

FILED

OCT 08 2010

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 29085-9-III

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

TOBIAS ALLEN PRITCHARD,

Appellant.

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

APPELLANT'S OPENING BRIEF

JAN TRASEN
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
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5 Jones on Evidence (2d ed.) 4001, § 2128 9

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A. SUMMARY OF ARGUMENT

The trial court punctured the rule of spousal privilege when it forced Tobias Pritchard's wife to testify against him at his trial for theft of a motor vehicle. This violation of his rights requires a new trial.

B. ASSIGNMENTS OF ERROR

1. The trial court violated Mr. Pritchard's rights by compelling his wife to testify against him at trial.

2. The trial court violated Mr. Pritchard's rights by permitting Mr. Pritchard's wife to testify concerning confidential communications exchanged during the marriage.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. A spouse or domestic partner cannot be compelled to testify against his or her spouse at trial, without the consent of the other. Where Sonya Pritchard, Mr. Pritchard's wife, was compelled to testify against him at trial, without his consent, did the court commit error requiring reversal?

2. Confidential communications between spouses during a marriage are privileged, and a spouse may not be examined concerning these communications. Where the trial court permitted Sonya Pritchard to be examined concerning privileged

communications with her husband during the marriage, did the trial court commit error requiring reversal?

D. STATEMENT OF THE CASE

Tobias Pritchard and his wife, Sonya Pritchard, were legally married but living separately on February 23, 2010. 5/10/10 RP 40.¹ On that day, Sonya arrived home to find Tobias there for an unplanned visit with their children.² 5/10/10 RP 42. Tobias was accompanied by his girlfriend at that time, Linda Galvan, and several other friends, who were all standing around Sonya's porch when she arrived. Id. at 25-26, 47. This angered Sonya, who decided to call the police and attempt to have Tobias thrown in jail, in order to "get him away from his girlfriend." Id. at 24, 42. Sonya called 911 and gave the license plate number and description of the unfamiliar Dodge truck sitting in her driveway. Id. at 42-44.

When the police responded to Sonya's 911 call, Tobias had already left Sonya's house with his friends. 5/10/10 RP 42. Sonya told the officer that she had seen Tobias driving the Dodge truck and that he told her it was stolen. Id. at 45. This was false, as Sonya

¹ The verbatim report of proceedings consists of three volumes of transcripts from May 10, 2010, through May 18, 2010. The proceedings will be referred to by the date of proceeding followed by the page number, e.g. "5/10/10 RP ___."

had never seen Tobias inside the vehicle, nor had he mentioned the truck to her. Id. at 42-45. At trial, Sonya testified: “At this point in time I admit that I was ready to do anything I could to get Mr. Pritchard incarcerated and that I wrote [the police statement] knowing that I was falsifying it.” Id. at 45.

Sonya Pritchard also told the officer the name of the motel in which her husband was staying – a fact Tobias had previously confided to her. 5/10/10 RP 44. Officers soon convened at the All Star Motel, based upon the disclosure made by Sonya. 5/10/10 RP 53. Once there, officers spoke with the motel manager, Maria Meeks, and attempted to contact Tobias Pritchard at Room 142. Id. at 55-59. Officers entered the room after obtaining a search warrant and found Tobias and his girlfriend, as well as the keys to the Dodge truck on the nightstand. Id. at 60-61. Tobias was thereafter charged with possession of a stolen motor vehicle.

At trial, both Sonya and Tobias Pritchard invoked spousal privilege. 5/10/10 RP 12-13. A pre-trial hearing was conducted, at which Sonya testified that she had lied to police officers in order to get Tobias arrested and jailed. Id. at 24. Sonya also stated that

² Since Mr. and Mrs. Pritchard share a last name, Sonya and Tobias will, at times, be referred to by first names for the sake of clarity. No disrespect is intended.

Tobias had told her his whereabouts at the All Star Motel in confidence, and only because Sonya had permitted him to take their daughter to the motel for visitation during the previous week. Id. at 26-28.

Tobias Pritchard timely objected to Sonya's testimony, arguing specifically that Sonya's testimony concerning Tobias's location at the motel should be precluded, as it was a confidential communication subject to spousal privilege. 5/10/10 RP 30. The trial court denied the defense motion, holding this communication was not confidential because it was for purposes of visitation. Id.

The State called Sonya Pritchard to testify at trial, where she explained she never saw Tobias driving the Dodge truck, and she had falsified her statement in order to get him arrested. 5/10/10 RP 41, 45. She also testified, subject to previous objection, to telling the police her husband could be found at Room 142 of the All Star Motel. Id. at 43-44.

Tobias Pritchard testified the truck had been borrowed by his girlfriend at that time, and neither of them knew the truck had been stolen. 5/11/10 RP 131-33.

The jury convicted Tobias Pritchard of one count of possession of a stolen motor vehicle. This appeal follows. CP 4.

E. ARGUMENT

WHERE THE TRIAL COURT VIOLATED SPOUSAL PRIVILEGE BY COMPELLING SONYA PRITCHARD TO TESTIFY TO CONFIDENTIAL COMMUNICATIONS WITH HER HUSBAND, REVERSAL MUST BE GRANTED.

In general, one spouse cannot be compelled to testify against another spouse. The marital privilege statute provides, in relevant part:

Who are Disqualified – Privileged Communications

A spouse or domestic partner shall not be examined for or against his or her spouse or domestic partner, without the consent of the spouse or domestic partner; nor can either during marriage or during the domestic partnership or afterward, be without the consent of the other, examined as to any communication made by one to the other during the marriage or the domestic partnership.

