

IN THE DISTRICT COURT OF JOHNSON COUNTY, KANSAS
CRIMINAL COURT DEPARTMENT

STATE OF KANSAS,)
Plaintiff,)
vs.) Case No. 07CR2701
COMPREHENSIVE HEALTH)
OF PLANNED PARENTHOOD)
OF KANSAS AND MID-MISSOURI, INC.,)
Defendant.)

TRANSCRIPT OF PROCEEDINGS

- Scheduling Conference -

BE IT REMEMBERED that on the 9th day of November,
2011, the above-entitled matter comes on for hearing before the
HONORABLE STEPHEN R. TATUM, Judge of Court No. 5 of the Tenth
Judicial District, State of Kansas, at Olathe, Kansas.

APPEARANCES

FOR THE STATE: Mr. Steve Howe, District Attorney, &
Christopher McMullin, Assistant District Attorney, Johnson
County Courthouse, 100 North Kansas Avenue, Olathe, Kansas
66061.

FOR THE DEFENDANT: Mr. Pedro Irigonegaray of Irigonegaray
& Associates, 1535 S.W. 29th Street, Topeka, Kansas
66611-1901.

REPORTED BY DENISE M. GARDNER, CSR, RPR

CLERK OF DISTRICT COURT
JOHNSON COUNTY, KS

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1 PROCEEDINGS

2 (The following proceedings were had before the
3 Court with all parties present.)

4 THE COURT; all right. This is the State of
5 Kansas versus Planned Parenthood. This is Case 07CR-2701.
6 Appearances, please.

7 MR. HOWE: May it please the Court, the State of
8 Kansas appears by Steve Howe and Chris McMullin.

9 MR. IRIGONERGARAY: May it please the Court,
10 Your Honor, Planned Parenthood appears by its president
11 and CEO, Mr. Peter Brownlie, by Ms. Dionne Scherff,
12 counsel, and Pedro Irigonergaray.

13 We are ready to proceed.

14 THE COURT: Mr. Howe.

15 MR. HOWE: Yes, Judge.

16 At the last hearing, the Court allowed the State
17 some additional time and -- in light of the recent
18 evidentiary discovery or destruction of some of the
19 documents, and you allowed us to proceed.

20 And what I'm going to do is kind of outline what
21 we discovered at this point. Because this is a case of
22 statewide importance, I think it's important for us to be
23 transparent as to what actions were taken, and the reasons
24 for any actions on behalf of the State.

25 The part of our investigation since the last

1 hearing, we outlined the following, basically, timeline.
2 In mid-2004, subpoenas were issue by Attorney General
3 Kline to KDHE requesting the BS-213 forms, which has been
4 referred to as the termination of pregnancy reports that
5 are required by law to be filed with their office.

6 The AG's office did not request an authenticated
7 copy or an affidavit from the custodian of records, but
8 just a copy.

9 These originals were given to the attorney
10 general's office under Mr. Kline in 2004. They include
11 thousands of pages of the T.O.P. forms. The KDHE retained
12 those copies for a period of time. There was no request
13 for a preservation or retention request made by the AG's
14 office. And KDHE, for reasons still unclear, destroyed
15 those records in 2005.

16 So that left -- there was one other complete
17 copy of those records, and those were the ones in the
18 possession of Attorney General Phill Kline at the time.
19 After that, he made the transition from attorney general
20 to district attorney here in Johnson County.

21 During that transition, he took those original
22 copies, the one original copy, to Judge Anderson on
23 January 8th of 2007 --

24 THE COURT: Judge Anderson in Shawnee County?

25 MR. HOWE: That's correct, Judge.

1 Judge Anderson, once he received those copies,
2 notified Attorney General Morrison's office that he had
3 them, and they then took possession of those from Judge
4 Anderson back on January 10th of 2007.

5 Since the last hearing, we have been working
6 with Attorney General Schmidt's office to locate the
7 original copies that were turned over back then.

8 Also, important in this highlight or this
9 timeline, Johnson County District Attorney Kline filed
10 this case on October 17th of 2007.

