NO. 88422-6

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JORGE PENA-FUENTES,

Petitioner.

RECEIVED
SUPREME COURT
STATE OF WASHINGTON
2013 JUL 31 A 10:46
BY RONALD R. CARPENTER
CLERK

STATE'S SUPPLEMENTAL BRIEF

DANIEL T. SATTERBERG
King County Prosecuting Attorney

BRIAN M. McDONALD
Senior Deputy Prosecuting Attorney
Attorneys for Respondent

King County Prosecuting Attorney
W554 King County Courthouse
516 Third Avenue
Seattle, Washington 98104
(206) 296-9000

TABLE OF CONTENTS

Page

A. ISSUES PRESENTED 1

B. STATEMENT OF THE CASE 1

C. ARGUMENT 3

1. THE TRIAL COURT PROPERLY DENIED PENA-FUENTES'S CrR 8.3(b) MOTION TO DISMISS ... 3

a. Pena-Fuentes Was Not Prejudiced Because The Detective's Actions Occurred After The Trial And The Content Of The Calls Was Not Shared With The Prosecutor ... 5

b. The Extreme Remedy Of Dismissal Is Not An Appropriate Sanction 12

D. CONCLUSION 19

TABLE OF AUTHORITIES

Page

Table of Cases

Federal:

United States v. Blue, 384 U.S. 251,
86 S. Ct. 1416, 16 L. Ed. 2d 510 (1966) 13

United States v. Morrison, 449 U.S. 361,
101 S. Ct. 665, 66 L. Ed. 2d 564 (1981) 12

United States v. Russell, 411 U.S. 423,
93 S. Ct. 1637 36 L. Ed. 2d 366 (1973) 16

Weatherford v. Bursey, 429 U.S. 545,
97 S. Ct. 837, 51 L. Ed. 2d 30 (1977) 6

Washington State:

City of Seattle v. Holifield, 170 Wn.2d 230,
240 P.3d 1162 (2010) 5

State v. Baker, 78 Wn.2d 327,
474 P.2d 254 (1970) 9

State v. Cory, 62 Wn.2d 371,
382 P.2d 1019 (1963) 8, 9, 15

State v. Fuentes, 172 Wn. App. 755,
295 P.3d 252, rev. granted,
177 Wn.2d 1008 (2013) 11

State v. Grant, 9 Wn. App. 260,
511 P.2d 1013 (1973) 6

State v. Lively, 130 Wn.2d 1,
921 P.2d 1035 (1996) 15, 16

State v. Marks, 114 Wn.2d 724,
790 P.2d 138 (1990) 5, 6, 13

State v. Modica, 136 Wn. App. 434, 149 P.3d 446 (2006),
aff'd, 164 Wn.2d 83, 186 P.3d 1062 (2008) 17

State v. Perrow, 156 Wn. App. 322,
231 P.3d 853 (2010) 9

State v. Puapuaga, 164 Wn.2d 515,
192 P.3d 360 (2008) 5

State v. Wilson, 149 Wn.2d 1,
65 P.3d 657 (2003) 5

Other Jurisdictions:

People v. Alexander, 49 Cal.4th 846,
235 P.3d 873 (2010) 7

People v. Pobliner, 32 N.Y.2d 356,
298 N.E.2d 637 (1973) 14

State v. Andersen, 784 N.W.2d 320 (Minn. 2010) 7

State v. Lenarz, 301 Conn. 417 (2011) 15

State v. Pecard, 196 Ariz. 371,
998 P.2d 453 (Ariz. Ct. App. 1999) 14

State v. Sherwood, 174 Vt. 27,
800 A.2d 463 (2002) 14

Constitutional Provisions

Federal:

U.S. Const. amend. VI 7, 12, 15

Rules and Regulations

Washington State:

CrR 8.3 ..... 1, 3, 5, 15

RAP 9.6 17

RAP 9.11 ..... 1, 17

A. ISSUES PRESENTED

1. Whether the trial court acted within its discretion in denying Pena-Fuentes's CrR 8.3(b) motion to dismiss for governmental misconduct.

