No. _____

In The

Supreme Court of the United States

Rene Gosselin

petitioner

v.

COMMONWEALTH OF MASSACHUSETTS

respondent

On Petition for a Writ of Certiorari
to the Massachusetts Supreme Judicial Court

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Does a criminal defendant have a Fourth Amendment right of privacy in his medical provider's records, such that the Third Party Doctrine does not apply to the defendant-patient's medical records?

RELATED CASES

Commonwealth v. Gosselin, No. 0873CR0657, Bristol Superior Court. Judgment entered May 4, 2012. Motion for New Trial denied January 10, 2019.

Commonwealth v. Gosselin, SJC-11598, Massachusetts Supreme Judicial Court. Judgment entered November 19, 2020. Motion for Reconsideration denied on January 25, 2021.

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PETITION FOR A WRIT OF CERTIORARI

Rene Gosselin respectfully petitions this Court for a writ of certiorari to review the judgment of the Massachusetts Supreme Judicial Court.

OPINION BELOW

The trial court decision on the motion for new trial was not published.

The opinion of the highest state court to review the merits, the Supreme Judicial Court of Massachusetts, is reported at Commonwealth v. Gosselin, 486 Mass. 256 (2020).

JURISDICTION

The judgment of the Supreme Judicial Court of Massachusetts was entered on November 19, 2020. On December 10, 2020, the Court allowed the defendant's motion to file a late Motion for Reconsideration. The Court denied the Motion for Reconsideration on January 25, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

RELEVANT CONSTITUTIONAL PROVISION

The Fourth Amendment to the United States Constitution states, "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.."

STATEMENT OF THE CASE

A. Factual History

The defendant was convicted of First Degree Murder, for which there is no possibility of parole in Massachusetts. The case is before the court as a consolidation of his direct appeal and the appeal of the denial of his motion for new trial.

On February 15, 2008, Frederick Thompkins was found dead in his Fall River, Massachusetts apartment. His body was on his living room floor, in a pool of blood. The cause of death was blunt force trauma. The medical examiner testified he had been dead for several days, perhaps as much as a week.

Police located a pair of eyeglasses "peeking out from underneath the couch." They initially believed that these were Thompkins' glasses. The left lens was intact, but the right lens was found near Thompkins' feet. There was blood splatter on the outside of the left lens. DNA testing showed that Thompkins matched the major profile and the defendant was a potential contributor to the DNA mixture.

In addition to the blood splatter, Thompkins' fingerprint was found on the outer side of the left eyeglass lens. A detective opined from visual examination that the reddish-brown print looked like "blood." DNA testing of that substance showed Thompkins was the major contributor. There was another person's DNA mixed in, but it was insufficient to determine anything more.

The defendant was a friend of Thompkins and had visited Thompkins' apartment in the past. In the course of the police investigation, they questioned the defendant as well as all of Thompkins' other friends and family.

At some point the investigation focused on the defendant. The police obtained his cellphone records. They revealed that on February 8, 2008, the defendant called Thompkins at 4:04 p.m., and Thompkins called back at 4:56 p.m. This was the last call made from Thompkins' phone.

The next call from the defendant's phone was at 5:37 p.m. to 411, which connected the defendant to 508-984-4062. The defendant called that same 508-984-4062 number a second time, at 6:02 p.m. Police would later learn this number was that of the Vision Center at a local Walmart, although the significance of this fact was not then readily apparent to the police.

The police decided to ask the defendant to come in for a second round of questioning. In this second interrogation the defendant mentioned that he may have left his glasses in Thompkins' apartment the last time he visited. He had purchased those glasses, and had had his eyes examined, at the Walmart in Dartmouth.

An Assistant District Attorney (ADA) was monitoring the interrogation at the Fall River Police station. The ADA already knew from the defendant's phone records that the defendant had called Walmart Optical around the time the police believed Thompkins was murdered. As the interrogation continued, it "gelled" to the investigators that they "really needed to get" the defendant's records from Walmart. "It just kind of unfolded like that all of a sudden."

While the defendant was still being interrogated, State Police Trooper David Coker and Fall River Detective Thomas Chase were "immediately" dispatched to Walmart. However, Walmart refused to produce the records, stating it wanted a

Grand Jury subpoena or a search warrant.

Learning this, the ADA typed up a grand jury subpoena in the police station. It commanded the production of "any and all documents, including, but not limited to eyeglass prescriptions, relating to Rene Gosselin (DOB *redacted*), and log of all calls received on February 8, 2008." The ADA further inserted language that instead of appearing before the grand jury, the recipient of the subpoena could alternatively comply with it by immediately providing the requested materials to the trooper serving the subpoena.

