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Gibbs v. State [State of Nevada], 140 Nev. Adv. Op. 13. 543 P.3d 1185 (Mar. 7, 2024)¹

NEITHER VIOLATION OF JAIL TELEPHONE POLICY NOR USE OF THREE-WAY
CALLING VIOLATES ATTORNEY-CLIENT PRIVILEGE ABSENT ADDITIONAL
EVIDENCE OF WAIVER

Summary

Absent additional evidence of waiver, a defendant does not waive his attorney-client privilege even when he makes phone calls during pretrial detention that are in violation of detention center phone use policy and uses a three-way phone service to connect to his defense investigator. Though district courts use discretion in admitting or denying evidence, these uses of discretion can be reviewed on appeal, and reversed if not harmless.

Background

Jamel Gibbs was charged with second degree murder for fatally shooting Jaylon Tiffith in the driveway of an apartment complex. A single witness, who was unfamiliar with Gibbs, identified Gibbs as the shooter after viewing a photo of him on social media. The defense planned to undermine this witness testimony at trial and argue a mistaken identity defense. At trial, the prosecution relied on a recorded telephone conversation that Gibbs had with his defense investigator while being held in pretrial detention during which Gibbs admitted to being at the scene of the shooting. The district court overruled Gibbs' objections that the phone call was protected by attorney-client privilege and admitted the recording. The district court found Gibbs waived the privilege since he violated jail phone policies by using another detainee's phone access code and used three-way calling to connect with the investigator. The key evidence strengthened the witness testimony and was instrumental in Gibbs' lower court conviction.

On appeal, The Supreme Court of Nevada found the district court had abused its discretion in admitting the recording. The Court found that violation of the jail phone policy alone is insufficient to waive attorney-client privilege since the violation alone does not demonstrate the client's intent to waive the privilege. Further, the Court found the use of three-way calling, alone, is also insufficient to waive privilege absent evidence that the third party listened to or participated in the call. The Court reversed and remanded the decision.

Discussion

The district court abused its discretion in admitting the recorded phone call between Gibbs and a defense investigator

Though decisions regarding evidence are within the district court's discretion, they can be reversed if it can be shown that the district court abused its discretion in an arbitrary or capricious

¹ By Weston T. Robinson.

way or exceeded the bounds of law.² The attorney-client privilege protects against the disclosure of confidential communications between attorney and client, and allow the client to make full disclosures to their attorney, which, in turn, allows the attorney to be a fully informed advocate. In order for this privilege to apply, the communications must be between an attorney and client for the purposes of rendering legal services and can include communications with a defense investigator.³ A defendant who asserts the privilege has the burden of showing that the evidence is indeed privileged and that the privilege was not waived.

Here, the district court was persuaded that Gibbs's communications were not privileged because he violated the detention center's phone use policy and because he used a three-way call service to connect with his investigator. The Supreme Court of Nevada was not persuaded by either argument.

First, the Court found that simple violation of the detention center's policy does not either explicitly or implicitly indicate that Gibbs intended to waive his attorney-client privilege. The privilege belongs entirely to him and absent a showing of intent to waive, violation of the policy alone is insufficient to demonstrate waiver.

Second, the use of three-way calling to connect with a member of the defense team is also insufficient by itself to constitute a waiver of attorney-client privilege. Generally, conversations between attorney and client in the presence of a third party are not confidential and are not protected by attorney-client privilege, and the presence of a third party can be evidence that the client did not intend the communication to be confidential.⁴ However, here, there is nothing in the record that indicates that a third party participated in or listened to the phone call. Gibbs simply called a third party who then connected him to the investigator. Since some telecommunication carriers permit the host of a three-way call to disconnect from the conversation and leave the remaining parties connected, the host here may have disconnected completely.

The district court failed to hold an evidentiary hearing on the matter. Given the lack of evidence on the record, the Supreme Court of Nevada cannot conclude that Gibbs waived his attorney client privilege in making this phone call. The district court abused its discretion in admitting the evidence.

The error was not harmless beyond a reasonable doubt

On appeal, the state contends that this admission was harmless error. However, this error by the district court in admitting evidence protected by attorney-client privilege, intrudes upon the right of counsel. The Supreme Court of Nevada cannot conclude that this error was harmless beyond a reasonable doubt because defense counsel planned a mistaken identity defense to undermine the single witness who was unfamiliar with Gibbs. Aside from this testimony, the evidence against Gibbs was not overwhelming. Gibbs statements to the investigator conceded he was present during

² *McLellan v. State*, 124 Nev. 263, 267, 182 P.3d 106, 109 (2008); *Crawford v. State*, 121 Nev. 744, 748, 121 P.3d 582, 585 (2005).

³ *Wynn Resorts, Ltd. v. Eighth Jud. Dist. Ct.*, 133 Nev. 369, 374, 399 P.3d 334, 341 (2017).

⁴ *Nev. Tax Comm'n v. Hicks*, 73 Nev. 115, 134, 310 P.2d 852, 862 (1957); NRS 49.055.

the shooting and directly undermined the theory of defense, necessitating a change in strategy at the start of trial. Thus, it was not a harmless error to admit the phone call.

Conclusion

The district court abused its discretion in admitting a recording of a conversation between Gibbs and his investigator. Violating a detention center's phone policy does not indicate intent to waive attorney-client privilege. Further, while the presence of a third party during a conversation may waive attorney-client privilege, the record here does not support such a finding. Because this error was not harmless beyond a reasonable doubt, the judgment of conviction is reversed and remanded for a new trial.