2. Whether the trial court acted within its discretion in denying Pena-Fuentes's belated discovery request.

3. Whether Pena-Fuentes failed to show that the trial court erred by not admitting L.P.'s letter as substantive evidence.

4. Whether the trial court erred by dismissing Pena-Fuentes's child rape conviction on double jeopardy grounds.

5. Whether the Court of Appeals properly rejected Pena-Fuentes's attempt to supplement the appellate record when he did not attempt to comply with the requirements of RAP 9.11.

B. STATEMENT OF THE CASE

A detailed statement of facts is set forth in the prior briefing. In summary, the evidence at trial established that Jorge Pena-Fuentes sexually abused his step-daughter, J.B., beginning when she was in kindergarten and continuing for many years. RP 315-43, 361. J.B. did not report the abuse to her family, concerned about what she would endure if she disclosed what was happening,

and concerned that her mother would not believe her. RP 328, 348-49. There were some clues that things were amiss, such as hickeys that Pena-Fuentes left on J.B.'s body, and J.B.'s refusal to take showers when she was alone with him. RP 185-86, 215-19. Though J.B.'s grandmother and aunt expressed concern to J.B.'s mother about Pena-Fuentes's behavior, J.B.'s mother did not listen to them. RP 201-02, 213-24.

When she was older, J.B. told a friend and a cousin about the abuse, but asked them not to tell anyone. RP 265-71, 336-38, 364, 371-84. Finally, when she was 15 years old, she reported it to a school counselor. RP 234-36, 241, 244. When police contacted Pena-Fuentes, he admitted that he frequently bit J.B. in various places on her body, including her buttocks, that he gave her a hickey, and that he may have grabbed her breasts up to 10 times. Ex. 9; Ex. 16 at 5-12. The jury found Pena-Fuentes guilty of first-degree rape of a child and two counts of first-degree child molestation. CP 18-21.

In his appellate briefing, Pena-Fuentes has consistently recounted as "fact" assertions that were never presented as evidence at his trial and have never been subjected to the adversarial process. See, e.g., Supplemental Brief of Petitioner

Jorge Pena-Fuentes at 3-4. Under the misleading heading "Trial Testimony," Pena-Fuentes begins by repeating complaints about his ex-wife, J.B.'s mother, that were not offered or admitted at trial. In fact, at trial, Pena-Fuentes asked the court to limit testimony about his relationship with his ex-wife and sought to exclude specific instances of domestic violence involving her. RP 24-25. Similarly, in the "fact" section of his appellate briefing, he repeatedly reports the results of an inadmissible polygraph examination. Pena-Fuentes's reliance upon purported facts that appear nowhere in the trial record has been a theme in these appellate proceedings, and should not be countenanced.

C. ARGUMENT[1]

1. THE TRIAL COURT PROPERLY DENIED PENA-FUENTES'S CrR 8.3(b) MOTION TO DISMISS.

Pena-Fuentes argues that he is entitled to dismissal of his child rape and child molestation convictions because, two months after the jury convicted him, a detective listened to recordings of some calls between Pena-Fuentes and his attorney. The trial judge

[1] Pena-Fuentes's Petition raised several issues. This supplemental brief provides further argument and authorities relating to Pena-Fuentes's post-trial CrR 8.3(b) motion to dismiss. The State's prior briefing fully addresses the other issues raised in the petition.

acted well within his discretion in denying Pena-Fuentes's motion to dismiss because the content of the calls was not shared with the prosecutor or used to Pena-Fuentes's detriment. All of the relevant case law supports the trial judge's decision: courts addressing improper eavesdropping on attorney-client communications have consistently held that dismissal is not proper when the police misconduct had no impact on the criminal proceedings.

Pena-Fuentes argues that he does not need to show any prejudice from the misconduct and asks the Court to dismiss his convictions in order to deter future police misconduct. Because society has a strong interest in holding criminals accountable for their behavior, the Supreme Court and this Court have repeatedly rejected this argument and have held that, even in cases of egregious police misconduct that occurred before or during trial, dismissal is not appropriate when there is credible and admissible evidence obtained against the defendant that is untainted by the governmental misconduct. Moreover, there is no evidence that there is a widespread practice by the police of listening to attorney-client calls, and dismissal of Pena-Fuentes's rape and molestation convictions would be a completely inappropriate and disproportionate sanction.

a. Pena-Fuentes Was Not Prejudiced Because The Detective's Actions Occurred After The Trial And The Content Of The Calls Was Not Shared With The Prosecutor.

