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COA No. 52872-0-II

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

STATE OF WASHINGTON,

Respondent,

v.

FORREST EUGENE AMOS

Appellant.

ON APPEAL FROM THE SUPERIOR COURT
OF LEWIS COUNTY

The Honorable J. Andrew Toynbee

REPLY BRIEF

OLIVER R. DAVIS
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 610
Seattle, Washington 98101
(206) 587-2711

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A. REPLY ARGUMENT

This Court of Appeals properly set forth the standard of constitutional error and prejudice to be applied in Forrest Amos' personal restraint petition challenging the entry of his plea of guilty and his waiver of review. On the PRP hearing on remand, the pertinent question is whether the defendant would have demurred taking a plea offer in favor of first litigating a potentially dispositive motion to dismiss based on invasion of attorney-client confidentiality. If a reasonable investigation by Mr. Amos' lawyer would have revealed a violation, considering that invasions of attorney-client privilege are presumed prejudicial and are harmless beyond a reasonable doubt in only the rarest of circumstances, actual prejudice is shown, because the record below indicates that State actors seized, held, lost, and/or declined to return a multiplicity, if not reams of privileged documents, including communications and work product for transmittal between attorney and client.

The superior court erroneously rejected multiple documents as not privileged because the court did not believe that Mr. Amos had showed a specific relationship of the content of the documents to theories of guilt or innocence in the case at hand, nor did he

prove how the particular content of the documents impacted the plea negotiations. This is not the test for whether documents are privileged, nor is it the test for whether an invasion of privilege is harmless.

The Washington case law shows, for example in State v. Granacki, 90 Wn. App. 598 (1998), infra, that a police officer's look at one undescribed page of a defense attorney's legal pad at a trial was an invasion that was not harmless beyond a reasonable doubt and was properly remedied by reversal of a string of serious charged felonies. The Respondent has cited no Washington case in which invasion of attorney-client privilege has been deemed harmless. Instead, the Respondent relies, as the trial court did, on a theory that because only some of the large cache of documents were transferred from the police to the prosecutor's office, that the error must be harmless, it can be said that no person of significance could have looked at the documents and therefore there was no breach or harm. The facts and the law do not support the argument.

1. This Court of Appeals' statement of the applicable law was correct.

Where a guilty plea was involuntary is a constitutional question that the Court of Appeals reviews *de novo*. State v. Gresham, 173 Wn.2d 405, 419, 269 P.3d 207 (2012). Mr. Amos' plea was invalid for purposes of a post-sentencing collateral effort to withdraw the plea for involuntariness if a "reasonable investigation" by his lawyer would have revealed a violation of the attorney-client privilege compelling a motion to dismiss which would necessary be filed before any plea of guilty. Matter of Amos, 1 Wn. App.2d 578, 597-98, 406 P.3d 707 (2017) ("The question before us is whether the purported violation of Amos' attorney-client relationship resulted in Amos receiving ineffective assistance of counsel that undermined the validity of his plea and waiver.").

For the first time in the Brief of Respondent following a litigated appeal and an order of remand, and a litigated hearing in the superior court on remand, the State contends that this Court of Appeals misstated the legal standard to be applied, in Matter of Amos. SRB, at p. 15 n. 6, 20. But the case cited, State of Buckman, held that the PRP petitioner attacking the constitutionality of his plea after being told that going to trial could

result in a statutory life maximum if an exceptional sentence was imposed, had to show that a rational person in his circumstances would have changed his mind and risked a trial if he had been informed that the maximum term was a mere 114 months in prison. This he failed to do because he merely asserted, inadequately under settled law, that he would have not plead, without providing any supporting evidence, or argument, for the assertion. State v. Buckman, 190 Wn.2d 51, 58, 60, 409 P.3d 193 (2018) (defendant on collateral attack failed to show actual prejudice as required, and instead merely showed constitutional error).

