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**IN THE COURT OF APPEAL OF THE STATE OF  
CALIFORNIA**

**SECOND APPELLATE DISTRICT**

**DIVISION ONE**

In re S.N., a Person Coming Under  
the Juvenile Court Law.

B271991  
(Los Angeles County  
Super. Ct. No. NJ28733)

THE PEOPLE,

Plaintiff and Respondent,

v.

S.N.,

Defendant and Appellant.

APPEAL from an order of the Superior Court of Los  
Angeles County, John C. Lawson, II, Judge. Affirmed.

Holly Jackson, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Paul M. Roadarmel, Jr., Supervising Deputy Attorney General, and Rene Judkiewicz, Deputy Attorney General, for Plaintiff and Respondent.

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S.N. argues that the juvenile court erred by denying his request to strike or redact certain of his medical records that were attached to the probation officer's report. Specifically, S.N. contends that the court's decision not to strike or redact records regarding an involuntary admission to a psychiatric hospital was contrary to section 5328.04 of the Welfare and Institutions Code.<sup>1</sup> We disagree and, accordingly, affirm.

## **BACKGROUND**

### **I. S.N.'s arrest**

On February 16, 2016, S.N.'s grandmother called the police after S.N. became "irate" when S.N.'s mother took two Xanax pills away from him. S.N.'s grandmother also advised the police that S.N. had been acting "very aggressive" over the course of the last several days. When the police arrived and confronted S.N. in his bedroom, he began cursing at them and threatening to shoot or stab them. After the police

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<sup>1</sup> All further statutory references are to the Welfare and Institutions Code unless otherwise indicated.

arrested S.N. and placed him in a police car, S.N. kicked out one of the car's windows, causing it to break apart from the door frame.

On February 17, 2016, the People filed a petition under section 602 against S.N., alleging criminal threats (Pen. Code, § 422, subd. (a); count 1), vandalism (Pen. Code, § 594, subd. (a); count 2), resisting arrest (Pen. Code, § 69; count 3), and possession of a controlled substance (Health & Saf. Code, § 11375, subd. (b)(2); count 4).

## **II. The probation officer's report**

On March 30, 2016, in preparation for a hearing on April 5, 2016, the probation department prepared a 62-page report regarding S.N. and the allegations against him (the report). Among other things, the report contained 25 pages of medical records. Those medical records were comprised of the following: seven pages of notes from the doctor treating S.N. for attention deficit hyperactivity disorder (ADHD); 16 pages of records from College Hospital (the College Hospital records); and two pages regarding S.N.'s vaccinations.

The College Hospital records concerned S.N.'s involuntary admission to that hospital from September 29, 2015 to October 6, 2015; S.N. was admitted due to the danger he posed to himself and others. The College Hospital records consist of the following items: (1) a one page College Hospital form signed by S.N.'s mother authorizing release of S.N.'s records to his ADHD doctor; (2) a three-page document entitled "PSYCHIATRIC AND MENTAL STATUS EXAMINATION," dated October 1, 2015 (the mental exam

report); (3) a three-page document entitled “MEDICAL HISTORY AND PHYSICAL EXAMINATION,” also dated October 1, 2015 (the physical exam report); (4) a two-page document entitled “PSYCHIATRIC DISCHARGE SUMMARY,” dated October 12, 2015 (the discharge report); (5) a one page form entitled “NURSING DISCHARGE INSTRUCTIONS”; and (6) a number of documents totaling six pages regarding the results of blood and urine testing.

Absent from the College Hospital records are any documents detailing any therapy or counseling sessions with S.N.; such an absence is noteworthy because the mental exam report states that S.N. “will be receiving individual, group and milieu therapy” while at the hospital and the discharge report states S.N. did in fact receive “milieu . . . and supportive therapy.”

### **III. The juvenile court denies S.N.’s request to redact the probation officer’s report**

On April 5, 2016, S.N. admitted the vandalism charge and the juvenile court sustained the petition as to that count. Pursuant to the parties’ settlement agreement, the court dismissed the other counts. In reaching its decision, the court did not admit the probation report into evidence. On that same date, the juvenile court denied S.N.’s request to redact the report, but continued the matter to April 14 in order to “readdress the issue.” (Capitalization omitted.)

