NO. 77618-1

95773-8

Supreme Court Of The State of Washington

State Of Washington,
Respondent,

V S.

Charles S. Longshore, III
PeHtioner.

Petition For Review

Charles S. Longshore, III
%o Mason County Jail
P.O. Box 519
Shelton, WA 98584
360-427-9670
Prose, PeHtioner.

A. Identity Of Petitioner

Charles Longshore, III Petitioner asks this Court to accept review of the decision designated in Part B. of this Petition.

B. Decision

Petitioner seeks review of the entire decision of the Court of Appeals affirming the trial courts order denying Defendants Motion to dismiss under CrR 8.3 (b) based on States Violation of Attorney-Client Privilege.

C. Issues Presented For Review.

1) Does a Trial Court Error if it fails to enter written findings of fact and conclusions of law after denying a defendants Motion for dismissal under CrR 8.3(b), when that failure precludes effective appellate review? If so, did the Court of Appeals error in failing to reverse and remand for entry of written findings and fact and conclusions of law?

2) Does a Trial Court Error if it denies a Motion to dismiss under CrR 8.3(b) when the defendant demenstrates that (1) the Police and Prosecution intentionally violated the defendants rights to confidential attorney-client communication and effective representation under Wash. Const. Article 1, §22 and U.S. Const. Sixth Amendment, and (2) That violation caused prejudice? If so, did the Court of Appeals Error in Failing to reverse the decision of the trial court?

3) Does a trial court Err by Placing the burden of proof on a criminal defendant in the context of a CrR 8.3(b) motion to dismiss, thats based on the States invasion and photo-copying of Attorney-client communication, when the State is the only one that knows what its done with the privet information and when its impossible to isolate prejudice? IF SO, did the court of Appeals error in failing to reverse the trial court?

4) Should there be a presumption of prejudice and the State be required to prove beyond a reasonable doubt that no prejudice has occured to the defendants right to a fair trial, when the Police seize and photo-copy Attorney-client communications and shares them with the prosecuter? IF SO, did the court of Appeals error in failing to reverse the trial court?

D. Statement of Case

By information filed May 30, 2012. The Mason County Prosecuter charged the defendant with two counts of aggravated first degree Murder. CP 271-272. Following trial on the matter the Jury found the defendant guilty on both counts. CP 256. The court later sentenced the defendant to two terms of life in prison without the possibility of release. CP 256-266. The defendant thereafter filed a direct appeal arguing in part that the trial court erred when it gave an accomplice instruction over the defendants objection. By unpublished opinion the court agreed, vacated the defendants convictions and ordered a new trial. See State v. Longshore, 197 Wn.App. 1019 (2016), as amended on denial of reconsideration (Mar. 14, 2017). Both parties filed petitions for review, which were denied by this court. Id.

During the pendency of the direct appeal, the defendant filed a pro se motion to dismiss under CrR 8.3, along with supporting declarations, and records. CP 234, 228-223, 224-227, 228-223,

93-110[1] The essence of defendants factual and legal claims are as follows: (1) That prior to trial he was transferred from Mason Co. Jail to Dept of Corrections, (2) That part of this transfer he was forced to leave a large bag of documents at the Jail, (3) that the lead investigator of his case of the Shelton Police Dept searched the bag, read and copied all the documents, and in turn provided copies to the Mason Co. prosecutor, who then read all the documents and provided them to all defendants counsels, (4) That at least one of the documents was titled "Questions to ask Attorney" included trial and defense strategy immediately recognizable as an Attorney-Client communication, (5) That the prosecutor knew that he was violating the attorney client privilege when he read this document, (6) That the State's review and use of this document caused prejudice and denied the defendant a fair trial. Id., RP. 26-75, 112-124 [2]

In its response to the defendants motion the state did not argue that it had not seen or read the document. CP 111-220, RP 75-112. In fact, as part of normal discovery process the State provided all defendants counsels with copies of all the documents the Detective had taken from defendants Property bag at the Jail, including the document titled "Questions to Ask Attorney" Id. Rather the state argued that (1) the document included was not privileged because it was included as part of other documents taken from the Jail, (2) That if the document is attorney-client privileged, the defendant failed to prove the states review of this document caused prejudice, as required by CrR 8.3(b) RP 75-112.

