

PRIVELEGE

Wife's Conversations With Husband in Public Visiting Areas of State Correctional Facilities Were Not Protected by Marital Communications Privilege Under G.S. 8-57(c)—Ruling of Court of Appeals Is Reversed

State v. Rollins, ___ N.C. ___, 675 S.E.2d 334 (1 May 2009), reversing, 189 N.C. App. 248 (2008).

The defendant was a suspect in a murder investigation and was incarcerated for an unrelated offense in various state correctional facilities. An officer placed a recording device on the defendant's wife (with her consent) when she visited him. The contents of those conversations were admitted at the defendant's murder trial. The court ruled that the wife's conversations in the public visiting areas of these facilities were not protected by the marital communications privilege under G.S. 8-57(c). The holder of the privilege must possess a reasonable expectation of privacy where the communication takes place and the intent that the communication be kept secret. Relevant factors necessarily include the physical location where the communication was made and whether other people were present.

(1) Testimony of Defendant's Former Attorney During Hearing on Defendant's Motion to Withdraw Guilty Plea Did Not Violate Attorney-Client Privilege

State v. Watkins, ___ N.C. App. ___, 672 S.E.2d 43 (3 February 2009).

The defendant filed a motion to withdraw his guilty plea. The defendant's former attorney, who had represented the defendant during the plea negotiations leading to the guilty plea, testified over the defendant's objection about a meeting with the defendant in which the defendant provided the attorney with his proposed testimony to be relayed to the prosecutor (this occurred during the plea negotiation process to show what testimony the defendant could offer at a possible trial of co-defendants). The court ruled, based on the reasoning in *In re Investigation of Death of Eric Miller*, 357 N.C. 316 (2003), that the conversation between the attorney and defendant was not a confidential communication to which the attorney-client privilege attached because the defendant had provided the information to the attorney for the purpose of conveying it to the prosecutor, a third party. [The court noted that the defendant had not raised the issue whether the defendant's proposed testimony was prohibited by Rule 410 (inadmissibility of plea discussions), and therefore the court would not address it.]

Evidence-Communications at church meeting-Not for counseling-Presence of non-

minister

State v Pulley 180 N.C. App. 54 (2006)

Communications at a church meeting were not protected by clergy-communicant privilege because the purpose of the meeting was to address administrative issues rather than the seeking of counsel and advice. Furthermore, the conversation between defendant and clergy was in the presence of an elder, who was not an ordained minister.

Evidence–Husband-wife privilege--Wife’s observations of defendant--Telephone conversation

State v. Gladden 168 N.C. App. 548 (2005)

The trial court did not err in a first-degree murder case by admitting the testimony of defendant’s wife about her observations of defendant on the morning of 1 September 2000 and a transcript and tape of the 23 September 2000 phone conversation between defendant, his wife, and his stepdaughter, because: 1) although defendant contends the phone conversation he made from jail was protected by marital privilege, defendant’s stepdaughter actively participated in the phone conversation with her mother and defendant, and defendant was informed prior to making the phone call that all calls made to outside parties were subject to recording and monitoring; 2) the wife’s testimony that defendant retrieved a gun around 7:15 a.m. while she was still in the bedroom and that defendant said he was using the gun to help his grandpa kill some chicken hawks did not give rise to the conclusion that defendant’s statement was made out of the confidence of the marital relationship as defendant was simply making a casual remark.

Evidence–Attorney-client privilege–Information regarding third party

In Re: Investigation of Death of Eric Miller, 358 NC 364 (2004)

The trial court correctly ordered that some of the statements made by a now-deceased client to an attorney be revealed where those statements concerned a third party, did not implicate the client, and were not privileged. The information was provided to the trial court in a sealed affidavit, which the court reviewed under the mandate of a prior Supreme Court opinion. Portions of the trial court’s order were modified: the use of “interest of justice” language was unnecessary and contrary to the prior opinion, the trial court did not need to determine the harm to this client in this case, and any dispute over whether the attorney may be interviewed is to be determined by the trial court, with the cautionary note that this is a very narrow exception to the attorney-client privilege.

1) Evidence–Letters from jail–No reasonable expectation of privacy

State v. Fuller 166 N.C. App. 548 (2004)

Letters defendant wrote to his wife from jail were properly admitted in a prosecution for first-degree statutory rape and other offenses. The letters were not marked "legal" or addressed to an attorney and were given to jail personnel to mail. There was no reasonable expectation of privacy.

2) Evidence--Marital privilege--Letters from jail

State v. Fuller 166 N.C. App. 548 (2004)

Letters sent by an incarcerated defendant to his wife that were seized by law enforcement officers were admissible despite defendant's claim of marital privilege. A third person who overhears a conversation between husband and wife may be examined as to that conversation, and confidential letters from husband to wife are admissible against the husband when brought into court by a third party.

3) Witnesses--Marital privilege--Limits

State v. Carter 156 N.C. App. 446 (2003)

Statements relating conversations with defendant which occurred before his marriage to the witness or in the presence of a third party did not violate statutory prohibitions on compelling a spouse to testify. N.C.G.S. § 8-57.

