IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	**No. 27894-8-III**
Appellant,	)	
	)	**Division Three**
v.	)	
	)	
JAMES MARTIN PERROW,	)	**PUBLISHED OPINION**
	)	
Respondent and Cross-Appellant.	)	
	)	

Brown, J. ─ The State appeals the trial court's dismissal of its child molestation prosecution against James Martin Perrow based upon the State's violation of Mr. Perrow's attorney-client privilege. The trial court found a detective had wrongfully seized attorney-client writings while executing a search warrant, examined and copied the writings, and delivered the writings to the State's prosecution team before charges were filed. The State contends the trial court abused its discretion in dismissing the charges because (1) the Sixth Amendment right to counsel had not attached when the writings were seized; (2) Mr. Perrow failed to establish the writings were protected by the attorney-client privilege; and (3) Mr. Perrow waived the privilege. We disagree, do

not reach Mr. Perrow's cross-appeal challenging the search warrant, and affirm.

FACTS

The facts mainly derive from the trial court's unchallenged findings of fact following Mr. Perrow's motion to dismiss for violation of the attorney-client privilege. Since the court's findings are unchallenged, they are verities on appeal. *State v. Levy*, 156 Wn.2d 709, 733, 132 P.3d 1076 (2006).

In October 2007, Detective Craig Sloan began investigating Mr. Perrow's alleged sexual abuse of his daughter, A.P. On October 26, Detective Sloan called A.P. and told her he would assist her with obtaining a civil anti-harassment protection order against her father. After speaking with A.P., the detective contacted an Okanogan County prosecuting attorney. A civil protection order was issued against Mr. Perrow on November 13. On or about November 14, Detective Sloan called Mr. Perrow and informed him of A.P.'s allegations. Detective Sloan then prepared an affidavit for a search warrant of Mr. Perrow's home.

Mr. Perrow received a copy of the protection order on November 17 and contacted Michael Vannier, an attorney, on or about November 19. Mr. Vannier agreed to represent Mr. Perrow on the civil protection order matter as well as the potential criminal charges. On November 20, Mr. Vannier met with Mr. Perrow and asked him to gather information about A.P.'s allegations and provide him with a "written narrative" of

the matters. Mr. Perrow prepared the requested materials for his attorney.

On November 29, Detective Sloan and other law enforcement officers executed a search warrant at Mr. Perrow's home. Detective Sloan seized written materials from Mr. Perrow's residence, including two composition books, some notes, and a yellow note pad. During the search, Mr. Vannier received a phone call from either Mr. Perrow or his wife informing him that Detective Sloan was taking the materials Mr. Perrow had prepared for Mr. Vannier. Mr. Vannier told the caller to tell the officer that the materials were protected by the attorney-client privilege. Mr. Perrow told Detective Sloan that the seized items had been prepared for Mr. Vannier. Detective Sloan removed the items from Mr. Perrow's home and took them to the Okanogan County sheriff's office where he read and analyzed them.

Detective Sloan observed that the documents appeared to have been written after Mr. Perrow was served with the protection order on November 17. He read through the documents page by page and compared them with what Mr. Perrow had said on the phone. Detective Sloan prepared a written analysis of the documents. He forwarded his report and the seized documents to the prosecutor's office.

On December 17, the State charged Mr. Perrow with two counts of child molestation. Mr. Perrow moved to dismiss based on unjustifiable interference of the right to counsel, violation of the attorney-client privilege, and prejudicial governmental misconduct under CrR 8.3(b). He argued that the seized documents were clearly

meant for his attorney and that Detective Sloan knew this at the time he seized them.

The court granted Mr. Perrow's motion, concluding Mr. Vannier represented him at the time of the seizure on the civil and the criminal matters and therefore the seized items were protected by the attorney-client relationship. It concluded the detective's conduct violated Mr. Perrow's constitutional right to counsel and his right to privileged communication with his attorney under RCW 5.60.060(2)(a). It did not address Mr. Perrow's CrR 8.3(b) argument. Based on Detective Sloan's communication to the prosecutor's office about the contents of the writings, the court concluded suppression was not an adequate remedy and dismissed the charges. The State appealed.