Following a hearing in the case, during which the court heard argument from both parties, the trial court orally denied the motion RP 131-137. The court later entered the following written order:

> "It is hereby ordered: That the defendants motion to dismiss filed March 14, 2016, is hereby denied. Findings to be presented later".

However, the state nore the court ever prepared or presented any Findings concerning this motion. Following order defendant filed a timely notice of Appeal. CP 19. The Court of Appeals after receiving

[1] The clerk papers are in reverse order, the first document has the highest number, [234] but oldest in the list. [2] The record on Appeal is one volume of verbatim reports of 11/17/15, 3/29/16, 4/19/16, 7/1/16, 9/27/16 referred to herein a "RP [case #]".

all the briefs considered the matter and affirmed the trial courts see State v. Longshore, NO. 77764-5-I (March 5, 2019). In so the court of Appeals held (1) The trial courts did not err in failing to file written findings of fact and conclusions of law, because the rule only requires it when such a motion is "granted" not "denied", (2) That the absense of written statement did not hamper review, (3) That the court did not err in denying his motion to dismiss because its decision was not manifestly unreasonable and (4) that the burden of proof was on the defendant to show prejudice Id. Longshore then filed timely motion to publish, which was denied, and in turn hereby files a timely petition for review by the supreme court.

E. Argument why Review Should Be Accepted

1) Does a trial court err if it fails to enter written findings of Fact and conclusions of law after denying a defendants motion for dismissal under CrR 8.3(b), when that failure precludes effective appellate review? If so, did the court of Appeals err in failing to reverse and remand for entry of written findings and fact and conclusions of law?

In instances where a trial court "Grants" a defendants motion to dismiss pursuant to CrR 8.3(b) a trial court is required to enter written findings of Fact and conclusions of law. However, the rules are silent and courts havent agreed, as to whether or not written findings of Fact and conclusions of law, are also required, and/or necessary, when a trial court "Denys" a defendants motion to dismiss pursuant to CrR 8.3(b). Thus, necessitating review by this court pursuant to RAP 13.4(b)(3) and (4).

CrR 8.3(b) Provides:

"On motion of court. The court, in the furtherance of Justice, after notice and hearing, may dismiss any criminal prosecution due to arbitrary action or governmental misconduct when there has been prejudice to the

rights of the accused which Materially affect the accused rights to a fair trial". The court[shall] set forth its reasons in a written order."

The rule grants the trial court discretion to dismiss a case upon its own motion. Under CrR 8.3(b), when a trial court dismisses a case for governmental misconduct, it must set out its reasons in a written order. This rule does not and [the Court of Appeals Division I] agrees, address circumstances here, where a trial court denies a defendants motion to dismiss for governmental misconduct. Because the rule is silent, the court of Appeals found no error for not entering written findings of Fact and conclusions of law. But absence of these findings its hampered review in this case.

For Example In State v. Garza, 99 Wn. App. 291 (2000) the Court of Appeals was faced with a similar situation. Division 3 In part Stated:

"In this case, the Superior courts [written and oral] findings indicate the Jail officers examination of the defendants legal materials was [purposeful]. The court concluded, however, that the examination of the legal materials was [justified] by the Jails legitimate concerns about the attempted escape. This conclusion misses the point.. Certainly the escape attempt justified the search, but the percise question is whether the security concerns justified such an extensive intrusion into the defendants privet attorney-client communications"

"This determination requires a precise articulation of what the officers were looking for, why it might have been contained in the legal materials, and why closely examing or reading the materials was required. We conclude the superior court Abused its discretion by failing to resolve these critical Factual questions. Without more specific fact finding, its impossible to determin whether the officers actions were [justified]. If on remand, the superior court finds Jail security concerns did not justify the specific level of —

intrusion here, there should be a presumption of prejudice, establishing a constitutional violation."

