

RECEIVED
SUPREME COURT
STATE OF WASHINGTON
May 26, 2015, 4:07 pm
BY RONALD R. CARPENTER
CLERK

E CRF
RECEIVED BY E-MAIL

NO. 90939-3

THE SUPREME COURT THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ROMAN M. FEDOROV,

Petitioner.

BRIEF OF AMICUS CURIAE

WASHINGTON ASSOCIATION OF PROSECUTING ATTORNEYS

PAMELA B. LOGINSKY

Staff Attorney

Washington Association of Prosecuting Attorneys

206 10th Ave. S.E.

Olympia, WA 98501

Telephone: (360) 753-2175

E-mail: pamloginsky@waprosecutors.org



ORIGINAL

TABLE OF CONTENTS

I. INTEREST OF AMICUS CURIAE 1

II. ISSUES PRESENTED 1

III. STATEMENT OF FACTS 1

IV. ARGUMENT 1

V. CONCLUSION 11

TABLE OF AUTHORITIES

TABLE OF CASES

Alexander v. Municipality of Anchorage, 15 P.3d 269 (Alas. App. 2000) 7

Bellevue v. Ohlson, 60 Wn. App. 485, 803 P.2d 1346 (1991) 3

Bickler v. North Dakota State Highway Comm’r,
423 N.W.2d 146 (N.D. 1988) 8

City of Ann Arbor v. McCleary, 674 Mich. App. 674,
579 N.W.2d 460 (1998) 2, 5

City of Mandan v. Jewett, 517 N.W.2d 640 (N.D. 1994) 8

City of Seattle v. Box, 29 Wn. App. 109, 627 P.2d 584 (1981) 3

Commissioner of Public Safety v. Campbell, 494 N.W.2d 268
(Minn. 1992) 7

Copelin v. State, 659 P.2d 1206 (Alaska 1983) 2

Eriksmoen v. Dir. of DOT, 706 N.W.2d 610 (N.D. 2005) 8

Grossman v. State, 285 P.3d 281 (Alaska App. 2012) 3

In re McNeely, 119 Idaho 182, 804 P.2d 911 (1990) 3

Kiehl v. State, 901 P.2d 445 (Alas. App. 1995) 6

Litteral v. Commonwealth, 282 S.W.3d 331 (Ky. App. 2008) 5

Mangiapane v. Anchorage, 974 P.2d 427 (Alas. App. 1999) 6, 7

People v. Iannopollo, 131 Misc. 2d 15, 502
N.Y.S.2d 574 (1983) 9

People v. Youngs, 2 Misc. 3d 823, 771 N.Y.S.2d 282,
appeal denied, 1 N.Y.S. 3d 583, 807 N.E.2d 912 (2003) 9

<i>Seattle v. Koch</i> , 53 Wn. App. 352, 767 P.2d 143, <i>review denied</i> , 112 Wn.2d 1022 (1989)	4, 9
<i>State v. Bernard</i> , No. A13-1245, ___ N.W.2d ___, 2015 Minn. LEXIS 46 (Feb. 11, 2015)	4
<i>State v. Bostrom</i> , 127 Wn.2d 580, 902 P.2d 157 (1995)	4
<i>State v. Carcieri</i> , 730 A.2d 11 (R.I. 1999)	8
<i>State v. Craney</i> , 347 N.W.2d 668 (Iowa), <i>cert. denied</i> , 469 U.S. 884 (1984)	11
<i>State v. Dowdy</i> , 332 S.W.3d 868 (Mo. Ct. App. 2011)	4
<i>State v. Durbin</i> , 335 Ore. 183, 63 P.3d 576 (2003)	3
<i>State v. Lombard</i> , 146 Vt. 411, 505 A.2d 1182 (1985)	10
<i>State v. Mullins</i> , 158 Wn. App. 360, 241 P.3d 456 (2010), <i>review denied</i> , 171 Wn.2d 1006 (2011)	3
<i>State v. Pawlyk</i> , 115 Wn.2d 457, 800 P.2d 338 (1990)	4, 10, 11
<i>State v. Staeheli</i> , 102 Wn.2d 305, 685 P.2d 591 (1984)	3
<i>State v. Templeton</i> , 148 Wn.2d 193, 59 P.3d 632 (2002)	2
<i>State v. Walker</i> , 804 N.W.2d 284 (Iowa 2011)	5
<i>State v. West</i> , 151 Vt. 140, 557 A.2d 873 (1988)	9, 10
<i>State, Department of Public Safety v. Held</i> , 246 N.W.2d 863 (Minn. 1976)	7

