No. 27894-8-III

Korsmo, A.C.J. (dissenting) — This case presents the novel question of whether a negligent violation of the statutory attorney-client privilege should be sanctioned in the same manner as an intentional and deliberate violation of the Sixth Amendment right to counsel, resulting in dismissal of a child molestation prosecution in the absence of actual prejudice to the defense. There is no authority to support this expansion and no hint that the Legislature intended such a remedy. I dissent.

Mr. Perrow retained counsel to represent him in a civil anti-harassment order case. An attorney-client relationship formed at that time. *Bohn v. Cody*, 119 Wn.2d 357, 363, 832 P.2d 71 (1992). Mr. Perrow and his counsel reasonably suspected that criminal charges might be filed. To that end, the attorney directed his client to provide him information about the victim (A.P.) and the case in order to impeach her and understand her motivation. Mr. Perrow communicates best in writing. He put down his thoughts in two notebooks and other papers, some of which were found in a trash bin awaiting destruction. Presumably, the information in those documents had also been forwarded to his counsel.

An Okanogan County Sheriff's detective executed a search warrant on Mr. Perrow's home. The detective found and seized the noted items after determining they were of evidentiary value. Sometime during the next three hours, Mr. Perrow told the detective that the items were privileged because his attorney directed their creation. The detective took the items back to his office where he analyzed them along with the other materials seized during the search. Information in the documents was included in the report sent to the prosecutor's office that was used to make the charging decision. In the meantime, some of the information was used by Mr. Perrow in his written response to the civil anti-harassment order case.

Mr. Perrow did not seek return of the documents from law enforcement nor otherwise act to limit their use. Instead, after charges were filed, he moved to suppress the documents and dismiss. The trial court ultimately granted both requests, reasoning that the documents were constitutionally and statutorily privileged and that suppression was an inadequate remedy because information had been communicated to the prosecution.[1] The trial court also found that the detective did not "consciously" undertake to violate the attorney-client privilege.[2] The State then timely appealed. It does not challenge the trial court's factual determinations.

[1] The trial court did not address Mr. Perrow's CrR 8.3(b) argument.
[2] Clerk's Papers (CP) at 29.

The Sixth Amendment right to counsel attaches when a criminal prosecution is initiated. *Brewer v. Williams*, 430 U.S. 387, 398, 51 L. Ed. 2d 424, 97 S. Ct. 1232 (1977); *State v. Medlock*, 86 Wn. App. 89, 99, 935 P.2d 693, *review denied*, 133 Wn.2d 1012 (1997). The constitutional right had not attached at the time of the search in this case since criminal charges were not filed until 19 days later. Thus, the communications privilege accorded to counsel under the Sixth Amendment was not at issue in this case. Since Mr. Perrow had retained counsel and an attorney-client relationship existed, it was the statutory privilege created by RCW 5.60.060(2), that was applicable here.

That statute provides:

> (a) An attorney or counselor shall not, without the consent of his or her client, be examined as to any communication made by the client to him or her, or his or her advice given thereon in the course of professional employment.
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> (b) A parent or guardian of a minor child arrested on a criminal charge may not be examined as to a communication between the child and his or her attorney if the communication was made in the presence of the parent or guardian. This privilege does not extend to communications made prior to the arrest.

Despite the apparent limitation of the privilege in subsection (a) to only attorneys, the statute has been construed to prohibit questioning the client about information provided to or by the attorney. *Dietz v. Doe*, 131 Wn.2d 835, 842, 935 P.2d 611 (1997); *State v. Emmanuel*, 42 Wn.2d 799, 815, 259 P.2d 845 (1953). It also extends to written documents that contain a privileged communication. *Dietz*, 131 Wn.2d at 842; *Pappas v.*

Holloway, 114 Wn.2d 198, 203, 787 P.2d 30 (1990). The trial court concluded, and the State does not challenge, that the questioned documents were prepared in order for Mr. Perrow to communicate with his counsel. Thus, the trial court properly determined that the seized documents were subject to the attorney-client privilege. The remaining question, and where I part from the majority, involves the remedy.

