

RECEIVED
SUPREME COURT
STATE OF WASHINGTON

79339-5

01 FEB -2 No: 79339-5 (Consolidated with 79371-9)

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

v.

LEE GILES
MAUREEN WEAR,

Respondents.

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

The Honorable Lisa Worswick, Judge
Nos. 06-1-03604-4(Giles) & 06-1-03616-8 (Wear)

Respondent's Supplemental Brief
~~RESPONDENT WEAR'S RESPONSE TO MOTION
FOR DISCRETIONARY REVIEW OF TRIAL COURTS DISCOVERY
RULING~~

MARY K. HIGH
WSBA# 20123
Attorney for Respondent Wear

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TO E-MAIL

TABLE OF CONTENTS

	<u>Page</u>
A. IDENTITY OF RESPONDENT.....	1
B. SUPERIOR COURT’S DECISION.....	1
C. ISSUES PRESENTED FOR REVIEW.....	1
D. STATEMENT OF THE CASE.....	2
E. ARGUMENT.....	3
1.	
<u>he Trial Court Did Not Abuse Its Discretion When It</u>	<u>I</u>
<u>Granted Defendants’ Motions To Compel Discovery</u>	
.....	3
2. <u>Ms. Wear Has The Right To Effective</u>	
<u>Representation By An Attorney Who Has Prepared And Consulted With</u>	
<u>Her In Private.</u>	7
F. CONCLUSION.	11
APPENDICES	

TABLE OF AUTHORITIES

Page(s)

Washington Cases

Barnard v. Henderson, 524 F.2d 744 (5th Cir. 1975)..... 10

Cogle v. Snow, 56 Wn. App. 499, 507, 784 P.2d 554 (1990)..... 3

In re Brett, 142 Wn.2d 868, 873, 16 P.3d 601 (2001)..... 8

Dietz v. John Doe, 131 Wn.2d 835, 842, 935 P.2d 611 (1997)..... 9

Limstron v. Ladenburg, 136 Wn.2d 595, 613, 963 P.2d 869 (1998)..... 11

Pappas v. Holloway, 114 Wn.2d 198, 203, 787 P.2d 30 (1990)..... 9

State v. Boehme, 71 Wn.2d 621, 633, 430 P.2d 527 (1967), *cert. denied*,
390 U.S. 1013 (1968) 3

State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971)... 4

State ex rel. Sowers v. Olwell, 64 Wn.2d 828, 832, 394 P.2d 681 (1964))5

State v. Hutchinson, 111 Wn.2d 872, 766 P.2d 447 (1989) 4, 5, 10

State v. Mak, 105 Wn.2d 692, 704, 718 P.2d 407, *cert. denied*, 479 U.S.
995, 93 L.Ed.2d 599, 107 S. Ct. 599 (1986)..... 3

State v. Riley, 122 Wn.2d 772, 780, 863 P.2d 554 (1993)..... 7,8

State v. Yates, 111 Wn2d 793, 765 P.2d 291 (1988)..... 3, 4, 10

Federal Cases

Sanders v. Ratelle, 21 F.3d 1446, 1456 (9th Cir.1994) 8

Strickland v. Washington, 466 U.S. 668, 80 L.Ed.2d 674,
104 S.Ct. 2052 (1984)..... 7,8

United States v. Nobles, 422 U.S. 225, 238, 95 S. Ct. 2160, 445 L.Ed. 2d
1414 (1975)..... 10

Wardius v. Oregon, 412 U.S. 470, 37 L.Ed.2d 82,
93 S. Ct. 2208 (1973) 5

Wiggins v. Smith, 539 U.S. 510, 123 S. Ct. 2527, 2535,
156 L. Ed. 2d 471 8

Constitution

U.S. Const. Sixth amend..... 7

Fourteenth Amendment 7

Const. Art. 1 § 22 (amend. 10) 7

Statutes

RCW 5.60.060(2) 9

Rules

RAP 10.4(g)..... 2

CrR 4.7..... 4,5

A. Identity of Respondent

Defendant/Respondent Maureen Wear requests this court affirm the trial court's order compelling discovery.

