COURT OF APPEALS
DECISION
DATED AND FILED

November 10, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP2406 **Cir. Ct. No. 2007CF2381**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JENNIFER HANCOCK,

DEFENDANT,

MARK OLALDE AND MEDILL JUSTICE PROJECT,

INTERVENORS-APPELLANTS.

APPEAL from an order of the circuit court for Dane County: DAVID T. FLANAGAN III, Judge. *Affirmed*.

Before Kloppenburg, P.J., Lundsten and Sherman, JJ.

¶1 PER CURIAM. Mark Olalde and the Medill Justice Project (collectively, the appellants) appeal an order of the circuit court placing under seal

certain medical records that were admitted into evidence during the trial of Jennifer Hancock, who was convicted of first-degree reckless homicide relating to the death of four-month-old L.W. For the reasons discussed below, we affirm.

BACKGROUND

¶2 The present appeal arises from our decision in ***State v. Hancock***, No. 2014AP727, unpublished slip op. (WI App May 28, 2015) (***Hancock I***). In ***Hancock I***, the appellants appealed an order of the circuit court denying their request to examine six exhibits[1] that were admitted into evidence at Hancock's trial, all of which had been made public as part of Hancock's preliminary hearing and trial, and which had not been placed under seal by the circuit court. ***Hancock I***, unpublished slip op. at ¶¶3-4. We reversed the circuit court's order and "remand[ed the cause] for further proceedings consistent with [our] opinion." ***Id.***, ¶16.

¶3 Our analysis in ***Hancock I*** focused on whether the six exhibits were open to public inspection under WIS. STAT. § 59.20(3) (2013-14),[2] which "grant[s] those persons who properly come under its umbrella 'an absolute right of inspection'" of records held in the office of the clerk of the circuit court. *See* ***State ex rel. Bilder v. Township of Delavan***, 112 Wis. 2d 539, 553-54, 334 N.W.2d 252 (1983) (quoted source omitted). We explained that the "'absolute right of

[1] The exhibits include the following: a Dean Healthcare Systems medical chart relating to L.W.; a St. Mary's Hospital medical chart relating to L.W.; an x-ray of L.W.'s skull; a University of Wisconsin Hospital skeletal survey of L.W.; diagrams and slides of L.W.'s skull; and a CT scan and MRI scan of L.W.

[2] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

inspection" under § 59.20(3) is not unfettered and that public inspection of records held by the clerk of the circuit court may be denied in the following three situations: (1) "when there is a statute authorizing the sealing of otherwise public records"; (2) if disclosure of the record would infringe on a constitutional right; or (3) the administration of justice requires the limitation of public access to the judicial record. ***Hancock I***, unpublished slip op. at ¶7 (quoting ***Bilder***, 112 Wis. 2d at 554-56).

¶4 We concluded in ***Hancock I*** that the State did not establish on appeal that any of the ***Bilder*** exceptions applied. The State argued in ***Hancock I*** that the first and third exceptions justified denying public access to the exhibits. The State argued that the exhibits' categorization as confidential under WIS. STAT. § 146.82 was sufficient to bring them within the first exception because a declaration that the records are confidential authorizes the sealing of those records. ***Hancock I***, unpublished slip op. at ¶9. We rejected this argument, stating that the circuit court had not sealed the records based on § 146.82 or on any other basis. ***Id.***, ¶10. The State also argued that the administration of justice requires that the documents not be made available for public inspection because they are confidential under § 146.82, and because there is a public interest in protecting the privacy of crime victims. ***Id.***, ¶¶12-13. We rejected these arguments as well, explaining that § 146.82 does not contain any limitation on access to public records and the State did not demonstrate that all records covered by § 146.82 are automatically sealed when they are admitted into evidence at trial or otherwise made part of a public court record. ***Id.***, ¶¶12, 14.

¶5 Although we concluded in ***Hancock I*** that the State had failed to establish that one of the three ***Bilder*** exceptions justified restricting public access to the exhibits, we limited our decision by stating the following:

> We stress that we do not decide that the medical records in this case could not have been sealed during the prosecution of Hancock. We also do not decide whether, at a later date, there might be justification for sealing this part of the circuit court record. Rather, we conclude that the medical records in dispute are not sealed, and neither the circuit court nor the State presents a reason why the clerk of courts need not comply with WIS. STAT. § 56.20(3) and provide the requested access.

Hancock I, ¶15.

¶6 Upon remand, the circuit court entered an order in November 2015, placing the six medical records in dispute under seal. The circuit court stated in its November 2015 order that in ***Hancock I*** this court had "explicitly left open the possibility that the records may properly be sealed pursuant to the third ***Bilder*** exception," and, after balancing the presumption of the openness of court records, the privacy interest of L.W.'s family, the privacy interest of crime victims in general, and the vast amount of trial materials available for public inspection, the circuit court determined that the administration of justice requires that access to the exhibits should be restricted. The appellants appeal the circuit court's November 2015 order.

