

No. 38977-1-II

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Petitioner,

v.

CLARK MANKIN,

Respondent.

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STATE OF WASHINGTON
BY MADURY

COURT OF APPEALS
DIVISION II

BRIEF OF AMICUS CURIAE OF THE
WASHINGTON DEFENDER ASSOCIATION
AND THE WASHINGTON ASSOCIATION OF CRIMINAL
DEFENSE LAWYERS

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TABLE OF CONTENTS

INTEREST OF AMICUS CURIAE..... 1

ISSUES TO BE ADDRESSED BY AMICUS 3

ARGUMENT 4

I. The Defendant is Denied the Due Process Right of Effective
and Competent Counsel when the Defendant is Not Able
to Tape Record a Pre-trial Interview with a Police Officer. 4

II. Requiring Police Officers to Agree to Tape Recording
Promotes Efficiency and Justice..... 6

III. The Washington Privacy Act Does Not Apply to
Conversations Between a Police Officer Acting in an
Official Capacity During a Defense Interview in Anticipation
of Testifying at Trial. 8

CONCLUSION 11

TABLE OF AUTHORITIES

Washington State Cases

Johnson v. Hawe, 388 F.3d 676, 682 (9th Cir. 2006) 8

State v. Burri, 87 Wash. 2d 175, 180 550 P.2d 507 (1976) 4

State v. Fjermestad, 114 Wn.2d 828, 836, 791 P.2d 897 (1990).... 8

State v. Flora, 68 Wn. App. 802, 845 P.2d 1355 (1992) 8

State v. Yates, 111 Wash. 2d 793, 765 P.2d 291 (1988)..... 5, 6, 7

Washington State Statutes

RCW 9.73.030 8

Washington State Rules

CrR 3.3(f) 7

CrR 8.3..... 7

Treatises

Am. Bar Assoc., Standards for Criminal Justice Discovery and Trial
by Jury 2 (3d ed. 1996). 6

United States Constitution

U.S. CONST. amend. VI..... 4

Washington State Constitution

Wash. Const. article I, § 22..... 4

INTEREST OF AMICUS CURIAE

The Washington Defender Association (“WDA”) is a statewide non-profit organization, with 501(c)(3) status. The membership of WDA is comprised of public defender agencies, indigent defenders and those who are committed to seeing improvements in indigent defense. More than one thousand persons are members of WDA.

The WDA bylaws state the purposes of the organization, which include, as a specific purpose, that WDA is seeks “to improve the administration of justice and to stimulate efforts to remedy inadequacies or injustice in substantive or procedural law”. WDA believes strongly in promoting the rights of indigent persons and upholding the protections guaranteed by Article 1, Section 22 of the Washington State Constitution, which ensures the rights of a defendant in a criminal case to due process and a fair trial.

WDA and its members have previously been granted leave to file amicus briefs on issues relating to these and other issues relating to criminal defense and indigency.

The Washington Association of Criminal Defense Lawyers (“WACDL”) is an association made up of attorneys practicing criminal defense law in Washington State. WACDL is a not-for-

profit corporation, with 501(c)(3) tax-exempt status. The association's objectives and purposes are defined in its bylaws as follows:

Washington Association of Criminal Defense Lawyers was formed to improve the quality and administration of justice. The objectives and purposes of this organization shall be as follows:

- A. To protect and insure by rule of law those individual rights guaranteed by the Washington and Federal Constitutions, and to resist all efforts made to curtail such rights;
- B. To improve the professional status of all lawyers and to encourage cooperation between lawyers engaged in the furtherance of our objectives through publications, education, and mutual assistance; and
- C. To engage in all activities on a local, state and national level that will advance the purposes for which this organization is formed in order to promote justice and the common good of the citizens of the United States.

WACDL representatives frequently testify at Washington House and Senate Committee hearings on proposed legislation affecting criminal defendants. WACDL has been granted leave on numerous occasions to file amicus briefs in the Washington appellate courts.

WACDL contains over 1100 attorneys. The WACDL amicus committee has approved the filing of this brief.

This Court's decision in this case has potentially far-reaching implications to criminal practice in this State.

