STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant,	UNPUBLISHED May 23, 2013
v	No. 313207 Kalamazoo Circuit Court
RODERIQUE LAREESE ROLARK, Defendant-Appellee.	LC No. 2012-000303-FC

Before: SERVITTO, P.J., and WHITBECK and SHAPIRO, JJ.

PER CURIAM.

The State appeals as on leave granted[1] the trial court's ruling granting the motion of defendant, Roderique Lareese Rolark, to suppress a document that corrections officers found when they searched his jail cell. We affirm.

I. FACTS

A. BACKGROUND FACTS

On August 7, 2007, an employee of the Stadium Drive Laundromat in Kalamazoo was killed during the course of a robbery. In early 2012, the Kalamazoo Department of Public Safety arrested and charged Rolark for his suspected connection with the employee's death.

Detective Brian Beauchamp testified that on April 27, 2012, while he was monitoring Rolark's phone calls, Rolark made statements to his mother that made Detective Beauchamp believe that Rolark intended to smuggle documents out of his jail cell. The transcript of the conversation indicated that Rolark's mother asked why Rolark's uncle, Tyrone Bynum, had not yet received a copy of a power of attorney form, and asked whether Bynum had yet received a copy of the police report. Rolark told his mother that he had another copy of the power of attorney form for Bynum, and stated that he believed that, because the deputies had notarized the power of attorney form, they would give the form to Bynum if he visited Rolark at the jail. In a

[1] *People v Rolark*, unpublished order of the Court of Appeals, entered January 8, 2013 (Docket No. 313207).

subsequent conversation, while discussing whether Bynum had yet received a copy of the police report, Rolark told his mother that he had "a bunch of stuff written down" that he could give to the officers to hand to Bynum. Rolark's mother suggested that her pastor visit him in jail so that he could give the "papers" to the pastor to give to Bynum.

Rolark's mother also suggested that Rolark might be able to give the papers to Geoffrey Upshaw, an attorney, the next time that Upshaw visited him in jail. Rolark asked his mother whether Upshaw was going to visit him again, and Rolark's mother told Rolark that "he can't right now," but that she was trying to find the funds to retain Upshaw to represent him. Rolark told his mother to see if the pastor would come for a visit.

At the time of the phone calls, Rolark's attorney of record was Kerri Selleck. Detective Beauchamp testified that Rolark's plans to personally pass papers, rather than mail them, made him suspicious. Detective Beauchamp testified that hand-passing letters violates the jail's policy of logging all outgoing mail, and that it is against jail policy for an inmate to send mail to any attorney other than the inmate's attorney of record.

Detective Beauchamp contacted Kalamazoo County Jail Sergeant Heather Mitcavish and asked her to conduct a security search of Rolark's cell for handwritten letters. Sergeant Mitcavish testified that during a security search, officers leave "legal mail"—mail from the suspect's attorney—in the cell. Sergeant Mitcavish testified that corrections officers do not read legal mail, but open it to assure that it does not contain contraband, like paperclips or staples. Sergeant Mitcavish testified that any letters that Rolark intended to pass contrary to jail policy would be contraband.

Sergeant Mitcavish instructed Corrections Officer Bruce Wheatley, Jr., to search Rolark's cell. Officer Wheatley testified that during the search, he found two opened envelopes under Rolark's mattress, and a sealed manila envelope. Officer Wheatley testified that he left the manila envelope in Rolark's cell because it appeared to be legal mail. Officer Wheatley testified that the other two envelopes appeared to contain handwritten letters; he gave those two envelopes to Sergeant Mitcavish.

B. THE PRIOR EVENTS DOCUMENT

Of the two envelopes that Officer Wheatley recovered, one was labeled with Rolark's mother's return address, and the other was labeled with Rolark's attorney's return address. The envelope bearing Rolark's mother's return address contained two documents: a notarized "Durable Power of Attorney for Finances" that authorized Bynum to act as Rolark's agent, and a sheet of paper with the heading "Things to Go Over with Mrs. Selleck." The envelope labeled with Selleck's return addressed contained four documents: two letters from Selleck on her attorney letterhead, one handwritten document headed "Notes on Police Report," and a second handwritten document headed "The Rundown of Prior Events to the Day" (the prior events document).