Garza illistrates the importance of specific findings, especially in circumstances as here, intrusion into the attorney-client privliged communication. Because the court did not enter written finding of fact and conclusions of law, like Garza, without more specific fact findings its impossible to determin whether the search was ruled [purposeful] and if so, was it [Justified] by any legitimate security concerns.. But lets not forget, here, unlike Garza, Detectives searched, read and copied the documents and shared them with the Prosecuter. Thus, NO security concern exsisted. And Because, these findings are relevant to the presumption of prejudice Analaysis, it hampered review, in not entering them. Wherefor, the Court of Appeals errored in Failing to reverse for entry of findings of Fact and conclusions of law. So the Court of Appeals could — determin whether the trial court abused its discretion in Failing to presume prejudice as required under this Supreme Courts precedent State v. Peña-Fuentes, 179, [redacted] wn.2d 808 (2014) and Division III's State v. Garza, 99 wn. App. 291 (2000). warrenting review under RAP 13.4 (b)(1),(2) and (3)

2) Does a trial court err if it denies a motion to dismiss under CrR 8.3(b) when the [redacted] defendant demenstrates that (1) police and Prosecuters intentionally violated the defendants rights to confiden tial Attorney-Client communication and effective representation under Wash. const. Art 1, §§ 22 and U.S. const. Sixth Amendment, and (2) That the violation caused prejudice? If so, did the Court of Appeals err in Failing to reverse the decision of the trial court?

Denial of a motion to dismiss under this rule is — reviewed for abuse of discretion. State v. Michielli, 132 wn.2d 229, 240, 937 P.2d 587, 71 A.L.R. 5th 701 (1997) To support — dismissal under this rule a defendant must show arbitrary action or governmental misconduct resulted in prejudice —

affecting the right to a fair trial. Id at. 239, 937 P.2d 587. The arbitrary action or Mismanagment need not be evil or dishonest, simple Mismanagement is enough. Id. Second, the defendant MUST demenstrate prejudice affecting his or her right to a fair trial. City of Seattle v. Orwick, 113 wn.2d 823, 830, 784 P.2d 161 (1989) But dismissal is not Justified when Supression of evidence will eliminate whatever prejudice is caused by the action or Misconduct. Orwick, 113 wn.2d at 831, 784 P.2d 161.

Here However, the evidence and facts before the court met the burden of proof required under CrR 8.3(b). But Lets not horget any purposeful and unJustified intrusion into a defendants privet communication is presumptively prejudicial. State v. Garza, 99 wn. App. 291 (2000), State v. Peña-Fuentes, 179, wn.2d 808 (2014), State v. Granacki, 90 wn. App. 598 (1998) and State v. Lenarz, 301 conn. 417 (Conn. 2011). First, its undisputed NO security concern was determined. Second, its undisputed the detective read, seized and photocopied and prouided the State the attorney-client privilaged communication, Third its undisputed the prosecuter read and disclosed this privet communication to all defendant(s) counsels through normal discoveryprocess.

With these Facts in Mind, its hard to understand the trial courts decision was not manifestly unreasonable or based on untenagable grounds.

Rather, the only dispute it came down to was a) — whether the actions and review of the attorney-client document resulted in prejudice and b) whether the defendant waived his attorney-client privilige by leaving it at the Jail in the bag of property?

In State v. Cory 62 wn.2d 371 (1963) This court held:

"There is no meaningful way to isolate prejudice resulting from such interference even if a new trial is granted. As the

Court observed.. the right to have assistence of Counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial".. Id Grancki, 90 wn. App 598 (1998) (Same)

In U.S. V. Cohen, 796 F.2d 27 (2d Cir. 1986) Their Court of Appeals was Faced with a similar circumstence and stated:

> "In this case it is plain, that no INSTITUTIONAL need is being served, were it a 'Prison official' that initiated the search of Barrs cell, established decisional law holds that the search would not be subject to constitutional challange, regardless of whether security needs could justify it. But here the search was initiated by the prosecution solely to obtain information for a superseding indictment. In our view, this kind of search of a prisoners cell falls outside the rationale of the decided cases.. Barr retains, a fourth Amendment right". Id.

