

STATE OF MAINE
AROOSTOOK, ss.

SUPERIOR COURT
DOCKET NO. AROCD-CR-2019-40973

STATE OF MAINE

vs.

ORDER ON DEFENDANT'S
MOTION FOR DISCOVERY
and/or DISMISSAL

BOBBY NIGHTINGALE
Defendant

The Court conducted a ZOOM hearing on the Defendant's Motion for Discovery and/or Dismissal on August 4, 2022. Assistant Attorneys General Robbin and Blam represented the State. Attorneys Tebbetts, Randall, and Paradie represented the Defendant. The Defendant was also present by ZOOM. Although the parties were afforded the opportunity to present witness testimony and other evidence, both sides elected to proceed with a nontestimonial hearing. After review of the pleadings related to the Motion, the assertions of counsel, and oral argument, the Court finds and ORDERS, as follows:

The attorney-client privilege is not derived from the Constitution. However, a violation of the privilege may implicate the Sixth Amendment right to counsel. For adequate legal representation, there must be a secure avenue for full disclosure of the facts and circumstances by the client to the attorney. When a defendant is held in jail, there is often little or no feasible alternative to communicating with his or her attorney by telephone.

Here, the Defendant has been held in custody awaiting trial. He was initially at the Aroostook County Jail from August 17, 2019 to December 4, 2019. Thereafter, the

Defendant has been at the Cumberland County Jail for the time period relevant to this decision. Detective Gregory Roy of the Maine State Police was tasked with reviewing the Defendant's recorded phone call from the jails. As noted by the defense at the hearing, it is common for defendants to make hundreds of phone calls while awaiting trial or release. Roy estimates that he listened to nearly 100 hours of calls of the Defendant. If the calls included any statements relevant to the investigation, he would make a note of the date or identification number of the call and report the information in his continuation report. While reviewing the recordings, Roy heard a portion of two calls that may have involved the Defendant and attorney Tebbetts or a member of attorney Tebbetts' staff. Upon encountering those calls, he immediately stopped listening to the calls. Roy contends that what he heard before shutting off the recording in both instances was what he would characterize as preliminary small talk. He claimed that he viewed the calls as isolated mistakes of attorney/client calls being recorded rather than it being part of a standard practice to record those calls. Roy made no note of the calls in any report at the time he heard those portions of those calls or thereafter. Roy did not immediately disclose to the prosecutors on the case that he had heard a portion of the calls between the Defendant and what may have been attorney Tebbetts or a member of attorney Tebbetts' staff.

Sometime later, Roy became aware through a media report that recording calls between attorneys and clients from jails is suspected to be a widespread issue rather than anomalies. Roy immediately contacted the Assistant Attorney General handling this case and informed her of the two calls that he reviewed up to the point he suspected it may

have involved attorney Tebbetts or a member of attorney Tebbetts' staff. He relayed to the Assistant Attorney General that one of the two calls was in the batch of calls recently forwarded to him by the jail and the other one was in a prior batch that he had reviewed "some weeks earlier." *See, Roy Affidavit at 4.*

The State and defense engaged in discussions about this issue in May of 2020. An agreement was reached that the Attorney General's Office would not review the recorded calls and would forward all call recordings to the defense so that they could be reviewed for possible confidential communications. The State has also taken the additional precaution of not listening to any of the Defendant's jail calls since the issue was identified in May of 2020. All of the recorded calls at issue were provided to the defense in July of 2020.

The Defendant has filed a motion for discovery and/or dismissal dated July 5, 2022. In his motion, the Defendant asserts that law enforcement officers listened to "one or more phone calls between Defendant and his attorneys." The Defendant made clear at the hearing on the motion that he is claiming that the refusal or failure of the State to disclose what *specific* phone calls were heard and what *specific* conversations were heard is a violation of the automatic discovery rule set forth in the Maine Rules of Unified Criminal Procedure at Rule 16. The Defendant is not contending that the State engaged in an intentional effort to record and review telephone calls between the Defendant and his attorneys.

The State contends that the issue in this matter was created by the negligence of the defense attorney. The Cumberland County Jail has a protocol to allow attorneys to

register their phone number "before an Inmate (Client) calls them, this allows for the calls not to be recorded." <https://www.cumberlandso.org/228/Inmate-Telephone-Tablets>. The defense concedes that the attorney's phone number was not registered with the Cumberland County Jail. The defense maintains that this is due to the attorney being unaware that the client was transferred to the Cumberland County Jail from the Aroostook County Jail.

Rule 16(a)(1) provides:

"The attorney for the State shall provide as automatic discovery all matters set forth in this subdivision that are within the possession or control of the attorney for the State. The obligation of the attorney for the State extends to matters within the possession or control of any member of the attorney for the State's staff and of any official or employee of this State or any political subdivision thereof who regularly reports or who, with reference to a particular case, has reported to the office of the attorney for the State."

Included is "any written or recorded statements and the substance of any oral statements made by the defendant." *M.R.Unif.Crim.P. 16(a)(2)(C)*. The recorded calls from the jail by the Defendant are clearly within the scope of the material that the State must provide to the defense. In this matter, there is no contention that the actual recordings of all of the calls have not been provided. What is at issue is that the State agent, Detective Roy, did not disclose what exactly was heard or what specific calls were listened to. The State has failed to produce this information due to the fact that it does not exist. Roy ceased listening to the calls immediately when he realized it may have involved an attorney or attorney's staff member. Although it is curious that there was no documentation reflecting that an attorney/client call was included in the recorded calls, there was no

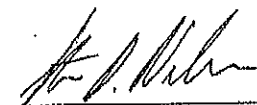
evidence presented at the hearing that there existed at any time any form of documentation that was created and not being provided by the State.

As it relates to the alleged discovery violation, the defense has failed to show that the attorney(s) for the State have failed to fully comply with Rule 16. There may be cases that involve facts such that sanctions should be imposed to deter any impermissible infringement on a Defendant's right to counsel, but this is not such a case. The record reflects that this matter involves a situation more akin to an inadvertent disclosure. Prudent steps were promptly taken by the prosecutors to address the inadvertent disclosure. See, *Corey v. Norman, Hanson & DeTroy*, 1999 ME 196, P19, 742 A.2d 933, 941; *Me. Rules of Prof'l Conduct 4.4*.

In light of the foregoing, the Defendant's motion for discovery/dismissal is hereby

DENIED.

Date: 8/11/2022



Justice, Maine Superior Court