

62609-4

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NO. 62609-4-I

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

STATE OF WASHINGTON,

Respondent,

v.

RAYNE D. WELLS,

Appellant.

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

The Honorable Susan K. Cook, Judge

REPLY BRIEF

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A. ARGUMENT IN REPLY

WELLS WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL.

1. Wells was Denied Effective Assistance of Counsel When His Attorney Turned Over the Report from Grace's Interview Directly to the Prosecutor When Such Behavior was Neither "Reasonably Necessary" to Respond to Wells' Motion, nor Sanctioned by the Court.

The appellant and the State agree that an attorney may reveal material otherwise protected by attorney-client confidentiality insofar as the attorney "reasonably believes necessary....to respond to allegations in any proceeding concerning the lawyer's representation of the client." RPC 1.6(b)(5). See also State v. Cloud, 95 Wn. App. 606, 613, 976 P.2d 649 (1999) (holding defendant raising ineffective assistance waives attorney-client confidentiality insofar as is necessary to "respond to allegations in any proceeding concerning the lawyer's representation of the client"). Where appellant and the State part ways is in the conclusion that providing the interview notes to the prosecuting attorney was either appropriate or "reasonably necessary." It was not.

A criminal defense attorney, when faced with an ineffective assistance argument from a former client, should not carelessly disclose materials to the prosecuting attorney. Such disclosure is bewildering given the simple option of disclosing the materials to the Court itself, or,

even better, asking the court to provide guidance on what should be provided. A comment to RPC 1.6 states almost exactly this:

Paragraph (b) permits disclosure only to the extent the lawyer reasonably believes the disclosure is necessary to accomplish one of the purposes specified. Where practicable, the lawyer should first seek to persuade the client to take suitable action to obviate the need for disclosure. In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to accomplish the purpose. If the disclosure will be made in connection with a judicial proceeding, the disclosure should be made in a manner that limits access to the information to the tribunal or other persons having a need to know it and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable.

RPC 1.6, Washington Comment 14 (2009 update) (emphasis added).

The content of this comment was important enough that it was largely reiterated in Comment 23:

The exceptions to the general rule prohibiting unauthorized disclosure of information relating to the representation “should not be carelessly invoked.” In re Boelter, 139 Wn.2d 81, 91, 985 P.2d 328 (1999). A lawyer must make every effort practicable to avoid unnecessary disclosure of information relating to a representation, to limit disclosure to those having the need to know it, and to obtain protective orders or make other arrangements minimizing the risk of avoidable disclosure.

RPC 1.6, Washington Comment 23 (2009 update) (emphasis added).

Here, there is no indication that Hoff, as suggested in Comment 14, spoke with Wells before disclosing the interview notes to the prosecuting

attorney. Note that a similar opportunity for defendants to choose whether to allow such disclosures is afforded by federal law. See Bittaker v. Woodford, 331 F.3d 715, 722-23 (9th Cir. 2003) (in cases where defendant raises ineffective assistance, “[t]he court...gives the holder of the privilege a choice: If you want to litigate this claim, then you must waive your privilege to the extent necessary to give your opponent a fair opportunity to defend against it.”) Instead, Hoff turned over confidential and privileged materials immediately to the prosecutor, thus acting directly against his former client’s interests, contrary to RPC 1.6 and RPC 1.9(c). The State should not benefit by such behavior, and neither the court below – nor this Court – should sanction it.

Should Wells be forced to go to trial again, his case will be prejudiced by Hoff’s disclosure, and such prejudice would be difficult, if not impossible, to isolate. The State has additional information about a witness that should have been confidential. Should the State call Grace as a witness, it would have the benefit of the investigative reports, and should Wells call Grace, the State would be able to impeach her based on the defense reports (not to mention the possibility of using the reports to carefully interview Grace further in the meantime, thereby potentially influencing her testimony).