At minimum, Defendants Declaration, Defense Counsels Declaration, and the Document in question and record demenstrated prejudice could of manifest itsself in several ways: 1) That the Document showed the defendants decision to go to trial under all circumstences, thus put the state at unfair advantage to make plea deells with co-defendents to secure a conviction, 2) The the defendant wanted supression of Statement MOTIONS filed on the grounds of Intoxication, thus putting the State on notice to prepare for this line of Attack, 3) That the seizure of the document in question and subsequent documents precluded the defense from calling a Material witness Erica Rodriguez, As the State had the substence of her testimony and impeachment evidence it gathered.. As such, the trial Court erred and the Court of Appeals erred in Failing to implement an adequate remedy or reverse for further instructions..

"As this court correctly Stated in Peña-Fuentes:

> The defendant is hardly in a position to show prejudice when only the state knows what was done with the information gleaned from the eavesdropping.." Id at 179 wn.2d 808 at 820-21..

Because its unclear where the lines draw between Lawenforcement

for prosecuter purposes or Jail Guards actions for security concerns in this particular context. And the two agencies are seperate and distinct, this court should accept review and resolve the issues herein. pursuant to RAP 13.4(b)(3) and(4)

3) Does a trial court err by placing the burden of proof on a criminal defendant in the context of a CrR 8.3(b) Motion to dismiss, thats based on the states invasion and photo-copying of Attorney-client communication, when the State is the only one that knows what it's done with the privet information and when its impossible to isolate prejudice? If so, did the Court of Appeals error in failing to reverse the trial court?

This court has time and time again addressed the circumstances and burden of proof in cases of —— Governmental misconduct and/or mismanagment, when the State violates the attorney-client privilige and results in prejudice to the accused right to a fair trial. Yet the court of Appeals and trial court have refused again to listen to the teachings set forth in the Following Circumstances

1) The Cory court presumed prejudice arising from the eavesdropping that occured during trial. Id at 377 & n.3, 382 P.2d 1019.

2) The Fuentes court found presumption of prejudice and held the state to have the burden of proof beyond a resonable doubt that the defendant was not prejudiced. Id at 819-21 & n.4,5 318 P.3d 257.

Yet, we are here again because its still not clear when actually does the presumption of prejudice Apply? and when

does the burden of proof shift to the State instead of the defendant? warranting review by this court in several regards under RAP 13.4(b)(1),(2),(3) and(4)

In State v. Fuentes, the State argued that the burden of proof should be on the defendant to show prejudice when the information is [not] communicated to the prosecutor. In striking down this argument the Supreme Court held:

"The State is the party that improperly intruded on attorney client communication and it must be proved is wrong ful actions did not result in prejudice, to the defendant."

"Further, the defendant is hardly in a position to show prejudice when only the State knows what was done with the information learned from the eavesdropping."

"The proper standard must apply is proof beyond a reasonable doubt with the burden on the State"

Id at 179 wn.2d 808(2014)

Subsequently, the trial court and court of appeals found under CrR 8.3(b) the correct burden of proof is 1) misconduct and 2) actual prejudice.

While this is true and the general rule, circumstances have shown us this is not always the correct standard to be applied. In State v. Garza, Division III recognized no Washington authority is found that directly addresses "who" the burden of proof is on in these circumstances.. I found State v. Cory, to be the closest. where Jailers eaves-dropping was both purposeful and without justification, The court presumed prejudice to the defendant. Similarly, Grancki, the deputys examination of defense counsels legal pad was purposeful and without justification, the superior court properly presumed prejudice. In unpublished case State v. Crary, the court held [any] purposeful and unjustified "governmental intrusion into defendants privet communications is presumptively prejudical, 124 wn.App. 1038 (2004).

