IMPORTANT NOTICE
NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD ADEQUATELY ADDRESS THE ISSUE BEFORE THE COURT. OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.

RENDERED: NOVEMBER 23, 2011
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2011-SC-000087-MR

JOHNNY CAVENDER — APPELLANT

V.

ON APPEAL FROM COURT OF APPEALS
CASE NO. 2010-CA-001604-OA
WOLFE CIRCUIT COURT NO. 96-CR-00021

HON. FRANK A. FLETCHER, JUDGE
WOLFE CIRCUIT COURT — APPELLEE

AND

COMMONWEALTH OF KENTUCKY — REAL PARTY IN INTEREST

MEMORANDUM OPINION OF THE COURT

REVERSING AND REMANDING

Johnny Cavender appeals from an order of the Court of Appeals denying his petition for a writ of prohibition. In that petition, Cavender alleges that it would be a violation of the attorney-client privilege for the Wolfe Circuit Court to question his former counsel during an RCr 11.42 evidentiary hearing. The Court of Appeals concluded that a writ was not warranted because Cavender had impliedly waived the attorney-client privilege. Cavender now appeals as a matter of right.

Cavender was tried and convicted of the murder of Millie Taulbee. That conviction was affirmed by this Court on direct appeal. *See Cavender v.*

Commonwealth, 1999-SC-000267-MR (Oct. 25, 2001). Thereafter, he timely filed a motion, pursuant to RCr 11.42, alleging ineffective assistance of counsel. This claim was based, in part, on trial counsel's failure to present evidence of Cavender's mental disability at the time of the crime. An evidentiary hearing was conducted.

At the hearing, Hon. Kelly Gleason testified that she represented Cavender at trial. She explained that her representation began approximately sixteen months prior to trial, after Hon. Bruce Franciscy withdrew from the case. She stated that, prior to trial, she discussed strategy and a possible mental health defense with Cavender.

She also testified that she had conferred with Franciscy when she assumed Cavender's representation. Franciscy told Gleason that he had seen medical records in Cavender's possession which indicated a mental health diagnosis of "borderline." However, she believed that Cavender had refused to give the records over to Franciscy, and the medical records were not in the trial attorney file that was provided to her. She unsuccessfully sought the records from Cavender and was unable to recall whether she ever obtained the records prior to trial. She acknowledged that she could have sought a court order to obtain the records, or that she could have requested a new psychological evaluation.

At the hearing, it was acknowledged—both by Gleason and Cavender's current counsel—that Franciscy withdrew from the case following a physical confrontation with Cavender. At the conclusion of the evidentiary hearing,

Judge Fletcher decided to question Franciscy at a later date regarding that physical confrontation. Specifically, Judge Fletcher wanted to know if the physical confrontation related to the mental health records, and whether Cavender refused to give his medical records to Franciscy. Cavender's counsel expressed her objection to Franciscy testifying, largely on the basis that his testimony would be irrelevant to the issue of Gleason's representation at trial.

Franciscy appeared before the trial court about a week later and explained that his representation of Cavender lasted about ten months. He clarified that the physical altercation that ended the relationship did not relate to the mental health records, but resulted from his refusal to file a motion to reconsider an order denying a change of venue. He was also asked his personal opinion of Cavender's competency to stand trial during the ten-month representation. Judge Fletcher then sought to question Franciscy regarding his discussions with Cavender about a possible psychological defense.

Cavender's counsel objected, arguing that the conversations were privileged. In overruling the objection, Judge Fletcher opined that Cavender's RCr 11.42 motion alleging ineffective assistance of counsel served as a waiver of any attorney-client privilege. The hearing was terminated pending resolution of the present action.

At the outset, we reiterate the standard by which we consider whether a writ of prohibition should issue:

> A writ . . . *may* be granted upon a showing that (1) the lower court is proceeding or is about to proceed outside of its jurisdiction and there is no remedy through an application to an intermediate court; or (2) that the lower

> court is acting or is about to act erroneously, although within its jurisdiction, and there exists no adequate remedy by appeal or otherwise and great injustice and irreparable injury will result if the petition is not granted.

