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Court of Appeals
Division II
State of Washington
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NO. 49492-2-II

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

JOHN ALLEN BOOTH JR.,

Appellant.

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

The Honorable Richard Brosey, Judge

SUPPLEMENTAL BRIEF OF APPELLANT

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A. SUPPLEMENTAL ASSIGNMENTS OF ERROR

1. The trial court abused its discretion when it held that the State had complied with its discovery obligation under CrR 4.7 and denied Mr. Booth's pro se motion to compel discovery.

2. The trial court abused its discretion when it denied Mr. Booth's motion to "expand the record" in order to supplement the record with additional evidence after the State and the defense had rested.

B. ISSUES PERTAINING TO SUPPLEMENTAL ASSIGNMENTS OF ERROR

1. Whether the trial court erred when it held that discovery requested by Mr. Booth is not within the knowledge, possession or control of the State and the prosecution had complied with CrR 4.7? Assignment of Error 1.

2. Whether the trial court erred in denying Mr. Booth's motion to "expand the record" after both sides had rested but prior to filing the written order denying the CrR 7.8 motion, in order to move for introduction of additional evidence? Assignment of Error 2.

C. STATEMENT OF THE CASE

John Allen Booth Jr. was convicted of one count of second degree

murder, two counts of first degree murder, one count of attempted first degree murder, one count of attempted first degree extortion, and one count of first degree unlawful possession of a firearm. Clerks Papers (CP) 154-162. An unpublished opinion was filed by this Court on August 12, 2014, affirming the convictions. *State v. Booth*, 2014 WL 3970707 (Div. II, no. 42919-5-II). He filed a personal restraint petition which was subsequently denied, and an Order of Dismissal was issued July 1, 2015. CP 245-46.

Mr. Booth filed a Motion to Vacate Judgment and Sentence pursuant to CrR 7.8. CP 163-200. Counsel for Mr. Booth sent a letter to the Lewis County Prosecutor on February 22, 2013, regarding discovery and information believed to be in the possession of the Prosecutor's Office or Lewis County Jail. The State responded on February 27, 2013 that it was not required to provide discovery to a defendant after conviction.

On June 27, 2013, Mr. Booth filed a motion to compel discovery. CP 227-231. Mr. Booth also made public records requests to the Lewis County Sheriff's Office regarding Lewis County Jail policies, emails, and recordings of his calls to counsel and investigators from the Lewis County Jail. IReport of Proceedings (RP) at 8; CP at 247-253. The Sheriff's Office requested several extensions to provide records pursuant to the public records

request, and ultimately incomplete and heavily redacted records were provided to Mr. Booth. 1 RP at 8.

Mr. Booth filed a *pro se* motion to compel discovery on January 22, 2016. CP 247-253. In his motion, Mr. Booth stated that the material provided following his public records requests consisted of “hundreds of pages that were also mostly completely blacked out from redactions.” CP 247-48. He argued that under *State v. Peña Fuentes*¹, he is entitled to complete discovery. CP 248. He specifically requested documents pertaining to his housing in the jail, documents related to the Lewis County Jail telephone system and records and logs of calls by Booth, emails or messages pertaining to Booth created by the jail staff and prosecutors, and video of jail staff escorting Booth to and from his attorney visits and their location during attorney visits. CP 251-52.

The State filed a Response to the defense motion to compel discovery on April 5, 2016. CP 255-57. In its response, the State asserted that Mr. Booth’s attorney had been provided with “voluminous discovery” and that the court had already conducted a hearing on the issue of discovery. CP 256. The State argued that Mr. Booth was engaged in a “fishing expedition” and that there are no documents, lists, or other public records to show that

corrections officers or other people eavesdropped on conversations between Mr. Booth and his attorney. CP 256.

The Court heard Mr. Booth's *pro se* request for discovery on April 13, 2017. 1Report of proceedings (RP) at 6-17. At the hearing the State argued that Mr. Booth had been provided with all discovery under State control pursuant to CrR 4.7, arguing that it had provided "everything" to Mr. Booth 1RP at 9. The trial court summarized the State's position that "documents in the custody of the sheriff and/or the jail are not under your control anyway." 1RP at 9. The State argued that Mr. Booth and his counsel had made numerous PRA requests from the jail and that "the State's position is he is looking for something that doesn't exist[,] and that all his PRA requests "were duly answered in consideration of the statute." 1RP at 8, 10. Mr. Booth was not present for the hearing and his counsel rested on the *pro se* motion without further argument. 1RP at 8.

