2020 WL 7861991 (Fla.Cir.Ct.) (Trial Order)
Circuit Court of Florida,
Eleventh Judicial Circuit.
Miami-Dade County

The STATE of Florida, Plaintiff,
v.
Ifeanyi King IBENNAH, Defendant.

No. F17-17780.
December 30, 2020.

***1** SECTION 5

Order Granting in Part, Denying in Part, Motion for Production, and in Camera Review, of Mental Health Records

Miguel M. de la O, Circuit Judge.

THIS CAUSE came before the Court on Defendant, Ifeanyi King Ibennah's ("Ibennah"), Motion for Production and *In Camera* Review of Mental Health Records of Alleged Victim ("Motion"). The Motion was served on October 26, 2020. The State of Florida ("State") served its Response to the Motion on November 9, 2020, and Ibennah filed a Reply November 23, 2020. The Court has reviewed the various filings, heard argument of Counsel, reviewed documentary and audio evidence, and is fully advised in the premises. The Motion is **GRANTED in part, DENIED in part**.

The State has charged Ibennah with violating Florida Statutes section 794.05, which makes it unlawful for a person over the age of 24 to engage in sexual activity with a person 16 or 17 years of age (colloquially referred to as "statutory rape").

Ibennah seeks mental health records of the alleged victim in this case ("T.P."). Ibennah asks that the records be produced *in camera* so that this Court can review them for information relevant to his defense. The State has conceded that the Court may review records related to T.P.'s involuntary hospitalizations pursuant to the Baker Act. However, the State objects to the production of non-Baker Act records, even for *in camera* inspection, on the authority of Florida Statutes section 90.503 ("Psychotherapist-patient privilege") and *State v. Famiglietti*, 817 So. 2d 901 (Fla. 3d DCA 2002).

The Court starts with what should be an uncontroversial observation, *Famiglietti* is a mess. Not the legal analysis, of course. The plurality, concurrences, and dissent are written by brilliant jurists, and their combined acumen shines through. What remains a mess nearly two decades later is the guidance which trial courts should decipher from the various opinions. Sitting *en banc*, five judges (out of eleven which comprised the Third District Court of Appeal at the time) issued the plurality opinion. A sixth judge (Judge Ramirez) agreed with the result while disagreeing that the psychotherapist privilege is absolute, but also rejecting application of the balancing test employed by the Fourth DCA in *State v. Pinder*, 678 So. 2d 410 (Fla. 4th DCA 1996). A seventh judge (Judge Schwartz) also agreed with the result, but declined to address the scope of the privilege or the *Pinder* balancing test.

Consequently, a six-judge majority of the Third DCA disapproved of *Pinder*, but there was no majority support for finding that the privilege is absolute. So, what test should trial courts of the Eleventh Judicial Circuit apply? Apparently, one that is stricter than *Pinder's* but short of absolute. *See Famiglietti*, at 908 ("In my view, [the *Pinder*] test is too permissive. However, I cannot

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agree with [the majority] that the privilege is absolute; simply that under the facts of this case, I cannot conceive of anything that Famiglietti could possibly allege upon remand that would be sufficient to overcome the privilege.") (Ramirez, J., concurring).

***2** In 2018, the Third DCA again addressed the psychotherapist privilege in *J.B. v. State*, 250 So. 3d 829 (Fla. 3d DCA 2018). *J.B.* left the issue unresolved. In J.B., a panel of the Third DCA acknowledged that a plurality of the court found that the privilege was absolute, but hedged its ruling by concluding that based on the specific facts of that case there was an insufficient basis for invading the privilege, even if the *Pinder* test were applied. Nevertheless, *J.B.*, a death penalty case, gives this Court the guidance it needs because Ibennah has failed to allege more than speculation that the records he seeks will contain relevant, admissible evidence.

> We additionally conclude that, even if the more permissive or qualified test relied upon by the Fourth District [in *Pinder*] was applied to the instant case, the trial court's order would still constitute a clear departure from established law, as Barahona's request for disclosure of J.B.'s confidential and privileged psychotherapist-patient records is exactly the type of fishing expedition that this Court, the United States Supreme Court, and our sister courts have strongly cautioned against.

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Here, defense counsel merely argued that the privileged records might potentially be relevant. This argument falls short of establishing, within a reasonable probability, that the records actually contain information necessary to Barahona's defense.