B. Superior Court's Decision.

Petitioner, the State of Washington, asks this Court to reverse the decision of the Honorable Lisa Worswick entered on Sept. 28, 2006 granting Defendant Wear's and Gile's motions to compel discovery pursuant to CrR 4.7.

C. Issues Presented For Review

1. Did the trial court abuse its discretion when it ordered the State to provide defense counsel discovery of materials within the State's possession and control after it balanced the materiality of the defendants' requests against the potential for harm resulting from such a disclosure?

2. Did the Court properly exercise its discretion in its

consideration of a defendant's Sixth Amendment right to counsel where the Defendants agreed to a restrictive protective order that preserved the attorney client privilege and the right to effective representation?

D. STATEMENT OF THE CASE

This matter involves the trial court's exercise of discretion in pre-trial discovery matters. On August 4, 2006, Ms. Wear was charged by Information with one count of child rape in the first degree, two counts of child rape in the second degree, three counts of child molestation in the first degree, two counts of sexual exploitation of a minor and one count of possession of sexually explicit depictions of a minor. See Information attached as Appendix A. As a direct result of the State's viewing of video tapes recovered from the defendants' homes, (See Supplemental Declaration For Determination of Probable Cause filed on 11/16/06 attached as Appendix B) an Amended Information (attached as Appendix C) was filed on November 16, 2006 charging Ms. Wear with three counts of child rape in the first degree, two counts of child rape in the second degree, and twelve counts of child molestation in the first degree. On September 12, 2006 Ms. Wear

filed a motion to compel discovery. The court granted this motion on October 3, 2006 and entered a Protective Order regulating the use and possession of the requested discovery .

Respondent Wear further adopts and incorporates the facts and contained in Respondent Giles brief. RAP 10.4(g).

E. ARGUMENT

Respondent/Defendant Wear adopts and incorporates the arguments supporting the release of discovery to defendants presented by Respondents/defendants Giles and Boyd and by amicus counsel as permitted by RAP 10.4(g). In addition to these arguments Ms. Wear provides the following authority in support her request to this court that it uphold the trial court's reasonable exercise of discretion in the granting of her discovery motion.

1. The Trial Court Did Not Abuse Its Discretion When It Granted Defendants' Motions To Compel Discovery

“[T]he scope of discovery is within the trial court’s sound discretion and the decisions of a trial court will not be disturbed absent a manifest abuse of discretion.” *State v. Yates*, 111 Wn2d 793, 797, 7665 P.2d 291 (1988) *citing State v. Mak*, 105 Wn.2d 692, 704, 718 P.2d 407, *cert. denied*, 479 U.S. 995, 93 L.Ed.2d 599, 107 S. Ct. 599 (1986); *State v. Boehme*, 71 Wn.2d

3

621, 633, 430 P.2d 527 (1967), *cert. denied*, 390 U.S. 1013 (1968). A trial court abuses its discretion when "discretion is exercised on untenable grounds or for untenable reasons, considering the purposes of the trial court's discretion." *Coggle v. Snow*, 56 Wn. App. 499, 507, 784 P.2d 554 (1990) (citing *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971))

As stated by this Court in *Yates, supra*, CrR4.7 guides the trial court in its exercise of discretion. The *Yates* court acknowledged that the principles underlying CrR 4.7 encompass the need for sufficient information for informed pleas, expedite trials, minimize surprise, afford adequate preparation for effective cross examination and to meet the requirements of due process and discovery prior to trial should be "as full and free as possible consistent with the protections of persons, effective law enforcement, the adversary system and national security." *Yates*, 111 Wn.2d at 797, citing the Criminal Rules task Force.

