

680684

68068-4

NO. 68068-4-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

PARISH TATE,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE MICHAEL TRICKEY
THE HONORABLE MICHAEL HAYDEN

BRIEF OF RESPONDENT

DANIEL T. SATTERBERG
King County Prosecuting Attorney

SAMANTHA D. KANNER
Deputy Prosecuting Attorney
Attorneys for Respondent

King County Prosecuting Attorney
W554 King County Courthouse
516 3rd Avenue
Seattle, Washington 98104
(206) 296-9650

TABLE OF CONTENTS

	Page
A. <u>ISSUES PRESENTED</u>	1
B. <u>STATEMENT OF THE CASE</u>	2
C. <u>ARGUMENT</u>	5
1. THE COURT CORRECTLY ASSIGNED THE BURDEN OF PROVING INCOMPETENCE: THE PRESUMPTION OF COMPETENCE MUST BE OVERCOME BY A PREPONDERANCE OF THE EVIDENCE	5
2. THE COURT'S ASSIGNMENT OF THE BURDEN OF PROOF DOES NOT VIOLATE DUE PROCESS	12
3. EVEN IF THE COURT ERRED IN ASSIGNING THE BURDEN, REVERSAL OF THE ADJUDICATION IS NOT THE APPROPRIATE REMEDY	13
D. <u>CONCLUSION</u>	16

TABLE OF AUTHORITIES

Page

Table of Cases

Federal:

Dusky v. United States, 362 U.S. 402,
80 S. Ct. 788, 4 L. Ed. 2d 824 (1960) 6

Medina v. California, 505 U.S. 437,
112 S. Ct 2572, 120 L. Ed. 2d 353 (1992) 12

Miranda v. Arizona, 384 U.S. 436,
86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966) 3

United States v. Johns, 728 F.2d 953
(7th Cir. 1984) 14

United States v. Renfro, 825 F.2d 763
(3rd Cir. 1987) 14

Washington State:

Born v. Thompson, 154 Wn.2d 749,
117 P.3d 1098 (2005) 10

Grannum v. Berard, 70 Wn.2d 304,
422 P.2d 812 (1967) 7

In re Application for a Writ of Habeas Corpus of Young,
8 Wn. App. 276, 505 P.2d 824 (1973) 14

In re Personal Restraint Petition of Dyer,
143 Wn.2d 384, 20 P.3d 907 (2001) 13

In re Personal Restraint Petition of Fleming,
142 Wn.2d 853, 16 P.3d 610 (2001) 6

In re Personal Restraint Petition of Rhome,
172 Wn.2d 654, 260 P.3d 874 (2011) 7, 11

<u>State v. Allen</u> , 67 Wn.2d 238, 406 P.2d 950 (1965).....	7
<u>State v. Anene</u> , 149 Wn. App. 944, 205 P.3d 992 (2009).....	9
<u>State v. Blakely</u> , 111 Wn. App. 851, 47 P.3d 149 (2002), <u>rev'd and remanded on other grounds</u> , 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004).....	8
<u>State v. Bushnell</u> , 38 Wn. App. 809, 690 P.2d 601 (1984).....	13
<u>State v. Eldridge</u> , 17 Wn. App. 270, 562 P.2d 276 (1977).....	7, 8
<u>State v. Harris</u> , 114 Wn.2d 419, 789 P.2d 60 (1990).....	7
<u>State v. Heddrick</u> , 166 Wn.2d 898, 215 P.3d 201 (2009).....	12
<u>State v. Hurst</u> , 158 Wn. App. 803, 244 P.3d 954 (2010) <u>aff'd</u> , 173 Wn.2d 597, 269 P.3d 1023 (2012).....	11
<u>State v. Wicklund</u> , 96 Wn.2d 798, 638 P.2d 1241 (1982).....	9
<u>State v. Wright</u> , 19 Wn. App. 381, 575 P.2d 740 (1978).....	14

Constitutional Provisions

Federal:

U.S. Const. amend. XIV 13

Statutes

Washington State:

Laws 2007, ch. 375, § 17, eff. July 22, 2007 10
RCW 10.77..... 1, 9, 12
RCW 10.77.060..... 6
RCW 10.77.084..... 6
RCW 10.77.090..... 10

A. ISSUES PRESENTED

1. The law presumes that every man is competent until satisfactory proof to the contrary is presented. Because Tate was presumed competent to stand trial and the defense challenged that presumption, the court determined that the defense had to prove his incompetence by a preponderance of the evidence at an initial competency hearing. Did the court properly hold that the defense bore the burden of proving incompetence?