CONSTITUTIONS

Fifth Amendment 2, 10
Sixth Amendment 2, 10

STATUTES

Ky. Rev. Stat. § 189A.105(3) 2
R.I. Gen. Laws § 12-7-20 8
RCW 36.27.020 1
RCW 5.60.060(2)(a) 6

COURT RULES

CrR 3.1 2, 5
CrRLJ 3.1 1, 2, 5

I. INTEREST OF AMICUS CURIAE

The Washington Association of Prosecuting Attorneys (“WAPA”) represents the elected prosecuting attorneys of Washington State. Those persons are responsible by law for the prosecution of all felony cases in this state and of all gross misdemeanors and misdemeanors charged under state statutes. Those persons are also responsible by law for providing advice to the duly elected sheriff. RCW 36.27.020.

WAPA is interested in cases, such as this, which have wide-ranging impact on the ability to investigate criminal activity and on the ability to collect relevant evidence.

II. ISSUES PRESENTED

Whether an arrestee's right of privacy while exercising his non-constitutional CrRLJ 3.1 right of counsel is unduly infringed when an officer remains nearby but takes no measures to overhear the arrestee's conversation with his attorney?

III. STATEMENT OF FACTS

The facts of these two cases are discussed in detail in the briefs of the parties and will not be addressed here.

IV. ARGUMENT

Virtually every jurisdiction extends a right to counsel upon arrest for impaired driving. Most jurisdictions recognize that this pre-charging right, which is not dependent upon custodial interrogation, is not mandated by

either the Fifth Amendment or the Sixth Amendment. *See, e.g., City of Ann Arbor v. McCleary*, 674 Mich. App. 674, 579 N.W.2d 460, 463 (1998) (no constitutional right to counsel in deciding whether to submit to a breath alcohol test); *State v. Templeton*, 148 Wn.2d 193, 211-12, 59 P.3d 632 (2002) (CrRLJ 3.1 goes beyond the requirements of the constitution). Many of the jurisdictions, including Washington state, have codified this non-federal constitutional right to counsel in a statute or court rule. *See, e.g., Ky. Rev. Stat. § 189A.105(3); CrR 3.1; CrRLJ 3.1.*

The purpose of the rule-based right to counsel is to ensure that arrested persons are aware of their right to counsel before they provide evidence which may tend to incriminate them and to ensure that persons arrested know of their right to counsel in time to decide whether to acquire exculpatory evidence, such as an independent alcohol test. *See Templeton*, 148 Wn.2d at 217-18.

Still, the rule-based right to counsel is not absolute, and must be considered together with the need to conduct an initial investigation in a timely manner. *See, e.g., Copelin v. State*, 659 P.2d 1206, 1211-12 (Alaska 1983) (because the alcohol in a DUI arrestee's blood will normally be dissipating with the passage of time and the government has an important interest in obtaining reliable evidence of the arrestee's blood alcohol level, an arrestee is not allowed to exercise his right to consult with an attorney in a manner that "interfere[s] with the prompt and purposeful investigation of

the case”). In fact, some jurisdictions delay the arrestee’s phone call to counsel until after the police have administered the breath alcohol test. *See, e.g., In re McNeely*, 119 Idaho 182, 804 P.2d 911 (1990) (an individual who is arrested for DUI has no constitutional or statutory right to consult with a counsel before submitting to a breath alcohol test).

