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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1777-22

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

ANDREW CANNING,

Defendant-Appellant.

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Submitted April 18, 2023 – Decided June 19, 2023

Before Judges Messano, Rose and Gummer.

On appeal from an interlocutory order of the Superior Court of New Jersey, Law Division, Passaic County, Indictment No. 21-10-0683.

Joseph E. Krakora, Public Defender, attorney for appellant (James A. Sheehan, Assistant Deputy Public Defender, of counsel and on the brief).

Matthew J. Platkin, Attorney General, attorney for respondent (Sara M. Gregory, Assistant Attorney General, of counsel; Peter Alvino, Deputy Attorney General, on the brief).

PER CURIAM

A Passaic County grand jury returned an indictment charging defendant Andrew Canning with two counts of first-degree kidnapping, two counts of first-degree robbery, two counts of second-degree burglary, third-degree possession of a weapon for an unlawful purpose, fourth-degree unlawful possession of a weapon, fourth-degree possession of an imitation firearm for an unlawful purpose, and fourth-degree theft. The State alleged that defendant entered an empty home in West Milford looking for money. When the mother and daughter of the family returned, defendant confronted the daughter, displayed an "airsoft" firearm while demanding money and had her disrobe before handcuffing her to her bed. When her mother entered the room, defendant held them both at bay with the imitation firearm. The daughter nevertheless was able to contact police who responded to the scene and apprehended defendant in the home.

Defendant moved for the release of records maintained by the Division of Child Protection & Permanency (the Division) regarding its involvement with defendant and his family when defendant was a minor or, alternatively, to have the judge conduct an in camera review of the records. The Deputy Attorney General representing the Division opposed defendant's request.

In an oral opinion, the judge concluded that defendant's request lacked "specificity" and any "nexus" to an issue facing the court. The judge's October

12, 2022 order denied defendant's motion to access his Division files. We granted him leave to appeal.

I.

Pursuant to N.J.S.A. 9:6-8.10a (the Statute), "[a]ll records of child abuse reports . . . and all reports of findings forwarded to the child abuse registry . . . shall be kept confidential and may be disclosed only under . . . circumstances expressly authorized" by the Statute. Only those records "relevant to the purpose for which the information is required" may be disclosed, "provided . . . that nothing may be disclosed which would likely endanger the life, safety, or physical or emotional well-being of a child or the life or safety of any other person or which may compromise the integrity of a[n] . . . investigation or a civil or criminal investigation or judicial proceeding." N.J.S.A. 9:6-8.10a(a). If access to the records is denied, "the requesting entity may seek disclosure through the Chancery Division of the Superior Court." Ibid.; see Div. of Youth & Fam. Servs. v. M.S., 340 N.J. Super. 126, 130 (App. Div. 2001) (holding the Chancery Division has exclusive jurisdiction when a request for disclosure of records has been denied).

Under subsection (b)(6) of the Statute, these records may be disclosed to

> [a] court . . . upon its finding that access . . . may be necessary for determination of an issue before it, and

> such records may be disclosed by the court . . . in whole or in part to the law guardian, attorney, or other appropriate person upon a finding that such further disclosure is necessary for determination of an issue before the court . . . ."
>
> [(Emphasis added).]

"[T]he [S]tatute is designed as a 'procedural safeguard to protect victim children from unnecessary disclosure . . . which may cause the child further guilt, vulnerability or humiliation.'" N.J. Div. of Youth & Fam. Servs. v. N.S., 412 N.J. Super. 593, 636 (App. Div. 2010) (quoting N.J. Div. of Youth & Fam. Servs. v. J.C., 399 N.J. Super. 444, 447 (Ch. Div. 2006)). Additionally, "there is a need to protect those who come forward to report child abuse and neglect, which are often difficult to detect." Ibid. (citing N.J. Div. of Youth & Fam. Servs. v. J.B., 120 N.J. 112, 125–26, (1990)).

During oral argument before the Law Division judge, defense counsel alluded to "one tiny vignette of some of the trauma that [defendant] experienced" as a child and said defendant had suffered "a series of . . . traumatic experiences throughout his childhood." Counsel acknowledged that the Statute limited disclosure of the Division's records but contended our decision in State v. Bellamy, 468 N.J. Super. 29 (App. Div. 2021), allowed the court to permit a criminal defendant access to "his own" Division records.