ANALYSIS

The issue is whether the trial court erred in granting Mr. Perrow's motion to dismiss for constitutional violations of the right to counsel and violation of the attorney-client privilege. We review a trial court's decision to dismiss criminal charges for an abuse of discretion. *State v. Michielli*, 132 Wn.2d 229, 240, 937 P.2d 587 (1997). A trial court abuses its discretion only when its decision is manifestly unreasonable or based on untenable grounds. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

The State first contends the trial court abused its discretion dismissing the case because Mr. Perrow's Sixth Amendment right to counsel had not attached when the writings were seized. It argues his right to counsel did not attach until charges were

later filed and he failed to establish the writings were protected by the attorney-client privilege under RCW 5.60.060(2)(a). Mr. Perrow responds that the State's arguments are disposed of by the trial court's unchallenged findings establishing he prepared the writings at his counsel's request to obtain legal advice on the very matters under investigation by Detective Sloan. Mr. Perrow argues privilege attachment is immaterial; the relevant inquiry is whether the attorney-client privilege violation was so egregious that dismissal was the sole remedy considering the "conduct is by definition so egregious that prejudice is presumed and dismissal warranted." Br. of Appellant at 26.

Initially, we examine whether the seized writings were privileged attorney-client communications. Washington's attorney-client privilege is found at RCW 5.60.060(2)(a).[1] The privilege applies to communications and advice between an attorney and client and extends to documents that contain a privileged communication. *Dietz v. Doe*, 131 Wn.2d 835, 842, 843, 935 P.2d 611 (1997). It applies to any information generated by a request for legal advice. *Soter v. Cowles Publ'g Co.*, 131 Wn. App. 882, 130 P.3d 840, *aff'd*, 162 Wn.2d 716, 174 P.3d 60 (2006).

"The attorney-client privilege exists in order to allow the client to communicate freely with an attorney without fear of compulsory discovery." *Dietz*, 131 Wn.2d at 842. The privilege encourages a client to make a full disclosure to his or her attorney,

[1] "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." RCW 5.60.060(2)(a).

enabling the attorney to render effective legal assistance. *R.A. Hanson Co. v. Magnuson*, 79 Wn. App. 497, 502, 903 P.2d 496 (1993), *review denied*, 129 Wn.2d 1010 (1996). Whether an attorney-client relationship exists is a question of fact. *Dietz*, 131 Wn.2d at 844; *Bohn v. Cody*, 119 Wn.2d 357, 363, 832 P.2d 71 (1992). The defendant has the burden of establishing the existence of the attorney-client privilege. *R.A. Hansen*, 79 Wn. App. at 501.

Dietz gives an eight-part test to guide courts in determining if an attorney-client relationship exists: (1) the client must have sought legal advice; (2) from an attorney; (3) the communication was made to obtain legal advice; (4) in confidence; (5) by the client; (6) the client must wish to protect his identity; (7) from disclosure; and (8) the protection must not have been waived. *Dietz*, 131 Wn.2d at 849.

The State argues Mr. Perrow did not show the seized materials were intended for his attorney; and even if they were privileged, Mr. Perrow waived the privilege because many of the seized documents were made public record in Mr. Perrow's protection order case. We are not persuaded. The court's unchallenged findings unequivocally establish the seized writings were intended for Mr. Vannier and no evidence shows the materials were used in the protection order proceedings.

The findings establish: (1) prior to the execution of the search warrant on November 28, 2007, Mr. Perrow retained the services of Mr. Vannier, an attorney; (2) Mr. Vannier's representation involved the defense of a civil protection order filed by

A.P., as well as representation during the investigative stage of the potential criminal charges that could be filed as a result of A.P.'s allegations; (3) Mr. Perrow was aware of A.P.'s allegations based on his conversation with Detective Sloan on or about November 14, 2007; (4) Mr. Vannier first met with Mr. Perrow on November 20, 2007 after previously speaking with him by telephone and receiving faxed documents concerning the allegations; (5) Mr. Vannier asked Mr. Perrow to provide him with information about A.P. and her allegations; (6) During the November 20, 2007 meeting, Mr. Vannier asked Mr. Perrow to gather additional information and to put that information into writing; (7) Mr. Perrow prepared written materials for his attorney which consisted of a green composition book, a black composition book, miscellaneous notes located in his office, and a yellow note pad; and (8) Mr. Vannier met with Mr. Perrow on November 27, 2007 to review the information and discuss the case.

