IN THE SUPREME COURT OF TEXAS

NO. 05-0613

IN RE BEXAR COUNTY CRIMINAL DISTRICT ATTORNEY'S OFFICE, RELATOR

ON PETITION FOR WRIT OF MANDAMUS

Argued September 28, 2006

JUSTICE WILLETT delivered the opinion of the Court, in which JUSTICE HECHT, JUSTICE O'NEILL, JUSTICE WAINWRIGHT, and JUSTICE BRISTER joined.

JUSTICE WILLETT delivered a concurring opinion.

JUSTICE JOHNSON delivered a dissenting opinion, in which CHIEF JUSTICE JEFFERSON and JUSTICE MEDINA joined.

JUSTICE GREEN did not participate in the decision.

This case presents an issue of first impression: whether the work-product privilege protects prosecutors from testifying in a malicious prosecution suit when they have already released the prosecution file. Relator Bexar County Criminal District Attorney's Office ("DA" or "DA's Office") provided its prosecution file to real party in interest David Crudup, who had sued relator Cynthia Blank for malicious prosecution. Crudup subpoenaed DA representatives to testify, but the trial court granted the DA's Motion to Quash and For Protective Order. The court of appeals disagreed

and ordered the trial court to withdraw its order.[1] The DA's Office and Blank now seek mandamus relief in this Court, and given the record and circumstances presented, we conditionally grant it.

I. Factual and Procedural Background

David Crudup and his wife were feuding neighbors of Cynthia Blank and her teenage son Travis. The Crudups and the Blanks complained repeatedly about each other to the Bexar County Sheriff's Office regarding such incivilities as barking dogs, obscenities yelled, cut cable lines, strewn grass clippings, trash left in a yard, rocks thrown at a fence, water sprayed on cars and grass, and a sprinkler that ran too long and created a puddle. Each time, the responding officer would talk to both sides and prepare an incident report.

On one occasion, Travis Blank alleged that Crudup threatened to kill him. Following this complaint, the DA charged Crudup with making terroristic threats.[2] During their investigation, members of the DA's Office interviewed Blank on several occasions. The DA's prosecution file contains sheriff's department reports, typed internal memos, letters written by Blank, and handwritten notes from interviews and telephone calls prepared by the DA's office. One set of notes detailed a series of calls between Blank and Assistant DA Robert McCabe. The file indicates that Blank refused to testify or to allow Travis to testify at trial, despite McCabe's warnings that the DA's Office would drop the charges against Crudup if they did not testify.

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[1] 179 S.W.3d 47, 51.

[2] This crime ranges from a Class B misdemeanor to a state jail felony depending upon the circumstances of the threat. *See* TEX. PENAL CODE § 22.07.

The DA's Office indeed dropped the charges, and Crudup sued the Blanks for malicious prosecution. The DA's Office complied with a subpoena *duces tecum* and turned over its prosecution file to Crudup for use in the civil case. Crudup subpoenaed McCabe, another assistant DA, and a DA investigator to testify at trial. The DA's Office and the three subpoenaed individuals filed a Motion to Quash and For Protective Order, arguing that the work-product privilege precluded the testimony Crudup sought. Crudup's response attached no evidentiary support other than the previously produced prosecution file. Crudup insisted the DA testimony was not work product, and in any event the DA had waived any privilege claim by disclosing the prosecution file. The trial court conducted a brief non-evidentiary hearing and granted the DA's motion from the bench. At the hearing, Crudup's counsel complained, without elaboration, that the court had "damaged my case" and "severely limited and handicapped my case." Crudup filed a motion for reconsideration, attaching a transcript of the hearing and arguing that he needed the testimony from the DA personnel "to fully develop" his case and to prove the elements of malicious prosecution. The motion also attached notes from the prosecution file written by McCabe, and purporting to "state the reasons" and "describe the reason" the criminal case was dismissed. The trial court entered a written order again granting the DA's motion and effectively denying the motion for reconsideration.

The court of appeals granted Crudup mandamus relief and directed the trial court to withdraw its order. The court of appeals concluded that under *King v. Graham*[3] Crudup must prove that Blank's provision of false information was the determining factor in the DA's decision to bring the

[3] 126 S.W.3d 75 (Tex. 2003) (per curiam).

criminal prosecution, and that "[u]nder these circumstances the work-product privilege does not operate as a blanket privilege covering all decisions made by the DA's office."[4] The DA now seeks mandamus relief in this Court.