Pena-Fuentes moved for dismissal under CrR 8.3(b), which provides that "[t]he court... 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." CrR 8.3(b). Dismissal under this rule is an extraordinary remedy, one that the trial court should use only as a last resort. State v. Wilson, 149 Wn.2d 1, 12, 65 P.3d 657 (2003). In order to justify dismissal, the defendant must show (1) arbitrary action or governmental misconduct and (2) prejudice affecting the defendant's right to a fair trial. State v. Puapuaga, 164 Wn.2d 515, 520, 192 P.3d 360 (2008). Dismissal is unwarranted in cases where suppression of evidence may eliminate whatever prejudice is caused by governmental misconduct. City of Seattle v. Holifield, 170 Wn.2d 230, 237, 240 P.3d 1162 (2010).

In State v. Marks, 114 Wn.2d 724, 790 P.2d 138 (1990), this Court held that even when the police engage in "egregious behavior," dismissal is improper when any tainted evidence is suppressed and the police misconduct had no impact on the

criminal proceedings. In Marks, this Court cited with approval the Court of Appeals' opinion in State v. Grant, 9 Wn. App. 260, 511 P.2d 1013 (1973), a case involving similar facts to this case. In Grant, police officers secretly and illegally monitored and taped conversations of the defendant with his attorney. Id. at 263-64. Though the prosecutors had no access to the recordings and the trial court excluded all possible evidence derived from them, Grant argued that the trial court should have dismissed the charges. Id. at 263-67. The Court of Appeals rejected this remedy, observing that dismissal of charges was an extraordinary remedy and was appropriate only when there had been prejudice to the defendant that could not be remedied by other relief. Id. at 266-67.

Consistent with these Washington authorities, federal and state courts have recognized that a defendant has not suffered prejudice when the contents of the improperly intercepted or recorded conversations are not used by or provided to the prosecutor. In the seminal case of Weatherford v. Bursey, 429 U.S. 545, 547-48, 97 S. Ct. 837, 51 L. Ed. 2d 30 (1977), an undercover law enforcement agent met twice with defendant Bursey and his trial counsel, and trial strategy was discussed. However, the government agent did not discuss with his superiors or the

prosecuting attorney any information regarding Bursey's trial plans. Id. at 548. The Supreme Court reversed a lower court decision reversing the convictions and held, "There being no tainted evidence in this case, no communication of defense strategy to the prosecution, and no purposeful intrusion by Weatherford, there was no violation of the Sixth Amendment." Id. at 558.

Similarly, in People v. Alexander, 49 Cal.4th 846, 884-89, 235 P.3d 873 (2010), prior to trial, law enforcement agents intercepted and recorded a telephone call between the defendant and a defense investigator where trial strategy was discussed. The contents of the call were not communicated to anyone on the prosecution team. The California Supreme Court affirmed the trial court's denial of the defendant's motion to dismiss and held that "a court properly rejects a Sixth Amendment claim based on surreptitious state participation in communications between a defendant and his or her attorney or the attorney's agent when the record demonstrates there was no realistic possibility of injury to the defendant or benefit to the prosecution." Id. at 889.

In State v. Andersen, 784 N.W.2d 320, 333-34 (Minn. 2010), investigators monitored and recorded phone calls between the defendant and his attorney. The investigators represented that

they stopped listening when they determined the call was between the defendant and his lawyer and that they never heard anything relating to the case. Id. at 334. The Minnesota Supreme Court held that the defendant failed to establish prejudice because there was no evidence that the prosecution received confidential information about trial preparations or defense strategy, and no information in the calls was used in any way to the defendant's detriment. Id.

