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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenville County

Honorable Robin B. Stilwell, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

WILLIAM SHANE FORDHAM BROWN,

APPELLANT

APPELLATE CASE NO 2019-001456

INITIAL REPLY BRIEF OF APPELLANT

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In this trial where a co-defendant pled guilty earlier but when called as witness by the State at Appellant's trial asserted his Fifth Amendment right to remain silent, the trial judge erred in allowing the State to call the co-defendant's attorney as a witness and admitting a letter in evidence the attorney received from his client during the course of representation before the co-defendant pled guilty, when the attorney for the co-defendant asserted that the letter was privileged communication with his client. 1

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ARGUMENT IN REPLY

In this trial where a co-defendant pled guilty earlier but when called as witness by the State at Appellant's trial asserted his Fifth Amendment right to remain silent, the trial judge erred in allowing the State to call the co-defendant's attorney as a witness and admitting a letter in evidence the attorney received from his client during the course of representation before the co-defendant pled guilty, when the attorney for the co-defendant asserted that the letter was privileged communication with his client.

The State, through the service of a subpoena, required the attorney who represented Connell Wells, a co-defendant who had already pled guilty and been sentenced, to appear at Appellant's trial, to testify and to produce the original of a letter Wells gave his attorney during the course of representation. (Tr. p. 585, line 17 – p. 586, 587, lines 1-14). The attorney for Wells objected and told the judge:

> Your Honor, my understanding is that Mr. Wells, my former client, has pled the Fifth. My understanding, the State is wanting me to present an original letter that Mr. Wells gave me at the jail. I believe that since he's pleaded the Fifth that I can't then go behind his back, so to speak, and kind of do a wrap around his right to remain silent in this case. I believe that under Rule 4.9 of the Rules of Professional Conduct that I'm not taking any adverse action to his interest and I believe this would constitute that, among the exceptions are that in the crime [verbatim], things of that nature. But there's no exception for what the State is asking me to do, so I don't believe I can ethically do it. I believe I'm covered by his Fifth Amendment as well.

(Tr. p. 579, lines 7-22). Counsel for Appellant and counsel for Curtis Allen Babb, Jr., another co-defendant being tried with Appellant, agreed that the letter should not be admitted. (Tr. p. 581, lines 2-6). The attorney for Wells also told the judge:

> Your Honor, a copy was turned over to the State for purposes of plea bargaining and also to prevent a threat. I believe had we gone to trial for him, it would have been inadmissible for those purposes, but pursuant to plea negotiations, involving attorney and prosecutor. But now, I think It's more broadly covered by the confidentiality restrictions and I think I would have to breach my duty to my client to honor the subpoena here today, Your Honor.

(Tr. p. 582, lines 12-21). The copy provided to the State only included the front page, not the back. The original letter was written on the back of paperwork that had Appellant's name on it. The copy containing the front of the letter was redacted to remove reference to co-defendant Babb. The redacted copy was later admitted in evidence as State's Exhibit #23 when the questioned documents witness testified. (Tr. p. 630, line 21 – p. 631, lines 1-10).

The judge asked the attorney for Wells, "Does your client not waive that privilege when he asked you to turn it over to the State?" (Tr. p. 582, lines 22-24). The attorney answered, "Well, Your Honor, perhaps, the contents of the letter, which they already have. If they're asking me under what conditions I received it, under what conditions I turned it over, I think that's all confidential." (Tr. p. 582, line 25 – p. 583, lines 1-4). The judge overruled the objections to the admission of the letter. (Tr. p. 584, lines 18-25). The judge, however, limited questioning and stated:

> Just know that this ruling stands for proposition, I am not going to make you or require you or suggest in any way shape or form that you should breach a lawyer/client privilege and that confidentiality. But to the extent to the extent that this letter you're your client asked you to turn it over to the State, for whatever purpose, he waives that confidentiality with respect to that letter and that letter alone. I'm not asking you to make -- I'm not asking you anything. I'm restricting the State from asking you any questions that bear upon conversations that you may have had or confidential discussions between the two of them. It's simply authentication. Authentication.

(Tr. p. 583, lines 11-24). The original letter was marked for identification as State's Exhibit #46. (Tr. p. 586, line 25 – p. 587, line 1). The original letter, disclosed for the first time at trial by the attorney for Wells, was later admitted in evidence as State's Exhibit #46. (Tr. p. 654, lines 22-23). State's Exhibit #46 was unredacted and contained both the front of the letter with the text and the back of the letter with Appellant's name. The back of the letter with Appellant's name contained confidential information covered by the attorney client privilege and

not waived. The identity of the author of the letter was in question at trial and the copy provided to the State only included the front with the text of the letter and not the back that included Appellant's name.

