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DISTRICT II

July 17, 2024

To:

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Circuit Court Judge
Electronic Notice

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Clerk of Circuit Court
Waukesha County Courthouse
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Christopher P. August
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You are hereby notified that the Court has entered the following opinion and order:

2023AP1464-CR State of Wisconsin v. Kordell L. Grady (L.C. #2021CF1379)

Before Gundrum, P.J., Grogan and Lazar, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Kordell L. Grady appeals a judgment of conviction, challenging only the circuit court's restitution award. He also appeals an order denying postconviction relief. On appeal, Grady argues: (1) he is entitled to a new restitution hearing on his ability to pay because he was deprived of the opportunity to meaningfully consult with his counsel at the restitution hearing and his privileged communications were used against him; and (2) he is entitled to an evidentiary hearing on his claim that trial counsel was ineffective for stipulating to a legally problematic restitution amount. Based upon our review of the briefs and record, we conclude at conference

that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2021-22).[1] We affirm.

After a high-speed pursuit that resulted in extensive damage to a police car, Grady pleaded to and was convicted of fleeing an officer, first-degree recklessly endangering safety, and operating a vehicle without consent. In terms of restitution, and as relevant, the City of Muskego's insurance company, Statewide Services, Incorporated ("Statewide"), requested $19,071.28 based on damage to the police car caused by Grady's criminal conduct. Specifically, Statewide requested $18,071.28 for itself and $1,000 for Muskego's deductible. Statewide stated that "[o]nce our insured's deductible has been reimbursed, please make any additional restitution checks payable to: League of Wisconsin Municipalities Mutual Insurance Company (LWMMI)." (Bolding omitted.)

At the plea and sentencing hearing, Grady, by counsel, stipulated to this restitution amount but requested a restitution hearing based on Grady's ability to pay. At the restitution hearing, the State and Grady's counsel appeared in person while Grady appeared remotely from the Dodge Correctional Institution.

Grady's counsel argued that Grady was not in a financial position to pay such a large restitution amount now or while out on extended supervision. Counsel explained Grady was eligible for State Public Defender representation when this case arose because he did not have any assets or income at that time. Counsel argued that Grady had a six-month-old child who he needed to financially support. In the middle of counsel's arguments, Grady interjected.

[1] All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

> THE COURT: Mr. Grady, did you need to speak with your attorney for a moment?
>
> [Grady]: Yes.
>
> THE COURT: All right. Off the record for a moment.
>
> (OFF-THE-RECORD DISCUSSION)
>
> THE COURT: Back on the record. [Grady's counsel], anything else you wish to add?
>
> [Grady's counsel]: No, Your Honor.
>
> THE COURT: State, anything for argument?
>
> [Assistant District Attorney]: I mean, it sounds like there's some ability to pay …. To his credit, it sounds like Mr. Grady is saying that he can work while out on extended supervision …. Sounds like, if I heard him correctly, he's paid over $3,000 in tickets in his past, so I'm asking the [c]ourt order it all, as he's acknowledged that he's responsible for these amounts.
>
> THE COURT: And for the record, we had gone off the record when he was speaking with his attorney. I warned him – or told him that everybody could hear him obviously. And that is what [the Assistant District Attorney] was referring to. But what he was referring to obviously is not going to show up in the transcript.

Grady's counsel then argued that when Grady is eventually released he "will have a lot of financial responsibilities, so to kind of saddle him with this stuff that may seem insurmountable, may actually be a detriment to his success into [sic] earning money and hopefully eventually living on his own." The circuit court granted the restitution request.

Grady filed a postconviction motion. As relevant, he first argued trial counsel was ineffective by stipulating to Statewide's requested $19,071.28 restitution amount. Grady asserted Statewide could only request $18,071.28 on behalf of itself and it could not request $1,000 on behalf of Muskego. He argued counsel was ineffective for stipulating to the full $19,071.28 amount. Separate from his ineffective assistance of counsel claim, Grady also argued the circumstances of the restitution hearing—during which Grady contended he was not

given a meaningful opportunity to consult with counsel and actually had his privileged communications used against him—merited a new restitution hearing.

The circuit court denied Grady's motion. The circuit court determined Grady was not entitled to an evidentiary hearing on his ineffective assistance of counsel claim because his motion did not establish he was prejudiced by trial counsel's stipulation. The court found that Statewide's restitution request "contemplated" that the $1,000 deductible would be paid back to Muskego based on Statewide's contractual relationship with Muskego. As for Grady's arguments regarding the circumstances of the hearing, the court determined the information Grady told his attorney off the record but while in open court with all parties present was not intended to be confidential because the court warned Grady that everybody could hear him. Grady appeals.

