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Court of Appeals
Division II
State of Washington
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NO. 52525-9-II

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

STATE OF WASHINGTON,

Respondent,

v.

FRANK WALLMULLER,

Appellant.

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

The Honorable Stanley J. Rumbaugh, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

The trial court erred in failing to compel production of the appellant's case file, in his former attorney's possession.

Issue Relating to Assignment of Error

Under State v. Padgett, 4 Wn. App. 2d 851, 424 P.3d 1235 (2018), RPC 1.16(d), and under the advisory opinion interpreting that rule, did the trial court err when it denied the appellant's motion to compel his former attorney to turn over his case file to him?

B. STATEMENT OF THE CASE

In 2008, the State charged appellant Frank Wallmuller with several crimes under Kitsap County superior court case number 08-1-00157-0. CP 1-12. Attorney Melissa Hemstreet represented Wallmuller on the charge. CP 17.

Wallmuller ultimately pleaded guilty to a single lesser charge. CP 18. Wallmuller was, however, convicted of other crimes in Mason County shortly thereafter, and he remains incarcerated on those convictions. CP 31.

On July 5, 2018, Wallmuller filed, pro se, a motion to compel former attorney (now judge) Hemstreet to turn over his case file. CP 32-51. According to the motion and supporting documents, Wallmuller wrote to Hemstreet in May of 2018 and requested that she forward his case file, including discovery materials, to Wallmuller. CP 45-50.

Although the Padgett case had not yet been decided when the motion was filed, Wallmuller cited persuasive authority including American Bar Association standards and federal authority in support of his request. CP 47-48.

On September 13, 2018, Hemstreet filed a declaration indicating that she recalled sending a *copy* of portions of Wallmuller's file to him in 2011, although she did not send discovery. CP 53-54. Hemstreet apparently believed she was prohibited from sending Wallmuller discovery. CP 53-54. Hemstreet acknowledged still possessing Wallmuller's original case file. CP 53.¹

The trial court heard Wallmuller's motion to compel on September 17, 2018. RP 1. Wallmuller was not present, but Hemstreet was, as was a prosecutor. RP 2. The State argued Wallmuller already had everything to which he was entitled. RP 3.

The court denied Wallmuller's motion without providing any reason for doing so. CP 56-57; RP 4.

¹ Wallmuller filed a declaration on September 28, 2018 stating that because the Department of Corrections was moving him around at that time, he could not have received the portions of the file sent by Hemstreet. CP 63-70. But, he pointed out, in any event, Hemstreet had acknowledged that she still retained his original file. CP 70. Wallmuller received Hemstreet's declaration only after the superior court's summary decision in this case. CP 74.

Wallmuller filed a notice of appeal. CP 58. This court determined the matter was not appealable of right but ultimately granted discretionary review under RAP 2.3(b)(1) (obvious error committed by trial court). March 6, 2019 Ruling Granting Review (appended to this brief).

Wallmuller now asks that this court reverse the superior court order denying his motion to compel. He asks that his case file be provided to him, subject to the limited withholdings and redactions discussed in Padgett, 4 Wn. App. 2d at 855, which is discussed in detail below.

C. ARGUMENT

THE TRIAL COURT ERRED WHEN IT DENIED MR. WALLMULLER'S MOTION TO COMPEL HIS FORMER ATTORNEY TO TURN OVER HIS CASE FILE, STILL IN HER POSSESSION.

This court should reverse the superior court's order denying Wallmuller's motion to compel. It should order that his former attorney turn over his case file, still in her possession, subject to limited redactions.

1. Standard of review

Whether an accused person is entitled to his or her case file or discovery materials is governed by CrR 4.7(h)(3) and RPC 1.16(d). The proper construction of these two provisions is a legal matter that this court reviews de novo. Padgett, 4 Wn. App. 2d at 854 (citing State v. Roggenkamp, 153 Wn.2d 614, 621, 106 P.3d 196 (2005)).

2. Under Padgett, an attorney must turn over a case file once the former client requests it.

Under Padgett, once representation is complete, a case file must be turned over upon request, subject to limited withholdings and redactions.

In Padgett, Padgett filed a motion to compel production of his client file and discovery materials, as well as supporting documents. 4 Wn. App. 2d at 854. In the declaration accompanying his motion, Padgett said he wanted his client file and the discovery materials to “perfect a Personal Restraint Petition.” Id. Padgett acknowledged that redactions would likely be made to both files, so he requested a “privilege log” explaining why any information was withheld or redacted. Id.

