FILED
Court of Appeals
Division I
State of Washington
4/17/2018 4:46 PM

No. 95776-2

Court of Appeals No. 75722-9-I

THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

EARL ROGERS

Petitioner.

ON DISCRETIONARY REVIEW FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY

PETITION FOR REVIEW

GREGORY C. LINK
Attorney for Petitioner

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 610
Seattle, Washington 98101
(206) 587-2711

TABLE OF CONTENTS

A. IDENTITY OF PETITIONER AND RELIEF REQUESTED ... 1

B. OPINION BELOW ... 1

C. ISSUE PRESENTED ... 1

D. STATEMENT OF THE CASE ... 2

E. ARGUMENT ... 4

Because it exceeds the scope of the criminal discovery rules, the trial court erred in failing to quash the subpoena issued to Mr. Roger's former attorney ... 4
Because it exceeds the scope of the criminal discovery rules, the trial court erred in failing to quash the subpoena issued to Mr. Roger's former attorney ... 4
1. Nothing in CrR 4.7 authorizes the State to subpoena material in the hands of a third party much less in the hands of a defendant's attorney or former attorney ... 4

2. The subpoena sought privileged or protected material and should have been quashed ... 11

F. CONCLUSION ... 16

TABLE OF AUTHORITIES

Washington Cases

Dietz v. Doe, 131 Wn.2d 835, 935 P.2d 611 (1997)............................. 14
King v. Olympic Pipeline Co., 104 Wn. App. 338, 16 P.3d 45 (2001)... 4, 9, 10
Seventh Elect Church in Israel v. Rogers, 102 Wn.2d 527, 688 P.2d 506 (1984)... 13
Sowers v. Olwell, 64 Wn.2d 828, 394 P.2d 681 (1964).................. 11, 12
State v. Beaver, 148 Wn.2d 338, 60 P.3d 586 (2002) 6, 7
State v. Blilie, 132 Wn.2d 484, 939 P.2d 691 (1997) 6
State v. Burri, 87 Wn. 2d 175, 550 P.2d 507 (1976) 8
State v. Garcia-Salgado, 170 Wn.2d 176, 240 P.3d 153 (2010).......... 10
State v. Gonzalez, 110 Wn.2d 738, 757 P.2d 925 (1988).............passim
State v. Pawlyk, 115 Wn.2d 457, 476, 800 P.2d 338 (1990).............. 5, 6
State v. Robinson, 153 Wn.2d 689, 107 P.3d 90 (2005)......................... 6
Tommy P. v. Board of Cy. Comm'rs, 97 Wn.2d 385, 645 P.2d 697 (1982)... 6

United States Supreme Court

Kyles v. Whitley, 514 U.S. 419, 115 S. Ct. 1555, 131 L.Ed.2d 490 (1995)... 8

Court Rules

CR 26.. 5
CR 45.. 9
CrR 4.8...passim
RAP 13.4.. 1, 11, 15
RPC 1.6.. 2, 11, 13, 14
RPC 3.8.. 14

A. IDENTITY OF PETITIONER AND RELIEF REQUESTED

Pursuant to RAP 13.4, Petitioner, Earl Rogers, asks this Court to grant review of the published opinion *State v. Rogers*, __ Wn.App.2d __, (75722-9-I).[1]

B. OPINION BELOW

After granting review on the two questions (1) whether the state had lawful authority to issue a subpoena *duces tecum* to a nonparty; Mr. Rogers's former attorney; and (2) whether that subpoena sought disclosure of privileged and confidential information, the Court of Appeals refused to address the first question and simply concluded the information was not privileged or confidential.

C. ISSUE PRESENTED

This Court has made clear that criminal discovery is far-narrower than civil discovery. In contrasted to the braod scope of civil discovery, criminal discovery is permissible only to the extend provided by court rule. CrR 4.8 directs a court should quash a subpoena where it seeks privileged or otherwise protected material or where it seeks material beyond the scope of the criminal discovery rules. The

[1] The court granted a motion to publish on April 2, 2018.

State issued a subpoena to Mr. Rogers's former attorney demanding he produce material which is likely "secret" under RPC 1.6. The sought after material is not within the scope of discovery as set forth in CrR 4.7. Did the trial court err in denying Mr. Rogers's motion to quash the subpoena?

D. STATEMENT OF THE CASE

The State charged Mr. Rogers with one count of harassment naming Manesbia Pierce as the victim. CP 1-6.

