

IN THE COURT OF APPEALS FOR THE STATE OF ALASKA

J.W.,

Petitioner,

vs.

SUPERIOR COURT,

Respondent.

Court of Appeals No. **A-12128**

RECEIVED

FILED

FILED in the Trial Court
State of Alaska Fourth District
JAN 05 2015 **JAN 05 2015**
APPELLATE COURTS
OF THE
STATE OF ALASKA

APPELLATE COURTS
OF THE
STATE OF ALASKA

Deputy

Trial Court Case # **4FA-13-02667CI**
Trial Court Case # **4FA-13-02668CI**
Trial Court Case # **4FA-13-02669CI**
Trial Court Case # **4FA-03-00976CI**

PETITION FOR REVIEW

COMES NOW the privilege holder, J.W., by and through counsel, Jason Gazewood of Gazewood & Weiner, P.C., and pursuant to Appellate Rule 403, hereby petitions the Alaska Court of Appeals to review the Sealed Tentative Decision on Motion to Find Waiver of Attorney-Client Privilege. J.W. relies on the exhibits he has previously filed in this matter.

STATEMENT OF FACTS

At one time, a person worked for the Public Defender Agency.¹ While the person worked at the Public Defender Agency, s/he learned client secrets.² S/he was later fired by the Public Defender Agency for misconduct.³ The person got a job with

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¹ See Sealed Tentative Decision on Motion to Find Waiver of Attorney-Client Privilege, November 17, 2014, at 2.

² See id at 8-9.

³ See id at 7.

another law firm.⁴ This person's law firm now wants to use the secrets that their employee learned while working for the Public Defender Agency in litigation directly benefiting their law firm.⁵ The Superior Court thinks this is okay.⁶

J.W. thinks what a client tells his or her attorney while s/he is in jail awaiting trial should remain secret and be utilized in the client's best interests.⁷ He wonders how attorneys at the Public Defender Agency can tell clients to speak to their employees when there are no parameters in place to stop Public Defender Agency employees from sharing secrets that damage public confidence in the institution.⁸

This case arises out of a post-conviction relief application.⁹ J.W. was previously represented by the Public Defender Agency.¹⁰ During the course of that representation, J.W. spoke with a Public Defender Agency investigator, Il.¹¹ He told Il things in confidence that could potentially be harmful to J.W.'s interests.¹²

⁴ See id at 7-8.

⁵ See id at 11.

⁶ See id at 28-29.

⁷ See id at 11-12.

⁸ See id at 11-12.

⁹ See id at 1.

¹⁰ See id at 3-4.

¹¹ See id at 3-5.

¹² See Id.

I1 takes his obligations of client secrecy seriously and has testified that he would never reveal a client confidence without the explicit direction of a supervising attorney.¹³

But that's not what everyone who has worked there thinks.¹⁴

I1 had developed strong opinions about the facts pertinent to the underlying PCR while he was investigating them on behalf of a party at the trial court level.¹⁵ This case occurred before J.W.'s matter.¹⁶ I1 never told J.W. about his previous involvement in the case.¹⁷

J.W. never consented to I1 telling anyone the information J.W. provided to I1.¹⁸ It is I1's belief that as an investigator with the Public Defender Agency, I1 cannot reveal such information to anyone outside of the Public Defender Agency, even today.¹⁹

I2 worked for the Public Defender Agency as its chief investigator.²⁰ He had some supervisory authority over I1, as he was the top investigator for the agency and was responsible for budgeting and various other administrative concerns.²¹

¹³ See id at 8-10.

¹⁴ See id at 8-9.

¹⁵ See id at 8.

¹⁶ See id at 3-4.

¹⁷ See id at 8.

¹⁸ See id at 10.

¹⁹ See id at 10.

²⁰ See id at 2-3.