11 We previously discussed the motion to quash the
12 subpoena filed by KDHE, which took place on April 3rd of
13 2008. And then after the Court's ruling on the matter,
14 this matter was taken up to interlocutory appeal to the
15 Supreme Court on August 4th, 2008. And, in fact, as this
16 Court knows, when we file a brief, we have to get it
17 signed off by the attorney general's office.

18 Then the trial involving the George Tiller
19 abortion clinic started in March of 2009.

20 Unfortunately, what we have uncovered, as well
21 as the Attorney General Schmidt's office, is that on April
22 7th, 2009, Attorney General Six's administration destroyed
23 those original T.O.P. records. It was done while this
24 case was pending and they knew that it was an appeal
25 issue, that -- it was the very appeal issue, those same

1 documents that were before the Supreme Court.

2 We were not told of that destruction. What
3 was -- what we have discovered is those documents were
4 destroyed while others were retained. And in discussions
5 with the current attorney general, it looks like they may
6 have violated their own retention policy.

7 So after that, we received a mandate from the
8 Supreme Court on December 9th, 2010, which then allowed us
9 to proceed.

10 I will note that I'm very concerned about the
11 circumstances that led to that record destruction that was
12 in the possession of the attorney general's office. The
13 copies that were destroyed by the AG was the last complete
14 copy of the KDHE T.O.P. records.

15 Clearly, my predecessor intended to have KDHE
16 look at the records to provide their authentication, but
17 that is not possible because KDHE destroyed the originals.

18 KDHE misrepresented in their motion to quash
19 that they still had those records, so then we moved on to
20 the original copies that were in the possession of the
21 attorney general's office. It was in the hope of having
22 them authenticate those original copies, the one left --
23 the one original copy that was left. But now we have
24 discovered that those have also been destroyed. So what
25 we are left with is a partial copy of a copy of these

1 records.

2 And so we began in this two-week period to
3 determine, is it possible to use these records to move
4 forward on the charges?

5 We've reviewed, during the course of this case,
6 the Court is well aware of, several Supreme Court
7 decisions that outlines a bevy of facts related to these
8 records. This includes testimony and information we have
9 gained as part of our investigation by interviewing
10 witnesses to determine if we can get the necessary
11 foundation and authentication.

12 We've also done some extensive case law research
13 on what options we have available.

14 We've staffed it internally in our office and
15 we've also consulted with Attorney General Schmidt's
16 office. And I think this Court is well aware of my years
17 of experience in the white collar cases, I know how to get
18 records into evidence, and I've done it on many occasions.

19 And so in this two-week period we worked hard to
20 try to figure out if we can move past this road block.

21 Based on our discussions with the attorney
22 general's office who we've been consulting with, we've
23 made the following determination: The partial copies that
24 we have currently, we are aware of some of the routes
25 travelled and it spilled out in some of the Supreme Court

1 decisions.

2 During the transition from attorney general to
3 district attorney, Phill Kline had some of his staff move
4 the documents to various locations. It was at Steve
5 Maxwell's house where it was broken down into different
6 groupings to be delivered to different offices. Then it
7 was transported to Agent Reed's house and remained in a
8 Tupperware container in his living room for over a month,
9 and then finally delivered to the DA's office.

10 Now, this is not a complete copy of the records
11 that we have in our custody, but a small percentage of
12 those.

13 What we have done is interviewed many of the
14 witnesses who had contact with them to try to determine if
15 we could establish a chain of custody. There is no one
16 who can provide which person and when these records were
17 copied. There is no documents memorializing what happened
18 to refresh witnesses' memories, old employees of the
19 attorney general's office and district attorney's office
20 to help ID these records.

21 From interviewing KDHE's employees, there is no
22 way for them to authenticate our partial copies as true
23 and accurate copies of the T.O.P. records.

24 And what is important about that is those T.O.P.
25 records are two-sided copies. Which also plays into this

1 analysis is we learned from one of the investigators that
2 when they filed the Wichita case against the Tiller
3 clinic, they had mixed up the front and back copies which
4 led to some problems with some of the charges, which also
5 concerns us as to being able to establish sufficient chain
6 of custody and authentication of the remaining documents.