Several months later the State filed a motion to disqualify Mr. Rogers's retained attorney, David Trieweiler. CP 26-33. The State alleged that during an interview of Ms. Pierce, Ms. Pierce gave Mr. Trieweiler a letter purported to be from Mr. Rogers in which, the State claimed, Mr. Rogers offered to pay Ms. Pierce money to resolve the matter. CP 27-28. Mr. Trieweiler denied the State's factual allegations but did not substantively respond to the State's insistence that he provide the alleged letter or even acknowledge the existence of the claimed letter. *Id.* The court agreed to interfere with Mr. Trieweiler's representation of Mr. Rogers, removing Mr. Trieweiler as counsel, and appointing new counsel to represent Mr. Rogers. CP 37.

The State then filed a subpoena duces tecum demanding Mr. Trieweiler produce the claimed letter. CP 51-53. The trial court denied Mr. Roger's motion to quash the subpoena. *Id*. When he did not respond to the subpoena, the court entered an order finding Mr. Trieweiler in contempt of court. The court directed that Mr. Treiwieler produce the claimed letter or pay $100 per day that he fails to do so. *Id.*

Mr. Rogers sought discretionary review arguing the trial court erred in refusing to quash the subpoena as it was issued without lawful authority and violated the attorney-client privilege. The Court of Appeals granted Mr. Rogers's motion for discretionary review and consolidated the case with Mr. Trieweiler's separately filed appeal of the court's contempt order. 75828-4-I. The trial court stayed its contempt order pending resolution "of any timely filed appeal."

Despite having granted review on the question of whether the subpoena was lawfully issued, the Court of Appeals refused to address that claim while nonetheless concluding the court lawfully ordered Mr. Trieweiler to comply.

E. <u>ARGUMENT</u>

Because it exceeds the scope of the criminal discovery rules, the trial court erred in failing to quash the subpoena issued to Mr. Roger's former attorney.

Mr. Rogers moved to quash the subpoena under CrR 4.8(4). That rule provides:

> (4) Protection of Persons Subject to Subpoena for Production. On timely motion, the court may quash or modify a subpoena for production if it . . . (B) requires disclosure of privileged or other protected matter and no exception or waiver occurs.. . . . or (D) exceeds the scope of discovery otherwise permitted under the criminal rules.

The trial court should have quashed the subpoena issued to Mr. Roger's former attorney both because it sought protected material and because it exceeded the scope of discovery.

1. Nothing in CrR 4.7 authorizes the State to subpoena material in the hands of a third party much less in the hands of a defendant's attorney or former attorney.

This Court has long recognized Significant differences [exist] between discovery in criminal and civil cases." *State v. Gonzalez*, 110 Wn.2d 738, 745, 757 P.2d 925 (1988). Civil discovery is far broader in scope than is criminal discovery. *King v. Olympic Pipeline Co.*, 104 Wn. App. 338, 363, 16 P.3d 45 (2001).

Under the civil rules, a party may obtain discovery of any material reasonably calculated to lead to discovery of admissible evidence regardless of whether the discovery sought is itself relevant to a claim or defense or whether it is admissible at trial. CR 26. That rule permits discovery of any material "reasonably calculated" to lead to admissible evidence. *Id.* In contrast to that broad rule, "CrR 4.7 sets out the exact obligations of the prosecutor and defendant in engaging in discovery, the detail of which suggests to us that no further supplementation should be sought from the civil rules." *State v. Pawlyk*, 115 Wn.2d 457, 476, 800 P.2d 338 (1990); *Gonzalez*, 110 Wn.2d at 745. In *Gonzalez*, this Court, specifically refused to read the "reasonably calculated" language of CR 26 into CrR 4.7 concluding the criminal rule was clear as to the obligations of the parties and fully defined the scope of discovery in criminal matters. 110 Wn.2d at 745.

At no time in the proceedings below did the State identify any provision of CrR 4.7 that permits it to demand a third-party produce anything as a part of the discovery process. As *Pawlyk* recognized, CrR 4.7 defines the obligations of the parties. Mr. Treiwieler is not a party to this matter. While CrR 4.7(d) does address material in the hands of nonparties, that rule only provides avenues for a **defendant** to obtain

material held by others and defines the State obligations to assist. No similar avenues exist for the State.

