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SUPREME COURT
STATE OF WASHINGTON
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NO. 89528-7

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IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON

Respondent

v.

JORDAN J. PORTCH,

Appellant

ANSWER TO PETITION FOR REVIEW

MARK K. ROE
Prosecuting Attorney

KATHLEEN WEBBER
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Attorney for Respondent

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 ORIGINAL

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I. STATEMENT OF THE CASE

The State relies on the statement of the case set out in the State's response brief filed in the Court of Appeals and the Court of Appeals opinion filed September 30, 2013. (WL 5503664 2013)

II. ARGUMENT

A. THE COURT OF APPEALS DECISION DID NOT CONFLICT WITH DECISIONS FROM THIS COURT OR OTHER APPELLATE COURTS.

The defendant argued that his right to counsel was violated when the State was allowed to present testimony from his former attorney's defense investigator to prove a charge of tampering with evidence and to rebut the alibi defense. Specifically he argued that the investigator's testimony violated his right to attorney client privilege. The Court of Appeals rejected that argument because the investigator's testimony did not reveal any confidential communications between attorney and client. Slip opinion at 7. The Court of Appeals opinion is consistent with cases decided by this Court and other appellate courts regarding the extent and application of the privilege.

"An 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.” RCW 5.60.060(2). The privilege applies to communications and advice between an attorney and client and extends to documents that contain privileged communications. State v. Perrow, 156 Wn App. 322, 328, 231 P.3d 853 (2010).

The privilege only applies to communications that are intended to be confidential. Seattle Northwest Securities Corporation v. SDG Holding Co., Inc., 61 Wn. App. 725, 742, 812 P.2d 488 (1991). When a communication is intended to be disclosed to others it is not protected by the attorney client privilege. State v. Sullivan, 60 Wn.2d 214, 217-18, 373 P.2d 474 (1962). When a party offers otherwise privileged communication as evidence the privilege is waived as to the entire communication. State v. Webbe, 122 Wn. App. 683, 691, 94 P.3d 994 (2004). Further, when a client reveals a communication between himself and his attorney to a third person the privilege is waived unless the third person is necessary for the communication. Zink v. City of Mesa, 162 Wn. App. 688, 725, 256 P.3d 384 (2011), review denied, 173 Wn.2d 1010 (2012).

Before trial the defendant's first attorney notified the prosecutor that the defendant would rely on an alibi defense. In

support of that defense counsel informed the deputy prosecutor that he would call several witness, including Mr. Scott Hardy and the defense investigator Mr. Joel Martin. Defense counsel told the deputy prosecutor that part of the defense would be supported by mileage readings on the defendant's odometer taken before and after the burglary. The readings were intended to demonstrate the car had not been driven sufficient miles for it to be the car seen by a witness in the area at the time of the burglary. The deputy prosecutor investigated the defense and learned that the defendant had made statements to Mr. Hardy's employer regarding destruction of an estimate used to establish the odometer reading before the burglary. 1 CP 68-71.

Mr. Martin testified at trial that he was assigned to investigate the case in May 2011. He stated that he understood the asserted defense was going to be an alibi defense. He testified regarding the preparation and service of a subpoena on Mr. Hardy and the reason why he did that. Mr. Martin identified a portion of a repair estimate for the defendant's car which he had seen previously. Mr. Martin testified about what he actions he took to investigate the odometer readings on the defendant's car, and the

distance between the defendant's home, the body shop, and the victim's home. 1 RP 149-172.

The defendant argues that his attorney client privilege was violated when the State was permitted to elicit testimony regarding why Mr. Hardy was listed as a witnesses in the defense case. Petition at 9. He claims that merely calling the defense investigator without his prior consent was itself a violation of his attorney client privilege. Petition at 10.

The defendant cites no authority for the proposition that a privileged communication remains privileged until he consents to its disclosure at trial, even if he has previously disclosed that communication before trial. Cases which have discussed the privilege have not placed this kind of restriction on it. Rather the cases indicate that once the communication has been disclosed the privilege is waived. Kammerer v. Western Gear Corp., 96 Wn.2d 416, 420, 635 P.2d 708 (1981). "[S]uch a waiver cannot be delayed until the trial itself." Id.

Mr. Martin's testimony regarding why Mr. Hardy had been listed as a witness had already been voluntarily disclosed when the defendant, through counsel, informed the prosecutor that he would be asserting an alibi defense, listed Mr. Hardy as witness, and

supplied a copy of the repair estimate. For that same reason no privilege had been violated when a copy of the repair estimate was introduced. It did not matter that the defendant had not put the odometer reading at issue, because he still asserted the alibi defense. The disclosure occurred before trial and therefore waived any kind of privilege that would have attached to that document.

Additionally, most of what Mr. Martin testified to related to what he did, and not his communications with the defense attorney. Thus, his testimony was not protected by attorney client privilege. Any privilege that arguably attached to testimony regarding the nature of the defense was waived when the defense gave the prosecution notice of intent to assert that defense, and then provided the prosecutor with a witness list and evidence to support that defense.

The defendant also relies on evidence that he characterizes as “unduly prejudicial information concerning Mr. Portch’s claim that his attorney had instructed him to get the body shop estimate deleted” to argue that his attorney client privilege had been violated. Whether that evidence should or should not have been introduced on the basis that it was too prejudicial is assessed under ER 403, not the attorney client privilege.

The defendant's citation to the record regarding evidence that Mr. Portch acted on his attorney's instructions relates to a motion to withdraw made by the defendant's first attorney. 1 RP 29. The trial court's comments reflected an understanding that the new information put that attorney in an untenable position which justified granting the motion to substitute counsel. The actual testimony on this point came from Mr. Hedahl, the owner of the body shop. He testified that the defendant insisted on deleting the estimate, because he was instructed to do so by his attorney. 2 RP 227-229. This evidence shows the defendant himself disclosed that communication. It was therefore not protected by any privilege.

Finally the defendant supports his argument by citation to State v. Garza, 99 Wn. App. 291, 994 P.3d 868 (2000). Petition at 7. He states that "a 'prosecutor's intentional intrusion into the attorney-client relationship constitutes direct interference with the Sixth amendment right of a defendant.'" Id. at 299, quoting Shillinger v. Haworth, 70 F.3d 1132, 1142 (10th Cir. 1995) He states that the logic in that case applies here, but fails to address the Court of Appeals analysis rejecting this case a support for his position. Garza differs from this case because there the

defendants did not voluntarily disclose their legal materials to the jail guards. Id. at 293-94. Here all the evidence that was introduced was disclosed pre-trial to the prosecutor. In addition, this Court rejected the contention that the attorney-client privilege is part of the Sixth Amendment right to counsel. State v. Pawlyk, 115 Wn.2d 457, 469, 800 P.2d 338 (1990). Thus, he fails to show how the Court of Appeals decision is in conflict with either a decision of this Court or decision of the Court of Appeals.

III. CONCLUSION

The Court of Appeals decision is not in conflict with a case from the Court of Appeals or this Court. The petition for review should be denied.

Respectfully submitted on November 21, 2013.

MARK K. ROE
Snohomish County Prosecuting Attorney

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Attorney for Respondent

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Good Afternoon...

RE: State v. Jordan J. Portch
Supreme Court No. 89528-7

Please accept for filing the attached: State's Answer to Petition for Review.

Let me know if there is a problem opening the attachment.


Thanks.

Diane.

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