Likewise, in Matter of Amos, this Court addressed the standard required for obtaining collateral relief in a PRP, stating that the petitioner alleging constitutional error must show actual and substantial prejudice. Amos, at 589-90. The Court made clear that in the context of ineffective assistance of counsel in connection with entry of a plea, petitioners making out the Strickland standard - error and a reasonable probability of a different outcome - have shown the required prejudice. Buckman, 190 Wn.2d at 62-63 and n. 7 (citing, *inter alia*, In re PRP of Crace, 174 Wn.2d 835, 846-47,

280 P.3d 1102 (2012); Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)).

The Court properly emphasized that in the context of Mr. Amos' case, the issue was not whether Mr. Amos would have insisted on going to trial versus entering a plea, because a motion to dismiss would potentially vitiate the need to make that decision. Amos, 1 Wn. App.2d at 598. The court in effect compared the difficult decision whether to accept a sentence of prison for a time certain versus proceeding to trial where a greater sentence or acquittal may result, to the situation of a defendant in Mr. Amos' type of circumstances who would have no reason to waive away the opportunity to raise a potentially dispositive motion to dismiss, injected before the case even reaches a plea decision point. Amos, at 597-98. Thus, this Court of Appeals tasked the trial court to determine whether, but for his attorney's deficiency, Mr. Amos would have rejected the plea offer before him, in favor of first proceeding with a CrR 8.3(b) motion to dismiss based on invasion of confidentiality. Amos, at 597-98.

This Court recognized that the required knowing, voluntary and intelligent waiver of trial rights that is the essence of a guilty plea can be compromised not only by counsel's dispensing of

inaccurate or misleading information but also by other deficiencies in counsel's performance. Matter of Amos, 1 Wn. App.2d at 593.

2. Because a reasonable investigation by counsel would have revealed a violation of the attorney-client privilege, Mr. Amos' counsel, Mr. Blair, provided ineffective assistance of counsel in connection with the plea, rendering the plea and the waiver of the right to review involuntary.

The multiple, yet distinct periods of time that a wide range of privileged documents were in the possession of State agents - including documents never returnable to the defense - and the State's witnesses' inadequate explanations of these time periods, results in a showing of invasion of the attorney-client privilege and a failure by the State to prove harmlessness. Respondent states that the documents Officer Haggerty seized from Mr. Amos's jail cell first thing in the morning of June 18, see RP 117-19, were placed into a clear plastic bag which was tied with a knot, whereupon Haggerty secured the bag at his patrol vehicle, and then "drove directly back to his office" where "the documents were placed inside a paper box and sealed" and the "box was secured pending an *in camera* review" with Judge Hunt. (Emphasis added.) SRB, at pp. 6-7.

The trial court noted that Haggerty said he conducted the cell search at 8 am on the 18th, see RP 118; and indeed he claimed he thereafter “directly went with the documents” to his office where the knotted bag was secured in a lidded box that was taped off with evidence tape signed by him, and retained. RP 122-24. But the Centralia Police Department’s chain of evidence log makes clear that the “documents taken from Amos’s cell” were only recorded as “Intake” at 6:04 pm on the next day, June 19, and only recorded as placed on a shelf by evidence technician Heather Colburn over *three and half days after that*, on June 23, thus sitting at what Haggerty admitted was the Department’s lower level of security over an entire, lengthy, Friday to Sunday end of week and weekend period. Exhibit 1; RP 126.

Certainly, for a minimum of a day and a half, the full cache of documents lay utterly unsecured. This cache included (a) the privileged documents that would later be separated out by Judge Hunt on July 21 and then lost to the wind, and (b) the documents from within Exhibits 34 and 35 (the documents that Judge Hunt allowed Haggerty to leave his chambers with) that the superior court concluded in FOF 1.13 included “mail from attorney Baum” and in FOF 1.35, 1.36, 1.39, 1.40, 1.41, 1.42, 1.43, 1.44, 1.45, and

1.48 concluded contained documents that the superior court either found to be privileged, or which Mr. Amos has argued were privileged. The documents are unaccounted for in any documented manner whatsoever. Haggerty stated that it was “possible” that the reason this box of documents was not secured as evidence by Colburn was that the department was waiting for an *in camera* review of the documents as perhaps something that was going to happen sooner than it ultimately did. RP 125-26. This is inadequate to show that the free possession of the documents by Haggerty and the department over an entire weekend was not an invasion of the attorney-client privilege.