The rules of discovery are intended to help insure that both the State and the Defendant are given a fair and orderly trial. *State v. Hutchinson*, 111 Wn.2d 872, 766 P.2d 447 (1989). Washington's discovery rules make no exception for disclosure of contraband and require an affirmative showing before disclosure can be limited or denied. The rules provide that the

prosecution, "except as otherwise provided by protective orders . . . shall disclose to the defendant the following material and information . . . (v) any books, papers, documents, photographs, or tangible objects, which the prosecuting attorney intends to use in the hearing or trial or which were obtained from or belonged to the defendant." CrR 4.7(a)(1)(v) (emphasis added). CrR 4.7(e)(2), "discretionary disclosures," provides that the court may condition or deny disclosure "if it finds that there is a substantial risk to any person of physical harm, intimidation, bribery, economic reprisals or unnecessary annoyance or embarrassment, resulting from such disclosure, which outweigh any usefulness of the disclosure to the defendant."

In *State v. Hutchinson*, 111 Wn.2d at 878, the court quoted from *Wardius v. Oregon*, 412 U.S. 470, 471, 37 L.Ed.2d 82, 93 S. Ct. 2208 (1973) that "[a]lthough the Due Process Clause has little to say regarding the amount of discovery which the parties must be afforded . . . it does speak to the balance of forces between the accused and his accuser." *Hutchinson*, 111 Wn.2d at 878.

The *Hutchinson* court went on to say:

The rules of discovery are designed to enhance the search for truth in both civil and criminal litigation. And, except where the exchange of information is not otherwise clearly impeded by constitutional limitations or statutory inhibition, the route of discovery should ordinarily be considered somewhat in the

nature of a 2-way street, with the trial court regulating traffic over the rough areas in a manner which will insure a fair trial to all concerned, neither according to one party an unfair advantage nor placing the other at a disadvantage.

Hutchinson, 111 Wn.2d at 878. Here, the State has permitted dissemination of the requested materials to police officers and has unfettered access the materials to prepare its case privately, away from the prying eyes of defense counsel. The court was merely leveling the playing field when it fashioned the discovery remedy embodied in its Orders granting the defense motions and the Protective Orders.

The Court carefully and fully considered the arguments of the parties and weighed the need for thorough investigation, complete discovery within the spirit and letter of the criminal court rules and effective representation against the State's argument that viewing discovery at the County City Building while a detective observed was sufficient. RP 9/20/06 20-23. The Court assessed the needs of the defense and the privacy considerations of the minors depicted in the discovery and only ordered release of the materials under the terms of a strict protective order and admonished defense counsel both in the order and orally that they would be held personally accountable for the secure handling of the discovery material. RP 9/20/06 22-23; 9/28/06 15. In light of the court's careful consideration

6

of the competing interests and the needs of the parties, along with the imposition of the Protective Orders governing the defendant's possession and use of discovery materials, thus the trial court's ruling was based on tenable grounds and the trial court's decision was not an abuse of discretion. For these reasons this Court should affirm the trial court's pre-trial discovery ruling.

2. Ms. Wear Has The Right To Effective Representation By An Attorney Who Has Prepared And Consulted With Her In Private

If this court denies Ms. Wear the right to have her attorney investigate her case and consult with her in private the court will deny Ms. Wear her State and federally guaranteed rights right to effective counsel and her due process right to access to the materials necessary to answer the charges against her. Also, the court will fail to protect her attorney's right to have her work product remain confidential. Such a complete failure to allow Ms. Wear and her counsel the right to adequately consult and prepare for trial with the aid of clearly material and discoverable evidence would result in reversible error.

The Washington State and United States Constitution guarantee a criminal defendant the right to effective assistance of counsel. Const. Art. 1 § 22 (amend. 10); U.S. Const. Sixth amend.; U.S. Const. Fourteenth amend § 1;

Strickland v. Washington, 466 U.S. 668, 80 L.Ed.2d 674, 104 S.Ct. 2052 (1984).

The right to counsel means the right to the effective assistance of counsel. *State v. Riley*, 122 Wn.2d 772, 780, 863 P.2d 554 (1993) *citing Strickland v. Washington*, 466 U.S. at 686. A defendant has not had effective assistance of counsel when the performance of counsel was deficient and the deficient performance prejudiced the defendant. *Riley*, 122 Wn.2d at 780.