²¹

First, I2 spoke with I1 while both were private investigators.²² At that time, I1 told I2 that he believed that the guilty verdict in the case was wrong.²³ I1 had other theories about how the underlying crime happened.²⁴

At that time, I1 was not yet employed by the Public Defender Agency and had not met J.W.²⁵ J.W.'s name did not come up when I1 and I2 first discussed the case.²⁶

I1 was subsequently hired by the Public Defender Agency.²⁷ J.W. was represented by the Agency on another matter. He met with his appointed attorney.²⁸ J.W. allegedly told his appointed attorney secrets that prompted the appointed attorney to have I1 go to the jail and meet with J.W.²⁹ I1 met with J.W.³⁰

I2 was then hired as the Chief Investigator for the Public Defender Agency.³¹ I2 met with I1 again after the meeting between I1 and J.W.³²

I2 came to Fairbanks to meet with I1.³³ I2 and I1 talked about the underlying case and the secret communications between

²² See id at 3

²³ See id at 8

²⁴ See id.

²⁵ See id at 3

²⁶ See id.

²⁷ See id.

²⁸ See id at 4

²⁹ See id.

³⁰ See id.

³¹ See id at 2

³² See id at 8

³³ See id.

J.W. and his attorney.³⁴ I1 said he felt comfortable telling I2 these things because I2 was an employee of the Public Defender Agency.³⁵ I1 thought that I2 also had the same understanding of the need to keep client secrets, even after employment with the Public Defender Agency terminated.³⁶

I2 started to work for I2's current law firm while maintaining his job at the Public Defender Agency.³⁷ I2 would call I1 on behalf of his new law firm on the Public Defender phone system.³⁸ I2 asked I1 about what J.W. had said to I1.³⁹ I1 refused to answer these questions.⁴⁰

I2 was then fired for ethical misconduct.⁴¹ The alleged ethical misconduct had nothing to do with the above-described misconduct.⁴²

After being fired for ethical misconduct, I2 returned to Fairbanks to discuss the case.⁴³ He was now solely working for

³⁴ See id at 8-9.

³⁵ See id at 9

³⁶ See id.

³⁷ See id at 5

³⁸ See id at 6

³⁹ See id at 9-10

⁴⁰ See id.

⁴¹ See id at 7

⁴² See id.

⁴³ See id at 9

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the current law firm.⁴⁴ I2 again met with I1.⁴⁵ I1 again refused to tell I2 what J.W. had told him.⁴⁶

However, I2 already knew J.W.'s secrets from when he was employed by the Public Defender Agency.⁴⁷ He is now attempting to exploit J.W.'s secrets on behalf of his current client.⁴⁸

I2's law firm began the instant action, alleging that J.W. had waived his privilege by talking to an investigator with the Public Defender Agency.⁴⁹ I2's firm does not care that J.W. never agreed to have his secrets repeated to anyone and has not consented to his secrets being revealed.⁵⁰ J.W. never shared this information with anyone else but Public Defender employees.⁵¹

Now, what J.W. is purported to have said to his attorney under the sacred protection of attorney-client privilege is readily available on the internet. And the Superior Court thinks this is okay.

STATEMENT OF THE QUESTION

Is a privileged communication to one's attorney protected where the purpose of the communication is to further representation, the privilege holder has never waived the

⁴⁴ See id at 7

⁴⁵ See id at 9-10

⁴⁶ See id.

⁴⁷ See id at 8-9

⁴⁸ See id at 1-2

⁴⁹ See id at 1-2

⁵⁰ See id at 10

⁵¹ See id.

privilege, and the breaking of the privilege is accomplished by a representative of one of the parties that wishes to use the statement?

REASONS WHY REVIEW SHOULD BE GRANTED

J.W.'s privileged communications have been revealed to a third party and the substance of those communications shall now be utilized in litigation favoring I2's law firm. The publication of these secrets could place J.W. in jeopardy.