C. ANALYSIS OF THE PRIOR EVENTS DOCUMENT

The prior events document is the subject of this appeal. The prosecution characterized this document as a confession; Rolark characterized it as a "fabricated story" that contained his

beliefs about the prosecution's trial strategy. Rolark moved the trial court to suppress the prior events document on the basis that it is subject to the attorney-client privilege. The prosecution contended that the letter was not subject to the attorney-client privilege because Rolark did not write it or intend it for Selleck, Rolark's attorney of record.

At the October 11, 2012 suppression hearing, Rolark testified that he prepared the prior events document to seek counsel and that he was attempting to hire Upshaw. Rolark denied that he intended to give the document to Bynum, and testified that he intended to give Bynum only the power of attorney document.

D. THE TRIAL COURT'S RULING

After hearing the testimony and arguments, the trial court stated that it would take the matter under advisement until it had an opportunity to review the exhibits. The trial court stated that its preliminary belief was that Rolark was attempting to communicate with Bynum, but that it did not know to what purpose. The trial court indicated that was unsure whether the documents were separated between "those items intended for counsel and those not."

The trial court issued its ruling on October 16, 2012. The trial court opined that Rolark's intent when he prepared the prior events document determined whether it was a privileged communication. The trial court found that Rolark's purpose "clearly was to ascertain whether . . . legal grounds existed for a defense in this matter."

The trial court found that there was "friction" between Rolark and Selleck, that Rolark was dissatisfied with Selleck as his appointed counsel, and that he had contacted another attorney about possibly retaining him. The trial court opined that whether Rolark intended to give the information to "Bynum or anyone else on the outside is in some ways speculation, because there's no designation of which are to be kept and which are to, in fact, be shipped on." It found that "the phone conversation, which [Rolark] had with his relatives, did not appear designed to smuggle these documents out of the jail." It found that the prior events document was Rolark's "attempt to provide some information with which individuals on the outside, be it Mr. Upshaw or any other attorney, might be able to provide legal counsel to [him]."

Concerning the envelope in which officers found the prior events document, the trial court found that

> [s]everal of the documents clearly were designed to be attorney/client documents. One was, in fact, a document dealing with . . . notes taken off of a review of the police report, and one was determined to be a recitation of [Rolark] of what appeared to be his activities on the date in question with regard to the underlying charged offense.

The trial court noted that the documents—Rolark's notes on the police report and the prior events document—were contained in an envelope with letters from Rolark's counsel, that was labeled with her return address. It found that the placement indicated that Rolark considered the documents as "part of one work product . . . ."

The trial court concluded:

> . . . [T]his document, certainly in conjunction with everything else that was contained in the envelope . . . was part of an attorney/client-potential attorney/client relationship even in the face of the deteriorating attorney/client relationship that existed. And by virtue of seizing this particular document, it is appropriate for this Court to suppress it under the Sixth Amendment.

II. ATTORNEY-CLIENT PRIVILEGE

A. STANDARD OF REVIEW

This Court reviews de novo the trial court's ruling on a motion to suppress evidence.[2] We review de novo whether the attorney-client privilege applies to a communication, and whether the client has waived the privilege.[3] This Court reviews for clear error the trial court's factual findings at a suppression hearing.[4] The trial court's factual findings are clearly erroneous if we are definitely and firmly convinced that it made a mistake.[5]

B. LEGAL STANDARDS

"The attorney-client privilege is the oldest of the privileges for confidential communications known to the common law."[6] The privilege attaches to confidential communications that a client makes to his or her legal advisor for the purposes of obtaining legal advice.[7] Its purpose is "to allow a client to confide in the attorney and be safe in the knowledge that the communication will not be disclosed."[8] The Legislature has codified the attorney-client privilege in MCL 767.5a(2):

> Any communications between attorneys and their clients . . . are hereby declared to be privileged and confidential when those communications were necessary to enable the attorneys . . . to serve as such attorney . . . .

The attorney-client privilege also has a specific context in criminal law. Both the Michigan and United States Constitutions guarantee a criminal defendant the right to the assistance of counsel.[9] "The right to counsel guaranteed by the Michigan Constitution is

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[2] *People v Lewis*, 251 Mich App 58, 67; 649 NW2d 792 (2002).

[3] *Augustine v Allstate Ins Co*, 292 Mich App 408, 419; 807 NW2d 77 (2011).

[4] *Lewis*, 251 Mich App at 67.

[5] *Id*.

[6] *Upjohn Co v United States*, 449 US 383, 389; 101 S Ct 677; 66 L Ed 2d 584 (1981).

[7] *Reed Dairy Farm v Consumers Power Co*, 227 Mich App 614, 618-619; 576 NW2d 709 (1998).

