IN THE COURT OF APPEALS OF IOWA

No. 3-333 / 11-0468
Filed May 30, 2013

STATE OF IOWA,
Plaintiff-Appellee,

vs.

ROBERT LOUIS HANES,
Defendant-Appellant.

Appeal from the Iowa District Court for Black Hawk County, Bradley J. Harris, Judge.

Robert Hanes appeals from his conviction of willful injury causing serious injury. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Martha J. Lucey, Assistant Appellate Defender, for appellant.

Robert Louis Hanes, Newton, appellant pro se.

Thomas J. Miller, Attorney General, Kevin Cmelik, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Brook Jacobsen, Assistant County Attorney, for appellee.

Considered by Eisenhauer, C.J., and Potterfield and Tabor, JJ.

POTTERFIELD, J.

Robert Hanes appeals from his conviction of willful injury causing serious injury. He contends the district court violated his due process rights in not allowing him access to the mental health records of the purported victim. We affirm.

I. Background Facts and Proceedings.

According to Nathanial Taylor, about a week before April 28, 2007, he met Robert Hanes in a park. Hanes had given him $2.25 to purchase gizzards for Hanes, but Taylor did not purchase the gizzards or return the money. Midmorning on April 28, Taylor was walking to a cigar store to redeem bottles and cans. Hanes encountered Taylor on the street near a park. Hanes asked Taylor, "Remember me? You took my money." Hanes was angry and yelling. Taylor offered Hanes his cans, but Hanes pulled out a sharp object Taylor described as having a black blade and said, "I'm going to kill you" and stabbed Taylor twice in the face. Taylor then grabbed Hanes's hand in which he was holding the blade, hit Hanes in the head, and kicked Hanes until Hanes said, "Stop." Taylor did stop; Hanes then picked up a bottle of whiskey he had set down earlier and walked into the park.

Hanes was convicted after a jury trial of willful injury causing serious injury in violation of Iowa Code section 708.4(1) (2005). He was first convicted in 2008, but the conviction was reversed as a result of errors in the jury instructions. *See State v*. *Hanes*, 790 N.W.2d 545 (Iowa 2010). After the reversal, Hanes did not waive his right to a speedy trial and the ninety-day speedy trial clock started to

run when procedendo issued on December 6, 2010.[1] *See State v*. *Zaehringer*, 306 N.W.2d 792, 794-95 (Iowa 1981) (holding that a criminal case in which a mistrial or remand has occurred, absent exceptions, must be retried within ninety days after the mistrial or remand).

Trial was scheduled to begin on Tuesday, February 22, 2011. On Friday February 18, Hanes filed an "application for mental health records of alleged victim." In his application, Hanes asserted that "[b]ased upon a review of a deposition of the alleged victim, the defendant has a reasonable basis to believe the alleged victim's mental health records are likely to contain exculpatory evidence tending to create a reasonable doubt as to the defendant's guilt."

The State moved to continue the February 22 trial due to the unavailability of a witness. Hanes objected, but the court found good cause and rescheduled trial for March 1.

On the morning of March 1, counsel for Hanes asked that the court consider the application for mental health records. The prosecutor reported he had seen the application but did not have a copy.[2] The State resisted on the ground that the "discovery deadline has long since lapsed." A hearing on the application was held that afternoon, following jury selection. Counsel for Hanes explained that Taylor stated in a discovery deposition, taken in February 2008 before the first trial, that he had been diagnosed with schizophrenia and hospitalized for one month in 2005. Taylor had also stated during the deposition

[1] Ninety days would run on March 6, 2011, which was a Sunday.

[2] Counsel for Hanes reported to the court that in checking online, the application had been filed. However, counsel for Hanes did not have a filed-stamped copy, and no copy of the motion had been delivered to the State.

that he took medications for his mental health condition and had discontinued certain medicines. Counsel for Hanes asserted,

> On just my general knowledge based on internet search of schizophrenia you can suffer from hallucinations and delusions from that mental health condition, and it would be our purpose in getting these mental health records to find out specifically whether or not he suffered from hallucinations or delusions at any time prior to his diagnoses, and any time after his diagnosis that if these medications were changed or went off certain medications and what time that actually happened and whether or not those dates would coincide with the date of the incident.
>
> . . . .
>
> So there is a lot there that we would like to try to get into that either Mr. Taylor didn't reveal in his depositions or simply didn't recall, and we feel that the medical records might reveal that information and that information might—might buttress Mr. Hanes claims that Mr. Taylor—Mr. Taylor was suffering from some symptoms of the—of the mental health condition that he has and that—wouldn't really call that a motive but rather an explanation as to why Mr. Taylor would start this particular incident. We feel that it is extremely important to Mr. Hanes's case because frankly without it, Mr. Hanes is simply going to be left with this guy started punching for no reason and Mr. Hanes acted in self-defense, and we know that the history is out here.

