IN THE COURT OF APPEALS OF THE STATE OF ALASKA

VAOMALA TALIVAA, Appellant, v. STATE OF ALASKA, Appellee.	Court of Appeals No. A-12124 Trial Court No. 3AN-13-11831 CR MEMORANDUM OPINION No. 6512 — August 16, 2017

Appeal from the Superior Court, Third Judicial District, Anchorage, Michael Spaan, Judge.

Appearances: Jürgen Jensen, The Law Office of Jürgen Jensen, Dillingham, for the Appellant. Eric A. Ringsmuth, Assistant Attorney General, Office of Criminal Appeals, Anchorage, and James E. Cantor, Acting Attorney General, Juneau, for the Appellee.

Before: Mannheimer, Chief Judge, Allard, Judge, and Suddock, Superior Court Judge.[*]

Judge ALLARD.

The State charged Vaomala Talivaa with first-degree robbery, first-degree vehicle theft, and fourth-degree misconduct involving a controlled substance based on

[*] Sitting by assignment made pursuant to Article IV, Section 16 of the Alaska Constitution and Administrative Rule 24(d).

allegations that he participated in the robbery of Omar Khulatain. At trial, Khulatain asserted his Fifth Amendment right not to incriminate himself. After the court upheld Khulatain's claim of privilege, the Attorney General chose to grant him immunity for his testimony. But when Khulatain was cross-examined at trial about the immunity agreement, Khulatain (who was speaking through a translator) appeared to deny that he had received immunity.

In response, Talivaa's attorney asked permission to call Khulatain's attorney to the stand so that the latter could confirm that he had told his client about the Attorney General's decision to grant him immunity. Khulatain's attorney objected, asserting that his conversations with Khulatain were protected by the attorney-client privilege. Instead of requiring Khulatain's attorney to testify, the judge took judicial notice of the grant of immunity, and the judge instructed the jury regarding the existence of the immunity agreement and its legal significance for Khulatain.

On appeal, Talivaa argues that the trial judge erred when he restricted Talivaa's ability to call Khulatain's attorney as a witness. Talivaa also argues that his constitutional right to confrontation was violated by the judge's actions. For the reasons explained here, we conclude that Talivaa was not prejudiced by the judge's decision. Accordingly, we affirm Talivaa's convictions.

Relevant factual background

On November 3, 2013, Khulatain called 911 to report that he had just been robbed in his Anchorage hotel room.

Earlier in the evening, Khulatain had rented a room with a female companion. At some point, two men entered the room. One of the men (later identified as Talivaa) pointed a gun at Khulatain while the other man stole Khulatain's wallet, phone, and money. The two men then left with Khulatain's female companion. A

moment later, Talivaa re-entered the room, took Khulatain's car keys, and then departed in Khulatain's vehicle.

A police officer stopped Talivaa a short time later and found a BB gun pistol, a key to Khulatain's hotel room, and methamphetamine.

The State charged Talivaa with first-degree robbery, first-degree vehicle theft, and fourth-degree misconduct involving a controlled substance.[1]

Prior to trial, Khulatain asserted his Fifth Amendment right not to testify. Following a hearing at which Khulatain was represented by Assistant Public Advocate Dan Bair, the superior court concluded that Khulatain had a valid Fifth Amendment privilege to refuse to testify. Pursuant to AS 12.50.101(h), the court then notified the Attorney General of its decision, so that the Attorney General could choose whether to grant transactional immunity to Khulatain. The Attorney General decided to grant immunity, thus requiring Khulatain to testify.

When Khulatain testified at Talivaa's trial, he was cross-examined by Talivaa's attorney concerning the fact that he was testifying pursuant to a grant of immunity. It is unclear from the record whether Khulatain fully understood the defense attorney's question about the grant of immunity. Khulatain is Somali, and he testified through an interpreter. Khulatain appeared confused by the defense attorney's questions and also appeared to deny that he had received immunity.