This same difficulty in isolating prejudice is the basis for the dismissal of charges in cases such as Cory and Granacki. State v. Cory, 62 Wn.2d 371, 377, 382 P.2d 1019 (1963); State v. Granacki, 90 Wn. App. 598, 603, 959 P.2d 667 (1998).

[T]here is no meaningful way to isolate the prejudice resulting from such interference even if a new trial is granted. As the Court observed, “ ‘... [t]he right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial.’ ”

Granacki, 90 Wn. App. at 603 (internal citation to Cory omitted). Here, given the potential harm of the breach in confidentiality and the natural difficulty in isolating such harm, this Court should conclude dismissal is an appropriate remedy, as in Cory and Granacki.

2. Wells was Denied Effective Assistance of Counsel When His Attorney Failed to Cross-Examine Stein to Elicit Testimony Stein Recognized Wells’ Gun and Knew it Did Not Work.

With regard to Hoff’s failure to cross-examine Stein about the non-functional gun, the State argues the same claim as below: that the fact that Stein knew this because he knew Josh Taylor owned the gun and it was non-functional would have worked against Wells.

Wells relies solely on the claim that Stein had a belief at trial that the gun was the same gun and did not work without consideration of the fact that this information would have placed the gun in the hands of the person for

whom he was completing the delivery or committing a robbery, depending on which theory is believed.

....

[D]efense counsel would have placed the weapon in the hands of the person who would have given it to Wells who was sent to rob Stein.

BOR at 28-29.

Appellate counsel is at a loss how this would have hurt Wells' case. After all, both Wells and Stein testified that Wells was ostensibly meeting with Stein and Shannon to complete a drug deal for Josh Taylor, so Wells' relationship with Taylor as a sub-dealer was already before the jury. And Stein had already testified that he believed Wells was "jacking" him for Taylor because Stein owed Taylor money, so that possibility was already before the jury as well. 2RP 41-42. Stein's testimony that he had seen the gun with Taylor therefore cannot hurt Wells any further, but Stein's statement that he knew the gun didn't work would plainly reduce the likelihood that Stein experienced "apprehension and fear of bodily injury," as required for the assault conviction. CP 151 (instruction 11) It was therefore not a legitimate strategic choice for Huff to fail to question Stein on such a crucial point, and the State's argument to the contrary should be rejected.

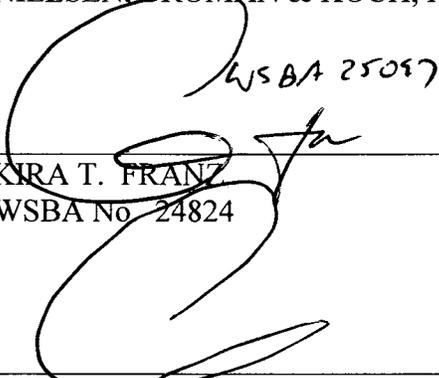
B. CONCLUSION

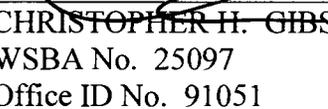
This Court should reverse Wells' convictions and dismiss the charges with prejudice because Rayne Dee Wells was denied assistance of counsel when his attorney breached the duty of attorney-client confidentiality. In the alternative, the court should reverse Wells' conviction for second-degree assault on Stein.

DATED this ____ day of October, 2009.

Respectfully Submitted,

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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I**

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
v.)	COA NO. 62609-4-1
)	
RAYNE WELLS, JR.,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 6TH DAY OF OCTOBER 2009, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] SKAGIT COUNTY PROSECUTOR'S OFFICE
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MOUNT VERNON, WA 98273

[X] RAYNE WELLS, JR.
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McNEIL ISLAND CORRECTIONS CENTER
P. O. BOX 881000
STEILACOOM, WA 98388

SIGNED IN SEATTLE WASHINGTON, THIS 6TH DAY OF OCTOBER 2009.

x. *Patrick Mayovsky*