WHY THE DECISION BELOW IS ERRONEOUS

1. The Court Failed to Make Findings

J.W. believes that his confidential attorney-client communications should remain secret. Any unauthorized disclosure of privileged information should remain protected, especially on the facts of this case. Here, an agent of a party, I2, is responsible for the violation and committed the violation so that the evidence could be used in I2's case to the advantage of I2's law firm. Despite there being a rule with plain language requiring factual findings, the Superior Court failed to make any significant factual findings on this issue, instead it simply recited two competing versions of events while hiding behind a masquerade of analysis which did not require the Court to actually decide what happened.

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J.W. has since requested that the Superior Court make factual findings in this case.⁵² In accord with its previous decisions in this matter, the Court holds steadfast to its position of impotency.

Civil Rule 52 mandates that a Court, "...shall find the facts specially..." The Court is the only party with the opportunity to judge the credibility of witnesses. In this case, the Court heard conflicting testimony from I1 and I2 about what happened. Either I1 or I2 is lying about what happened. However, the Superior Court finds this irrelevant to its resolution of the matter, despite J.W. telling the Superior Court that the evidence was unlawfully obtained and should therefore not be used in this case.

What happened is critical to J.W., not only as an aggrieved party, but also as a non-party litigant whose privileged communications continue to be exploited in the Superior Court and beyond. This contravenes Alaska Rule of Evidence 511 and its commentary.

The Superior Court needs to make factual findings. The failure of a court to resolve disputed factual issues is an issue itself that would require remand. J.W. therefore requests that this Court issue an order requiring Judge Lyle

⁵² At this time, the motion for factual findings has not yet been ruled on by the trial court.

to resolve the disputed factual issue and make factual findings.

2. The Privileged Communication Should be Excluded In the Post-Conviction Relief Proceeding

In its Tentative Decision, the trial court ruled that J.W.'s attorney-client privilege was breached but that he did not waive his privilege.⁵³ The trial court further ruled that the remedy for the breach is only that the statements cannot be used against J.W.⁵⁴ but that they are admissible in the Post-Conviction Relief proceeding because J.W. is not a party. The court cites to Alaska Rule of Evidence 511 to support this theory.

ARE 511 is an identical copy of Rejected Federal Rule 512.⁵⁵ The trial court cites to a treatise, Federal Practice and Procedure, to support its interpretation of ARE 511. However, the trial court misinterprets this treatise. In the treatise, Graham notes that Rejected Rule 512 "makes evidence of a wrongful disclosure of privileged matter inadmissible 'against the holder of the privilege.'⁵⁶ However, the section clarifying the term "against holder" explains that "the holder or other authorized claimants could, of course, still claim the privilege

⁵³ See id at 16.

⁵⁴ See id at 26.

⁵⁵ 26A Graham, Fed. Prac. & Proc. Evid. §5741 (Statutory History) n. 19

⁵⁶ Id. at §5748

in other actions since by hypothesis the wrongful disclosure was not a waiver of the privilege."⁵⁷

This is exactly what is happening here. Here the statement is being used in a proceeding where the privilege holder is not a party. The attorney client privilege does not only apply to proceedings where the holder is a party, but also extends to matters outside of litigation.⁵⁸

Section 5742 explores the policy of the rejected rule. This section clarifies that the holder of the privilege can bar use of the statement in proceedings to which he is not a party.⁵⁹ The purpose of excluding from evidence confidential communications between the attorney and the client is to ensure that the client is able to speak freely to his or her attorney. Drafters of the Uniform Rule of Evidence determined that Rule 511:

Will most often operate as rule of exclusion, i.e., it will render inadmissible evidence of the prior disclosure in a civil or criminal action to which the holder of the privilege is a party. But the rule does more than prohibit the use of such evidence against the holder of the privilege (as does Rejected Rule 512), it provides that the privilege shall remain intact, to be treated as originally granted. Thus, the holder, as a witness, may claim the privilege, in an action to which he is not a party.⁶⁰

The commentary notes that Rejected Rule 512 would allow the holder to claim the privilege even if he or she is not a party to the action. It would defeat the purpose of the attorney

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⁵⁷ *Id.* at §5748 (Scope - "Against Holder", FN 1).

