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**COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

ROMAN M. FEDOROV, APPELLANT

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Appeal from the Superior Court of Pierce County  
The Honorable Roseanne Buckner

No. 12-1-00053-2

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**SUPPLEMENTAL BRIEF**

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MARK LINDQUIST  
Prosecuting Attorney

By  
CHELSEY MILLER  
Deputy Prosecuting Attorney  
WSB # 42892

930 Tacoma Avenue South  
Room 946  
Tacoma, WA 98402  
PH: (253) 798-7400

 ORIGINAL

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Has defendant failed to show any non-compliance with CrR 3.1 when the findings show the trooper allowed defendant to have a 13 minute conversation with an attorney prior to taking the BAC test and the trooper could not hear anything even though he remained in the same room?

2. Has defendant failed to show that the right to counsel in CrR 3.1 includes the right to a private conversation with counsel when the Sixth Amendment right to counsel has not yet attached, the Fifth Amendment prophylactic right to counsel contains no right to privacy and the rule itself contains no express right to private communications with counsel?

B. STATEMENT OF THE CASE.

On January 2, 2012, at 11:42 p.m., Washington State Patrol Trooper Ryan Durbin activated his lights and sirens and began following a vehicle he observed travelling at 119 miles per hour on Interstate 5 in Fife. 4RP<sup>1</sup> 157-58, 162-63. Trooper Durbin chased the vehicle as it swerved across all lanes of traffic, passed other vehicles on the right shoulder,

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<sup>1</sup> The verbatim record of proceedings consists of 9 volumes, only some of which are paginated consecutively. For purposes of simplicity, they will be referred to the same as in defendant's Petition for Review on page 2.

accelerated to 130 miles per hour, ran a red light after taking an exit, turned off its headlights and traveled the wrong way down Pacific Avenue. 4RP 164-166. When the vehicle finally stopped after hitting a dead end, the driver and passenger got out, but refused to comply with Trooper Durbin's commands to get on the ground. 4RP 166-169. The driver, later identified as defendant, was slow to get on the ground and resisted Trooper Durbin numerous times while being placed under arrest. 4RP 168-171.

After making observations consistent with defendant being under the influence of intoxicants, Trooper Durbin transported defendant to the nearest police station with a BAC machine, which happened to be located in Fife approximately five minutes away. 4RP 20, 36, 172-175; CP 114-119, (FOF #2)<sup>2</sup>. The Fife Police Department is also a jail holding facility run by one guard who is responsible for all the incarcerated inmates there. 4RP 21-22, 31. Only he has a key to access the doors within the facility and when Trooper Durbin arrived with defendant, the guard had to let them into the building and into the room with the BAC machine. 4RP 26, 30-31. Once the guard left the room, Trooper Durbin was locked in the BAC room with the defendant and only able to exit with the assistance of the guard who had the only key. 4RP 21-22, 30.

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<sup>2</sup> "FOF" refers to the Undisputed Findings of Facts. *See* Appendix A.

The BAC machine is located at one end of a large room approximately 29 paces by 17 paces next to a washing machine. 4RP 21-22, 30-31; CP 114-119 (FOF #4). At the other end of the room is a small desk containing a computer used by the Fife officer, a metal bench to which officers can handcuff arrestees to and a phone located on the wall for arrestees to contact their attorneys. 4RP 21-24. Defendant was seated on the metal bench and after being read his *Miranda* rights and Implied Consent Warnings, he asked to speak to an attorney. 4RP 24, 27-28; CP 114-119 (FOF #3). Trooper Durbin contacted the on call Department of Assigned Counsel (DAC) attorney, who asked Trooper Durbin several questions including the name of the suspect, the alleged crime, whether the suspect performed field sobriety tests or took the portable breath test, whether the suspect would be booked and if he was being cooperative. 4RP 28-29, 43, 55-63.

Defendant then spoke with DAC attorney Nicholas Andrews for 13 minutes with one hand handcuffed to the bench or wall while his other hand held the phone. 4RP 74-75; CP 114-119 (FOF #4, 8). Mr. Andrews twice had defendant request complete privacy and Trooper Durbin said he could not accommodate the requests because of their location at the Fife Station. 4RP 43-46; CP 114-119 (FOF #7). Trooper Durbin did, however, walk to the other side of the room near the washing machine to give

defendant as much privacy as he could. 4RP 29-30; CP 114-119 (FOF #5). Trooper Durbin was unable to hear defendant's conversation with Mr. Andrews. 4RP 30; CP 114-119 (FOF #6).