Thereafter, the *in camera* review took almost 5 weeks to occur (on July 21), during which time and even afterward, the Respondent contends, “the State did not review the materials [with the exception of the documents that the lower court, at the hearing here appealed from, deemed certainly privileged].” SRB at p. 8. Respondent mistakenly describes this period as three weeks. SRB, at p. 7. The State’s arguments that the possession of privileged documents by the State for five weeks after the cell search and the evidence surrounding that possession permits a finding of no invasion of privilege that was harmless beyond a

reasonable doubt should not be accepted. See Opening Brief Assignments of Error 3, 4, 5. Some of the documents, beyond just those separated by Judge Hunt, were privileged. FOF 1.48. These documents were in the possession of the State for 5 weeks until Mr. Amos plead guilty. During this same time when Mr. Amos was being counseled to plead guilty by attorney Blair, Blair had told the trial court that he needed the documents seized from the cell search to properly represent his client yet for most of that time the documents were denied to him. Although an order of July 30 was entered by the superior court to return that portion of the documents that were set aside by Judge Hunt in the *in camera* review, Mr. Blair counseled a guilty plea even before receiving this set of documents that were certainly privileged. That was not an reasonable investigation.

Thus the superior court finding at FOF 1.65 that attorney Blair had no reason to believe that privileged material was taken from Amos's cell (see Assignment of Error 23) is plainly in error. The possession of privileged documents by the State for this lengthy period of time during which no corroborative evidence can establish that the documents were not viewable by the State is incompatible with a finding of harmlessness. Judge Hunt, of

course, testified that when he received the documents from the Centralia Police Department, there was no box, and no evidence tape sealing it - "just . . . a plastic bag." RP 187-88.

The absence of evidence that these documents were secured and untouched during the days they sat at the Centralia Police Department during Forrest Amos' decision-making period before his guilty plea - at which time he knew none of this because his attorney conducted a reasonable investigation - are compatible with no case in which similar facts of retention of documents have been deemed to show the absence of an invasion of the privilege. Further, the superior court repeatedly entered findings that only a certain portion of the documents taken from Mr. Amos's cell - whether then or later portioned or labeled as Exhibits 34 and 35, Discovery Packet 11 or Exhibit 41, parts of which the Superior Court deemed privileged, and other documents of which Mr. Amos argues contained privileged documents - were received by the Prosecuting Attorney's Office before Mr. Amos plead guilty, and entered findings the logic of which is predicated on the notion that it is only receipt by the prosecutor from the police that establishes an invasion of the attorney-client privilege. FOF 1.35, 1.36, 1.37, 1.38, FOF 1.48.

Regarding Exhibit 41, which contains proof of retention of documents by the Centralia Police, the court erred when it deemed non-“recei[pt] by the Prosecuting Attorney’s Office” of these documents to be proof of an absence of prejudice. FOF 1.35. And each of the court’s findings that expressly or implicitly find that non-receipt, or non-review, of seized items by the prosecutor himself demonstrates an absence of prejudice are not only factually inaccurate as to the police - documents were received, and reviewed, by several of those State actors – but also legally incorrect. FOF 1.35, 1.36, 1.37, 1.38, FOF 1.58.

The trial court ignored this Court of Appeals’ emphasis on the case of State v. Granacki, which the Court cited for the rule that simply because one State actor, an officer, could not say that he saw anything in particular on one page of a defense legal pad, and did not communicate to the prosecutor what he saw if anything, failed to establish harmless invasion of the privilege.

At oral argument, the State argued that Amos failed to show that the prosecutor’s office had received any privileged attorney-client information from Haggerty and thus fails to establish his claim. . . . In [State v. Granacki, 90 Wn. App. 598, 600, 604, 959 P.2d 667 (1998)], though, there was no evidence that the police detective ever passed on the defense’s strategies to the prosecutor involved

in the case. Yet, the court still found that dismissal of the defendant's charges was warranted. Thus, we disagree with the State's argument.

Matter of Amos, at 600 n. 12. In Granacki, the defendant had been charged with two counts of second degree robbery, one count of attempted second degree robbery, one count of third degree theft, and one count of fourth degree assault. Granacki, at 90 Wn. App. at 599-600. After a recess in trial, a court reporter stated that she observed the State's police detective "looking at the top page of a legal pad on defense counsel's table[.]" Granacki, at 600. For this and related reasons, the case was dismissed.

