

COA NO. 45203-1-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

ANTHONY CLARK,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PIERCE COUNTY

The Honorable John R. Hickman, Judge
The Honorable Bryan E. Chushcoff, Judge
The Honorable John A. McCarthy, Judge

REPLY BRIEF OF APPELLANT

CASEY GRANNIS
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 East Madison
Seattle, WA 98122
(206) 623-2373

TABLE OF CONTENTS

	Page
A. <u>ARGUMENT IN REPLY</u>	1
1. THE COURT VIOLATED CLARK'S CONSTITUTIONAL RIGHTS IN FAILING TO ORDER A SECOND COMPETENCY EVALUATION AND IN FAILING TO ACCOMMODATE HIS MENTAL LIMITATIONS.....	1
a. <u>Defense Counsel's Opinion Based On New Information Established A Reason To Doubt Competency, Requiring A Second Evaluation Be Ordered.</u>	1
b. <u>Even If Another Competency Evaluation Was Not Needed. The Court Still Erred In Failing To Accommodate Clark's Inability To Follow The Testimony</u>	3
2. THE COURT VIOLATED CLARK'S CONSTITUTIONAL RIGHT TO PRESENT A DEFENSE IN EXCLUDING RELEVANT EVIDENCE ABOUT CLARK'S MENTAL RETARDATION AND ITS IMPACT ON THE CREDIBILITY OF HIS CONFESSION TO POLICE.....	4
3. THE COURT LACKED AUTHORITY TO IMPOSE A SUSPENDED SENTENCE AND CONDITIONS OF PROBATION ON COUNTS II AND III BECAUSE THE COURT SENTENCED CLARK TO SERVE THE MAXIMUM TERM OF CONFINEMENT.....	6
B. <u>CONCLUSION</u>	7

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

DeHeer v. Seattle Post-Intelligencer,
60 Wn.2d 122, 372 P.2d 193 (1962)..... 2

State v. Gailus,
136 Wn. App. 191, 147 P.3d 1300 (2006),
overruled on other grounds by
State v. Sutherby,
165 Wn.2d 870, 204 P.3d 916 (2009)..... 7

State v. Israel
19 Wn. App. 773, 577 P.2d 631 (1978)..... 3

State v. McNear,
88 Wn. App. 331, 944 P.2d 1099 (1997)..... 2

State v. Ray,
116 Wn.2d 531, 806 P.2d 1220 (1991)..... 4

FEDERAL CASES

Drope v. Missouri
420 U.S. 162, 95 S. Ct. 896, 43 L. Ed. 2d 103 (1975)..... 3

RULES, STATUTES AND OTHER AUTHORITIES

ER 103(a)(2) 4

A. ARGUMENT IN REPLY

1. THE COURT VIOLATED CLARK'S CONSTITUTIONAL RIGHTS IN FAILING TO ORDER A SECOND COMPETENCY EVALUATION AND IN FAILING TO ACCOMMODATE HIS MENTAL LIMITATIONS.
 - a. Defense Counsel's Opinion Based On New Information Established A Reason To Doubt Competency, Requiring A Second Evaluation Be Ordered.

The trial court erred in failing to order another competency evaluation because defense counsel presented new information that Clark was unable to understand the proceedings during an actual trial, based on Clark's experience in the previous murder trial and his experience in the present trial.

The State claims there was no factual basis to support another competency evaluation because the information defense counsel pointed to "was contradicted by the deputy prosecutor and by the record from the parallel murder case." Brief of Respondent (BOR) at 12-13. The State maintains a different attorney's failure to advance a claim of mental incompetency in the murder case precluded the need for a competency evaluation in the present case. BOR at 14.

The State cites no authority for the proposition that the failure of different counsel to request a competency evaluation in a separate case controls whether there is reason to doubt competency in another case.

"Where no authorities are cited in support of a proposition, the court is not required to search out authorities, but may assume that counsel, after diligent search, has found none." DeHeer v. Seattle Post-Intelligencer, 60 Wn.2d 122, 126, 372 P.2d 193 (1962). The failure to cite authority constitutes a concession that the argument lacks merit. State v. McNear, 88 Wn. App. 331, 340, 944 P.2d 1099 (1997).