During the conversation, defendant was free to ask questions and Mr. Andrews was able to determine defendant's relevant driving history and driver's license status. 4RP 64-68; CP 114-119 (FOF #8, 10). Mr. Andrews advised defendant of his rights, including the right to remain silent and refuse to perform any tests, the consequences of refusing the breath test, that all tests and questions were voluntary, and that defendant had a right to additional tests. 4RP 45-48, 64-75; CP 114-119 (FOF #9, 11-13). There were some questions relating to consumption that were relevant to whether Mr. Andrews would advise defendant to take the breath test that Mr. Andrews felt unable to ask because of a lack of privacy. 4RP 46-48; CP 114-119 (FOF #14). It would have been possible for Mr. Andrews to ask those questions in a way that would elicit only "yes or no" answers. 4RP 71-73, 82; CP 114-119 (FOF #15).

Defendant submitted to the breath test and produced results of .096 and .095. 4RP 321 (FOF #17). He was charged with attempting to elude and driving under the influence of intoxicants. CP 1-2. Prior to trial, defense filed a motion to suppress evidence based upon a claim that defendant had been denied his right to counsel due to the lack of privacy

in the breath test room. CP 14-21. The court denied the motion to suppress despite finding a privacy violation and entered findings of fact and conclusions of law. 4RP 108-109; CP 114-119 (*See* Appendix A). After a jury trial, defendant was convicted as charged and sentenced to 41 months on count one and 364 days on count two, to be served concurrently. CP 88, 90, 99-111.

Defendant appealed alleging amongst other issues that the trial court erred when it denied defendant's motion to suppress his breath test based on a privacy violation. Appellant's Opening Brief at 20-32. The State assigned error to the court's finding of a violation<sup>3</sup>, but argued that it came to the right result. After oral argument, Division Two of the Court of Appeals agreed with the State and found the trial court had erroneously determined that the officer violated defendant's right to counsel by invading his privacy during the phone call. *State v. Fedorov*, 183 Wn. App. 736, 743-745, 335 P.3d 971 (2014)<sup>4</sup>. It held that because defendant's right to counsel was not violated, the trial court did not err in

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<sup>3</sup> Finding as to Disputed Facts 1 reads "Trooper Durbin could not recall if there was a request for privacy, but [Mr. Andrews] indicated that there were two requests for privacy. The Court found that there was a request for privacy in this case and as a result, there was insufficient privacy afforded to the defendant during his phone call with [Mr. Andrews]." However, the trial court denied defendant's motion to suppress the breath test based on a privacy violation because it found "defendant has not proved actual prejudice as a result of the lack of privacy." CP 114-119, Findings as to Disputed Facts 2.

<sup>4</sup> The case was initially affirmed in an unpublished decision; however, the decision was published after motions to publish were granted.

denying defendant's motion to suppress the breath test results and affirmed defendant's conviction. *Id.* at 739.

This Court then granted defendant's petition for review of the privacy issue.

C. ARGUMENT.

1. DEFENDANT HAS FAILED TO SHOW ANY NON COMPLIANCE WITH CrR 3.1 WHEN THE FINDINGS SHOW THE TROOPER ALLOWED DEFENDANT TO HAVE A 13 MINUTE CONVERSATION WITH AN ATTORNEY PRIOR TO TAKING THE BAC TEST AND THE TROOPER COULD NOT HEAR THEIR CONVERSATION EVEN THOUGH HE REMAINED IN THE SAME ROOM.

CrR 3.1 holds that “[t]he right to a lawyer shall accrue as soon as feasible after the defendant is taken into custody...” CrR 3.1(b)(1). It also states that “[a]t the earliest opportunity a person in custody who desires a lawyer shall be provided access to a telephone, the telephone number of the public defender or official responsible for assigning a lawyer, and any other means necessary to place the person in communication with a lawyer.” CrR 3.1(c)(2).

