IN THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT, IN AND FOR ORANGE COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff,

CASE NO.: 48-02-CF-6371-0

vs. Division 10

NOELLE L. BUSH,

Defendant.

_____/

ORDER DENYING MOTION TO CLOSE DRUG COURT PROCEEDINGS

This matter came before the Court upon Defendant's Motion to Close Drug Court Proceedings filed on October 4, 2002. Defendant requested that all subsequent drug court proceedings in this matter should be closed to the public in order to preserve her right to privacy in her health care information and to a fair trial. The *Orlando Sentinel* and the *South Florida Sun-Sentinel* (hereinafter referred to as "the *Sentinel*"), both newspapers published in the State of Florida, opposed Defendant's motion. As mentioned in an order rendered last week by Chief Judge Belvin Perry, Jr., in a case involving issues somewhat related to the instant controversy, this particular matter is of first impression in this Court. Also similarly, the matter herein involves a clash between important public policy interests: a criminal defendant's right to privacy concerning his or her medical information and treatment records which may be relevant to the court proceedings versus the public's interest and right to access in all criminal matters in this state.

After carefully considering the parties' pleadings, the testimony, and the argument of counsel presented at the hearing held in this matter on October 8, 2002, the relevant case law, and the applicable state and federal statutes and regulations, and being otherwise fully advised,

this Court concludes that Defendant's motion must be denied.

STANDING

Initially, this Court recognizes and finds that the *Sentinel* may properly object to Defendant's motion and has standing to be heard in this matter. The Florida Supreme Court has repeatedly held "that the news media, even though not a party to litigation, has standing to question the validity of an order restricting publicity because its ability to gather news is directly impaired or curtailed." Miami Herald Publ'g Co. v. Lewis, 426 So. 2d 1, 4 (Fla. 1982) (citing State ex rel. Miami Herald Publ'g Co. v. McIntosh, 340 So. 2d 904 (Fla. 1977)).

FACTS

Earlier this year, Defendant was charged with a felony in Leon County, Florida. Defendant met the criteria for entry into a pretrial substance abuse education and treatment intervention program as authorized by section 948.08(6)(a) of the Florida Statutes. The program is more commonly known as "drug court." Defendant's case was transferred to Orange County and she began the drug court program in Orlando, Florida, in June. For a time, Defendant participated in drug court, appearing in court for status hearings every two weeks, without the glare of media scrutiny. All that changed, however, when Defendant was sanctioned by this Court[1] and was placed in the Orange County Jail. Since then, Defendant has been constantly under the media's microscope. As a result, Defendant filed the instant motion to close any further drug court proceedings to the media and to the public.

DRUG COURT

Drug court is a pretrial[2] intervention program whereby a defendant must complete a rigorous course of counseling and drug treatment over a period of not less than one year in duration. If a defendant successfully completes the program, the court will dismiss the charges pending against the defendant. The Florida Legislature specifically required "[e]ach judicial circuit [to] establish a . . . treatment-based drug court program . . . ." § 397.334(2), Fla. Stat. (2001). The Legislature recognized

> that the integration of judicial supervision, treatment, accountability, and sanctions greatly increases the effectiveness of substance abuse treatment. The Legislature also seeks to ensure that there is a coordinated, integrated, and multidisciplinary response to the substance abuse problem in this state, with special attention given to creating partnerships between the public and private sectors and to the coordinated, supported, and integrated delivery of multiple-system services for substance abusers, including a multiagency team approach to service delivery.

