

FILED
Court of Appeals
Division III
State of Washington
4/18/2019 4:05 PM

COURT OF APPEALS DIVISION III
OF THE STATE OF WASHINGTON

No. 360598

STATE OF WASHINGTON

Respondent,

v.

WILLIAM NICOL

Appellant.

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

BRIEF OF APPELLANT

John Gary Metro, WSBA 37919

Attorney for Appellant

719 Jadwin Avenue

Richland, WA. 99352

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ASSIGNMENT OF ERROR

The Court erred in taking the Jury's verdict when the defendant was not present in Court.

STATEMENT OF THE CASE

William Nicol was charged by information with two counts of Rape of a Child in the First Degree and one count of Child Molestation in the First Degree. In October of 2016, Mr. Nicol's case was tried before a jury. The state presented its' case; the defense rested. The jury left the courtroom to deliberate at approximately 11:45am. This brief colloquy took place almost immediately after the jury departed.

MS PETRA: Your Honor, how late do you, in your experience, will you let them deliberate tonight?

THE COURT: I usually am guided by them and what their needs and schedules are. So, I would suspect somewhere between 4:00 and 4:30. (Vol 5 Pg. 841 Lines 11-16)

Court was adjourned. Sometime after 4:10 pm court came back into session for approximately three minutes. Court was once again adjourned. Sometime soon thereafter court was called back into session at which time the following colloquy took place:

THE COURT: Mr. Egan, where is your client?

MR EGAN: I don't know your honor.

THE COURT: Well, the Court expects him to be here. What efforts did you make to contact him?

MR. EGAN: I talked to him after the questioning. I told him that I thought he was going to be found guilty. He said he was going to the bathroom. I went a different way.

(Trial Transcript Vol. 5, P. 845 Lines 10-13)

A break was taken. After the break the following colloquy took place:

MR. EGAN: Bailiff Ruegsegger told me in the -- I talked to my client -- my client had already gone to the bathroom, I think. He told me he was goin' to the bathroom, and Bailiff Ruegsegger told me that we have a verdict, and I can't remember where -- I think it was in the court administrator's office, and I used that phone to call my office to ensure that I had the correct number for Mr. Nicol, and I called but never reached him.

(Trial Transcript Vol. 5 P. 855 Line 4)

THE COURT: All right, and you attempted how many times to call him?

MR. EGAN: Twice.

THE COURT: All right. Any voicemails left?

MR. EGAN: No.

THE COURT: Is this a phone that has a voicemail?

MR. EGAN: It didn't this time. When I called it didn't have a voicemail to it.

THE COURT: All right. How many times did you

let it ring?

MR. EGAN: I don't know.

THE COURT: All right, and did you -- all right, that's all the questions I have.

Did you have any inquiry for Mr. Egan?

MS. PETRA: I thought we took a break so Mr. Egan could call his client again? That was my Understanding.

THE COURT: Okay. Well, he indicated he called twice. He's now making a motion that it was --

MR. EGAN: Once before and once after

THE COURT: Okay, and --

MS. PETRA: And then the record was made previously that he told his client he thought he was going to be found guilty as well.

THE COURT: I understand. I heard that. All right, Mr. Egan, do you have any other record or are you making any waiver on behalf of your client for purposes of hearing the verdict without him present?

MR. EGAN: I can't make any waiver, Judge.

THE COURT: Okay. The Court finds as follows: This trial has commenced with the defendant present and present on each day. I will note that this trial started on October

17th and it's lasted for October 18th, October 19th, October 20th, and October 21st. For each day the defendant has been present and timely so -- at least from the Court's observations, when I was on the bench, the defendant was present with defense counsel. The defendant was also present when the Court convened to address the jury's question, and I signed the answer by the Court today at 4 -- I think it was 4:13. and that was then copied by the bailiff and then delivered to the jury, and then subsequently shortly -- not very long thereafter there was a determination that we had a verdict. As this Court convened with counsel the defendant was not to be found, and the Court, in light of the record, finds that he has absented himself from this court voluntarily. Given the totality of the circumstances that I'm aware of and know about, while there wasn't necessarily a positive identification by name by the security officer who just testified, Mr. Wetmore, as to whether indeed the person exiting the building quickly or in a jog was Mr. Nicol, the Court would indicate that's probably the case. With that, and given that I find he has -- he is voluntarily absent, the Court will bring the jury in and receive the verdict.....