Defendant argues that CrR 3.1 includes the right to speak in private with an attorney. Without determining whether there exists a right to privacy in CrR 3.1, the findings in the present case show that defendant was given an opportunity to speak in private with his attorney. Although

Trooper Durbin remained in the same room, he moved as far away as was possible and was unable to hear any of the defendant's 13 minute conversation with his attorney. 4RP 30; CP 114-119 (FOF #5, 6) (*See* Appendix A). Defendant has not challenged this finding or any other on appeal. Unchallenged findings of fact are verities on appeal. *State v. Hill*, 123 Wn.2d 641, 644-47, 870 P.2d 313 (1994).

As such, regardless of whether CrR 3.1 contains a right to privacy, defendant's conversation with Mr. Andrews was private. He fails to show any non compliance with CrR 3.1 or any violation of this alleged right. Division II correctly held the trial court had erred in finding there was insufficient privacy afforded to defendant just because the trooper remained in the room. Trooper Durbin placed himself in a position where he could not hear the defendant's conversation with his attorney. Defendant was given prompt access to counsel and allowed to speak with him privately. This Court should affirm the Court of Appeals.

2. DEFENDANT HAS FAILED TO SHOW THAT THE RIGHT TO COUNSEL IN CrR 3.1 INCLUDES THE RIGHT TO A PRIVATE CONVERSATION WITH COUNSEL.

a. CrR 3.1 is not an extension of the Sixth Amendment or article I, § 22 right to counsel because these rights have not yet attached.

The right to counsel in CrR 3.1 is not of constitutional origin. *State v. Clark*, 48 Wn. App. 850, 863, 743 P.2d 822 (1987). The CrR 3.1 rule based right to counsel found in CrR 3.1 attaches “as soon as feasible” after a defendant is taken into custody. CrR 3.1(b)(1). The two purposes of the rule based right to counsel are: (1) to ensure that arrested persons are aware of their right to counsel before they provide evidence which might tend to incriminate them, and (2) to ensure that persons arrested know of their right to counsel in time to decide whether to acquire exculpatory evidence such as disinterested witnesses or alternative blood alcohol concentration tests. *State v. Templeton*, 148 Wn.2d 193, 217-218, 59 P.3d 632 (2002) (citing *State v. Trevino*, 127 Wn.2d 735, 746, 903 P.2d 447 (1995); *City of Tacoma v. Heater*, 67 Wn.2d 733, 739, 409 P.2d 867 (1966)). Essentially, CrR 3.1’s underlying purpose is to ensure a defendant is aware of his right to contact counsel, but does not require any actual contact. See *City of Airway Heights v. Dilley*, 45 Wn. App. 87, 93, 724 P.2d 407 (1986) (the rule based right to counsel “require[s] more an opportunity [to contact counsel], rather than an actual communication with

an attorney”); *See also City of Bellevue v. Ohlson*, 60 Wn. App. 485, 490, 803 P.2d 1346 (1991) (the rule based right to counsel “requires reasonable access to, not actual contact with, an attorney”).

The right to counsel under the Sixth Amendment only arises at “critical stages” in a criminal prosecution. *Kirby v. Illinois*, 406 U.S. 682, 92 S. Ct. 1877, 32 L. Ed. 2d 411 (1972). The right to counsel in article I, § 22 of the Washington state constitution is coextensive with the Sixth Amendment right under the federal constitution. *Heinemann v. Whitman County of Wash., Dist. Court*, 105 Wn.2d 796, 800, 718 P.2d 789 (1986). No critical stage arises for Sixth Amendment purposes prior to the initiation of formal judicial proceedings by citation or indictment. *State v. Judge*, 100 Wn.2d 706, 714, 675 P.2d 219 (1984) (*citing Kirby v. Illinois*, 406 U.S. 682 (1972)). This is because “[i]t is only at that point that the government has committed itself to prosecute and ‘that a defendant finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law.’” *Heinemann v. Whitman County of Wash., Dist. Court*, 105 Wn.2d 796, 800, 718 P.2d 789 (1986) (*quoting Kirby v. Illinois*, 406 U.S. 682 (1972)). Thus, CrR 3.1 is not an extension of the Sixth Amendment or article I, § 22 right to counsel because these rights have not yet attached.

- b. The prophylactic right to counsel stemming from the Fifth Amendment and article I, § 9 contain no right to privacy.

