NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA, Appellee v. JAMES E. TOLLIVER, Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 607 EDA 2012

Appeal from the Judgment of Sentence Entered February 1, 2012
In the Court of Common Pleas of Philadelphia County
Criminal Division at No(s): CP-51-CR-0004054-2011

BEFORE: BENDER, P.J., OTT, J., and STRASSBURGER, J.*

MEMORANDUM BY BENDER, P.J. **FILED DECEMBER 20, 2013**

Appellant, James E. Tolliver, appeals from the judgment of sentence of seven to twenty-three months' incarceration, followed by two years' probation, imposed after he was convicted of attempted theft by deception and insurance fraud. After review, we affirm.

The trial court set forth the facts adduced at Appellant's trial as follows:

> On March 11, 2010, [Marsha Corbett-Blunt], a regional property manager for Penrose Management Company, encountered [Appellant] as [she] left the Brentwood office located at 4130 Parkside Avenue. [Ms. Corbett-Blunt] testified that she knew of [Appellant] since an eviction notice had previously been filed against [Appellant's] girlfriend in 2009, 2010, and again in 2011. On the day of the encounter, [Ms.

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* Retired Senior Judge assigned to the Superior Court.

> Corbett-Blunt] had just left the office and proceeded to go across the street to where her car was parked. Around the same time, [Appellant] left his girlfriend's apartment and proceeded to cross the street alongside [Ms. Corbett-Blunt]. During that time, both individuals looked at each other and [Appellant] told [Ms. Corbett-Blunt] that "[she] was funny" and that "[she] makes him laugh."
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> After the encounter, [Ms. Corbett-Blunt] testified that she went to her vehicle, a black Dodge Magnum, sat inside, and waited [for] up to five minutes for [Appellant] to pull out. [Ms. Corbett-Blunt] waited because she felt uncomfortable based on her interaction with [Appellant]. [Ms. Corbett-Blunt] testified that [Appellant] sat inside his vehicle, which was positioned behind hers, and waited for [Ms. Corbett-Blunt] to leave. When [she] eventually pulled out of the parking lot, [Appellant] began to follow her. [Appellant] followed [Ms. Corbett-Blunt] for several blocks before swerving in front of [her] vehicle and abruptly slamming on his brakes. Although there was no collision, [Ms. Corbett-Blunt] testified that [Appellant] got out of his car and aggressively said[,] "Did you hit my F'n car?"
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> Within a few minutes, Officer [Martin] Demota arrived at the scene. [Appellant] initially denied knowing [Ms. Corbett-Blunt] but eventually admitted that he knew who she was when [Appellant] claimed that [Ms. Corbett-Blunt] was trying to keep him from his kids. Officer Demota obtained [Ms. Corbett-Blunt's] and [Appellant's] vehicle information, examined both vehicles, and prepared a non-reportable accident report.[1] Officer Demota testified that there was no sign of damage or contact between the two vehicles and that no injuries were reported.
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> Around April 13, 2010, [Ms. Corbett-Blunt] was contacted by Geico Insurance [Company], the insurance carrier for [her] vehicle. Jessica Brown, a claims examiner for Geico, told [Ms. Corbett-Blunt] that there was a claim made against the insurance policy indicating that a collision had occurred on March 11, 2010. Ms. Brown indicated that Geico wished to examine the vehicle and take pictures. On April 22, 2010, Craig Rogerson, an

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[1] A 'non-reportable' accident report indicates that no one was injured and neither car had to be towed from the scene. N.T. Trial, 12/19/11, at 114.

appraiser for Geico, examined [Ms. Corbett-Blunt]'s vehicle. Mr. Rogerson testified that based on his twenty[-]three years [of] experience as a licensed appraiser, there was no damage on the vehicle nor was there evidence that a collision occurred. As part of his report, Mr. Rogerson took several photographs of the vehicle and filled out an estimate for the total damage [to] the vehicle. The total estimate listed on the report was .01 cents since a number was required in order to attach photographs into the file. Mr. Rogerson then uploaded the estimate into the company's database.

