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Selected Columbia Rules of Professional Conduct.....

State v. Nelson

Columbia Supreme Court (2015)

SELECTED COLUMBIA RULES OF PROFESSIONAL CONDUCT

Rule 4.2. Communication with a Represented Person

- (a) In representing a client, a lawyer shall not communicate directly or indirectly about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer.

.....

- (c) This rule shall not prohibit: (1) communications with a public official, board, committee, or body; or (2) communications otherwise authorized by law or a court order.

.....

Comment

- [1] This rule applies even though the represented person initiates or consents to the communication. . . .

.....

- [3] The prohibition against communicating “indirectly” with a person represented by counsel in paragraph (a) is intended to address situations where a lawyer seeks to communicate with a represented person through an intermediary such as an agent, investigator or the lawyer’s client.

.....

- [8] Paragraph (c)(2) recognizes that statutory schemes, case law, and court orders may authorize communications between a lawyer and a person that would otherwise be subject to this rule. The law recognizes that prosecutors

and other government lawyers are authorized to contact represented persons, either directly or through investigative agents and informants, in the context of investigative activities, as limited by relevant federal and state constitutions, statutes, rules, and case law. The rule is not intended to preclude communications with represented persons in the course of such legitimate investigative activities as authorized by law.

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Rule 5.2. Responsibilities of a Subordinate Lawyer

- (a) A lawyer shall comply with these rules notwithstanding that the lawyer acts at the direction of another lawyer or other person.

- (b) A subordinate lawyer does not violate these rules if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty.

Comment

When lawyers in a supervisor-subordinate relationship encounter a matter involving professional judgment as to the lawyers' responsibilities under these rules and the question can reasonably be answered only one way, the duty of both lawyers is clear and they are equally responsible for fulfilling it. Accordingly, the subordinate lawyer must comply with his or her obligations under paragraph (a). If the question reasonably can be answered more than one way, the supervisory lawyer may assume responsibility for determining which of the reasonable alternatives to select, and the subordinate may be guided accordingly. . . .

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We granted review in this case to address the question whether a prosecutor violates Rule 4.2 of the Columbia Rules of Professional Conduct, which is commonly referred to as the no-contact rule, by communicating, post-indictment, with a defendant known to be represented by counsel, without counsel's consent. The answer, as will appear, is yes.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

James Nelson and Philip Brooks were indicted for conspiracy to distribute cocaine in the Superior Court of the County of Pleasanton. Nelson retained attorney Barry Tarlow to represent him, and Brooks retained attorney James Young.

While awaiting trial, Nelson was detained with Brooks at the Pleasanton County Jail. Tarlow informed Nelson that he believed that he and Brooks had a viable entrapment defense and that, in any case, it was his general policy not to negotiate a plea agreement with the State at this stage in the proceedings.

Young had agreed with Tarlow to coordinate a joint investigation. In so doing, Young often spoke to both Nelson and Brooks by telephone and in person during visits to Pleasanton.

One day, Nelson and Brooks telephoned Young and expressed an interest in negotiating a plea agreement. Without informing Tarlow, Young twice traveled to Pleasanton in order to discuss negotiating a plea agreement with Nelson and Brooks. Nelson asked Brooks and Young not to reveal their discussions to Tarlow because he feared that, if Tarlow learned that he was involved in negotiating a plea

agreement, Tarlow would withdraw as his counsel and thereby deprive him of his services in the event the case were to go to trial.

Young contacted Deputy District Attorney Joan Lyons, who was prosecuting the case against Nelson and Brooks, on behalf of both men. Subsequently, along with Brooks and Young, Nelson met with Lyons twice in her office. Following the second meeting, Lyons sent Young a proposed plea agreement for Nelson and Brooks. After talking with Young, Nelson and Brooks rejected the proposal.

Not long thereafter, Tarlow discovered what had transpired and filed a motion to dismiss the indictment. Tarlow alleged that Lyons violated the Sixth Amendment, which granted Nelson the right to Tarlow's assistance, and also violated Columbia Rule of Professional Conduct 4.2, which prohibited her from communicating with Nelson without Tarlow's consent. After a hearing, the Superior Court concluded that Lyons did not violate the Sixth Amendment, since Nelson was not deprived of Tarlow's assistance. But it also concluded that she did indeed violate Rule 4.2. In the exercise of its supervisory powers, it dismissed the indictment against Nelson.

The State appealed from the dismissal. The Court of Appeal, however, affirmed. The State petitioned for review. We granted review, and now affirm the Court of Appeal's affirmance.

DISCUSSION

The State does not dispute that, *if* Lyons violated Rule 4.2, the Superior Court properly dismissed the indictment against Nelson in the exercise of its supervisory power. The State claims only that Lyons did not violate Rule 4.2.

In support, the State argues that Rule 4.2 was not intended to apply to a

prosecutor. It is too late in the day to present such an argument. Years ago, we held that a “prosecutor is no less subject to the Columbia Rules of Professional Conduct than any other lawyer.” *State v. Mann* (Columbia Supreme Ct., 1976). It is true that, depending on the circumstances, a prosecutor may or may not be prohibited from communicating with a defendant known to be represented by counsel, without counsel’s consent, *before the defendant is indicted*. Such circumstances include whether the prosecutor knows that the defendant has expressed a willingness to communicate, a fact that would militate in favor of communication, and whether the prosecutor knows that counsel has expressed an unwillingness to consent, a fact that would militate against communication. But it is also true that, in all circumstances, a prosecutor is prohibited from communicating with a defendant known to be represented by counsel, without counsel’s consent, *after the defendant has been indicted*. Indictment gives rise to a defendant’s Sixth Amendment right to rely upon counsel as a medium between him and the State. The defendant’s Sixth Amendment right would be meaningless if one of its critical components, a lawyer-client relationship characterized by trust and confidence, could be circumvented by a prosecutor under the guise of conducting an investigation.

The State then argues that Rule 4.2 does not prohibit a prosecutor from communicating with a defendant known to be represented by counsel, without counsel’s consent, *if the prosecutor is conducting an investigation*. The State relies on Comment [8] to Rule 4.2, which states that “[t]he rule is not intended to preclude communications with represented persons in the course of ... legitimate investigative activities as authorized by law.” We read Comment [8] to mean that a prosecutor is not prohibited from communicating with a represented defendant *if and to the extent that the prosecutor is authorized by law to do so*. In Columbia, however, a prosecutor is *not* authorized by law to communicate with a represented defendant where, as here, the defendant has been indicted.

Finally, the State next argues that, even if Rule 4.2 prohibits a prosecutor

from communicating with a defendant known to be represented by counsel without counsel's consent, it prohibits a prosecutor only from *speaking* and not from *listening*. While certainly one purpose of Rule 4.2 is to prevent attorneys from utilizing their legal skills to gain an advantage over an unsophisticated lay person, an equally important purpose is to protect a person represented by counsel not only from the approaches of his or her adversary's lawyer, but from the folly of his or her own well-meaning initiatives and the generally unfortunate consequences of his or her ignorance.

CONCLUSION

Because Lyons did indeed violate Rule 4.2, the Superior Court properly dismissed the indictment against Nelson in the exercise of its supervisory powers.

And because the Superior Court properly dismissed the indictment against Nelson, the judgment of the Court of Appeal affirming the dismissal must be, and hereby is,

AFFIRMED.