Id. One purpose for instituting the drug court program was to force those agencies and people not normally concerned with a defendant's drug addition to actually become concerned. The Legislature stated that drug court was "an effort to reduce crime and recidivism, . . . by breaking

the cycle of addiction which is the most predominant cause of cases entering the justice system." § 397.334(1), Fla. Stat. (2001). The Legislature created an environment in which defense attorneys, the State Attorney, the Court, governmental agencies, and treatment service providers could work together in order to address and treat the underlying drug problem. Traditionally, the State Attorney, the Court and the defense attorneys merely worked to process cases through the judicial system in order to mete out justice for the crimes committed by drug addicted defendants. A defendant's drug addiction may have been addressed in a recommendation for treatment in prison or jail or as a probation requirement. The addiction, however, was not the focus; rather, conviction and punishment for the crime was the goal. Drug court has altered that goal to now concentrate on stopping the addiction with the ultimate aim of stopping the crime. Drug court is a team approach, and group advice, encouragement, admonishments and sanctions are involved in the treatment process. Having all drug court participants observe each other's court proceedings is also key because they can learn from each other's mistakes and by viewing other's successes, they realize that they too can overcome their addiction.

The drug court judge is involved in two different settings: one is a private staffing and the other is a status hearing. In a staffing, the judge, defense counsel, an assistant state attorney, case managers, treatment providers, the drug court coordinator, and representatives from law enforcement and probation meet to discuss the progress of each drug court participant including any medical or mental health issues, social issues affecting treatment, violations of the treatment plan, and any other issues concerning the participant's progress. No drug court participants are present at the staffing. Additionally, there are no court reporters present and no evidence is presented and no testimony is given. These staffings are non-judicial in nature and simply involve the drug court judge because of the nature of the program. These meetings are akin to a round table discussion among a team of physicians planning the best medical treatment strategy for a cancer patient. Nothing stated in the drug court staffings may be divulged to any outside person.

The status hearings, on the other hand, have all the normal accoutrements of a standard court proceeding. A court reporter, court deputies, defense counsel, and an assistant state attorney are present. Testimony and evidence may be presented but typically, there is little or no discussion of medical or treatment information at the status hearing. These hearings are also traditionally very short and to the point. If the participant is progressing satisfactorily in treatment then the drug court judge will simply provide encouragement. If the participant is not progressing satisfactorily, the judge will admonish that participant. In those instances where a participant has actually violated the treatment terms, the judge may sanction the participant. Sanctions include community service, increased drug testing, increased counseling, imposition of a jail term and expulsion from the drug court program. If the participant is expelled from the program, he or she returns to a traditional criminal track to face the original charges upon which he or she was arrested. No violation of a treatment plan, including the commission of a new crime, goes unpunished.

LAW AND ANALYSIS

As discussed above, several Florida statutes regulate drug court proceedings including provisions in chapter 397 and chapter 948. Florida has a specific statute concerning confidentiality of records pertaining to substance abuse treatment. See § 397.501, Fla. Stat.

(2001). Section 397.501(7)(a) of the Florida Statutes, states:

> The records of service providers which pertain to the identity, diagnosis, and prognosis of and service provision to any individual client are confidential in accordance with this chapter and with applicable federal confidentiality regulations and are exempt from the provisions of s. 119.07(1) and s. 24(a), Art. I of the State Constitution.

The term "records" is not defined in the statutes. A service provider is defined as "a public agency, a private for-profit or not-for-profit agency, a person who is a private practitioner, or a hospital, which agency, person or hospital is licensed under this chapter." § 397.311(28), Fla. Stat. (2001). "Court" is defined separately in the same section. See § 397.311(8), Fla. Stat. (2001).

Further, federal statutes and regulations may also apply. Both Defendant and the *Sentinel* agree, and this Court finds based upon the unrebutted testimony presented at the hearing, that the drug court program and the Center for Drug Free Living where Defendant is receiving treatment receive federal funding. This is crucial because 42 U.S.C. § 290dd-2 entitled, "Confidentiality of records," upon which Defendant heavily relies, only regulates those substance abuse programs which are "conducted, regulated, or directly or indirectly assisted by any department or agency of the United States . . . ." 42 U.S.C. § 290dd-2(a). Hence, 42 U.S.C. § 290dd-2 and its implementing regulations which are codified at 42 C.F.R. § 2.1, et seq., are relevant to the issues herein and this Court must consider that statute and regulations in deciding this matter. The legislative history of Title 42 shows that Congress intended

> to assure the privacy rights of patients undergoing drug treatment in order to enhance the success of the treatment program:
>
> [T]he strictest adherence to the provisions of this section is absolutely essential to the success of all drug abuse prevention programs. Every patient and former patient must be assured that his right to privacy will be protected. Without that assurance, fear of public disclosure of drug abuse or of records that will attach for life will discourage thousands from seeking the treatment they must have if this tragic national problem is to be overcome.