Defense counsel told the judge he sought the Division's records "for three specific purposes": (1) "to assist in plea negotiations"; (2) "to assist the psychiatrist in evaluating [defendant] . . . either for a defense at trial or again for mitigation"; and (3) "at sentencing."[1] Counsel alternatively requested the judge conduct an in camera review before deciding whether the court should provide the records to defendant.

The Division's counsel recognized that Bellamy might apply in "some cases" but asserted there was "no proof . . . [of] any connection between [defendant's] childhood history with respect to the current crimes that he is alleged to have committed." Counsel said that if the judge were "inclined to review the Division's records or to release them," he should first conduct an in camera review, and the Division would "provide a protective order." The judge did not ask for the assistant prosecutor's position, nor did she offer one.

Approximately one week later, the judge issued his oral opinion on defendant's motion. The judge distinguished our decision in Bellamy, noting the defendant in that case was nineteen-years old at the time of the murders for

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[1] During oral argument, defense counsel referenced the motion papers filed with the judge, which indicated that a psychiatrist had already been contacted to conduct an evaluation of defendant. Those papers are not part of the appellate record, which also does not include any further information regarding defendant's retention of an expert.

which she was charged and "had spent years in the care and custody of [the Division] and some years in the care and custody of a family member who sexually abused her." In this case, defendant was thirty-years old when the crimes were committed.

The judge also noted that in Bellamy "[t]here was specificity as to the purpose with regards to the need for [the Division's] records," namely the defendant's sentence. Here, the judge found defendant's request was "more generalized than the specifics noted in Bellamy and the preparation of [defendant's] defense is not an issue before the [c]ourt." The judge found defendant had not offered any "specific nexus" between the records and the crimes charged, and so there was no "issue before" the court justifying release of the Division's records. He entered the order denying defendant's motion.

Before us, defendant reiterates the arguments he made in the Law Division, asserting that our decision in Bellamy supports the release of his Division records, and the judge's denial of his motion violated his due process rights to mount a defense to the charges. The State opposes release of the records and urges us to affirm the order, arguing the Statute permits disclosure in only two specific circumstances: (1) if a defendant is charged with crimes arising from conduct the Division investigated, see, e.g., State v. Cusick, 219

N.J. Super. 452 (App. Div. 1987); and (2) where there is already a finding of guilt, and a defendant seeks to utilize the records in mitigation at sentencing, see, e.g., Bellamy, 468 N.J. Super. at 48–49.

We ordered the Division, which was mistakenly omitted by defendant as a respondent when we granted him leave to appeal, to file a brief stating its position. The Division also urges us to affirm. While recognizing that defendant "may still yet assert a valid need" for in camera review or possibly release of the records, and that he is not required to "plead guilty for that need to arise," the Division argues defendant has failed to demonstrate that release of the records "may be necessary to an issue before the court."

We have considered these arguments and reverse and remand for further proceedings consistent with this opinion.

II.

The parties' arguments point us to most of the limited published authority on subsection (b)(6) of the Statute.

A.

In Cusick, the defendant was charged with sexually assaulting an eight-year-old victim. 219 N.J. Super. at 454. After preliminarily determining access to the Division's records on the victim "may be necessary for the determination

of the issue of credibility," the trial judge conducted an in camera review before denying the defendant's request to release the records.[2] Id. at 457–59.

> In essence, the trial court held that: (1) disclosure of the records is not essential to the resolution of any issue before the court, nor was disclosure necessary for the conduct of the proceedings, and (2) most, if not all, of the information contained in the records could be obtained from other sources through diligent investigation.
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> [Id. at 457.]

In affirming, we were

> entirely satisfied that the procedure employed by the trial court was proper in all respects. The failure to disclose the . . . records did not violate defendant's Sixth Amendment right to confront witnesses or his Fifth Amendment right of due process. The trial court's determination that these considerations did not outweigh the need for confidentiality [wa]s amply supported by the record.
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> [Id. at 459.]