The trial court held a hearing on Padgett’s motion. Padgett’s trial (but not sentencing) counsel and the prosecutor appeared at the hearing. The attorney who represented Padgett at sentencing did not appear. Padgett was not transported from custody and did not participate. Trial counsel expressed reluctance at being involved in the hearing and did not offer any argument on Padgett’s behalf. The prosecutor opposed the motion, citing procedural issues and an interest in limiting Padgett’s access to sensitive information in the discovery file. Id.

The trial court denied Padgett’s motion because: (1) it was not brought by appellate counsel, who had no notice of the motion, (2) any

issues Padgett wanted to raise were already being addressed by the Court of Appeals in the direct appeal, and (3) Padgett did not specify what the requested files were needed for. Id. The trial court suggested that Padgett could renew the motion, provided he give appropriate notice to his appellate counsel and specify why he wanted his client file and the discovery. Id. at 853-54.

Division Three of this court accepted review and reversed. Id. at 854.

In Washington, professional conduct rules for attorneys require defense counsel to “surrender papers and property to which the client is entitled” upon termination of representation unless retention is ‘permitted by other law.’” Id. (quoting RPC 1.16(d)).

In addition, the Padgett court noted, the Washington State Bar Association (WSBA) has issued an ethics advisory opinion interpreting RPC 1.16(d) to mean that “unless there is an express agreement to the contrary, the file generated in the course of representation, with limited exceptions, must be turned over to the client at the client’s request” at the conclusion of representation. Padgett, 4 Wn. App. 2d at 854 (quoting WSBA Rules of Prof’l Conduct Comm., Advisory Op. 181 (rev. 2009)); see also WSBA Advisory Op. 181 (“[a]t the conclusion of representation . . . the file generated in the course of representation, with limited exceptions,

must be turned over to the client at the client's request, *and if the lawyer wishes to retain copies for the lawyer's use, the copies must be made at the lawyer's expense.*") (emphasis added).

Moreover, the rules of criminal procedure authorize defense counsel to provide discovery materials to a defendant "after making appropriate redactions which are approved by the prosecuting authority or order of the court." Padgett, 4 Wn. App. 2d at 854 (quoting CrR 4.7(h)(3)).²

The Padgett court concluded that "[u]nder the combined force of CrR 4.7(h)(3) and RPC 1.16(d), some sort of disclosure must be made when a criminal defendant requests copies of his or her client file and relevant discovery at the conclusion of representation." Padgett, 4 Wn. App. 2d at 854. And, like a public records request, no showing of need is required for disclosure. Id.

² CrR 4.7(h)(3) provides that

Any [discovery] materials furnished to [a defense] attorney pursuant to these rules shall remain in the exclusive custody of the attorney and be used only for the purposes of conducting the party's side of the case, unless otherwise agreed by the parties or ordered by the court, and shall be subject to such other terms and conditions as the parties may agree or the court may provide. *Further, a defense attorney shall be permitted to provide a copy of the materials to the defendant after making appropriate redactions which are approved by the prosecuting authority or order of the court.*

(Emphasis added.)

The Padgett court did observe that even under CrR 4.7(h)(3) and RPC 1.16(d), a defendant will not be given unlimited access to his attorney's file or discovery. Padgett, 4 Wn. App. 2d at 854-55. For instance, counsel may withhold materials of a certain type, if doing so would not prejudice the client. The court cited WSBA Advisory Op. 181 for guidance on what these materials would comprise:

Examples of papers the withholding of which would not prejudice the client would be drafts of papers, duplicate copies, photocopies of research material, and lawyers' personal notes containing subjective impressions such as comments about identifiable persons

Padgett, 4 Wn. App. 2d at 855.

In addition, discovery materials may be redacted,³ as approved by the prosecuting attorney or court order, to protect sensitive or confidential information; a protective order may be entered if appropriate. Id. (citing CrR 4.7(h)(3), (4)).

Noting these limited exceptions, the Padgett court concluded that the trial court was, nonetheless, "*obliged* to grant Mr. Padgett's motion for disclosure of his client file and discovery materials, subject to

³ In a related context, "to redact" is defined as "'to protect from examination by the public and unauthorized court personnel *a portion or portions* [of] a specified court record.'" GR 15(b)(5) (emphasis added). The concept of redaction of materials is, therefore, inconsistent with a blanket refusal to provide such materials.

nonprejudicial withholdings under RPC 1.16(d) and redactions under CrR 4.7(h)(3).” Padgett, 4 Wn. App. 2d at 855 (emphasis added).

Padgett is directly on point. Here, as in that case, the trial court issued a blanket denial of Wallmuller’s request to turn over his case file. CP 56-57; RP 4. But, “[a] superior court has the authority and duty to see to the ethical conduct of lawyers in proceedings before it.” State v. Sanchez, 171 Wn. App. 518, 546, 288 P.3d 351 (2012). And, under the applicable rules, the trial court had no discretion in the matter; it was “obliged” to order Hemstreet to turn over the case file, subject to the limited withholdings and redactions discussed in Padgett. 4 Wn. App. 2d at 855.