Trooper Coker returned to the police station, retrieved the subpoena, and served Walmart around 1:00 p.m. Walmart gave the trooper a copy of the defendant's medical records and a duplicate pair of frames matching the frames the defendant had purchased. The medical records included an intake record that has a section entitled "VISUAL AND MEDICAL HISTORY." That section lists fifteen medical conditions[1] and asks whether the patient has any of those conditions. It separately asks whether any members of the patient's immediate family have any of those conditions. It further asks about the patient's medications and allergies, and whether the patient has any difficulty driving at night.

Upon receiving the medical records and frames, Trooper Coker drove to the State Crime Lab and obtained the lenses and frames found in Thompkins' apartment.

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[1] The fifteen enumerated conditions are: "Diabetes, High blood pressure, Cataracts, Heart problems, Respiratory problems, Thyroid problems, Glaucoma, Loss of Vision, Retinal detachment, Eye surgery, Lazy eye, Double vision, Blindness, Head/eye injury, Headaches."

From there he proceeded to a local LensCrafters, where an optometrist compared the Walmart prescription to the lenses found in Thompkins' apartment. The optometrist opined they were the same prescription. Coker himself compared the duplicate frames from Walmart to the frames found in Thompkins' apartment, and concluded they were the same model. Id.

B. Procedural History

The defendant's trial counsel did not raise a Fourth Amendment privacy claim prior to trial, relative to the prosecution using a grand jury subpoena to obtain the defendant's medical records. The matter proceeded to trial by a jury on April 17, 2012 in Bristol Superior Court. The primary issue at trial was the identity of the perpetrator.

The jury convicted the defendant and an appeal was timely filed. Instant counsel successfully stayed the direct appeal and brought a motion for new trial that raised several issues, including the Walmart Fourth Amendment issue. Citing to Carpenter v. United States, 138 S. Ct. 2206 (2018), as well as other cases, the defendant argued that he had a reasonable expectation of privacy in his medical records held by a third party such as Walmart. He argued that it was improper to use a grand jury subpoena to obtain the defendant's medical records. The defendant analogized that his privacy interests in his medical records is as great, if not greater, than the cell site information of the defendant in Carpenter v. United States, 138 S. Ct. 2206, 2219 (2018). As such, as in Carpenter, the Commonwealth needed to demonstrate probable cause and obtain a search warrant for the medical records.

The trial judge conducted an evidentiary hearing on the motion for new trial and wrote a 28-page decision. On this issue, the motion judge wrote that under the Third Party Doctrine, the defendant had no "legitimate expectation of privacy" in his optical information as contained in Walmart's records. *See* A-29-31 (Memorandum pages 17-19). In the consolidated direct appeal and appeal of the denial of the motion for new trial, the Massachusetts Supreme Judicial Court affirmed that holding. A-7-8 (Commonwealth v. Gosselin, 486 Mass. 256, 263-264 (2020)).

Reasons for Granting the Petition

I. FEDERAL AND STATE COURTS ARE DIVIDED OVER WHETHER A PATIENT HAS A FOURTH AMENDMENT RIGHT TO PRIVACY IN HIS MEDICAL PROVIDER'S RECORDS AND WHETHER THE THIRD PARTY DOCTRINE APPLIES TO MEDICAL RECORDS.

There is a significant split in the United States Courts of Appeal, and in the courts of last resort of the several states, in regard to whether a patient has a reasonable expectation of privacy in his medical records, and whether the Third Party Doctrine applies to medical records.

A. Jurisdictions holding there is a right of privacy in medical records

i. Federal Caselaw

At a minimum, the Second, Third, Fourth, and Tenth Circuit Courts of Appeal have ruled that a patient has a Fourth Amendment reasonable expectation of privacy in his medical records.

Perhaps the most significant of those decisions is Doe v. Broderick, 225 F.3d 440, 450-452 (4th Cir. 2000), where the court held a police officer subject to personal

liability under 42 U.S.C. § 1983, for obtaining medical records stored in a methadone clinic without probable cause. The Court held that this violated the Fourth Amendment because Doe had a reasonable expectation of privacy in the clinic's records. Id. at 450. According to the Court,

> The reason for this is apparent: medical treatment records contain intimate and private details that people do not wish to have disclosed, expect will remain private, and, as a result, believe are entitled to some measure of protection from unfettered access by government officials. Id. at 451.

In Doe v. New York, 15 F.3d 264, 267 (2nd Cir. 1994), the Court cited Whalen v. Roe, 429 U.S. 589, 599 (1977) as establishing a right of privacy that protects, "the individual interest in avoiding disclosure of personal matters." In holding that one has a constitutional right of confidentiality, the court stated, "there are few matters that are quite so personal as the status of one's health, and few matters the dissemination of which one would prefer to maintain greater control over." Id.