DISCUSSION

¶7 The appellants contend that they have a right to review the six exhibits from Hancock's trial, which are part of the court record held by the clerk of the circuit court and which were placed under seal on remand. The appellants make two arguments in support of their contention: (1) the circuit court's November 2015 order violates the law of the case doctrine; and (2) the circuit court erred in determining that the administration of justice requires the limitation of public access to the exhibits. We address each argument in turn.

A. Law of the Case Doctrine

¶8 The appellants argue that the circuit court's November 2015 order placing the documents under seal is contrary to this court's ruling in ***Hancock I***, which constitutes the law of the case, and that the circuit court's November 2015 order should be reversed and the cause remanded with specific instructions to the circuit court that the appellants be given access to the exhibits.

¶9 "The law of the case doctrine is a 'longstanding rule that a decision on a legal issue by an appellate court establishes the law of the case, which must be followed in all subsequent proceedings in the [circuit] court or on later appeal.'" ***State v. Stuart***, 2003 WI 73, ¶23, 262 Wis. 2d 620, 664 N.W.2d 82 (quoted source omitted). Thus, the circuit court is generally bound to apply decisions made by this court in a particular case. ***Id.***

¶10 The appellants argue that in ***Hancock I***, we reversed the circuit court's order denying Olalde access to the six exhibits and remanded "with specific instructions to allow [the] appellants access to the requested records to prevent any further judicial obstruction of the exercise of statutory rights." The appellants misread our decision in ***Hancock I***.

¶11 In ***Hancock I***, the discrete issue before this court was whether the State had established that the six exhibits were not open to public inspection because they fell within one of the three ***Bilder*** exceptions to the general rule of disclosure of records held by the clerk of the circuit court. *See* ***Hancock I***, unpublished slip op. at ¶¶6-8. In concluding that the State had not met its burden, we determined that the State had failed to present this court with a persuasive argument that there is a statutory authority authorizing the sealing of the exhibits, the first ***Bilder*** exception, or that the administration of justice requires that public

access to the exhibits be limited, the third ***Bilder*** exception. Our determination that the State had not shown that the exhibits fall within one of the ***Bilder*** exceptions turned on the fact that the six exhibits had not been placed under seal by the circuit court. *See* ***id.***, ¶¶9-14. Specifically, as to the court's inherent authority in the interest of justice, we stated, "The circuit court did not exercise any authority that it might have had to limit public access to the medical records by sealing them. Perhaps the circuit court could have justified sealing the records under this authority, but it did not do so." ***Id.***, ¶11.

¶12 Lest our decision in ***Hancock I*** be read too broadly, we stated that our decision did not address whether the exhibits could have been sealed during the prosecution of Hancock or whether they could be sealed sometime following our decision. ***Id.***, ¶12. In stating that we did not address whether the exhibits could be sealed following the issuance of our decision in ***Hancock I***, we specifically left open the possibility that the circuit court could do so.

¶13 Furthermore, nowhere in our decision in ***Hancock I*** did we instruct the circuit court on remand to grant the appellants access to the exhibits. Rather, we stated that on the record then before us, the State had failed to present a reason why the clerk of the circuit court need not provide access as generally required under WIS. STAT. § 59.20(3), and we remanded the matter to the circuit court "for further proceedings consistent with this opinion." ***Id.***, ¶16.

¶14 Accordingly, we conclude that the circuit court's order exercising its authority to seal the exhibits does not violate the law of the case doctrine.

B. Legal Basis for Sealing the Exhibits

¶15 The appellants contend that the circuit court erred in sealing the exhibits at issue on the basis that the administration of justice requires the limitation of public access to the exhibits. The appellants argue that the court's November 2015 order lacks "justification or [a] legal basis."

¶16 As we explained in ***Hancock I***, the general rule under WIS. STAT. § 59.20(3) is that all records used in court proceedings are open for public inspection. *See* ***id.***, ¶7; s*ee also* § 59.20(3) and ***Bilder***, 112 Wis. 2d at 554. There are, however, three exceptions to the general rule of inspection of court records: (1) a statute authorizes confidentiality of the record; (2) there is a showing that disclosure of the record would infringe on a constitutional right; or (3) a court using its "inherent power to preserve and protect the exercise of its judicial function" determines that "the administration of justice requires" that the records not be available for public inspection. ***Bilder***, 112 Wis. 2d at 554-57; ***State v. Stanley***, 2012 WI App 42, ¶29, 340 Wis. 2d 663, 814 N.W.2d 867. The dispute here is whether the circuit court properly relied on the third exception to seal the records. That is, the question before us is whether the circuit court properly exercised its inherent power by determining that the administration of justice requires that the exhibits be sealed. This presents a question of law, which is subject to our de novo review. *See* ***Bilder***, 112 Wis. 2d at 557, and ***Estates of Zimmer***, 151 Wis. 2d 122, 132, 442 N.W.2d 578 (1989) (question of law); ***Ambrose v. Continental Ins. Co.***, 208 Wis. 2d 346, 356, 560 N.W.2d 309 (Ct. App. 1997) (questions of law are reviewed de novo).