The judge, apparently believing that the motion to compel unprovided discovery centered on eavesdropping of his attorney-client conversations at the jail, stated:

I presided over his murder trial, and I don't recall any testimony ever being produced at the trial through Mr. Hunko, his trial counsel, that was offered by the state or anybody else

¹*State v. Peña Fuentes*, 179 Wn.2d 808, 318 P.3d 257 (2014).

that was generated as a result of somebody supposedly overhearing some conversation in the jail. I'm aware that that is the basis of his CrR 7.8 motion, and I assume we will deal with that on May 2nd and May 3rd.

1RP at 12.

Mr. Booth's counsel stated:

The only other issue that I can see from his motion it brings up is that the state has a computer system that access jail calls as well as records – as well as recording them. He wants to know who listened to these phone calls between him and other persons who recorded them and where they were listening from. I don't know if there was any automatically generated or handwritten log to that effect, but that's what he is requesting.

1RP at 14.

After hearing argument, the court denied Mr. Booth's *pro se* motion to compel discovery. 1RP at 17.

On September 29, 2016, after the defense and State had rested on June 13, 2016, but prior to entry of an order denying the CrR 7.8 motion and findings and conclusions, Mr. Booth moved to "expand the record" to include proposed evidence including Global-Tel Link records of calls he made from the jail, and transcripts from the pre-trial hearing in which Detective Riorden was ordered to leave the courtroom. He filed a supplemental motion to expand the record to include the Lewis County Jail Handbook, a 17 page

document provided to every inmate when booked into the jail. CP 234-37, 308-325. In support of the motion, Mr. Booth stated that the prosecutor argued that the jail phone system informs the inmate that calls are recorded and his defense counsel was unprepared to rebut this argument when it pertains to attorney calls, which were not supposed to be rerecorded in any manner. The Jail Handbook states that calls to attorneys are not recorded or monitored, and that Mr. Booth was not on notice that his attorney calls were being recorded, as the State argued. 3RP at 589. Following denial of his motion for reconsideration on September 29, 2016, the court heard argument on Mr. Booth's motion to supplement the record. 3RP at 589-96. The court denied the motion to "expand" the record, stating that it was never denied that the jail policy is to not record inmate calls to attorneys and that "no such phone calls were recorded." 3RP at 596.

1. THE COURT ERRED BY DENYING MR. BOOTH'S MOTION TO COMPEL DISCOVERY OF RECORDS

Defense counsel moved to compel discovery of video of Booth being escorted to and from jail visits and court appearances, emails and other documents regarding Booth by the prosecutor's office and the jail, jail policy regarding transporting inmates, and recordings of calls and logs or records of

calls he made while in the jail. CP 255-57. Mr. Booth and his counsel also made requests for records and documents pursuant to the Public Records Act. The court denied the motion to compel on April 13, 2016. 1 RP at 17.

CrR 4.7 governs criminal discovery. *State v. Pawlyk*, 115 Wash.2d 457, 471, 800 P.2d 338 (1990). The scope of criminal discovery is within the trial court's discretion. A court will not disturb a trial court's discovery decision absent a manifest abuse of that discretion. *State v. Yates*, 111 Wash.2d 793, 797, 765 P.2d 291 (1988); *State v. Norby*, 122 Wash.2d 258, 268, 858 P.2d 210 (1993); *Pawlyk*, 115 Wash.2d at 470–71, 800 P.2d 338. Discretion is abused if it is manifestly unreasonable, or exercised on untenable grounds or for untenable reasons. *State v. Alexander*, 125 Wash.2d 717, 732, 888 P.2d 1169 (1995); *State v. Herzog*, 69 Wash.App. 521, 524–25, 849 P.2d 1235, review denied, 122 Wash.2d 1021, 863 P.2d 1353 (1993).

CrR 4.7 is a reciprocal discovery rule that separately lists the prosecutor's and defendant's obligations when engaging in discovery. *Yates*, 111 Wash.2d at 797, 765 P.2d 291. The prosecutor has a duty to disclose and to preserve evidence that is material and favorable to the defendant. CrR 4.7(a)(3). Failure to do so will generally be held to violate the accused's constitutional right to a fair trial. *State v. Mak*, 105 Wash.2d 692, 704, 718

P.2d 407, cert. denied, 479 U.S. 995, 107 S.Ct. 599, 93 L.Ed.2d 599 (1986).

The prosecutor's general discovery obligation is limited, however, "to material and information within the knowledge, possession or control of members of the prosecuting attorney's staff." CrR 4.7(a)(4). Where the prosecutor's efforts to obtain discoverable material held by others are unsuccessful, the court has authority to issue suitable subpoenas or orders. CrR 4.7(d).