Courts rely on the rules of statutory construction to interpret court rules. *State v. Blilie*, 132 Wn.2d 484, 492, 939 P.2d 691 (1997). Generally, courts attempt to give effect to the plain terms of a statute. *Tommy P. v. Board of Cy. Comm'rs*, 97 Wn.2d 385, 391, 645 P.2d 697 (1982); *see also*, *State v. Beaver*, 148 Wn.2d 338, 343, 60 P.3d 586 (2002) (every statutory term is intended to have some material effect). Where the terms of a court rule are unambiguous the plain language controls and no interpretation is necessary. *State v. Robinson*, 153 Wn.2d 689, 693, 107 P.3d 90 (2005). Because CrR 4.7 expressly provides for defense access to documents in the hands of third parties while making no similar provision for the State, the rule cannot be construed as permitting the State to demand third parties produce materials as a part of the discovery process.

Instead, before the Court of Appeals, and despite *Gonzalez*, *Pawlyk*, and *Olympic Pipeline*, the State has insisted CrR 4.7 does not define the scope of criminal discovery. To fill that vacuum, the State asserts CrR 4.8 broadly authorizes the issuance of subpoenas in criminal case, without apparent limitation. Aside from the fact that the

State’s contention is unsupported by the language of that rule, to accept the State’s position would require a court to conclude criminal discovery is in fact far broader than, or equal to, civil discovery, unhampered by even the “reasonably calculated rule” that governs civil matters. That is of course contrary to the holdings of *Pawlyk*, *Gonzalez*, and *Olympic Pipeline*. Indeed, the State pleadings in this case have yet to mention these cases much less address their holdings.

Beyond that, the State’s position is contrary to the express language of CrR 4.8. If the State is free to subpoena whatever it wishes without regard to CrR 4.7, then nothing “exceeds the scope of discovery otherwise permitted under the criminal rules” for purposes of CrR 4.8(4). That provision is rendered wholly meaningless contrary to the rule that every statutory term is intended to have some material effect. *State v. Beaver*, 148 Wn.2d 338, 343, 60 P.3d 586 (2002).

The State also points to language in CrR 4.8(b)(2) specifically allowing issuance of subpoenas by either party to the victim or complaining witness as evidencing the ability to subpoena any third-person. Answer at 7. But that provision makes Mr. Rogers’s point. If the rule permitted either party to subpoena **any** third-person, as the

State contends, there would be no need for the rule to specifically address the ability to subpoena a specific third-person, the victim.

Additionally, a defendant's ability to obtain material from the complaining witness or third-persons not covered by CrR 4.7 is driven by constitutional guarantees which do not apply equally to the State. For example, *Kyles v. Whitley*, 514 U.S. 419, 437, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995), requires disclosure to the defendant of material held by others acting on the State's behalf. Too, the Sixth Amendment "right to compulsory process includes the right to interview a witness in advance of trial." *State v. Burri*, 87 Wn. 2d 175, 181, 550 P.2d 507 (1976). Consistent with these requirements, CrR 4.7 makes specific provisions for a defendant's effort to obtain material from a third party without similar provisions permitting the State to do so.

The State's argument starts from the premise that the State must be entitled to demand production of anything it wants from any person. The State then proceeds on a search for some authority to support that view and finds none. In place of actual support for its claim the State offers only "[t]hat CrR 4.8 allows both parties to subpoena evidence in the custody of third parties is so basic a premise that little case law exists directly addressing the point." Brief of Respondent at 7. The

State's inability to identify any language in CrR 4.8 that permits it to broadly issue subpoenas to whomever and for whatever it wishes, is entirely consistent with the Supreme Court's express statements that discovery in criminal cases is far narrower than in civil cases and is governed by CrR 4.7. *Olympic Pipeline Co.*, 104 Wn. App. at 363.

The State contends CrR 4.8 authorizes it to subpoena whomever and whatever it likes. Brief of Respondent at 7. But, the State's own actions in this case belie its claim of CrR 4.8 as the source of its authority. The subpoena the State issued did not mention CrR 4.8 and instead parroted the language of CR 45. The very language that the despite *Gonzalez's* holding that civil discovery rules do not apply to criminal proceedings.

The State's claim of unlimited subpoena authority directly contradicts this Court's holding in *Gonzalez* that the criminal discovery rules are purposely narrower than the civil rules. 110 Wn.2d at 745.

