

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

BRIAN Z. WOMAC,

Appellant.

No. 42553-0-II

UNPUBLISHED OPINION

Penoyar, J. — Brian Z. Womac appeals the trial court’s denial of his motion to require his trial counsel to release the discovery portion of his client file to him pursuant to CrR 4.7(h)(3), and further assigns error to the court’s refusal to hold an in-camera hearing to review the withheld file. CrR 4.7(h)(6). Because Womac received a redacted discovery file after filing his appeal, we dismiss the portion of his appeal premised on a violation of CrR 4.7(h)(3) as moot. In addition, because CrR 4.7(h)(6) does not require an in-camera hearing in this circumstance, we affirm the trial court’s denial of Womac’s request for a hearing.¹

FACTS

In 2004, a jury convicted Womac of one count of homicide by abuse, one count of second degree murder, and one count of first degree assault of a child. On review, our Supreme Court held that the three convictions were the same offense for double jeopardy purposes. It reversed and remanded the matter to the trial court with instructions to vacate counts II and III of Womac’s convictions. In 2007, the trial court entered a new judgment and sentence on one count of homicide by abuse with a 320-month sentence.

¹ A commissioner of this court initially considered this appeal as a motion on the merits under RAP 18.14 and then transferred it to a panel of judges.

In 2011, Womac requested a copy of his trial discovery file from his trial attorneys. The public records officer for the Department of Assigned Counsel (DAC) refused his request because “[d]iscovery must remain in the exclusive custody of the defense attorney.” Clerk’s Papers (CP) at 83. In June 2011, Womac filed a pro se motion requesting the trial court to order his trial attorneys “to turn over . . . the discovery portion of [his] file minus any appropriate and necessary redactions.” CP at 84. The trial court denied the motion without a hearing. Womac appeals.²

ANALYSIS

Womac argues that defense counsel violated CrR 4.7(h)(3)³ by refusing to provide him with his redacted discovery file. He adds that counsel had an ethical obligation to provide these documents. He requests us to reverse the trial court’s order denying his motion and “remand with instructions for the trial court to order defense counsel to provide Mr. Womac with a copy of the discovery after appropriate redactions are made.” Appellant’s Br. at 9. The State responds that the CrR 4.7(h)(3) is limited to pretrial discovery. It adds that we do not have jurisdiction over alleged ethical violations.

² A commissioner of this court originally determined that the trial court’s order was not appealable as of right. On February 17, 2012, we granted Womac’s motion to modify this ruling and allowed his appeal to proceed.

³ CrR 4.7(h)(3) provides:

Custody of Materials. Any materials furnished to an attorney pursuant to these rules shall remain in the exclusive custody of the attorney and be used only for the purposes of conducting the party's side of the case, unless otherwise agreed by the parties or ordered by the court, and shall be subject to such other terms and conditions as the parties may agree or the court may provide. Further, a defense attorney shall be permitted to provide a copy of the materials to the defendant after making appropriate redactions which are approved by the prosecuting authority or order of the court.

Womac filed a statement of additional grounds (SAG). Womac's SAG raises two issues. First, he states that the DAC denied a request for 118 pages of documents, claiming that it previously provided these pages to Womac.⁴ Womac contends that the Public Records Act (PRA) requires DAC to provide him with a redaction log for these allegedly withheld documents. SAG Ground 1. Womac next states that the DAC provided him with "redacted discovery" but no log, and he requests us to remand this matter to the trial court for an in-camera review of the redacted documents. SAG Ground 2 (citing CrR 4.7(h)(6)).⁵

In light of Womac's SAG acknowledgement that he has now received a redacted discovery file, a commissioner of this court ordered the parties to submit additional briefing on the issue whether Womac's appeal was moot. CrR 4.7(h)(3).

The State responded that the appeal is moot because in April 2012, "while Womac's appeal was pending, DAC submitted to this office a copy of discovery which DAC had initially redacted, and asked for approval to turn the material over to Womac." State's Response re Mootness at 3. The Pierce County Prosecutor's Office made additional redactions and returned the documents to DAC with approval to release them to Womac. It concludes that "[e]ven if this Court were to reverse the trial court's dismissal [of Womac's discovery file request], and the trial

⁴ He appears to be referencing certain client documents released to him by the DAC on March 26, 2011.

⁵ CrR 4.7(h)(6) provides:

(6) *In Camera Proceedings*. Upon request of any person, the court may permit any showing of cause for denial or regulation of disclosure, or portion of such showing, to be made in camera. A record shall be made of such proceedings. If the court enters an order granting relief following a showing in camera, the entire record of such showing shall be sealed and preserved in the records of the court, to be made available to the appellate court in the event of an appeal.

court were to order DAC to provide discovery to Womac, he would only be entitled to what he has already received: discovery redacted pursuant to CrR 4.7.” State’s Response re Mootness at 5-6.

Womac’s appellate attorney also responded to the commissioner’s order. The response does not explicitly acknowledge that during this appeal DAC provided Womac with a redacted discovery file. Rather, it contends that the appeal is not moot because we can grant effective relief by granting Womac’s SAG request for an in-camera review of withheld or redacted documents pursuant to CrR 4.7(h)(6).

