff's petition for rehearing, but we DENY his claim on rehearing. We therefore affirm our original decision.

---

[14] *See Adrian v. Adrian*, 838 P.2d 808, 811 & n.5 (Alaska 1992); *see also Ketchikan Retail Liquor Dealers v. State*, 602 P.2d 434, 438-39 (Alaska 1979) (holding that a party's failure to designate a record to support the party's claims justifies a reviewing court in deciding those claims against the party); *Whittier v. Whittier Fuel & Marine Corp.*, 577 P.2d 216, 223 n.26 (Alaska 1978) (a reviewing court will not consider trial exhibits if the exhibits are not designated as part of the record on appeal).