SUPREME COURT NO. 93927-6

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

v.

JIMI HAMILTON,

Respondent.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR SNOHOMISH

The Honorable Marybeth Dingledy, Judge

ANSWER TO PETITION FOR REVIEW

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RULES, STATUTES AND OTHER AUTHORITIES

A. IDENTITY OF RESPONDENT AND COURT OF APPEALS DECISION

Respondent Jimi James Hamilton, the appellant below, answers the State's petition for review following the Court of Appeals decision in State. v. Hamilton, ___ Wn. App. ___, 383 P.3d 1062 (2016).

B. COUNTERSTATEMENT OF THE ISSUES

1. Because the Court of Appeals correctly applied the rule from Washington Irrigation & Development Co. v. Sherman, 106 Wn.2d 685, 724 P.2d 997 (1986), pertaining to ER 705 and the cross examination of expert witnesses, should the State's petition for review be denied?

2. A corrections officer entered Hamilton's cell and read his legal materials for 25 to 30 minutes. He or another Department of Corrections (DOC) officer then tampered with video evidence showing him entering and exiting the cell. DOC also refused to provide Hamilton and his counsel with a confidential meeting space. The trial court issued orders requiring DOC to provide a confidential meeting space for Hamilton and his defense team, but DOC refused to comply with the order. Was DOC's misconduct so egregious that it shocks the fundamental sense of fairness and bars this prosecution as a matter of due process of law?

3. Despite finding multiple intrusions into Hamilton's attorney-client communications on the part of DOC personnel as well as "shocking

and unpardonable" conduct, the trial court refused to dismiss the case, placing the burden of proof on Hamilton to show prejudice. Given that "the State has the burden to show beyond a reasonable doubt that the defendant was not prejudiced" by such intrusions under State v. Peña Fuentes, 179 Wn.2d 808, 819-20, 318 P.3d 257 (2014), is remand necessary for the trial court to reconsider dismissal under the correct standard?

C. STATEMENT OF THE CASE

The facts generally necessary for review are adequately set out in the Court of Appeals decision, the State's petition for review, and Hamilton's opening brief in the Court of Appeals. Where additional facts are needed to support Hamilton's legal analysis, Hamilton includes such facts below with citations to the record per RAP 10.4(f).

D. ARGUMENT

1. BECAUSE THIS COURT'S PRECEDENT ESTABLISHES THE "IMPEACHMENT" OF THE DEFENSE EXPERT WAS IMPERMISSIBLE, AND BECAUSE THE DECISION UNDER REVIEW IS CONSISTENT WITH THIS PRECEDENT, THE STATE'S PETITION FOR REVIEW SHOULD BE DENIED

Throughout this appeal, the State has failed to acknowledge that an expert's review of certain records is not the same as the expert's reliance on the records as a basis for opinion. The State misapprehends ER 705 and this court's decision in Sherman, 106 Wn.2d at 688, which held that ER 705

requires an expert to disclose only the bases for his or her opinion during cross examination. Thus, a party may not cross-examine an expert with the opinions or conclusions of nontestifying experts unless the testifying expert relies on those opinions or conclusions in forming his or her own. Id. Where the record "fails to indicate that [the expert] relied upon the conclusions of the non-testifying [experts] to formulate his opinion," those "conclusions [a]re improperly admitted into evidence." Id. at 688.

At trial, Hamilton presented the testimony of psychiatrist Stuart Grassian, M.D., to support his diminished capacity defense. Grassian opined Hamilton could not form the requisite mens rea to commit assault. He based this opinion on his extensive experience working with inmates who, like Hamilton, have spent significant periods in the "catastrophe" of solitary confinement, noting that almost all of Hamilton's prison time since 1996 had been served in segregated custody. 23RP[1] 57-75. Grassian also relied on