Counsel for Hanes cited *State v*. *Cashen*, 789 N.W.2d 400 (Iowa 2010), as authority for the request, but acknowledged the timing was "problematic" and outlined the procedural steps necessary under *Cashen*. He also stated, "[I]t is going to be difficult for us to do in the middle of trial, but that's what we at least would like the opportunity to try to do."

The State resisted, asking that the application be denied as "untimely and without foundation."

> The problem here is that there is a motion being made the morning we selected a jury, and the state has been forced into trial by the defendant's refusal to waive speedy trial. It is an issue that came up in the past. It is his request that we go to trial today and allowing this would either extend this trial an extensive amount if we are trying to go fishing for which institutions to even request records

at, and then to have there be any kind of review that's worthwhile by the defense, and the opportunity to have the same review for the state. . . .

. . . .

. . . It is an issue—even if it were permitted under the *Cashen*, and the state argues that it is not, there is an extensive protocol. There are six or seven steps, and the Supreme Court in *Cashen* recognizes the conflict between these two constitutionally-protected rights. The defendant's right to a fair trial and the society's right to privileged confidential information. And the state says for these privileged records to be made available in a criminal proceeding, a certain protocol must be followed. Must be followed.

. . . .

First of all, there has to be showing laid by the defendant. A specific factual showing made by the defendant in a motion that there is a reasonable basis to believe that records are likely to contain exculpatory evidence and cite to the deposition of the victim in this particular case. That's how *Cashen* came about. There was a deposition in that particular case as well, but the information contained in those depositions vastly different. In *Cashen* there was an admission by the victim to prior assaults against the defendant. There was admission of psychological issues that explain the prior assaults, and a post-trauma stress disorder and an admission of becoming easily frustrated and having difficulty controlling impulsive behavior.

We have the deposition in this particular case and a trial transcript that was made on this exact issue when there was an offer-of-proof in the first trial to get this information in, and nothing in either the deposition or the trial transcripts suggests that there is a reasonable basis to believe these confidential records would include anything that would be exculpatory to the defendant. [Taylor] did admit in 2005, two years before the incident, he had been hospitalized with schizophrenia. They go on to question both of these parents regarding his treatment program. By all the testimony that is available to base this request on, he was compliant with the treatment program, he was taking his medication as required, and he had had no further difficulties. They specifically asked about this particular date in question, and the testimony in the deposition and the offer-of-proof during the trial establishes that no, he was having no difficulties at this time. There is not, based upon that record which is the only record we have available, any rational belief that searching for mental health issues is going to come up. . . .

. . . .

. . . And it was raised at the first trial. They attempted to get into the victim's mental health status in the first trial as well. There was an offer-of-proof. There were—There was testimony taken

> from Mr. Taylor both in form of his deposition and at trial. There was testimony taken from both of Mr. Taylor's parents in forms of an offer-of-proof at trial, talking about his mental health issues, his treatment and medication, and nowhere in any of that testimony is there anything remotely close to saying that he was suffering from anything at the time. All the information is 2005 he had been diagnosed and successfully medicated since that time. It is in the record already. I certainly can provide page numbers for the prior transcripts if the court would like. Otherwise we can make photo copies of it. But there was an offer-of-proof of Nathan Taylor that began on 92. And offers-of-proof on both Mr. Taylor's parents regarding these issues again on page—starting on page 119 and continuing through page 133. The motion at that time was denied by Judge Fister as there was no relevancy shown from the testimony established there that Mr. Taylor's prior diagnosis of schizophrenia in 2005 had any bearing on his abilities to perceive the event on that particular date. I frankly believe, Your Honor, that the motion itself is incredibly untimely. It would cause an enormous amount of prejudice if it was granted at this point in time, and they don't even satisfy foundational requirement from *Cashen*.

The district court ruled that the defendant could question Taylor about prescription medication and alcohol consumption as it "goes to his competency and his ability to remember the events." With respect to the witness's mental illness, "The mental illness and the other matters [such as having been involuntarily hospitalized] are not relevant at this time and an offer of proof would need to be given before the defendant goes into those matters."

Just before defense counsel was to make an opening statement, Hanes invoked his right to self-representation. An extensive and detailed colloquy followed Hanes's request, after which the court found that Hanes knowingly, intelligently, and voluntarily waived his right to be represented by an attorney. Former defense counsel was appointed as stand-by counsel for Hanes.

The trial continued with Taylor testifying as to the events of April 28, 2007. Taylor's step-father and mother testified that they had each seen Taylor that

morning, he had no injuries, and he was not acting agitated or angry. Hanes asked Taylor, his step-father, and his mother about Taylor being on medications, which they acknowledged and testified he was taking them as prescribed.

