



IN THE COURT OF COMMON PLEAS OF
CENTRE COUNTY, PENNSYLVANIA
CRIMINAL DIVISION

COMMONWEALTH OF	:	CP-14-CR-2421-2011
	:	CP-14-CR-2422-2011
v.	:	
	:	
GERALD A. SANDUSKY,	:	HONORABLE SENIOR JUDGE
	:	JOHN M. CLELAND
PETITIONER.	:	
	:	
	:	

TYPE OF PLEADING:

BRIEF

FILED ON BEHALF OF:

PETITIONER, GERALD A.
SANDUSKY

COUNSEL FOR PETITIONER:

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GERALD A. SANDUSKY
CENTRE COUNTY

STATEMENT OF QUESTIONS PRESENTED

I. Whether the portion of *Commonwealth v. T.J.W.*, 114 A.3d 1098 (Pa. Super. 2015), relied upon by PCRA counsel in their prior brief on psychologist-patient privilege, is binding upon the PCRA court or is *dicta*?

Suggested Answer: *T.J.W.* is binding upon the PCRA court and does not constitute non-binding *dicta*.

II. Whether *T.J.W.* announced a new rule of law or merely interpreted a statutory privilege under a new set of facts?

Suggested Answer: *T.J.W.* did not announce a new rule of law.

STATEMENT OF RELEVANT FACTS

Testimony at trial by D.S., J.S., B.S.H., and Z.K., as well as after-discovered evidence from D.S. and Matt Sandusky, demonstrate that the accusers in this matter were able to recall allegations of sexual abuse based on therapy and they have stated that they blocked out or repressed their memories of abuse. Then-Attorney General Linda Kelly exclaimed herself, immediately following Mr. Sandusky's convictions, that the victims had "unearthed long buried memories." <https://www.youtube.com/watch?v=czFCQpjD 0o>. Aaron Fisher and his therapist, Michael Gillum, in their book, also discussed the importance of Mr. Fisher's therapy in his revealing allegations of sexual abuse. Based on the changing testimony of the accusers, the statements of the accusers before and after trial, and the fact that the accusers have attributed their changes in story and/or coming forward to therapy, there is strong evidence that repressed memories were at issue at trial.

Mr. Sandusky, in his PCRA petitions, has leveled several claims directly pertaining to repressed memories and the lack of scientific support for such claims. Mr. Sandusky previously made a request that the PCRA Court conduct, with the assistance of a qualified expert—Dr. Paul Simpson, an *in camera* review of Mr. Gillum's therapy notes pertaining to Aaron Fisher as

well as any other relevant therapy notes of other therapists engaged by the accusers to assist them in recovering memories of abuse.

At a May 19, 2016 conference, the PCRA Court inquired as to what authority the Court would have for engaging in such a procedure. Thereafter, the undersigned filed a brief in support of such a review. Following the August 22, 2016 evidentiary hearing, the PCRA Court indicated that it believed the repressed memory issues warranted further exploration. Accordingly, it raised two issues regarding the decision of *Commonwealth v. T.J.W.*, 114 A.3d 1098 (Pa. Super. 2015), which was relied upon in Mr. Sandusky's prior brief pertaining to *in-camera* review of therapy notes. Specifically, the Court asked PCRA counsel to address whether a portion of *T.J.W.* was non-binding *dicta* and whether the decision could be classified as a new rule of law since it was decided after Mr. Sandusky's trial.¹

This brief follows.

¹ The PCRA court, in an order filed on August 23, 2016, and dated August 22, 2016, provided, "counsel for the defendant shall submit a brief in support of its in camera review of therapy notes to the Court within ten (10) days of the date of this Order[.]" Mr. Sandusky filed a brief regarding a similar issue earlier. This brief addresses the more specific issues raised by the PCRA court at the conclusion of the presentation of evidence on August 22, 2016.

SUMMARY OF THE ARGUMENT

The decision in *Commonwealth v. T.J.W.*, 114 A.3d 1098 (Pa. Super. 2015), insofar as it applies to this matter, does not constitute non-binding *dicta*. *Dicta* or *obiter dictum* is defined as “[a] judicial comment made while delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential[.]” Black’s Law Dictionary, 3d Pocket Edition.

Although the *T.J.W.* Court initially concluded that the appellant therein had waived a claim of privilege it also ruled in the alternative. The Superior Court’s waiver finding, however, does not result in its alternative holding be considered *dicta*. *Commonwealth v. Reed*, 971 A.2d 1216, 1220 (Pa. 2009). Since *T.J.W.* addressed, in the alternative, the merits of the issues, its alternative holding is not *obiter dictum*. *Reed, supra*.

Further, *T.J.W.* does not constitute a new rule of law merely because it was decided after Mr. Sandusky’s trial. The *T.J.W.* Court expressly relied on and cited prior decisions discussing privilege and was interpreting a statute. *See T.J.W., supra* at 1103 (citing *Commonwealth v. Mejia–Arias*, 734 A.2d 870, 876 (Pa. Super. 1999), and *Commonwealth v. Copeland*, 723 A.2d 1049, 1051–52 (Pa. Super. 1998)).