[8] *People v Compeau*, 244 Mich App 595, 597; 625 NW2d 120 (2001).

[9] Const Am VI; Const 1963, art 1, § 20.

generally the same as that guaranteed by the Sixth Amendment[.]"[10] Federal courts regard the opportunity to privately communicate with counsel as necessary to ensure that a criminal defendant receives the effective assistance of counsel.[11]

But because the attorney-client privilege keeps facts from the trier of fact, it has a limited scope.[12] The privilege is limited to the communication itself.[13] The communication must be the type of communication that enables the attorney to serve as an attorney.[14] Additionally, the attorney-client privilege attaches to some documents, but does not "automatically shield documents given by a client to his counsel . . . [,]" for instance where the documents would otherwise be subject to discovery.[15]

C. THE TRIAL COURT DID NOT FIND THAT THE PRIOR EVENTS DOCUMENT WAS INTENDED FOR BYNUM

As an initial matter, we note that the prosecution's contentions largely rest on its assertion that the trial court found that Rolark intended to deliver the prior events document to Bynum. We disagree with this characterization of the trial court's findings.

Though the trial court indicated in its preliminary remarks that it believed that Rolark intended to communicate with Bynum, the trial court reserved its ruling to further review the record, and clearly indicated that it was not sure whether it should consider the documents separately. After reviewing the documents and obtaining additional memoranda from the attorneys, the trial court issued its findings. It stated that "[w]hether in fact [the documents] were in fact designed to be all given to Mr. Bynum or anyone else on the outside is in some ways speculation, because there's no designation of which are to be kept and which are to, in fact, be shipped on." The trial court then found that "it is more persuasive to believe that it is [Rolark's] attempt to provide some information with which individuals on the outside, *be it Mr. Upshaw or any other attorney*, might be able to provide legal counsel to this defendant." The trial court ultimately concluded that the document was part of a potential attorney-client relationship in the face of Rolark's deteriorating attorney-client relationship with Selleck.

Thus, though the trial court preliminarily indicated that it thought that Rolark wanted to communicate with Bynum, its actual findings were contrary to its statement of its preliminary

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[10] *People v Marsack*, 231 Mich App 364, 373; 586 NW2d 234 (1998).

[11] *United States v Brugman*, 655 F2d 540, 546 (CA 9, 1981); see *Weatherford v Bursey*, 429 US 545, 554 n 4; 97 S Ct 837; 51 L Ed 2d 30 (1997).

[12] *People v Nash*, 418 Mich 196, 219; 341 NW2d 439 (1980); *United States v Fisher*, 425 US 391, 403; 96 S Ct 1569; 48 L Ed 2d 39 (1976).

[13] *Reed Dairy Farm*, 227 Mich App at 619-620.

[14] *People v Johnson*, 203 Mich App 579, 584-585; 513 NW2d 824 (1994); MCL 767.5a(2).

[15] *McCartney v Attorney General*, 231 Mich App 722, 731; 587 NW2d 824 (1998); see *Fisher*, 425 US at 403-404.

beliefs. We do not agree with the prosecution's argument that the trial court found that Rolark prepared the document for Bynum, and then misapplied agency and waiver principles to arrive at its result.

Further, we conclude that the trial court's finding that Rolark intended the prior events document for an attorney was not clearly erroneous. The power of attorney document and the prior events document were in separate envelopes. The prior events document was contained in an envelope with two letters from Rolark's attorney and his notes on the police report. Both the transcripts of Rolark's phone conversations with his mother and his testimony at the suppression hearing indicated that Rolark was attempting to retain different counsel. Rolark testified that he prepared the document to seek counsel, and that he was attempting to hire Upshaw. Further, while the transcripts of the phone conversations clearly indicate that Rolark intended to give "some documents" to Bynum, whether those documents included the prior events document was far from clear. The trial court ultimately decided to treat the documents separately, and determined that Rolark intended the prior events document for Upshaw or another attorney. We are not definitely and firmly convinced that the trial court made a mistake when it found that Rolark wrote the document with the intent to discuss it with a potential attorney.

D. APPLYING THE STANDARDS

Additionally, the prosecution contends that allowing a defendant to give a document to a third party to seek an attorney distorts the attorney-client privilege. The prosecution's argument relies on its belief that the trial court found that Rolark intended to give the document to Bynum.