ISSUES TO BE ADDRESSED BY AMICUS

- I. Whether the refusal of police officers to be tape recorded during a pretrial interview denies due process to the accused under the Federal and State Constitutions.
- II. Whether the efficiency and need to expedite criminal proceedings is obstructed by a police officer's refusal to be tape recorded during a pretrial interview.
- III. Whether the Washington Privacy Act applies to police officers while performing official public duties when they do not have a reasonable expectation of privacy.

ARGUMENT

- I. The Defendant is Denied the Due Process Right of Effective and Competent Counsel when the Defendant is Not Able to Tape Record a Pre-trial Interview with a Police Officer.

Denying the defense the opportunity to tape record a pre-trial interview is a denial of due process rights guaranteed by the federal and Washington state constitutions because it conflicts with the right to effective, competent and prepared defense counsel.

The Sixth and Fourteenth Amendments of the U.S. Constitution and Article I, § 22 of the Washington State Constitution guarantee a defendant's right to a fair trial. "A fair trial contemplates the defendant will not be prejudiced by the denial to him of his right to counsel and compulsory attendance of witnesses." State v. Burri, 87 Wash. 2d 175, 180, 550 P.2d 507 (1976). The right to compel a necessary witness's attendance, i.e., the defendant's right to present a defense, "is a fundamental element of due process law. Id. at 180-81. The right to interview a witness in advance of trial is included in the defendant's right to compulsory process. Id. at 181.

“Criminal Rules, CrR 4.7, guide the trial court in the exercise of its discretion over discovery,” and the principles behind that rule have been stated as follows:

In order to provide adequate information for informed pleas, expedite trials, minimize surprise, afford opportunity for effective cross-examination, and meet the requirements of due process, discovery prior to trial should be as full and free as possible consistent with protections of persons, effective law enforcement, the adversary system, and national security.

State v. Yates, 111 Wn. 2d 793, 797, 765 P.2d 291 (1988).

“These rules are intended to provide for the just determination of every criminal proceeding. They shall be construed to secure simplicity in procedure, fairness in administration, effective justice, and the elimination of unjustifiable expense and delay.” Id.

If the Court were to reach a decision that would deny the defendant the ability to insist on tape recording a pre-trial interview with a material witness, it would result in increased expense and delay, complexity in procedure, and would leave open the possibility for unjust determinations in criminal proceedings.

II. Requiring Police Officers to Agree to Tape Recording Promotes Efficiency and Justice

“Meaningful pretrial discovery promotes fairness and justice.” Am. Bar Assoc., Standards for Criminal Justice Discovery and Trial by Jury 2 (3d ed. 1996). Enforcing the defendant’s right to tape record pre-trial interviews with police and other state witnesses ensures that defense interviews are both meaningful and expedient. Our courts have affirmed that one of the most important reasons pre-trial discovery “should be as full and free as possible” is to expedite trials. State v. Yates, 111 Wash.2d 793, 797, 765 P.2d 291 (1988). Enforcing a defense request that interviews be recorded ensures that these goals are met.

Requiring the police witness to be tape recorded upon defense request leads to many efficiencies and promotes justice. An exact recording of the interview ensures that there will be no arguing at trial over what was said at the interview. It allows the prosecutor and defense counsel to conduct the interview without the need for an independent recorder and ensures that they do not become witnesses to the conversation. It eliminates the need for an independent recorder to be sure that interview notes are an accurate transcription of the interview. It encourages full disclosure

and honesty during the interview and it removes the court from the discovery process.

Without a clear rule requiring tape recording of a police interview, the process of resolving criminal case is inevitably slower and the system more inefficient. When the criminal defendant is denied the opportunity to a fair trial by not being allowed to tape record a witness interview, the judge has broad discretion to correct the situation appropriately so that a defendant is not prejudiced. See, e.g., CrR 8.3; CrR 4.7 (h)(7)(i); CrR 3.3(f). If routine discovery requires regular judicial intervention supervising the interview process, the result is contrary to the intent of the discovery rules, which is to aid the expediency of trial. See Yates, 111 Wn.2d at 797. An officer's refusal to be tape recorded leads to unnecessary court intervention and will slow down the court process and ability of the parties to try the case efficiently. An officer who refuses to be recorded is likely to be subject to a motion to compel a deposition that could have been avoided had the officer been required to be tape recorded. This prolonged procedure will necessarily slow down the process of resolving the criminal case.

