IN THE SUPREME COURT OF THE STATE OF NEVADA

MARILYN MARIE TOSTON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 57592

FILED

JAN 12 2012

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY [signature]
DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of seven counts of theft, three counts of forgery, and one count each of burglary, embezzlement, and obtaining money under false pretenses. Eighth Judicial District Court, Clark County; Douglas W. Herndon, Judge.

Appellant Marilyn Marie Toston argues that the district court abused its discretion by denying her claim of attorney-client privilege and allowing her former attorney to testify concerning confidential communications in which Toston confessed to taking money from her disabled son's trust. The district court admitted the testimony over Toston's objection after concluding that Toston waived the privilege during a previous contempt hearing where Toston told the court that her attorney admitted to taking the money from the trust.

Before addressing whether Toston waived the privilege, we must first determine whether the communications between Toston and her attorney were privileged. See NRS 49.095(1) (explaining that a client has a privilege to prevent his or her attorney from disclosing confidential communications between the client and the attorney); see also NRS 49.045

and 49.055 (defining "client" and "confidential" and explaining that the communication must be in furtherance of the rendition of professional legal services). At trial the attorney testified to two communications in which Toston implicated her husband and herself in the charged crime. During the first communication, Toston told the attorney over the telephone that she was going to jail because her husband had taken all of her son's money. She then told the attorney not to speak with her husband. The attorney reassured Toston that, "I'm your attorney and I won't talk to him if you don't want me to." She also told Toston that, "[t]hey're not going to put you in jail if you didn't do it." The second communication occurred in the parking lot of the attorney's law office where Toston told the attorney that her husband did not have anything to do with the missing money and that she did it. We conclude that these communications were privileged because they were intended to be confidential and in furtherance of the rendition of professional legal services. See NRS 49.095(1); NRS 49.045; NRS 49.055. Not only did the attorney reassure Toston that she was her attorney and would protect her confidences, she also had an ongoing attorney-client relationship stemming from two medical malpractice settlements and a third case that was still active.

While the district court and the State both contend that Toston's previous allegations against her attorney waived the attorney-client privilege, neither cites to any authority to support their position. There is only one provision in Nevada's evidence code that uses the term waiver. NRS 49.385 provides that a client waives the attorney client privilege by (1) voluntarily disclosing, (2) any significant part, (3) of a confidential matter. See NRS 49.055 (explaining that a communication is

only confidential if it is "in furtherance of the rendition of professional legal services"). Our review of the record reveals that Toston disclosed the following attorney-client communications to the district court during her contempt hearing. The attorney told Toston that there was a problem because the attorney took the money from the trust and could not replace it. The attorney wanted Toston to take the blame and claim that she was mentally incompetent. The attorney would then have Toston committed to a mental hospital, take guardianship over her minor children, and get her released at a later time. The attorney told Toston that they would not believe she took the money because she was an attorney and Toston was "just some woman on welfare." These communications are not confidential. See 24 Charles Alan Wright, et al., Federal Practice and Procedure, Evidence § 5501 (1st ed. 2011) ("The privilege only applies when what is sought is professional legal service and it is not part of the lawyer's profession to conspire with the client to commit a crime or fraud."). Accordingly, Toston did not voluntarily waive the attorney-client privilege. Restatement (Third) of Law Governing Lawyers § 79 cmt. e (2000) (disclosure of nonprivileged portions of a communication does not result in waiver).

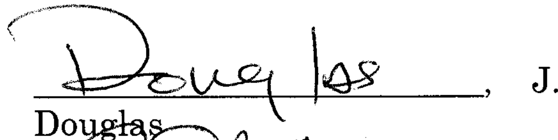
Some courts have also used the term waiver when referring to the exceptions listed in NRS 49.115. See Connell, Foley v. Israel Travel, 872 A.2d 1100, 1107 (N.J. Super. Ct. App. Div. 2005) (referring to the "breach of duty" exception as an implied waiver). NRS 49.115(3) provides that "there is no privilege . . . [a]s to a communication relevant to an issue of breach of duty by the lawyer to his or her client or by the client to his or her lawyer." Therefore, we must consider whether Toston's allegations implicate the breach of duty exception.

Although we have never interpreted the statutory breach of duty exception, we have held that under certain circumstances an attorney is released from his or her obligat ion of confidentiality. See Molina v. State, 120 Nev. 185, 193, 87 P.3d 533, 539 (2004) (claims of ineffective assistance of counsel under NRS 34.735(6) and NRS 176.165); Mitchell v. Bromberger, 2 Nev. 345, 349-50 (1866) (dispute over attorney's fees). These cases comport with the Advisory Committee Note to Draft Rule of Evidence 5-03(d)(3) which states that this exception was intended to apply to "cases of controversy over attorney's fees, claims of inadequacy of representation, or charges of professional misconduct." See Legislative Commission of the Legislative Counsel Bureau, A Proposed Evidence Code, Bulletin No. 90 (Nev. 1970) (explaining that NRS 49.115(3) was taken without substantive change from Draft Federal Rule 5-03).

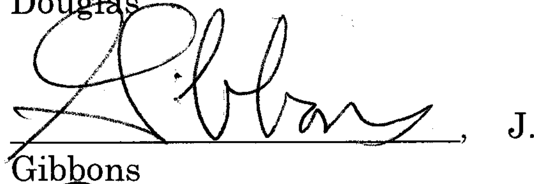
Here, however, the attorney was not defending herself against the allegations made by the client. See Restatement (Third) of Law Governing Lawyers § 83 cmt. e (2000) ("The lawyer's invocation of the exception must be appropriate to the lawyer's need in the proceeding."). The attorney was not being charged with a crime, sued by the client, or investigated by the state bar. Furthermore, when Toston asserted the privilege during trial, she had not cross-examined the attorney nor raised the attorney's guilt as a defense. Accordingly, Toston's communication to her attorney was not "relevant to an issue of breach of duty" by her attorney. NRS 49.115(3). We therefore conclude that the district court erred by allowing the attorney to testify to confidential communications over the objection of Toston. Because the State failed to address or even assert that the error was harmless, we are constrained to reverse Toston's

conviction, see Polk v. State, 126 Nev. ___, ___, 233 P.3d 357, 361 (2010), and we

ORDER the judgment of conviction REVERSED AND REMAND this matter to the district court for proceedings consistent with this order.[1]



_______________, J.
Douglas



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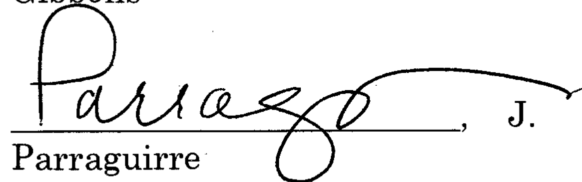

_______________, J.
Parraguirre

cc: Hon. Douglas W. Herndon, District Judge
Cannon & Tannery
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

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[1]Because we reverse Toston's judgment of conviction and remand this matter for a new trial we need not address Toston's other claims of error.