Accordingly, other jurisdictions, including Washington state, limit an arrestee’s court-rule right to counsel by: (1) only requiring reasonable efforts to reach an attorney— actual contact is not required;¹ (2) limiting the length of any call;² and (3) refusing to suspend the investigation until the attorney can actually appear at the station house.³ These restrictions are imposed to ensure that delay does not thwart the investigation and are also consistent with the fact that an arrestee does not have a constitutional right to refuse the

¹*See, e.g., State v. Staeheli*, 102 Wn.2d 305, 310, 685 P.2d 591 (1984) (“If an accused has been allowed reasonable access and has made no contact with counsel, but the test can no longer be delayed, the driver must decide on his own whether he will submit to the test.”); *Bellevue v. Ohlson*, 60 Wn. App. 485, 803 P.2d 1346 (1991) (no violation of rule where defendant was unable to reach an attorney after four phone calls).

²*State v. Durbin*, 335 Ore. 183, 193, 63 P.3d 576 (2003) (in the DUI context, where an arrested driver has an Article I, section 11, “right to a reasonable opportunity to consult privately with counsel,” a 15-minute opportunity “normally will be sufficient for a person to contact and consult with a lawyer after that person invokes the right to counsel”); *Staeheli*, 102 Wn.2d at 310 (“For the purposes of the Breathalyzer test, an accused’s opportunity to contact an attorney must be limited to a reasonable period of time. An extended delay may significantly affect the test results.”).

³*See, e.g., Grossman v. State*, 285 P.3d 281 (Alaska App. 2012) (while an arrestee may contact an attorney during the mandatory 15-minute observation time, the arrestee does not have a right to suspend the actual testing to speak with an attorney); *State v. Mullins*, 158 Wn. App. 360, 369-70, 241 P.3d 456 (2010), *review denied*, 171 Wn.2d 1006 (2011) (“the rule [CrR 3.1] does not necessarily compel police to postpone routine prebooking procedures or the execution of a search warrant when an arrestee expresses the desire to consult an attorney”); *City of Seattle v. Box*, 29 Wn. App. 109, 627 P.2d 584 (1981) (officer not required to delay breath test until defendant’s attorney arrives).

breath test. *See generally*, *State v. Bostrom*, 127 Wn.2d 580, 590, 902 P.2d 157 (1995) (no constitutional right to refuse a breath test); *State v. Bernard*, 859 N.W.2d 762, 767-68 (Minn. 2015) (warrantless breath tests are lawfully compelled under the search-incident-to arrest doctrine); *State v. Won*, 139 Haw. 59, 332 P.3d 661 (Haw. Ct. App. 2014) (review granted, Haw. No SCWC~12-0000858, oral argument heard September 4, 2014) (compelled warrantless breath tests are constitutional due to exigent circumstances).

The rule-based right to counsel must also be exercised in a manner that does not endanger the officer, the suspect, or others. While an arrestee must be given reasonable privacy during the phone call to further the non-constitutional attorney-client privilege,⁴ the amount of privacy will depend on a number of factors such as the unique security and safety problems presented by a particularly uncooperative, intoxicated defendant. *Seattle v. Koch*, 53 Wn. App. 352, 358, 767 P.2d 143, *review denied*, 112 Wn.2d 1022 (1989).

Roman Fedorov contends that an arrestee, regardless of his demeanor, the physical location, or any other consideration has an absolute right to privacy guaranteed by a sound-proof room while exercising his rule-based right to counsel. *See* Supplemental Brief on Behalf of Petitioner. Fedorov argues that absent total privacy, effective representation cannot occur due to

⁴*See State v. Pawlyk*, 115 Wn.2d 457, 469, 800 P.2d 338 (1990) (attorney/client privilege is not of constitutional dimension).

the erosion of the attorney-client privilege. *Id.* at 16-18. Fedorov's arguments should be rejected. A right to total privacy would thwart legitimate investigations and may create dangerous situations for officers or detainees. The right to counsel can be reconciled with avoiding such dangers by a reasonable rule accommodating both interests.