In response, Talivaa's attorney argued that he should be permitted to call Khulatain's attorney as a witness and question the attorney regarding his communications with Khulatain about the grant of immunity. Talivaa's attorney proposed asking Khulatain's attorney four questions:

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[1] AS 11.41.500(a)(1), former AS 11.46.360(a)(1) (2012), and former AS 11.71.-040(a)(3)(A) (2014), respectively.

(1) Are you Khulatain's lawyer?

(2) Did Khulatain receive immunity from the State of Alaska for his trial testimony?

(3) Did you explain to Khulatain that "immunity" means he could never get in trouble for anything he did on November 3, 2013? and

(4) Was the same translator who translated Khulatain's trial testimony present during the conversation and translating when you explained this to him?

Khulatain's attorney objected to answering these questions, asserting that his discussions with Khulatain were protected by the attorney-client privilege.

The trial judge never specifically ruled on whether the attorney's communications with Khulatain were protected by the attorney-client privilege. Instead, the trial judge decided to moot this issue by taking judicial notice of the immunity agreement. The judge then instructed the jury as follows:

> When certain facts are generally known, or can be accurately determined from a reliable source, the law permits me to take judicial notice of those facts.
>
> I have taken judicial notice of the following fact: Omar Khulatain, a witness who testified in this case, did so under grant of immunity. Mr. Khulatain, represented by counsel, invoked his rights under the Fifth Amendment of the United States Constitution. The Court found a claim of immunity to several higher level felony offenses and a misdemeanor offense. The State granted transactional immunity. The immunity does not protect the witness from prospective perjury. A translator was provided to Mr. Khulatain at all proceedings leading up to and during the grant of immunity.
>
> You may conclude that this fact is true, but you are not required to do so.

The jury convicted Talivaa of all charges, and this appeal followed.

Did the proposed questions require Khulatain's attorney to divulge information that was protected by the attorney-client privilege?

Alaska Evidence Rule 503(b) protects "confidential communications made for the purposes of facilitating the rendition of professional legal services to the client." But this Court has previously recognized that the privilege does not protect certain types of communications, such as "an attorney's act of conveying to the client a third-party's communication."[2] In *Downie v. Superior Court*, we explained that "[when] the attorney is merely acting as a conduit for information, *i.e.*, as a messenger, the privilege is inapplicable."[3] In addition, the attorney-client privilege generally does not protect the "incidents of representation" such as "the client's name, the amount and payment of a fee, and the fact of consultation."[4]

Talivaa argues that his attorney's proposed questions were only seeking information that would have fallen within these exceptions to the attorney-client privilege. That is, he contends that his attorney was only asking Khulatain's attorney to confirm that he represented Khulatain, that the State had granted immunity to Khulatain, that the attorney had told Khulatain about the immunity agreement, and that Khulatain had the benefit of a translator during these communications.

On appeal, the State concedes that, for the most part, the proposed questions appear to have been designed to elicit only non-privileged information from Khulatain's

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[2] *Downie v. Superior Court*, 888 P.2d 1306, 1308 (Alaska App. 1995); *see also Jorgens v. State*, 2013 WL 6168561, at *3 (Alaska App. Nov. 20, 2013) (unpublished).

[3] *Downie*, 888 P.2d at 1308 (quoting Stephen A. Saltzburg, et al., *Federal Rules of Evidence Manual* (6th ed. 1994), Vol. 2, p. 595).

[4] *Moudy v. Superior Court*, 964 P.2d 469, 471 (Alaska App. 1998).

attorney. The State points out, however, that the judge's instruction to the jury essentially covered all of the information that the questions were designed to elicit, and Talivaa therefore was not prejudiced by his inability to obtain that information directly from Khulatain's attorney.

The State also points out that the third question — "Did you explain to Khulatain that 'immunity' means that he could never get in trouble for anything he did on November 3, 2013?" — could be understood as asking Khulatain's attorney to divulge the substance of his communications with Khulatain, and to opine on whether Khulatain actually understood the legal advice he received. Understood this way, the State contends that the question did seek information that would fall within the attorney-client privilege.