Dismissal of the charges against Forrest Amos is warranted for similar reasons here, but of far greater legal effect. The superior court entered multiple incorrect findings that rejected the following, as not privileged or as harmlessly privileged, under the above reasoning:

- "copies of discovery (i.e., police reports, transcripts of faxed statements, copies of emails) which are identifiable as discovery by the 'bates stamps' on the bottom of those documents"
- "copies of miscellaneous court documents"
- "copies of letters sent by Amos to judges [and others] unrelated to the cases at issue here"
- "copies of miscellaneous court documents"

- “handwritten notes about legal standards not related to the instant cases”
 - “billing statements from attorney Charles Lane regarding a separate Thurston County Superior Court criminal case”
 - “a list of potential witnesses”
 - “handwritten notes that refer to two pages in the discovery”
 - “a copy of a page from a search warrant with a ‘>’ written in the margin”
 - “31 pages of the discovery materials with portions highlighted”
 - “one page of discovery with an asterisk in the margin”
 - “a copy of a page of the discovery with ‘Jack Briggs (Yakima)’ written in the margin”
 - “a copy of a page of discovery with notes in the margin not written in Amos’ handwriting”
 - “a copy of two pages from the discovery with highlighted portions”
 - “a handwritten note quoting Officer Haggerty and citing page numbers of a document”
 - “a handwritten note with notes to himself for his attorney”
 - “billing statements from attorney Charles Lane”
- an “address book” with “names and addresses” which Amos testified “contained contact information for potential witnesses which he did not want law enforcement personnel to have because he did not want them to intimidate these potential witnesses”
- “handwritten notes [Amos] took for himself ‘to later fashion smoothing up to assist (his) attorney’ which “were his own notes to himself, which at some point could have become work product to assist his attorney”
 - “pages of discovery with notations in the margin.”

See FOF 1.39. 1.40, 1.42, 1.43, 1.44, 1.45, 1.48, 1.49. 1.51. This was not a mistrial motion where the court rules based on its assessment of the prejudice caused by the error in the context of the evidence in the whole case, and the reviewing court applies an abuse of discretion standard, reversing only where no reasonable court could rule that the error did not affect the verdict. See State v. Rodriguez, 146 Wn. 2d 260, 269, 45 P.3d 541 (2002) (citing State v. Russell, 125 Wn.2d 24, 85, 882 P.2d 747 (1994)). The superior court in this case scrutinized the contents of hundreds of documents above (far exceeding the unspecified contents of one page of a legal pad in Granacki), erroneously deemed most not privileged, and erroneously deemed others only harmlessly privileged, rejecting Amos's claim of constitutional injury because Amos had not shown specifically how what was written on each document "implicate[d] Amos in the very criminal activity which is the subject of this case" or otherwise "had an impact on . . . the plea negotiations" See FOF 1.39. 1.40, 1.42, 1.43, 1.44, 1.45, 1.48, 1.49. 1.51 and Conclusions of Law 2.4, and 2.6. Respondent cites no authority for the notion that such scrutiny and a standard requiring materiality excuses police seizure of documents, nor any authority that such scrutiny is consistent with the general rule that is

it impossible to isolate the prejudice caused by invasions of privilege - except, perhaps, where the trial was over before the invasion occurred, as in Granacki, supra.

These documents were contained in the bag seized from Mr. Amos' cell. In addition, documents that were deemed privileged by Judge Hunt were of course among those taken from Mr. Amos' cell - by a sworn detective from the Centralia Police Department whose actions set in motion a series of events continuing with attorney Blair repeatedly requesting that those documents, and all documents taken by the State be returned, by which time the actions or omissions of the State had allowed the documents that were separated by Judge Hunt to be lost to the wind forever.

The claim that this in no way worked an invasion of privilege that was proved to be harmless beyond a reasonable doubt is no more tenable than an argument that there would be no invasion of privilege worked by the police removing privileged documents and immediately burning them by accident. The fault would be of different degrees, perhaps, but the invasion would be no less of an invasion and no less harmless. Certainly, mere confiscation and destruction of materials can constitute invasion of the attorney-client privilege. In Carter v. McKee, No. 2:19-CV-10391,

2019 WL 1455163, at *4 (E.D. Mich. Apr. 2, 2019), appeal dismissed, No. 19-1492, 2019 WL 3526376 (6th Cir. May 21, 2019), the plaintiff argued that the “confiscation and destruction” of his copy of the DSM-IV (a diagnostic manual for mental disorders, prohibited to be possessed by the institution) interfered with his legal mail and violated the attorney-client privilege. The federal district court rejected the argument on ground that the book, although sent to him by attorneys, was not legal mail and did not “disclose a confidential attorney-client communication.” Carter v. McKee, at *4. Plainly, however, the destruction or loss of the privileged materials separated by Judge Hunt after they were seized from Mr. Amos’ cell -- whatever the gradations of degree of fault for that loss by the State that might be debated -- is an invasion of privileged communications that impairs the attorney-client relationship. And the incurable loss or destruction of documents after the State was in possession of them for weeks is assuredly an invasion of the attorney-client relationship as much as a police officer’s glance at one page of Mr. Granacki’s defense lawyer’s notepad. See Abascal v. Fleckenstein, No. 06-CV-349, 2012 W L 638977, at *4 (W.D.N.Y. Feb. 27, 2012) (stating in *dicta*

that if the documents seized were privileged communications, destruction of the documents would invade the privilege).