In contrast, prejudice is shown when the eavesdropping occurs during or prior to trial and the content of the privileged communications is shared with the prosecutor. In State v. Cory, 62 Wn.2d 371, 382 P.2d 1019 (1963), the sheriff secretly eavesdropped on and taped conversations in a room that the jail provided for meetings between prisoners and their attorneys. The prosecutor listened to at least two tapes and the court assumed that the sheriff transmitted other information to the prosecutor. Id. at 377 n.3. This Court held that dismissal was warranted because "[t]here is no way to isolate the prejudice resulting from an eavesdropping activity, such as this. If the prosecution gained information which aided it in the preparation of its case, that

information would be as available in the second trial as in the first." Id. at 377.[2]

Similarly, in State v. Perrow, 156 Wn. App. 322, 231 P.3d 853 (2010), a detective seized attorney-client writings while executing a search warrant, examined and copied the writings, and gave them to the prosecutor. Prior to trial, the court dismissed the case, finding that suppression was not an adequate remedy because the detective had communicated to the prosecutor's office the contents of the writings. Id. at 327. On appeal, the State argued that the prosecutor was entitled to examine the writings, claiming that the documents were not protected by the attorney-client privilege. Id. at 327-30. A two-judge majority for the Court of Appeals rejected this argument, and held that "[a]s in Cory, it is impossible to isolate the prejudice presumed from the attorney-client privilege violation." Id. at 331-32.

In this case, there was no prejudice to Pena-Fuentes. The detective's actions occurred approximately two months after the jury had found Pena-Fuentes guilty of child rape and child molestation and could not have impacted the jury's verdicts.

[2] This Court later confirmed that "[i]n Cory, we assumed that the prosecutor had taken advantage of a simple means of 'obtaining evidence and knowledge of the defendant's trial strategy' because there was no way of determining exactly what had been overheard." State v. Baker, 78 Wn.2d 327, 333, 474 P.2d 254 (1970).

Moreover, the detective did not share any of this information with the prosecutor.

Pena-Fuentes claims that he suffered prejudice by alleging that after the detective listened to the calls, he somehow assisted the prosecutor in responding to the motion for new trial. The record does not support this claim. On the contrary, after learning that the detective had listened to calls, the prosecutor immediately cut the detective out of the case, sending the following e-mail:

> You should not have listened to the conversation between the defendant and his lawyer. You'll need to do the following:
>
> - do not listen to any more phone calls between the defendant and any of his attorneys
> - do not tell me anything else about the contents of the calls
> - do not tell any other KCSO [King County Sheriff's Office] investigator or officer about the contents of those calls.
> - take the disc(s) on which those calls occurred, seal it (them) in an envelope (after you've made a copy as outlined below) – do not destroy.
>
> On my end, I will need to inform the Court and Mr. Hansen that this occurred. I think it would be prudent for you to tell your supervisor as well.

CP 223.

It was the prosecutor, not the detective, who prepared the response to the motion for a new trial and who provided L.P.'s

declaration to the court. The prosecutor represented under oath that "I do not know the substance or details of the calls between the defendant and Mr. Hansen." CP 220. Furthermore, the prosecutor attested, "I have not relied on any information that may be contained in the calls between Mr. Hansen and the defendant for any purpose, including trial preparation or the defendant's motion for a new trial." Id. Before the trial court, Pena-Fuentes did not question or challenge these representations, though he insinuates that they may be untrue. Yet, at no point during the post-trial motion, the hearing on the motion to dismiss, or in this appeal, has Pena-Fuentes ever identified any specific evidence that the prosecution offered in response to his motion for a new trial that was developed as a result of the recorded calls.

In its opinion, the Court of Appeals began its analysis with a presumption that Pena-Fuentes suffered prejudice. State v. Fuentes, 172 Wn. App. 755, 762-65, 295 P.3d 252, rev. granted, 177 Wn.2d 1008 (2013). However, after reviewing the record, the court concluded that this presumption was rebutted. Id. In his subsequent briefing with this Court, Pena-Fuentes has not attempted to explain how the Court of Appeals erred in its review of the record. This Court should affirm the trial court and the Court of

Appeals and conclude, as they did, that Pena-Fuentes suffered no prejudice and that dismissal of his convictions is unwarranted.

b. The Extreme Remedy Of Dismissal Is Not An Appropriate Sanction.