The Washington state constitution “article I, § 9 is equivalent to the Fifth Amendment and ‘should receive the same definition and interpretation as that which has been given to’ the Fifth Amendment by the Supreme Court.” *State v. Templeton*, 148 Wn.2d 193, 207-08, 59 P.3d 632 (2002) (quoting *Heater*, 67 Wn.2d at 736). Neither the Fifth Amendment, nor article I, § 9 contain an express constitutional right to counsel. The right to counsel under the Fifth Amendment stems from the prophylactic rule announced in *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). In other words, the right to counsel included in the *Miranda* warnings is not a constitutional right in itself, rather it is part of the standards designed to safeguard the privilege against self-incrimination. *Michigan v. Tucker*, 417 U.S. 433, 444, 94 S. Ct. 2357, 41 L. Ed. 2d 182 (1974). The U.S. Supreme Court has not held that the right to an attorney under the Fifth Amendment includes the right to speak to that attorney without anyone else in the room. The State has been unable to find any federal cases which support such a claim.

The right to counsel that is a procedural safeguard ancillary to the Fifth Amendment exists to protect against self incrimination by way of testimonial evidence. *City of Seattle v. Stalsbrotten*, 138 Wn.2d 227, 232,

978 P.2d 1059 (1999); *See also Schmerber v. California*, 384 U.S. 757, 761, 86 S. Ct. 1826, 16 L. Ed. 2d 908 (1966). A breath test is not testimonial evidence and thus, does not raise Fifth Amendment concerns. *State v. Templeton*, 148 Wn.2d 193, 211, 59 P.3d 632 (2002)(citing *State v. Franco*, 96 Wn.2d 816, 828-29, 639 P.2d 1360 (1982)). As such, the argument that defendant was entitled to speak in private with defense counsel as to whether to take the breath test should not impact the admissibility of the BAC test as it is not testimonial and does not implicate the Fifth Amendment protection against self incrimination.

- c. Defendants only argument that a right to privacy exists in CrR 3.1 incorrectly relies upon the right to privacy encompassed in the Sixth Amendment right to counsel which has not yet attached.

The right to access counsel prior to taking the breath test is not based upon federal or state constitutional grounds, but was a procedural matter promulgated as part of the State Supreme Court's inherent rule making authority. *Templeton*, 148 Wn.2d at 215-216 (citing *State v. Fitzsimmons*, 93 Wn.2d 436, 610 P.2d 893 (1980), *vacated*, 449 U.S. 977, 101 S. Ct. 390, 66 L. Ed. 2d 240, *aff'd on remand*, 94 Wn.2d 858, 620 P.2d 999 (1980)). Accordingly, there is no *constitutional* right to privacy when speaking with an attorney in the context of CrR 3.1.

Despite acknowledging that CrR 3.1 is not of constitutional origin, defendant argues that the court should treat CrR 3.1 as having the same or greater privacy protections than either the State or Federal constitution provide under the Sixth Amendment and article I, § 22. Petition for Review at 15. Defendant continually argues that the “right to counsel ‘includes the right to confer privately with that counsel[.]’” Petition for Review, at 15. Defendant fails to articulate where this supposed right to privacy comes from and only cites to *State v. Fuentes*, 179 Wn.2d 808, 318 P.3d 257 (2014), in support of this argument.

However, everything defendant discusses relates to the Sixth Amendment right to counsel. *See Fuentes*, 179 Wn.2d at 818 (“A defendant’s *constitutional* right to the assistance of counsel unquestionably includes the right to confer privately with his or her attorney.” (Emphasis added)). Defendant’s argument, which encapsulates and relies upon the privacy rights recognized in the Sixth Amendment, is not relevant as there is no dispute that the Sixth Amendment right to counsel has not attached in this case. Defendant asks this Court to provide constitutional privacy protections to a rule based right with no direct link to the Constitution.

- c. The only entitlement to private communications with counsel under CrR 3.1 may come from attorney client privilege which the facts and circumstances must allow defendant to qualify for before he is entitled to such a right to privacy.

The CrR 3.1 rule itself contains no explicit provision detailing a right to privacy. If a statute's meaning is plain on its face, the court should give effect to the plain meaning as an expression of legislative intent. *Dep't of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 9, 43 P.3d 4 (2002). The fact that the rule does not include any language about the conversation being private should in and of itself be evidence that there was no intent to incorporate a right to privacy in the communication with counsel under CrR 3.1.