This Court has not directly addressed how to reconcile safety and privacy while allowing an impaired driver arrestee to consult with an attorney, but other states have. A number of jurisdictions reject Fedorov's "absolute privacy rule" based upon the absence of a statute or court rule that mandates privacy during a pre-testing consultation. *See, e.g., State v. Walker*, 804 N.W.2d 284, 289-90 (Iowa 2011) (Iowa Code section 804.20 requires phone calls to counsel to occur in the presence of the person having custody of the arrestee); *Litteral v. Commonwealth*, 282 S.W.3d 331, 333-34 (Ky. App. 2008) (statutory right to counsel prior to submitting to a breath test does not include a right to private consultation); *McCleary*, 579 N.W.2d at 463 n.2 (rejecting Arizona and Ohio's privacy right on the grounds that "Michigan does not have a statute ensuring private communications with an attorney after arrest or detention."). Rather than overriding reasonable police policies regarding security and custody of arrestees, the defendant's interests are protected by prohibiting the prosecution from using any statements the defendant makes during his telephone conversation with counsel. *See, e.g., McCleary*, 579 N.W.2d at 464-65. Since neither CrR 3.1, CrRLJ 3.1, nor

RCW 5.60.060(2)(a) specifically mandate that an arrestee's conversation with his counsel prior to the administration of an alcohol test must be in private, this Court could affirm Fedorov's conviction on this ground alone. *See generally* State's Supplemental Brief at 13-17.

Rather than adopting Fedorov's absolute-privacy rule, a number of jurisdictions hold that an officer's mere presence during the arrestee's phone conversation with his attorney is not a violation of an arrestee's non-constitutional right to counsel. States that follow this rule include Alaska, Minnesota, North Dakota, and Rhode Island.

Alaska resolves the tension between an arrestee's right to consult counsel and a police officer's need to keep the arrestee under observation by holding that

"even though police officers have a duty to maintain custodial observation of [an arrestee] before administration of the breath test, [the arrestee] must be given a reasonable opportunity to hold a private conversation with his or her attorney." But an arrestee's right to confer with counsel "is not violated merely because the arresting officer maintains physical proximity to the [arrestee]". This court has suppressed Intoximeter results only when, in addition to maintaining physical proximity, "the police engaged in additional intrusive measures, intrusions that convinced [arrestees] that the officers were intent on overhearing and reporting [the arrestees'] conversations with their attorneys."

Mangiapane v. Anchorage, 974 P.2d 427, 429 (Alas. App. 1999) (quoting *Kiehl v. State*, 901 P.2d 445, 447 (Alas. App. 1995)). Applying this test, Alaska courts have denied requests to suppress breath tests under facts

similar to those presented in Fedorov's case. *See, e.g., Alexander v. Municipality of Anchorage*, 15 P.3d 269 (Alas. App. 2000) (officer, who disabled the station house's recording system and switched the phone from speaker to handset, held phone to arrestee's ear during conversation after the handcuffed arrestee was unable to keep the phone cradled between his shoulder and his ear); *Mangiapane v. Anchorage, supra* (officer stood ten to fifteen feet away during the arrestee's conversation with the attorney).

The Minnesota Supreme Court rejected a request to adopt a rule that police must allow an arrestee to telephone his attorney from a private booth or room in *State, Department of Public Safety v. Held*, 246 N.W.2d 863 (Minn. 1976). Recognizing that many police departments may not have a private phone booth or room suitable for such a use and the potential security problems that can arise from leaving an arrestee alone in a room, the Court determined that a driver's statutory right to counsel and Minnesota state Constitutional right to counsel are sufficiently safeguarded by a rule that forbids the use in evidence of any statements made by the arrestee to his counsel over the telephone which are overheard by police. *Commissioner of Public Safety v. Campbell*, 494 N.W.2d 268, 269-70 (Minn. 1992); *Held*, at 864.