A new rule of law is one that “overrules prior law, expresses a fundamental break from precedent, upon which litigants may have relied, or decides an issue of first impression not clearly foreshadowed by precedent[.]” *Fiore v. White*, 757 A.2d 842, 847 (Pa. 2000). “A decision does not articulate a new rule of law when it ‘merely relies upon a statutory interpretation which was not wholly without precedent.’” *Id.* As the *Fiore* Court set forth, “when we have not yet answered a specific question about the meaning of a statute, our initial interpretation does not announce a new rule of law. Our first pronouncement on the substance of a statutory provision is purely a clarification of an existing law.” *Id.* at 848.

Here, the *T.J.W.* ruling does not overrule any prior decision, express a fundamental break from past precedent or decide an issue of first impression that was not foreshadowed by existing precedent. Rather, it applied existing precedent in interpreting a statutory provision: 42 Pa.C.S.. § 5944.² Thus, *T.J.W.* did not announce a new rule of law.

² The statute reads,

No psychiatrist or person who has been licensed under the act of March 23, 1972 (P.L. 136, No. 52), to practice psychology shall be, without the written consent of his client, examined in any civil or criminal matter as to any information acquired in the course of his professional services in behalf of such client. The confidential relations and communications between a psychologist or psychiatrist and his client shall be on the same basis as those provided or prescribed by law between an attorney and client.

Since *T.J.W.* is binding precedent and did not announce a new rule of law, the PCRA court must apply that decision herein and afford Mr. Sandusky the opportunity to have *in camera* review of the therapist notes in question. As discussed in Mr. Sandusky's brief on the non-evidentiary hearing issues, trial counsel were ineffective in failing to adequately address the repressed memory issues.

42 Pa.C.S. § 5944. (internal footnote omitted).

ARGUMENT

The portion of *Commonwealth v. T.J.W.*, 114 A.3d 1098 (Pa. Super. 2015), relied upon by PCRA counsel in their prior brief on psychologist-patient privilege is binding upon the PCRA court.

In *Commonwealth v. Reed*, 971 A.2d 1216 (Pa. 2009), the Pennsylvania Supreme Court ruled that although the Superior Court had ruled a claim regarding admission of bad acts evidence was waived on direct appeal, an alternate holding that the position was meritless was a valid, binding, holding. The *Reed* Court opined, “where a decision rests on two or more grounds equally valid, none may be relegated to the inferior status of *obiter dictum*.” *Id.* at 1220.

It continued, stating, “while the Superior Court in *Reed I* determined that Reed’s claims were waived, it also determined that even if the claims had not been waived they were without merit, and the court explained the basis for its conclusions.” *Id.* Accordingly, the High Court held, “the Superior Court’s holding in *Reed I* that Reed’s claim regarding the admission of prior bad acts testimony was meritless was a valid holding[.]”

Thus, the Court’s alternate holding in *T.J.W.*, *supra* that the psychologist-patient privilege, 42 Pa.C.S. § 5944, does not apply where there exists a long delay in reporting the sexual abuse, in combination with recovery

of memories, is applicable herein. *See T.J.W., supra* at 1104. Here, as in *T.J.W.*, the issue concerns the reliability of recovered memories.

As argued previously in Mr. Sandusky's earlier brief on the subject, in *T.J.W.*, the Pennsylvania Superior Court, in a unanimous decision, interpreted that privilege in a similar context to that presented here. Therein, the defendant was accused of a number of sex offenses, including rape. The accuser was the defendant's daughter. The defendant sought *in camera* inspection of mental health records relative to therapy the accuser had undergone.

The accuser therein allegedly had recalled one incident of sexual abuse but claimed she had blocked out memories of other instances of abuse until she was nineteen. The defendant denied the charges and asserted that these recovered memories were false and the result of her therapy. Additionally, the defendant maintained that the process for recovered repressed memories is unproven and unreliable.

The panel first set forth,

“the law is clear that a criminal defendant is entitled to know about any information that may affect the reliability of the witnesses against him.” *Commonwealth v. Mejia-Arias*, 734 A.2d 870, 876 (Pa. Super. 1999) (quoting *Commonwealth v. Copeland*, 723 A.2d 1049, 1051–52 (Pa. Super. 1998), *appeal denied*, 561 Pa. 652, 747 A.2d 897 (1999)). Therefore, absent an applicable claim of privilege, if Appellee T.J.W. were able to articulate a reasonable basis for his request, he would have a

colorable claim to seek evidence which might show that the complainant's memories were somehow impaired or otherwise unreliable.

T.J.W., *supra* at 1103. It highlighted that “evidentiary privileges have been viewed by this Court to be in derogation of the search for truth, and are generally disfavored for this reason.” *Id.*³ The panel continued that evidentiary privileges are to be narrowly construed. It then reasoned that the accuser should reasonably have known “that the long delay in reporting the persistent memory of the first incident and the recovery of memories of the intervening incidents, would, *inter alia*, raise an issue of the reliability of the recovered memories.” *Id.* at 1104. The Court then remanded for an *in camera* review for a determination of privilege and whether exculpatory material existed.