II. Discussion

A. Standard of Review

We grant mandamus relief when the trial court has abused its discretion and a party has no adequate appellate remedy.[5] As to the first prong, a lower court has no discretion in determining what the law is, even when the law is unsettled.[6] As to the second, we have repeatedly held that appeal is inadequate when a court erroneously orders disclosure of privileged information.[7]

B. The *King* Decision Does Not Mandate DA Testimony

Causation is an indispensable element of this malicious prosecution case. As we explained in *King*, "to recover for malicious prosecution when the decision to prosecute is within another's discretion, the plaintiff has the burden of proving that that decision would not have been made but for the false information supplied by the defendant."[8] So Crudup must prove not only that the

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[4] 179 S.W.3d at 50.

[5] *In re Prudential Ins. Co.*, 148 S.W.3d 124, 135–36 (Tex. 2004) (orig. proceeding); *Walker v. Packer*, 827 S.W.2d 833, 839–40 (Tex. 1992) (orig. proceeding).

[6] *Prudential*, 148 S.W.3d at 135 (citing *Huie v. DeShazo*, 922 S.W.2d 920, 927–28 (Tex. 1996)).

[7] *In re Ford Motor Co.*, 211 S.W.3d 295, 298 (Tex. 2006) (per curiam) (orig. proceeding); *In re Bass*, 113 S.W.3d 735, 745 (Tex. 2003) (orig. proceeding).

[8] 126 S.W.3d at 78.

Blanks furnished false information, but also that this false information caused Crudup to be prosecuted.[9]

In *King*, Kerr County district attorney Sutton testified in the malicious prosecution case brought by plaintiffs Graham and Wren.[10] In rendering judgment for defendants, we wrote, "Graham and Wren offered no evidence whatever—*as by opinion from Sutton, for example*—that the decision to prosecute was based on any information supplied by King that Graham and Wren assert was false."[11] The *King* decision and our review of the *King* record do not reveal whether Sutton testified voluntarily or pursuant to a subpoena.

Crudup argues that "[a] necessary element for a malicious prosecution is the testimony of the District Attorney's office," and insists that this Court "has ruled that the testimony of the District Attorney's office is necessary to prove an element of malicious prosecution." This is assuredly wrong; nothing in *King* suggests that plaintiffs must provide direct evidence of causation or that prosecutors can be subpoenaed to provide live testimony regarding causation or anything else. In *King*, the district attorney did testify, and as this Court weighed but-for causation in that case, we noted that his testimony nowhere opined "that the decision to prosecute was based on any information supplied by [the defendant] that [plaintiffs] assert was false."[12] We summarized what the district attorney did and did not say and mentioned his testimony as merely one way causation

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[9] *See id*. at 76; s*ee also Browning-Ferris Indus., Inc. v. Lieck*, 881 S.W.2d 288, 292–93 (Tex. 1994) (citing RESTATEMENT (SECOND) OF TORTS § 653 cmt. g (1977)).

[10] 126 S.W.3d at 78–79.

[11] *Id*. at 78 (emphasis added).

[12] *Id*.

could have been proved in that case. Our reference to the district attorney's testimony in *King*, however, did not announce a blanket privilege waiver or authorize plaintiffs to subpoena prosecutors to testify whenever plaintiffs wish to bolster the causation element of their malicious prosecution lawsuit.

C. Crudup Cannot Overcome the DA's Testimonial Privilege

The United States Supreme Court first recognized the work-product doctrine 60 years ago in *Hickman v. Taylor*,[13] and our state discovery rules protect those materials prepared by or at the request of an attorney in anticipation of litigation.[14] As we have explained, "The primary purpose of the work product rule is to shelter the mental processes, conclusions, and legal theories of the attorney, providing a privileged area within which the lawyer can analyze and prepare his or her case."[15] The privilege continues indefinitely beyond the litigation for which the materials were originally prepared.[16] Moreover, the privilege covers more than just documents: it extends to an attorney's mental impressions, opinions, conclusions, and legal theories,[17] as well as the selection and ordering of documents.[18] The work product privilege is broader than the attorney-client

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[13] 329 U.S. 495, 509 (1947).

[14] TEX. R. CIV. P. 192.5(a)(1).

[15] *Owens-Corning Fiberglas Corp. v. Caldwell*, 818 S.W.2d 749, 750 (Tex. 1991) (orig. proceeding) (citing *Axelson, Inc. v. McIlhany*, 798 S.W.2d 550, 554 (Tex. 1990)).

[16] *Id*. at 751–52.

[17] TEX. R. CIV. P. 192.5(b)(1).