Further, defense counsel in the present case represented that counsel in the murder case had the same concerns about competency. 10RP 23-24. The prosecutor did not claim to have any knowledge of Clark's discussions with counsel. 11RP 14. The record does not clearly reflect what counsel in the murder case did or did not do in regards to competency concerns. Meanwhile, the prosecutor's limited observation of Clark during the murder trial was at no time accorded the status of evidentiary fact by the trial court. 10RP 22-23; 11RP 7-8, 13-15.

The State's suggestion that the prosecutor's opinion trumps defense counsel's observations when it comes to reason to doubt competency finds no sanctuary in the case law. The prosecutor's limited observation of Clark during the murder trial is not a substitute for the personal observations of defense counsel in the present case. Since defense counsel has "the closest contact with the defendant," the court must give considerable weight to the lawyer's representations regarding the client's

competency and ability to assist in his defense. State v. Israel, 19 Wn. App. 773, 779, 577 P.2d 631 (1978) (quoting Drope v. Missouri, 420 U.S. 162, 177 n.13, 95 S. Ct. 896, 43 L. Ed. 2d 103 (1975)).

Moreover, defense counsel in the present case did not rely solely on her understanding of what transpired in the murder case. She requested another competency evaluation because she also observed, based on her personal interactions with her client to which the prosecutor had no access, that Clark did not understand the proceedings in real time in the present case. 11RP 4-5, 10-12; 14RP 52, 129-30, 309-10. New information presented to the court triggered the need for another competency evaluation. The failure to order one violated Clark's right to due process.

b. Even If Another Competency Evaluation Was Not Needed, The Court Still Erred In Failing To Accommodate Clark's Inability To Follow The Testimony

The State asserts the trial court never ruled on the defense motion for accommodation and therefore this Court should not address the claimed error. BOR at 15-16. Clark disagrees with the State's interpretation of the record. Defense counsel requested a continuance to get a cognitive aid for Clark. 11RP 16-17. In context, it is clear that counsel wanted a cognitive aid to assist Clark at trial. 11RP 16-17. The trial court implicitly denied the request for a cognitive aid by denying the

continuance to allow counsel to get the cognitive aid. 11RP 16-22; CP 694. After the case was assigned to Judge Hickman for trial, counsel noted a standing objection to the lack of accommodation. 14RP 20. In these circumstances, the error in failing to provide accommodation is preserved for appeal. The State on appeal does not contest Clark's argument that such accommodation was needed. BOR at 14-16.

2. THE COURT VIOLATED CLARK'S CONSTITUTIONAL RIGHT TO PRESENT A DEFENSE IN EXCLUDING RELEVANT EVIDENCE ABOUT CLARK'S MENTAL RETARDATION AND ITS IMPACT ON THE CREDIBILITY OF HIS CONFESSION TO POLICE.

The State claims the trial court properly excluded defense expert testimony because the defense did not make an adequate offer of proof on the subject. BOR at 17-20. The State is mistaken.

"ER 103(a)(2) does not require that the details of the testimony be apparent. The rule requires only that the substance of the testimony be apparent from the record." State v. Ray, 116 Wn.2d 531, 539, 806 P.2d 1220 (1991). Defense counsel made the substance of Dr. Oneal's proposed testimony known to the trial court. Dr. Oneal was prepared to testify about Clark's mental limitations and how Clark would be prone to suggestibility during police interrogation. 10RP 25, 28-30; 14RP 47-48, 53-54; CP 79-94.

In this regard, the State is wrong that defense counsel proffered the testimony to address Clark's ability to handle cross-examination. BOR at 17, 19. The defense motion makes it quite clear that Dr. Oneal's testimony was offered to show the effect of Clark's mental limitations on his statements to police, from which the jury could assess the reliability and weight to be given to the confession. CP 79, 85-94; 14RP 47-48, 53-54.