We agree with the State that, to the extent Talivaa's attorney was only seeking non-privileged information from Khulatain's attorney about the immunity agreement, the judge's instruction sufficiently informed the jury of this information. We note that the judge's instruction specifically informed the jury that (1) Khulatain had claimed his Fifth Amendment right not to testify, and (2) the State had granted immunity to Khulatain that prevented the State from prosecuting Khulatain for "several higher level felony offenses and a misdemeanor offense." The judge's instruction further informed the jury that this grant of immunity did not prevent the State from prosecuting Khulatain for perjury if he lied in his trial testimony. Lastly, the judge's instruction informed the jury that Khulatain was represented by a lawyer and that he had received the services of a translator during all of the proceedings leading up to, and including, the grant of immunity.

Talivaa argues that the judge's instruction was insufficient because the instruction did not directly instruct the jury that Khulatain *understood* that he had been granted immunity and that the grant of immunity meant that he could not be prosecuted

for any criminal acts he might have committed the day of the incident. We disagree. Although the judge's instruction did not directly state that Khulatain had been informed of the grant of immunity, the information included in the instruction clearly implied that this had occurred. Moreover, the fact that Khulatain had claimed his Fifth Amendment right not to testify, and was now testifying, also indicated that some form of communication about the grant of immunity had to have occurred.

We also agree with the State that although Khulatain's attorney could have testified to the fact that Khulatain had been told about the grant of immunity, any further testimony about the substance of the attorney's conversation with his client or any testimony about whether the attorney believed Khulatain understood his advice would have directly implicated matters protected by the attorney-client privilege.[5] Indeed, we question Talivaa's assumption that Khulatain's attorney would have been competent to testify to Khulatain's actual *understanding* of the grant of immunity, particularly given that Khulatain was communicating with his attorney through a translator and there were clear communication and language issues.[6]

On appeal, Talivaa argues that he was entitled to call Khulatain's attorney as a witness — even if the matters he sought to question the attorney about were protected by the attorney-client privilege. He further asserts that the judge's refusal to call Khulatain's attorney as a witness violated his confrontation rights.[7]

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[5] *See Downie*, 888 P.2d at 1308; Alaska Evid. R. 503; Alaska R. Prof. Conduct 1.6; *see also Dunn v. State Farm Fire & Cas. Co.*, 927 F.2d 869, 875 (5th Cir. 1991) ("Like the attorney-client privilege, the work product doctrine insulates a lawyer's research, analysis of legal theories, mental impressions, notes, and memoranda of witnesses' statements from an opposing counsel's inquiries.").

[6] *See* Alaska Evid. R. 602.

[7] U.S. Const. amend. VI.

We find no merit to this claim. "The main and essential purpose of [the] confrontation [clause] is to secure the opportunity of cross-examination."[8] Here, Talivaa's attorney was given a full opportunity to cross-examine Khulatain about the grant of immunity and Khulatain's understanding of that immunity. The jury was also able to view Khulatain's responses to that cross-examination and to judge Khulatain's credibility for itself.[9] Moreover, as the State points out, Talivaa could have impeached Khulatain's apparent lack of knowledge of the immunity agreement through other non-privileged means — including, but not limited to, calling other witnesses who were present during the public hearing on the grant of immunity. Thus, even if there might theoretically be circumstances where a defendant's due process rights would trump the protections of the attorney-client privilege, such circumstances are not presented in this case.

In sum, because we conclude that the judge's instruction essentially conveyed all of the information that Talivaa could legitimately have obtained from Khulatain's attorney, we conclude that Talivaa was not prejudiced by his inability to call Khulatain's attorney as a witness.

Conclusion

We AFFIRM the judgment of the superior court.

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[8] *Davis v. Alaska*, 415 U.S. 308, 315-16 (1974).

[9] *See, e.g.*, *United States v. Owens*, 484 U.S. 554, 559 (1988) ("[T]he Confrontation Clause guarantees only an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." (Emphasis in original)).