2. The United States Supreme Court has held that it does not violate due process for a defendant to bear the burden of proving incompetence by a preponderance of the evidence. The trial court complied with the procedures required by RCW 10.77 and held that the defense had not met its burden of proving incompetence and concluded Tate was competent to stand trial at a pretrial hearing. Tate was subsequently tried and found guilty at a fact finding hearing. Has Tate failed to show a due process violation?

B. STATEMENT OF THE CASE

On December 10, 2010, the respondent, Parish Tate, boarded a bus in Seattle, Washington. 2RP 75.¹ Tate sat down on the bus next to victim Jaime Pineda-Torres who was watching a movie on an iPod Touch (iPod). 2RP 81, 86. Tate decided to steal the iPod. 2RP 185-86, 189. When the bus stopped and the opportunity presented itself, Tate attempted to grab the iPod from Pineda-Torres's hand. 2RP 89, 91, 186. The two struggled over the iPod for a few seconds but Tate eventually was able to get it out of Pineda-Torres's hand. 2RP 89, 91, 93. When Pineda-Torres stood up and told Tate to give him the iPod back, Tate balled up his fist, took a fighting stance and threatened Pineda-Torres, "Get off me because I'm going to sock you in the face." 2RP 91-92, 95. Pineda-Torres felt threatened and stepped aside. 2RP 96. Tate then left the bus with the stolen iPod. 2RP 100. The bus driver contacted the police. Id. When Seattle Police officers arrived, Pineda-Torres gave them a description of Tate, who was a stranger to him. 2RP 101-04.

¹ The Verbatim Report of Proceedings consists of three volumes, referred to as follows: 1RP (3/24/2011, 4/7/2011, 4/25/2001, 6/6/2011, 6/21/2011, and 7/7/2011), 2RP (10/25/2011), and 3RP (11/15/2011).

The officers recognized that the description fit Tate, based on prior contacts and they went to Tate's home. 2RP 26-29, 154-55. Tate was not home but the officers requested that his mother call when he returned home. 2RP 30, 155. A few hours later, after contact from Tate's foster mother, the officers returned to the home to speak with Tate. 2RP 31, 157. After being advised of his Miranda² rights, Tate admitted to the officers that he stole the iPod and admitted it was in his bedroom. 2RP 60, 157. He also gave the officers permission to retrieve the iPod from his bedroom. 2RP 61, 158.

The officers retrieved an iPod from Tate's bedroom. 2RP 61-62, 158. Shortly thereafter, Pineda-Torres identified Tate in a show-up identification. 2RP 105-07. After the show-up Pineda-Torres was able to identify the iPod as his by using his password to unlock the device. 2RP 109, 158.

The State charged Tate with robbery in the second degree in Juvenile Court. CP 1. Pre-trial, Tate's counsel questioned Tate's competency to stand trial and the trial court ordered an evaluation by Western State Hospital. 1RP 4-9. At the competency hearing, the State called Dr. Ray Hendrickson, a forensic psychologist from

² Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

Western State Hospital. 1RP 47, 55. Dr. Hendrickson testified that Tate exhibited no symptoms of a major mental illness, that he understood the nature of the charges and the court proceedings, and that he demonstrated the ability to communicate and apply reasoning and capably communicates with counsel to assist in his defense. RP 61-63. On appeal, Tate notes that Dr. Hendrickson did not use the juvenile competency evaluation tool to evaluate Tate. App. Br. at 3. Dr. Hendrickson explained that he did not use the juvenile tool to evaluate Tate as he was no longer a juvenile at the time of the competency evaluation. 1RP 85.