The lead case is also the sole authority relied upon by the majority, *State v. Cory*, 62 Wn.2d 371, 382 P.2d 1019 (1963). There a sheriff bugged a jail meeting room and secretly recorded conversations between the criminal defendant and his attorney. *Id.* at 372. The information gleaned from the recordings was presumed to have been shared with the prosecuting attorney. *Id.* at 377 n.3. Our court found this egregious misconduct violated the constitutional right to counsel. *Id.* at 377. The court also noted that the recording violated the statutory attorney-client privilege. *Id.*

The court then turned to the issue of remedy. After citing the logic of a California opinion, the court concluded its analysis in this manner:

> This concept of how the judiciary should react to violation of constitutional rights, appeals to us.
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> We think that the court in *Fusco v. Moses*,[3] *supra,* made the only disposition of the case which would afford an adequate remedy to the defendants and effectively discourage the odious practice of eavesdropping on privileged communication between attorney and client. There, the court ordered that the charges against the defendants should be dismissed and that they should be reinstated in their jobs.
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> It is our conclusion that the defendant is correct when he says that the shocking

[3] *Fusco v. Moses*, 304 N.Y. 424, 107 N.E.2d 581 (1952).

and unpardonable conduct of the sheriff's officers, in eavesdropping upon the private consultations between the defendant and his attorney, and thus depriving him of his right to effective counsel, vitiates the whole proceeding. The judgment and sentence must be set aside and the charges dismissed.

Id. at 378.

Several inescapable conclusions follow from this passage. First, the court was concerned with the violation of the *constitutional* right to counsel. There was no consideration of the statutory privilege when the court fashioned its remedy. Second, the court was understandably upset and concerned about the *egregious and deliberate* violation of the constitutional right. Third, the court's remedy was designed to *deter* further misbehavior by eliminating any incentive to repeat such conduct in the future.

The next case raising *Cory* issues also involved *deliberate* government intrusion into the *constitutionally protected* attorney-client relationship. In *State v. Granacki*, 90 Wn. App. 598, 959 P.2d 667 (1998), a detective deliberately read an attorney's notes, including communications with his client, which were left sitting at counsel table during a trial recess. *Id.* at 600. The trial court found the detective's actions were deliberate and violated the right to counsel. *Id.* at 601. The trial court dismissed the case. *Id.* Division One of this court affirmed the action on the basis of *Cory*. *Id.* at 602-604. The court reasoned that the remedy was left to the discretion of the trial judge and that lesser remedies would have been permissible. *Id.* at 604. Nonetheless, the court thought that

the deliberate review of the notes was essentially the same as the intentional eavesdropping in *Cory*. *Id.* at 603. In order to discourage such deliberate and egregious intrusions, dismissal was not an abuse of the trial court's discretion. *Id.* at 603-604.

Unlike *Cory* and *Granacki*, the detective here did not intrude upon the *constitutional* right to counsel which did not even exist. Instead, the detective violated Mr. Perrow's *statutory* privilege. Second, and probably even more critical, is the fact that the violation was not the egregious and deliberate intrusion evidenced by eavesdropping on an attorney consultation room. Here, at worst the intrusion was a negligent one. The officer found the items while executing a valid search warrant. It was only some time after the officer saw the writings that a privilege was claimed by the defendant. Nothing on the face of the writings indicated that they were made for an attorney or had been communicated to one. It was very understandable that the officer did not necessarily lend credence to Mr. Perrow's assertion of privilege. While it may have been prudent for the detective to seek legal advice about the documents, it also is clear that Mr. Perrow did not act to force their return[4] or seek to limit their use. Instead, he waited until after the criminal investigation had been completed before acting.

Under these facts, the remedy of dismissal of criminal charges is not warranted.

[4] *See* CrR 2.3(e), which authorizes courts to return improperly seized items prior to charges being filed.

No case appears to have ordered dismissal of any action—civil or criminal—for violation of the statutory attorney-client privilege. The Legislature did not specify any remedy and the case law to date has not declared any such remedy. The deterrence rationale underlying Sixth Amendment cases is not at play in this case. In both *Cory* and *Granacki*, the courts addressed deliberate intrusions into the protected relationship.[5] Here, the trial court expressly found that the detective did not purposefully intrude upon the attorney-client relationship. This circumstance calls for a more nuanced approach than the absolute deterrence remedy of dismissal applied to intentional violations of the constitutional right to counsel.

This court dealt with *Cory* in a somewhat different factual circumstance in *State v. Garza*, 99 Wn. App. 291, 994 P.2d 868, *review denied*, 141 Wn.2d 1014 (2000). There, corrections officers had searched the cells of inmates involved in an escape attempt and looked through all of their possessions, including legal papers. Some items were seized, including legal materials. *Id.* at 293-294. The paperwork was returned when counsel requested it. *Id.* at 294-295. The inmates filed individual motions to dismiss their pending charges, using CrR 8.3(b) to argue governmental misconduct. The trial court

[5] Division One has subsequently read both *Cory* and *Granacki* as cases where dismissal was employed to discourage intentional government intrusion into the constitutional attorney-client relationship. *State v. Webbe*, 122 Wn. App. 683, 697 n.36, 94 P.3d 994 (2004); *State v. Hunter*, 100 Wn. App. 198, 205, 997 P.2d 393, *review denied*, 141 Wn.2d 1027 (2000).

denied the motions, finding good faith on behalf of the corrections officers and lack of prejudice to the inmates. This court granted discretionary review. *Id.* at 295.