[1] Consistent with his briefing below, Hamilton refers to the verbatim reports of proceedings as follows: 1RP—August 7, 2013; 2RP—three-volume consecutively paginated transcripts dated August 22, 23, and 26, 2013; 3RP—September 24, 2013; 4RP—December 4, 2013; 5RP—December 11, 2013; 6RP—December 20, 2013; 7RP—January 2, 2014; 8RP—January 8 and 21, 2014; 9RP—April 1, 2014; 10RP—May 15, 2014; 11RP—June 16, 2014; 12RP—June 17, 2014; 13RP—two-volume consecutively paginated transcripts dated June 19, 2014; 14RP—August 11, 2014; 15RP—August 12, 2014; 16RP—August 19, 2014; 17RP—September 12, 2014; 18RP—September 15, 2014; 19RP—September 16, 2014; 20RP—September 17, 2014; 21RP—September 18, 2014; 22RP—September 19, 2014; 23RP—September 22, 2014; 24RP—September 23, 2014; 25RP—two-volume consecutively paginated transcripts dated September 24, 2014; 26RP—September 25, 2014; 27RP—September 29,

interviews of Hamilton and his family as well as on specific records that showed patterns in Hamilton's symptoms. 23RP 80-89, 92-99.

To purportedly impeach Grassian, during cross examination the prosecutor read numerous facts and conclusions from Hamilton's prison records into evidence that Grassian had reviewed but had not relied on. See Br. of Appellant at 50-54 (bulleted list detailing records used by prosecutor). The prosecutor asserted she was entitled to impeach Grassian "with the facts that he reviewed, he considered, or should have considered when making his statements and his opinions." 25RP 165. The State thus read the various statements of nontestifying experts to challenge Grassian's diagnosis, claiming, "It goes strictly to his diagnosis, and what Dr. Grassian has chosen to ignore in making his diagnosis." 25RP 10.

The State's impeachment method violated ER 705 and Sherman because the State never established Grassian had relied on any of the materials it questioned him about. Grassian had seen the records in question.[2] 23RP 39-40. But he was clear that he did not rely on them,

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2014; 28RP—September 30, 2014; 29RP—October 1, 2014; 30RP—October 2, 2014; and 31RP—November 3, 2014.

[2] The State claims that in Sherman, "There was no indication that the witness had read the reports or taken them into consideration when formulating his opinion." Petition for Review at 7. This is incorrect. The expert in Sherman, just like Dr. Grassian, had read the reports: "The respondents in this case failed to establish that Sherman's expert relied upon the reports of the non-testifying doctors,

instead heavily criticizing DOC for inadequate mental health treatment. 23RP 41-44. Grassian referred to the DOC records generally as "helter-skelter" and described a lack of continuity, mismanagement in medication protocols, and "grossly inadequate service" that failed to "rise to the level of appropriate standard of care."[3] 23RP 47-55. Given his condemnation, the record is clear that Grassian did not substantively rely on the various prison records, about which the State cross-examined him, to formulate his opinion.

The Court of Appeals agreed with Hamilton that Grassian had not relied on the DOC records in forming his opinion. Hamilton, 383 P.3d at 1071-72 ("The State never established that Dr. Grassian relied on the opinions of the four nontestifying medical professionals with whose opinions he was confronted or, for that matter, any other entry in Hamilton's voluminous medical records."). Applying Sherman, the Court of Appeals concluded the trial court "erred by permitting the prosecutor to impeach Dr. Grassian with 'unrelied on opinions' that constituted inadmissible hearsay." Id. at 1072. Because the Court of Appeals applied the controlling precedent of this court, there is no RAP 13.4(b)(1) conflict. Review is not warranted.

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although Dr. Bridgeford did admit that he had seen them." Sherman, 106 Wn.2d at 689 (emphasis added).

[3] With regard to many of the specific records used by the State during cross examination, Grassian also leveled several specific criticisms. See 23RP 169, 176, 183, 186, 189-90; 25RP 88-89, 92-93, 108, 111, 125-26, 128, 143; Br. of Appellant at 56-57.

The State cites State v. Furman, 122 Wn.2d 440, 858 P.2d 1092 (1993), claiming that it is more similar to Hamilton's case than Sherman. The State is incorrect, as Furman did not even involve improper cross examination of an expert under ER 705—Furman challenged expert testimony about his sexual history on ER 403 grounds. 122 Wn.2d at 452-53. And even if ER 705 were at issue, the testifying expert in Furman explicitly relied on the sexual history at issue in reaching his conclusions:

> The sexual history information had been provided by appellant himself to Dr. Olson, who prepared a report which was given to Dr. Halpern to assist him in reaching the conclusions he presented at trial. Dr. Halpern testified that he read the report and relied on the sexual history at least to some extent, in reaching some of his conclusions.

Id. (emphasis added). Unlike what occurred here and in Sherman, in Furman, no party attempted to impeach the testifying expert by arguing the substantive correctness of a nontestifying expert's conclusions. Furman is not on point and therefore creates no RAP 13.4(b)(1) conflict.

