72516-5

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Court of Appeals
Division I
State of Washington

NO. 72516-5-I

IN THE COURT OF APPEALS
OFTHE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON

Respondent

v.

JIMI J. HAMILTON,

Appellant

REPLY BRIEF OF RESPONDENT-CROSS-APPELLANT

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I. ARGUMENT IN REPLY

A. THE STATE IS ENTITLED TO FILE A CROSS APPEAL TO SOME OF THE TRIAL COURTS FINDINGS AND CONCLUSIONS DENYING THE DEFENDANT'S MOTION TO DISMISS THE CHARGE FOR GOVERNMENTAL MISCONDUCT.

The defendant challenges the trial court's decision denying his motions to dismiss for allegedly intruding into his attorney client communications in violation of his right to due process. Alternatively he challenged the court's decision denying his motion to dismiss under CrR 8.3(b) for governmental misconduct. Each motion was based on a claim that Department of Corrections personnel intruded into communications with his attorney in two scenarios. The first occurred in the context of a routine cell search. The second occurred in the context of two attorney-client visits in a no-contact room at the prison.

In response the State argues that the court reached the right result when it denied the motions to dismiss. However the result was reached despite erroneous findings and conclusions. The defendant claims that the State is not an "aggrieved party" because the court did not grant his two motions to dismiss on those bases. He therefore argues the State may not cross-appeal challenging those findings and conclusion.

In some cases the court has allowed the State to challenge the basis for a trial court's ruling, while at the same time maintaining that the court ultimately reached the right result. Thus the court has held that it may uphold the court's decision where it reaches the right result but for the wrong reason. State v. Cawyer, 182 Wn App. 610, 330 P.3d 219 (2014), State v. Markle, 118 Wn.2d 424, 438, 823 P.2d 1101 (1992).

On occasion the court has precluded the State from making such argument when no cross-appeal has been filed. State v. Greve, 67 Wn. App. 166, 834 P.2d 646 (1992), review denied, 121 Wn.2d 1005 (1993). In Greve the trial court suppressed a defendant's statements as obtained in violation of the Fourth Amendment, but allowed the State to impeach the defendant with those statements if he elected to testify. Id. at 168-169. Because the State did not cross-appeal the suppression ruling this Court refused to consider the argument that the court erred in that regard as an alternative basis on which to find no error allowing those statements to be used for impeachment. Id. at 171 n. 3.[1]

[1] The position taken by the Court in Greve is inconsistent with other cases which have not required the State to file a cross-appeal in similar circumstances. However, because of this court's decision in Greve the State has consistently addressed claimed errors by the trial court by way of cross-appeal.

This case presents a situation similar to that in Greve. There are alternative bases on which to find the trial court did not err when it denied the defendant's motion to dismiss. One basis is that whatever happened in regard to Reeder's cell search and the manner in which the two attorney-client meetings were conducted in a no-contact room, the defendant had not been prejudiced. Another basis on which to uphold the trial court is that the defendant had not shown any intrusion into his attorney client communications, or that there was any governmental misconduct. Because the court entered findings and conclusions that were not supported by the record finding otherwise, the State may have needed to file a cross-appeal in order to preserve a claim on that basis to support the court's ultimate decision denying the two motions to dismiss.

The defendant also argues the State should not be allowed to challenge some of the trial court's findings and conclusions as an aggrieved party because its position is inconsistent with the position that it took at the trial level. He states the deputy prosecutor asserted the motion was a waste of her time since the claimed

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If this court overturns its decision in Greve on this point the State will no longer believe it is necessary to file cross-appeals for those errors.

misconduct related to DOC and not the prosecutor's office. The defendant's references to the record do not support that claim. Each of the "waste of time" references relate to issues that were collateral to the defendant's motion to dismiss for government misconduct.[2]

Even if the deputy prosecutor's comments revealed an attitude that this was a DOC problem, not a Snohomish County Prosecutor problem, that would not preclude the State from filing a cross-appeal. Since the defendant has appealed the court's decisions on his two motions for dismissal, the basis for those decisions are at issue. The State should be allowed to challenge the court's findings and conclusions that are unsupported by the record on which those decisions were made.

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[2] The first comment was made during the first motion to dismiss for government intrusion into attorney-client communications. It was a response to a defense motion to dismiss the assault charge under CrR 8.3(b) for failure to timely provide defense with some photographs the State sought to use a the hearing. Defense counsel refused to give the prosecutor any information about the nature of the motion until shortly before the scheduled hearing date, limiting the prosecutor's ability to do any investigation earlier. 8/23/13 RP 319-325. The second comment was made during closing argument on that motion, asserting that the motion was based on a desire to get a strong case dismissed, rather than a sincere desire to ensure confidentiality between the defendant and his attorney. 8/26/13 RP 623-624. The third comment related to claims involving another inmate which had no bearing on the defendant's case. 8/12/14 RP 32-33.