North Dakota recognizes that the integrity of the breath test sample requires an officer to maintain observation of the arrestee for a period of time. To do so, an officer may remain in visual contact with the arrestee while the

arrestee consults with an attorney in the same room as the officer. *See, e.g., City of Mandan v. Jewett*, 517 N.W.2d 640 (N.D. 1994) (officer's standing passively 9 to 12 feet away from defendant during defendant's phone call to counsel provided sufficient privacy to defendant); *Bickler v. North Dakota State Highway Comm'r*, 423 N.W.2d 146 (N.D. 1988) (adopting an "out-of-earshot rule, rather than an absolute privacy rule when arrestee and counsel meet in person at the police station prior to breath test). If an arrestee poses a security or flight risk, the officer may stay quite close during the arrestee's telephone call. *See Jewett*, 517 N.W.2d at 642-43. When an officer remains within earshot of the arrestee, the propriety of doing so is tested under the totality of the circumstances. *Id.* As an additional protection, anything the officer overhears is inadmissible at trial. *Eriksmoen v. Dir. of DOT*, 706 N.W.2d 610, 613 (N.D. 2005).

Rhode Island's statutory right to counsel codified at R.I. Gen. Laws § 12-7-20 requires an officer to "provide confidentiality between the arrestee and the recipient of the call." Despite this language, the Rhode Island Supreme Court found it unnecessary to adopt a requirement that officers stand out-of-earshot during the arrestee's phone call. The Court was "not satisfied that § 12-7-20 is violated by the mere presence of the police officer during a telephone conversation and not that at best, the conversation is one-sided." *State v. Carcieri*, 730 A.2d 11, 15 (R.I. 1999).

A number of jurisdictions follow the rule announced in *Koch* and look to the totality of the circumstances to decide whether the amount of privacy afforded an arrestee during his non-constitutionally mandated phone conversation with counsel was reasonable. This group includes New York and Vermont.

In New York, a DUI arrestee's right to privacy while speaking with counsel is conditional. An officer may remain in the room in order to protect sensitive files, to prevent the arrestee from using chairs or other furniture as weapons, and to protect computers and other devices. *See People v. Youngs*, 2 Misc. 3d 823, 771 N.Y.S.2d 282, *appeal denied*, 1 N.Y.S. 3d 583, 807 N.E.2d 912 (2003). A breath test will, however, be suppressed when officers do not provide an adequate explanation for remaining in the room. *See People v. Iannopollo*, 131 Misc. 2d 15, 502 N.Y.S.2d 574 (1983).

The Vermont Supreme Court has determined that the statutory right to consult with counsel prior to taking a breath test contemplates a reasonable degree of privacy. Privacy, however, cannot always be absolute. "The degree of privacy an arrestee should be afforded to communicate with counsel must be determined by balancing the individual's right to consult privately with counsel against society's interest in obtaining or preserving important evidence." *State v. West*, 151 Vt. 140, 557 A.2d 873, 876 (1988). This test is an objective one which focuses on the physical setting within

which the events take place and how a reasonable person in the defendant's position would have understood his situation. *West*, 557 A.2d at 876-77.

If an arrestee presents a security risk, an officer may remain nearby during the phone call. *See, e.g., State v. Lombard*, 146 Vt. 411, 505 A.2d 1182, 1185 (1985) (officer's presence while arrestee spoke with counsel was justified by security concerns as the arrestee made the call from an outdoor public phone). When the risk posed by a defendant is less acute, police officers may still position themselves so as to avoid an escape. *See State v. West, supra* (no violation of right to privacy when one officer remained near the cubicle, which was located near a door to the outside, from which the defendant telephoned his attorney and another officer paced the aisle).

The balance struck by all of these states is similar to what this Court did with a related claim in *State v. Pawlyk*, 115 Wn.2d 457, 800 P.2d 338 (1990). In *Pawlyk*, the defendant argued that allowing discovery of defense psychiatrist's reports on the issue of sanity would violate the defendant's Fifth Amendment right, Sixth Amendment right to counsel, and the attorney-client privilege. With respect to the privilege argument, this Court stated that:

We are not persuaded by defendant's specific arguments relating to counsel's obligation to maintain confidentiality, counsel's effectiveness, and defendant's right to be free of improper governmental interference with his right to counsel. First, we perceive defendant's arguments in part as a recasting of defendant's attorney-client privilege claim as a

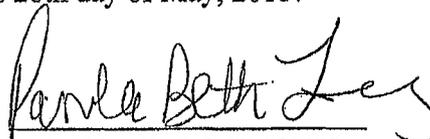
constitutional right to counsel claim. We do not agree that the attorney-client privilege is of constitutional dimension.