Pena-Fuentes argues that, even in the absence of any prejudice, dismissal is warranted in order to deter police misconduct. Vacating criminal convictions and releasing a convicted sex offender are inappropriate and disproportionate sanctions for a detective's mistake that had no effect whatsoever on the trial or the jury's verdicts. There is no support in this Court's precedents for such an extreme remedy.

The Supreme Court has held that the remedy for a Sixth Amendment violation is not dismissal of the charges:

> [W]ithout detracting from the fundamental importance of the right to counsel in criminal cases, we have implicitly recognized the necessity for preserving society's interest in the administration of criminal justice. Cases involving Sixth Amendment deprivations are subject to the general rule that remedies should be tailored to the injury suffered from the constitutional violation and should not unnecessarily infringe on competing interests.

United States v. Morrison, 449 U.S. 361, 364, 101 S. Ct. 665, 66 L. Ed. 2d 564 (1981). The Court has recognized that society's

interest in holding criminals accountable for their behavior must be accorded great weight. "So drastic a step might advance marginally some of the ends served by exclusionary rules, but it would also increase to an intolerable degree interference with the public interest in having the guilty brought to book." United States v. Blue, 384 U.S. 251, 255, 86 S. Ct. 1416, 16 L. Ed. 2d 510 (1966).

This Court has also held that even in cases involving gross mismanagement by the police, dismissal is not required. "Dismissal is also inappropriate when there is credible and admissible evidence obtained against the defendant that is untainted by the governmental misconduct." Marks, 114 Wn.2d at 731.

When addressing improper eavesdropping on attorney-client communications, courts have rejected the argument that dismissal, rather than suppression of any tainted evidence, is the appropriate remedy. The New York Court of Appeals summarized the law:

> It would appear that it is not sufficient to justify dismissal of the indictment merely to show that attorney-client conversations were intercepted [citations omitted]. It must be shown that the interception undermined the right to counsel and that the interference could not be cured by holding a new trial. In other words, it must appear to warrant dismissal, as distinguished from the limited sanction of exclusion of evidence, that the prosecution could or

> would necessarily avail itself of the illegal evidence directly or indirectly by way of strategy, or tactics, which it could not have but for the unlawful wiretap.

People v. Pobliner, 32 N.Y.2d 356, 363-65, 298 N.E.2d 637 (1973). See also State v. Pecard, 196 Ariz. 371, 379, 998 P.2d 453 (Ariz. Ct. App. 1999) (where the government had intentionally recorded defendant's telephone conversations with his attorney for the purpose of harassing the defendant and obtaining evidence against him, the trial court should not have dismissed the case without first considering less drastic remedies); State v. Sherwood, 174 Vt. 27, 29, 800 A.2d 463, 464-65 (2002) (suppression of tainted evidence, rather than dismissal, is the appropriate remedy when the police recorded defendant's post-arrest telephone conversation with his attorney). In Pena-Fuentes's case, there was nothing to suppress because of the timing of events and the prosecutor's quick and appropriate response.

Courts have dismissed cases only when the defendant has been so prejudiced that suppression is not an effective remedy. When the defense's confidential communications were shared with the prosecutor prior to trial and included information about defense trial strategy, some courts have held that dismissal is appropriate because exclusion will not prevent the prosecutor from benefiting

from the information about the defense trial strategy. See State v. Cory, supra; State v. Lenarz, 301 Conn. 417 (2011) (prior to trial, prosecutor obtained and reviewed voluminous attorney-client communications containing detailed discussions of defendant's trial strategy).

Pena-Fuentes looks beyond CrR 8.3(b) and Sixth Amendment cases in searching for authority for the extreme remedy of dismissal. He cites State v. Lively, 130 Wn.2d 1, 921 P.2d 1035 (1996), an extraordinary case where a government agent egregiously encouraged the defendant's criminal behavior. In Lively, a paid government informant attended AA/NA meetings for the purpose of luring recovering drug addicts to commit illegal acts. The government informant began a personal relationship with Lively, asked her to marry him and then urged her to sell drugs. After Lively engaged in two drugs sales, she was charged and convicted of two counts of delivery of a control substance. On appeal, this Court reversed Lively's convictions based upon the principle that "the conduct of law enforcement officers and informants may be 'so outrageous that due process principles would absolutely bar the government from invoking judicial

processes to obtain a conviction.'" Id. at 19 (quoting United States v. Russell, 411 U.S. 423, 431-32, 93 S. Ct. 1637 36 L. Ed. 2d 366 (1973)). This Court held that dismissal is appropriate only in the most egregious of cases, such as where "the government agents direct the crime from beginning to end, or where the crime is fabricated by the police to obtain a defendant's conviction, rather than to protect the public from criminal behavior." Id. at 20-21.