Deplte State v. Fuentes which is the case more analogous to this one. The court of Appeals here relied on State v. Salgado-Mendoza, 189 wn. 2d 420 (2017) when it held the trial court did not err in placing the Burden of proof on the defendant. But Salgado-Mendoza, did not involve circumstances as here violation and examination of Attorney-client communications by the State. Rather, Salgado-Mendoza, involved defense motion to suppress the testimony of State toxicology witness. For Failing to disclose him as a witness. Thus, the court of Appeals held the wrong standard applied to this case.

Instead, the court of Appeals should of Looked to State v. Cory and State v. Fuentes for the correct Standard to be Applied. This decision also conflicts with published court of Appeals decisions in State v. Garza, and essesionally overruled its own decision in State v. Granacki. As well Division II's In re PRP of Amos, 1 wn. App 578 (2017).. wherefor, (1) the decision is in conflict w/ the supreme court, (2) is in conflict with a published decision of the court of Appeals and (3) presents both a significant question of law under the Constitution of Washington and United States. Finally, involves a — substantial public interest that should be determined by this court.

4) Should there be a presumption of prejudice and the State be required to prove beyond a reasonable doubt that no prejudice has occured to the defendants right to a fair trial, when the police seize, photo copy Attorney client communications and share them with the prosecuter? If so, did the court of Appeals error in failing to reverse the trial court?

In State v. Fuentes, this court addressed the question of the burden of proof in circumstances where the State violates attorney-client privilge. Where Law enforcement were tasked with listening to Fuentes phone calls.. But this court has not had the opportunity to address the burden of proof in circumstances where law enforcement read, photocopy and provide the prosecuter confidential Attorney-client notes found in a Jail context.

Unlike Fuentes, the lead detective here communicated the privet information to the prosecuter, who shared this same information to all defendants involved counsels. The State never notified defence counsel of the document in question. Instead, defence counsel discoverd it in a batch of approx 300 documents disclosed with it through normal discovery process.

As such, because this information was "communicated to the prosecuter and taken by law enforcement for evidentary and prosecuter purposes, and not by Jail Guards for security reasons.. this issue warrents review under RAP 13.4(b)(3) and(4).

F. Conclusion

For the above reasons this court should Accept review and Appoint counsel in this matter.

Dated This 10th day of April 2018

Charles S. Longshore
Mason Co. Jail
PO Box 519
Shelton, WA 98584

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. CHARLES S. LONGSHORE, III, Appellant.	)	No. 77764-5-I DIVISION ONE UNPUBLISHED OPINION FILED: March 5, 2018

SPEARMAN, J. — Under CrR 8.3(b), a trial court has discretion to dismiss a criminal prosecution where there has been governmental misconduct that prejudiced the defendant's right to a fair trial. Charles S. Longshore appeals the denial of his motion to dismiss based on government misconduct. But because the trial court's decision is not manifestly unreasonable, we affirm.

FACTS

Longshore was charged with two counts of aggravated first degree murder and detained at the Mason County jail. While there, he maintained a correspondence with his girlfriend. Longshore was later transferred to the Washington Correction Center (WCC). The WCC allows transferees to bring legal, but not personal, papers. Longshore took an envelope of legal paperwork with him to the WCC and left his personal papers in a bag at the Mason County jail.

After the transfer, a detective from the Mason County Police Department visited the jail to photograph drawings and marks that Longshore left on the wall of his cell. Jail staff told the detective that Longshore had left a bag of papers. The detective skimmed the first few papers and believed they were correspondence between Longshore and his girlfriend. The detective forwarded copies of the papers to the prosecutor's office. The prosecutor distributed copies to Longshore's attorney as discovery.

The copies consisted of about 45 pages. The majority of the pages are letters between Longshore and his girlfriend. The correspondence discusses their relationship and their desire to get married. The letters also address the circumstances of Longshore's arrest, the charges against him, the possibility of a death sentence, trial dates, trial strategy, and Longshore's desire to go to trial rather than plead.

