

June 17, 2011 Cases

ORAM V. COLORADO, SUPREME COURT OF COLORADO, NO. 09SC224, 5/16/11

The Colorado Supreme Court has ruled that the privilege provided by common law to bail bonding agents to enter a home in search of a bonded individual does not exist in Colorado. In doing so, the court upheld the burglary convictions of bounty hunters Richard Oram and Devon Weinstein.

The two bounty hunters were in search of a defendant who had failed to appear in court. When he was bonded out, the defendant had provided the bonding company with an address in Denver. As it turned out, the defendant's brother lived at that address, but the defendant himself had not been living there for a number of years. The bounty hunters appeared at the brother's address, identified themselves to the residents of the home as police officers, then forced their way in, subduing and handcuffing one resident they initially believed to be the defendant. The bounty hunters were later arrested and charged with burglary.

At their jury trial, the bounty hunters asked the court to read to the jury an instruction specifying that it was an affirmative defense to the crime of burglary that the defendant the bounty hunters were searching for had "granted immunity from criminal liability to the bail bondsmen and the (bounty hunters), acting as agents of the bondsman, in his return upon failing to abide by the bail bonding contract." In making this request, the bounty hunters relied upon the 1872 U.S. Supreme Court decision in *Taylor v. Taintor* (83, U.S. 366), which ruled that a commercial surety bail is a private contract between the bondsman and a defendant, and if the defendant violates the terms of that contract by failing to appear in court the bondsman "may break and enter his home." The trial court declined to read that instruction, a decision that was upheld by the Court of Appeals.

When the case reached the Colorado Supreme Court, that court took up the issue of whether the *Taylor* privilege even exists in Colorado. The court reviewed the Colorado Revised Statutes and concluded that the statutes make clear that any affirmative defense to a crime must be defined by the General Assembly in the statutes, and not by common law. Concluding that there was no *Taylor*-like affirmative defense to the crime of burglary in the statute, "the common law bonding agent's privilege has not survived and has been abrogated by the General Assembly in the general provisions of the criminal code and the burglary statute."

**IN THE MATTER OF SUBPOENA DUCES TECUM ON CUSTODIAN OF RECORDS,
CRIMINAL DIVISION MANAGER, MORRIS COUNTY, SUPERIOR COURT OF NEW JERSEY,
APPELATE DIVISION, NO. 0924-10T3, 3/31/11**

In New Jersey counties, the Criminal Division Manager's Office has the responsibility of interviewing defendants for both bail determination and for eligibility for representation by the Public Defender's Office. This case involved a defendant charged with a series of

financial crimes who was interviewed by that office. The prosecutor issued a subpoena to the Criminal Division Manager's Office seeking information that the defendant provided regarding his financial status as part of the indigency screening portion of the interview. The trial court quashed the subpoena citing attorney-client privileges, holding that that privilege "extends to any statement by the defendant, written or oral, including financial information disclosed" during the interview by the Criminal Division Manager's Office. The prosecutor's office appealed.

The appeals court held that the trial court correctly applied principles laid out in New Jersey case law. Those principles hold that the following interactions are privileged: communications between a defendant and his lawyer; disclosures made to an attorney in order to obtain assistance; and disclosures made through "necessary intermediaries and agents." But, the court noted, the privilege is not absolute, and "the determination whether a communication between a client and attorney is protected must be made on the basis of the purposes for which the privilege exists and the reasons for its assertion in the context of the particular case." The court concluded that, given the nature of the charges against the defendant, the information the defendant provided in the interview "could very well...be useful to the State in prosecuting the pending charges against the defendant."

Moreover, the court observed that allowing the information to be used would mean that the defendant "would be subject to the potential use of those materials in the pending criminal proceedings against him solely because of his putative indigency. This would be contrary to the principle that indigent clients who seek representation at public expense are entitled to the same degree of protection under attorney-client privilege as non-indigent clients who seek to retain private counsel."

The court ruled that defendant communications with the Criminal Division Managers Office to obtain representation by the Public Defenders Office are protected by the attorney-client privilege.