Further, good reasons exist for not reading CrR 4.7 and CrR 4.8 so broadly as to allow the State to demand a private person produce documents. Article I, section 7 of the Washington Constitution prohibits the State from intruding on the private affairs of the citizens of this State without authority of law. Court rules may provide the

"authority of law" only to the extent they are consistent with the warrant requirement or recognized exception. The warrant requirement of the Fourth Amendment and article I, section 7 may be satisfied by a court order. *State v. Garcia-Salgado*, 170 Wn.2d 176, 186, 240 P.3d 153 (2010). The State's expansive view of its subpoena power is squarely contrary to the jealous protection of privacy.

"Significant differences [exist] between discovery in criminal and civil cases." *Gonzalez*, 110 Wn.2d at 745, 757 P.2d 925 (1988). Civil discovery is far broader in scope than is criminal discovery. *Olympic Pipeline Co.*, 104 Wn. App. at 363. The trial court's failure to quash the subpoena ignores this Court's holdings and is contrary to CrR 4.8. Moreover, the State's course of action in this case creates grave constitutional concerns. The State has interfered with the attorney-client relationship, moving to disqualify Mr. Rogers's prior attorney. The State now insists that is entitled to subpoena that attorney as a witness, demanding he disclose materials which he may or may not possess, but which if he does he obtained in the course of his representation of Mr. Rogers. The State has done all of this despite its inability to cite a single provision of the applicable discovery rules which permits it to have what it believes the former attorney possesses.

To be sure, nothing in CrR 4.7 permits the State to demand production of documents from third parties.

In the end, the State's argument requires the Court to conclude criminal discovery is at least equally broad if not more expansive than civil discovery. That result is contrary to this Court's well-established law and raises significant constitutional issues. This Court should grant review under RAP 13.4

2. The subpoena sought privileged or protected material and should have been quashed.

Beyond the fact the subpoena exceeded the scope of discovery, CrR 4.8(b)(4) directs the court to quash a subpoena which seeks disclosure of "privileged or other protected" information. Information and material gathered by an attorney in the course of representation of a client is "secret" even if not "confidential." Ethical rules bar the attorney from revealing those secrets in the same way as the rules bar disclosure of client confidences. RPC 1.6.

The Supreme Court has made clear the attorney need not obtain the evidence directly from the defendant in order to be considered privileged. *State ex rel. Sowers v. Olwell*, 64 Wn.2d 828, 831, 394 P.2d 681 (1964). The Court held it is enough that it is reasonably possible

that information from the client led to the attorney obtaining the item. *Id*.

In *Sowers*, an attorney retained by a person accused of murder received a subpoena from a coroner directing him to produce a knife purported to be the murder weapon. 64 Wn.2d at 831. While the circumstances of how the attorney came to possess the knife were not clear, it was apparent that it happened after he was retained and following a meeting with his jailed client. *Id*. The fact that the defendant was confined in jail at the time the attorney came into possession of the knife makes clear that it could not have been directly transferred from the client to the attorney. Despite the absence of certainty of whether the attorney's possession was the product of information from the client or the attorney's own investigation, because the attorney came into possession of the knife after meeting with his client, the Court assumed he did so based upon information from the client. *Id*. The upshot of that holding being, that information may be privileged even if it was not obtained directly from the defendant. Thus, Mr. Trierweiler's alleged possession of a letter is equally privileged.

After concluding the subpoena was invalid, *Sowers* did conclude the attorney could be required to disclose privileged information. 64

Wn.2d at 833-34. *Sowers* predated the current criminal rules, and thus the Court reached its conclusion by balancing the public interest against the privilege to conclude the attorney could be required to surrender the evidence but the jury could not learn of the source. *Id.*

But the plain language of the subsequently adopted CrR 4.8 no longer allows for such balancing. The rule instead simply directs that a subpoena should be quashed if it pertains to privileged information without mentioning a balancing of interests. Because any letter is privileged, the trial court should have quashed the subpoena.

An attorney's ethical obligations extend beyond the testimonial privilege. Addressing the predecessor to RPC 1.6 the Court held

> The rule of confidentiality found in Canon 4 of the Code is considerably broader than the statutory attorney-client privilege discussed above. The provisions in the Code cover both "confidences", which is coextensive with the statutory privilege, and "secrets", which "refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client."