One of the copied pages is a document titled "Questions for Attorney." Clerk's Papers (CP) at 33. The page, which appears to be in Longshore's handwriting, contains a list of seven topics: (1) whether Longshore and another party were lawfully arrested; (2) whether the prosecutor will commit felony harassment if he seeks the death penalty in the hopes that Longshore will plead; (3) Longshore's desire to go to trial before any of his codefendants; (4) whether his marriage application has been handled; (5) Longshore's desire to suppress everyone's statements; (6) whether Longshore has a claim against the Mason County Sheriff's office for the theft of his vehicle from the crime scene; and (7) the need to suppress evidence.

When Longshore's attorney received the copies from the prosecutor's office, he noticed the "Questions for Attorney" page. He filed a motion to compel the State to account for how it obtained the document and the legal basis for its violation of the attorney-client privilege. The issue was heard in pretrial motions. No motion to suppress the evidence was brought. None of the papers from Longshore's cell were introduced into evidence.

At trial, a jury convicted Longshore as charged. Longshore appealed. See State v. Longshore, 197 Wn. App. 1019, 2016 WL 7403795 (2016). While his direct appeal was pending, Longshore filed a pro se motion to dismiss the charges against him. Longshore alleged that the government committed prejudicial misconduct by obtaining the "Questions for Attorney" page through an improper search. He asserted that the document contained details about trial strategy that benefitted the State.

The State contended the "Questions for Attorney" page was the product of a valid search and any violation of the attorney-client privilege was inadvertent. The State asserted that reading the page did not prejudice Longshore because the document had minimal relevance and did not address trial strategy. To the extent the document addressed Longshore's trial, the State argued, the same information was revealed in more detail in non-privileged documents.

The trial court agreed with the State in a lengthy oral ruling. Assuming without deciding that the page constituted privileged attorney-client communication, the court found that the State's violation of the privilege was not

deliberate and did not result in prejudice. The court's written order denies Longshore's motion but does not set out findings of fact or conclusions of law.

DISCUSSION

Longshore appeals the denial of his motion to dismiss under CrR 8.3(b).[1] He first contends the trial court erred in failing to issue written findings of fact or conclusions of law. Longshore asserts that CrR 8.3(b) requires the court to state the reasoning behind its decision in a written order.

Superior Court Criminal Rule 8.3(b) states:

> **On Motion of Court.** The court, in the furtherance of justice, after notice and hearing, may dismiss any criminal prosecution due to arbitrary action or governmental misconduct when there has been prejudice to the rights of the accused which materially affect the accused's right to a fair trial. The court shall set forth its reasons in a written order.

The rule grants the trial court discretion to dismiss a case upon its own motion. Under CrR 8.3(b), when the trial court dismisses a case for governmental misconduct, it must set out its reasons in a written order. The rule does not address the circumstance here, where the trial court denies a defendant's motion to dismiss for governmental misconduct. Because the rule mandates no procedure in this circumstance, Longshore fails to show that the trial court was required to enter a written statement of reasons.

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[1] The procedural posture of this case is confused. Longshore is appealing the denial of a post judgment motion. The denial of a post judgment motion may be but is not always subject to review. RAP 2.2, 7.2(e). The State does not challenge appealability and thus appears to concede that Longshore's appeal is properly before this court. We assume for purposes of this appeal that review of the trial court's decision is proper under RAP 2.2(13), as a final order after judgment that may affect a substantial right.

Longshore asserts, however, that the absence of a written statement of reasons hampers review. He asks us to remand for entry of written findings of fact and conclusions of law. Longshore relies on State v. Michielli, 132 Wn.2d 229, 937 P.2d 587 (1997). But Michielli is of no help to him because that case concerns appellate review of a trial court's order dismissing a case, for which, as discussed above, the rule requires a written explanation of the court's reasons. Michielli, 132 Wn.2d at 233. That is not the case here.

Longshore next contends the trial court erred in denying his motion to dismiss. The trial court may dismiss a case pursuant to CrR 8.3(b) where there has been governmental misconduct that prejudiced the defendant's right to a fair trial. Michielli, 132 Wn.2d at 239-40. We review the trial court's decision on a motion to dismiss under CrR 8.3(b) for abuse of discretion. The trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds.