Sherrie Jones testified that on April 28, she came upon Taylor who "looked distressed" and was bleeding from the mouth. When she asked if he was okay, he told her he "was jumped by someone with a knife," and she called 911. Brian Weldon of the Waterloo police department testified he responded to a report of a stabbing victim on April 28, 2007, and talked with Taylor. Taylor told Officer Weldon that the person who stabbed him was a black male, wearing all black clothing, and was heading north toward Lincoln Park. Officer Weldon learned later that another officer, Officer Stephen Crozier, had a suspect in custody who matched that description. Officer Weldon identified the defendant as the person Officer Crozier had in custody. Hanes had a knife when taken into custody, but it did not have a black or dark blade as described by Taylor. Upon testing, the knife Hanes had in his possession did not show blood. One of Hanes's shoes, however, did have blood on it, which matched Taylor's.

The district court, on March 3, 2011, entered a written ruling finding the defendant had produced "no evidence to show that Nathaniel Taylor's mental health records were likely to contain exculpatory evidence tending to create a reasonable doubt as to the defendant's guilt."

Hanes was convicted as charged and now appeals, contending his due process rights were violated by the denial of Taylor's mental health records.

II. Scope and Standard of Review.

Ordinarily, we review discovery orders for an abuse of discretion. *Cashen*, 789 N.W.2d at 405. "However, to the extent the issues in this case involve constitutional claims, our review is de novo. Because the issues in this case rest on constitutional claims involving [the defendant's] due process right to present a defense, our review is de novo." *Id.* (internal citation omitted).

III. Discussion.

In *Cashen*, the defendant was charged with domestic abuse assault and willful injury, and claimed self-defense. *See id.* at 403-04. The district court denied the State's motion in limine, which sought to exclude the complaining witness's mental health records, finding her mental health history—"specifically her propensities for violence and explosive behavior"—relevant to Cashen's defense of self-defense. *Id.* at 404. The State was granted discretionary review, *see id*.; the supreme court "adopt[ed] a protocol that balances a patient's right to privacy in his or her mental health records against a defendant's right to present evidence to a jury that might influence the jury's determination of guilt." *Id.* at 403.

The first step in that protocol was described in *Cashen*, as follows:

> First, we want to emphasize that a defendant is not entitled to engage in a fishing expedition when seeking a victim's mental health records. Before a subpoena may issue for a victim's privileged records, the defendant must make a showing to the court that the defendant has a reasonable basis to believe the records are likely to contain exculpatory evidence tending to create a reasonable doubt as to the defendant's guilt. In doing so, the defendant need not show the records actually contain information for establishing the unreliability of a charge or witness. A defendant need only advance some good faith factual basis indicating how the records are relevant to the defendant's innocence. Thus, to begin

> this process, a defendant's counsel[3] must file a motion with the court demonstrating a good faith factual basis that the records sought contain evidence relevant to the defendant's innocence. The motion shall be marked confidential, filed under seal, and set forth specific facts establishing a reasonable probability the records sought contain exculpatory evidence tending to create a reasonable doubt as to the defendant's guilt. The motion shall also request the court issue a subpoena requiring the custodian of the records to produce the records sought by the defendant. Defendants or their attorneys shall not subpoena a victim's privileged records without a court order.

Id. at 408 (citations omitted).

Here, as in *Cashen*, Hanes asserted a claim of self-defense and sought Taylor's mental health records because they might provide some support for Hanes's claim that Taylor assaulted him first. The request was based upon defense counsel's "general knowledge based on internet search of schizophrenia you can suffer from hallucinations and delusions from that mental health condition."

The district court ruled that Hanes's motion did not show Taylor's mental illness was relevant and Hanes would be required to make a further offer-of-proof. The court later ruled that Hanes had failed to make the showing required in *Cashen*.

Upon our de novo review of the record, we conclude Hanes did not make a sufficient showing that Taylor's mental health records contained evidence relevant to the defendant's justification defense. While the record reflects Taylor had been diagnosed with schizophrenia some two years before the assault in question, there is no indication Taylor experienced hallucinations or had

[3] The *Cashen* court specifically expressed "no opinion as to the applicability of this protocol when the defendant is self-represented." *Id.* at 408 n.2.

propensities for violence. Hanes cross-examined witnesses regarding Taylor's compliance with prescribed medication, but nothing in the record suggests Taylor was not taking his medications as prescribed. His mother and step-father noted no unusual behaviors. Having failed to make the necessary threshold showing, the *Cashen* protocol was stalled. Hanes never made a further offer of proof as to the relevance of Taylor's mental health. We therefore affirm.

AFFIRMED.