The court categorically excluded this testimony, not on the basis of an inadequate offer of proof, but due to an improper understanding of the law. The court excluded the evidence on two grounds. First, the court wrongly believed evidence of Clark's mental retardation and its effect on suggestibility was only appropriately raised at the CrR 3.5 hearing if at all. 14RP 56-57, 84-85. Second, the court wrongly believed expert testimony on Clark's mental limitations was irrelevant because Clark had not presented a diminished capacity defense. 14RP 55-57, 84-85.

Notably, the State on appeal does not argue either rationale was a proper basis to exclude the expert testimony. The opening brief sets forth the reasoning and authority that refutes the trial court's position. Brief of Appellant at 39-47.

Instead, the State claims Dr. Oneal's testimony was inadmissible because the doctor would have invaded the jury's province by providing an opinion on Clark's credibility. BOR at 19. The trial court did not exclude

the testimony on that basis. And the record undermines the State's contention. As shown by the offer of proof, the defense did not offer the doctor's testimony to express an opinion on Clark's credibility. Instead, the doctor's testimony would have aided the jury in forming its own opinion regarding the credibility and weight to be given to Clark's confession. CP 79, 85-94; 14RP 47-48, 53-54.

3. THE COURT LACKED AUTHORITY TO IMPOSE A SUSPENDED SENTENCE AND CONDITIONS OF PROBATION ON COUNTS II AND III BECAUSE THE COURT SENTENCED CLARK TO SERVE THE MAXIMUM TERM OF CONFINEMENT.

The State contends that court did not order any probation and so no error occurred. BOR at 20. The record does not support its contention.

The court entered a written order entitled "conditions on suspended sentence" that specifies "the Court, having suspended that term, the Court herewith orders the following conditions and provisions: . . . 3. (x) Defendant will pay the following amounts to the Clerk of the Superior Court, Pierce County, Washington . . . see felony J+S."¹ CP 662-63. The order further provides "Revocation of this probation for nonpayment shall occur if defendant wilfully fails to make the payments having the financial

¹ The felony judgment and sentence imposed \$1,306.85 in legal financial obligations. CP 647.

ability to do so or wilfully fails to make a good faith effort to acquire means to make the payment." CP 663.

Yet the court did not suspend any term of the gross misdemeanor sentence, instead imposing the maximum 364 days in confinement. CP 662. If a court imposes a maximum sentence of confinement and actually suspends none of it, the court lacks the authority to impose probation. State v. Gailus, 136 Wn. App. 191, 201, 147 P.3d 1300 (2006), overruled on other grounds by State v. Sutherby, 165 Wn.2d 870, 204 P.3d 916 (2009). The court therefore lacked authority to enter the "conditions on suspended sentence" order.

B. CONCLUSION

For the reasons set forth above and in the opening brief, Clark requests that this Court reverse the convictions and order correction of the judgment and sentence.

DATED this 13th day of November 2014

Respectfully Submitted,

NIELSEN, BROMAN & KOCH, PLLC

CASEY GRANNIS

WSBA No. 37301

Office ID No. 91051

Attorneys for Appellant

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
v.)	COA NO. 45203-1-II
)	
ANTHONY CLARK,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 13TH DAY OF NOVEMBER 2014, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY EMAIL AND/OR DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] ANTHONY CLARK
DOC NO. 365895
WASHINGTON CORRECTIONS CENTER
P.O. BOX 900
SHELTON, WA 98584

SIGNED IN SEATTLE WASHINGTON, THIS 13TH DAY OF NOVEMBER 2014.

X *Patrick Mayovsky*

NIELSEN, BROMAN & KOCH, PLLC

November 13, 2014 - 3:30 PM

Transmittal Letter

Document Uploaded: 452031-Reply Brief.pdf

Case Name: Anthony Clark

Court of Appeals Case Number: 45203-1

Is this a Personal Restraint Petition? Yes No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: _____

Answer/Reply to Motion: _____

Brief: Reply

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: _____

Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: Patrick P Mayavsky - Email: mayovskyp@nwattorney.net

A copy of this document has been emailed to the following addresses:

PCpatcecf@co.pierce.wa.us