The trial court's obligation to conduct an in camera review of requested Division records has been the sine qua non to deciding whether a defendant's right to access outweighs the Statute's presumption of confidentiality. In In re

[2] The defendant also sought access to records from the child treatment center that had treated the victim in the past and where she was residing at the time of trial. Id. at 455–56.

Z.W., the State appealed from an order entered without any in camera review by the judge that compelled disclosure to a criminal defendant of a psychological evaluation obtained by the Division of the minor witness to a purported sexual assault. 408 N.J. Super. 535, 536 (App. Div. 2009). We noted that "relevancy of the challenged records [wa]s not the proper inquiry." Id. at 539.

Rather, in reversing the trial court's order, we held that "courts must weigh the conflicting constitutional rights of criminal defendants to a fair trial and the confrontation of witnesses, against the State's compelling interest in protecting child abuse information and records." Ibid. (citing Pennsylvania v. Ritchie, 480 U.S. 39, 59–61 (1987)); see also N.J. Div. of Youth & Fam. Servs. v. T.H., 386 N.J. Super. 271, 281 (Ch. Div. 2006) ("An in camera review seems the most effective way to safeguard defendants' Sixth Amendment right to confront witnesses and their Fifth Amendment right of due process while avoiding a fishing expedition.")

Bellamy, however, presented an entirely different factual scenario because the "[d]efendant [wa]s the subject of [the Division's] records as well as the requestor." 468 N.J. Super. at 48. In Bellamy, prior to her resentencing,

> [the] defendant sought release of [Division] records describing the circumstances surrounding the agency's intervention in her life. She argued the records were necessary for a complete clinical evaluation by the

> psychologist whose report she intended to produce at sentencing, and that the records would support the finding of additional mitigating factors.
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> [Id. at 37.]

The trial judge denied the request, opining "that defendant was her own best historian, and that the records would not be relevant because he was limited on resentencing" by our remand order to consideration of only one mitigating factor. Id. at 38.

In reversing and remanding again for resentencing, and citing subsection (b)(6) of the Statute, we held that the defendant was "clearly entitled" to the Division's "records from her childhood," subject to the judge's "in camera inspection to determine the redactions necessary to preserve the anonymity of innocent third parties." Id. at 48. We further observed that "[w]here a defendant ha[s] the right to discovery of [Division] records to defend against criminal charges, she [wa]s entitled to them as a matter of due process." Id. at 48–49 (citing Cusick, 219 N.J. Super. at 459). We added:

> The purpose of the [S]tatute, after all, is to provide for the protection of children. The person with the greatest interest in these records is the child, not the agency. To enable defendant to access them to prepare for a sentence which to date has resulted in multiple consecutive terms, the aggregate of which far exceeds life imprisonment, seems equally a matter of due process.

> Nor should it be necessary for defendant to turn to the Family Part. In Cusick, the records were obtained in the Law Division to assist in the preparation of a defense. It would run contrary to the spirit of the [S]tatute for the very subject of [the Division's] protective services to be enjoined from compelling their disclosure in the court in which the State is proceeding against her. Defendant needed those records to assist an expert in evaluating her mental health status for the important purpose of the sentencing; in Cusick, it was a parent who needed the records for the defense of criminal charges. If the [S]tatute applies in that context, it should certainly apply here where the State is proceeding against a defendant it once protected as a child.
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> Defendant's additional argument that, regardless of the expert, the records should be made available for the judge to determine which are necessary and should be released to her in redacted form, is also convincing. A defendant who commits an offense at nineteen, an age barely out of childhood, should be entitled to redacted records for her benefit to enable her to address this sentence, arguably one of the most important events in her history.
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> [Id. at 49 (emphasis added).]

B.

It is significant for a number of reasons that, like in Bellamy, defendant is both the subject of the Division's records and the requestor of those records. Initially, we note another section of the Statute permits the Division to

> share information with a child who is the subject of a child abuse or neglect report, as appropriate to the

> child's age or condition, to enable the child to understand the basis for the department's involvement and to participate in the development, discussion, or implementation of a case plan for the child.
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> [N.J.S.A. 9:6-8.10a(c) (emphasis added).]