Constitutional Law--Right to remain silent--Incriminating information elicited from another

State v. Belfield, 144 N.C. App. 320 (2001)

Even though defendant invoked his Fifth Amendment privilege to remain silent, the trial court did not commit plain error in an aiding and abetting case involving robbery and murder by allowing defendant's girlfriend to testify that defendant never sought medical assistance or help for the victim and refused to allow his girlfriend to do so, because: 1) the Fifth Amendment privilege is a personal privilege adhering to the person and not to the information that may incriminate him; and 2) defendant's invocation of his Fifth Amendment privilege is irrelevant when the evidence sought to incriminate defendant came from his girlfriend, who did not invoke her Fifth Amendment privilege.

Evidence--Husband-wife privilege--Not confidential marital communications

State v. Hammonds, 141 N.C. App. 152, 2000

The trial court did not err in a first-degree murder case by allowing defendant's

wife to testify on cross-examination to alleged confidential marital communications allegedly in violation of N.C.G.S. § 8-57, because: 1) defendant failed to make a timely objection to two of the statements as required by N.C. R. App. P. 10(b)(2); 2) the wife's statement during cross-examination that cable workers were outside was at most a casual observation not induced by the marital relationship and prompted by the affection, confidence, and loyalty engendered by such relationship; 3) the wife's statement during cross-examination that she observed defendant remove a firearm from under their bed was not induced by or even part of the marital relationship, defendant took no steps to ensure confidentiality while obtaining the weapon, and the wife's presence in the bedroom to watch defendant arm himself was incidental; and 4) the wife's statement during cross-examination that defendant told her what he had done to the victim cannot be considered the disclosure of a confidential marital communication since the wife did not reveal the content of any communication between herself and defendant, and defendant's brother was also told what happened.

Evidence and Witnesses 2616, 2617 (NCI4th) - Letters to wife - Threats and promises - Not privileged communications

State v. Mckinnish, 110 N.C. App. 241 (1993) 429 S.E.2d 443

Two letters defendant wrote to his wife after they separated asking her to support his alibi concerning the time they left their apartment to travel to West Virginia on the day of the crimes with which defendant was charged were not privileged communications because both letters show that defendant was not relying on the affection, confidence and loyalty of the marital relationship where one letter contained threats that the wife would serve time if defendant served time, and both letters offered a material reward to the wife if she would support his alibi.

Evidence and Witnesses 2616 (NCI4th) - Rape of stepdaughter - Statements to wife - Not a marital communication

State v. Smith, 113 N.C. App. 827 (1994) ___ S.E.2d ___

The trial court did not err in a prosecution of defendant for the attempted rape of his twelve-year-old stepdaughter by permitting his wife to testify that defendant had admitted to her that he had sexually abused the girl. Defendant's confession was driven by his own psychological motivations rather than by any confidence induced by the marital relationship. N.C.G.S. 8-57 (b)(5).

1) Evidence and Witnesses 1 2567 (NCI4th) first-degree murder - Statements of defendant's spouse to

911 dispatcher - Admissible

State v. Rush, 340 N.C. 174 (1995) ___ S.E.2d ___

There was no plain error in a first-degree murder prosecution in the admission of statements made by defendant's spouse to a 911 dispatcher on the night of the murder. The sole prohibition of N.C.G.S. 18-57(b) is directed to compelled testimony and does not address out-of-court statements made by a spouse and introduced against a defendant spouse through a third party; moreover, defendant concedes that these statements were not confidential.

2) Evidence and Witnesses §§ 923, 929, 1162 (NCI4th) murder defendant's statement to wife instruction to call father and police admissible

State v. McLemore, 343 N.C. 240 (1996) 470 S.E.2d 2

The trial court in a first-degree murder prosecution properly admitted testimony from the defendant's father and from a detective that defendant's wife had told them of a telephone call in which defendant had told her that he had shot his mother and asked her to call his father and have him call the police. Defendant did not intend that his statement to his wife be confidential; he specifically told her to let other people know what he had told her. Although the testimony of the father and the detective was hearsay, the father's testimony fits easily under the excited utterance exception because the wife called him approximately three minutes after her conversation with defendant, when she would have been under the influence of an undoubtedly startling event.

3) Evidence - Clergy privilege - Waiver

State v. Andrews, 131 N.C. App. 370 (1998)

There was no plain error in a non-capital first-degree murder prosecution in allowing the testimony of a minister who served as chaplain for the sheriff's office to testify where the minister was called to the sheriff's office to talk to defendant because of the possibility of defendant being suicidal; the minister aware of defendant's privilege and asked whether he could divulge information to officers; defendant agreed; defense counsel withdrew his objection at trial after defendant stated that he waived the privilege; the court questioned defendant to make sure that he understood that he possibly had a privilege; and defendant said that he understood and still wanted to waive the privilege. N.C.G.S. § 8-53.2

4) Evidence - Medical records - District court judge - Disclosure - No prejudice

State v. Rich, 132 N.C. App. 440 (1999)

There was no prejudice in a second-degree murder prosecution arising from an automobile accident where an order compelling disclosure of defendant's medical records (including a statement to a doctor that he had drunk several shots and several beers) was issued by a district court judge rather than a superior court judge. While the order should have come from a superior court judge, there was no reasonable possibility of the jury reaching a different result in view of the overwhelming evidence that defendant had a strong odor of alcohol on his breath on the night in question.

5) Evidence - Work product - Privilege waived

State v. Holston, 134 N.C. App. 599 (1999)

The trial court did not err in requiring defendant's attorney to produce to the State his notes summarizing defendant's previous medical records, after conducting a voir dire, because even if those notes constitute work product, the privilege was waived when defendant's attorney provided those same notes to an expert who relied on them for his testimony.