RCW 5.60.060(1). There are two distinct privileges contained within the spousal privilege statute. First is the testimonial privilege, which prevents a spouse from being examined as a witness without the consent of the other spouse. State v. Bonaparte, 34 Wn. App. 285, 288, 660 P.2d 334 (1983) (citing State v. Thorne, 43 Wn.2d 47, 55, 260 P.2d 331 (1953)). The second is the confidential communications privilege, which prevents a spouse from being examined as to confidential

communications made by one to the other during the marriage.

Bonaparte, 34 Wn. App. at 288 (citing Thorne, 43 Wn.2d at 55).

1. The trial court violated the spousal testimonial privilege by compelling Sonya Pritchard to testify against Tobias Pritchard.

Tobias timely objected to the admission of his wife's testimony and requested its exclusion under the spousal privilege. 5/10/10 RP 13.

The testimonial privilege "prevents any testimony by a defendant's spouse without consent of the defendant." State v. White, 50 Wn. App. 858, 862, 751 P.2d 1202 (1988) (emphasis in original); see generally Bigelow, The Marital Privileges in Washington Law: Spouse Testimony and Marital Communications, 54 Wash.L.Rev. 65, 70-80 (1978). In White, this Court considered whether a trial court's refusal to sever the cases of a husband and wife accused as co-defendants in a drug case denied each defendant the right to exercise the spousal testimonial privilege. 50 Wn. App. at 862. This Court held that the trial court had violated the privilege, and that since each defendant was "entitled to rely on the testimonial privilege in preparing their defense and trial strategy, ... speculation as to presence or absence of prejudice is not the issue." Id. at 862-63.

Here, Tobias Pritchard moved for preclusion of his wife Sonya's testimony concerning his actions and statements on the date of the incident – particularly concerning his communications concerning the All Star Motel.³ 5/10/10 RP 13-14, 31. The defense motion in limine was denied by the trial court and Sonya was compelled to testify against her husband at trial. Id. at 30, 40. As in White, the State pointed to no authority for the proposition that a trial court, in its discretion, may refuse to give effect to the statutory testimonial privilege where it directly applied. 50 Wn. App. at 862.

Therefore, had the trial court properly applied RCW 5.60.060(1), Sonya Pritchard's testimony would have been unavailable. See ER 804(a)(1) (defining unavailable witness in hearsay context as one who is "exempted ... on the ground of privilege from testifying"); see also 5 K. Tegland, Wash. Prac., Evidence § 210, at 427-32.

Without Sonya's improperly admitted testimony, the jury would not have heard about the Dodge truck parked in her driveway; nor would the jury have heard about Mr. Pritchard's departure for the All Star Motel later that evening. 5/10/10 RP 41-

³ The confidential communications privilege will be further addressed in

44. Accordingly, the trial court's violation of the testimonial spousal privilege was reversible error, requiring remand. White, 50 Wn. App. at 869.

2. The trial court violated the spousal confidential communications privilege by compelling Sonya Pritchard to testify against Tobias Pritchard concerning his location at the motel. At trial, Tobias Pritchard moved to preclude his wife's testimony concerning his whereabouts at the All Star Motel, pursuant to RCW 5.60.060(1). 5/10/10 RP 30.

In a pre-trial hearing, Sonya Pritchard stated that Tobias had told her in confidence that he was staying at the motel. 5/10/10 RP 28. She noted that, among other parties, collections agencies were seeking Tobias, so that she knew his disclosure of the motel was meant to be confidential. Id. Sonya stated that her husband disclosed his residence at the All Star Motel to her approximately one week before the incident, at the date of his prior visitation with his daughter. Id.

The trial court created an exception in the spousal confidential communications privilege "for purposes of visitation with the

Section Two, infra.

daughter.” Id. at 30. No such exception exists; therefore, the court was in error.⁴

Pursuant to RCW 5.60.060(1), a spouse or domestic partner shall not be examined as to any communication made by one to the other during the marriage or the domestic partnership. Thorne, 43 Wn.2d at 55. The communications privilege applies to all confidential exchanges and is intended to encourage mutual understanding and trust. Id. The privilege is intended “... to keep inviolate those acts and confidences without which no two persons would wish to live in intimate and constant relation as man and wife.” Id. (citing 5 Jones on Evidence (2d ed.) 4001, § 2128). Similar to the privilege afforded to the communications of attorney-client, doctor-patient, and priest-penitent, the privilege survives the end of the relationship – in the case of marriage, brought about by divorce or by the death of a spouse. Thorne, 43 Wn.2d at 55-56.

Had the trial court not improperly admitted Sonya Pritchard’s testimony concerning her husband’s confidences to her regarding the motel, the jury would not have heard about Tobias’s lodging at

⁴ Exceptions apply, for example, to civil actions filed by one spouse against the other; to criminal actions committed by one spouse against the other; or to criminal actions if the marriage occurred subsequent to the filing of formal charges against the defendant. RCW 5.60.060(1). No exception exists for family visitation, and none of the statutory exceptions applies here.

the All Star later that evening. 5/10/10 RP 41-44. The trial court's violation of the testimonial spousal privilege was reversible error, requiring remand. White, 50 Wn. App. at 869.

3. Reversal must be granted. As in State v. White, where this Court held that the trial court had violated the spousal privilege, "speculation as to presence or absence of prejudice is not the issue." 50 Wn. App. at 862-63. Reversal must be granted.

F. CONCLUSION

For the foregoing reasons, Mr. Pritchard respectfully requests this Court reverse his conviction and remand the case for further proceedings.

DATED this 6th day of October, 2010.

Respectfully submitted,



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DIVISION THREE**

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)	
RESPONDENT,)	
)	
v.)	COA NO. 29085-9-III
)	
TOBIAS PRITCHARD,)	
)	
APPELLANT.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 6TH DAY OF OCTOBER, 2009, I CAUSED THE ORIGINAL **BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION THREE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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