Furthermore, other states which have recognized a right to privacy in their similarly promulgated rule based rights to counsel have done so because the rule explicitly details the right to a *private* consultation with the attorney. *See* Ariz. R. Crim. P. 6.1(a) ("The right to be represented shall include the *right to consult in private* with an attorney, or the attorney's agent, as soon as feasible after a defendant is taken into custody...") (Emphasis added). *See also* Ala. R. Crim P. 6.1(a) (The right to be represented shall include the *right to consult in private* with an attorney or the attorney's agent, as soon as feasible after a defendant is

taken into custody...” (Emphasis added). In contrast, Washington chose not to explicitly include that right in their rules.

While it is true that our state recognizes the importance of a client’s ability to speak candidly with his attorney by making such conversations privileged when they are conducted in private, the attorney client privilege is not a source of a right to privacy. *See* RCW 5.60.060(2)(a); *See also R.A. Hanson Co., Inc. v. Magnuson*, 79 Wn. App. 497, 502, 903 P.2d 496 (1995), *review denied*, 129 Wn.2d 1010, 917 P.2d 130 (1996) (The attorney client privilege seeks to promote full disclosure by the client in order to provide effective legal assistance). However, the attorney client privilege is one that is created by the circumstances, not one that exists solely because defendant is conversing with an attorney. In other words, the privilege only exists if the communications were reasonably intended as confidential and were in fact confidential. *Ramsey v. Madding*, 36 Wn.2d 303, 311-12, 217 P.2d 1041 (1950). If the surrounding circumstances would lead a reasonable person to conclude that the conversation was not confidential, there is no attorney client privilege in existence.

Here, the defendant had a private conversation with his attorney. That is not the same as arguing that the privilege gives the defendant the right to order the trooper out of the room. In the context of DUI investigations, the interest in allowing defendant to have a private

conversation with an attorney must be balanced against the State's interest in obtaining evidence and efficiently and safely processing defendants through post arrest procedures.

Courts have routinely recognized the unique situation that DUI arrests present and have previously balanced these two interests in the context of what the CrR 3.1 right to counsel means in terms of a defendant's access to an attorney. *City of Seattle v. Koch*, 53 Wn. App. 352, 357, 767 P.2d 143 (1989) (citing *Fitzsimmons*, 93 Wn.2d at 448). Division I recognized that the rule based right to counsel under CrR 3.1 is a limited one dependent upon the facts and circumstance of each case. *Koch*, 53 Wn. App. at 357 (citing *Fitzsimmons*, 93 Wn.2d at 448). While a defendant has the right to attempt to contact an attorney, those attempts and communications must be balanced against the State's interest in collecting dissipating evidence and efficiently processing defendants through the relevant procedures. For instance, this Court has specifically held that a defendant has a right to speak with an attorney on the telephone, but no right to delay routine processing to wait for an attorney to personally arrive at the scene. *City of Seattle v. Box*, 29 Wn. App. 109, 627 P.2d 584 (1981). Similarly, a defendant must be provided a reasonable opportunity to contact counsel, but has no right to delay chemical testing when no attorney can be contacted. See *State v. Staehli*,

102 Wn.2d 305, 309-310, 685 P.2d 591 (1984); *See also Dilley*, 45 Wn. App. at 93-84; *See also Ohlson*, 60 Wn. App. at 491.

Likewise, whether a defendant is given any amount of privacy to speak with an attorney must be balanced against the time constraints involved, officer and individual safety concerns and the feasibility of such a request. In essence, while taking into consideration the State's interests in the ongoing investigation, if the facts and circumstances of the case allow for a defendant to speak privately with an attorney, that conversation may qualify for attorney client privilege thereby implicating a right to privacy in that conversation. If however, the facts and circumstances do not allow for a private conversation to occur, the attorney client privilege does not apply and no right to privacy can be borne from it.

In the present case, Trooper Durbin was locked in the room with defendant by the Fife guard who had the only key. Trooper Durbin moved as far away as was possible to the other side of the large room that was 19 by 27 paces in size. Trooper Durbin could not hear the conversation defendant had with his counsel making defendant's conversation with his counsel private. Considering the logistical difficulty of entering and exiting the room, the safety and property concerns given defendant's intoxication and resistant behavior and time constraints involving the dissipating evidence and 15 minute observation period which had already begun, Trooper Durbin did everything he reasonably could to provide

defendant a private conversation with counsel. Defendant was not entitled to have a private conversation with counsel under CrR 3.1, but in this case, the circumstances allowed for one even while Trooper Durbin remained in the room.

