STATE OF MINNESOTA
IN COURT OF APPEALS
A17-1232

State of Minnesota,
Respondent,

vs.

Casimir Robert Krithers,
Appellant.

Filed July 9, 2018
Affirmed
Rodenberg, Judge

St. Louis County District Court
File No. 69DU-CR-15-1596

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Mark S. Rubin, St. Louis County Attorney, Sharon N. Chadwick, Assistant County Attorney, Virginia, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Richard Schmitz, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Rodenberg, Presiding Judge; Halbrooks, Judge; and Jesson, Judge.

U N P U B L I S H E D O P I N I O N

RODENBERG, Judge

Appellant Casimir Robert Krithers appeals his conviction for felony domestic assault, arguing that the state violated his Sixth Amendment right to counsel by recording

his jail phone calls with his attorney, and then transferring the recordings to a compact disk that was delivered to the prosecutor. Appellant further claims that his waiver of the right to counsel was invalid. Appellant also argues in a pro se supplemental brief that the state's conduct violated his Fourth and Fifth Amendment rights. We affirm.

FACTS

This case, which was tried on stipulated facts in March 2017, came about after a Douglas County, Wisconsin, 911 dispatcher received a call on May 14, 2015. The caller reported an incident of domestic assault in Duluth. This phone call was recorded. The dispatcher realized a short time into the call that it should be transferred to the St. Louis County, Minnesota, 911 dispatcher. The victim repeated her report to the St. Louis County dispatcher, who also recorded the phone call. The recording of the transferred call resulted in parts of the same call having been recorded by the two departments.

Law enforcement responded to this call in Duluth and went to the site of the reported assault. The responding officers spoke to the victim, who said that appellant had physically assaulted her while she was in his car. She and appellant had driven to a grocery store parking lot where he purchased some methamphetamine. The victim stated that she became upset with appellant. When she expressed her displeasure, appellant punched her in the face six or seven times. She also reported that when she called 911 from the car, appellant tried to grab her phone. The victim eventually got out of the car while still on

the phone with the 911 operator. The state charged appellant with one count of felony domestic assault for this incident.[1]

On September 24, 2015, the prosecutor requested that Duluth Police Investigator Westerman do follow-up investigation, including obtaining the recordings of appellant's jail calls. After this request went without response, the prosecutor again contacted the investigator on September 30 and sent Investigator Westerman another email noting that, in the body camera video, the victim told the responding officers that she had tried to call 911 and was on the phone until appellant ripped it away from her, and then called 911 again after she got out of the car. The prosecutor requested that Investigator Westerman determine whether a second 911 call recording exists. Investigator Westerman responded on September 30, 2015, stating that he had not gotten to any of these tasks and would "have to just dedicate a day" to doing follow-up work for this case. The prosecutor also requested on October 1 that Investigator Westerman interview a possible defense witness.

As of October 1, Investigator Westerman had not yet completed any of the requested follow-up investigation, but had created a list of follow-up tasks that had been requested by the prosecutor. These tasks included speaking with the victim's probation officer, contacting Douglas County dispatch to check for a second 911 call, contacting the victim about medical treatment, obtaining the recordings of appellant's jail phone calls, and conducting a follow-up interview with a newly identified defense witness. On that day, Investigator Westerman did the follow-up investigation.

[1] Appellant was also charged in the same complaint with other charges, which were severed before trial and resolved separately. The other charges are not relevant to this appeal.

Investigator Westerman first requested appellant's jail phone calls using appellant's jail ID number. The jail phone system records all inmate telephone calls but is supposed to be set up so that inmate calls to and from attorneys are either not recorded or are flagged, so that state agents do not listen to those calls. The investigator downloaded all of appellant's calls three-minutes or more in duration.[2] He downloaded 52 calls and copied the recordings to compact disks. Investigator Westerman then randomly opened one call file and listened until he heard dial tones, to make sure it downloaded correctly. He determined that the files had been successfully transferred to the disks, and did not listen any further to the phone calls. He also printed out a list containing details about the jail phone calls, such as the time they were made and the number dialed. Investigator Westerman completed this work at about 9:15 or 9:30 a.m. on October 1. He then personally delivered two identical disks and lists of appellant's jail phone calls to the prosecutor at the courthouse before attending a prescheduled 11:00 a.m. meeting with the victim's probation officer. Investigator Westerman had not listened to the substance of any call and was unaware that appellant's calls to attorneys were included on the disks.

Investigator Westerman continued his follow-up investigation on October 1 by interviewing the victim's probation officer at 11:18 a.m. The probation officer explained that he had met with the victim on May 24, 2015, and that the victim told him that appellant had punched her in the face several times. The probation officer also gave Investigator

[2] The investigator downloaded only calls of at least that length because the first few minutes of each call usually consists of automated recordings and the dialing process. Calls shorter than three minutes usually have no conversation.