The State also attempts to show a RAP 13.4(b)(4) issue of substantial public interest, complaining that "[u]nder the court's decision, an expert can 'cherry-pick' facts that support his conclusion" and "can select the facts that he chooses to 'rely on' and ignore the rest." Petition for Review at 9. This concern amounts to nothing beyond the basic recognition that experts rely on certain information to the exclusion of other information in reaching their

opinions. According to the State, though, the "opposing party is then precluded from pointing out the information that the expert chose to ignore." Petition for Review at 9. This statement illustrates the State's misunderstanding of ER 705 and Sherman. If the State wishes to impeach an "expert or introduce additional medical testimony by using the reports of non-testifying physicians, [it] should [do] so by calling these physicians as witnesses. By doing this, the use of hearsay [can be] avoided and the non-testifying physicians [can be] cross-examined." Sherman, 106 Wn.2d at 689. Nothing prevented the State from pointing out the information Grassian supposedly "chose to ignore" by calling the authors of the DOC prison records as witnesses or by attempting to admit the records themselves into evidence. Expecting the State to follow the rules of evidence does not give rise to an issue of substantial public interest. The State's petition for review should be denied.

2. THE COURT OF APPEALS DECISION WRITES THIS COURT'S AND THE COURT OF APPEALS' OUTRAGEOUS GOVERNMENT MISCONDUCT CASES OUT OF EXISTENCE, NECESSITATING REVIEW

Based on outrageous and shocking government misconduct—some of which amounted to criminal activity—Hamilton argued that due process barred this prosecution as a matter of law. Government conduct may be "'so outrageous that due process principles would absolutely bar the government

from invoking judicial processes to obtain a conviction.'" State v. Lively, 130 Wn.2d 1, 19, 921 P.2d 1035 (1996) (quoting United States v. Russell, 411 U.S. 423, 431-32, 93 S. Ct. 1637, 36 L. Ed. 2d 366 (1973)). To violate due process, "the conduct must shock the universal sense of fairness." Id.; see also State v. Martinez, 121 Wn. App. 21, 35, 86 P.3d 1210 (2004) (holding certain government misconduct is "so repugnant to principles of fundamental fairness that it constitutes a violation of due process").

DOC repeatedly invaded Hamilton's privileged and confidential attorney-client communications, attempted to cover it up, and then refused to comply with the trial court's orders designed to prevent future invasions. DOC's actions are so repugnant that fundamental notions of fairness bar this prosecution under Lively and Martinez.

Corrections officer Shannon Reeder spent 25 to 30 minutes reading Hamilton's legal materials during a lengthy "search" of Hamilton's cell. 2RP 86-87, 117, 162-63, 168-69, 172, 175. Reeder exited the cell and exclaimed, "I was just trying to figure out how someone could sucker punch a corrections officer and claim he didn't have the intent." CP 597; 2RP 34-35, 89, 118, 165. Given the diminished capacity defense, Reeder's words and actions show he was invading Hamilton's privileged communications.

Rather than admit this, Reeder came to court and lied. He said his search was a routine search for contraband, noting he had found an

unauthorized pen and paperclip. CP 598; 2RP 228-29, 242-43, 271-72. Reeder said he placed this contraband in his pocket and then disposed of it in an inmate-accessible trashcan, which other DOC witnesses said was unreasonable and against DOC policy. 2RP 229-30, 278-79, 336-37, 470, 495-96, 518-19, 531. Reeder also missed other paperclips and staples that were present, leading the trial court to conclude that Reeder was not credible and "did read some of Mr. Hamilton's paperwork." CP 598, 601; 2RP 518.

Not only did Reeder invade attorney-client communications, he or other DOC personnel tampered with a video documenting him entering and exiting Hamilton's cell. 2RP 285-87, 460, 471-72, 500. The trial court found, "One of the videos shows CO Reeder entering and leaving the area of Mr. Hamilton's cell. The other video speeds up at the exact times CO Reeder comes into the frames as he enters and leaves the cell." CP 597. Given testimony suggesting Reeder was aware of only one camera angle, the trial court concluded "Reeder's conduct and the possible collusion with other DOC employees in tampering with the videotape, suggest government misconduct both voluntary and dishonest." CP 601; cf. RCW 9A.72.020(1) (criminalizing perjury); RCW 9A.72.150(1)(a) (criminalizing evidence tampering).