CrR 4.7(d) allows a Superior Court to subpoena a third party to provide material or information, if it "would be discoverable if in the knowledge, possession or control of the prosecuting attorney." CrR 4.7 lists specific items that the prosecuting attorney must provide in discovery. When the defendant requests an unlisted item, CrR 4.7(e)(1) states:

Upon a showing of materiality to the preparation of the defense, and if the request is reasonable, the court in its discretion may require disclosure to the defendant of the relevant material and information not [listed].

A showing of materiality to the preparation of the defense requires the defendant to provide some factual basis making it reasonably likely that the requested evidence would give rise to information material to the defense. *State v. Blackwell*, 120 Wash.2d 822, 828, 830, 845 P.2d 1017

(1993).

Booth repeatedly moved for disclosure of material pertaining to his argument that his confidence in his attorney was undermined and destroyed due to eavesdropping on all forms of communication with his attorneys.

The Sixth Amendment to the United States Constitution guarantees a criminal defendant the right to effective assistance of counsel, which includes the right to confer privately with that counsel. U.S. Const. amend. VI; *State v. Peña Fuentes*, 179 Wn.2d 808, 818, 318 P.3d 257 (2014). Under the Sixth Amendment's guaranty, when the State interferes with a defendant's right to confer privately with his or her attorney, prejudice to the defendant is presumed. *Peña Fuentes*, 179 Wash.2d at 818–19. This presumption may be rebutted when the State can show beyond a reasonable doubt that the defendant was not, in fact, prejudiced by the interference. *Peña Fuentes*, 179 Wash.2d at 818–19. The State violated his right to counsel by positioning jail staff in the proximity of his attorney visits and during at least one meeting with counsel during the trial itself, by consistently stationing a detective immediately behind the defense table during pretrial hearings until the practice was stopped by judicial intervention, and recording of at least one of his calls to his attorneys and

recording calls to his investigator. The trial court abused its discretion by failing to require the State to obtain records and discovery that were repeatedly requested by the defense starting in February, 2013. The defense demonstrated the materiality of the records regarding the argument that Mr. Booth's calls to his attorneys and investigators were monitored. The State asserted that it did not have the logs under their control and that all discovery had already been provided. 1 RP at 9-14.

In *Peña Fuentes*, the Supreme Court reversed the trial judge's decision to deny discovery because such discovery is necessary to determine prejudice resulting from eavesdropping. The Court stated:

Because the State holds all of the information regarding the eavesdropping and any results thereof, Peña Fuentes cannot make any showing of prejudice (or rebut the State's arguments regarding lack of prejudice) without discovery of information related to the eavesdropping.

Fuentes, 179 Wash.2d at 821.

Here, the trial court's decision to deny the motion rested entirely on the State's unadorned representations as to the prosecutor's claim that it was unaware of any records. However, the record is clear that the prosecution has at least *some* knowledge of the phone calls and data produced by the jail when recording and monitoring telephone calls. Witnesses testified that the

calls could be accessed by investigators and also by prosecutors. 2 RP at 349-52, 3 RP at 457. That is where the possibility of prejudice arises because the prosecution may have relied on evidence gathered by law enforcement as part of an investigation aided by the eavesdropping.

Moreover, when addressing the defense request, the court appeared to not understand the thrust of the defense argument that Mr. Booth's confidence in his attorney was shattered due to interception of the calls, therefore violating his Sixth Amendment right to counsel. Rather than address the telephone logs, the court focused on the recording of a call that Mr. Booth made to a non-attorney in Spokane which resulted in the discovery of vital evidence used at trial. That call, which was clearly not privileged communication, is not the gravamen of Mr. Booth's argument; instead, it's the unrefuted testimony that at least one call was recorded, and that the state had virtually unfettered access to his calls to his investigator.

Under CrR 4.7(e)(1), a court may require disclosure of any relevant information that is both material and reasonable. In this case the State provides little evidence supporting its contention that it lacked knowledge of the alleged eavesdropping; it merely contends that the call to Mr. Booth's attorney heard by Officer Haskins and reported to Lieutenant Pea, did not

pass from law enforcement to the prosecutor's office. The State's position, however, is alarmingly cynical. The provider in question—Global-Tel-Link—was hired by the county to provide telephone monitoring services, yet the contractor asserts a defense that it “knows nothing” about the very records it paid Global-Tel-Link to generate and maintain. The State's position of having no knowledge of its own contractor's records is made even more absurd by its claim that Global-Tel-Link is no longer the telephone services provider for the jail, its corporate offices are located out of state and that the information is therefore somehow unobtainable. The appellant contends that the requested discovery is controlled solely by the prosecutor, or is available to the prosecution. The court abused its discretion by denying the motion to compel and by not requiring disclosure of the requested material or requiring the State to subpoena Global-Tel-Link to obtain the relevant logs and records. *Fuentes*, 179 Wash.2d at 821.