At the competency hearing the defense called no witnesses and there was no testimony that Tate presently lacked an ability to understand the charges or assist in his own defense. 1RP 86. The only evidence questioning Tate's competency was Dr. Hendrickson's testimony that he was aware Tate had been found incompetent two years prior and had been prescribed psychotic medications during his 2009 hospitalization. 1RP 81. After hearing the testimony from Dr. Hendrickson, the court heard argument from the parties first on which party bore the burden of proof. 1RP 87-88. During substantive argument, the defense advocated for the court to find Tate incompetent while the State

argued Tate was competent. 1RP 89-102. The court held that the defense had the burden of proving incompetence by a preponderance of the evidence. 1RP 103-04. The court further held that Tate was competent because he understood the nature of the charges and understood how to work with and consult with his attorney. 1RP 106.

At the subsequent fact finding, Tate testified that he stole the iPod but that he did so without using any force and that there was no resistance from Pineda-Torres. 2RP 185-88. The court found this portion of Tate's testimony was not credible. CP 37. (Finding of Fact 8). The court found Tate guilty as charged. CP 18, 36-38.

C. ARGUMENT

- 1. THE COURT CORRECTLY ASSIGNED THE BURDEN OF PROVING INCOMPETENCE: THE PRESUMPTION OF COMPETENCE MUST BE OVERCOME BY A PREPONDERANCE OF THE EVIDENCE.**

Tate argues that the trial court incorrectly held that the defense had the burden of proving incompetence by a preponderance of the evidence. Tate maintains that, in an initial competency hearing, the State bears the burden of proof of proving competence by a preponderance of the evidence and therefore the

trial court erred in finding him competent. Tate's assertion is incorrect. A finding of incompetence requires proof of incompetency by a preponderance of the evidence because competence is presumed. It is imprecise to say that a particular party bears the burden of proof. Because Tate was presumed competent at the time of this competency hearing, the court correctly had to find proof by a preponderance of the evidence in order to declare him incompetent. Because the only evidence offered at the competency hearing supported a finding of competence, the court did not abuse its discretion in declaring Tate competent to stand trial.

The two-part test for legal competency for a criminal defendant in Washington is as follows: (1) that the defendant understands the nature of the charges; and (2) that he is capable of assisting in his defense. In re Personal Restraint Petition of Fleming, 142 Wn.2d 853, 862, 16 P.3d 610 (2001); Dusky v. United States, 362 U.S. 402, 80 S. Ct. 788, 4 L. Ed. 2d 824 (1960). RCW 10.77.060 and RCW 10.77.084, the two statutes regarding competency, are silent as to which party bears the burden of proof at an initial competency hearing.

However, “[i]t is well settled that the law will presume sanity rather than insanity, competency rather than incompetency; it will presume that every man is sane and fully competent until satisfactory proof to the contrary is presented.” Grannum v. Berard, 70 Wn.2d 304, 307, 422 P.2d 812 (1967). Further, a court’s competency finding generally reflects that “the defense did not meet its burden of overcoming the general presumption of competency to stand trial.” In re Personal Restraint Petition of Rhome, 172 Wn.2d 654, 663 n.2, 260 P.3d 874 (2011). See also State v. Allen, 67 Wn.2d 238, 242, 406 P.2d 950 (1965) (holding that defendant is presumed competent to waive the right to silence but that defendant may rebut the presumption by presenting evidence that he lacked the mental capacity to make a voluntary waiver); State v. Harris, 114 Wn.2d 419, 789 P.2d 60 (1990) (holding that defense has the burden of proving the defendant was incompetent to be executed post-conviction).

Because of the presumption of competency, whichever party asks a court to find a defendant incompetent to stand trial, when no previous finding of incompetency has been made by the trial court, has the burden of showing that the accused is incompetent. See State v. Eldridge, 17 Wn. App. 270, 280, 562 P.2d 276 (1977). In

Eldridge, a pretrial hearing was held to determine the defendant's competence to stand trial. The trial court considered a report by the State psychiatrist as well as a report from a defense-retained psychiatrist. Both reports concluded Eldridge was competent to stand trial. Id. The judge also observed Eldridge's appearance and demeanor during the hearing. Id. The trial judge found Eldridge competent and then proceeded with trial. Id. On appeal this Court held that the trial judge did not abuse its discretion in finding Eldridge competent and stated, "We have reviewed the record including Eldridge's subsequent trial testimony and *find no evidence that Eldridge was not competent.*" Id. at 280 (emphasis added).