Pawlyk, 115 Wn.2d at 469-70. The Court further found that the defendant's asserted right to the effective assistance of counsel under the facts of that case reflected the "bygone philosophy that for an attorney's investigations to be effective they must be shrouded in secrecy." *Id.* at 470 (quoting *State v. Craney*, 347 N.W.2d 668, 677 (Iowa), *cert. denied*, 469 U.S. 884 (1984)). Rather than deprive the State of important evidence, the Court protected the defendant's interests by restricting how the State used the information it obtained from the defendant's expert. *Id.* at 480. The Court should take the same path with respect to the court-rule right to counsel.

V. CONCLUSION

Allowing an officer to remain in the room when an arrestee speaks by phone with his counsel protects the safety of the officer and the arrestee, and allows for the timely administration of a valid breath test. Precluding an officer from repeating anything the officer may overhear during the non-constitutionally based consultation protects the interests of the arrestee.

Respectfully submitted this 26th day of May, 2015.



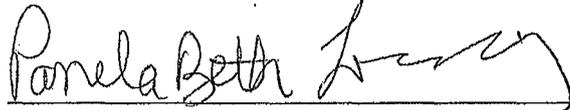
PAMELA B. LOGINSKY
WSBA No. 18096
Staff Attorney

PROOF OF SERVICE

I, Pamela B. Loginsky, declare that I have personal knowledge of the matters set forth below and that I am competent to testify to the matters stated herein.

On May 26, 2015, I e-mailed a copy of this document to
Chelsey Miller at cmille2@co.pierce.wa.us and Pcpatcecf@co.pierce.wa.us
Kathryn Russell Selk at KARSdroit@aol.com
Cindy Arends Elsberry at Cindy@defensenet.org
Magda Baker at Magda@defensenet.org
Shelley Williams at ShelleyW1@ATG.WA.GOV and
CRJSeaEF@atg.wa.gov

Signed under the penalty of perjury under the laws of the state of
Washington this 26th day of May, 2015, at Olympia, Washington.



Pamela B. Loginsky, WSBA #18096
Staff Attorney
206 10th Ave. SE
Olympia, WA 98501
Phone: (360) 753-2175
E-mail: pamloginsky@waprosecutors.org

OFFICE RECEPTIONIST, CLERK

To: Pam Loginsky; KARSdroit@aol.com; CRJSeaEF@atg.wa.gov; ShelleyW1@atg.wa.gov; cmille2@co.pierce.wa.us; pcpatcecf@co.pierce.wa.us; Cindy@defensenet.org; Magda@defensenet.org
Subject: RE: State v. Fedorov, No. 90393-3

Rec'd 5/26/15

Supreme Court Clerk's Office

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Pam Loginsky [mailto:Pamloginsky@waprosecutors.org]
Sent: Tuesday, May 26, 2015 4:01 PM
To: KARSdroit@aol.com; CRJSeaEF@atg.wa.gov; ShelleyW1@atg.wa.gov; cmille2@co.pierce.wa.us; pcpatcecf@co.pierce.wa.us; OFFICE RECEPTIONIST, CLERK; Cindy@defensenet.org; Magda@defensenet.org
Subject: State v. Fedorov, No. 90393-3

Dear Clerk and Counsel:

Attached for filing is WAPA's amicus curiae brief. WAPA previously filed a motion for leave to participate as an amicus curiae in this case.

Please let me know if you should encounter any difficulty in opening this document.

Sincerely,

Pam Loginsky
Staff Attorney
Washington Association of Prosecuting Attorneys
206 10th Ave. SE
Olympia, WA 98501

Phone (360) 753-2175
Fax (360) 753-3943

E-mail pamloginsky@waprosecutors.org