¶17 Our inquiry begins "with the presumption that the public has a right to inspect [the exhibits] … and that denial of access to [the exhibits] is contrary to

the public interest and will be [upheld] only in the 'exceptional case.'" ***Estates of Zimmer***, 151 Wis. 2d at 131 (quoted source omitted). The State, as the party seeking to uphold the sealing of the exhibits, bears the burden of rebutting this presumption by "demonstrating, with particularity, that the administration of justice requires that the court records be closed." ***Bilder***, 112 Wis. 2d at 556-57. In determining whether the party advocating closure of court records has satisfied his or her burden, we must balance the public interest of free access against the public interest in nondisclosure. ***Zimmer***, 151 Wis. 2d at 132. For closure to be justified, we must be satisfied that "'the public-policy presumption in favor of disclosure is outweighed by even more important public-policy considerations.'" ***Id.*** (quoted source omitted). As grounds for closing the exhibits at issue in this case, the State asserted a public interest in protecting the victims of crime.

¶18 More specifically, the State made the following arguments, as recognized and considered by the circuit court, in demonstrating that the administration of justice requires that the exhibits be closed. First, our legislature has recognized that all victims of crimes are to be "treated with dignity, respect, courtesy and sensitivity," WIS. STAT. § 950.01, and that victims are "[t]o be treated with fairness, dignity, and respect for his or her privacy by public officials." WIS. STAT. § 950.04(1v)(ag). Here, the parents of L.W. oppose public access to L.W.'s medical records, and the disclosure of the records so long after Hancock's trial is contrary to L.W.'s parents' expectations. The authorization for release of L.W.'s medical records signed by L.W.'s mother provided that the authorization was "to expire one year after September 24, 2007," and a second authorization to release L.W.'s medical information to the Dane County District Attorney's office specified that the release of information was "for use in a legal proceeding." These releases support the family's current position that it expected

that L.W.'s medical records would be disclosed and used only for legal proceedings connected with Hancock's trial.

¶19 Second, the protection of the privacy of child victims in general justifies closing the exhibits. Child victims of crime, in particular those who are the victim of abuse, may be less willing to participate in the judicial process if information provided for the specific purpose of trial is viewed as a permanent and total loss of confidentiality.

¶20 Third, the appellants have not provided any reason that closing the exhibits from public inspection is detrimental to any purpose the appellants may have for seeking access to them. As the circuit court noted in its November 2015 order when considering this last argument by the State, "[t]o the extent [that] the contested exhibits were 'relevant to any trial issue,' they were discussed by the expert witnesses, whose testimony is available to all. To the extent information in the six [exhibits] was not discussed at trial, 'there was no disclosure at trial and there is no apparent reason for disclosure now.'"

¶21 We agree with the circuit court that the State presented sufficient reasons requiring the closure of the exhibits in the interest of justice and that the administration of justice requires the sealing of the documents.

¶22 The appellants argue that because the exhibits were made public during Hancock's trial and no effort was made during the trial to maintain any confidentiality over the documents, public interest in protecting crime victims and the interest in protecting the confidentiality of documents for which confidentiality was waived for a limited time are insufficient reasons for sealing the exhibits under the administration of justice exception. The appellants argue that appellate courts have determined that individuals do not have a privacy interest in materials

contained in public records that are generally open to the public, and that because the exhibits were used in Hancock's trial, any and all confidentiality those exhibits may have had has been lost and "cannot be restored."

¶23 We are not persuaded. In support of their argument, the appellants cite this court to cases holding that where information is made public that is otherwise protected under WIS. STAT. § 905.04, which governs physician and professional counselor-patient privilege, and WIS. STAT. § 51.30(3), which addresses the sealing of files and records of court proceedings under WIS. STAT. ch. 51, the information loses the statutory shield of confidentiality. However, we are not concerned here with whether there remains a statutory shield of confidentiality over the exhibits. Rather, the issue before us is whether the circuit court properly invoked its inherent authority to now seal the exhibits. *See generally* ***C.L. v. Edson***, 140 Wis. 2d 168, 183, 409 N.W.2d 417 (1987).

¶24 Accordingly, we conclude that the circuit court did not err in sealing the exhibits at issue here on the basis that the administration of justice requires their closure.

CONCLUSION

¶25 For the reasons discussed above, we affirm.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.