B. NEITHER THE FINDING THAT DOC PERSONNEL TAMPERED WITH A SURVEILLANCE VIDEO NOR THE FINDING THAT THERE WAS AN INTRUSION INTO THE ATTORNEY CLIENT RELATIONSHIP ARE SUPPORTED BY SUBSTANTIAL EVIDENCE.

The State challenged the court's finding that Corrections Officer Reeder possibly colluded with other DOC personnel to tamper with the surveillance video that was recording during the time he searched the defendant's cell. BOR at 23-25. The defendant argues that the trial court's challenged finding is supported by substantial evidence, and therefore this court must accept that finding.

A reviewing court will not disturb a trial court's finding of fact if it is supported by substantial evidence. State v. Hill, 123 Wn.2d 641, 644, 870 P.2d 313 (1994). "Substantial evidence" is a sufficient amount of evidence to persuade a rational fair-minded person that the premise is true. Korst v. McMahon, 136 Wn. App, 202, 206, 148 P.3d 1081 (2006). When applying this standard the court will view all reasonable inferences from the evidence in the light most favorable to the prevailing party. Id. The court may not rely on guess, speculation, or conjecture when determining the existence of any fact. State v. Hutton, 7 Wn. App. 726, 728, 502 P.2d 1037 (1972).

The defendant prevailed on the issue of whether there had been government misconduct during the cell search. The defendant points out (1) the video sped up at the point that CO Reeder entered the defendant's cell, and (2) that neither Reeder nor administration staff Yvette Stubbs was aware that more than one camera was recording to infer that the videos had been altered to cover up CO Reeder's misconduct. These facts do not lead to a reasonable inference that either person tampered with the video.

That evidence does not refute other evidence presented that showed that the video sped up for mechanical reasons rather than as a result of an intentional modification to the system. The video was copied by the captain's secretary. There was no evidence that she did anything but copy what had been recorded on the surveillance system. The evidence did show that the surveillance system was old, and recordings from that system were jumpy. 8/26/13 RP 460, 500.

There was also no evidence that anyone, including CO Reeder, had any personal interest in the outcome of that hearing. CO Reeder did not know CO Trout and had never worked at Monroe Correctional Complex. 8/23/13 RP 226. Ms. Stubbs

testified that she did not have a personal stake in the case. 8/26/13 RP 460.

In light of these facts and circumstances the two facts relied on by the defendant do not support a logical, reasonable inference that CO Reeder and possibly others colluded to tamper with the video. Rather the court's finding that the video had been tampered with is based solely on conjecture.

The defendant argues that this court should uphold the finding that the video was tampered with by DOC personnel by pointing to declaration by Thomas Taber, an electronics technician at Clallam Bay Correctional Center, and defense counsel's offer of proof that the witness system was not malfunctioning. Ex. 38, 8/26/13 RP 549. Mr. Taber's declaration says nothing about whether the system was malfunctioning or not. Ex. 38. Counsel's offer of proof is not evidence in the record that would support a court's factual finding. State v. Ray, 116 Wn.2d 531, 538, 806 P.2d 1220 (1991) (an offer of proof informs the judge of the specific nature of the offered evidence so that the court can assess its admissibly.) The State did not stipulate that the system was not malfunctioning; the State represented that Mr. Taber said that he did not review any of the videos. 8/26/13 RP 549. Thus there was

no affirmative evidence in the record that the system had not malfunctioned at the time in question. The court may not infer the system malfunctioned in the absence of any established facts to support that inference.

CO Reeder and Ms. Stubbs testified neither had anything to do with recording or copying the video. 8/23/13 RP 298; 8/26/13 RP459-460. The defendant states this testimony should be rejected because, as he argues, it is a matter of common sense that if someone is willing to tamper with evidence, he or she is willing to lie about it. This argument is based on circular reasoning that presupposes the existence of the very fact that is at issue, whether the video had been tampered with. It also asks this court to assess the credibility of the witnesses, a function reserved for the finder of fact. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). For those reasons the court should reject the argument. The court's finding that CO Reeder and possibly other DOC personnel tampered with the video is not supported by substantial evidence.

The State also challenged the court's finding that there was a purposeful intrusion into the attorney client relationship as a result of the March 12, 2014 visit that occurred in a no contact room at

DOC. The defendant argues that this finding was supported by substantial evidence because DOC failed to provide a contact room for that visit in violation of the trial court's sua sponte order entered on August 26, 2013. 3 CP 905. If the court had jurisdiction over DOC when it entered the order then at best DOC was guilty of contempt. Dike v. Dike, 75 Wn.2d 1, 7, 448 P.2d 490 (1968)[3].