Mr. Sandusky, therefore, should be permitted *in camera* review of therapy notes of Michael Gillum and the therapist(s) identified by D.S. in his interview that has been filed as an Addendum to the PCRA Appendix as to whether any exculpatory material exists.

³ Importantly, “files containing diagnoses, opinions, evaluations, and treatment plans ... are not confidential communications from the client covered under § 5944.” *T.J.W.*, *supra* at 1105.

***T.J.W.* did not announce a new rule of law but merely interpreted a statutory privilege and applied past precedent.⁴**

First, it should be noted that, “[s]trictly speaking, the Superior Court does not establish new rules.” *Passarello v. Grumbine*, 87 A.3d 285, 310 (Pa. 2014) (Castille, C.J., dissenting). Rather, it interprets existing law or laws. A statutory interpretation of a statute that does not overrule prior precedent does not announce a new rule of law. *Fiore, supra*. Instead, the interpretation of the statute relates back to when it was first adopted. *See id.* at 848; *Commonwealth v. Infante*, 63 A.3d 358, 364 (Pa. Super. 2013).

The *Fiore* Court reasoned that the Pennsylvania Supreme Court announces a new rule of law either when it “overrules prior law, expresses a fundamental break from precedent, upon which litigants may have relied, or decides an issue of first impression not clearly foreshadowed by precedent[.]” *Fiore, supra* at 847. The *T.J.W.* decision does not fit within any of these paradigms nor was it decided by the Pennsylvania Supreme Court. Pointedly, it relied on prior precedents to articulate its decision. While it did express that some cases had suggested the statutory privilege at issue was absolute it

⁴ The Superior Court recently noted, “There has been some debate amongst the jurists on the Pennsylvania Supreme Court on whether the Superior Court can announce a new rule of law at all. *See Passarello v. Grumbine*, — Pa. —, 87 A.3d 285 (2014).” *Commonwealth v. Concordia*, 97 A.3d 366, 369 n.1 (Pa. Super. 2014).

recognized that those decisions explicitly noted that there were circumstances where the privilege was not absolute.

Simply put, “A decision does not articulate a new rule of law when it ‘merely relies upon a statutory interpretation which was not wholly without precedent.’” *Id.* Since the *T.J.W.* decision was not wholly without precedent, did not overrule prior law, or create a fundamental break from precedent it is not a new rule of law. Because the *T.J.W.* ruling was not a new rule of law, the fact that it was decided after Mr. Sandusky’s trial does not preclude trial counsel from having been ineffective.

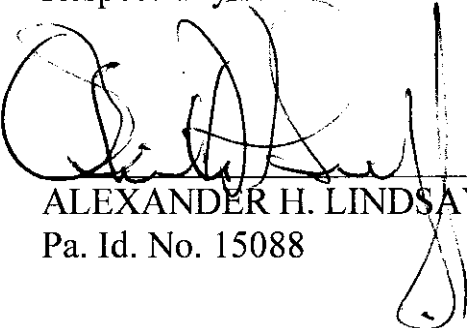
CONCLUSION

Mr. Sandusky has provided both trial record evidence and post-trial evidence, including statements from the Office of Attorney General itself, that confirm that recovered memories/repressed memories were at issue. Numerous accusers testified regarding therapy enabling them to recall abuse. Matt Sandusky attributed therapy to his coming forward and D.S., in a post-trial interview, confirmed that it was therapy that enabled him to remember allegations of sexual abuse. The accusers delayed in coming forward and each changed their story, frequently attributing the change to therapy enabling them to better remember the events. The prosecution itself has testified that one reason for disbelieving an accuser was the change of his story and because of

the actions of the attorney who represented him. That accuser, Allan Myers, was represented by Attorney Andrew Shubin. Mr. Shubin also represented D.S., J.S., and Matt Sandusky: three individuals whom evidence shows that recovered memory and repressed memory therapy were in play. Indeed, these individuals may have been directed by Mr. Shubin to therapists.

In light of the statutory privilege, it would be next to impossible for Mr. Sandusky to obtain review of the therapy notes in question. Accordingly, exceptional circumstances plainly warrant the limited request herein: *in camera* review by the PCRA Court with a qualified expert or experts (should the Commonwealth wish to have expert review). Based on *T.J.W.*, which is neither *dicta* nor a new rule of law, Mr. Sandusky's request for an *in camera* review should be granted. Frankly, since the psychologist-patient privilege does not preclude such review, and Mr. Sandusky cannot otherwise discover this evidence, he has shown exceptional circumstances warranting discovery on this issue and the limited PCRA court review requested.

Respectfully submitted:



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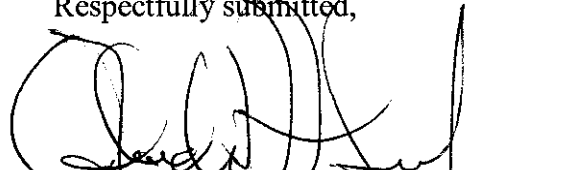
CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 31st day of August, 2016 he caused an exact copy of the foregoing document to be served in the manner specified, upon the following:

Via First Class Mail

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