New York v. Silkworth, 538 N.Y.S.2d 692, 756-57 (N.Y. 1989) (quoting H.R. Conf. Rep. No. 92-920 (1972), reprinted in 1972 U.S.C.C.A.N. 2045, 2072). 42 U.S.C. § 290dd-2(a) states that

> records of the identity, diagnosis, prognosis, or treatment of any patient which are maintained in connection with the performance of any program or activity relating to substance abuse education, prevention, training, treatment, rehabilitation, or research, . . . shall . . . be confidential and be disclosed only for the purposes and under the circumstances expressly authorized under subsection (b) of this section.

Records are defined as "any information, whether recorded or not, relating to a patient received or acquired by a federally assisted alcohol or drug program." 42 C.F.R. § 2.11 (emphasis added).[3] "Program means: (a) An individual or entity (other than a general medical care

facility) who holds itself out as providing, and provides, alcohol or drug abuse diagnosis, treatment or referral for treatment; . . . ." 42 C.F.R. § 2.11.

It is obvious that the Court is not governed by the confidentiality provisions of the Florida or federal statutes because it cannot be defined as or included as a "program." Nevertheless, the Court relies entirely on the testimony and records of the treatment providers who are held to the strict standards of confidentiality imposed by the statutes. Provision has been specifically made in the federal regulations to allow treatment providers to communicate with the court system.[4] 42 C.F.R. § 2.35 states that

> (a) A program may disclose information about a patient to those persons within the criminal justice system which have made participation in the program a condition of the disposition of any criminal proceedings against the patient . . . if:
>
> (1) The disclosure is made only to those individuals within the criminal justice system who have a need for the information in connection with their duty to monitor the patient's progress (e.g., a prosecuting attorney who is withholding charges against the patient, a court granting pretrial or posttrial release . . .) and
>
> (2) The patient has signed a written consent . . . .

(emphasis added).[5] This Court takes judicial notice that Defendant has signed a limited consent form authorizing release of information to the drug court. Therefore, treatment providers can testify in court and can provide relevant information to the Court without violating the confidentiality provisions.

A conflict arises, however, because in Florida there is a strong presumption that almost all court proceedings are open to the public and the press. Miami Herald Publ'g Co. v. Lewis, 426 So. 2d 1, 4 (Fla. 1982); Barron v. Florida Freedom Newspapers, 531 So. 2d 113 (Fla. 1988). Yet, the statutes and regulations discussed above clearly forbid the release of treatment information to the general public. The federal statute, federal regulations, and Florida statutes dealing with substance abuse records and testimony simply do not contemplate the situation which has arisen here. On one hand, are the laws which direct that Defendant's treatment information is confidential and on the other hand, is Florida's strong public access doctrine. The question presented in this case is which competing interest will prevail.

The *Sentinel* argues that the instant proceedings are presumptively open and that pursuant to the test set forth in Miami Herald Publishing Co. v. Lewis, 426 So. 2d 1 (Fla. 1982), which deals with closure of criminal proceedings, the proceedings cannot be closed. Defendant, on the other hand, contends that Lewis is unhelpful in this matter because drug court proceedings are an alternative to criminal court proceedings and as a result, do not fit neatly into a criminal format.

Drug court status hearings are first and foremost a criminal court proceeding. Simply because the proceedings have been labeled "drug court" does not alter that fact. All drug court participants, including Defendant, have been charged with a crime and are facing prosecution by the State for that crime unless and until they successfully complete the drug court program. It is

essentially a pretrial diversionary process and participation is voluntary. The proceedings are presumptively open pursuant to established case law unless some other consideration dictates closure. Consequently, Lewis is applicable and relevant to the instant proceedings.