Hoskins v. Maricle, 150 S.W.3d 1, 10 (Ky. 2004).

Cavender seeks a writ of the second class and, therefore, must establish that the Wolfe Circuit Court is acting erroneously; that no adequate remedy exists by appeal; and that great and irreparable injury will result. While acknowledging that the wrongful disclosure of privileged information can cause irreparable injury, the Court of Appeals determined that Cavender failed to establish that irreparable injury would result from any disclosure of privileged information by Franciscy. It reasoned that Cavender's RCr 11.42 motion placed his counsel's effectiveness at issue and, therefore, waived the attorney-client privilege. As such, the Court concluded, "Judge Fletcher is within his authority to inquire [of] trial counsel concerning any psychological defense that may have been raised in the case." Thus, it seems, the actual thrust of the Court of Appeals' order is that the trial court was not proceeding erroneously. We disagree. However, as proscribed by *Bender v. Eaton*, we defer that question and address first the threshold requirements for issuance of a writ. 343 S.W.2d 799, 801 (Ky.App. 1961).

Cavender has satisfied these threshold requirements. As the Court of Appeals correctly noted, it is well-settled that Cavender lacks an adequate remedy by appeal. Privileged information, once disclosed, cannot be recalled. *The St. Luke Hospitals, Inc. v. Kopowski*, 160 S.W.3d 771, 775 (Ky. 2005). *See also McMurry v. Eckert*, 833 S.W.2d 828 (Ky. 1992); *Dudley v. Stevens*, 338

S.W.3d 774, 776 (Ky. 2011). Further, this Court has made clear that the disclosure of privileged information or documents warrants the issuance of a writ of prohibition. *St. Luke, id.* Though perhaps not always ruinous in nature, the disclosure of privileged information is certainly irreparable and results in a substantial miscarriage of justice. The unwilling disclosure of privileged information is "not a result that comports with the interest of justice." *Id.* In such exceptional circumstances, a writ may issue. *Bender, id.*

Having determined that Cavender satisfied the threshold requirements for issuance of a writ of prohibition, we turn to the question of whether the trial court is proceeding erroneously. As the Court of Appeals correctly noted, waiver of the attorney-client privilege is implied and automatic where the client places his attorney's effectiveness at issue. *Rodriguez v. Commonwealth*, 87 S.W.3d 8, 11 (Ky. 2002) (motion to set aside guilty plea due to alleged attorney coercion served as implied waiver of attorney-client privilege). However, that waiver extends "only as to matters put in issue by the client's motion." *Id.* A careful look at the record reveals that Cavender's RCr 11.42 motion never put Franciscy's effectiveness at issue; only Gleason's performance was challenged.

In his original *pro se* RCr 11.42 motion, Cavender repeatedly refers to "trial counsel's failure" to request a mental competency evaluation prior to trial or to present a mental health defense at trial. A subsequent supplemental motion filed by counsel also refers to the failure of "trial counsel" to present any evidence of Cavender's mental condition at the time of the crimes. Franciscy never represented Cavender at trial. In fact, his representation

ended sixteen months prior to trial. The only reasonable interpretation of Cavender's RCr 11.42 motion is that he challenged Gleason's performance, not Franciscy's. This conclusion is further supported by the fact that Cavender never called Franciscy to testify at the RCr 11.42 evidentiary hearing, and that counsel immediately objected when Judge Fletcher attempted to question Franciscy about the substance of privileged conversations. *See 3M Co. v. Engle*, 328 S.W.3d 184, 188 (Ky. 2010) (implied waiver occurs when client's position places the substance of the privileged communications in issue).