Seventh Elect Church in Israel v. Rogers, 102 Wn.2d 527, 532, 688 P.2d 506 (1984). Thus, even if the information is not "privileged"

> it may be unethical and a violation of RPC 1.6(a) for the attorney to reveal information involving "secrets," i.e., "other information gained in the professional relationship that the client has requested be held inviolate or the

> disclosure of which would be embarrassing or would be likely to be detrimental to the client."

Dietz v. Doe, 131 Wn.2d 835, 842 n.3, 935 P.2d 611 (1997).

While RPC 1.6 permits disclosure subject to a court order, that must presuppose a lawful basis exits to order the disclosure. No such basis exists where the secret material is not within the scope of the applicable discovery rules. In that instance there is no justification to impede or interfere with the attorney-client relationship.

Further, RPC 3.8 provides:

> The prosecutor in a criminal case shall:
> . . . .
> (e) not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless the prosecutor reasonably believes:
> (1) the information sought is not protected from disclosure by an applicable privilege;
> (2) the evidence sought is essential to the successful completion of an ongoing investigation or prosecution; and
> (3) there is no other feasible alternative to obtain the information . . . .

Even allowing, for argument's sake, that the prosecutor reasonably believed the information held by Mr. Rogers's former attorney was not protected, the prosecutor could not possibly contend the evidence is essential to any investigation or prosecution. Certainly, the filing of charges reveals the State must have believed it had

sufficient evidence to prosecute Mr. Rogers for harassment based upon the victim's testimony alone even prior to the attorney's alleged possession of the alleged letter. Thus, disclosure of the letter could not be essential to the case. Perhaps additional evidence would be useful to the State's case but that is by no means essential. Additionally, the testimony of Ms. Pierce as to the contents of the letter may provide a feasible alternative to a subpoena.

Protection of client confidences and secrets is at the core of the attorney-client relationship. A court should not easily interfere in that relationship merely because the State wants such secrets disclosed. Most certainly, a court should not do so where the materials sought are not discoverable under the applicable rules. The published opinion of the Court of Appeals affords little in the way of protection to the attorney-client relationship. The published opinion is contrary to case law, to the existing rules, and, by easing the State's ability to interfere with the relationship, presents an issue of substantial public interest. His court should accept review under RAP 13.4.

F. CONCLUSION

The Court should grant review in this matter.

Respectfully submitted this 17th day of April, 2018.

Gregory C. Link – 25228
Attorney for Petitioner
Washington Appellate Project
greg@washapp.org

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON, Respondent, v. EARL RONALD ROGERS, JR. Appellant.	)	No. 75722-9-I
STATE OF WASHINGTON, Respondent, v. EARL RONALD ROGERS, JR., Appellant.	)	No. 75828-4-I UNPUBLISHED OPINION FILED: February 20, 2018

VERELLEN, C.J. — These appeals concern the State's attempt to compel attorney David Trieweiler to produce a letter written by his former client, Earl Rogers, to the victim of his alleged felony telephone harassment.

In No. 75828-4-I, Trieweiler appeals the trial court's order finding him in contempt for failing to produce the letter. He argues the court's subpoena duces tecum is invalid because it exceeds the scope of criminal discovery and seeks privileged or protected information. In No. 75722-9-I, Rogers challenges the

court's denial of the motion to quash the subpoena on the same grounds. Because the two cases involve the same legal issues and facts, we issue a single opinion.

The subpoena was not challenged before the trial court on the basis that it exceeded the scope of criminal discovery. We decline to reach this unpreserved claim of error.

Trieweiler was not the recipient of the letter. He obtained the letter from a third party. Even assuming the client mentioned the letter to his attorney, the attorney-client privilege does not extend to objects obtained from third parties. The letter is not protected by attorney-client privilege.

RPC 1.6 does not preclude Trieweiler from producing the letter to comply with a court order. Because the State has a legitimate interest in the letter and disclosure has little impact on the attorney-client relationship, the trial court did not abuse its discretion when it ordered Trieweiler to disclose the letter.

Therefore, we affirm.

FACTS

Rogers was charged with felony telephone harassment for threatening to kill Manesbia Pierce, his girlfriend's mother. He was represented by Trieweiler.

While the case was pending, the State became aware of a letter Rogers had written and mailed to Pierce's daughter, Timothea Marshall. Marshall gave the original letter to Pierce. Pierce gave a copy of the letter to Trieweiler. Pierce told the prosecutor Rogers apologized in the letter and offered to pay her to drop

the charges. It is undisputed that neither Marshall nor Pierce possess the original or a full copy of the handwritten letter.

