IMPORTANT NOTICE
NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD ADEQUATELY ADDRESS THE ISSUE BEFORE THE COURT. OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.

RENDERED: APRIL 23, 2009
NOT TO BE PUBLISHED

FINAL
DATE 5/14/09 Kelly Keaber D.C.

Supreme Court of Kentucky

2007-SC-000929-MR

DONALD THOMAS — APPELLANT

V.

ON APPEAL FROM MCCRACKEN CIRCUIT COURT
HONORABLE R. JEFFREY HINES, JUDGE
NO. 06-CR-00001

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant, Donald Thomas, was found guilty but mentally ill by a McCracken Circuit Court jury of rape in the first-degree and was sentenced to fifty years imprisonment. He appeals to this Court as a matter of right, Ky. Const. §110, arguing that his conviction should be reversed and remanded for a new trial because the trial court denied his discovery requests for the psychotherapy records of the victim. Appellant contends that the ruling violated his right to due process and a meaningful opportunity to present a defense. For the reasons set forth herein, we now affirm Appellant's conviction and sentence.

In September, 2005, the Cabinet for Families and Children began an investigation into a report that B.M., a twelve-year-old girl, was pregnant by her uncle, Appellant. Her pregnancy was confirmed shortly thereafter. At the time, B.M. and her siblings lived with Appellant and his wife. Initially, B.M. denied to investigators that Appellant had intercourse with her, claiming that a

boy from her former school was the father of her baby. However, a DNA test performed after the baby was born, confirmed that Appellant was the father. Appellant was indicted for rape in the first-degree under KRS 510.040(1)(b)(2) for having sexual intercourse with a child under twelve.

Prior to trial, Appellant sought discovery of B.M.'s psychotherapy counseling records from the Purchase Area Sexual Assault Clinic ("PASAC"), a counseling service for rape victims, where B.M. had been counseled by a certified psychologist. PASAC filed a motion to quash Appellant's filed subpoena, which sought discovery of the records, arguing that the records were privileged. Appellant argued that the records would be crucial to his cross-examination of B.M. because they would contain her statements that she and Appellant never had intercourse. The trial court granted PASAC's motion finding the records were privileged under either KRE 506 or KRE 507 as applied in Commonwealth v. Barroso, 122 S.W.3d 554 (Ky. 2003), and quashed Appellant's subpoena for the records.

At trial, Appellant presented an insanity defense. Now on appeal, Appellant argues that he should have been granted access to B.M.'s psychotherapy records because they may contain evidence to support his insanity defense, and that without the records his defense was critically impaired.

Appellant asserts that the privilege invoked at trial to block his access to B.M.'s mental health records should have been the qualified counselor-client

privilege of KRE 506 and not the absolute psychotherapist-patient privilege of KRE 507. The Commonwealth argues that the psychotherapist-patient privilege applies because the therapist who counseled B.M. was a certified psychologist. We conclude that, under the facts of this case, it is immaterial whether the privilege is qualified or absolute because both privileges yield to a defendant's right to compulsory process if he presents a proper preliminary showing of a reasonable belief that the records contain exculpatory evidence. Barroso, 122 S.W.3d at 564. The issue here is whether Appellant made such a showing. Upon review of the record, we conclude that he did not.

In support of his attempt in the trial court to obtain the records, Appellant claimed that they "might contain evidence which is exculpatory in nature." He made no direct reference to the trial court that the records were needed to establish his insanity defense. He now suggests that his vague statement that the records "may provide valuable information about the time, place, and manner of the offense that may be used to aid the defense" fairly apprised the trial court of that need. He acknowledges that the "main thrust" of his argument to the trial court was the need for evidence to impeach the credibility of B.M. through her contradictory statements about having intercourse with Appellant. The DNA test that confirmed Appellant's paternity of the baby effectively rendered moot that argument.

Based on Appellant's vague argument, the trial court held that Appellant had not shown a reasonable belief that the records contained exculpatory

evidence. Barroso, 122 S.W.3d at 563. Appellant had not satisfied the standard. The trial court held that:

> [t]here is no evidence that [B.M.] suffers from a condition which impairs her ability to recall, comprehend, and accurately relate the subject matter of her anticipated testimony at trial. In light of [B.M.'s] initial denial of intercourse with the defendant, which has been disclosed to the defendant, there is no reasonable expectation that the records contain further exculpatory evidence.

Accordingly, the trial judge declined to conduct an *in camera* review of the records. Whether sufficient evidence has been presented to raise a reasonable belief that psychotherapy records contain exculpatory evidence is left to the discretion of the trial court. Id. at 564.

The trial court did not abuse its discretion when it rejected Appellant's effort to examine B.M.'s mental health records.

Further, because Appellant did not argue before the trial court that B.M.'s psychotherapy records were crucial to his insanity defense, we conclude that his argument was not preserved for review by this Court. Kennedy v. Commonwealth, 544 S.W.2d 219, 222 (Ky. 1976). (Holding "the appellant will not be permitted to feed one can of worms to the trial judge and another to the appellate court.") Notwithstanding his failure to squarely present the issue to the trial court, we find his argument that B.M.'s confidential records could contain information crucial to the issue of *his* mental health unpersuasive. In Barosso, we announced a departure from the standard set in Eldred v.

Commonwealth, 906 S.W.2d 694 (Ky. 1994),[1] and instituted "a more restrictive test to preclude fishing expedition[s] to see what may turn up." Barosso, 122 S.W.3d at 563. Under that new standard, the confidentiality of a witness's psychotherapy records may be breached for an *in camera* review only upon receipt of evidence sufficient to establish a reasonable belief that the records contain exculpatory evidence. Id. at 564. Appellant presented nothing to the trial court or to this Court which satisfies that standard.

Accordingly, we affirm the judgment and sentence of the McCracken Circuit Court.

All sitting. All concur.

COUNSEL FOR APPELLANT:

Shelly R. Fears
Assistant Public Advocate
Department of Public Advocacy
100 Fair Oaks Lane, Suite 302
Frankfort, Kentucky 40601-1133

COUNSEL FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

Todd Dryden Ferguson
Assistant Attorney General
Office of the Attorney General
Criminal Appellate Division
1024 Capital Center Drive
Frankfort, Kentucky 40601-8204

---

[1] **Eldred** held that "articulable evidence that raised a reasonable inquiry of a witness's mental health history" was sufficient to warrant an *in camera* review of the privileged records.