On April 14, 2016, S.N. renewed his request to remove or redact documents attached to the report, arguing that the College Hospital records were protected from disclosure by

the patient-psychotherapist privilege (Evid. Code, § 1014) and section 5328.04. The request was not supported by any evidence other than the records, such as a declaration by a College Hospital psychotherapist stating that some or all of the College Hospital records constituted psychotherapy notes.

Once again, the juvenile court denied S.N.'s request. The court denied S.N.'s request because the College Hospital records did not contain any psychotherapy notes and, as a result, fell outside the protections of Welfare and Institutions Code section 5328.04 and Civil Code section 56.103. In particular, the juvenile court emphasized that it found "nothing in the reports of a confidential nature in terms of conversation with a psychotherapist or psychiatrist." The court further noted that it "did order . . . substance abuse counseling . . . which is an order towards the rehabilitation of the minor, and these records which were attached [to the report] do provide probation the information necessary to fulfill the court's orders making sure that the minor is involved in appropriate rehabilitation counseling." The trial court, however, did not analyze S.N.'s request under the psychotherapist-patient privilege.

On April 28, 2016, S.N. timely appealed.

### **DISCUSSION**

On appeal, S.N. does not address whether the patient-psychotherapist privilege protected the College Hospital records from disclosure. As a result, we will treat S.N.'s failure to raise this issue in his opening brief as a waiver of

that challenge. (See *Paulus v. Bob Lynch Ford, Inc.* (2006) 139 Cal.App.4th 659, 685; *Osornio v. Weingarten* (2004) 124 Cal.App.4th 304, 316, fn. 7.)

Instead, S.N. limits his challenge to whether the College Hospital records were “privileged”—that is, protected from disclosure—under section 5328.04. As discussed below, we hold that they were not.

## **I. Standard of review**

Ordinarily, the determination whether a privilege or other protection from disclosure applies is subject to the abuse of discretion standard and, as a result, we would determine “whether the trial court’s factual findings are supported by substantial evidence.” (*Kirchmeyer v. Phillips* (2016) 245 Cal.App.4th 1394, 1402.) However, where, as here, there is not only no conflict in the evidence presented by the parties regarding the proper interpretation of the College Hospital records, but no extrinsic evidence at all, the matter is subject to independent or de novo review. (*Parsons v. Bristol Development Co.* (1965) 62 Cal.2d 861, 865–866 & fn. 2; *Nguyen v. Applied Medical Resources Corp.* (2016) 4 Cal.App.5th 232, 247.)

## **II. The statutory protection at issue**

Section 5328 provides that “[a]ll information and records obtained in the course of providing services under” enumerated statutory divisions addressing services provided to mentally ill individuals “to either voluntary or involuntary recipients of services shall be confidential. . . .” It further provides that “[i]nformation and records shall be disclosed

only in any of the following cases” and then enumerates 25 specific exceptions. The exceptions include, among other things, disclosure “[t]o the courts, as necessary to the administration of justice.” (*Id.* at subd. (f).)

A. DISCLOSURE PERMITTED EXCEPT FOR  
PSYCHOTHERAPY NOTES

In addition to the exceptions listed in section 5328, the Legislature also provided in section 5328.04 an exception to the general rule against disclosure; this exception concerns the care and treatment of minors: “Notwithstanding Section 5328, information and records made confidential under that section may be disclosed to . . . a probation officer . . . , or any other person who is legally authorized to have custody or care of a minor, for the purpose of coordinating health care services and medical treatment . . . , mental health services, or services for developmental disabilities, for the minor.” (§ 5328.04, subd. (a).)

Section 5328.04 further provides that “[i]nformation disclosed pursuant to this section shall not be admitted into evidence in any criminal or delinquency proceeding against the minor” (§ 5328.04, subd. (c)), and that “[i]nformation and records that may be disclosed pursuant to this section do not include psychotherapy notes, as defined in Section 164.501 of Title 45 of the Code of Federal Regulations.” (§ 5328.04, subd. (h).)<sup>2</sup>

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<sup>2</sup> Civil Code section 56.103 similarly provides that a minor’s “medical information” may be disclosed to probation

In other words, sections 5328 and 5328.04 permit the disclosure of a minor’s medical records—but not psychotherapy notes—to a court and a probation officer if such disclosure is necessary for the care and treatment of the minor.