In March 2016, the court removed Trieweiler as Rogers' attorney. In June 2016, the trial court issued a subpoena duces tecum for Trieweiler to produce documents, including the letter. On Trieweiler's motion to quash, the court narrowed the scope of the subpoena but still required Trieweiler to produce the letter. When he failed to produce it, the court found him in contempt.

Trieweiler appeals the contempt order. Rogers appeals the denial of the motion to quash.

ANALYSIS

Rogers argues the trial court abused its discretion when it denied the motion to quash the subpoena. Trieweiler contends the trial court abused its discretion when it found him in contempt for failing to produce the subpoenaed letter.

We review contempt findings and discovery orders for abuse of discretion.[1]

I. Scope of Discovery

For the first time on appeal, Trieweiler and Rogers contend the subpoena exceeded the scope of criminal discovery because CrR 4.7 does not allow the State to subpoena materials from any third party. We generally do not consider

[1] In re Interest of M.B., 101 Wn. App. 425, 454, 3 P.3d 780 (2000); State v. Yates, 111 Wn.2d 793, 797, 765 P.2d 291 (1988); State v. Boehme, 71 Wn.2d 621, 633, 430 P.2d 527 (1967) (quoting State v. Mesaros, 62 Wn.2d 579, 587, 384 P.2d 372 (1963)).

issues raised for the first time on appeal.[2] This rule encourages "'the efficient use of judicial resources' . . . by ensuring that the trial court has the opportunity to correct any errors, thereby avoiding unnecessary appeals."[3]

Trieweiler concedes the error was not preserved and, in a conclusory footnote, requests review under RAP 2.5(a). Given the lack of objection below and the limited argument before us, we decline to review this unpreserved claim.[4]

II. Attorney-Client Privilege

Trieweiler and Rogers contend the letter is protected by attorney-client privilege.

The attorney-client privilege is codified in RCW 5.60.060(2)(a), which provides "[a]n attorney or counselor shall not, without the consent of his or her client, be examined as to any communication made by the client to him or her, or his or her advice given thereon in the course of professional employment." Information protected by the attorney-client privilege includes objects acquired by an attorney through a direct and confidential communication with the client, along with literal communications.[5] But the statutory privilege is not absolute and an

---

[2] RAP 2.5(a); State v. McFarland, 127 Wn.2d 322, 332-33, 899 P.2d 1251 (1995).

[3] State v. Robinson, 171 Wn.2d 292, 304-05, 253 P.3d 84 (2011) (quoting State v. Scott, 110 Wn.2d 682, 685, 757 P.2d 492 (1988)).

[4] We note there is authority supporting the ability of the State or defendants to subpoena items from third parties. See, e.g., State v. White, 126 Wn. App. 131, 134-35, 107 P.3d 753 (2005) (addressing the notice required to be given by the State when subpoenaing evidence from a third party); CrR 4.8(b)(2) (addressing notice required of "a party" who seeks to subpoena a third party.)

[5] State ex rel. Sowers v. Olwell, 64 Wn.2d 828, 831, 394 P.2d 681 (1964).

object obtained from a third party with whom there was no attorney-client relationship is not privileged.[6]

In State ex rel. Sowers v. Olwell, an attorney refused to comply with a subpoena duces tecum requiring him to produce any knives relating to his client.[7] Our Supreme Court assumed the attorney must have obtained the knife as a direct result of information given to the attorney by his client.[8] For this reason, the court concluded the attorney-client privilege was implicated and the subpoena was defective on its face.[9]

But the Supreme Court expressly recognized "[i]f the knife were obtained from a third person with whom there was no attorney-client relationship, the communication would not be privileged, and the third person could be questioned concerning the transaction."[10] Additionally, the court acknowledged that even if a piece of evidence was protected by the attorney-client privilege, "the attorney, after a reasonable period, should, as an officer of the court, on his own motion turn the same over to the prosecution."[11]

---

[6] Id. at 832.

[7] 64 Wn.2d 828, 829, 394 P.2d 681 (1964)).

[8] Id. at 831-32 ("Although there is no evidence relating thereto, we think it reasonable to infer from the record that appellant did, in fact, obtain the evidence as the result of information received from his client during their conference. Therefore, for the purposes of this opinion and the questions to be answered, we assume that the evidence in appellant's possession was obtained through a confidential communication from his client.").