On appeal, Grady argues he is entitled to a new restitution hearing because he was deprived of the opportunity to meaningfully consult with counsel at the restitution hearing and because he had his privileged communications with counsel used against him. Grady first asserts his procedural right to due process was violated because the circumstances in this case made the restitution hearing fundamentally unfair. Grady contends that while appearing remotely via video he had to make the unfair choice of consulting with his counsel while everyone could hear or not consulting with counsel because everyone could hear.

We disagree. Nothing in the record suggests that Grady asked to speak privately with his attorney. Further, after the circuit court specifically warned Grady that "everybody could hear him obviously," neither Grady nor trial counsel asked for a private conference or to delay the restitution hearing so that they could privately confer. We reject Grady's argument that the

restitution hearing was fundamentally unfair because he was unable to have a private communication with his attorney.

We also reject Grady's argument that the State improperly relied on his privileged attorney-client communication in its argument at the restitution hearing. The attorney-client privilege protects against disclosure of confidential communications with counsel. WIS. STAT. § 905.03(2). "A communication is 'confidential' if not intended to be disclosed to 3rd persons." Sec. 905.03(1)(d). Here, when Grady was speaking with counsel over the video conference, the circuit court explicitly warned him that "everybody" could hear him. As a result, we agree with the circuit court that Grady never intended his communication with his attorney in open court to be a confidential communication with counsel.

Grady next argues the circuit court erred by denying him an evidentiary hearing because trial counsel was ineffective for stipulating to Statewide's requested $19,071.28 restitution amount. A defendant claiming ineffective assistance of counsel must prove both that his lawyer's representation was deficient and that he suffered prejudice as a result of that deficient performance. ***State v. Jackson***, 2023 WI 3, ¶10, 405 Wis. 2d 458, 983 N.W.2d 608. "A defendant is entitled to a ***Machner***[2] hearing if his postconviction motion sufficiently alleges ineffective assistance of counsel and the record fails to conclusively demonstrate that he is not entitled to relief." ***Jackson***, 405 Wis. 2d 458, ¶1. Stated another way, assuming a postconviction motion is sufficiently pled, a defendant is not entitled to a ***Machner*** hearing if the

[2] ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979). "A ***Machner*** hearing is '[t]he evidentiary hearing to evaluate counsel's effectiveness, which includes counsel's testimony to explain his or her handling of the case.'" ***State v. Jackson***, 2023 WI 3, ¶1 n.1, 405 Wis. 2d 458, 983 N.W.2d 608 (citation omitted).

record conclusively demonstrates that either counsel's performance was not deficient or that the defendant was not prejudiced by any purported errors. ***Id.***, ¶11.

In support of his argument that trial counsel was ineffective for stipulating to the restitution amount, Grady emphasizes the $19,071.28 amount includes "both the amount that Statewide paid out to the City of Muskego for repairs" for the police car, "as well as the City of Muskego's insurance deductible" of $1,000. Grady asserts that restitution is limited to a victim's "actual pecuniary losses," *see* ***State v. Holmgren***, 229 Wis. 2d 358, 365, 599 N.W.2d 876 (Ct. App. 1999), and he argues Statewide did not "lose" the $1,000 paid out by Muskego as an insurance deductible. Grady suggests that because Statewide did not lose the entirety of the $19,071.28 amount, Statewide was going to be unjustly enriched by $1,000, and his trial counsel was ineffective for stipulating to the full $19,071.28 amount.

We agree with the circuit court that the record demonstrates Grady was not prejudiced by trial counsel's stipulation. First, it is undisputed that the full amount of damage to the police car caused by Grady's criminal conduct was $19,071.28. *See* ***State v. Wiskerchen***, 2019 WI 1, ¶22, 385 Wis. 2d 120, 921 N.W.2d 730 ("Wisconsin courts have repeatedly held that 'restitution is the rule and not the exception,' and 'should be ordered whenever warranted.'" (citation omitted)). Second, the circuit court found that Statewide's restitution request "contemplated" that the $1,000 deductible would be paid back to Muskego based on the parties' contractual relationship and as such there would be no unjust enrichment for Statewide. The circuit court's finding that Statewide had a contractual obligation to reimburse Muskego made its affidavit requesting reimbursement of the deductible appropriate and made the circuit court's restitution award not clearly erroneous. *See* ***id.***, ¶18 (We review restitution awards for an erroneous exercise of discretion). Accordingly, the circuit court correctly concluded that Grady failed to

sufficiently allege that he was prejudiced as a result of trial counsel's stipulation to the $19,071.28 restitution amount. Grady was not entitled to a ***Machner*** hearing. *See* ***Jackson***, 405 Wis. 2d 458, ¶11.