In Doe v. Southeastern Pennsylvania Transp. Auth., 72 F.3d 1133, 1138 (3rd Cir. 1995) the Court held that there was a constitutional right of privacy in one's medical records. The court noted that due to advancements in the medical field at that time, "[i]t is now possible from looking at an individual's prescription records to determine that person's illnesses, or even to ascertain such private facts as whether a woman is attempting to conceive a child through the use of fertility drugs. This information is precisely the sort intended to be protected by penumbras of privacy."

In Douglas v. Dobbs, 419, F.3d 1097, 1100 (10th Cir. 2005), the Court likewise cited to Whalen as supporting that there is a Fourth Amendment right of privacy in one's medical records.

ii. State Caselaw

In State v. Skinner, 10 So.3d 1212, 1218 (La. 2009), the Court held that there was a "right to privacy in one's medical and prescription records." The Court stated that the "right to privacy in one's medical and/or prescription records is an expectation of privacy that society is prepared to recognize as reasonable." Id. The court held that the state could not conduct warrantless searches of medical and pharmacy records for criminal investigative purposes. Id. In reaching that conclusion, the court stated, "a majority of the federal Circuit Courts of Appeal have concluded the constitutional right to privacy extends to medical and/or prescription records." Id. at 1217.

B. Jurisdictions holding there is no right of privacy in medical records

i. Federal Caselaw

Jarvis v. Wellman, 52 F.3d 125 (6th Cir. 1995) is a 42 U.S.C. § 1983 case. The Sixth Circuit held that, "[d]isclosure of plaintiff's medical records does not rise to the level of a breach of a right recognized as 'fundamental' under the Constitution." Id. at 126.

ii. State Caselaw

In State v. Guido, 698 A.2d 729, 733 (R.I. 1997), the Court held, "we are of the opinion that defendant has no legitimate Fourth Amendment expectation of privacy

in Rhode Island Hospital's medical records relating to his emergency treatment following his near fatal automobile collision."

In the instant case, the Massachusetts Supreme Judicial Court ruled that, "[p]ursuant to the third-party doctrine, the Commonwealth did not search, in the constitutional sense, the defendant's ophthalmological records when subpoenaing them from Walmart because he has no reasonable expectation of privacy in his optical prescription retained by Walmart in order to complete his purchase of eyewear. See Carpenter v. United States, 138 S. Ct. 2206, 2219 (2018)." Commonwealth v. Gosselin, 486 Mass. 256, 263 (2020).

Several courts have held that one does not have a Fourth Amendment right of privacy in blood alcohol tests performed by their medical providers in the course of treatment. State v. Davis, 161 N.H. 292, 298 (2010); State v. Huse, 491 S.W.3d 833, 841 (Tex. Crim. App. 2016); People v. Perlos, 436 Mich. 305, 329 (1990).

II. THE MASSACHUSETTS COURT WAS INCORRECT IN NOT RECOGNIZING THAT THIS COURT'S RULINGS INDICATE THE CONSTITUTION AFFORDS MEDICAL RECORDS A GREAT DEGREE OF PRIVACY

The defendant argued below that this court's holding in Ferguson v. City of Charleston, 532 U.S. 67 (2001) supports that there is a Fourth Amendment right of privacy in one's medical records. The Massachusetts Supreme Judicial Court disagreed. Commonwealth v. Gosselin, 486 Mass. 256, 263, 264 n.8 (2020).

In Ferguson, a public hospital enacted a policy in cooperation with law enforcement wherein it would conduct urine screens on expectant mothers who were suspected of using cocaine. Ferguson v. City of Charleston, 532 U.S. 67, 70-71 (2001).

The immediate objective of the urine screen was to generate evidence for law enforcement purposes. Id. at 83 and 83 n.20. The screens were not done for routine medical purposes, but, rather, for the specific purpose of obtaining incriminating evidence. Id. at 85. Law enforcement personnel were given access to the medical files of those women who tested positive. Id. at 82. The petitioners in Ferguson were ten women who were arrested after testing positive for cocaine. Id. at 73. They contended the policy violated the Fourth Amendment. Id. at 73-74, 84-85.

The Court started its analysis by recognizing that the women had a right of privacy in their medical records. Ferguson, 532 U.S. at 78. The Court stated that,

> The reasonable expectation of privacy enjoyed by the typical patient undergoing diagnostic tests in a hospital is that the results of those tests will not be shared with nonmedical personnel without her consent. Ferguson v. City of Charleston, 532 U.S. 67, 78 (2001).