[9] Id. at 833.

[10] Id. at 832.

[11] Id. at 834.

Here, Trieweiler did not obtain the letter as a result of direct or confidential communication with Rogers. Rogers originally sent the letter to Marshall. Marshall gave the letter to Pierce, who then gave a copy to Trieweiler. Even if Rogers had some discussion with Trieweiler about the existence of the letter, Trieweiler still obtained the letter from third parties. And unlike Olwell, the subpoena in this case is limited to production of the letter. The State has not sought and assured this court it will not seek testimony from Trieweiler regarding the letter. It would be an odd standard if a defendant could shield a material item from discovery merely by communicating its existence to his or her attorney.[12] The letter is not subject to the attorney-client privilege.

III. RPC 1.6

Trieweiler and Rogers also argue RPC 1.6 precludes Trieweiler from disclosing the letter.

RPC 1.6(a) provides "[a] lawyer shall not reveal information relating to the representation of a client unless . . . the disclosure is permitted by paragraph (b)." The information protected by the rule includes confidences and secrets. "'Confidence' refers to information protected by the attorney client privilege under applicable law, and 'secret' refers to other information gained in the professional

---

[12] In Matter of Det. of Williams, 147 Wn.2d 476, 494, 55 P.3d 597 (2002) (a client "cannot create a privilege simply by giving [crime related] records to his attorney.").

relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client."[13]

"Confidences," for purposes of RPC 1.6, is coextensive with the statutory attorney-client privilege.[14] But because the rule also extends to "secrets," the rule "is considerably broader than the statutory attorney-client privilege."[15]

As previously discussed, the letter is not within the attorney-client privilege and therefore is not a confidence. And even if the letter is a secret, the duty of nondisclosure is not absolute. RPC 1.6(a) expressly provides that its limits on disclosure do not apply if "the disclosure is permitted by paragraph (b)." Pursuant to RPC 1.6(b)(6), a lawyer "may reveal information relating to the representation of a client to comply with a court order." Since the court ordered disclosure of the letter, Trieweiler will not violate the RPCs by divulging the information.[16]

That leaves the question of whether the trial court abused its discretion in ordering Trieweiler to disclose the letter.[17] "In ordering disclosure of 'secrets', the trial court must balance the necessity of the disclosure against the effect such

---

[13] RPC 1.6 cmt. 21.

[14] Seventh Elect Church in Israel v. Rogers, 102 Wn.2d 527, 534, 688 P.2d 506 (1984).

[15] Id.; Dietz v. Doe, 131 Wn.2d 835, 842 n.3, 935 P.2d 611 (1997).

[16] See Seventh Elect Church, 102 Wn.2d at 534 ("Since the two trial courts involved in this appeal have ordered disclosure of the information sought by the Church, Betts, Patterson will not violate the disciplinary rule by divulging the information").

[17] See id. ("We must next determine whether either trial court abused its discretion in ordering Betts, Patterson to disclose its client's 'secret.'").

disclosure might have on the attorney-client relationship."[18] The purpose of the duty of confidentiality is to preclude disclosure of secrets when disclosure would have a "significant adverse effect on open and free-flowing communications which are so important to the attorney-client relationship."[19]

Here, the State has a legitimate interest in the letter because it is not disputed that the letter contains evidence of the crime charged (the apology for admitted acts), along with evidence of other criminal activity (offer to bribe the victim). Any suggestion that the severity of the crime impacts the legitimacy of the State's interest is not compelling. The State has as legitimate an interest in prosecuting harassment as it does for murder.

The impact of disclosure on the attorney-client relationship depends on all the circumstances. Here, the impact is minimal because the order is limited to the letter itself, and the State assures us that it will not seek any testimony from Trieweiler, including how he gained possession of the letter.[20] Any suggestion that production of the letter alone chills open and free-flowing communication with an attorney is not persuasive. Although compelling an attorney to disclose evidence of a client's criminal conduct may generally implicate protected confidences or

---

[18] Id. at 534-35.

[19] Id. at 536.

[20] See Olwell, 64 Wn.2d at 834 ("By thus allowing the prosecution to recover such evidence, the public interest is served, and by refusing the prosecution an opportunity to disclose the source of the evidence, the client's privilege is preserved and a balance is reached between these conflicting interests.").

secrets, a client does not establish an adverse impact on the attorney-client relationship solely because the item obtained may have detrimental consequences in current or future criminal proceedings. Neither Rogers nor Trieweiler establish any meaningful harm to their attorney-client relationship. The trial court did not abuse its discretion in ordering Trieweiler to disclose the letter.

