NO. 95776-2

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

EARL ROGERS,

Petitioner.

STATE'S ANSWER TO PETITION FOR REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Table of Cases

Statutes

Rules and Regulations

A. INTRODUCTION

This case does not meet the criteria for review set forth in RAP 13.4 governing acceptance of review.

B. STANDARD FOR ACCEPTANCE OF REVIEW

"A petition for review will be accepted by the Supreme Court only: (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or (2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court." RAP 13.4(b).

C. STATEMENT OF THE CASE

The State charged Earl Rogers with one count of felony telephone harassment for threatening to kill the victim, Manesbia Pierce, his girlfriend's mother. CP 1, 5. On November 1, 2015, the victim reported that she received five phone calls from Rogers, in which he yelled at her and threatened to come over and kill her, and "blow" her "brains out." CP 5. She was afraid that Rogers had

obtained a gun and would carry out his threat. CP 5. She was visibly upset when police responded to her home, so much so that they had trouble interviewing her. CP 5. Rogers was arrested and admitted calling the victim, but denied threatening her. CP 5.

Attorney David Trieweiler initially represented Rogers. CP 8, 13, 23. When Trieweiler interviewed the victim at her home in the course of his investigation, the victim showed Trieweiler a letter that Rogers had mailed from jail to the victim's daughter, Timothea Marshall, in which Rogers apologized and offered to pay the victim money in exchange for "dropping" the charge against him. CP 7-8. According to the victim and Marshall, Trieweiler took the only known copy of the letter with him when he left her home. CP 8; RP 5.

The victim subsequently contacted Trieweiler and asked for the letter back. CP 8-9. After the prosecutor learned of the letter's existence, the prosecutor also requested that Trieweiler return the letter to the victim or provide a copy of it to the State. CP 8-9, 14-15, 18, 20. The victim called Trieweiler in the presence of detectives and informed him that she wanted the letter back. CP 15. Trieweiler stated "I can't talk to you about this." CP 15.

The State filed a motion to compel production of the letter. CP 7-21. In response, Trieweiler contended he could not produce evidence he gathered in the course of representing Rogers. CP 23.

The court ordered the State to first serve the victim's daughter, Marshall, with a subpoena duces tecum to produce the letter. CP 34. The State issued the subpoena duces tecum. CP 109-11. Marshall provided a declaration to the court, stating that Rogers had mailed her a letter, and that she gave the letter to her mother. CP 35-36. She stated that she had no copies of the letter. CP 36.

Trieweiler was removed as Rogers' defense counsel after the presiding judge found an irreconcilable conflict of interest between Rogers and Trieweiler, and new counsel was appointed for Rogers. CP 37. The presiding judge subsequently signed a subpoena duces tecum over Trieweiler's objection, ordering him to produce "all letters, notes, memorandum or writings obtained at 103 S. 339th Circle, Unit B, Federal Way, WA 98113, from or in the presence of Manesbia Pierce, by David Trieweiler and/or his investigator, during the fall or winter of 2015." CP 51-53. Trieweiler objected. CP 54.

The criminal motions judge permitted Trieweiler to file under seal a motion and declaration to quash the subpoena. RP 14; CP 99-100. The State, although unable to know the precise contents of the motion to quash, provided briefing to the court arguing that the letter was physical evidence that does not contain attorney-client communications and is not protected by attorney-client privilege. CP 112-15, 131-36.

The court denied the motion to quash in part, requiring Trieweiler to turn over "any letter(s) (or copy of letter(s)) written by Mr. Rogers to Ms. Timothea Marshall provided to Mr. Trieweiler or his investigator by Manesbia Pierce or in her presence at 103 S. 339th Circle, Unit B, Federal Way, WA 98113 in the fall of 2015." CP 99-100. However, the court granted the motion to quash in part by striking broader language in the subpoena requiring production of "all letters, notes, memorandum or writings obtained. . . from or in the presence of Manesbia Pierce" out of concern that the broader language, as phrased, could require production of privileged documents. CP 99-100.