Westerman a phone number for the victim and called her from his office with the investigator present. Investigator Westerman asked the victim if she had made multiple 911 calls on the date of the incident. The victim reported that she had tried to call 911 twice, had been unable to finish dialing on the first attempt, but completed the call on the second try. The investigator noted in his report that the victim "did not elaborate further as to how or why the first call had not been successfully dialed" and that he "did not think of it at the time, and failed to ask clarifying questions in that regard." Investigator Westerman continued with the other requested follow-up investigation tasks throughout the day.

Later on October 1, the prosecutor looked through the list of jail phone calls given to her by Investigator Westerman. She immediately recognized appellant's attorney's phone number on that list. The prosecutor made a note next to each of the listed calls to appellant's attorney. She then emailed Investigator Westerman at 1:05 p.m. on October 1 explaining that, of the 52 recorded calls she received from the investigator, only two were calls that were not between appellant and his attorney. The prosecutor emailed appellant's attorney at 1:11 p.m. to inform her that the prosecutor had accidentally received appellant's privileged phone calls and "immediately destroyed" the state's copy of the disk. The prosecutor sent the second disk to appellant's attorney that same afternoon. The prosecutor did not listen to any of the phone calls between appellant and his attorney and "ha[s] never received any information about any conversations" between defense counsel and appellant. Investigator Westerman replied to the prosecutor at 2:34 p.m., stating that he delivered to the prosecutor all of appellant's calls that were long enough to be a conversation. The

prosecutor immediately responded, stating that she could not have the attorney calls and requesting a separate disk containing only the nonattorney calls.

The St. Louis County Jail, where appellant was being held, does not monitor jail calls to attorneys. Jail staff is not supposed to have access to those calls. The phone system, if functioning properly, is supposed to monitor any call that is not listed as private. Attorney calls are private. In May 2015, the jail switched vendors for its phone systems and began using a new vendor, Reliance.

On October 1, 2015, the jail administrator, after learning that appellant's jail phone calls to his attorney had been recorded, alerted the information-technology sergeant of a potential problem with the phone system. The sergeant logged onto the Reliance software and noticed that he was able to play all of the calls made by appellant, including private calls. The sergeant immediately called Reliance to report this issue. A Reliance employee called back 15 minutes later to tell the sergeant that new software had been uploaded to correct the issue. Although Reliance had identified this problem on September 30, 2015, St. Louis County Jail staff were not notified of it until October 1.

Appellant requested an evidentiary hearing concerning the recording and downloading of his jail phone calls to his attorney. Appellant moved for dismissal of the charges against him, arguing that the state violated his constitutional rights by what it did. The district court found that the state did not violate appellant's constitutional rights and denied appellant's motion to dismiss. Appellant attempted to appeal the district court's denial of his motion to dismiss, but we denied discretionary review of the pretrial order,

stating that appellant "can raise the issue involving the recording of his jail phone calls in a direct appeal from judgment if he is convicted after a trial."

Appellant then petitioned the district court for a writ of habeas corpus. The district court denied appellant's petition for writ of habeas corpus, determining that the petition was an attempt to have the court reconsider its December 29, 2015 order denying his motion to dismiss, stating that the court "does not believe that a petition for habeas corpus is the proper venue to challenge the December 29th decision."

Appellant petitioned the Minnesota Supreme Court for review of our order denying discretionary review, which the supreme court returned to him to cure procedural infirmities. Appellant also petitioned the district court "for reconsideration" of its December 29 order denying dismissal of the charges against him. The district court denied this request. Appellant also appealed the district court's denial of his petition for habeas corpus. We affirmed the district court's order denying the petition for habeas corpus, and the supreme court denied review. *Krithers v. State*, No A16-0829, 2016 WL 6395337 (Minn. App. Oct. 31, 2016), *review denied* (Minn. Dec. 27, 2016).[3]

Appellant also petitioned the district court to allow him to proceed pro se, stating that part of his reason for discharging his attorney was the jail-phone-call issue.[4] The district court granted that petition, finding that appellant's waiver of his right to counsel

[3] Appellant also appears to have petitioned the United States District Court for the District of Minnesota for a writ of habeas corpus, which was denied.

[4] Appellant also expressed concern about his lawyer having a conflict of interest because the attorney had been reassigned for a portion of his case.

was voluntary. The parties then submitted stipulated facts to the court for trial. At the hearing to present the district court with the stipulated facts, the state noted that it had received that morning a second, previously undiscovered, 911 call from Douglas County, Wisconsin, dispatch, after the prosecutor personally requested those records.[5] Appellant argued that Investigator Westerman had no credibility because the investigator had previously stated that he looked for a second 911 call and had been told that none existed. The district court received the second Douglas County 911 recording into evidence.