7 The Johnson County District Attorney's office
8 and the attorney general's office have concluded that the
9 partial copies were not maintained in a way to be
10 self-authenticating. They are partial copies and we can't
11 establish sufficient foundation for chain of custody. We
12 cannot authenticate them through KDHE after speaking to
13 these witnesses.

14 And those original documents or the items
15 submitted to KDHE are necessary for us to be able to
16 compare to the documents provided by the defendant during
17 the course of this investigation.

18 So, basically, Judge, what we've determined is
19 that the legal hurdles are insurmountable based on the
20 destruction of the originals by KDHE, based on the
21 destruction of the original copies by Attorney General
22 Six's office, and we don't have a complete copy in our
23 possession, and a lack of chain of custody, and, most
24 importantly, our inability to have anybody authenticate
25 the remaining copies, we are left with no other

1 alternative but to dismiss the counts proven through KDHE
2 T.O.P. records.

3 That would be -- and at this time, the State is
4 going to move to dismiss all the felony counts, Counts I
5 through 23, as a result of this, as well as the
6 misdemeanor counts, failure to maintain records, which are
7 Counts 24 through 49.

8 So with that being said, Judge, the State is
9 ready to move forward with the remaining counts of the
10 complaint. And if you have any questions, I will be happy
11 to answer those.

12 I will let you know that prior to today's
13 hearing, I advised counsel, to be fair to them, and
14 advised them of basically the action that we were going to
15 be taking today.

16 THE COURT: Thank you. I don't have any
17 questions.

18 Mr. Irigonergaray.

19 MR. IRIGONERGARAY: Just briefly, Your Honor.
20 May I approach, Your Honor?

21 THE COURT: You may.

22 (Whereupon Mr. Irigonergaray approached the
23 bench.)

24 MR. IRIGONERGARAY: Your Honor, I have placed
25 before you a journal entry which I have prepared based

1 upon my conversations with Mr. Howe.

2 It is important to note that the journal entry
3 indicates that the counts are being dismissed with
4 prejudice, and Mr. Howe has signed on that agreement. And
5 we would like the Court's signature on it to conclude this
6 part of the process.

7 THE COURT: Okay.

8 MR. HOWE: Judge, it's my understanding on the
9 remaining counts that -- in speaking to counsel, that we
10 would like to have that matter set for motion hearings.

11 MR. IRIGONERGARAY: That's correct, Your Honor.

12 But it is important having --

13 THE COURT: Which motion are you referring to,
14 Mr. Howe?

15 MR. HOWE: Well, it was indicated to me that
16 there were going to be some motions filed, and so --

17 THE COURT: On the remaining counts.

18 MR. IRIGONERGARAY: Yes, Your Honor.

19 MR. HOWE: Yes, Your Honor.

20 THE COURT: You are not objecting to the
21 dismissal of prejudice then?

22 MR. HOWE: Judge, Statute of Limitations would
23 make that effective.

24 THE COURT: Yes.

25 MR. IRIGONERGARAY: All right.

1 Having said that, Your Honor -- and we
2 will address the issue regarding the remaining
3 misdemeanors.

4 Counsel was given an opportunity to make
5 statements regarding the dismissal. And we have some
6 prepared remarks that we would also like to put into the
7 record because this is clearly a matter that has statewide
8 implications.

9 It is --

10 THE COURT: Go ahead.

11 MR. IRIGONERGARAY: Thank you, Your Honor.

12 It is important for this Court, for our
13 community, and indeed it is important for justice that
14 defendant responds on the record to the comments just made
15 by the district attorney.

16 State of Kansas versus Comprehensive Health of
17 Planned Parenthood of Kansas & Mid-Missouri, Inc., Case
18 No. 07CR-2701, was filed by Mr. Kline during his tenure as
19 Johnson County District Attorney.

