

COURT OF APPEALS OF THE STATE OF WASHINGTON
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COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

vs.

JOEL ZELLMER,

Appellant.

No. 59228-9-I

STATE'S RESPONSE TO
SUPPLEMENTAL ASSIGNMENTS
OF ERROR

1. IDENTITY OF RESPONDING PARTY

The responding party, the State of Washington, seeks the relief designated in Part 2.

2. STATEMENT OF RELIEF SOUGHT

The State respectfully asks this Court to affirm Zellmer's conviction and sentence for murder in the second degree and uphold the trial court's post-sentencing decision to unseal previously sealed court records pursuant to GR 15(e).

3. FACTS PERTAINING TO ARGUMENT

Zellmer filed his opening brief in this appeal in December 2011, challenging his conviction on a number of grounds, including an allegation that the State illegally intruded into

1 protected attorney-client communications. He asserted that the trial court wrongly rejected his
2 claim that the State's execution of a search warrant at his home in December 2005 and the
3 State's obtainment via subpoena of a statement that Zellmer made to a claims adjuster exposed
4 investigators to privileged information which caused him such prejudice that dismissal of his
5 conviction was the only reasonable remedy. Brief of Appellant, at 13-18, 25-32. He also
6 contended that the State further interfered with his right to attorney-client confidentiality when
7 its investigators were contacted by a fellow inmate of Zellmer's at the King County Jail, who
8 sought to disclose admissions made by Zellmer to him. Brief of Appellant, at 18-32.

9 The State addressed these assertions in great detail in its responsive brief. Brief of
10 Respondent, at 29-50. The State noted that other than one non-privileged item, it did not attempt
11 to introduce any property seized during the execution of the warrant. Brief of Respondent, at 31.
12 The State discussed the bases upon which the trial court reasonably denied Zellmer's claim of
13 prejudice as to the seized and subpoenaed materials and also pointed out that, during his trial,
14 Zellmer never sought dismissal of his case due to the State's interaction with the jailhouse
15 informant, and that he could prevail on that argument on appeal only if he demonstrated manifest
16 constitutional error. Brief of Respondent, at 47-50.

17 After the State filed its response, Zellmer moved to supplement his opening brief in order
18 to argue that the trial court improperly denied his request for an evidentiary hearing at which he
19 could place the privileged materials at issue before the court and allow it to conduct a further
20 factual inquiry. Appellant's Motion to File Supplemental Assignment of Error, at 2. This Court
21 granted that request.

22 Also, in his opening brief, Zellmer asserted that the trial court applied an outdated legal
23 analysis when ruling on the State's post-sentencing motion to unseal dozens of previously-sealed
24

1 court records. Brief of Appellant, at 82-84. In response, the State noted that although it was true
2 that the trial court initially applied a test based on case law that was subsequently abrogated by
3 the state supreme court, the trial court was made aware of the change in the law by the parties,
4 and ultimately applied the current standard. Brief of Respondent, at 93-94. Because it appeared
5 that Zellmer's appellate counsel mistakenly overlooked the complete history, this Court granted
6 her request to submit supplemental briefing on that subject, as well.

7 By letter dated September 6, 2012, this Court allowed the State to file a supplemental
8 response brief addressing the additional assignments of error.

9 4. ARGUMENT

10 As to Zellmer's first supplemental assignment of error, regarding the purported failure by
11 the trial court to hold an evidentiary hearing on the issue of intrusion into privileged
12 communications, it appears that Zellmer has abandoned that claim in his reply/supplemental
13 brief. Instead, he observes, quite reasonably, that the trial court was presented with abundant
14 materials on this subject, consisting of hundreds of pages of transcripts of phone conversations
15 and recorded interviews, along with multiple reports by a special master assigned to review the
16 materials seized by the State. Appellant's Reply Brief and Supplemental Assignments of Error,
17 at 4-5. At no point in his second submission to this Court does Zellmer contend that the denial of
18 a request for an evidentiary hearing necessitates the reversal of his conviction; rather, he simply
19 replies to the arguments put forward by the State in its response to his opening brief regarding
20 the validity of the trial court's disposition of his claims.¹

21
22 ¹ It bears noting that Zellmer cites to CP 1708 for the proposition that he sought dismissal of the
23 State's case due to its purportedly unlawful relationship with Zellmer's fellow inmate. Reply
24 Brief of Appellant and Supplemental Assignments of Error, at 13. In actuality, the dismissal
motion designated as CP 1708-51 related solely to the seizure of materials from Zellmer's home
and to the statement obtained from Zellmer's homeowner's insurance adjuster.

1 With regard to Zellmer's second supplemental assignment of error, he relies on State v.
2 McEnroe, 174 Wn.2d 795, 279 P.3d 861 (2012), for the proposition that a defendant has the right
3 to withdraw documents filed under seal if the State later seeks to unseal those documents.
4 Appellant's Reply Brief and Supplemental Assignments of Error, at 28-29. Zellmer's reliance
5 on that recent decision by the state supreme court is misplaced. The McEnroe court held only
6 that documents submitted with a motion to seal may be withdrawn if the sealing motion is
7 denied. McEnroe, 174 Wn.2d at 798. The supreme court's decision is wholly inapposite to the
8 instant matter, in which numerous sealing motions were granted and records were sealed, and
9 much later, a request to unseal those records pursuant to GR 15(e) was presented.

10 5. CONCLUSION

11 The State respectfully asks this Court to affirm Zellmer's conviction and sentence, and
12 uphold the trial court's granting of the State's motion to unseal records.

13 Submitted this 4th day of October, 2012.

14
15 DANIEL T. SATTERBERG
Prosecuting Attorney

16 

17 DAVID SEAVER, WSBA #30390
18 Senior Deputy Prosecuting Attorney
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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Nancy Collins, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the State's Supplemental Response, in STATE V. JOEL ZELLMER, Cause No. 59228-9-1, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

W Brame
Name
Done in Seattle, Washington

10/9/12
Date

Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Sheryl G. McCloud, the attorney for the appellant, at 710 Cherry St., Seattle, WA 98104, containing a copy of the State's Supplemental Response, in STATE V. JOEL ZELLMER, Cause No. 59228-9-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

LuBrame

Name

Done in Seattle, Washington

10/4/12

Date