The court found Trieweiler in contempt of court for failing to comply with the court's order to produce the letter on August 25, 2016. CP 107. The court imposed a sanction of $100 per day after

48 hours, but stayed the sanction pending appeal. CP 107. Rogers sought discretionary review, which was granted.

The Court of Appeals affirmed the trial court in an unpublished decision dated February 20, 2018. The Court of Appeals ordered that on remand Trieweiler must provide the letter within 30 days of issuance of the mandate.

D. THIS COURT SHOULD DENY THE PETITION FOR REVIEW

The Court of Appeals opinion does not conflict with any decision of this Court or other decisions of the Court of Appeals, presents no constitutional issue, and does not involve an issue of substantial public importance. Review should be denied.

1. THE COURT OF APPEALS PROPERLY CONCLUDED THAT ROGERS DID NOT OBJECT TO THE SUPERIOR COURT'S AUTHORITY TO ISSUE THE SUBPOENA DUCES TECUM BELOW.

Rogers argues that the subpoena in this case exceeds the scope of the criminal discovery rules. The Court of Appeals found that this argument was raised for the first time on appeal and thus refused to address it, citing RAP 2.5(a). RAP 2.5(a) provides that the appellate court will not review errors for the first time on appeal

in a criminal case unless the error is manifest error affecting a constitutional right. Rogers does not dispute that this issue is being raised for the first time on appeal. Rogers also does not dispute that this is not a constitutional issue. Rogers cited no constitutional provisions in his briefing. The Court of Appeals properly concluded that this issue cannot be raised for the first time on appeal.

Moreover, the subpoena duces tecum was properly issued. Criminal Rule 4.8 permits the issuance of a "subpoena commanding *a person* to produce and permit inspection and copying of designated documents, tangible things, or premises in the possession, custody, or control of that person," known as a "subpoena for production." CrR 4.8(b) (emphasis added). "On timely motion, the court may quash or modify a subpoena. CrR 4.8(b)(4).

Criminal Rule 4.8(b) states that a subpoena for production of documents or tangible things can be issued either by the court or by an attorney for a party. The rule does not limit the use of subpoenas to only one party. CrR 4.8(b)(1)(b). The rule contains no limitations on the types of persons who may be the subject of subpoenas for production. Subpoenas may be directed to any "person," including both the opposing party or a third party.

CrR 4.8(b)(2). For example, the rule specifically contemplates that "any party" may use a subpoena to obtain documents from an alleged victim, who is necessarily a third party in a criminal case. CrR 4.8(b)(2).

That 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. However, what decisions regarding CrR 4.8 do exist make clear that the rule can be used by the State to obtain evidence from third parties. E.g., State v. White, 126 Wn. App. 131, 136, 107 P.3d 753 (2005) (holding that when State issues a subpoena duces tecum to a third party for documents pertaining to a defendant pursuant to CrR 4.8, State must serve notice of subpoena on adverse party); State v. Hyder, 159 Wn. App. 234, 251, 244 P.3d 454 (2011) (noting holding of White).

Finally, Rogers' reliance on State v. Gonzalez, 110 Wn.2d 738, 757 P.2d 925 (1988), is misplaced. To the extent that case stands for the proposition that criminal discovery is limited to material information, there can be no question that the letter in question is material.

2. THE COURT OF APPEALS PROPERLY CONCLUDED THAT THE SUBPOENA DUCES TECUM DOES NOT REQUIRE DISCLOSURE OF PRIVILEGED INFORMATION.

Rogers contends that the trial court should have quashed the subpoena because it seeks the disclosure of "privileged or other protected" information. He argues that the letter that Rogers mailed to Pierce's daughter from jail is privileged because it constitutes a "secret" that Trieweiler is prohibited from disclosing under RPC 1.6. The Court of Appeals properly affirmed the trial court's determination that the letter is not a privileged communication, as it was directed to a third party. Because it is not privileged, Trieweiler can be compelled to disclose it in order to comply with a lawful subpoena.