- e. Division II's decision does not eviscerate the right to have the opportunity to speak with counsel under CrR 3.1 nor does it conflict with *Koch*.

Defendant's argument that Division II's holding in *Fedorov* "effectively eviscerates the CrR 3.1(b) right to counsel" is a gross mischaracterization of the court's holding. Petition for Review at 13. The court stated "[w]hen a police officer is present in a room while defendant speaks with counsel by telephone, the defendant's rule-based right to counsel is not necessarily violated." *Fedorov*, 183 Wn. App. at 745 (citing *Koch*, 53 Wn. App. at 353-55). They held that whether a violation of the defendant's rule based right to counsel occurs is dependent upon the facts and circumstances of each case. *Fedorov*, 183 Wn. App. at 745 (citing *Ohlson*, 60 Wn. App. at 489). Then, because the findings of fact established that Trooper Durbin did not hear defendant's conversation with his attorney, the court held that defendant's right to counsel was not violated by an invasion of privacy and the trial court erred in concluding it was. *Fedorov*, 183 Wn. App. at 743-45.

Division II did not eviscerate a defendant's right to confer with counsel. Rather, they held that while a defendant is entitled to have an opportunity to speak with counsel under CrR 3.1, there does not exist a right to private communications unless a private conversation is feasible given the facts and circumstances of the individual case. Only then, if the right to privacy stemming from attorney client privilege is implicated and subsequently violated, is defendant's right to counsel under CrR 3.1 violated by such an invasion of privacy. Defendant was afforded his right to counsel by being able to speak with his attorney. As Trooper Durbin could not hear the conversation, that conversation was private. Similarly, Division II's decision in *Fedorov* is not in conflict with *Koch*. As described above, both cases stand for the proposition that the whether any privacy is afforded to a defendant is dependent upon the facts and circumstances of each case. Contrary to defendant's contention, *Koch* did not affirm the reversal of Koch's dismissal because of the absence of a request for privacy. See Petition for Review 19-20. Rather, the court considered that absence of the request for privacy in their determination that Koch's rule based right to counsel was not violated and specifically pointed out "[i]t does not necessarily follow, however, and we do not mean to imply, that in every case where such a request is made, the police must grant increased privacy. This may depend on a number of factors such as the unique security and safety problems presented by a particularly

uncooperative, intoxicated defendant.” *Koch*, 53 Wn. App. at 358 n.7 (emphasis in original). As such, Division II’s holding is not in conflict with *Koch*; it stands for the same proposition as *Koch*.

In conclusion, defendant has failed to show that the right to counsel under CrR 3.1 includes the right to private communications with that counsel. The right to privacy in conversations with counsel under the Sixth Amendment and article I, § 22 have not yet attached. The prophylactic rule based right to counsel stemming from the Fifth Amendment and article I, § 9 contain no right to privacy. The CrR 3.1 rule itself contains no express right to private communications with counsel. The only arguable right to private communications with counsel occurs when the attorney client privilege is implicated and that privilege only exists when the facts and circumstances of the situation make it feasible for a private conversation to occur. Case law indicates that privacy in the conversation is to be afforded if the circumstances will allow for it; not that it may be insisted upon. If the facts and circumstances do not allow for the conversation to qualify as attorney client privilege, there exists no other right to private communications with counsel under CrR 3.1.

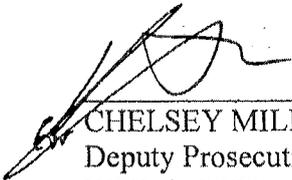
D. CONCLUSION.

The State respectfully requests this Court affirm Division II’s holding that the trial court erred in concluding defendant’s right to counsel

was violated by an invasion of privacy as there was no violation and affirm defendant's conviction and sentence.