Defense attorneys have “a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.” *Strickland*, 466 U.S. at 691, 104 S.Ct. 2052.

To provide constitutionally adequate assistance, “counsel must, at a minimum, conduct a reasonable investigation enabling [counsel] to make informed decisions about how best to represent [the]client.”

In re Brett, 142 Wn.2d 868, 873, 16 P.3d 601 (2001), *quoting Sanders v. Ratelle*, 21 F.3d 1446, 1456 (9th Cir.1994) (*citing Strickland*, 466 U.S. at 691). Defense counsel has a fundamental duty to investigate and to make strategic trial choices only after undertaking this investigation.

Strategic choices made after thorough investigation of law and fact relevant to plausible options are virtually unchallengeable and strategic choices made after less than complete investigation are reasonable precisely to the extent that

reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In an ineffective case, a particular decision not to investigate must be directly assessed for reasonableness in all circumstances, apply a hearing measure of deference to counsel's judgments.

Wiggins v. Smith, 539 U.S. 510, 123 S. Ct. 2527, 2535, 156 L. Ed. 2d 471 (2002).

RCW 5.60.060(2) provides that "[a]n attorney or counselor shall not, without the consent of his or her client, be examined as to any communication made by the client to him or her, or his or her advice given thereon in the course of professional employment." The policy behind this statutorily created privilege is to encourage free and open attorney-client communication by assuring the client that his or her communications will not be directly or indirectly disclosed to others. *Pappas v. Holloway*, 114 Wn.2d 198, 203, 787 P.2d 30 (1990).

"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, 935 P.2d 611 (1997) (citing *State ex rel. Sowers v. Olwell*, 64 Wn.2d 828, 832, 394 P.2d 681 (1964)). Here, the trial court reasonably concluded that review of discovery materials within the view of law enforcement officers was not sufficient to safeguard the

9

Defendant's right to counsel and the due process right to prepare a defense in confidence.

Due process and fundamental fairness dictate that in support of the duty to investigate, a defendant must have access to evidence in the state's possession in order to independently assess the evidence. *Barnard v. Henderson*, 524 F.2d 744 (5th Cir. 1975). In *Barnard v. Henderson*, an independent testing case, the Fifth Circuit held that a defendant is denied due process when he is denied the opportunity to have an expert of his own choosing conduct independent testing. The Court of Appeals stated that the right to independent testing involves not only discovery rights, but the right to the means to conduct his own defense: "Fundamental fairness is violated when a criminal defendant on trial for his liberty is denied the opportunity to have an expert of his choosing, bound by appropriate safeguards imposed by the Court, examine a piece of critical evidence whose nature is subject to varying expert opinion." *Barnard v. Henderson*, 524 F.2d at 746. Due process also requires that the defendant be allowed to prepare a case for trial in parity with the State. *Cf. State v. Hutchinson*, 111 Wn.2d 872, 878, 766 P.2d 447 (1989).

Further, the review of discovery by defense counsel in the preparation of a defense are protected by the work product doctrine. *United States v.*

Nobles, 422 U.S. 225, 238, 95 S. Ct. 2160, 445 L.Ed. 2d 1414 (1975); *State v. Yates*, 111 Wn.2d 793, 765 P.2d 291 (1988) (work of investigators with defense counsel is protected from disclosure). "The work product rule . . . protect[s] materials prepared in anticipation of litigation." *Limstron v. Ladenburg*, 136 Wn.2d 595, 613, 963 P.2d 869 (1998). Here, the trial court's Orders protect the defense counsels' rights to prepare for trial with their clients away from the watchful eye of law enforcement.

F. CONCLUSION

Respondent/Defendant Wear requests that this Court uphold the trial court's reasonable exercise of her discretion in granting Defendants' Giles' and Wear's Motion to Compel Discovery.

Respectfully submitted this 2nd day of February, 2007

Mary Katherine Young High
MARY K. HIGH, WSBA# 20123
Attorney for Respondent Wear
949 Market Street, Ste 334
Tacoma, WA 98402
(253) 798-6989