⁵⁸ See *Walstad v. State* 818 P.2d 695 (Alaska 1991).

⁵⁹ *Id.* §5742 (Policy of Rejected Rule)

client privilege if it could be used in the manner requested by I2's firm and authorized by the trial court. The privilege is in place to ensure that a client may speak with his attorney freely so that he can get real advice. That is a basic thing that the public understands about attorneys: they keep their secrets.⁶¹ Violating that principle here, especially where J.W. had no role in the breach, is just wrong, but not surprising.⁶² Therefore, the trial court erred when it held that the statements could be used in the post-conviction relief proceedings.

3. I2's Law Firm Should Not Be Allowed to Benefit From I2's Breach of J.W. Attorney Client Privilege.

In this case, if J.W.'s statements are admissible in the Post-Conviction Relief proceeding, I2's law firm would directly benefit from I2's own violation of J.W. privileged communications. The exclusionary rule is in place to deter exactly this type of behavior and it should be applicable in this case.⁶³

I2 learned about J.W.'s statements while he was an employee at the Public Defender Agency and is now attempting to use this

⁶⁰ *Id.*

⁶¹ See Commentary to ARE 511.

⁶² See "Framed by Forensics" by Douglas Starr, <http://aeon.co/magazine/society/how-can-we-rid-the-legal-system-of-bad-science/>, noting that poor clients who have appointed counsel have attorneys who lack an understanding of scientific evidence that results in conviction. This may be a resource issue, as private counsel in civil cases often have the money to challenge bad science. However, the authors note that bad science is still in every courtroom.

⁶³ *Wong Sun v. United States*, 371 U.S. 471 (1963).

information to benefit his new employer. The privileged statement is fruit of the poisonous tree and should therefore be excluded.⁶⁴ Admitting this evidence would run afoul of the policy of the exclusionary rule and destroy the attorney-client privilege.

4. Failure to Recognize J.W.'s Attorney-Client Privilege Would Erode the Public's Confidence in the Public Defender Agency

There is another reason that J.W. privilege should be upheld, and that is because a failure to recognize the privilege will result in a further erosion of the public's confidence in public defenders, as an unauthorized third-party disclosure could be revealed to another party.

As it is, public defender agencies are notoriously underfunded and public confidence in their abilities is low.⁶⁵ Difficulties associated with trust and lack of resources have resulted in wrongful guilty pleas and excessive sentences.⁶⁶ The hallmark of the attorney client relationship is the trust exemplified in Rule of Evidence 511.

It seems counter-intuitive to say that J.W. cannot restore a privilege that he had no role in breaking. The Public Defender Agency's agents revealed this information. Whether it be because

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⁶⁴ See *id.*

⁶⁵ See "An Essay on the New Public Defender for the 21st Century" by Charles Ogletree, Jr., 1995 Law and Contemporary Problems, at <http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=4267&context=lcp>.

they failed to train I2 or I2 knowingly violated rules of privilege, the public defender is ultimately to be blamed for this breach. This will further erode the confidence that Alaskans have in the state's commitment to defending the indigent.

STATEMENT OF PRECISE RELIEF SOUGHT

J.W. is seeking to have his privilege upheld and not have his privileged communications with his attorney be provided to the State of Alaska or used in the PCR proceedings.

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⁶⁶ See <https://www.aclu.org/racial-justice/prisoners-rights/womens-rights/immigrants-rights/inadequately-funded-public-defender->.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was provided via:

☐ email ☐ fax ☐ mail to the following:

William B. Oberly - Alaska Innocence Project
Colleen Libbey - Libbey Law Offices LLC

Dated: _____ By: _____

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DATED ON THIS 5TH day of January, 2015.

GAZEWOOD & WEINER, P.C.

By: Jason A. Gazewood

Jason A. Gazewood
ABA No. 0211060

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was provided via: ☒ mail ☐ fax ☐ courier ☐ hand-delivery to the following:

Dated: 1-5-15 By: Michael Aksh

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