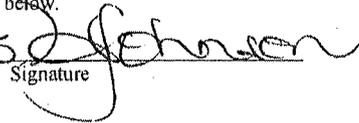
DATED: May 22, 2015

MARK LINDQUIST  
Pierce County  
Prosecuting Attorney

  
CHELSEY MILLER 37336  
Deputy Prosecuting Attorney  
WSB # 42892

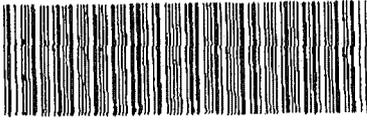
Certificate of Service:

The undersigned certifies that on this day she delivered by ~~U.S. mail~~ <sup>refile</sup> or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

5/22/15   
Date Signature

## **APPENDIX “A”**

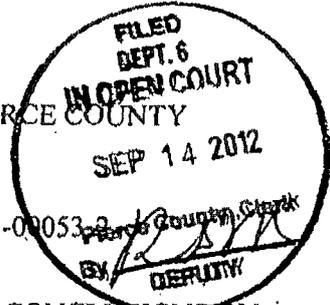
*Findings of Fact and Conclusions of Law*



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SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY



STATE OF WASHINGTON,  
  
Plaintiff,  
  
vs.  
  
ROMAN MIKHAILOVICH FEDOROV,  
  
Defendant.

CAUSE NO. 12-1-00053-2  
FINDINGS AND CONCLUSIONS ON  
ADMISSIBILITY OF EVIDENCE CrR  
3.6

THIS MATTER having come on before the Honorable Rosanne Buckner on the 30th day of July, 2012, and the court having rendered an oral ruling thereon, the court herewith makes the following Findings and Conclusions as required by CrR 3.6.

**THE UNDISPUTED FACTS**

1. On January 2, 2012, at approximately 11:45 pm, Washington State Patrol Trooper Ryan Durbin arrested the defendant, ROMAN M. FEDOROV, for Felony Eluding and DUI.
2. After the defendant's arrest, Trooper Durbin transported the defendant to the closest BAC facility, the Fife Police Department, to process the defendant for driving under the influence.
3. While at the Fife Police Department, Trooper Durbin advised the defendant of his Implied Consent Warnings for breath. The defendant stated he understood his rights and would submit to the breath test. Trooper Durbin began the 15 minute observation period and asked the defendant if he would answer the voluntary questions on the DUI Interview portion of the DUI Arrest Packet. The defendant stated he would and answered the questions.

- 1 4. After answering the question, the defendant requested to speak to an attorney. Trooper  
2 Durbin called the Department of Assigned Counsel for the defendant and the defendant  
3 spoke to DAC Attorney Nicholas Andrews. The Trooper noted that the conversation lasted  
4 approximately 13 minutes. Trooper Durbin does not recall if the defendant requested  
5 privacy during his phone call, but indicated that had the defendant requested privacy, he  
6 would have gone to the other side of the room. The Fife BAC room's dimensions are  
7 approximately 27 feet by 19 feet.
- 8 5. When Trooper Durbin dialed the Department of Assigned Counsel number, he reached  
9 attorney Nicholas Andrews. Trooper Durbin did not leave the room, but indicated that if he  
10 requested privacy, he would have walked away from the defendant when/if the defendant  
11 requested privacy.
- 12 6. Trooper Durbin testified that if he was at the other end of the room, he would not have been  
13 able to hear the defendant's conversation.
- 14 7. Mr. Andrews stated he requested complete privacy on two occasions. Trooper Durbin's  
15 response was that he could not accommodate his requests because of the specific location of  
16 the phone and (Fife Police Headquarters) where the BAC instrument was located.
- 17 8. Mr. Andrews testified that his client, the defendant, was free to ask questions and that  
18 speaker phone was not used.
- 19 9. Mr. Andrews testified that he advised his client of his right to remain silent, including the  
20 right not to answer questions and the right to decline to perform any physical tests.
- 21 10. Mr. Andrews indicated that he was able to determine that the defendant did not have any  
22 DUI/Physical control convictions or charges within the past 7 years, and that his client was  
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1 not currently on, or had ever been on a deferred prosecution. Mr. Andrews also learned that  
2 his client did not have a commercial driver's license.

3 11. Mr. Andrews indicated that was able to ask the defendant a series of questions and advise  
4 him of multiple rights and consequences of refusing a breath test, including the  
5 administrative and criminal conviction consequences.

6 12. Mr. Andrews advised the defendant, and the defendant understood, that all the tests and  
7 questions were voluntary.

8 13. Mr. Andrews advised the defendant of the right to have additional tests, such as a blood test  
9 at a hospital, and that although the defendant did not desire an additional test, he could pay  
10 for it.