In Lewis, beginning with the premise "that the public should generally have unrestricted access to all judicial proceedings . . . ," the Florida Supreme Court set out a three-pronged test for closure of criminal court proceedings:

> 1. Closure is necessary to prevent a serious and imminent threat to the administration of justice;
>
> 2. No alternatives are available, other than change of venue, which would protect a defendant's right to a fair trial; and
>
> 3. Closure would be effective in protecting the rights of the accused, without being broader than necessary to accomplish this purpose.

Id. at 4. In order to meet the first prong of the test, the court stated that "[t]he primary purpose of closure is to protect the defendant's right to a fair trial, one free of widespread hostile publicity, so as to insure him an unbiased jury." Id. at 7. In these proceedings, Defendant cannot meet this burden because no jury is involved and will never be involved in drug court proceedings. This Court recognizes that Defendant could possibly face a jury sometime in the future, like any defendant in drug court, but that possibility is tenuous and as stated is well into the future. Additionally, in Lewis, the court instructed that

> those seeking closure should demonstrate that there is a substantial probability that closure will be effective in protecting against the perceived harm. Where prejudicial information already has been made public, there would be little justification for closing a pretrial hearing in order to prevent only the disclosures of details which had already been publicized.

Id. at 8. There is no doubt that in this particular case, the information has already been well publicized. Accordingly, this Court finds that Defendant cannot meet her burden under Lewis.

Defendant submits that the factors set forth in Barron v. Florida Freedom Newspapers, 531 So. 2d 113 (Fla. 1988), should be utilized rather than those established in Lewis, because drug court is not truly a "criminal" court. Barron discusses the factors to be considered for closure of civil cases. While this Court has determined that drug court proceedings are not civil in nature, Barron is instructive and its reasoning has been utilized in a non-civil, criminally-related matter. See generally Post-Newsweek Stations, Florida Inc. v. Doe, 612 So. 2d 549 (Fla. 1993) (Persons named on an alleged prostitute's client list tried to restrict public access to pretrial discovery materials in the prostitute's criminal case.). Hence, this Court will examine whether Barron requires closure of these proceedings.

In Barron, the supreme court set forth the following factors which must be considered in closing a proceeding:

> (a) to comply with established public policy set forth in the constitution, statutes, rules, or case law; (b) to protect trade secrets; (c) to protect a compelling governmental interest [e.g., national security; confidential informants]; (d) to obtain evidence to properly determine legal issues in a case; (e) to avoid substantial injury to innocent third parties [e.g., to protect young witnesses from offensive testimony; to protect children in a divorce]; (f) to avoid substantial injury to a party by disclosure of matters protected by a common law or privacy right not generally inherent in the specific type of civil proceeding sought to be closed.

Id. at 118. Obviously, only factor (a) could apply herein. Defendant has not directed this Court to any statute, regulation or case which expressly states that drug court proceedings are closed to the public and the media. Defendant points to the Florida and federal statutes and regulations concerning the confidentiality provisions protecting participants in substance abuse treatment and infers that these provisions require closure. These statutes and regulations though do not definitively state that drug court proceedings are closed to the public nor do they clearly establish that proposition as required by Barron.

In determining whether the statutes and regulations establish the proposition that closure is required, one case found by this Court, while not controlling, is instructive. In United States v. White, 902 F. Supp. 1347 (D. Kansas 1995), the defendant was convicted of driving under the influence of alcohol. The sentencing court ordered the defendant to be evaluated by a substance abuse treatment center. The court then used the center's report to impose certain probation conditions. The defendant argued that the sentence violated the federal substance abuse treatment confidentiality laws because it required her to further disclose her substance abuse history. The appellate court, finding the same lack of instructive case law as this Court, concluded that the sentencing court's use of the treatment information in open court was proper based on 42 C.F.R. § 2.35. The appellate court stated that

> if [the defendant's] analysis and interpretation of the regulations were correct, any mention by the magistrate judge of the information gleaned from the evaluation performed by the [treatment center] during sentencing in open court would potentially constitute a violation of those regulations, subjecting the magistrate judge to criminal penalties. Clearly, this is not and cannot be the law. Because sentencing hearings are generally open to the public, the court and the attorneys for both the defendant and the government would be precluded from discussing any portion of the evaluation in determining the appropriate sentence to be imposed in open court. [The defendant's] interpretation of the regulations would effectively hamstring the court's ability, if it so chose, to explain in open court the reasons for imposing the sentence it deems appropriate.