[18] *Nat'l Union Fire Ins. Co. v. Valdez*, 863 S.W.2d 458, 460 (Tex. 1993) (orig. proceeding) (citing *Hickman*, 329 U.S. at 511).

privilege[19] because it includes all communications made in preparation for trial, including an attorney's interviews with parties and non-party witnesses.[20]

In the pending case, all of the DA's Office's work in connection with the criminal proceeding against Crudup, and relevant to the decision to bring criminal charges against him, constitutes work product, namely "material prepared or mental impressions developed in anticipation of litigation or for trial" or communications "made in anticipation of litigation or for trial . . . among a party's representatives" under Rule 192.5(a). The totality of the DA's work on the Crudup matter, as evidenced by the prosecution file, consisted of the preparation of a criminal charge against Crudup and the criminal litigation that followed. The trial court record indicates that Crudup was not interested in eliciting general factual testimony from DA witnesses regarding how the DA's Office receives, processes, and investigates criminal complaints. Crudup only subpoenaed DA employees who had been directly involved with his criminal case to testify in the civil case. He informed the district court, in his response to the Motion to Quash and For Protective Order, that he was interested in their testimony because "[t]he DA's office had numerous conversations with Defendant Cindy and because of these conversations they are fact witnesses to the statements made by Defendant Cindy." He stated in his motion for reconsideration that he needed the testimony in order to "present evidence of the conduct of the Defendants before the criminal case was initiated" and also "to present evidence of the conduct of the Defendants during the course of the criminal proceedings, especially

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[19] *See* TEX. R. EVID. 503.

[20] *See* TEX. R. CIV. P. 192.5(a)(1)–(2); *Hickman*, 329 U.S. at 512–13.

as to the reason of the dismissal of the criminal case." In his briefing to this Court, he stresses that without DA testimony, he cannot prove the specific elements of malicious prosecution.

For purposes of his civil case, conversations made in the course of the criminal investigation, information learned during that investigation, and the DA's decision to drop the case all constitute work product as defined above, and while producing the prosecution file unquestionably waived protection of the documents themselves, that selective disclosure does not oblige DA staff to provide deposition and trial testimony interpreting, explaining, or otherwise elaborating on matters contained in the file. The dissent notes that Crudup may well want to quiz DA staff about various matters unrelated to the specifics of the prosecution against him: "testimony as to general procedures such as procedures of the DA's office for intake of criminal complaints, processing of those complaints, whether investigation is made into the facts of cases before criminal proceedings are instituted, and whether contacts are typically made with complaining witnesses before criminal proceedings are begun, during the proceedings, or after the proceedings are completed." ___ S.W.3d ___, ___. Crudup, however, has never expressed the slightest interest in such general matters, which might well be fair game; the record and his briefs to this Court show him focused solely on eliciting DA testimony regarding the specific events surrounding his criminal case and insisting that without such case-specific details, "he will not be able to prove every element of malicious prosecution."

Rule 192.5(b)(1) distinguishes everyday work product from "core work product" and makes clear that the latter—defined as "the attorney's or the attorney's representative's mental impressions, opinions, conclusions, or legal theories"—is inviolate and flatly "not discoverable," subject to

narrow exceptions that are inapplicable here.[21] Core work product is sacrosanct and its protection impermeable. Assuming *arguendo* that the testimony Crudup seeks is non-core work product, which seems doubtful, Crudup still bears a heavy burden: he must show that he "has substantial need" for the testimony in the preparation of his case and that he "is unable without undue hardship to obtain the substantial equivalent of the material by other means."[22]

The court of appeals said it granted mandamus relief because "the DA's office has failed to meet its burden of showing any basis to quash the subpoenas."[23] This misses the mark. In the record, briefing, and oral argument, Crudup continued to demonstrate his intention to interrogate the DAs about case-specific details. Such testimony would unquestionably require the disclosure of DA work product, which, at a minimum, places the burden on Crudup to show a "substantial need" for the testimony and the inability to obtain its substantial equivalent by other means without "undue hardship."

Addressing the first prong, "substantial need," Crudup contends that he "will not be able to prove an element of his case" (namely, causation) without testimony from the prosecutors. To be

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[21] Rule 192.5(c) provides exceptions to the work-product privilege for:

> (1) information discoverable under Rule 192.3 concerning experts, trial witnesses, witness statements, and contentions; (2) trial exhibits ordered disclosed under Rule 166 or Rule 190.4; (3) the name, address, and telephone number of any potential party or any person with knowledge of relevant facts; (4) any photograph or electronic image of underlying facts (e.g., a photograph of the accident scene) or a photograph or electronic image of any sort that a party intends to offer into evidence; and (5) any work product created under circumstances within an exception to the attorney-client privilege in Rule 503(d) of the Rules of Evidence.

A "witness statement" under Rule 192.3(h) includes signed witness statements and recorded statements, but does not include "[n]otes taken during a conversation or interview with a witness."

[22] TEX. R. CIV. P. 192.5(b)(2).

[23] 179 S.W.3d at 51.

sure, granting Crudup access to live DA testimony might improve his chances in court, but improving a civil litigant's odds of winning is not enough. Substantial need is not merely substantial desire. Prosecutors could win more convictions absent the Fifth Amendment, or the priest-penitent privilege, or the marital privilege, but we safeguard these privileges and others because they advance a greater societal good. Like every litigant, Crudup wants to strengthen his lawsuit, understandably so, but that cannot trump a settled privilege and justify a wide-ranging excavation of prosecutorial decision-making.