III. The Washington Privacy Act Does Not Apply to Conversations Between a Police Officer Acting in an Official Capacity During a Defense Interview in Anticipation of Testifying at Trial.

The purpose of the Washington Privacy Act¹ (WPA) is to protect private conversations from being recorded without the consent of all parties to the conversation. RCW 9.73.030. It has never applied to conversations that are not private. The purpose of the Act is “to protect individuals from the disclosure of any secret illegally uncovered by law enforcement.” Johnson v. Hawe, 388 F.3d 676, 682 (9th Cir. 2006) (quoting State v. Fjermestad, 114 Wn.2d 828, 836, 791 P.2d 897 (1990)). The WPA provides a judicial buffer between law enforcement and private citizens in order to protect against electronic eavesdropping. Id. (citing State v. Flora, 68 Wn. App. 802, 807, 845 P.2d 1355 (1992)).

An interview of a police officer in anticipation of that officer testifying in a public courtroom could never be considered a private conversation. To the contrary, the whole point to the interview is that is to allow the defendant to conduct an investigation and to

¹ The WPA states that it is “unlawful to ... intercept or record any ... private conversation ... without first obtaining the consent of all the persons engaged in the conversation.” RCW 9.73.030.

hold the officer accountable in a public courtroom. The WPA cannot be used as a cloak by the state to prevent the defendant from tape recording an interview with a police witness. The State's reliance on this statute is misguided.

The Washington Privacy Act does not apply in this case. When appearing for a pre-trial defense interviews, the officers were undoubtedly performing an act within their official capacity. The officers were not private citizens seeking protection from electronic eavesdropping and defense counsel did not need to seek their permission to record the interviews as he was not attempting to illegally record and expose secrets to other law enforcement officials by recording the interview. The purpose for recording the interview was to make a record of the interview and allow defense counsel to adequately prepare for trial.

The officers in this case should not be allowed to use the Privacy Act as "a sword available for use against individuals by public officers acting in their official capacity." Flora, 68 Wn. App. at 800. Here, as in Flora and Johnson, the officers had no reasonable expectation of privacy when they arrested the appellant, or when they were being interviewed by defense counsel. Just as with testimony, a pre-trial interview is an official

duty of police officers which they perform in their official capacity. When the officer participates in an interview, they are in the presence of third parties, including the prosecutor and a defense investigator. Finally, all of the parties to the conversation fully expect that the interview may be used at trial, which will clearly be held in a public courtroom before many persons not a party to the conversation.

A police officer who is interviewed in anticipation of trial and in their official capacity has clear knowledge that the conversation is not intended to be private. The very nature of the interview is a public matter. There is no expectation of privacy in these interviews and the WPA should not apply.

CONCLUSION

WDA and WACDL urge this court to uphold the defendant's right to a fair trial and full process of law by finding that the police officer's refusal to submit to a tape recorded interview constitutes a refusal to be interviewed and to grant the defendant's request for a deposition.

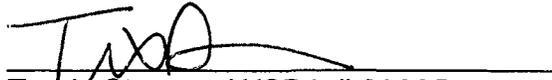
It is the position of this amicus brief that the due process rights of the defendant are denied when defense counsel is not able to tape record a police interview and that the defendant is thus denied a fair trial. It is also our contention that allowing the interview to be recorded leads to greater efficiencies in the system and that justice is served by granting the defendant's request. Finally, WDA and WACDL urge this court to find that the WPA does not apply to these clearly non-private conversations and that the purposes of the WPA are not served by allowing the state to cloak a police witness in the protections that the WPA were intended to provide to citizens.

For these reasons, WDA and WACDL respectfully request that the Court hold that the refusal of the police officer to be tape recorded during an interview constitutes a refusal to be interviewed which gives defense counsel the right to conduct a deposition.

~~DATED this ___ day of October 2009.~~

DATED this 3rd day of November ~~October~~ 2009.

Respectfully submitted,



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