

FILED
Jul 11, 2016
Court of Appeals
Division I
State of Washington

No. 73219-6-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

ALAN SMITH,

Appellant.

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

The Honorable Linda C. Krese

REPLY BRIEF OF APPELLANT

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A. ARGUMENT

Mr. Smith's confession was protected by the clergy-penitent privilege and it was error to admit it at trial.

Initially, the State contends that the trial court's conclusions of law 1, 2 and 3 entered by the trial court following the clergy-penitent hearing should be considered findings of fact. To the extent this Court accepts the State's argument, Mr. Smith assigns error to each of these conclusions of law.

1. *Morris was a licensed minister.*

The State continues to contend that Mr. Morris was not an assistant pastor, thus he was not a minister and therefore did not fall within the definition of "clergy." Brief of Respondent at 20-21. RCW 5.60.060(3) is not so limited. As noted in the Brief of Appellant, the term "clergy" is not defined in RCW 5.60.060(3), thus the Supreme Court construed it in light of RCW 26.44.020(6). *State v. Motherwell*, 114 Wn.2d 353, 359-60, 788 P.2d 1066 (1990) ("Status as a member of the clergy is conferred by license or ordination within one's church or religious denomination."). A member of the clergy under that statute is "*any regularly licensed or ordained minister, priest, or rabbi of any church or religious denomination[.]*" RCW 26.44.020(6) (emphasis added).

Morris was associate minister at Eastside Baptist Church, which made him a licensed minister for the purposes of the statute.

4/4/2014RP 107, 115, 175. Morris was granted a temporary license while at Eastside, which became permanent so long as Morris had no problems. 4/4/2014RP 116. Morris admitted in his application to City Church that he was a licensed minister and he told the police when interviewed that he was a licensed minister. 4/9/2014RP 36, 60.

Further, the trial court agreed that Morris was an associate minister who had received his permanent license. CP 864 (Finding of Fact 12).

The fact Morris was not an associate pastor is meaningless for the purposes of determining whether he was a member of the clergy for the purposes of RCW 5.60.060(3).

The decision in *State v. Buss*, 76 Wn.App. 780, 887 P.2d 920 (1995), *overruled on other grounds* by *State v. Martin*, 137 Wn.2d 774, 975 P.2d 1020 (1999), is of no assistance here. *Buss* involved “a non-ordained ‘family minister’ at [the defendant’s] Catholic church.” *Id.* at 782. Here, Morris was a licensed minister.

Thus, Morris continued to be a “licensed minister” after leaving Eastside Baptist Church. The statute refers only to a “licensed minister.”

2. *Mr. Smith's confession was confidential.*

For the privilege to apply, the confession must be confidential. *State v. Martin*, 137 Wn.2d 774, 791, 975 P.2d 1020 (1999). In arguing that Mr. Smith's confession was not confidential, the State ignores one major tenet of the penitent-clergy privilege: "Whether a communication is confidential turns on the *communicant's* reasonable belief that the conversation would remain private." *State v. Martin*, 91 Wn.App. 621, 632, 959 P.2d 152 (1998), *aff'd*, 137 Wn.2d 791 (emphasis added). As a consequence, the only viewpoint from which this step is to be analyzed is from Mr. Smith's.

During the conversation between Mr. Smith and Morris, Morris admitted that he told Mr. Smith that whatever Mr. Smith said "stays between you and I." 4/4/2014RP 203. Morris admitted that as far he knew, Mr. Smith believed his confession would stay between the two men. 4/9/2014RP 60. He never told Mr. Smith that he intended disclose the contents of the conversation to the police. 4/24/2014RP 60.

Mr. Smith's confession was confidential under RCW 5.60.060(3).

3. *The confession made “in the course of discipline enjoined” by Morris’s church.*

The Court of Appeal’s decision in *Martin* is helpful in determining whether the privilege applies. In *Martin*, Pastor Hamlin was an ordained minister of the Evangelical Reformed Church of Tacoma, and the defendant’s mother, contacted the Pastor at the offices of Youth for Christ of Tacoma, where the Pastor worked part-time. The defendant’s mother requested the Pastor meet with her son at his apartment. 91 Wn.App. at 623.

The Pastor was introduced to defendant as “the preacher.” The Pastor’s “spiritual” consultation with the defendant lasted about 60 to 90 minutes. The Pastor and the defendant met on at least two additional occasions before the defendant turned himself over to the police. *v. Martin*, 91 Wn.App. at 623.

The Court of Appeals found the defendant’s confession fell under the privilege:

Focusing on the clergy member’s discipline, the record demonstrates that Pastor Hamlin felt enjoined by his religion to receive Martin’s penitential communications and to provide Martin with spiritual counsel. As Pastor Hamlin stated in his affidavit, meeting with individuals and families to provide an opportunity for open discussions is an essential aspect of his religious practice—a service that Pastor Hamlin offers to church members and nonmembers alike. Pastor Hamlin

explained that receiving confessions and leading individuals in confession are integral components of his relationship with God; “confession,” the pastor stated, “is a necessary component” of his religious practice. Pastor Hamlin’s religion, thus, constrains him to provide confessors with spiritual counsel and the opportunity for redemption. It is a duty that the pastor must fulfill based upon the tenets of his faith.