The district court found appellant guilty of felony domestic assault after reviewing the stipulated facts and appellant's written arguments. The district court sentenced appellant to 36 months in prison.

This appeal followed.

D E C I S I O N

I. The district court did not err in determining that appellant's Sixth Amendment rights were not violated by the recording and download of appellant's jail phone calls to his attorney, where the prosecutor promptly disclosed the mistaken recording and no state agent listened to the recorded calls.

Appellant argues that the district court erred in concluding that his Sixth Amendment rights were not violated by Investigator Westerman's download of appellant's jail phone calls to his attorney.

We review the factual findings in the district court's pretrial order on a motion to suppress for clear error. *State v. Ortega*, 770 N.W.2d 145, 149 (Minn. 2009). "Findings

[5] The prosecutor explained that she had trusted that her investigator looked for the call previously and that there had been some confusion over whether a second call even existed based on the victim's prior statements about only making one call.

of fact are clearly erroneous if, on the entire evidence, we are left with the definite and firm conviction that a mistake occurred." *State v. Andersen*, 784 N.W.2d 320, 334 (Minn. 2010). We review the district court's legal determinations, including those concerning claims of constitutional violations, de novo. *Ortega*, 770 N.W.2d at 149.

A criminal defendant has a constitutional right to counsel. U.S. Const. amends. VI, XIV; Minn. Const. art 1, § 6. While "[t]he attorney-client privilege is a statutory right . . . not a constitutional right," the supreme court has recognized that "in some situations government interference with the confidential relationship between a defendant and his counsel may implicate the constitutional right to counsel." *Andersen*, 784 N.W.2d at 333 (citation omitted).

The Minnesota Supreme Court has recognized that "the act of recording, but not listening to, attorney-client phone conversations" might intrude into the attorney-client relationship, but stated that "such an intrusion does not automatically translate into a violation of a defendant's right to counsel." *Id.* at 333-34. The supreme court paraphrased the United States Supreme Court's holding in *Weatherford v. Bursey* that "an intrusion into the attorney-client relationship, standing alone, does not, as a matter of law, constitute a violation of the Sixth Amendment." *Id.* at 333 (citing *Weatherford v. Bursey*, 429 U.S. 545, 558, 97 S. Ct. 837, 845 (1977)). The Minnesota Supreme Court has also recognized that "[t]he federal courts of appeals agree that a defendant claiming a violation of the right to counsel must show something in addition to an intrusion." *Id.*

In *Andersen*, the supreme court explained that the district court's factual findings supported the conclusion that the defendant's constitutional right to counsel was not

violated by the monitoring and recording of his phone calls to his attorney's cell phone. *Id.* at 334. It reasoned that there was "no indication that the intrusions were intentional, that evidence presented at trial was produced by the intrusions, that the prosecution received confidential information about trial preparations or defense strategy, or that any information in the calls was used in any way to [the defendant]'s detriment." *Id.* These are the same factors the United States Supreme Court considered in *Weatherford* in concluding that the defendant had failed to establish a constitutional violation. 429 U.S. at 554-58, 97 S. Ct. at 843-45. But the supreme court "ha[s] not articulated a standard that a defendant, or the State, must show to prevail on a claim that an intrusion into the attorney client relationship amounted to a violation of the right to counsel." *Andersen*, 784 N.W.2d at 333. Since *Andersen*, the supreme court has again noted the lack of such a standard and declined to announce one. *State v. Taylor*, 869 N.W.2d 1, 21 (Minn. 2015).

The incompletely articulated *Andersen* standard is sufficient to resolve this case. The district court found as a fact that, on May 15, 2015, the prosecutor requested further investigation. The district court also found that Investigator Westerman did not complete this investigation immediately, but instead followed his normal practice of waiting to investigate until closer to trial. The district court found that the prosecutor requested on September 24 that the investigator obtain appellant's jail calls and prior police reports; that, after inquiry from defense counsel, the prosecutor requested on September 25 that the investigator obtain body-camera footage, submit a report on his interview with the victim, and obtain the victim's medical records; and that, on September 30, the prosecutor followed up on these requests and additionally requested that the investigator look for a second 911

call. The district court further found that Investigator Westerman worked on these tasks on October 1, 2015, and downloaded to a disk appellant's jail phone calls that morning. Based on these findings and the record evidence, the district court found that "nothing happened during the relevant time period to suggest that the prosecution was pursuing angles that were new or different or that had been suggested in the calls," and that, of the follow-up items, "none arose or were suggested for the first time when the attorney calls were accessible." The district court's findings of fact are amply supported by the record.