Based on these findings, the court concluded "[a]n attorney/client relationship had been formed and existed at the time the papers and notebooks were seized on November 28, 2007 inasmuch as defendant sought and received legal assistance from Mr. Vannier on matters related to the civil protection petition filed by AP and the active criminal investigation." Clerk's Papers (CP) at 12. And, the court concluded Mr. Perrow satisfied the *Dietz* test because: (1) Mr. Perrow sought specific legal advice; (2) from Mr. Vannier in his capacity as an attorney; (3) the papers and notebooks were prepared and made to obtain legal advice, outline strategy and prepare a defense; (4)

in confidence; (5) by Mr. Perrow; (6) the materials were intended for his attorney; (7) they were not for disclosure; and (8) the desire for protection was not waived.

It follows from the court's conclusions that the writings seized from Mr. Perrow's residence were protected by the attorney-client privilege and the State's seizure of these materials violated that privilege. Given the violation, the next inquiry is whether dismissal was the appropriate remedy. The State contends dismissal is an extraordinary remedy available only when the accused's rights have been materially prejudiced, affecting his right to a fair trial. It argues Mr. Perrow's Sixth Amendment right to counsel had not attached when the writings were seized and he fails to show egregious governmental misconduct justifying dismissal under CrR 8.3(b). Mr. Perrow's responsive arguments are exactly the opposite.

Here, the trial court relied primarily on *State v. Cory*, 62 Wn.2d 371, 382 P.2d 1019 (1963) to support the dismissal. The *Cory* court analyzed government intrusion into the attorney-client relationship. Mr. Cory met with his attorney to discuss his case in a private jail room, where the sheriff had secretly installed a microphone. *Id.* at 372. The trial court excluded the evidence derived from the eavesdropping but declined to dismiss the case. *Id.* at 378. The Supreme Court dismissed, stating:

> There is no way to isolate the prejudice resulting from an eavesdropping activity, such as this. If the prosecution gained information which aided it in the preparation of its case, that information would be as available in the second trial as in the first.

Id. at 377. The *Cory* court noted effective representation requires a defendant to be able to consult with his or her attorney in private. *Id.* at 373-74.

The State argues *Cory* is distinguishable because Mr. Perrow's Sixth Amendment right to counsel had not attached at the time of the search and Detective Sloan did not purposely intercept communication between Mr. Perrow and his attorney. We disagree. First, we need not evaluate if the State's conduct violated Mr. Perrow's constitutional rights to counsel because the *Cory* court observed that in addition to the Sixth Amendment right to counsel, the State's eavesdropping violated the attorney-client communications privilege established in RCW 5.60.060(2).

Considering the State's egregious behavior, Mr. Perrow establishes the seized writings were protected under RCW 5.60.060(2). Under *Cory*, dismissal is the sole adequate remedy when, like here, the State intercepts privileged communications between an attorney and client. *Id.* at 378. It is not possible to isolate the prejudice resulting from the intrusion. *Id.* at 377; *see also State v. Granacki*, 90 Wn. App. 598, 603-04, 959 P.2d 667 (1998) (when the State's violation of the attorney-client privilege is egregious, the trial court does not abuse its discretion in presuming prejudice).

The State's conduct is analogous to that in *Cory*. The court's unchallenged findings establish: (1) Mr. Perrow informed Detective Sloan during the search that the written materials were for Mr. Vannier; (2) Detective Sloan nevertheless seized the materials, closely analyzed them, made copies of them, and concluded the information

contradicted previous statements made by Mr. Perrow; and (3) Detective Sloan forwarded copies of the documents to the prosecutor's office.

Based on these findings, the court entered conclusions:

> 1.69 Although this Court most assuredly cannot conclude that Det. Sloan consciously undertook to violate defendant's attorney/client privilege, this Court does conclude that the detective's conduct was in violation not only of the constitutional provision assuring the right to counsel but also of RCW 5.60.060(2)(a), which establishes that communication between an attorney and his client shall be privileged and confidential.
>
> 1.70 The Court concludes that since the privileged papers, documents and notebooks were not impounded by Det. Sloan but were, rather, reviewed and analyzed as to specific content and therefore communicated to the prosecutor's office, suppression is not an adequate remedy.

CP at 15.

In sum, we conclude the trial court did not abuse its discretion in dismissing the charges against Mr. Perrow. As in *Cory*, it is impossible to isolate the prejudice presumed from the attorney-client privilege violation. The resolution of this issue is dispositive of this appeal. Thus, we, like the trial court, do not reach Mr. Perrow's CrR 8.3(b) arguments. Nor, do we address Mr. Perrow's cross-appeal.

Affirmed.

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Brown, J.

I CONCUR:

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Sweeney, J.