(Trial Transcript P. 855-857)

ARGUMENT

A lawyer has an absolute duty of loyalty to his client. *Strickland v. Washington*, 466 US 668, 104 S.Ct. 2052 1984). The duty of loyalty is the most basic of counsel's duties. *Id at 2067*. It is fundamental to the attorney client relationship that conversations between lawyer and client are private and must be carefully guarded. Disclosures of these conversations are forbidden because their contents can be extremely destructive to the accused in a criminal proceeding.

Washington's attorney-client privilege is found at *RCW 5.60.060(2)(a)*. The privilege applies to communications and advice between an attorney and client and extends to documents that contain a privileged communication. *Dietz v. John Doe*, 131 Wn.2d 835, 842, 843, 935 P.2d 611 (1997). It applies to any information generated by a request for legal advice. *Soter v. Cowles Publ'g Co.*, 131 Wn. App. 882, 130 P.3d 840, *aff'd*, 162 Wn.2d 716, 174 P.3d 60 (2006). The attorney-client privilege

exists in order to allow the client to communicate freely with an attorney without fear of compulsory discovery.” *Dietz v. John Doe*, 131 Wn.2d 835, 842, 843, 935 P.2d 611 (1997) The privilege encourages a client to make a full disclosure to his or her attorney, enabling the attorney to render effective legal assistance. *R.A. Hanson Co. v. Magnuson*, 79 Wn. App. 497, 502, 903 P.2d 496 (1995), *review denied*, 129 Wn.2d 1010 (1996). Whether an attorney-client relationship exists is a question of fact. *Dietz*, 131 Wn.2d at 844; **[**856]** *Bohn v. Cody*, 119 Wn.2d 357, 363, 832 P.2d 71 (1992). T

Sometime after 4:15 the Court asked Mr. Egan where his client was. Mr. Egan responded: “I told him he had been found guilty...”

Mr. Egan’s answer to the Court is not responsive to the Court’s question. Instead of answering the question, Mr. Egan revealed a privileged conversation between himself and his client. This

revelation clearly violated Mr. Egan's duty of loyalty to his client. This violation of the attorney client privilege led the Court and the prosecution to suspect that Mr. Nicol had fled the court house even though there was no evidence that he Mr. Nicol had knowledge that the jury had reached any verdict. The Court had a duty to disregard Mr. Egan's breach of loyalty and proceed to determine whether the trial should continue despite Mr. Nicol's absence.

The Court could not proceed with the trial unless it determined that Mr. Nicol's absence was voluntary; the Court must presume, however, that that defendant's absence was the result of mistake, duress, illness or some other event other than free will. *State v. Jackson*, 124 Wash. 2d 359, 361 (1994). Here, the Court had no reason to suspect the defendant's absence was voluntarily. Mr. Nicol appeared in Court each day and re-appeared during each day when instructed to return by the Court. There was no act which would indicate to the Court that Mr. Nicol intended to interfere with the judicial process. His

lawyer informed the court that he tried to contact Mr. Nicol but no one else tried to contact Mr. Nicol. The Court did not try to reach the defendant; the Court did not instruct the bailiff or the clerk to contact the defendant; the Court did not order the sheriff to go out to the defendant's house and see if he was there and bring him back.

The Court's finding that Mr. Nicol's absence was voluntary is not supported by the evidence. The Court should have continued the case until the next court day. Instead, the Court decided to take the verdict without the defendant being present. The defendant's right to due process was violated when his trial continued without him; the verdict must be set aside.

CONCLUSION

The Court should set aside the verdict and remand to the Superior Court for a new trial.

Respectively submitted this 18 day of April, 2019.

A handwritten signature in black ink, appearing to read 'G. Metro', is written over a horizontal line.

Gary Metro WSB 37919

Attorney for Defendant

COURT OF APPEALS DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	
Respondent,)	No. 360598
)	PROOF OF SERVICE
v.)	
WILLIAM NICOL,)	
Defendant.)	

I, Erica Toebe, being over the age of twenty- one emailed a copy of defendant's Opening Brief to the Respondent at the address which follows:

—

Anita.petra@co.benton.wa.us

I delivered this document to the defendant by mail at the address which follows on April 18, 2019 swear under penalty of perjury this is true.

William George Nicol 92077
7122 W. Okanogan Place,
Kennewick, WA 99337


Erica Toebe
719 Jadwin Ave
Richland, WA 99354

Date 4/18/19