Ms. Brown testified that on April 22, 2010, she received Mr. Rogerson's estimate of damages and photographs of the vehicle and immediately referred the claim to Sam Dunlap, one of Geico's senior [investigators] in the special investigative unit. Ms. Brown testified that Geico made a determination that [Ms. Corbett-Blunt] was not liable for any injuries or damages resulting from the afore-[mentioned] accident. Ms. Brown then notified all parties of Geico's decision. On October 7, 2010, Ms. Brown was contacted by the District Attorney's Office of Philadelphia County and Ms. Brown then gave a statement regarding Geico's decision of non-liability.

At the [hearing on Appellant's motion to suppress], Detective [Donald] Murtha of the Insurance Fraud Unit with the District Attorney's Office testified that the Geico claim file was referred to his office. Detective Murtha reviewed all the documents that were submitted and conducted an investigation. Detective Murtha testified that Special Agent Sutch of the National Insurance Crime Bureau, who is an expert in the field of automotive identification, examined [Ms. Corbett Blunt]'s vehicle and confirmed that the vehicle examined was the same as the one listed on the police report. After conducting an investigation, Detective Murtha prepared a warrant affidavit for the purpose of searching and seiz[ing] … [Appellant]'s private attorney's civil files. The warrant was reviewed by an Assistant District Attorney, a police captain, and the Insurance Fraud Unit Chief before being sent to the bail commissioner. Detective Murtha testified that everyone who reviewed the warrant affidavit approved the finding of probable cause. Further, Detective Murtha testified that in his eleven years [of] experience in the Insurance Fraud Unit, it was not uncommon to seize case files from an attorney's office. Detective Murtha executed the warrant and seized [Appellant]'s files from the Office of Reid and Fritz.

Trial Court Opinion (T.C.O.), 2/25/13, at 2-5 (citations to the record omitted).

At Appellant's trial, the Commonwealth called Appellant's civil attorney, Adrian Reid, Esq., to the stand. Attorney Reid testified that on or about April 2, 2010, Appellant contacted him in regard to an automobile accident. N.T. Trial, 12/19/11, at 103-104. Appellant told Attorney Reid that "he had been rear ended" and was injured in the collision. ***Id.*** at 104. Based on this information, Attorney Reid contacted Geico and initiated a claim on Appellant's behalf. ***Id.*** at 107. Ms. Brown testified that during the processing of that claim, she contacted Appellant, who told her that he had suffered "neck [and] back pain" and that he had "an injury to his right finger." ***Id.*** at 60.

Based on this evidence, the court found Appellant guilty of attempted theft by deception and insurance fraud. On February 1, 2012, Appellant was sentenced to the above-stated terms of incarceration and probation. He filed a timely notice of appeal on February 15, 2012.[2] The trial court issued an order directing Appellant to file a Pa.R.A.P. 1925(b) concise statement of errors complained of on appeal by May 15, 2012. However, the docket reveals that Appellant's Rule 1925(b) statement was not filed until June 18,

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[2] We note that in its Pa.R.A.P. 1925(a) opinion, the trial court erroneously states that Appellant filed his notice of appeal on June 18, 2012. The trial court's docket, however, indicates that Appellant's notice of appeal was timely filed on February 15, 2012.

2012. The trial court apparently overlooked the untimeliness of Appellant's Rule 1925(b) statement, as it addressed each of his issues in its Rule 1925(a) opinion. Accordingly, we will also examine the merits of Appellant's claims. ***See Commonwealth v. Burton***, 973 A.2d 428, 433 (Pa. Super. 2009) (holding that where an appellant files an untimely Rule 1925(b) statement, "this Court may decide the appeal on the merits if the trial court had adequate opportunity to prepare an opinion addressing the issues being raised on appeal"). Appellant presents the following three issues for our review:

> I. [Did] [t]he [trial] court err[] in finding Appellant guilty of insurance fraud and theft by deception due to insufficient evidence[?]
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> II. [Did] [t]he [trial] court err[] by failing to dismiss the prosecution based on the seizure of Appellant's private civil attorney file and evidence flowing from the seizure of the file[?]
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> III. [Did] [t]he [trial] court err[] by failing to dismiss the prosecution based on outrageous governmental conduct, or alternatively to preclude the Commonwealth's introduction of Appellant's civil attorney file and attorney testimony[?]