We agree that had the trial court found that Rolark intended the communication for his uncle, it would not be the type of communication that the attorney-client privilege is designed to protect. But for the reasons stated above, the record does *not* support the prosecution's contention that the trial court found that Rolark intended to give the document to Bynum. To the contrary, it found that Rolark intended to give the document to Upshaw or "some other attorney" to obtain legal advice. To put it another way, the trial court found that Rolark intended to make a confidential communication to an attorney, whether that attorney was Upshaw, some other potential counsel that Rolark was seeking to retain, or Selleck.

The prosecution also contends that the document is not privileged because Rolark did not intend it for Selleck, his attorney of record. We disagree.

The application of the attorney-client privilege to discussions between clients and *prospective* counsel is nearly as old as the privilege itself. The Michigan Supreme Court has long recognized that communications made for the purposes of legal consultation—whether the client subsequently retains the attorney, or not; whether the attorney declines representation, or not—are privileged.[16] Here, the trial court found that Rolark intended to use the prior events document to consult with Upshaw or "some other attorney" to obtain legal representation. Thus,

[16] *People v Doe*, 226 Mich 5, 9-10; 196 NW 757 (1924); *Devich v Dick*, 177 Mich 173, 178; 143 NW 56 (1913), citing *Mack v Sharp*, 138 Mich 448, 451; 101 NW 631 (1904); see 81 Am Jur 2d, Witnesses, § 386, p 380.

the trial court determined that Rolark did intend the communication to be a confidential communication to an attorney. We conclude that simply because Rolark intended to use the document to consult with Upshaw or another attorney to obtain replacement counsel does not move the communication outside of the attorney-client privilege.

We agree that *United States v DeFonte*,[17] a federal decision from the Second Circuit Court of Appeals, is indeed analogous, but do not agree with the prosecution's application of that case. In *DeFonte*, the defendant maintained a journal that contained memorialized conversations with her attorney, as well as other recollections.[18] The court noted two district court cases in which a client's notes were found to be privileged, because the client communicated the notes to an attorney.[19] The court opined that those cases hinged on whether the notes were communications.[20]

The defendant never delivered the journal to her attorney, but argued that the entries "serve[d] as an outline for an attorney-client conversation."[21] The court opined that "an outline of what a client wishes to discuss with counsel—and which is subsequently discussed with one's counsel—would seem to fit squarely within our understanding of the scope of the privilege."[22] The court remanded for the trial court to hold an evidentiary hearing to determine whether the defendant discussed the notes with defense counsel.[23]

Here, the trial court did find that Rolark intended the prior events document to serve as the basis for a discussion with counsel. The distinctions in this case are that Rolark intended the document to serve as a discussion with potential rather than current counsel, and that officers obtained the document before he was actually able to do so. Under *DeFonte*, the attorney-client privilege would have attached to the document if Rolark had actually discussed it with his potential counsel. But here, the officers took the document before he was able to do so. We do not think that the facts of *DeFonte* are distinguishable on this basis. We hold that the attorney-client privilege attached to the document, even though Rolark did not *actually* discuss it with counsel, because the trial court found that he intended to do so.

Finally, we agree that if Rolark actually had given the document to Bynum, it would no longer have been subject to any claim of privilege. When a client intentionally and voluntarily discloses an attorney-client communication to a third party, or fails to take precautions to keep remarks confidential, the client has waived any claim of attorney-client privilege because the

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[17] *United States v DeFonte*, 441 F3d 92 (CA 2, 2006).

[18] *Id*. at 95.

[19] *Id*.

[20] *Id*. at 95-96.

[21] *Id*. at 96.

[22] *Id*.

[23] *Id*.

communication is no longer confidential.[24] But in this case, Rolark did *not* give the document to Bynum. Absent any evidence that Rolark knowingly disclosed the contents of the document to Bynum, we must conclude that Rolark did not waive the privilege.

E. ROLARK'S REQUESTED RELIEF

Rolark additionally argues that the proper remedy in this case was for the trial court to dismiss the charges against him because the prosecution now knows his trial strategy. We conclude that this issue is not properly before us. An appellee is generally limited to the issues raised by an appellant unless he or she files a cross-appeal.[25] Rolark did not file a cross-appeal, and we decline to consider this issue.

We affirm.

/s/ Deborah A. Servitto
/s/ William C. Whitbeck
/s/ Douglas B. Shapiro

[24] *Liebel v General Motors Corp*, 250 Mich App 229, 241; 646 NW2d 179 (2002); *Compeau*, 244 Mich App at 597-598.

[25] *People v Langley*, 187 Mich App 147, 151; 466 NW2d 724 (1991); see MCR 7.207.