DOC's misconduct was not limited to Reeder. DOC refused to provide a confidential meeting space for Hamilton and his defense team and

instead placed them in a room that was not soundproofed, had audio and video recording capabilities, and a plexiglass divider that prevented the exchange of documents. CP 597; 2RP 190-91, 362, 383-84, 469, 555-56. Hamilton and his attorneys practically had to yell to communicate. 2RP 202, 365-66, 415, 417, 433, 557. Because they could not pass documents, one attorney asked a DOC officer to physically deliver two documents. 2RP 367, 378, 398-400, 422, 559-60. The officer was absent with the documents for 10 minutes and then delivered only one of them, explaining that the other document had to be sent by mail. 2RP 400, 405, 407, 425-27.

This conduct is also outrageous. DOC refused to let Hamilton and his lawyers meet in a confidential space where they could exchange documents, despite the attorneys' requests and despite the availability of such a room. This forced the attorneys to ask a DOC officer to serve as a courier so Hamilton could review certain documents. Rather than act as a courier, the officer read the documents and, based on their contents, decided to deliver one but not the other. Hamilton, who faced a charge that could result in lifetime imprisonment, had no opportunity to confer with his attorneys without the interference of state actors. This is so "repugnant to the principles of fundamental fairness that it constitutes a violation of due process." Martinez, 121 Wn. App. at 35.

The trial court, however, declined to dismiss, believing it could fashion other remedies through two orders. The first order instructed DOC not to read Hamilton's legal mail; the second order required DOC to provide Hamilton and his attorneys a confidential meeting place. CP 904-05; 2RP 626-27.

DOC refused to comply. The very next time counsel visited Hamilton, DOC placed them in a no-contact room, separated by plexiglass, and prohibited the passing of documents. CP 13; 11RP 29-30; 13RP 115, 129; 14RP 43. Although DOC personnel were aware of the trial court's orders, they ignored them. CP 14; 13RP 115-16, 123-24, 141; 14RP 57-58. Defense counsel asked a DOC officer to contact the attorney general's office but no one from DOC did so. CP 14; 11RP 32; 13RP 77-78, 116, 119, 128-29, 146, 153-55. Then, without explanation, the defense lawyers were escorted out of the facility before the scheduled end of the meeting. CP 14; 11RP 32; 13RP 132.

The DOC's willful noncompliance with the trial court's orders is additional outrageous misconduct. DOC defied the trial court's attempts to protect attorney-client communications, thumbing its nose at two duly issued court orders. There was no remedy short of dismissal to deter DOC from violating Hamilton's rights. "[P]reservation of the integrity of conviction is at minimum as important as securing the conviction itself." Martinez, 121

Wn. App. at 36. "[W]ithout dismissal there is no remedy at all." Id. DOC's repeated outrageous misconduct, its attempts to hide it from scrutiny, and its refusal to follow court orders rises to the level of a due process violation.

The Court of Appeals refused to address Hamilton's due process claim based on outrageous and conscience-shocking governmental misconduct. Hamilton, slip op. at 29. Instead, the Court of Appeals concluded Hamilton could only bring a Sixth Amendment claim, asserting that this court's decision in State v. Peña Fuentes, 179 Wn.2d 808, 811, 318 P.3d 257 (2014), precluded an outrageous government misconduct claim as set forth in Lively and Martinez. Hamilton, slip op. at 29.[4] Though Hamilton asked for dismissal under Peña Fuentes, Br. of Appellant at 37-42, he also asserted a Fourteenth Amendment due process violation based on how outrageous DOC's conduct was, as Lively and Martinez contemplate. Without analysis, the Court of Appeals simply willed these cases and Hamilton's claim under them out of existence, refusing to address whether DOC's misconduct shocked the conscience to such an extent that the prosecution was barred as a matter of due process.

[4] Contrary to the Court of Appeals decision, Peña Fuentes does not explicitly or implicitly preclude a Lively/Martinez claim for outrageous government misconduct.

The Court of Appeals decision refusing to consider a constitutional due process claim under Lively and Martinez conflicts with these cases. Review of this issue is warranted under RAP 13.4(b)(1), (2), and (3).