Upon the foregoing,

IT IS ORDERED that the judgment and order of the circuit court are summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

LAZAR, J. (*concurring in part; dissenting in part*).

> It is undisputable that due process is not a mechanistic requirement of American jurisprudence. It is a test of fundamental fairness ….

State v. Disch, 119 Wis. 2d 461, 469, 351 N.W.2d 492 (1984); *see also* ***Gagnon v. Scarpelli***, 411 U.S. 778, 790 (1973) ("fundamental fairness" is the "touchstone of due process"); U.S. CONST. amend. XIV. While confidential communication between a lawyer and client is not a constitutional right per se, denying it to one side is fundamentally unfair and undermines the constitutional right to a fair hearing. *See* ***Guajardo-Palma v. Martinson***, 622 F.3d 801, 801-03 (7th Cir. 2010).

The common law establishment of attorney-client privilege "encourage[s] full and frank communication between attorneys and their clients and thereby promote[s] broader public interests in the observance of law and administration of justice." ***Upjohn Co. v. United States***, 449 U.S. 383, 389 (1981). "The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client." ***Id.*** In Wisconsin, the lawyer-client privilege is codified in WIS. STAT. § 905.03

(2021-22).[3] As explained in the 2012 Judicial Council Note to that statute, "[a]ttorneys and those who work with them owe clients and their confidences the utmost respect. Preserving confidences is one of the profession's highest duties." Our courts have long held that "[t]he policy of the privilege" is that "[s]ecrecy of communications between one person and his attorney is one of the exceptions" to "full access to all reasonable means of determining the truth." ***Jax v. Jax***, 73 Wis. 2d 572, 579, 243 N.W.2d 831 (1976) (quoting ***Jacobi v. Podevels***, 23 Wis. 2d 152, 156-57, 127 N.W.2d 73 (1964)).

Grady asserts that, because his procedural due process rights were violated when the circuit court deprived him of a meaningful opportunity to consult with his attorney, his restitution hearing (on his ability to pay) was fundamentally unfair. The majority disagrees—but fails to distinguish the key question in this part of the appeal: It is not whether Grady continued to communicate with his attorney in an effort to obtain legal advice despite being told that others in the courtroom could also hear their conversation, but whether the court appropriately facilitated a means by which Grady could exercise his statutory and due process rights to communicate with his attorney in private. The court did not do so. I therefore concur in part and dissent from the portion of the majority's opinion that rejected Grady's arguments "that the restitution hearing was fundamentally unfair because he was unable to have a private communication with his attorney" and "that the State improperly relied on his privileged attorney-client communication in its argument at the restitution hearing."

[3] That statute establishes that "[a] client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client ...." WIS. STAT. § 905.03(2).

The circuit court allowed Grady to be placed in the untenable position of not being able to communicate confidentially with his attorney at any point during the restitution hearing at issue. Grady appeared at this hearing from prison via Zoom[4] while his attorney was present in the courtroom. This court acknowledges that Zoom is now a more available and more frequently used option to both save transport and law enforcement costs and eliminate disruptions in a prisoner's daily routines. That being said, it is a tool that must be utilized in a manner that safeguards the same rights an individual would have if he appeared in person or by telephone.

Before the widespread use of videoconferencing, if a defendant could not (or chose not to) appear in person for a hearing, the solution was for that individual to appear by telephone. If the defendant sought to speak confidentially to his attorney, the attorney would call the defendant on a separate line; the client and attorney would not speak publicly so the entire courtroom (in particular the opposing counsel and the court) could hear the discussion. If there was no way to have the attorney and client separately call each other, it would be standard practice for the circuit court to have the courtroom cleared to protect privacy. No one would reasonably expect anything else.

Now that Zoom is an option, a direct line of communication should be even easier to effect. If both the attorney and the client appear by Zoom, the circuit court can open a "break-out room" in which only those two individuals can converse in the event of a request by the client. In a case like this, when the attorney appears in person, the attorney can call the Zoom conference number from another room so that communications can remain confidential. Another

[4] Zoom is an internet-based video conferencing platform that came into widespread use during the COVID-19 global pandemic.

option is for the court to clear the courtroom so that a client and his attorney can communicate in private via Zoom.