B. PSYCHOTHERAPY NOTES ARE DEFINED NARROWLY

The federal regulation cited in section 5328.04, subdivision (h) defines the term psychotherapy notes as “notes recorded (in any medium) by a health care provider who is a mental health professional documenting or analyzing the contents of conversation during a private counseling session or a group, joint, or family counseling session and that are separated from the rest of the individual’s medical record.” (45 C.F.R. § 164.501 (2016).) The regulation further states: “Psychotherapy notes excludes medication prescription and monitoring, counseling session start and stop times, the modalities and frequencies of treatment furnished, results of clinical tests, and any summary of the following items: Diagnosis, functional status, the treatment plan, symptoms, prognosis, and progress to date.” (*Ibid.*)

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officers and other persons responsible for coordinating health care services and medical treatment to a minor (Civ. Code, § 56.103, subd. (a)), and that “‘medical information’ does not include psychotherapy notes, as defined in Section 164.501 of Title 45 of the Code of Federal Regulations.” (Civ. Code, § 56.103, subd. (e)(2).)



The grounds for affording heightened protection to psychotherapy notes are found in the explanatory comments made by the Department of Health and Human Services at the time the regulation was finalized: “the rationale for providing special protection for psychotherapy notes is not only that they contain particularly sensitive information, but also that they are the personal notes of the therapist, intended to help him or her recall the therapy discussion and are of little or no use to others not involved in the therapy. Information in these notes is not intended to communicate to, or even be seen by, persons other than the therapist. Although all psychotherapy information may be considered sensitive, we have limited the definition of psychotherapy notes to only that information that is kept separate by the provider for his or her own purposes. It does not refer to the medical record and other sources of information that would normally be disclosed for treatment, payment, and health care operations.” (65 Fed.Reg. 82623 (Dec. 28, 2000).)

In other words, “[s]ummary information, such as the current state of the patient, symptoms, summary of the theme of the psychotherapy session, diagnoses, medications prescribed, side effects, and any other information necessary for treatment or payment”—that is, information that is “always placed in the patient’s medical record . . . [and] routinely sent to insurers for payment”—does not qualify for the special protection provided to psychotherapy notes. (65 Fed.Reg. 82623 (Dec. 28, 2000).)

C. THE COLLEGE HOSPITAL RECORDS ARE NOT  
PSYCHOTHERAPY NOTES

Of the 16 pages of College Hospital records, only three documents totaling eight pages could arguably be construed as psychotherapy notes: the physical exam report; the mental exam report; and the discharge report. However, each of those reports only provides “[s]ummary information” (65 Fed.Reg. 82623 (Dec. 28, 2000)) of the kind that might be found in any mental patient’s file.

For example, the mental exam report provides a précis of S.N.’s “present illness,” as well as a synopsis of his “past psychiatric history,” “past medical history,” his “family history,” “social history” and “developmental history”; (capitalization omitted) the mental exam report does not discuss or even summarize any counseling or therapy, because no therapy had been provided yet; instead, it merely outlines a “plan of treatment.” (capitalization omitted) Similarly, the physical exam report does not contain any notes from any therapy or counseling sessions; it merely comments (in an abbreviated fashion) on such things as S.N.’s vital signs, heart rate and rhythm, and his neurological reactions. Even the discharge report is void of any details regarding S.N.’s therapy; it simply notes that S.N. was “provided milieu and supportive therapy.”

Because the College Hospital records do not contain psychotherapy notes, because those records were not admitted into evidence, and because the information contained in those records is relevant to the probation

officer's care and treatment of S.N., including the court-ordered substance abuse counseling, we hold that the juvenile court properly denied S.N.'s request to strike or redact those records.

**DISPOSITION**

The order is affirmed.

NOT TO BE PUBLISHED.

JOHNSON, J.

We concur:

ROTHSCHILD, P. J.

CHANEY, .J.