A failure to comply with the order did not constitute a purposeful intrusion into the attorney client relationship; there was no showing that someone acting on behalf of the government obtained confidential communications between the attorney and client. State v. Cory, 62 Wn.2d 371, 382 P.2d 1018 (1963), State v. Pena Fuentes, 179 Wn.2d 808, 318 P.3d 257 (2014). The trial court erred when it found that there was a purposeful intrusion into the attorney client relationship simply because its order for visits in contact room was not complied with on one occasion.

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[3] Since DOC was not a party to the criminal action, and had not entered the criminal case in an official capacity to respond to any motion brought in this case the Superior Court likely did not have jurisdiction to enter an order affecting the rights of DOC to manage its population. Woodfield Neighborhood Homeowner's Association v. Graziano, 154 Wn. App. 1, 3, 225 P.3d 246 (2009). (The trial court lacks jurisdiction to adjudicate a dispute if all necessary parties are not before it.) If the court lacked jurisdiction over DOC then the order was void, and DOC had no obligation to comply with the order. Dike 75 Wn.2d at 7-8.

C. THE COURTS FINDINGS OF FACT THAT ARE SUPPORTED BY SUBSTANTIAL EVIDENCE DO NOT SUPPORT THE CONCLUSION THAT THERE WAS GOVERNMENTAL MISCONDUCT ARISING FROM THE MAY 2013 ATTORNEY VISIT OR CELL SEARCH.

The State assigned error to the court's conclusion that an attorney client visit in a no contact room at Clallam Bay Corrections Center constituted government misconduct. BOR at 28-29; 2 CP 599. The defendant argues that the court did not err because defense attorneys asked a corrections officer to pass paperwork to the defendant, that officer had the paperwork for about 10 minutes, and then only delivered one of the documents counsel asked to be passed to him. He argues that it was reasonable to conclude that the DOC officer read the documents during that 10 minute period of time.

On this point the only evidence in the record was that the officer did not read the documents. 8/23/13 RP 399-400; BOR at 35. The court made no specific finding regarding the officer's transfer of paperwork from the attorney to the defendant except to note that there was no pass through slot for document delivery in the no contact room 2 CP 597. The court did find that there was no evidence that the prosecution had obtained any information

relating to the defendant's case that it would use to prejudice his right to a fair trial. 2 CP 604.

In light of affirmative evidence that the officer did not read the documents there is no basis on which to conclude that government misconduct occurred as a result of manner in which documents were transferred between attorney and client during a visit in the no contact room.

The defendant relies on the circumstances of the document transfer to argue that it was reasonable for the court to conclude that the officer had read those documents. If the court had made that finding it would be based on pure conjecture. The affirmative evidence in the record showed that defense counsel put the officer in an unfamiliar position by asking her to transfer those documents to the defendant. The delay in transferring a document to the defendant and returning other documents to defense counsel was due to the time it took the officer to find out what could be done pursuant to prison policy in that circumstance. Once she learned what the procedure for doing so was, she complied with it. 8/23/13 RP 399-400. In light of these facts the short delay that occurred in transferring the document to the defendant did not lead to a reasonable inference that the officer intruded into any attorney-

client communication. The court erred when it concluded that attorney-client visits in a no contact room constituted government misconduct by DOC.

II. CONCLUSION

For the foregoing reasons the State asks the court to find that the trial court erred when it entered certain findings of fact and conclusions of law. For the reasons stated in the State's Response brief and brief of cross-appellant the State asks the court to affirm the defendant's conviction.

Respectfully submitted on February 16, 2016.

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IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

THE STATE OF WASHINGTON, Respondent, v. JIMI J. HAMILTON, Appellant.	No. 72516-5-I DECLARATION OF DOCUMENT FILING AND E-SERVICE

AFFIDAVIT BY CERTIFICATION:

The undersigned certifies that on the 16th day of February, 2016, affiant sent via e-mail as an attachment the following document(s) in the above-referenced cause:

REPLY BRIEF OF RESPONDENT-CROSS-APPELLANT

I certify that I sent via e-mail a copy of the foregoing document to: The Court of Appeals via Electronic Filing and Kevin March, Nielsen, Broman & Koch, MarchK@nwattorney.net; and Sloanej@nwattorney.net.

I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 16th day of February, 2016, at the Snohomish County Office.

Diane K. Kremenich
Legal Assistant/Appeals Unit
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