Lively does not help the defendant's argument because the circumstances in that case bear little similarity to his own. It is one thing to dismiss a criminal charge when the police were integrally involved in setting up and encouraging the crime in the first place. The remedy of dismissal is causally connected with the offending misconduct. Here, the police had nothing to do with the defendant's repeated acts of molesting and raping J.B. The misconduct at issue did not occur until after the defendant's trial was concluded. There is no causal connection between the detective's misconduct and the defendant's convictions for child rape and molestation. Under the logic of Pena-Fuentes's position, if the detective had not listened to the calls until after Pena-Fuentes's motion to dismiss was denied and after he was

sentenced, he would still be entitled to dismissal, simply as a sanction to deter police misconduct.

Citing to material stricken from the record, Pena-Fuentes argues that dismissal is warranted because the King County Sheriff failed to take action on his attorney's complaint against the detective. Pena-Fuentes's attempted use of this material is unfair and improper under the Rules of Appellate Procedure. Contrary to RAP 9.6, he submitted this material without the court's permission and he never attempted to comply with RAP 9.11's requirements for taking additional evidence on review. It is unfair because the full circumstances of the police investigation and the reasons they reached their conclusions are not in the record.

There is no evidence that there is a widespread problem of law enforcement officers listening in on calls between defense attorneys and their clients. This case appears to be an anomaly. The King County Jail has been recording inmate calls since at least 2005. See State v. Modica, 136 Wn. App. 434, 438-39, 149 P.3d 446 (2006), aff'd, 164 Wn.2d 83, 186 P.3d 1062 (2008). Prosecutors and/or detectives frequently listen to these calls, hoping to uncover incriminating statements. Precautions are in place to ensure that calls between a defendant and his attorney are

not recorded and provided to law enforcement. CP 195; RP 579. Other than this case, there are no published (or unpublished) Washington criminal cases where a law enforcement officer has improperly listened to a recording of a call between an inmate and his or her attorney, either deliberately or inadvertently.

Dismissal of Pena-Fuentes's child rape and child molestation convictions would be a disproportionate and inappropriate sanction. J.B., who did nothing wrong, will see the man who repeatedly raped and molested her go unpunished. The public will lose; Pena-Fuentes, a convicted sex offender, will be released without conditions on his behavior. He will not be required to finish his criminal sentence, he will not be required to undergo sexual deviancy evaluation and treatment, and he will not be required to register as a sex offender. There is no precedent for such a remedy, and this is not a case supporting the need for such a remedy. This Court should affirm the Court of Appeals and hold that the trial court acted within its discretion in denying the motion to dismiss.

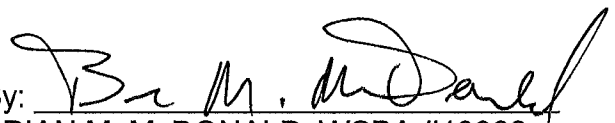
D. CONCLUSION

For all the foregoing reasons, the Court should affirm the Court of Appeals' opinion and affirm Pena-Fuentes's convictions.

DATED this 30th day of July, 2013.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney



By: _____
BRIAN M. McDONALD, WSBA #19986
Senior Deputy Prosecuting Attorney
Attorneys for Respondent
Office WSBA #91002

Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Richard Hansen, the attorney for the appellant, at 600 University Street, Suite 3020, Seattle, WA 98101 containing a copy of the State's Supplemental Brief, in STATE V. JORGE PENA FUENTES, Cause No. 88422-6, in the Washington Supreme Court.

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

UBrame
Name

7/30/13
Date

Done in Seattle, Washington