Prior to the admission of State's Exhibit #46, the prosecutor told the judge, "And I believe the least confusing way to handle this issue is to admit State's 46, but not allow the jury to review it outside the Court's supervision. To the extent that I cannot redact that particular version." (Tr. p. 633, lines 17-21). The prosecutor, however, wanted the jury to know that the back of the letter, State's Exhibit #46, contained Appellant's name. (Tr. p. 634, lines 1-8). Counsel for Appellant stated, "I'm not really sure what that – other than his name and so forth, I don't know what else would be admissible on there honestly. The rest of it is just - -" (Tr. p. 634, lines 16-19). The judge stated, "Right, I understand. And I think that's exactly what Ms. Owens [the prosecutor] is suggesting, that really she wants to admit it into the record to further demonstrate that it contains the name of Mr. Brown [the Appellant]. But she doesn't want it to go back to the jury, she wants to have it for demonstrative purposes to demonstrate that it was his. And I think your suggestion is that it does not go back to the jury?" (Tr. p. 634, line 20 - p. 635, lines 1-3). The prosecutor answered, "That's correct, Your Honor. The State would offer it as an exhibit to the extent that we've met the threshold for authentication required by Rule 901, but I don't think it's appropriate for the jury to view the unredacted content of the letter that we've been so careful about." (Tr. p. 635, lines 4-9).

The judge ruled, "I understand. I understand. And for that purpose, I will allow it introduction. And I'll allow you to reference the name if you so chose [sic] in closing argument." (Tr. p. 635, lines 10 -13). The trial judge erred in "admitting" State's Exhibit #46, allowing the prosecutor to reference the fact that Appellant's name appears on the back of the

document in her closing argument but not allowing the jury to see the document. The ruling is also in contradiction to the judge's earlier limiting instructions with regard to the questioning of counsel about how Wells obtained the letter.

In closing argument the State told the jury, "With respect to this letter, you should also in evaluating whether this letter came from Mr. Brown consider that it's written on the back of paperwork with Mr. Brown's name on it. Whose else would have paperwork with Mr. Brown's name on it if it's not his? This letter was written by him." (Tr. p. 794, lines 4-9). The trial judge erred in admitting both State's Exhibit #23 and State's Exhibit #46 because both constituted privileged communication between co-defendant Wells and his attorney. The back of the letter showing paperwork with Appellant's name on it included in State's Exhibit #46 is not included in State's Exhibit #23 because the back was not turned over to the State and not waived. As to the content of the letter, once the judge allowed Wells to assert his right to remain silent at Appellant's trial, the State should not have been able to circumvent that ruling by calling the attorney to testify about privileged communications.

The Rule of Professional Conduct dealing with the responsibilities of a prosecutor provides that:

> The prosecutor in a criminal case shall:
>
> (a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;
>
> (b) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;
>
> (c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing;
>
> (d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the

defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;

(e) not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless the prosecutor reasonably believes:

(1) the information sought is not protected from disclosure by any applicable privilege;

(2) the evidence sought is essential to the successful completion of an ongoing investigation or prosecution; and

(3) there is no other feasible alternative to obtain the information;

Rule 3.8, RPC, Rule 407, SCACR (emphasis added).

It is important to note that when the prosecutor served the subpoena on Wells' attorney compelling his attendance at trial and requiring him to produce State's Exhibit #46, the original document provided to him by his client, a copy of the front of that original document, State's #23, had been turned over to the State and was in the State's possession. While there was no objection at trial to the admission of State's Exhibit #23, when the prosecutor questioned Wells at Appellant's trial she specifically asked him about State's Exhibits #20, #21 and #22 but never questioned him about the copy of the letter, State's #23. (Tr. pp. 272– p. 275, lines 1-7). Additionally, the judge precluded the State from questioning Wells' attorney about how and presumably from whom, Wells received the letter. The State, however, was allowed to tell the jury that Appellant's name was on the back of the letter, implying that Wells received the letter from Appellant.

The original document, State's Exhibit #46, meets the elements required for protection pursuant to the attorney client privilege. In State v. Doster, 276 S.C. 647, 651, 284 S.E.2d 218, 219–20 (1981), the South Carolina Supreme Court wrote:

> Many jurisdictions strictly construe the privilege. 81 Am.Jur.2d Witnesses § 174, at 210. The reasoning behind the strict construction is that evidence excluded under the privilege is not necessarily incompetent. See generally, McCormick, Handbook of the Law of Evidence, §§ 87, *et seq.* (2d Ed. 1972).
>
> We agree that the privilege must be tailored to protect only confidences disclosed within the relationship. The essential elements giving rise to the privilege were stated by Wigmore to be:
>
> "(1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) except the protection be waived." 8 Wigmore, Evidence § 2292 (McNaughton rev. 1961).

Wells provided the letter to his lawyer in confidence during the course of representation. Only a copy of the front side of the letter was provided to the State. The original letter was not in furtherance of criminal, tortious or fraudulent conduct. The privilege should be strictly construed and this Court should find prejudicial error in the admission of both State's Exhibit #23 and State's Exhibit #46.

CONCLUSION

Based on the above argument, this Court should reverse Appellant's convictions and remand the case for a new trial.

Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT

This 25th day of February, 2021.

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CERTIFICATE OF SERVICE

Pursuant to the Supreme Court's Order "RE: Operation of the Appellate Courts During the Coronavirus Emergency," dated March 20, 2020, the undersigned hereby certifies a true copy of the Initial Reply Brief of Appellant in the above referenced case has been served upon Caroline Scrantom, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS); and a copy of the Initial Reply Brief of Appellant has been served on William Shane Fordham Brown, #345422, at McCormick Correctional Institution, 386 Redemption Way, McCormick, SC 29899, this 25th day of February, 2021.

Kathrine H. Hudgins
Appellate Defender
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