This court noted that rulings under CrR 8.3(b) are reviewed for abuse of discretion and that the extraordinary remedy of dismissal is only appropriate when there has been such prejudice that no other action would ensure a fair trial. *Id.* The court also noted that the United States Supreme Court had rejected a *per se* dismissal rule for violation of the Sixth Amendment attorney-client relationship.[6] *Id.* at 298. Finding *Cory* and *Granacki* most on point, the court concluded that dismissal would be an appropriate remedy if the search of the legal papers was not justified.[7] *Id.* at 300-301. The matter was remanded for factual findings. *Id.* at 301. Even if the search was justified, the inmates could still receive relief if they were able to establish prejudice from the search. *Id.* The trial court would have discretion to fashion an appropriate remedy, but dismissal would only be permissible when no lesser sanction would be effective. *Id.* at 301-302.

Garza is interesting in several respects that inform the decision here. First, the court agreed that it was actually dealing with a constitutional violation if the intrusion

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[6] *Weatherford v. Bursey*, 429 U.S. 545, 51 L. Ed. 2d 30, 97 S. Ct. 837 (1977) (government informant's presence at attorney-client meetings did not require dismissal of charges where informant had not reported information to the prosecutor and suppression was adequate remedy).

[7] The court concluded that an unjustified search would "establish[] a constitutional violation." *Garza*, 99 Wn. App. at 301.

was not justified. Second, the court agreed with *Granacki* that sanctions less than dismissal could be appropriate. Third, sanctions would be possible even if the search was justified, if prejudice was established.

These lessons are useful here. First, although I do not believe the constitutional right to counsel is implicated here because this was a pre-charging situation, the *Garza* court's suggestion that a justified search would not violate the constitution should also lead to the conclusion that the detective's search here likewise did not. The reason is that the detective seized the unmarked and clearly relevant items pursuant to a valid search warrant. Further, the trial court found the detective was not acting with the purpose of intruding on the attorney-client privilege. These two factors strongly suggest that no constitutional violation occurred under the *Garza* reasoning.

Next, the *Garza* court's recognition that a lesser sanction than dismissal could be proper for a justified (or, in my view, non-deliberate) violation directly affects the sanction in this case.[8] Appellate counsel for Mr. Perrow has identified an alternative sanction that would have cured the damage done here—removal of the sheriff's office and the prosecuting attorney's office from the case. A new prosecutor, relying solely on evidence delivered by another investigating agency from proper sources, could decide

[8] The *Granacki* court likewise recognized that lesser sanctions than dismissal were permitted for Sixth Amendment violations. 90 Wn. App. at 604. The United States Supreme Court concurs. *Weatherford v. Bursey*, 429 U.S. 545.

whether to proceed with charges or not. This sanction seems particularly appropriate here since there is no obvious taint to the prosecution's case. A.P. had disclosed the alleged abuse to law enforcement in Louisiana, and then in Washington, prior to the search conducted in this case. The evidence needed to prosecute the case existed independent of, and prior to, the discovery of the defendant's written remarks. Moreover, the thrust of the written items was simply impeachment of A.P. and disagreement with her about the events in question. Much of this the defendant soon put into the public record by responding in the anti-harassment order case. There does not appear, from the description we have received, to be anything in the written comments that would have been useful to the prosecution. The material also would have ultimately been disclosed to the prosecutor if used by the defense at trial, and it also was used in the civil proceedings. It is difficult to discern any harm at all to the defense, let alone such significant injury that a dismissal was required.[9]

The consequence of extending *Cory's* sanction for the deliberate violation of a constitutional right to the non-deliberate violation of the statutory privilege is potentially staggering and is certainly not limited to criminal cases. The shrewd defense attorney, in either a civil or a criminal case, would be wise to "inadvertently" send a privileged

[9] It also is very telling that the defense did not seek immediate return of the privileged materials as permitted by CrR 2.3(e) and as the *Garza* defendants did. This inaction suggests that Mr. Perrow did not consider the comments very material.

document to the plaintiff's counsel and then seek dismissal of the pending civil or criminal case. The resulting windfall, whether escaping liability for a potential multi-million dollar verdict or avoiding a term in prison, is simply not justified by the imputed injury.

The trial court erred in applying *Cory* to the non-deliberate violation of a statutory privilege. The harsh sanction of dismissal, created to deter intentional intrusion into the constitutional attorney-client relationship, should not be the remedy in this fact pattern, particularly in the absence of actual prejudice. Since the majority concludes otherwise, I dissent.

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Korsmo, A.C.J.