Generally, if a court cannot grant effective relief, a case is moot. *State v. Turner*, 98 Wn.2d 731, 733, 658 P.2d 658 (1983). There are two exceptions to the mootness doctrine. We will hear an otherwise moot appeal “if it involves matters of continuing and substantial public interest.” *In re Dependency of A.K.*, 162 Wn.2d 632, 643, 174 P.3d 11 (2007) (quoting *In re Det. of Swanson*, 115 Wn.2d 21, 24, 793 P.2d 962 (1990)). And, we will entertain an appeal if the trial court’s ruling has collateral consequences. *Turner*, 98 Wn.2d at 733.

Womac’s request to obtain the discovery portion of his file pursuant to CrR 4.7(h)(3) is moot. This rule allows defense counsel to release a discovery file to the client “after making appropriate redactions which are approved by the prosecuting authority or order of the court.” CrR 4.7(h)(3). Here, DAC followed the rule and released Womac’s discovery file to him after the prosecuting authority reviewed the file and authorized disclosure. Womac does not identify any issues of public interest or potential collateral consequences that require us to hear this otherwise moot issue.

Womac’s trial court motion also requested in-camera review of the discovery file pursuant

to CrR 4.7(h)(6). He reasserted a modified version of this request in his SAG ground 2.⁶ This rule allows an individual to request an in-camera hearing for any “showing of cause for denial or regulation of disclosure.” CrR 4.7(h)(6). Because in the event Womac can demonstrate that this rule applies to the contents of the DAC’s discovery file, this court could grant relief in the form of the requested remand, we conclude that this issue is not moot.

Nothing in the text of CrR 4.7(h)(3) or (h)(6), however, entitles a former defendant to an in-camera hearing on a request for his discovery files from defense counsel. As previously set out, CrR 4.7(h)(3) governs discovery file requests made by a client to his counsel, and allows release of a redacted file either after approval by the prosecutor or the court. The prosecutor and DAC followed this procedure by having the prosecutor approve of the file release.⁷

In contrast, CrR 4.7(h)(6) is concerned with examining evidence withheld by a party or witness in an ongoing criminal trial; “An in camera hearing is a means by which the trial court controls evidence in a lawsuit.” *State v. Allen*, 27 Wn. App. 41, 48, 615 P.2d 526 (1980). The in-camera procedure is designed to protect a defendant’s right to due process. Specifically,

In view of the mandate of the Constitution, information helpful to possible defenses of a defendant such as entrapment, alibi, mistaken identity, lack of sufficient knowledge on the part of the accused whose knowledge is an element of the crime all require disclosure unless the governmental privilege is overwhelming.

⁶ We note that Womac’s original motion requested an in-camera review of the entire withheld discovery file based on DAC’s position that it was not allowed to release the file to Womac. The motion requested release of the discovery file to Womac “minus any appropriate and necessary redactions.” CP at 84. Because Womac now has a redacted discovery file, his SAG requests an in-camera review of the redacted portions as opposed to the entire discovery file.

⁷ Because DAC and the State did not present the discovery file to the court for approval, this analysis does not address CrR 4.7(h)(3)’s alternative procedure to present the file to the court. CrR 4.7(h)(3) (“a defense attorney shall be permitted to provide a copy of the materials to the defendant after making appropriate redactions which are approved by the prosecuting authority or order of the court.”).

When . . . the defendant makes the requisite showing of relevance, such a hearing is necessary for the protection of the defendant's due process rights.

Allen, 27 Wn. App. at 48. Because Womac's appeal does not involve prosecutor-withheld documents potentially necessary to his criminal defense, CrR 4.7(h)(6) does not require an in-camera hearing.

Womac also asserts that CrR 4.7(h)(6) is designed to prevent a prosecutor from withholding discovery documents "upon his mere assertion that they are not relevant or that they are privileged." Appellant's Response re Mootness at 2 (quoting *Allen*, 27 Wn. App. at 47 (quoting *Jencks v. United States*, 353 U.S. 657, 676, 77 S. Ct. 1007, 1 L. Ed. 2d 1103 (1957))). The language of CrR 4.7(h)(3), however, explicitly grants the authority to the prosecutor to authorize redactions to the discovery file as between a client and defense counsel. Thus, unlike at trial, where a court cannot abdicate its control of the case to executive officers, CrR 4.7(h)(3) delegates authority to the prosecutor to control the contents of a discovery file in this context. *See Allen*, 27 Wn. App. at 47. Accordingly, we affirm the trial court's denial of Womac's request for an in-camera hearing under CrR 4.7(h)(6) to review any or all withheld portions of his discovery file.

Both of Womac's SAG grounds also reference PRA requests. Womac's motion and memorandum to the trial court, however, did not raise any PRA claims and we will not consider them for the first time on appeal. RAP 2.5(a); *see generally Wood v. Lowe*, 102 Wn. App. 872, 878, 10 P.3d 494 (2000) (declining to review whether certain public records were exempt from disclosure because the claim was not raised in the superior court). We note, however, that the State acknowledges that the civil division of the Pierce County Prosecutor's Office is processing

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these requests and that “[r]edaction logs are normally maintained with regard to public disclosure requests.” State’s Response re Mootness at 5.

We dismiss in part as moot and affirm in part.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Penoyar, J.

We concur:

Quinn-Brintnall, J.

Johanson, A.C.J.