Notably, this court reached the same result three years earlier in an unpublished decision, State v. Chargualaf, noted 182 Wn. App. 1058, 2014 WL 3942086 (2014). Although nonbinding, the reasoning of that case is persuasive and should be followed.

As in this case, Chargualaf made a post-judgment motion for a copy of his discovery and case-related files. Id. at *1. This court determined that Churgualaf had a right to his file, subject to the same limited withholdings discussed in Padgett. Accordingly, this court reversed the trial court’s order and remanded the case for further proceedings. Id. at *2.

As a final matter, Hemstreet claims to have sent copies of some documents to Wallmuller in the past. Wallmuller, who did not have an

opportunity to respond to these assertions before the trial court's ruling, disputed this.

But there is no dispute that Hemstreet retains his actual case file. CP 53. Under Padgett and WSBA Advisory Op. 181, the original file, still in her possession, must be turned over to Wallmuller, subject to the limited exceptions discussed in Padgett.

The court's blanket and summary denial of Wallmuller's request was error under Padgett and the authority cited therein. This court should reverse.

3. The timing of the request does not diminish Mr. Wallmuller's right to possess the file.

This court should reject any argument by the State that the timing of the request distinguishes Wallmuller's case from Padgett. The State made such an argument in response to Wallmuller's motion for discretionary review. This court's commissioner correctly rejected that argument. Ruling Granting Review at 4 (appended to this brief).

Also quoted above, the advisory opinion interpreting RPC 1.16(d) states in relevant part that

At the conclusion of a representation, unless there is an express agreement to the contrary, the file generated in the course of representation, with limited exceptions, must be turned over to the client at the client's request, and if the lawyer wishes to retain copies for the lawyer's use, the copies must be made at the lawyer's expense.

WSBA Advisory Op. 181 (emphasis added) (cited with approval in Padgett, 4 Wn. App. 2d at 855; Chargualaf, 2014 WL 3942086 at *1).

The State has, to date, cited no authority for the proposition that the “conclusion of representation” implies a hard deadline. The simplest analysis is the correct one: The attorney’s representation has concluded, and Wallmuller has requested a file that Hemstreet still possesses. Therefore, Wallmuller is entitled to the file.

Of course, the passage of time might lead to a viable excuse for not turning over a file that, for example, in the meantime has been destroyed, particularly where notice is given. But there is no dispute that Wallmuller’s former attorney still has his file. Accordingly, any such argument should be rejected.

D. CONCLUSION

This court should reverse the trial court and compel the former attorney to turn over Mr. Wallmuller’s case file, still in her possession.

DATED this 10th day of May, 2019.

Respectfully submitted,

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APPENDIX

COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

BY JIT
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

THE STATE OF WASHINGTON,

Respondent,

v.

FRANK ALEXANDER WALLMULLER,

Petitioner.

No. 52525-9-II

RULING GRANTING REVIEW

Frank Wallmuller seeks discretionary review of the trial court's order denying his motion to compel his former trial attorney to provide him with his case file. Concluding Wallmuller demonstrates review is appropriate under RAP 2.3(b)(1), this court grants review.

In October 2008, Wallmuller plead guilty to a single count of possession of depictions of minors engaged in sexually explicit conduct. He received a sentence of 12 months with credit for time served. He is currently incarcerated on other convictions.

In July 2018, Wallmuller filed a motion to compel requesting the trial court order his former trial attorney, now Judge Melissa Hemstreet, to provide him with his case file in the 2008 matter. According to the motion, Wallmuller wrote to Judge Hemstreet twice in May 2018, requesting she forward his case file, but she did not respond. In response to Wallmuller's motion, Judge Hemstreet filed a declaration in response, asserting Wallmuller requested the same materials back in 2010. Judge Hemstreet submitted a mailing receipt indicating she sent a copy of the file to Wallmuller while he was incarcerated. She also mentioned letters in which Wallmuller acknowledged receiving the file copies as evidence of her compliance, but did not attach them due to their inclusion of other protected information. She affirmed she remained in possession of Wallmuller's case file.

On September 17, 2018, the trial court heard Wallmuller's motion to compel. Wallmuller, did not appear. Judge Hemstreet was present. The trial court asked the State if Judge Hemstreet previously provided a copy of the file to Wallmuller and the State affirmed she had. The trial court then denied Wallmuller's motion without additional explanation.

Wallmuller contends he never received the documents and Judge Hemstreet's recollections are incorrect. He partially attributes his lack of receipt to his moving amongst Department of Corrections' facilities at the time.