3. The superior court not only erred in finding documents not to be privileged and erred in application of the strict constitutional harmless error standard applicable to invasions of attorney-client confidentiality.

The State's effort to compare this case to State v. Fuentes, 179 Wn.2d 808, 811-12, 318 P.3d 257 (2014), is unavailing. The Supreme Court in Fuentes properly stated the rule that courts presume that invasion of the attorney-client privilege results in prejudice to the defendant, requiring reversal because there is "no way to isolate the prejudice to the defendant." Fuentes, 179 Wn.2d at 811. What was critical in Fuentes was that the eavesdropping by a police officer on an attorney-client conversation occurred "after the trial was complete and the jury had found the defendant guilty." Fuentes, at 812; see Matter of Amos, at 599 (making clear that the State would be required to prove beyond a reasonable doubt that this was one of the "rare circumstances where there is no possibility of prejudice to the defendant[.]"). The invasion in this case -- the details of which only became known to Mr. Amos after he plead guilty - took place at the height of his pressures to enter

that guilty plea by an attorney who failed to conduct a reasonable investigation.

The Respondent also argues that the documents taken from Mr. Amos's jail cell were properly taken pursuant to a Fourth Amendment search warrant for materials believed to be used to commit crimes or witness intimidation under the cover of the legal mail system. SRB, at pp. 5, 36. It is true that a brief interruption in a prisoner's access to his papers is not, in general, a constitutional violation where the interruption was reasonably related to legitimate penological objectives. See Crawford-El v. Britton, 951 F.2d 1314, 1318 (D.C.Cir.1991), cert. denied, 506 U.S. 818, 113 S.Ct. 62, 121 L.Ed.2d 29 (1992) (citing Turner v. Safley, 482 U.S. 78, 89, 107 S.Ct. 2254, 96 L.Ed.2d 64 (1987)). But a prisoner does not "waive an attorney-client privilege with respect to documents retained in her cell simply because there is no reasonable expectation of privacy in those documents for Fourth Amendment purposes." United States v. DeFonte, 441 F.3d 92, 94 (2d Cir.2006). In this case, the police and prosecutorial conduct of holding Forrest Amos' legal papers or portions thereof, including a range of privileged communications for five weeks, and plainly

resulting in the irreversible loss of documents deemed privileged by Judge Hunt, is not a brief interruption.

It is “universally accepted” that effective representation cannot be had without private consultations between attorney and client. State v. Cory, 62 Wn.2d 371, 374, 382 P.2d 1019 (1963). The confidential attorney-client relationship is not only a “fundamental principle” in our justice system, it is “pivotal in the orderly administration of the legal system, which is the cornerstone of a just society.” In re Schafer, 149 Wn.2d 148, 160, 6 P.3d 1036 (2003). Because it is impossible to isolate the prejudice presumed from the attorney-client privilege violation in this case, the superior court erred as argued in the Opening Brief.

B. CONCLUSION

Mr. Amos’s judgment and sentence must be reversed and the charges dismissed with prejudice.

Respectfully submitted this 23RD day of January, 2020.

/s Oliver R. Davis
WSBA 24560
Washington Appellate Project – 91052
1511 Third Avenue, Suite 610
Seattle, WA 98101
Phone: (206) 587-2711
Fax: (206) 587-2710
Email: oliver@washapp.org

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STATE OF WASHINGTON,

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NO. 52872-0-II

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SARA BEIGH, DPA

[appeals@lewiscountywa.gov]

[sara.beigh@lewiscountywa.gov]

LEWIS COUNTY PROSECUTING ATTORNEY

345 W MAIN ST FL 2

CHEHALIS, WA 98532

U.S. MAIL

HAND DELIVERY

E-SERVICE VIA PORTAL

SIGNED IN SEATTLE, WASHINGTON THIS 23RD DAY OF JANUARY, 2020.

x _____



Washington Appellate Project
1511 Third Avenue, Suite 610
Seattle, WA 98101
Phone (206) 587-2711
Fax (206) 587-2710

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