20 On October --

21 THE COURT: Let me interrupt you before you go
22 forward.

23 Your comments are only as to Counts 1 through 49
24 today?

25 MR. IRIGONERGARAY: That is correct, Your Honor.

1 THE COURT: Thank you. So noted. Noted for the
2 record.

3 MR. IRIGONERGARAY: Thank you, Your Honor.

4 As I was saying, Johnson County District
5 Attorney Mr. Kline filed these charges on October the
6 17th, 2007. However, his involvement in these matters
7 commenced in 2003 at a time when he was the attorney
8 general for the State of Kansas.

9 At the time that he was attorney general, Mr.
10 Kline commenced an inquisition in Shawnee County. At that
11 time, he issued a subpoena to the Kansas Department of
12 Health and Environment, KDHE, requiring the production of
13 a number of unauthenticated copies of termination of
14 pregnancy reports, the originals of which have been
15 previously filed by Planned Parenthood with KDHE in full
16 compliance of the law.

17 At no time was there ever a complaint filed by
18 KDHE against Planned Parenthood regarding the content or
19 the timeliness of the T.O.P. reports filed. During the
20 inquisition, Planned Parenthood also produced certain
21 retained copies of the original T.O.P. reports filed with
22 KDHE.

23 Simply because the T.O.P. copies provided by
24 Planned Parenthood to then Attorney General Phill Kline
25 were not photocopies of the unauthenticated copies

1 Mr. Kline had obtained from KDHE, Mr. Kline assumed that
2 criminal conduct had taken place, an assumption that well
3 suited his political ambitions.

4 Notwithstanding the fact that the information
5 contained in the copies was the same, the only difference
6 being the handwriting, Mr. Kline, without ever questioning
7 Planned Parenthood or their lawyers about the reason for
8 the handwriting differences, proceeded to file criminal
9 charges when he became Johnson County District Attorney.

10 Had Mr. Kline taken his duty to investigate
11 seriously, and had he inquired of Planned Parenthood or
12 their lawyers the reasons for the handwriting differences,
13 Mr. Kline would have learned that the difference in
14 handwriting did not represent criminal conduct, but
15 rather, that an innocent and perfectly legal system to
16 copy by hand the reports provided to KDHE had been
17 established by Planned Parenthood personnel.

18 He would have learned that rather than a
19 criminal intent, the real intent of Planned Parenthood's
20 staff was to ensure both the accuracy of the T.O.P.s as
21 well as their timely filing with KDHE.

22 After defeating Mr. Kline in the race for
23 attorney general, Mr. Paul Morrison, a competent and
24 capable prosecutor, took seriously his duty to investigate
25 the allegations against Planned Parenthood. He conducted

1 a thorough investigation of the facts and circumstances
2 involved and concluded that Planned Parenthood had not
3 violated any laws and closed the inquisition in 2007.

4 Competent lawyers know the importance of
5 obtaining authenticated copies of records in order to
6 comply with rules which govern admissibility of evidence
7 in our courts.

8 The responsibility to obtain authenticated
9 copies of the reports and to ensure their safeguarding of
10 the original reports, filed by my client with KDHE, was
11 Mr. Kline's, and solely Mr. Kline's and his staff. Not
12 anyone else.

13 It is unfair, it is inaccurate to say or to
14 suggest that KDHE counsel or other Kansas attorney
15 generals or their staffs had a duty to anticipate
16 Mr. Kline's incompetence and to provide him with their
17 legal advice regarding evidentiary issues.

18 Today's dismissal with prejudice of Counts 1
19 through 49, inclusive, represents a partial conclusion of
20 a prolonged and unnecessary legal process which had -- has
21 cost the people of Johnson County an immense amount of
22 money and my client a great deal of unnecessary expense
23 and grief.

24 The person responsible for this legal fiasco is
25 Mr. Kline and no one else.

1 Thank you, Your Honor.

2 THE COURT: Counsel, I have noted your
3 signatures on this journal entry of dismissal. I have
4 signed the journal entry of dismissal. We'll file these
5 in.