Instead of using these procedures, the circuit court in this case apparently told Grady (off the record) that "everybody could hear him" when he was speaking with his attorney. Based on that, the court found, at Grady's hearing on his postconviction motion, that the communications at issue were not confidential. *See* WIS. STAT. § 905.03(1)(d) ("A communication is 'confidential' if not intended to be disclosed to 3rd persons other than those to whom disclosure is in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication."). In other words, the court concluded that Grady's communications with his attorney were not intended to be private, but rather were intended to be disclosed to others in that courtroom. The majority's endorsement of this view that Grady "never intended his communication with his attorney in open court to be a confidential communication with counsel" based solely on the circuit court's "warning" is too far a stretch given that defendants are entitled to the fundamental fairness inherent in due process when their liberty and property interests are in jeopardy.

First, the circuit court's warning statement to Grady was not on the record, nor did the court immediately recount its warning when it went back on the record.[5] That could easily have been done. Circuit courts are the masters of their courtroom and control what is—and what is not—"on the record." There is no evidence as to what the court actually told Grady, whether the

[5] The court stated that it had "warned [Grady]—or told him that everybody could hear him" only after the State made its argument, based on what it heard Grady say to his attorney off the record, that Grady had an ability to pay restitution.

court's statement about the ability of the entire courtroom to hear was given before or after Grady divulged information, whether Grady heard the court's comment, or whether Grady understood that he was forfeiting his statutory right to engage in confidential communication with his attorney.[6]

While there are no Wisconsin opinions directly on point, some out-of-state opinions dancing around the periphery of the issue are informative when considering the inherent perils of Zoom hearings. For instance, in ***Vazquez Diaz v. Commonwealth***, 167 N.E.3d 822, 842 (Mass. 2021), the Massachusetts Supreme Court held that an evidentiary hearing conducted via Zoom did not violate the defendant's due process and other statutory rights, but noted that:

> [A]ttorney-client communication over Zoom [is not] immune from constitutional scrutiny. Attorney-client communication during a Zoom hearing is more restrictive than during an in-person hearing and requires both the attorney and the judge to take care that the technology is functioning properly and that a defendant has the opportunity to use the private breakout room with counsel if he or she requests to do so. Inquiries should be made regularly of all parties to ensure that there is clear audio and video transmission, but particularly of the defendant, to ensure that he or she has the opportunity to consult with counsel.

Other cases accentuate the difference between situations in which a defendant and counsel fail to take precautions to keep their communications private and those in which the court itself is a key player in establishing the conduit for such confidential communications. For instance, where a defendant waiting for a hearing to begin loudly speaks to his attorney in a courtroom such that a bailiff and others are able to hear their conversation, it is reasonable to conclude that that communication was not intended to be confidential. *See* ***Stavale v. Stavale***,

[6] As discussed below, Grady's competency was a concern throughout the underlying case.

957 N.W.2d 387, 390 (Mich. Ct. App. 2020) (discussing ***People v. Compeau***, 625 N.W.2d 120, 122 (Mich. Ct. App. 2001) (per curiam)). Compare that to the facts here where Grady invoked his right to speak with his attorney; the circuit court acknowledged that request, but then placed Grady in a circumstance where privacy was impossible. To add insult to injury, the court then permitted the State to use Grady's own statements against him.

The circuit court's action to merely tell Grady that his attorney-client communications could be heard by "everybody" is more akin to the actions of a State of Washington circuit court when it placed a defendant in an in-court holding cell[7] (caged area) during a hearing. *See* ***State v. Luthi***, 549 P.3d 712, 714 (Wash. 2024) (en banc). One of the reasons this physically separated cage (with a corrections officer standing right next to the defendant) was deemed to violate the defendant's due process rights is that it "imposed significant limitations on [the defendant's] ability to communicate with her defense counsel" and made it "almost impossible" to discuss confidential matters. ***Id.*** at 719. Grady suffered a similar impediment to private communication here.