Martin, 91 Wn.App. at 631. Further, in affirming the Court of Appeals, the Supreme Court made clear that the term confession should be construed in the broadest sense. *Martin*, 137 Wn.2d at 789. Thus, the State’s focus on the fact that City Church has no formal method of confessing, leaving to the individual to confess his sins to God is far too narrow and would undercut the privilege.

The emphasis of the privilege is spiritual counsel, “to provide spiritual instruction and guidance[.]” *Martin*, 91 Wn.App. at 629. Thus the confession does not have to be the goal but merely a potential and unexpected outcome from spiritual instruction and guidance. As long as the spiritual instruction by the minister is one of the rules or practices of the religion, the privilege applies.

Morris was engaged in spiritual instruction and guidance with Mr. Smith as part of his City Group teaching:

This would be me practicing what I preached in the sense of what was taught at my City Group. This is literally the subject that I had been stuck on for months and months

and months when we'd get in the Word was disciple making, making disciples, preaching the gospel to every creature, you know, making disciples of all nations. So basically letting them know what Jesus said, giving them an opportunity to accept Jesus. So this is something that I was encouraging all of my brothers in the Lord to do, and also taking the challenge myself to do it and take it seriously.

4/4/2014RP 193-94.

And while the Church had no policy on confession, instead believing it was between the person and God, here Morris was seeking to determine whether Mr. Smith's self-professed confession was in fact an honest confession and that Mr. Smith had sought repentance:

A. My main concern was that he hadn't heard the gospel with clarity, and that he hadn't had the opportunity to experience that true repentance over who he was and what he had done in the past as a sinner.

Q. After you met with him at the potluck briefly, you wanted a second chance to meet with him?

A. Yeah, definitely, yeah.

Q. One on one?

A. Absolutely.

Q. So you could talk to him about the gospel?

A. Preach the gospel to him.

Q. Specifically about what it means to confess and repent?

A. Yeah, a true salvation experience, a true repentance, true contrition really.

4/24/2014RP 46-47.

Morris saw confession and repentance as two sides of the same coin:

Q. And I want to move on a little bit and talk to you about confession. What is confession?

A. Someone coming out with the reality that they're a sinner and confessing any sin that they're currently operating in. Just coming out with the secrets, if there are secret sins. Mainly, the dual confusion of confessing that Jesus Christ is lord and savior, and also confessing that you are a sinner and being willing to come out with what you've been doing.

Q. Is there a difference between confession and repentance?

A. Is there a difference between confession and repentance? I just feel like they're hand in hand. Technically, yeah, there's definitely a difference.

Q. But they need to go together?

A. Well, confession is you're confessing these things you're coming out with. Repentance is a change of mind, a change of heart and you're currently going in a different direction.

Q. So the confession would be the actual coming out with the secrets?

A. Like I said, it's dual. It's a confession about who God is, who Jesus Christ is. It's confessing that you are a

sinner, and it's also specifically confessing the sin that you are currently doing.

Q. All these three things together?

A. Yeah.

Q. Okay. I think I understand. So part of confession would actually be coming out, if there were secret sins, actually coming out with what the actual sins were?

A. Absolutely.

Q. This is something that you believe pretty strongly in?

A. Absolutely.

Q. You stress that within your own City Group as a leader?

A. Sure.

4/24/2014RP 42-43.

These passages of testimony by Morris confirm that at the time of Mr. Smith's confession, Morris was a licensed minister, and that he was acting consistent with his position as a City Group leader. Thus, under the statute, Mr. Smith's confession was protected by the privilege and should have been excluded from the trial.

As a policy matter, ruling that the privilege applied here would be consistent with the decisions construing the statute. The privilege cannot apply only when the intent of the clergy member is to obtain a

confession. Plainly the privilege is designed to protect religious conversations between the clergy member and the penitent during which a confession occurred. Such a conclusion would severely limit the privilege and would be contrary to the purpose of the privilege which is to foster the candid discussions between the clergy and those who seek spiritual guidance. *See Lowy v. PeaceHealth*, 174 Wn.2d 769, 785, 280 P.3d 1078 (2012) (“[t]he attorney-client, physician-patient, and clergy-penitent privileges are all founded on the premise that communication in these relationships is so important that the law is willing to sacrifice its pursuit for the truth, the whole truth, and nothing but the truth.”); *Scott v. Hammock*, 870 P.2d 947, 955 (Utah 1994) (“[t]o fulfill their responsibilities, clergy must be able to counsel and admonish with confidentiality if they are to ‘show the transgressor the error of his way; to teach him the right way; to point the way to faith, hope, and consolation [and] perchance to lead him to seek atonement.’”), quoting *In re Swenson*, 183 Minn. 602, 237 N.W. 589, 591 (1931).

Under RCW 5.60.060(3), Mr. Smith’s confession to Morris was privileged and it was error to admit it at trial. This Court should reverse Mr. Smith’s conviction and remand for a new trial.

B. CONCLUSION

For the reasons stated in this reply brief as well as the previously filed Brief of Appellant, Mr. Smith asks this Court to reverse his conviction and remand for a new trial.

DATED this 11th day of July 2016.

Respectfully submitted,

s/Thomas M. Kummerow

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DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 11TH DAY OF JULY, 2016, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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