Id. at 1352 (citations omitted). This Court agrees with the reasoning in White. A "basic tenet of statutory construction [is] that courts are constrained to avoid a construction [of a statute] that would result in unreasonable, harsh, or absurd consequences." Thompson v. State, 695 So. 2d 691, 693 (Fla. 1997). To interpret the confidentiality provisions as imposing criminal penalties

on all the courts that have addressed these matters in some fashion, including the appellate courts which have tended to use a patient's name rather than an alias, would be an untenable, absurd result.

Moreover, another fundamental statutory maxim is that Congress and the Legislature are "presumed to know the existing law when a statute is enacted . . . ." Seagrave v. State, 802 So. 2d 281, 290 (Fla. 2001). Here, it must be presumed that both Congress and the Florida Legislature knew that the vast majority of criminal and civil court proceedings are open to public scrutiny. Had Congress or the Legislature intended to close these drug court hearings, a specific provision could very easily have been added to 42 C.F.R. § 2.35 (or the Florida statutes) directing that all court proceedings wherein confidential substance abuse treatment information may be discussed must be closed to the public. Because there is no such explicit directive, this Court must assume that none was intended and none may be inferred. See generally Rife v. State, 789 So. 2d 288, 294 (Fla. 2001)("[H]ad it intended no mitigation under this statute, the legislature could easily have said so. It did not and this court should not.").

Accordingly, this Court cannot insert a mandate for closing court proceedings into the confidentiality laws issued by Congress and the Florida Legislature nor can this Court interpret the laws in such a manner. Therefore, it cannot be said that, as required by Barron, there is an "established public policy set forth" in the statutes which requires closure of drug court proceedings. Barron v. Florida Freedom Newspapers, 531 So. 2d 113, 118 (Fla. 1988). Consequently, Defendant does not meet the standard for closure under either the Barron or Lewis cases.

Defendant also relies on a ruling issued by Judge Belvin Perry, Jr. in In Re: Investigation Orlando Police Department, Case #2002-330145, Order Closing Hearing on State's Motion to Compel (Fla. 9th Cir. Ct. Sept. 30, 2002). In that matter, the State was attempting to compel a witness to respond to questions concerning certain events which allegedly occurred at The Center for Drug Free Living. The witness refused to answer several questions citing the confidentiality provisions contained within Title 42 of the federal statutes and regulations. At the hearing on the State's motion, Judge Perry sua sponte considered whether the hearing should be closed to the public. The *Sentinel*, as here, appeared and contended that the hearing should not be closed to the public. Judge Perry subsequently ruled that the hearing on the State's motion should be closed to the public based on certain confidentiality provisions contained within Title 42.

At first blush, the finding by this Court that the drug court status proceedings will not be closed seems inapposite to Judge Perry's order in which the provisions of Title 42 played such an important part. But, that proceeding was in an entirely different posture than the instant matter.

The State was trying to compel testimony in order to investigate whether a drug treatment patient had committed a crime so that the patient could be prosecuted. Importantly, a specific regulation aplies to the situation faced by Judge Perry. Section 2.65 states:

> § 2.65 Procedures and criteria for orders authorizing disclosure and use of records to criminally investigate or prosecute patients.

> (c) Review of evidence: Conduct of hearings. Any oral argument, review of evidence, or hearing on the application shall be held in the judge's chambers or in some other manner which ensures that patient identifying information is not disclosed to anyone other than a party to the proceedings, the patient, or the person holding the records.