11 14. Mr. Andrews indicated that because of the lack of privacy, he was not able to ask the  
12 defendant the following questions

- 13 a. How much have you had to drink?  
14 b. What type of alcohol?  
15 c. How big were the drinks?  
16 d. How much alcohol was in them?  
17 e. When was your last drink?  
18 f. When did you start drinking?  
19 g. When did you last eat?  
20 h. What did you eat?  
21

22 15. However, Mr. Andrews testified that it was possible to ask those questions with a series of

23 "yes or no" answers, *but it was not feasible to ask those questions*  
24 *in the allotted time.* *BB*  
25

- 1 16. Mr. Andrews testified that the decision to submit to the test is ultimately up to the client and  
2 that he did not advise the defendant as to what his decision should be (submit to the breath  
3 test or refuse).
- 4 17. After consulting with Mr. Andrews, the defendant again agreed to take the BAC test. The  
5 defendant's results of the BAC test were .096 and .095 g/210L. Mr. Andrews also informed  
6 Trooper Durbin of his client's intent to take the breath test.
- 7 18. On the Implied Consent Warnings for Breath, Trooper Durbin noted that the defendant did  
8 not express any confusion regarding the warnings that been read to him.
- 9 19. The incident described by Trooper Durbin occurred in Pierce County, Washington.
- 10 20. Trooper Durbin identified the defendant in open court as the person he arrested for Felony  
11 Eluding and DUI on January 2, 2012.

#### 12 THE DISPUTED FACTS

- 13 1. Whether or not Trooper Durbin provided the defendant with sufficient privacy by  
14 remaining in the room while the defendant was on the telephone?
- 15 2. If sufficient privacy was not provided, whether or not the defendant has demonstrated  
16 specific prejudice.

#### 17 FINDINGS AS TO DISPUTED FACTS

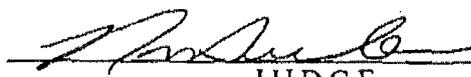
- 18 1. Trooper Durbin could not recall if there was a request for privacy, but Mr. Andrews  
19 indicated that there were two requests for privacy. The Court found that there was a  
20 request for privacy in this case and as a result, there was insufficient privacy afforded to  
21 the defendant during his phone call with Mr. Andrews.
- 22 2. The defendant has not proved actual prejudice as a result of the lack of privacy.
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**REASONS FOR ADMISSIBILITY OR INADMISSIBILITY OF THE EVIDENCE AND  
CONCLUSIONS OF LAW**

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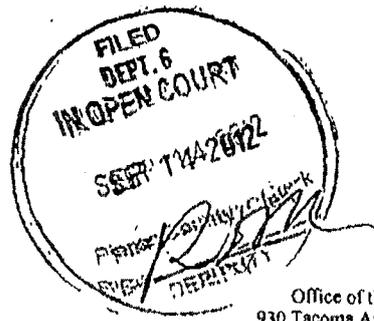
1. Trooper Durbin and Mr. Andrews were credible.
2. Mr. Andrews testified that the defendant was free to answer questions.
3. Mr. Andrews testified that he was able to advise the defendant of all of his rights and the consequences of either submitting or refusing a breath test despite the lack of privacy
4. The only questions Mr. Andrews indicated he did not ask related to the defendant's consumption. Mr. Andrews admitted that he could have asked these questions using a series of "yes or no" questions.
5. The defendant has not demonstrated that as a result of the consumption questions not being asked/answered, his decision to submit to the breath test was prejudiced in any way.
6. This Court concludes that since the defendant has not demonstrated actual prejudice, the lack of privacy afforded to the defendant did not interfere with his right to counsel.
7. As such, the defendant's breath test is admissible.

DONE IN OPEN COURT this 14 day of September, 2012.

  
\_\_\_\_\_  
JUDGE

Presented by:

  
\_\_\_\_\_  
MARK SANCHEZ  
Deputy Prosecuting Attorney  
WSB # 35503



Approved as to Form:

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JOSEPH EVANS  
Attorney for Defendant  
WSB # 37681

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## OFFICE RECEPTIONIST, CLERK

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**To:** Heather Johnson  
**Cc:** 'KARSdroit@aol.com'  
**Subject:** RE: State v. Roman Fedorov--90939-3

Received 5-22-2015

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Chelsey Miller, WSB No. 42892  
(253)798-3375  
[Cmille2@co.pierce.wa.us](mailto:Cmille2@co.pierce.wa.us)

Attached is the Supplemental Brief