2. THE TRIAL COURT ERRED WHEN IT DENIED THE DEFENDANT'S MOTION TO “EXPAND” THE RECORD AFTER BOTH SIDES RESTED

After the defense and state rested but before the court issued its ruling, Mr. Booth filed two motions to “expand” the record to include

additional evidence including the Lewis County Jail Handbook. CP 308-325. Although he termed his *pro se* request as a motion to “expand” the record, Mr. Booth’s request amounted to a motion to reopen the case.

Generally, a motion to reopen a proceeding for the purpose of introducing additional evidence is addressed to the sound discretion of the trial court." *State v. Luvene*, 127 Wn.2d 690, 711, 903 P. 2d 960 (1995) (quoting *State v. Sanchez*, 60 Wn. App. 687, 696, 806 P.2d 782 (1991)); *State v. Brinkley*, 66 Wn.App. 844, 848, 837 P.2d 20 (1992). A trial court's decision allowing a party to reopen its case will be reviewed where it is a manifest abuse of discretion that results in prejudice to the complaining party. *State v. Brinkley*, 66 Wn. App. at 848; *State v. Vickers*, 18 Wash.App. 111, 113, 567 P.2d 675 (1977); *Seattle v. Heath*, 10 Wash.App. 949, 520 P.2d 1392 (1973). In bench trials, where the trial court is also the trier of fact, at least one appellate court has held it is not an abuse of discretion to allow the State to reopen, after the defense had rested, to address a specific question of the trial court. *State v. Johnson*, 1 Wash.App. 602, 464 P.2d 442 (1969). Because the prosecution may properly be allowed to present additional evidence to resolve deficiencies in its case pointed out by the defendant, and to address the trial court's questions in a

bench trial after both sides have rested, there is no logical basis for concluding that it is a per se abuse of discretion to allow the defense to reopen, after both sides have rested.

In this case, in his initial motion to expand the record, Mr. Booth asked for introduction of the Global-Tel-Link records of his calls while at the jail, for which the defense failed to present a custodian of the records. Mr. Booth also asked for introduction of a plea agreement by former co-defendant Ryan McCarthy. In his Supplemental Motion to Expand the Record, he also asked to be allowed to introduce the Lewis County Jail Handbook. CP 298-301, CP 308-325. Mr. Booth also filed a motion to reconsider, although the court had not yet issued its written decision. CP 302-03. After hearing argument on the issue of legal financial obligations on September 29, 2016, the court heard the motion for reconsideration and the motion to expand the record. 3RP at 576-596.

Mr. Booth argued that the Jail Handbook states that attorney calls will not be recorded, but that the State's argument is that he was on notice that all his calls could be recorded. 3RP at 589. This was also contradicted by the testimony of Officer Haskins, who testified that he heard a portion of at least one call to an attorney. 2RP at 352. The Jail Handbook states "calls

to attorneys are not recorded or monitored.” CP 313. Mr. Booth reiterated that the Jail Handbook states at pages 5 and 6 that “calls to attorneys are not recorded.” 3 RP at 589.

The trial court denied the motion to expand the record because “it’s never been an issue that the jail policy is you don’t record phone calls between an inmate and his attorney,” and that “contrary to your assertion, no such phone calls were recorded.” 3RP at 596. The court continued by stating: “[a]nything and everything that happened in the Lewis County Jail was inadvertent and was not done intentionally and it’s apples and oranges as far as I can determine.” 3RP at 596. The trial court then referred to *Cory* in the course of denying the defense motion. The court misunderstands the gravamen of Mr. Booth’s argument regarding the addition of additional evidence. The purpose of introducing the Jail Handbook is to refute the State’s argument that he was on notice that any and all calls could be recorded or monitored, despite the clear, unequivocal “guarantee” in the Jail Handbook that attorney-inmate calls would not be recorded.

The trial court, by misinterpreting the reason for Mr. Booth’s request, abused its discretion in denying the request to expand (or reopen the case) to offer this evidence and have an opportunity to overcome any

procedural barriers to its introduction.

D. CONCLUSION

Based on the above, Mr. Booth respectfully requests that this Court reverse the ruling denying the CrR 7.8 motion consistent with the argument presented herein and in his opening brief.

DATED: January 19, 2018.

Respectfully submitted,
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CERTIFICATE OF SERVICE

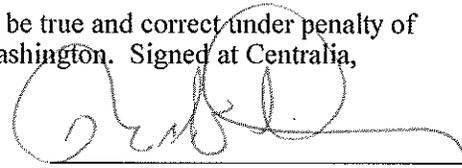
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This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Centralia, Washington on January 19, 2018.



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