

Commonwealth of Kentucky
Court of Appeals

NO. 2018-CA-000914-MR

ROLLO LEE HIBBITT

APPELLANT

v. APPEAL FROM MUHLENBERG CIRCUIT COURT
HONORABLE BRIAN WIGGINS, JUDGE
ACTION NO. 18-CR-00029

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** ** *

BEFORE: ACREE, GOODWINE, AND KRAMER, JUDGES.

GOODWINE, JUDGE: Rollo Lee Hibbitt (“Hibbitt”) appeals from a judgment and sentence on a conditional plea of guilty of the Muhlenberg Circuit Court.

Hibbitt argues the trial court improperly denied a motion *in limine* upon which his plea was conditioned. After careful review, we affirm.

Hibbitt was charged with possession of a controlled substance (a prescription medication) in a separate but related case on October 9, 2017. During the discovery phase of the drug possession case, Hibbitt's attorney provided the Commonwealth a series of prescriptions for the drugs in question. Although these prescriptions were dated July, August, and September 2017, it became apparent to the Commonwealth that the prescriptions were actually for July, August, and September 2018. The prescriptions had been altered to appear as though Hibbitt obtained them prior to being charged with possession of a controlled substance instead of afterward. Investigative officer, Detective Wade Shoemaker, "contacted staff at [counsel's] law office and was informed [Hibbitt] had brought in the allegedly false documents." Hibbitt was then indicted for tampering with physical evidence, making a false statement/utterance regarding a prescription, and being a persistent felony offender in the first degree.

Following Hibbitt's indictment on the new charges, he filed a motion *in limine* to exclude from evidence the identities of Hibbitt and his former attorney. Hibbitt specifically sought to exclude, pursuant to the attorney-client privilege codified in Kentucky Rules of Evidence (KRE) 503, that he was the individual who delivered the forged prescriptions to his attorney, and that his attorney was the individual who turned copies of these prescriptions over to the Commonwealth. After a hearing on the issue, the trial court entered an order denying the motion *in*

limine, finding the identities of Hibbitt and his counsel as sources of the forged prescriptions were admissible because Hibbitt's actions were in furtherance of a crime or fraud under KRE 503(d)(1).

Following the trial court's ruling, Hibbitt entered a conditional guilty plea to tampering with physical evidence and the amended count of being a persistent felony offender in the second degree. Hibbitt's plea was conditioned on his ability to appeal the trial court's denial of his motion *in limine*. Hibbitt was sentenced to seven years' imprisonment. This appeal followed.

The standard of review for admission of evidence is whether the trial court abused its discretion. *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999). "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Id.*

On appeal, Hibbitt argues the trial court improperly denied his motion *in limine* to exclude the source of the forged prescriptions because the attorney-client privilege applies. KRE 503(b) governs the attorney-client privilege in Kentucky. The general rule provides:

A client has a privilege to refuse to disclose and to prevent any other person from disclosing a confidential communication made for the purpose of facilitating the rendition of professional legal services to the client . . . [b]etween the client . . . and the client's lawyer or representative of the lawyer[.]

Id. “A communication is ‘confidential’ if not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.” KRE 503(a)(5). However, “[t]here is no privilege under this rule . . . [i]f the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud[.]” KRE 503(d)(1).

This case bears similarity to *Hughes v. Meade*, 453 S.W.2d 538 (Ky. 1970), in which an undisclosed individual retained the services of an attorney for the purpose of returning a stolen typewriter to a police department. *Id.* at 539. The attorney was held in contempt for refusing to disclose the individual’s identity. *Id.* at 540. Generally, “the identity of a client is not a privileged communication[.]” but this rule “is subject to exception under unusual circumstances.” *Id.* at 540-41. The identity of a client is subject to the attorney-client privilege when “the act in question” falls “within the scope of professional employment[.]” *Id.* at 541. The Court held “that whether or not a bona fide attorney-client relationship existed between the [attorney] and the undisclosed person, the principal transaction involved, i.e., the delivery of stolen property to the police department, was not an act in the professional capacity of [the attorney] nor was it the rendition of a legal service.” *Id.* at 542. The Court further opined, “While repose of confidence in an

attorney is something much to be desired, to use him as a shield to conceal transactions involving stolen property is beyond the scope of his professional duty and beyond the scope of the privilege.” *Id.*

Although the identity of a client can be privileged under certain circumstances, Hibbitt’s and his counsel’s identities as the source of the forged documents are not protected by the privilege. The attorney in *Hughes* had been retained solely to anonymously return stolen evidence to a police station. Here, Hibbitt hired counsel to represent him for the underlying drug possession charge, but not to serve as a conduit for submitting falsified evidence to the Commonwealth. Hibbitt sought to use his counsel “as a shield” to conceal from the Commonwealth that he committed an additional crime (tampering with physical evidence) in an effort to defend himself against the underlying charge. The identity of a client is beyond the scope of the privilege when the client seeks to conceal himself as the source of evidence of a new crime. Thus, we hold the trial court did not abuse its discretion in denying Hibbitt’s motion *in limine*.

For the foregoing reasons, we affirm the judgment the Muhlenberg Circuit Court.

ALL CONCUR.

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