Clearly, Cavender waived the attorney-client privilege with respect to Gleason by virtue of his RCr 11.42 motion. Therefore, it was entirely proper for Gleason to testify concerning privileged conversations she had with Cavender regarding a mental health defense, as well as conversations she had with Franciscy at the time of his withdrawal from the case. However, Cavender's allegations against Gleason, who represented him for the sixteen months prior to trial and who was solely responsible for the development of the trial strategy, cannot be extended to include Franciscy. Under the particular circumstances of this case, no waiver of Cavender's privilege with Franciscy can be implied.

For the foregoing reasons, the Court of Appeals abused its discretion in denying Cavender's petition for a writ of prohibition. This matter is remanded to the Court of Appeals with instructions to grant the writ.

Minton, C.J., Abramson, Cunningham, Schroder and Venters, JJ., concur. Scott, J., dissents by separate opinion in which Noble, J., joins.

SCOTT, J., DISSENTING: I must respectfully dissent from the majority's opinion for reasons that "an evaluation of the circumstances supporting or refuting claims of . . . ineffective assistance of counsel requires an inquiry into *what transpired* between [an] attorney and client . . . ." *Rodriguez v. Commonwealth*, 87 S.W.3d 8, 11 (Ky. 2002) (emphasis added). Thus, to get at this truth, a client alleging ineffective assistance of counsel is deemed to have made an implied and automatic waiver of attorney-client privilege. *Id.* "Of course, [this] waiver applies only as to matters put in issue by the client's motion." *Id.* But, it should apply to *any* attorney of the RCr 11.42 claimant that has relevant information concerning the matter.

Here, the majority's opinion unduly restricts this search as to *what happened* to what the *last attorney knows* about a defendant's participation or facilitation of an alleged error, the prejudice from which, if any, *has yet to be determined.* Here, Judge Fletcher was simply trying to flesh out the truth to facilitate his full understanding of the matter in support of his ultimate findings—upon which an appellate court must rely—a duty he cannot now fully perform. Even the majority recognizes he was honestly looking for Appellant's hand in this matter.

In this regard, Appellant argues inconsistently that (1) his attorneys failed to properly follow up on a possible mental health defense, but then argues that (2) Franciscy's discussions with Appellant concerning a possible mental health defense have *no possible bearing* on the question of whether his later trial counsel was ineffective *in following up* on such a defense. This latter

assertion may be true, or, it may not be. Now, however, neither this Court, nor the trial court, will ever know, as the majority's opinion unduly circumscribes the discretion of the trial court to thoroughly examine the issue of whether counsel was influenced by Appellant's actions.

In this respect, Appellant admits that Gleason (his later attorney) was questioned at the evidentiary hearing concerning conversations she had with Franciscy (his earlier counsel) about Appellant's mental health. In fact, there is some suggestion from the existing evidence that his earlier counsel, Franciscy, noted Appellant had *in his possession* medical records which would *undermine* the development of such a defense. There is also a suggestion that *he withheld these records* from both counsel, as well as a suggestion that Appellant's obstructiveness in this regard may have contributed to a breakdown of communications between he and prior counsel, tidbits of which were passed on to the last counsel and may have influenced her in conjunction with her interactions and observations of Appellant, which presumably gave *no hint* of such a defense.

Thankfully, the legal profession has yet to adopt the expensive protective strategy of *developing every defense*, including those that are impractical, self-protective, improbable, or impossible. In fact, we still rely on our conversations, observations, and interactions with our clients to disclose to us possible mental health or impairment issues that need evaluation. Thus, it would take little comment from others for us to confirm what we already believe, when it is consistent with what our senses have already told us.

Because of the majority's new holding, we will now be faced with reviewing defenses only because they could be *possible* under a limited factual scenario—not that they would have been relevant, or even defensible under the real facts.

And this is precisely why what Franciscy had to say about the matter was relevant and pertinent to the court's inquiry—an inquiry into the truth, whatever it may have been. Thus, I would hear it for its relevancy; keeping in mind that the waiver is strictly limited to the *matter at issue.* It does not extend to other matters on which the attorney may have information. Thus, I must dissent.

Noble, J., joins.

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