4. THE COURT OF APPEALS DECISION CONFLICTS WITH THIS COURT'S PEÑA FUENTES DECISION, WARRANTING REVIEW

The Court of Appeals decision also misapplies Peña Fuentes's burden of proof, necessitating review under RAP 13.4(b)(1) and (3).

"The constitutional right to privately communicate with an attorney is a foundational right. We must hold the State to the highest burden of proof to ensure that it is protected." Peña Fuentes, 179 Wn.2d at 820. The State thus bears the burden of proving the absence of prejudice beyond a reasonable doubt when it improperly intrudes on attorney-client communications, even "when the information is not communicated to the prosecutor." Id. This is so because "the defendant is hardly in a position to show prejudice when only the State knows what was done with the information gleaned from" its intrusion. Id. Only in "rare circumstances" is there no possibility of prejudice. Id. at 819.

At the conclusion of the proceedings regarding Hamilton's first dismissal motion, the trial court placed the burden on Hamilton to demonstrate prejudice. CP 603-04 (refusing to find prejudice because there was no evidence the prosecution actually obtained privileged information).

Following this court's issuance of the then-recent Peña Fuentes decision, Hamilton moved for reconsideration, asking the court to place the burden on the State to prove the absence of prejudice beyond a reasonable doubt. CP 517-25. The court refused. CP 435. Thus, under Peña Fuentes, remand is required "for the trial court to consider whether the State has proved the absence of prejudice beyond a reasonable doubt." 179 Wn.2d at 820.

The State cannot show the absence of prejudice. The trial court acknowledged appropriate remedies might include instructing witnesses not to discuss Hamilton's case in an attempt to isolate any prejudice. CP 606 (discussing that in State v. Granacki, 90 Wn. App. 598, 603-04, 959 P.2d 667 (1998), trial court excluded eavesdropping witnesses and prohibited them from discussing case). The trial court also noted that those who "*possibly* obtained information are quite indirectly involved . . . in [the] prosecution at issue." CP 606. However, several DOC witnesses testified against Hamilton at trial regarding Hamilton's alleged assault on a DOC officer. The trial court never instructed the DOC witnesses not to discuss Hamilton's case and made no other attempt to isolate any potential prejudice.

In addition, at the hearing on Hamilton's first dismissal motion, deputy prosecuting attorney Laura Twitchell, who was originally assigned to Hamilton's prosecution, testified she filed a public records request only after she received information that the defense had requested certain records. 2RP

483. Twitchell indicated she had considered filing such a request, but had not decided to do so until "someone called" her to tell her she should get the same records the defense requested. 2RP 483. Twitchell also stated it was possible the person who called her was a DOC employee to report on public disclosure requests submitted by Hamilton's defense team. 2RP 484-85. It was undisputed that Hamilton possessed documents in his cell from public records requests within the timeframe that Reeder and other DOC personnel invaded Hamilton's attorney-client communications; some of the records Hamilton had requested shortly after the charges were filed. 2RP 563. It is thus quite possible that DOC's unlawful intrusions on Hamilton's attorney-client privileged communications were communicated to the prosecutor and altered the prosecution's course of action in this case. The State will be unable to prove the absence of prejudice beyond a reasonable doubt.

The Court of Appeals concluded that the "trial court herein properly found, beyond a reasonable doubt, that Hamilton was not prejudiced by the DOC employees' in[ter]ference with his ability to confer privately with his attorneys." Hamilton, slip op. at 29. But the Court of Appeals conflated the trial court's findings from the first dismissal motion with those from the

second.[5] With respect to Hamilton's first dismissal motion—which pertained to the denial of a confidential meeting space, Reeder's cell search, and the DOC courier reading privileged documents—the trial court never found the absence of prejudice beyond a reasonable doubt and expressly refused to reconsider its denial of dismissal under the correct beyond-a-reasonable-doubt standard. CP 435, 517-25. The Court of Appeals' misreading of the facts places its decision in conflict with the Peña Fuentes standard, necessitating review under RAP 13.4(b)(1). This court should grant review and remand Hamilton's dismissal motion to the trial court for reconsideration under the correct standard.

[5] In its order on the second dismissal motion, the trial court concluded that DOC's intrusions did not prejudice Hamilton's right to a fair trial beyond a reasonable doubt. CP 22-23.

E. CONCLUSION

The State's petition for review should be denied. Hamilton asks that review be granted of the additional issues he raises in this answer.

DATED this 11th day of January, 2017.

Respectfully submitted,

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