The government argued in Ferguson that, notwithstanding the right of privacy in medical information, the police should be able to acquire that information without a warrant because there was a "special need" for it. 532 U.S. at 79. The Court rejected that argument, stating that in its prior cases where it had found a "special need" to obtain medical information without a warrant, the reason for producing it was, "divorced from the State's general interest in law enforcement." Id.

Accordingly, the Ferguson Court held that the dissemination of the test results to the police violated the Fourth Amendment. 532 U.S. at 85-86.

Missouri v. McNeely, 569 U.S. 141 (2013) also supports a Fourth Amendment right of privacy in one's medical records. McNeely concerned the prosecution of a drunk driving defendant. Id. at 145. The government argued that it should always be

entitled to draw blood from a suspected drunk driver without obtaining a warrant. Id. at 151. It argued that one's blood alcohol level is continuously dissipating, and that therefore the "exigency exception" to the warrant requirement always applied. Id. at 163 The Court rejected the government's request for a per se rule that the exigency exception always applied. Id. at 165. The court stated, "the Fourth Amendment will not tolerate adoption of an overly broad categorical approach that would dilute the warrant requirement *in a context where significant privacy interests are at stake*." Id. at 158 (emphasis added).

As stated in State v. Little, 23 N.E.3d 237, 249 (Ohio App. 2014), the holding in McNeely is instructive because, "it directs us to prevent the dilution of the warrant requirement in cases where a patient's federally recognized privacy interest in his or her medical records is at stake and no reasons exist to diminish that privacy interest."

III. THE MASSACHUSETTS COURT WAS INCORRECT IN HOLDING THAT THE THIRD PARTY DOCTRINE APPLIES TO MEDICAL RECORDS

Under the "Third Party Doctrine," an individual has no Fourth Amendment right of privacy in information about himself that is maintained by another entity, because: the record where the information is stored is owned by the entity, not the person; the nature of the information is such that the individual had a limited expectation of privacy in it; and the entity's personnel are "exposed" to the information in the ordinary course of business. Carpenter v. United States, 138 S. Ct. 2206, 2216 (2018). For the Third Party Doctrine to *not* apply, the individual must

have a subjective expectation of privacy in the information, and that expectation must be one that, "society is prepared to recognize as reasonable." Id.

In Carpenter, the Court held that a warrant was required to obtain cell site location information (CSLI) from a wireless carrier because individuals have a "reasonable expectation of privacy in the whole of his physical movements." Id. at 2219.

The Massachusetts Court ruled that the holding in Carpenter, that the Third Party Doctrine did not apply to CSLI, was not applicable to the instant case. Commonwealth v. Gosselin, 486 Mass. 256, 263 (2020). The Court stated that there was a reasonable expectation of privacy in CSLI information because that information can be aggregated to create a "complete mosaic" of one's life. Id. The same cannot be said of optical records, the court held. Id. at 264.

The Court was incorrect. The instant case is the natural sequalae to Carpenter. If Mr. Carpenter had a reasonable expectation of privacy under the Fourth Amendment as to the physical location of his body as held by his phone company, then Mr. Gosselin had an *even greater* reasonable expectation of privacy in the medical information about his body as held by his doctor. One's medical information reveals a similar "complete mosaic" about the most intimate details of one's life, such as the patient's sexual practices, mental health, drug and alcohol usage/abuse, family medical history, non-apparent physical and mental diagnoses, and the patient's social relationships.

The Carpenter court held that the fact that the "deeply revealing" CSLI was gathered by a third party "does not make it any less deserving of Fourth Amendment protection. Carpenter v. United States, 138 S. Ct. 2206, 2223 (2018). The same can be said for one's medical information.

IV. THIS CASE PRESENTS AN IDEAL VEHICLE FOR RESOLVING THE CONFLICT

As stated above, there is a conflict among the courts as to whether a patient has a Fourth Amendment right to privacy in one's medical records. This case is particularly suitable for resolving the issue of whether the Third Party Doctrine applies to such records, due to the seriousness of the conviction (first degree murder, life sentence, no possibility of parole) and the role that the defendant's medical records played at trial. The recitation of the facts herein focused on the instant Fourth Amendment issue. The defendant acknowledges that there was additional evidence against him at trial. Nevertheless, the blood-splattered eyeglasses found at the scene was highly incriminating evidence and the result at trial may not have been the same had the glasses not been linked to the defendant through his medical records.

Conclusion

The petitioner Rene Gosselin respectfully requests that the Court grant his Petition for a Writ of Certiorari.

Respectfully submitted,
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by his counsel,

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