The district court credited the testimony of the state's witnesses that none of them listened to the substance of any appellant's privileged jail calls. It further found that "the prosecution's actual access to [appellant]'s attorney client calls was transitory" and that "no one could have listened to all of the recorded phone calls in the time investigators had them." The district court also specifically found that the recording of appellant's attorney calls by the jail was inadvertent, that the system malfunction was unknown to the jail until after this incident, that the recording of attorney calls was unintentional, that the calls do not provide insight into appellant's trial strategy,[6] and that "[t]he timing of the accessibility of the calls, the length of the calls, and the follow up investigation being requested do not suggest that the State gleaned any valuable information that could be used to [appellant]'s detriment." Here again, the district court's findings are amply supported by the record. Because the state agents never listened to the recorded calls, appellant suffered no prejudice

[6] The district court listened to the recorded calls as part of its comprehensive review of the record. It found that nothing of strategic or other value to the state was included in the recordings.

from the recording and download of his jail phone calls, and there was no Sixth Amendment violation.

II. The record is insufficient to determine whether appellant voluntarily waived his right to counsel.

Appellant also argues that the recording and downloading of his jail calls caused him to believe that his calls to his attorney would not remain private, forcing him to involuntarily waive his right to counsel.

This issue was not raised to or decided by the district court. We generally will not consider matters not argued to and considered by the district court. *Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996). "This rule is not absolute, however, and we may address an issue in the interests of justice if addressing the issue will not work an unfair surprise on a party." *State v. Gauster*, 752 N.W.2d 496, 508 (Minn. 2008) (quotation omitted). "But the record must permit us to address such an issue." *Id.* (citing Minn. R. Crim. P. 29.04, subd. 6). A direct appeal is an inappropriate means for alleging errors that were never presented to or considered by the district court when the grounds for the challenge go outside the record on appeal. *State v. Newcombe*, 412 N.W.2d 427, 430 (Minn 1987). Such arguments "are a collateral attack upon the judgment which should be presented, if at all, at the [district] court level by petition for post conviction relief." *State v. Tamminen*, 282 Minn. 523, 524, 162 N.W.2d 369, 369 (1968).

Based on the record before us, we are unable to determine, and reach no decision on, whether appellant's waiver of his right to counsel was rendered invalid by appellant's belief that his communications with counsel were impaired by the jail-phone-call recording

such that he no longer believed he could rely on his conversations with his lawyer remaining private. Therefore, the issue of whether appellant's waiver of his right to counsel is invalid is preserved for postconviction proceedings, should appellant later initiate such a petition.

III. Appellant's pro se arguments are without merit.

Appellant argues in his pro se brief that the recording and downloading of his jail phone calls to his attorney violated his Fourth and Fifth Amendment rights.

Appellant first argues that Investigator Westerman's download of appellant's jail phone calls constitutes an improper seizure under the Fourth Amendment. Appellant cites to a number of cases discussing the Fourth Amendment generally, but provides no case law supporting his assertion that the recording and downloading of his jail phone calls constitutes a seizure. The inmate handbook at the jail provides that "[a]ll non attorney/client privileged phone calls completed in the jail may be monitored and/or recorded." The policy provides clear notice that inmate phone calls are not completely private. Courts have also acknowledged that incarcerated prisoners have reduced expectations of privacy. *See State v. Bartylla*, 755 N.W.2d 8, 17 (Minn. 2008) (stating that an incarcerated prisoner has a lower expectation of privacy than a probationer, parolee, or conditional releasee); *see also Hudson v. Palmer*, 468 U.S. 517, 524, 104 S. Ct. 3194, 3199 (1984) (stating that "while persons imprisoned for crime enjoy many protections of the Constitution, it is also clear that imprisonment carries with it the circumscription or loss of many significant rights"). Appellant has failed to establish that his Fourth Amendment

rights were violated by the recording and downloading of his jail phone calls, after notice to him that his nonprivileged calls would be recorded.

Appellant also argues that the recording and downloading of his jail phone calls violated his Fifth Amendment rights under *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602 (1966). *Miranda* applies to "custodial interrogation[s]." 384 U.S. at 444, 86 S. Ct at 1612. Appellant was certainly in custody while he was in the St. Louis County Jail. But "interrogation" refers to "express questioning" or "words or actions on the part of the police . . . that the police should know are reasonably likely to elicit an incriminating response from the suspect." *Rhode Island v. Innis*, 446 U.S. 291, 301, 100 S. Ct, 1682, 1689-90 (1980). Appellant's making his own jail phone calls and speaking during those calls does not constitute interrogation for the purposes of *Miranda*, and Appellant's Fifth Amendment claim is without merit.

We see no merit to any of appellant's additional pro se arguments.

Affirmed.