Longshore contends the trial court abused its discretion because the State's violation of attorney-client communication prejudiced his right to a fair trial. He argues that the "Questions for Attorney" page revealed his determination to go to trial, reading the document spurred the State to offer plea deals to Longshore's codefendants, and the plea deals allowed the State to obtain the codefendants' testimony against Longshore.

The record does not support this argument. Of the seven items on the "Questions for Attorney" page, three address Longshore's upcoming trial. Reproduced verbatim, these state:

> 3.) I need to get into trial befor [redacted] or anyone. Exsplane theory and stradegy.
>
> ...
>
> 5.) We need to get all of my recorded statements suppressed and everyone eles. Every person was intoxicated and under mind Altering substences makes statements invalid.
>
> ...
>
> 7.) Evidence suppress [illegible] is needed in this [illegible]

CP at 33.

The "Questions for Attorney" page does not reveal Longshore's determination to go to trial or address whether he would consider a plea deal. In contrast, Longshore's letters to his girlfriend, which were not privileged, predict that the prosecutor will offer plea deals to Longshore and his codefendants, opine that Longshore will receive a shorter sentence at trial than through a plea, and express his desire to go to trial.

The allegedly prejudicial information was contained, not in the "Questions for Attorney" page, but in non-privileged documents. Longshore presents no other argument as to prejudice. He fails to show that the trial court's denial of his motion to dismiss was manifestly unreasonable.

In a statement of additional grounds, Longshore contends the trial court erred by applying the wrong burden of proof. He asserts the trial court should have presumed prejudice in this case. Longshore is mistaken.

In a motion to dismiss under CrR 8.3(b), the defendant "bears the burden of showing both misconduct and actual prejudice." State v. Salgado-Mendoza, 189 Wn.2d 420, 427, 403 P.3d 45 (2017). Where the State has committed egregious misconduct by deliberately eavesdropping on attorney-client

communications, a presumption of prejudice arises. State v. Fuentes, 179 Wn.2d 808, 818-20, 318 P.3d 257 (2014). The burden then shifts to the State to rebut that presumption. Id. at 820.

In this case, the trial court acknowledged that when the State deliberately and egregiously intrudes into the defendant's attorney-client communication, a rebuttable presumption of prejudice arises. But because it found no deliberate or egregious intrusion in this case, the trial court properly did not apply the presumption or place the burden of rebutting it on the State. There was no error.

Because the court found no deliberate government misconduct, Longshore had the burden to show prejudice. When he failed to do so, the court properly denied his motion. There was no abuse of discretion.[2]

Affirmed.

Spearman, J.

WE CONCUR:

Cox, J.

[2] We do not reach the State's argument that the "Questions for Attorney" page was not privileged attorney-client communication. And, because the State asserts that it does not intend to seek an award of appellate costs, we do not address Longshore's request that we decline to award costs to the State.

FILED
4/3/2018
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. CHARLES S. LONGSHORE, III, Appellant.	No. 77764-5-I DIVISION ONE ORDER DENYING MOTION FOR EXTENSION OF TIME TO FILE A MOTION TO RECONSIDER AND DENYING MOTION TO PUBLISH

Appellant, Charles S. Longshore, III, filed a motion for extension of time to file a motion to reconsider and a motion to publish the opinion filed in the above matter on March 5, 2018. A majority of the panel has determined the motion for extension of time to file the motion to reconsider should be denied and the motion to publish should be denied.

NOW THEREFORE, IT IS HEREBY ORDERED that the motion for extension of time to file a motion to reconsider is denied;

IT IS FURTHER ORDERED that the motion to publish is denied.

FOR THE COURT

JOHN A. HAYS, ATTORNEY AT LAW

April 19, 2018 - 3:10 PM

Transmittal Information

Filed with Court:	Court of Appeals Division I
Appellate Court Case Number:	77764-5
Appellate Court Case Title:	State of Washington, Respondent v. Charles S. Longshore, III, Appellant
Superior Court Case Number:	12-1-00219-3

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