The attorney-client privilege is codified in RCW 5.60.060(2)(a), which states, "An 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." (Emphasis added). Here, the letter itself is obviously not an attorney-client communication. It was written by Rogers to Marshall

and provided by Marshall to Pierce. The letter is not a communication made by Rogers to his attorney in confidence.

Rogers' attempt to rely on State ex rel. Sowers v. Olwell, 64 Wn.2d 828, 831, 394 P.2d 681 (1964), was properly rejected by the Court of Appeals. In Sowers, this Court held that "to be protected as a privileged communication, information or objects acquired by an attorney must have been communicated or delivered to him by the client, and not merely obtained by the attorney while acting in that capacity for the client." Id. at 831. Thus, Sowers is of no avail to Rogers. In this case, the trial court properly concluded that the letter is not privileged because it was written by Rogers and sent to the victim's daughter, and was obtained from the victim. It was, in the words of Sowers, "merely obtained by the attorney while acting in that capacity for the client." Id. at 831. As a result, the letter is not protected by attorney-client privilege. Id. at 831-32.

The subpoena in this case does not compel Trieweiler to disclose any communications from Rogers regarding the letter. The letter itself, which is clearly not an attorney-client communication, does not become protected by the attorney-client privilege simply because Trieweiler and Rogers may have discussed it during the course of Trieweiler's representation of

Rogers, or because Trieweiler learned of the letter's existence from Rogers before interviewing the victim.

Beyond the claim of attorney-client privilege, Rogers also argues that the letter is still a "secret" if not privileged, and thus Trieweiler cannot disclose it pursuant to RPC 1.6. However, because the letter is not privileged, disclosure is authorized under RPC 1.6 in order to comply with the lawful subpoena.

While the statutory attorney-client privilege protects only attorney-client communications, RPC 1.6 imposes a duty on attorneys to not reveal "information relating to the representation of a client" unless certain exceptions apply. RPC 1.6(a). "Information relating to the representation of a client" includes both "confidences" and "secrets." Comment 21 to RPC 1.6. "Confidences" refers to information that will convey the substance of confidential communications and is coextensive with the statutory attorney-client privilege, while "secrets" "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, 533-34, 688 P.2d 506 (1984); Comment 21 to RPC 1.6. Thus, something

may be a secret but not a confidence. One example of information that is a "secret" but not a "confidence" is information about the source of client funds used to pay an attorney's fees. Seventh Elect Church, 102 Wn.2d at 534.

The subpoena does not require Trieweiler to testify about or otherwise disclose how he learned of or obtained the letter. Thus, the subpoena does not require Trieweiler to disclose any confidences.

RPC 1.6 specifically permits attorneys to disclose client secrets in order "to comply with a court order." RPC 1.6(b)(6). Thus, RPC 1.6 allows disclosure of a "secret" that is not privileged when disclosure is ordered by a court. Seventh Elect Church, 102 Wn.2d at 511. In this case, because a lawful subpoena exists which orders Trieweiler to turn over the letter, and because the letter itself is not privileged and cannot contain privileged information as argued above, disclosure is authorized and not prohibited by RPC 1.6.

"In ordering disclosure of 'secrets', the trial court must balance the necessity of the disclosure against the effect such disclosure might have on the attorney-client relationship." Seventh Elect Church, 102 Wn.2d at 534-35. In this case, that balancing

weighs heavily in favor of disclosure, and the trial court did not abuse its discretion in so concluding. The letter is believed to not only contain an admission to the crime of felony harassment, but is itself evidence of two additional crimes, tampering with a witness pursuant and violation of a no-contact order. See RCW 9A.72.120 and 26.50.110. The public interest in disclosure of a letter that constitutes a felony is great. Because Trieweiler and Rogers no longer have an attorney-client relationship, the public interest in disclosure cannot be outweighed by protecting that relationship.

E. CONCLUSION

For the foregoing reasons, the petition for review should be denied.

DATED this 8th day of May, 2018.

Respectfully submitted,

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