6 Do each of you want one copy of this before it's
7 filed or after?

8 MR. HOWE: We can -- we can get a copy.

9 THE COURT: Okay. That's fine. Cause that to
10 be filed.

11 Need to set a date for motions; is that right?

12 MR. IRIGONERGARAY: If I may, Your Honor.

13 In conversations with Mr. Howe, we believe that
14 it is wise to set a motion date, a date to respond to the
15 motions and a motions argument, and then at the Court's
16 discretion to determine whether you wish to set a trial
17 date at this time or wait until the motions argument and
18 your decision.

19 The suggested schedule that Mr. Howe and I have
20 discussed is as follows:

21 We would like to have a motions date set for
22 sometime -- a motion's filing date sometime in late
23 February.

24 We would like a response to file those motions
25 set approximately 30 to 45 days following that.

1 We would like, and I would suggest to the Court,
2 a two-day setting for motions arguments.

3 And then we anticipate, based upon the
4 complexity of any remaining count, that -- and
5 particularly with the complications involved with a jury
6 trial and the issues with voir dire, that a four-week
7 trial setting would be appropriate.

8 I will be out of the state from December the
9 11th through January the 16th. Unfortunately, my mother
10 has developed Alzheimer's and I'm going to be with her for
11 a few weeks out of state.

12 We have not been focusing on the misdemeanors in
13 this matter, neither Mr. Howe or us. We've been focusing
14 on the issue of the felonies.

15 We want to make sure we have plenty of time to
16 review both the law as well as to appropriately develop
17 for this Court legal motions that we think may be
18 dispositive.

19 THE COURT: Well, I'm happy to set a February
20 date, but I think you can have all your motions filed by
21 then and responses to the motions.

22 MR. IRIGONERGARAY: That's what we're
23 suggesting, sir. Sometime in --

24 THE COURT: We can hear the motions in February.
25 That's a ways out for my Court, but if the parties are

1 both requesting that, we can do that.

2 MR. HOWE: Judge, in light of his unavailability
3 and being out of town, I don't have a problem with setting
4 a February motion date. I --

5 THE COURT: Do you want a full day?

6 MR. IRIGONERGARAY: Well, I'm trying to
7 understand what the Court is --

8 THE COURT: I would like to have all the motions
9 filed and responded to by that date in February. Can we
10 do that?

11 MR. IRIGONERGARAY: Judge, I respectfully
12 request that because of the complexity involved in the
13 remaining counts and the issues that we're going to have
14 to decide, that you please allow us a February motion
15 filing date. Between now and December 11th, my schedule
16 is completely packed. I will not be returning until the
17 17th.

18 THE COURT: Mr. Howe, do you agree with that?

19 MR. HOWE: Judge, as long as the defendant takes
20 the time on this issue --

21 THE COURT: Here's the point. I mean, due to
22 all circumstances that have been discussed, this case is
23 an old case, trips to the Supreme Court and all of those
24 things. So I'm going to try to push the case along now
25 and get the matter going forward on those remaining

1 counts.

2 But I will give the parties some time to file
3 the motions and then another date to hear the motions
4 after that, but I do want you back here in February so we
5 can see what the progress is.

6 MR. IRIGONERGARAY: All right, sir. We would
7 respectfully request, Your Honor, that after the deadline
8 for the filing of the motions, that you provide us
9 somewhere between 30 to 45 days to respond to each other's
10 motions prior to --

11 THE COURT: Let's see what motions are filed and
12 we'll set a date that's appropriate --

13 MR. IRIGONERGARAY: Okay.

14 THE COURT: -- based on the motions that are
15 filed.

16 MR. IRIGONERGARAY: All right, sir.

17 THE COURT: Usually, don't take that long,
18 response to motions, but we'll consider it if it's
19 necessary.

20 MR. IRIGONERGARAY: So --

21 THE COURT: I understand there are a lot of
22 counts here.

23 MR. IRIGONERGARAY: So my understanding then is
24 that you are going to set a date in February.

25 THE COURT: Yes. We'll go forward with one

1 date, February date, for people to file their motions --

2 MR. IRIGONERGARAY. All right, sir.

3 THE COURT: -- February 2012 at the defendant's
4 request.

5 I think on that date, you know, it's just for
6 motions to be filed, so it's not going to be a long
7 hearing, and we'll see how much time you need to respond.