Likewise in State v. Blakely, the Court of Appeals relied on the presumption of competency. 111 Wn. App. 851, 47 P.3d 149 (2002), rev'd and remanded on other grounds, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004). In Blakely, a jury trial was held on the issue of competency and the trial court denied the defense's request that the jury be instructed that a defendant is presumed incompetent to stand trial if there is proof of a prior mental illness adjudication. Id. The Court of Appeals affirmed the trial court's refusal to give the instruction and held that a civil court's

findings were admissible evidence but they did not rebut the presumption of competence. Id. at 861.

Further, in State v. Anene, the Court of Appeals did not take issue with the State's assertion that a defendant is presumed competent and the party claiming incompetence bears the burden of proving it by a preponderance of the evidence. 149 Wn. App. 944, 954 & n.5, 205 P.3d 992, 997 (2009). Division Two did reverse Anene's conviction but that was because the evidence was certain that he could not assist in his defense as he was in a coma during trial as a result of a suicide attempt. Id.

Tate cites State v. Wicklund for the broad proposition that the State has the burden of proving competence. 96 Wn.2d 798, 638 P.2d 1241 (1982). However Wicklund did not reach this issue. Rather, the Washington Supreme Court held that the provisions of RCW 10.77 applied to courts of limited jurisdiction and required a psychiatric evaluation by two evaluators. Id. Tate places significant emphasis on the fact that trial court there placed the burden on the State to prove competency. App. Br. at 6. However, the issue of whether or not the trial court had properly placed the burden on the State was not raised on appeal by either party. Wicklund explains merely that the State is required to follow the

mandatory procedures of the statute and contains no holding that assigns the burden to the State as a general matter.

Tate also cites two cases involving the burdens required to trigger commitment of a defendant for restoration of competency, after a finding of incompetency has been made. Contrary to Tate's claim, those cases do not assign the burden of proving competency to the State. See App. Br. at 7. In Born v. Thompson, the court determined that the standard of proof of "clear and convincing evidence" applied to whether or not a crime constituted a "violent act." 154 Wn.2d 749, 117 P.3d 1098 (2005). The court needed to decide that question in order to impose commitment for restoration of a defendant who had already been found incompetent pending misdemeanor charges. Id. at 752. The court did not address the standard of proof or who had the burden of proof regarding the court's finding of competency or incompetency. Rather, the court held that because the court had already found the defendant incompetent, the State had the burden of proving that a "violent act" occurred in order for the court to order commitment under RCW 10.77.090 (repealed by Laws 2007, ch. 375, § 17, eff. July 22, 2007). Id. at 769.

Further, Tate misstates the holding of State v. Hurst, 158 Wn. App. 803, 244 P.3d 954 (2010) aff'd, 173 Wn.2d 597, 269 P.3d 1023 (2012). In Hurst, the trial court had previously found Hurst incompetent and ordered restoration. Id. at 805. To commit Hurst to a third period of confinement for restoration of competency, the State had to prove that the defendant would be restored to competency, and that the defendant was either a substantial danger to others or that he would commit criminal acts jeopardizing public safety or security. Id. The Court of Appeals and the Washington Supreme Court both affirmed the commitment of Hurst holding that the standard of proof the jury needed to apply was a preponderance of the evidence. State v. Hurst, 173 Wn.2d 597, 599, 269 P.3d 1023 (2012). Again, the issue was not proof of competence or incompetence, but was what the State had to prove for the court to order commitment after a finding of incompetence had been made.

It is well understood that *competence is presumed* until the trial court makes a finding of incompetence. In re Rhome, 172 Wn.2d at 663 n.2. The reasoning of Hurst, supra, merely demonstrates that, *after* a finding of incompetence (and generally after a period of restoration), the burden shifts such that

incompetence becomes the presumption. Because the trial court had to presume Tate's competence here, it did not err by placing the burden with the defense to prove incompetence.

2. THE COURT'S ASSIGNMENT OF THE BURDEN OF PROOF DOES NOT VIOLATE DUE PROCESS.

Tate also argues on appeal that the trial court's assigning the burden of proof to the defense after hearing the testimony of Dr. Hendrickson was a due process violation. Tate cites State v. Heddrick for this proposition. 166 Wn.2d 898, 215 P.3d 201 (2009). However, the court in Heddrick merely stated that "the procedures outlined in chapter 10.77 RCW satisfy the due process requirements," and that trial courts must follow the procedures outlined in chapter 10.77. Id. 904 n.3. As the statute is silent as to which party bears the burden at an initial competency determination, there is neither error nor a due process violation.

