

FILED
OCT 30 2007
3:42 PM
COURT CLERK

Rec'd 9 Feb 07

Ordered Filed

30 Oct 07

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WASHINGTON COUNTY FIFTH DISTRICT COURT
STATE OF UTAH

<p>STATE OF UTAH, Plaintiff,</p> <p>vs.</p> <p>WARREN STEED JEFFS, Defendant.</p>	<p>OBJECTION TO AND REQUEST FOR CLARIFICATION REGARDING PROPOSED ORDER ALLOWING CONFIDENTIAL AND PRIVILEGED CONTACT WITH PATIENT</p> <p>(Filed Under Seal)</p> <p>Criminal No. 061500526</p> <p>Judge James L. Shumate</p>
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The State objects to the proposed order because it exceeds the defense request. The State further respectfully seeks clarification regarding the scope of certain aspects of the proposed order. Due to the limited time available to respond to the defense motion, the State did not fully anticipate all the issues related to implementing the Court's order. Hence, the State seeks the Court's direction and clarification regarding the following issues:

Defendant's Presence at the Hearing: Because the defendant's access to medical care and the confidentiality of this medical information are substantial rights that belong to him (as opposed to his counsel and his doctors), the hearing on the defense motion is a critical stage of

the proceeding. As such, defendant was entitled to be present. State v. Pando, 2005 UT App 384 ¶ 16 (*citing Tennessee v. Lane*, 541 U.S. 509, 523 (2004) (deriving a criminal defendant's right to be present at critical stages of his or her trial from the Due Process Clause of the Fourteenth Amendment and the incorporated Confrontation Clause of the Sixth Amendment)). Defendant's absence could be a basis for reversal. Id.

There is nothing in the record regarding whether the defendant knowingly waived his right to be to be present while his medical diagnosis, treatment and access to protected medical records were litigated. To guard against reversible error and to protect the record, the State asks the Court to hold an additional hearing at which defendant is present and given the opportunity to waive his appearance or be heard. This is particularly significant given defense counsel's statement that defendant's competency is not an issue.

Clarity regarding whether the defendant consents to the distribution of his protected medical information is a significant issue for both the State and PCF with respect to preserving the record and with regard to several aspects of the proposed order:

HIPAA: The first paragraph of the proposed Order states "that in furtherance of HIPAA approved communication with the patient, Warren Jeffs, no jail staff will be present when either Dr. Barlow, Dr. Bittker, or Dr. Warner meets with their patient, Warren Jeffs."

First, the federal HIPAA law was not raised in either party's memorandum. HIPAA is a complex law with unique provisions that apply specifically to Correctional Facilities. *See e.g.* 45 CFR 164.520(a)(a) and 524 (regarding notice requirements and exceptions to access). Because

no HIPAA issues were briefed by either the State or the Defense, the State objects to any reference to or reliance upon HIPAA as justification for the Court's order.

Second, under HIPAA, the patient controls access to and confidentiality of medical records. The patient must be informed in advance and have the opportunity to object or agree. 45 CFR 164.510. In this case, the defendant was not present at the hearing on the defense motion and there was no indication from defense counsel regarding whether the defendant personally consents to and authorizes PCF to distribute his medical records and information. PCF could face potential liability if it distributes a patient's medical records contrary to the patient's wishes.

Consent in General: The issue of defendant's consent is implicated by paragraphs 2, 3, 4, 5, and 6 of the proposed order as well. Those paragraphs require PCF to share defendant's medical information with multiple individuals. The defendant's consent to the distribution of protected medical records and the discussion of his medical diagnosis and treatment is implicated with regard to paragraphs 2, 3, 4, 5 and 6 just as it is with paragraph 1.

Refusal of Consent: Paragraphs 1, 2, and 3 require PCF to give certain doctors unfettered access to the defendant. However, the proposed order does not address how PCF should respond if the defendant does not wish to be examined by the proposed doctors. Inmates have a constitutionally protected liberty interest in refusing unwanted medical treatment absent specific findings related to incompetency. Cruzan v. Director, Missouri Department of Health, 497 U.S. 261, 278-79 (1990). None of those findings are present here. Indeed, defense counsel specifically stated that competency is not an issue and that the purpose for the doctor visits is

medical diagnosis and treatment. The State requests that the Court clarify whether the Order requires PCF to compel the defendant to see a doctor over the defendant's objection.

Consult With Entire Hospital/Medical Staff: Paragraph 6 of the proposed order exceeds defense counsel's request and conflicts with the orderly operation of the jail's medical protocols.

First, the Court stated that it was issuing this portion of the Order consistent with Brock Belnap's invitation. During argument, State's counsel offered the possibility of consultation with defense medical personnel only as an example of a less intrusive alternative to granting the defendant's motion for private medical treatment. Counsel never intended to consent to free ranging interviews of PCF's medical employees by agents of the defendant *in addition to* the requests in the defense motion. To the extent counsel left the Court with an impression that the State acquiesced to such an order, counsel apologizes. Such a broad based order was never contemplated, offered, or stipulated to.

Second, PCF's protocols regarding medical consultation are that nurses and other subordinate health care providers refer all requests for consult and opinion to Dr. LaRowe. This procedure is consistent with appropriate medical practice. Consequently, the State requests that at the very least, the Court modify paragraph 6 of the proposed order to require all such consultation be only with Dr. Judd LaRowe and only after defendant personally consents.

CONCLUSION

In light of the complex issues raised by the Court's proposed order and the extremely short notice with which the State was given an opportunity to respond, the State requests the Court convene another hearing as soon as reasonably possible to: 1) allow the defendant to be present and heard with respect to the issue of consent; and 2) clarify the aspects of the Court's proposed order set forth above.

Respectfully submitted this 9th day of February, 2007,



Brock R. Belnap
Washington County Attorney

CERTIFICATE OF DELIVERY

I hereby certify that, on the 9th day of Feb., 2007, I caused a true and correct copy of the foregoing document to be served as follows:

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