42 C.F.R. § 2.65 (emphasis added). The factors outlined in Barron v. Florida Freedom Newspapers, Inc., 531 So. 2d 113 (Fla. 1988), could be met because a specific regulation established the public policy for closure. In the instant case, as discussed at length previously, no constitutional provision, statute, regulation or case law has been found that specifically mandates that drug court proceedings be closed. Consequently, the order issued by Judge Perry is consistent with the findings of this Court.

CONCLUSION

The Florida Supreme Court has stated that "[p]ublic access to the courts is an important part of the criminal justice system, as it promotes free discussion of governmental affairs by imparting a more complete understanding to the public of the judicial system [and] the people have a right to know what occurs in the courts." Miami Herald Publ'g Co. v. Lewis, 426 So. 2d 1, 6 (Fla. 1982). Open access is critical so that the public can see that drug court is working to reduce the recidivism rate and to return individuals to a productive state. Open access is necessary in order to demonstrate that the program is worthy of public support. It is vital that the community realize that drug court works so that its graduates can become productive mmbers of society, that jobs will be available to them, and that other community support will be forthcoming.

Additionally, and equally as important, drug court status hearings must be open to all participants so that all participants can observe each other's successes and failures. If drug court were closed to the public that would also mean that no other drug court participant could be in the hearing, nor could the participant's family be involved without special consent. Every participant must be able to observe other participants' status hearings because the hearings and the interaction with the drug court judge are an essential part of the treatment program. The drug court participants who are observing, gain encouragement by seeing that other participants can become drug free and that the program works. The hearings also give the participants the opportunity to see what sanctions may be imposed and thereby help them to avoid the same behavior.

THEREFORE, Defendant's Motion to Close Drug Court Proceedings is denied as to all drug court status proceedings.

DONE AND ORDERED, in chambers, at Orlando, Orange County, Florida, this _____ day of October, 2002.

_____

Reginald Whitehead

Circuit Judge

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was furnished this _____ day of October, 2002, by U.S. Mail and by facsimile, to: Mr. Peter Antonacci, Attorney at Law, Gray Harris & Robinson, PA, 301 E. Pine Street, Suite 1400, Orlando, Florida 32801; Mr. Willie May, Assistant State Attorney, Offices of the State Attorney, 415 N. Orange Ave., Orlando, Florida 32801-1546; to Mr. Jonathan D. Kaney Jr., Attorney at Law, Cobb & Cole, P.O. Box 2491, Daytona Beach, Florida 32115-2491; and Mr. Carlos J. Burruezo, Attorney at Law, Fisher & Phillips LLP, 300 South Orange Ave., Suite 1250, Orlando, Florida 32801-3392.

_____

Judicial Assistant

1.

_____1 This Court is responsible for drug court along with a felony docket.

_____2 Some post-plea defendants are included in drug court but the vast majority of participants are in pretrial status.

_____3 The *Sentinel* contends that it is not attempting to obtain records but rather is simply trying to ensure access to a legal proceeding. The term "records," however, is defined very broadly by the federal regulations implementing section 290dd-2. Utilizing the most fundamental of statutory maxims that statutory language must be given "its plain and ordinary meaning," there can be only one logical result. Green v. State, 604 So. 2d 471, 473 (Fla. 1992). The word "record" is not limited to written documents but encompasses testimony concerning any patient information received or acquired by a drug treatment program. Therefore, the *Sentinel*'s argument that the confidentiality provisions do not apply because it is seeking access to proceedings and not records is without merit.

4 Florida's confidentiality statute incorporates any applicable federal confidentiality regulations. § 397.501(7)(a), Fla. Stat. (2001).

5 Although not crucial to this decision, the Court notes that:

> Although Congress must have intended . . . judges to have access to treatment records[,] . . . the Regulations issued by the Secretary of Health and Human Services create an incongruous result by requiring the [participant's] consent as a precondition to disclosure, even in cases of mandated treatment. This effectively leaves the ultimate power of supervision in the hands of the person who is being supervised.

New York v. Silkworth, 538 N.Y.S.2d at 757-58.