Appellant's Brief at 6.

In Appellant's first issue, he avers that the evidence was insufficient to support his convictions. Appellant's half-page argument is underdeveloped and precludes our meaningful review of this claim. For instance, Appellant does not set forth our standard of review, the definitions of the offenses of which he was convicted, or specify what element(s) the Commonwealth

failed to prove. He also does not cite any legal authority to support his claim. Accordingly, we conclude that he has waived his challenge to the sufficiency of the evidence. ***See Commonwealth v. Hardy***, 918 A.2d 766, 771 (Pa. Super. 2007) (stating it is "an appellant's duty to present arguments that are sufficiently developed for our review," and "when defects in a brief impede our ability to conduct meaningful appellate review, we may dismiss the appeal entirely or find certain issues to be waived").

Appellant's argument in support of his second claim is nearly as inadequate as his first. Appellant begins by setting forth general legal principles regarding the attorney-client privilege. In terms of how this privilege applies in his case, he stated:

> In short, courts have repeatedly made clear that privilege is a fundamental principle of the attorney-client relationship and it's [*sic*] "sanctity" should not have been violated. In the instant case, the allegations are that [Appellant] initiated an insurance claim against GEICO via counsel and thus [the communications are] covered by the attorney-client privilege unless the Commonwealth can show that the privilege has been waived or otherwise invalidated by the actions of [Appellant]. [Appellant] asserted his privilege by moving to suppress the evidence gained through the seizure of his confidential client file from Reid & Fritz and moving to bar [Attorney] Reid from testifying as a prosecution witness.

Appellant's Brief at 9.

It is unclear from Appellant's argument what precise trial court ruling he is challenging on appeal. However, we assume he takes issue with the trial court's denial of his motion to suppress the evidence contained in

Attorney Reid's case file and Attorney Reid's trial testimony. Our standard of review for denial of a suppression motion is as follows:

> In reviewing an order from a suppression court, we consider the Commonwealth's evidence, and only so much of the defendant's evidence as remains uncontradicted. We accept the suppression court's factual findings which are supported by the evidence and reverse only when the court draws erroneous conclusions from those facts.

Commonwealth v. Hoopes, 722 A.2d 172, 174-75 (Pa. Super. 1998).

Here, in Appellant's pretrial motion to suppress, he claimed that Attorney Reid's case file was seized pursuant to a "facially defective search warrant" that was unsupported by probable cause. Appellant's Omnibus Motion, 9/16/11, at 3 (unnumbered pages). Appellant also averred that the file was improperly seized in violation of the attorney-client privilege. ***See id.*** On appeal, Appellant does not present any argument regarding the validity of the search warrant; instead, he solely contends that the attorney-client privilege barred the admission of evidence obtained from his attorney's case file, as well as Attorney Reid's trial testimony.

This Court discussed the attorney-client privilege in ***Commonwealth v. Boggs***, 695 A.2d 839 (Pa. Super. 1997), as follows:

> The attorney-client privilege is "the most revered of our common law privileges, and, as it relates to criminal proceedings, it has been codified in this Commonwealth at 42 Pa.C.S. § 5916." ***Commonwealth v. Maguigan,*** 511 Pa. 112, 511 A.2d 1327, 1333 (1986). Section 5916 provides that "[i]n a criminal proceeding, counsel shall not be competent or permitted to testify to confidential communications made to him by his client, nor shall the client be compelled to disclose the same, unless in either case this privilege is waived upon the trial by the client."

> The generally recited requirements for assertion of the attorney-client privilege are:
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> (1) The asserted holder of the privilege is or sought to become a client.
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> (2) The person to whom the communication was made is a member of the bar of a court, or his subordinate.
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> (3) The communication relates to a fact of which the attorney was informed by his client, without the presence of strangers, for the purpose of securing either an opinion of law, legal services or assistance in a legal matter, **and not for the purpose of committing a crime** or tort.
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> (4) The privilege has been claimed and is not waived by the client.
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> ***Commonwealth v. Mrozek****,* 441 Pa.Super. 425, 657 A.2d 997, 998 (1995) (citation omitted).

Id. at 843 (emphasis added).