Therefore, we affirm the trial court's order compelling the production of the letter and denying the motion to quash the subpoena. Because Trieweiler asserted a claim of privilege in good faith, we vacate the contempt finding contingent on Trieweiler providing the letter within 30 days of issuance of the mandate in No. 75828-4-I.[21]

WE CONCUR:

Trickey, J

Appelwick, J

[21] See Seventh Elect Church, 102 Wn.2d at 536-37 ("When an attorney makes a claim of privilege in good faith, the proper course is for the trial court to stay all sanctions for contempt pending appellate review of the issue. Accordingly, we vacate the finding of contempt against Betts, Patterson contingent on their [compliance with the court order] within 30 days of issuance of the mandate in this case.").

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2018 FEB 20 AM 8:59

FILED
3/19/2018
Court of Appeals
Division I
State of Washington

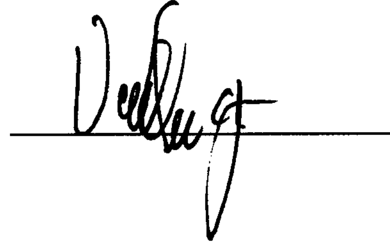
IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON, Respondent, v. EARL RONALD ROGERS, JR. Appellant.	)	No. 75722-9-I
STATE OF WASHINGTON, Respondent, v. EARL RONALD ROGERS, JR., Appellant.	)	No. 75828-4-I ORDER DENYING MOTION FOR RECONSIDERATION

Appellant filed a motion for reconsideration of the court's February 20, 2018 opinion. Following consideration of the motion, the panel has determined it should be denied. Now, therefore, it is hereby

ORDERED that the appellant's motion for reconsideration is denied.

FOR THE PANEL:



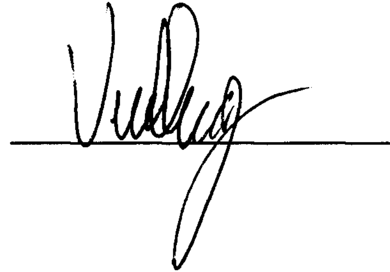
IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON, Respondent, v. EARL RONALD ROGERS, JR. Appellant.	)	No. 75722-9-I
STATE OF WASHINGTON, Respondent, v. EARL RONALD ROGERS, JR., Appellant.	)	No. 75828-4-I ORDER GRANTING MOTION TO PUBLISH OPINION

Appellant filed a motion to publish the court's February 20, 2018 opinion. Respondent has filed a response stating it has no opposition to the motion. Following consideration of the motion, the panel has determined the motion should be granted. Now, therefore, it is hereby

ORDERED that the appellant's motion to publish is granted.

FOR THE PANEL:



DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 75722-9-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

☒ respondent Ann Summers, DPA
[PAOAppellateUnitMail@kingcounty.gov]
[ann.summers@kingcounty.gov]
King County Prosecutor's Office-Appellate Unit

☒ petitioner

☐ Attorney for other party

MARIA ANA ARRANZA RILEY, Legal Assistant
Washington Appellate Project

Date: April 17, 2018

WASHINGTON APPELLATE PROJECT

April 17, 2018 - 4:46 PM

Transmittal Information

Filed with Court:	Court of Appeals Division I
Appellate Court Case Number:	75722-9
Appellate Court Case Title:	State of Washington, Respondent v. Earl Ronald Rogers, Petitioner
Superior Court Case Number:	15-1-06546-3

The following documents have been uploaded:

- 757229_Petition_for_Review_20180417164505D1205215_7557.pdf
  This File Contains:
  Petition for Review
  The Original File Name was washapp.041718-9.pdf

A copy of the uploaded files will be sent to:

- ann.summers@kingcounty.gov
- paoappellateunitmail@kingcounty.gov

Comments:

Sender Name: MARIA RILEY - Email: maria@washapp.org
Filing on Behalf of: Gregory Charles Link - Email: greg@washapp.org (Alternate Email: wapofficemail@washapp.org)

Address:
1511 3RD AVE STE 701
SEATTLE, WA, 98101
Phone: (206) 587-2711

Note: The Filing Id is 20180417164505D1205215