The United States Supreme Court rejected the claim that it is a violation of due process to assign the burden of proving incompetency to the defendant. Medina v. California, 505 U.S. 437, 112 S. Ct 2572, 120 L. Ed. 2d 353 (1992). In Medina, the Court noted that the California court's presumption of competence

placed the burden of rebutting that presumption on the defendant. Id. at 452-53. The Supreme Court held that placing the burden on the defendant to prove incompetence is not a violation of due process so long as the standard of proof is by a preponderance of the evidence. Id. Washington's due process clause does not afford a broader due process protection than the Fourteenth Amendment. In re Personal Restraint Petition of Dyer, 143 Wn.2d 384, 394, 20 P.3d 907 (2001). As the trial court here explicitly noted that standard of proving incompetence was by a preponderance of the evidence, Tate cannot show a due process violation under either the United States or Washington State Constitution.

3. EVEN IF THE COURT ERRED IN ASSIGNING THE BURDEN, REVERSAL OF THE ADJUDICATION IS NOT THE APPROPRIATE REMEDY.

Tate maintains that the court's assigning the burden of proof to the defense requires reversal of his adjudication because the alleged error "tainted the entire proceeding." App. Br. at 8.³

³ If the adjudication is reversed but Tate is ultimately found competent, he will be retried as an adult as Juvenile Court no longer has jurisdiction due to his age. State v. Bushnell, 38 Wn. App. 809, 690 P.2d 601 (1984). King County Juvenile Court's jurisdiction over this case expired on December 1, 2011. CP 12.

However, if this Court concludes that the trial court improperly assigned the burden of proof to the defense, the remedy is to remand for the trial court to retrospectively decide whether or not Tate was competent at the time of trial. If Tate was competent, his adjudication should be affirmed. See United States v. Renfro, 825 F.2d 763, 767 (3rd Cir. 1987).

A retrospective competency determination “may be conducted if a meaningful hearing on the issue of the competency of the defendant at the prior proceedings is still possible.” Id.; See also United States v. Johns, 728 F.2d 953, 957-58 (7th Cir. 1984) (listing cases). Washington courts likewise have held that if a meaningful hearing could be accomplished despite the passage of time, the appellate court should remand for a retrospective determination of competency. State v. Wright, 19 Wn. App. 381, 575 P.2d 740 (1978); In re Application for a Writ of Habeas Corpus of Young, 8 Wn. App. 276, 278, 505 P.2d 824, 825 (1973). Because Tate was evaluated by experts prior to trial and the court

already heard all of the necessary evidence at a competency hearing, there is no doubt that the trial court could conduct a meaningful hearing on the issue. Furthermore, the witness who testified at the competency hearing was called by the State and no evidence was presented calling Tate's competence into question. Additionally, because Tate actually testified at the fact-finding hearing and the judge had an extensive opportunity to observe Tate, the court has even more evidence upon which to determine Tate's competence.

Further, because the trial judge here did not determine who held the burden of proof until after hearing the evidence regarding Tate's competency, Tate's argument that an alleged error in assigning the burden of proof tainted the evidentiary portion of the proceeding lacks merit. Thus, even if this Court finds that the court erred in holding Tate had the burden of proof, the remedy is not reversal of his adjudication but reversal of the competency determination and remand for a retrospective competency finding.

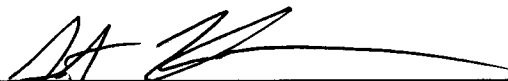
D. **CONCLUSION**

For the foregoing reasons, the State asks this Court to affirm
Tate's adjudication.

DATED this 7 day of August, 2012.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: 
SAMANTHA D. KANNER, WSBA #36943
Deputy Prosecuting Attorney
Attorneys for Respondent
Office WSBA #91002

Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Marla L. Zink, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Brief of Respondent, in STATE V. PARISH TATE, Cause No. 68068-4-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



Name
Done in Seattle, Washington

08-07-12

Date

2012 AUG -7 PM 3:15
CLERK OF SUPERIOR COURT
STATE OF WASHINGTON
JULIENNE M. HARRIS