The second prong is inability to obtain the substantial equivalent of the requested material. As stated above, Crudup cannot win his malicious prosecution suit without showing that false information supplied by the Blanks to the DA's Office caused the DA to prosecute.[24] The DA's Office, however, has already provided Crudup with the substantial equivalent of testimony: it has, pursuant to a subpoena *duces tecum*, turned over its entire prosecution file, which contains notes related to the investigation, sheriff's department complaint reports, Travis Blank's affidavit to the sheriff's department detailing Crudup's alleged threat, and McCabe's log of conversations with Cynthia Blank that ultimately prompted him to dismiss the criminal charges. Many if not all of these documents might come into evidence either through a non-hearsay use or as an exception to hearsay.[25] Any false statements made by the Blanks to the DA, for example, would not constitute

[24] *See King*, 126 S.W.3d at 78.

[25] *See* TEX. R. EVID. 801(e)(2) (admission by party-opponent); *id*. 803(6) (records of regularly conducted activity); *id*. 803(8)(A), (C) (public records and reports).

hearsay if offered for their effect on the listener rather than for the truth of the matter asserted.[26] And Crudup has already taken a deposition on written questions of the DA's custodian of records in order to establish that the prosecution file contains records of a regularly conducted activity under Rule 803(6). Crudup is not required to produce live testimony from a prosecutor, and he might well be able to prove his case through alternative means, including (1) circumstantial evidence, (2) trial testimony and pretrial discovery from the Blanks, and (3) expert testimony on prosecutorial decision-making and whether the file suggests the DA would not have charged Crudup but for the allegedly false information. Rule 192.5 strikes a sensible balance, recognizing that a lawyer's thoughts are his own and that a party cannot invade every nook and cranny of a lawyer's case preparation, particularly when the "essence" of what the party seeks has already been revealed to him or is readily available.[27] Indeed, while insisting he needs live testimony to prove Blank's malice, Crudup's brief concedes that the prosecution file contains all the evidence he needs: "The notes of District Attorney McCabe clearly indicate the malice of Cynthia Blank."

Understandably, Crudup desires live testimony to fortify his case, but Rule 192.5(b)(2) is not nearly so permissive. Even assuming the testimony sought is non-core work product, Crudup's burden of showing causation in his malicious prosecution suit is insufficient to constitute "substantial need." Nor has Crudup shown an inability to obtain the substantial equivalent of the testimony sought without "undue hardship." If anything, when it comes to affecting Crudup's burdens at trial, the DA's disclosure of its prosecution file did more to alleviate than to aggravate.

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[26] *See id.* 801(d).

[27] *See Hickman*, 329 U.S. at 509.

D. The DA Has Not Consented to Testify by Producing the File

Crudup alternatively argues that the DA waived the privilege under Texas Rule of Evidence 511(1) and cannot resist testifying. Again, we disagree. Rule 511(1) provides that a person waives a privilege against disclosure if he "voluntarily discloses or consents to disclosure of any significant part of the privileged matter . . . ." Although the DA's Office turned over its prosecution file without objection, which waived the work-product privilege as to the file's contents, the record is devoid of any indication that by doing so the DA likewise enlisted its current and former personnel to testify in Crudup's malicious prosecution suit regarding their case materials and related impressions and communications. The DA's waiver here is limited, not limitless, and agreeing to produce a prosecution file does not in itself require the DA to produce its personnel so that their mental processes and related case preparation may be further probed.

We therefore hold on this record, given the protected nature of what Crudup intends to elicit, that the DA's selective disclosure of the prosecution file, while waiving the privilege as to the documents themselves, does not waive the DA's testimonial work-product privilege regarding the prosecutor's mental processes; nor did the DA's file disclosure itself give rise to a "substantial need" or "undue hardship" sufficient to overcome the privilege that protects non-core work product.

III. Conclusion

Direct prosecutor testimony is not required to prove causation and malice in malicious prosecution suits. Nor, on this record, did the DA's Office waive its work-product privilege against testifying by producing the prosecution file. Given the nature of what Crudup seeks and his inability to show both "substantial need" and "undue hardship" under Rule 192.5(b)(2), he cannot force DA

personnel to discuss their mental processes or other case-related communications and preparation, even if the subpoenaed testimony relates to documents already produced.

We conditionally grant the petition for writ of mandamus and direct the court of appeals to vacate its writ of mandamus and to reinstate the trial court order quashing the subpoenas and issuing a protective order.[28] The writ will issue only if the court of appeals fails to comply.

Don R. Willett
Justice

Opinion delivered: May 4, 2007

[28] *See* TEX. R. APP. P. 52.8(c).