The Commonwealth contends that the above-emphasized language, commonly referred to as the "crime-fraud exception" to the attorney-client privilege, bars the application of the privilege in Appellant's case. We agree. Our Supreme Court has discussed the crime-fraud exception, stating:

> When the advice of counsel is sought in aid of the commission of crime or fraud, the communications are not "confidential" within the meaning of the statute and may be elicited from the client or the attorney on the witness stand. "There is a privilege protecting communications between attorney and client. The privilege takes flight if the relation is abused. A client who consults an attorney for advice that will serve him in the commission of a fraud will have no help from the law. He must let the truth be told[.]"

In re Investigating Grand Jury of Philadelphia, 593 A.2d 402, 407 (Pa. 1991) (citation omitted). The Court also noted that "[t]he crime-fraud exception is applicable even when the client alone is guilty." ***Id.***

Moreover, this Court has clarified that "it is the party seeking to overcome the privilege who has the burden of establishing a *prima facie* case that the party asserting the privilege is committing a crime or fraud or continuing the same in exercising the privilege…." ***Brennan v. Brennan***, 422 A.2d 510, 517 (Pa. Super. 1980). Here, the Commonwealth satisfied this burden. At the suppression hearing, Officer Demota, the officer who responded to the scene of the alleged accident, testified that he saw "no damage" to Ms. Corbett-Blunt's car. N.T. Suppression Hearing, 9/19/11, at 53. He further stated that he "saw no signs of contact between [the] vehicles," and there were "[n]o reported injuries." ***Id.*** Appellant's attorney, Attorney Reid, also took the stand at that hearing and testified that he was contacted by Appellant in April of 2010 and, after meeting with Appellant, he filed a claim with GEICO insurance company. ***Id.*** at 57-58.

This evidence was sufficient to prove a *prima facie* case that Appellant consulted with his attorney for purposes of committing a crime or fraud. Officer Demota testified that there was no evidence of a collision between Ms. Corbett-Blunt's and Appellant's vehicles, yet Appellant retained an attorney to file an insurance claim on his behalf. The reasonable inference from this evidence is that Appellant consulted counsel for the purpose of committing the crime of insurance fraud. Therefore, the attorney-client

privilege did not protect the communications between Appellant and Attorney Reid.

Finally, Appellant contends that the court erred by not dismissing the charges against him in light of the Commonwealth's "egregious and outrageous" act of seizing Attorney Reid's case file in violation of the attorney-client privilege. Appellant's Brief at 9. In support of this claim, Appellant relies on this Court's decision in ***Commonwealth v. Sun Cha Chon***, 983 A.2d 784 (Pa. Super. 2009). There, we stated:

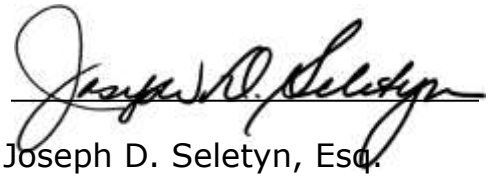
> Pennsylvania recognizes the defense of outrageous government conduct, which "is based on the theory that 'police involvement in criminal activity may be so outrageous that a prosecution will be barred on due process grounds.'" ***Commonwealth v. Mance,*** 539 Pa. 282, 652 A.2d 299, 303 (1995) (quoting ***Commonwealth v. Mathews,*** 347 Pa.Super. 320, 500 A.2d 853, 854 (1985)). The question of whether due process is violated by outrageous police conduct is a "legal question to be determined by the court, not the jury." ***Commonwealth v. Lindenmuth,*** 381 Pa.Super. 398, 554 A.2d 62, 64 (1989).

Id. at 786-87.

Here, Appellant's defense of outrageous government conduct rested on his assertion that the seizure of his attorney's case file violated the attorney-client privilege. For the reasons stated *supra*, we disagree. Therefore, we ascertain no egregious conduct by the Commonwealth that would have warranted the dismissal of the charges against Appellant. ***Compare to Sun Cha Chon***, 983 A.2d at 791 (finding outrageous government conduct warranting dismissal of case where government sent informant into house of prostitution on four occasions to engage in sexual acts with prostitutes).

Judgment of sentence affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 12/20/2013