Id. at 833-34. [1]

For what little it's worth, this Court would – if writing on a clean slate – join Judge Sorondo's dissent. *See Famiglietti*, at 910 ("If the attorney-client privilege is qualified, it follows that the psychotherapist-patient privilege is as well.") (Sorondo, J., dissenting). However, the Court would still deny the Motion with regards to the non-Baker Act records because, even applying the more permissive *Pinder* test, the relevance of the records Ibennah seeks are far outweighed by the alleged victim's interest in the privacy of her psychotherapy records. Ibennah's best case scenario is that the alleged victim's records would show she is prone to imagine or exaggerate events, or perhaps suffers from psychotic delusions. Such evidence in the medical records of an alleged victim would ordinarily be a fruitful area for a defense lawyer to pursue. Here, however, it is decidedly unfruitful because Ibennah himself admitted sexual contact with 16 year-old T.P., and his DNA was found in swabs of her vagina. Although Ibennah correctly notes that 1 in 1335 persons in the population at large share the same profile as the DNA found in T.P.'s vagina, it is Ibennah who admits being in a car alone with her, admits the union of her mouth with his penis, and admits his fingers touched her vagina. It is not difficult, therefore, to believe the events occurred as T.P. alleges. However, it is unnecessary for this Court to believe all parts of T.P.'s story for the purposes of ruling on the Motion.

***3** Ibennah himself has admitted to the elements of the charged crime, and T.P.'s mental health history cannot exculpate him or mitigate his actions because Florida Statute 794.05 is a strict liability crime.

> A strict liability statute imposes criminal liability regardless of fault. For example, statutory rape is a strict liability crime. *See* §§ 794.05, .021, Florida Statutes (2012) .... Under section 794.05, "[a] person 24 years of age or older who engages in sexual activity with a person 16 or 17 years of age commits a felony of the second degree." These statutes do not require the State to prove the defendant's knowledge of the minor's age, and ignorance or belief as to the minor's age is no defense.

State v. Washington, 114 So. 3d 182, 187 (Fla. 3d DCA 2012). Likewise, consent is not a defense.

> It should by now be clear through experience, as recognized in *Jones*, that there is no constitutionally protected right to the defense of consent when any person commits a lewd act on a minor. The difficulty

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> of defining exactly what "consent" consists of when the "consenting" party is a child, what might be deemed the communication of "consent" by a minor, how a minor would be expected (or required) to communicate lack of consent and determining the earliest age at which "consent" would be valid are just some of the obvious reasons why the legislature has determined this defense cannot apply in such cases.

State v. Raleigh, 686 So. 2d 621, 623 (Fla. 5th DCA 1996), *cause dismissed*, 694 So. 2d 739 (Fla. 1997). *See* *Schmitt v. State*, 590 So. 2d 404, 410–11 (Fla. 1991) ("By the same token, it is evident beyond all doubt that any type of sexual conduct involving a child constitutes an intrusion upon the rights of that child, whether or not the child consents"); *Feliciano v. State*, 937 So. 2d 818, 820 (Fla. 1st DCA 2006) ("unemancipated minors are under a statutory disability that precludes consent to sexual activity with adults.").

These facts distinguish Ibennah's case from *Traffanstead v. State*, 290 So. 3d 985 (Fla. 1st DCA 2019).[2] In *Traffanstead*, the defendant did not admit to sexual activity with the victim, and the DNA evidence was found on two items which may have been contaminated – not in the victim's sexual organ. As noted earlier, this Court agrees a balancing test should be applied, as *Traffanstead* notes. However, in light of *Famiglietti's* rejection of *Pinder's* balancing test, this Court would be hard-pressed to follow *Traffanstead*.

In light of Ibennah's admissions, and the corroboration of both his admissions and T.P.'s allegations with DNA evidence, there is no reasonable or plausible evidence that could be contained in T.P.'s non-Baker Act records.[3] Consequently, the Court grants, without objection, *in camera* production of the alleged victim's Baker Act records, but denies his request for production of all other psychotherapist records.

***4 DONE and ORDERED** in Miami-Dade County, Florida this 30th day of December 2020.

<<signature>>

Miguel M. de la O

Circuit Judge

Footnotes

1 Judge Schwartz made the same point in *Famiglietti.*
> The sole basis for the defendant's attempt to invade the secrecy of the victim's communications with her psychotherapist is the entirely fanciful suggestion that, because, for a good reason she fully explained, the victim had attempted to protect the defendant by claiming that someone else had committed an earlier assault upon her, she "might" have also made a similar admission about the present crime. Since there is nothing whatever to this line of reasoning, as to which speculative is too worthy a description, it is obvious that production may not be required even under the most permissive standard of invading the privilege imaginable, let alone the very restrictive one adopted in *Pinder*.

Id. at 908-09 (Schwartz, J., concurring in part, dissenting in part).

2 *Reh'g denied* (Feb. 7, 2020), *review denied*, SC20-319, 2020 WL 3041609 (Fla. June 8, 2020), and *review denied*, SC20-320, 2020 WL 3042038 (Fla. June 8, 2020).

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3 Any issue regarding T.P.'s competence to testify will be resolved at the time of trial, which is the relevant time period. *See Coney v. State*, 643 So. 2d 654, 655 (Fla. 3d DCA 1994) (trial court must access "the victim's competency *at the time of trial*") (emphasis in original).

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