8 MR. IRIGONERGARAY: All right, sir.

9 ADMINISTRATIVE ASSISTANT: February 22nd at
10 10:00 or 11:00?

11 MR. IRIGONERGARAY: 10:00 would be fine.

12 THE COURT: Mr. Howe?

13 MR. HOWE: February 22nd at 10:00.

14 THE COURT: I'm going to set an hour at that
15 time and -- aside so we can discuss how this case is going
16 to move forward at that time. You all should be pretty
17 familiar with it by then --

18 MR. IRIGONERGARAY: Yes, sir.

19 THE COURT: -- if you are not now.

20 MR. HOWE: Your request is -- just so we're all
21 clear -- that we are to have all our motions filed.

22 THE COURT: All motions that you anticipate
23 filing as to those remaining counts be filed by that date,
24 and then parties can tell me how long they think that they
25 will need to respond to those motions.

1 Is that a concern, Mr. Howe?

2 MR. HOWE: Judge, so on February 22nd, we're
3 going to appear, have our motions on file, filed by both
4 parties, be able to advise the Court how much time we need
5 to be able to file our responses, and set an appropriate
6 date at that point.

7 THE COURT: Correct. And we might be able to
8 set a date for trial at that time as well. Do as much as
9 we can on that next date.

10 MR. HOWE: Sure.

11 THE COURT: I'll set aside an hour so we'll have
12 plenty of time to air it out.

13 MR. HOWE: Judge, one of the things that the
14 Supreme Court made abundantly clear is the balance of the
15 privacy interest of the patient, as well as trying to move
16 forward with the criminal matter.

17 And we'll also be having discussions about if
18 there is things that we can do procedurally, and maybe
19 even some stipulations, to help move that along to cover
20 those requests by the Supreme Court.

21 THE COURT: I anticipate the parties will try to
22 iron out those issues.

23 MR. IRIGONERGARAY: It's been a pleasure working
24 with Mr. Howe. I don't see that there would be any
25 problem with that.

1 Your Honor, on the 22nd, do you wish for us to
2 bring the motions to you at that time?

3 THE COURT: File them any time you have them
4 ready, and we will look at the motions and see how much
5 time that we need to set for a response to those motions.
6 But the earlier you can file, the more time the other side
7 has to look at them.

8 MR. IRIGONERGARAY: And, again, the filing of
9 the motions should be first done through the Court before
10 they are sent to the Clerk, to retain the same practice
11 that we've --

12 THE COURT: We'll continue that same practice as
13 we've had in place, yes.

14 MR. IRIGONERGARAY: Thank you, Your Honor.

15 THE COURT: Thank you.

16 Anything else today?

17 MR. HOWE: No, Your Honor.

18 MR. IRIGONERGARAY: Not on our behalf, Your
19 Honor.

20 THE COURT: Thank you. We'll stand in recess.

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C E R T I F I C A T E

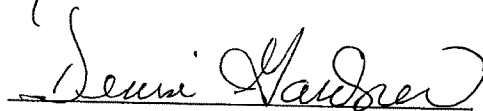
COUNTY OF JOHNSON)

STATE OF KANSAS)

I, Denise M. Gardner, a Certified Shorthand Reporter, and the regularly appointed, qualified, and acting Official Court Reporter of Division 11 for the 10th Judicial District of the State of Kansas, do hereby certify that as such Official Reporter, I was present at and reported in machine shorthand the above and foregoing proceedings.

I further certify that a transcript of my shorthand notes was typed and that the foregoing transcript is a true and correct transcript of my notes in said case to the best of my knowledge and ability.

SIGNED AND FILED with the Clerk of the District Court of Johnson County, Kansas on this 14th day of November 2011.



Denise Gardner, CSR, RPR