This court may grant discretionary review only when:

- (1) The superior court has committed an obvious error which would render further proceedings useless;
- (2) The superior court has committed probable error and the decision of the superior court substantially alters the status quo or substantially limits the freedom of a party to act;

(3) The superior court has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by an inferior court or administrative agency, as to call for review by the appellate court; or

(4) The superior court has certified, or all the parties to the litigation have stipulated, that the order involves a controlling question of law as to which there is substantial ground for a difference of opinion and that immediate review of the order may materially advance the ultimate termination of the litigation.

RAP 2.3(b). Wallmuller seeks review under RAP 2.3(b)(1).

This court reviews the trial court's decision to grant or deny a motion to compel for abuse of discretion. *Clarke v. State*, 133 Wn. App. 767, 778, 138 P.3d 144 (2006), *review denied*, 160 Wn.2d 1006 (2007). A trial court abuses its discretion when its decision is made on untenable grounds or for untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 482 P.2d 775 (1971).

Wallmuller argues the trial court abused its discretion in denying his motion to compel. He relies on *State v. Padgett*, 4 Wn.App.2d 851, 424 P.3d 1235 (2018). In *Padgett*, a defendant appealing several felony convictions filed a pro se motion to compel production of his client file and discovery materials to perfect a personal restraint petition. *Padgett*, 4 Wn.App.2d at 853. The trial court in *Padgett* denied the defendant's motion because: (1) it was not brought by appellate counsel, who had no notice of the motion, (2) any issues defendant wanted to raise were already being addressed by the Court of Appeals in direct appeal, and (3) defendant did not specify why the requested files were needed. *Padgett*, 4 Wn.App.2d at 854. This court reversed the trial court, reasoning that under CrR 4.7(h)(3), defense counsel is authorized to provide discovery materials to a defendant "after making appropriate redactions which are approved by the prosecuting authority or order of the court" and under RPC 1.16(c), defense counsel is required to

“surrender[] papers and property to which the client is entitled” upon termination of representation unless retention is “permitted by other law.” RPC 1.16(d). Thus, it held that “[u]nder the combined force of CrR 4.7(h)(3) and RPC 1.16(d), some sort of disclosure must be made when a criminal defendant requests copies of his or her client file and relevant discovery at the conclusion of representation.” *Padgett*, 4 Wn.App.2d at 854. The *Padgett* court compared the production of one’s file to a public records request, in that “no showing of need is required for disclosure.” *Padgett*, 4 Wn.App.2d at 854.

Here, the State argues Judge Hemstreet fulfilled her obligation when she mailed Wallmuller a copy of his case file in 2010. The State posits the lack of a rule-imposed timeframe on an attorney’s obligation to provide a client with his or her files implies the obligation extinguishes at some point after the termination of representation.

This court disagrees with the State. Based on the rationale of *Padgett*, an attorney’s obligation to provide his or her former criminal client his or her case file is ongoing. The trial court was obliged to compel disclosure of Wallmuller’s case file, subject to non-prejudicial withholdings under RPC 1.16(d) and redactions under CrR 4.7(h)(3). That Judge Hemstreet previously provided Wallmuller a copy of the case file, does not mitigate her duty to provide him with the original case file. The trial court abused its discretion and committed obvious error in denying Wallmuller’s motion to compel.

An advisory opinion issued by the Washington Bar Association regarding RPC 1.16 bolsters this reasoning:

Subject: Asserting Possessory Lien Rights and Responding to Former Client’s Request for Files

.....

II. Responding to a former client’s request for files

.....

B. Conclusion: At the conclusion of a representation, unless there is an express agreement to the contrary, the file generated in the course of representation, with limited exceptions, *must* be turned over to the client at the client's request, and if the lawyer wishes to retain copies for the lawyer's use, the copies must be made at the lawyer's expense.

Washington State Bar Association (WSBA) *Advisory Opinion 181* at 2 (rev. 2009) (emphasis added) (available at: <http://mcle.mywsba.org/IO/print.aspx?ID=1524>); Court Spindle, Notice of Appeal, Exhibit A at 2; Mot. for Disc. Rev. at 7.

Wallmuller also argues the denial of his motion to compel renders further proceedings useless. He has no other recourse to obtain his case file. This court agrees.

Wallmuller demonstrates review is appropriate under RAP 2.3(b)(1). Accordingly, it is hereby

ORDERED that the Wallmuller's motion for discretionary review is granted. The Clerk will issue a perfection schedule.

DATED this 6th day of March, 2019.



Eric B. Schmidt
Court Commissioner

cc: Jennifer Winkler
John L. Cross
Randall A. Sutton
Hon. Stanley Rumbaugh

NIELSEN, BROMAN & KOCH P.L.L.C.

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