It is difficult to square sharing such information with a child presumably still under the custody or care and supervision of the Division while at the same time not permitting the records to be shared, subject to the court's control, with counsel for a thirty-year-old adult.

In addition, provisions of the Child Abuse Prevention and Treatment Act (CAPTA), 42 U.S.C.A. § 5106a(b)(2)(B)(viii), the receipt of federal funding is predicated on a state's certification that it "has in effect and is enforcing a State law, or has in effect and is operating a statewide program . . . that includes . . . methods to preserve the confidentiality of all" child abuse and neglect records "to protect the rights of the child and of the child's parents or guardians." Among its limited exceptions to this confidentiality mandate, CAPTA expressly provides that such "reports and records . . . shall . . . be made available to individuals who are the subject of the report." 42 U.S.C.A. § 5106a(b)(2)(B)(viii)(I).

"As of 2008, Congress and all fifty state legislatures had adopted statutes preserving the confidentiality of records relating to children under the protective

care or custody of the state." N.S., 412 N.J. Super. at 636 (citations omitted). Several of our sister states, however, expressly provide that otherwise confidential child abuse reports and records may be made available to the child named in the record.[3] See Ill. Comp. Stat. Ch. 325, § 5/11.1 (allowing disclosure to "subject of the report," which includes "any child reported to the central register . . . as an alleged victim of child abuse or neglect" (quoting Ill. Comp. Stat. Ch. 325, § 5/3)); Ind. Code Ann. § 31-33-18-2(7) (report or record "shall be made available . . . to . . . "[a]n individual named in the report who is alleged to be abused or neglected"); Me. Rev. Stat. Ann. tit. 22, § 4008(2)(D) ("A child named in a record who is reported to be abused or neglected, or the child's parent or custodian, or the subject of the report."); Mich. Comp. Laws Ann. § 722.627 (allows confidential information to be made available to "[a] person named in the report or record as a perpetrator or alleged perpetrator . . . or a victim who is an adult at the time of the request"); N.H. Rev. Stat. Ann. § 170-G:8-a ("[t]he child and the parent, guardian, or custodian of the child named in the case record"); N.Y. Soc. Serv. Law. § 422(4)(A) (making reports available

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[3] For a breakdown of each state's confidentiality laws, see Child Welfare Information Gateway (2018), Establishment and Maintenance of Central Registries For Child Abuse or Neglect Reports, U.S. Department of Health and Human Services, Children's Bureau. https://www.childwelfare.gov/pubPDFs/centreg.pdf.

to "any person who is the subject of the report or other persons named in the report").

III.

We conclude that the judge should have conducted an in camera review of the Division's records before ruling on defendant's motion. Defendant provided three legitimate reasons why the records might be relevant to his defense, either during plea negotiations, at trial via a potential expert's report, or at sentencing. More importantly, while the trial court may not involve itself in plea negotiations without express approval of the parties, <u>see</u> <u>Rule</u> 3:9-3(a) and (c), the trial itself and any potential sentence imposed on defendant are certainly "issue[s] before" the court. N.J.S.A. 9:6-8.10a(b)(6). Defendant need only demonstrate that the Division records "<u>may be necessary</u> for determination of" those issues. <u>Ibid.</u> We therefore reverse the October 12, 2022 order and remand the matter to the trial court to conduct an in camera review of the disputed records.

In doing so, the judge should bear in mind that this case is unlike <u>Cusick</u>, where a criminal defendant sought the Division's records of its investigation of the same conduct for which the defendant now was charged. That situation and others like it implicate the "[t]wo oft-cited justifications for securing th[e] level

of confidentiality . . . provided" by the Statute, specifically protecting the child victim from unnecessary disclosure of traumatic events and avoiding a chilling effect on those willing to come forward and report child abuse and neglect. N.S., 412 N.J. Super. at 636. But when the requestor of the records is also a subject of the records, the first concern loses most, if not all, significance, and the confidentiality counterweight to disclosure requires the judge to consider only the possible chilling effect on reporting. In most situations, that concern can be appropriately addressed through redaction of the records.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.

CLERK OF THE APPELLATE DIVISION