In addition, the fact that Grady's competency was at issue from the very start of his criminal proceeding further supports the conclusion that Grady did not knowingly intend to waive or forfeit his right to a confidential and private conversation with his attorney. There were two competency examinations conducted (at least one at the request of Grady's counsel) prior to Grady's plea. Although they did not result in a finding of incompetency, Grady's counsel

[7] The holding cell consisted of a "roughly five feet wide, five feet deep, and eight feet long [box] with a 'mesh window' on the right to allow defendants to speak with their attorneys, and a glass window on the left." ***State v. Luthi***, 549 P.3d 712, 714 (Wash. 2024) (en banc).

informed the circuit court of her belief that Grady "was having some sort of mental health crisis" when he committed his crime. After the restitution hearing at issue but prior to the post-conviction motion proceedings, Grady underwent a third court-ordered competency examination. This third examining psychologist opined that Grady "lack[ed] substantial mental capacity to assist in his defense." The circuit court subsequently adjudicated Grady incompetent to proceed. These facts render the court's failure to ensure that any waiver of confidentiality between himself and his attorney was knowing and intentional even more troubling.

Finally, "[t]he purpose of the Sixth Amendment counsel guarantee—and hence the purpose of invoking it—is to 'protec[t] the unaided layman at critical confrontations' with his 'expert adversary,' the government, *after* 'the adverse positions of government and defendant have solidified' with respect to a particular alleged crime." ***McNeil v. Wisconsin***, 501 U.S. 171, 177-78 (1991) (second alteration in original) (quoting ***United States v. Gouveia***, 467 U.S. 180, 189 (1984)). Even in their pursuit of the truth and goal to protect the citizens of Wisconsin, the State and its "prosecutors have an affirmative duty not to circumvent or exploit the protections guaranteed by the right [to counsel]." ***State v. Anson***, 2002 WI App 270, ¶10, 258 Wis. 2d 433, 654 N.W.2d 48. "The privilege contemplates a confidential disclosure by a client to his attorney which the client reasonably believes to be related to obtaining professional legal services." ***Jax***, 73 Wis. 2d at 579-80. If a defendant is to obtain the full benefits of his right to counsel, including the protection afforded by the attorney-client privilege, he must have full assurance of the confidentiality and privacy of his communications. Without those safety precautions, his statutory rights are rendered excessively flimsy, if not entirely meaningless.

This principle was articulated by the D.C. Circuit in ***Doe v. District of Columbia***, 697 F.2d 1115, 1119 (D.C. Cir. 1983), in which that court stated:

> It is sufficient ... to recognize simply that every litigant has a powerful interest in being able to retain and *consult freely with an attorney*. Insofar as the fair administration of justice requires that all parties to a controversy be fully and equally informed of their entitlements, the public has a similarly important interest in preserving the ability of each disputant to confer with his lawyer.

(Emphasis added). And, in a District of Columbia opinion addressing a situation in which a defendant was prohibited from communicating with one of his lawyers, the important concept of the "integrity of the proceedings" was eloquently discussed:

> The integrity of the proceeding also depends crucially on respect for the rights of the participants. To ensure the integrity of the proceeding, it was the trial court's obligation to "make special efforts" if necessary to accommodate T.B.'s fully informed exercise of his Fifth Amendment privilege. ***United States v. Certain Real Prop.***, 55 F.3d 78, 83 (2d Cir. 1995). The court should therefore have been receptive to T.B.'s request to be allowed to confer with [his attorney], not dismissive of that request.

In re TI.B., 762 A.2d 20, 30 (D.C. 2000).

Here, in order to protect the integrity of the proceeding—and protect Grady's due process rights to confer with his attorney in confidence—the circuit court should have honored its obligation to accommodate Grady's request. As part of our system of justice, the search for truth is balanced with the constitutional right to counsel and the concomitant due process right of defendants. Our courts must always be aware of the awesome responsibility they have to uphold the honor and integrity of our legal proceedings. The significant touchstones are our Constitutions (Federal and State) and the requirement that all citizens are guaranteed the right to counsel in criminal proceedings. When participants in our legal and judicial system fail to acknowledge, honor, and uphold that attorney-client privilege, the entire judicial system—not merely the impacted defendant—suffers. The circuit court had an obligation to ensure that

Grady could communicate pursuant to his attorney-client privilege. Cautioning him that he could be heard was insufficient.

Accordingly, I would have reversed the circuit court's findings and conclusions that Grady was not deprived of his rights to privately and confidentially communicate with his attorney. Based upon that conclusion, I would have remanded for a new hearing on Grady's ability to pay the restitution sought where the State would not be permitted to use any of the attorney-client communications. For these reasons, I respectfully concur in part and dissent in part.

Samuel A. Christensen
Clerk of Court of Appeals