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Supreme Court No. 97585-0
(Court of Appeals No. 78079-4-I)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JIMROY BANNISTER,

Appellant.

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

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER AND DECISION BELOW

Jimroy Bannister, Appellant, asks this Court to review the opinion of the Court of Appeals in *State v. Bannister*, No. 78079-4-I (filed August 5, 2019). A copy of the opinion is attached as Appendix A.

B. ISSUE PRESENTED FOR REVIEW

1. Due process prohibits the conviction of an individual who is incompetent at the time of trial. Where a court has a reason to doubt a defendant's competency to stand trial, it must order a competency evaluation pursuant to RCW 10.77.060. Is a significant question of law under the state and federal constitutions involved where the trial court failed determine whether a doubt existed as to Mr. Bannister's competency despite notification from defense counsel that Mr. Bannister was acting bizarrely, had difficulty understanding their conversations, and would not be competent to plead guilty?

2. Mr. Bannister has a Sixth Amendment right to effective assistance of counsel throughout the criminal proceeding, including representation by counsel who is appraised of the relevant law. Is a significant question of law under the state and federal constitutions involved where Mr. Bannister's attorney failed to ask the trial court to order a competency hearing because counsel erroneously believed a lower

standard of competency exists for clients who stand trial than those who plead guilty?

C. STATEMENT OF THE CASE

Mr. Bannister has a long history of mental health diagnoses, with a current diagnosis of unspecified schizophrenia or other psychotic disorder. CP 34. He was twice determined to be incompetent in unrelated criminal cases, resulting in a dismissal of charges in 2011 and inpatient restoration at Western State Hospital in 2014. CP 30. Mr. Bannister was also detained for involuntary inpatient mental health treatment in 2005 and 2014. CP 30.

In June 2016, the State charged Mr. Bannister with possession of methamphetamine. CP 1. In February 2017, defense counsel in this case as well as defense counsel in another pending matter moved the court for a competency evaluation. RP 15. Counsel in the other matter informed the court that, after five months of working with Mr. Bannister, she continued to have concerns regarding his competency. RP 16. Some of her observations of Mr. Bannister were consistent with behaviors described in a 2014 competency report, where Mr. Bannister was found incompetent to stand trial, and counsel believed a competency evaluation was warranted. RP 16. Counsel in this case shared these concerns and echoed the need for an evaluation. *See* RP 16. The court granted the defense motion and ordered Mr. Bannister to complete an out-of-custody competency

evaluation at Western State Hospital. CP 11-16. Mr. Bannister did not attend the evaluation or subsequent competency hearing. *See* RP 39-40.

Several months later, the court again ordered a pretrial competency evaluation. CP 17-22. Western State Hospital submitted a competency evaluation report in November 2017, which concluded that Mr. Bannister was competent to stand trial. CP 27-37. The report, however, observed that this was the fourth competency evaluation for Mr. Bannister, and Mr. Bannister was previously determined to be incompetent to stand trial in other matters. CP 30. In a 2011 evaluation, Mr. Bannister was diagnosed with a psychotic disorder not otherwise specified and unknown substance abuse. CP 30. The evaluation stated that Mr. Bannister "DID NOT have the capacity to understand the nature of the proceedings against him and he DID NOT have the capacity to assist in his defense." CP 30 (emphasis in original).

A September 2014 evaluation similarly found that Mr. Bannister "did not have the capacity to understand the nature of the proceedings or the capacity to assist in his defense due to symptoms of psychosis and labile mood," ultimately resulting in inpatient restoration. CP 30. The evaluation included diagnoses of unknown substance-induced psychotic disorder; alcohol use disorder; unknown substance(s) use disorder, by

history; unspecified schizophrenia spectrum or other psychotic disorder (provisional). CP 30.

The November 2017 evaluation report described Mr. Bannister as "present[ing] with what appeared to be disorganized thought processes and potential delusional belief," and included a diagnosis of unspecified schizophrenia or other psychotic disorder and unknown substance use disorder per the DSM-5. CP 34. The evaluator believed that, although competent, Mr. Bannister "required a great deal of education about typical legal proceedings." CP 36. In late November 2017, the court found Mr. Bannister competent to stand trial. CP 23-25. Neither party objected to the finding. CP 24.

Mr. Bannister's trial began on January 30, 2018. *See generally* RP 1/30/18. At the conclusion of the trial and before the jury returned a verdict, however, defense counsel again raised the issue of competency. RP 492. Specifically, defense counsel informed the court that,

> I have had concerns about Mr. Bannister's competency. I do not believe that he was – would be found incompetent to stand trial either by a private expert or by western state. It is an issue. I believe that I even have trouble – as the court may know, the case law says that competency is different for giving up your right to trial versus going to trial. I just wanted to express that to the court. Even if we were to come to an agreement at this point, I don't know if I would feel comfortable moving forward with a plea agreement with Mr. Bannister, that he would understand the rights he was giving up. I only wanted to put that on the record –

> because it was becoming more and more clear throughout
> today some of the concerns that I have had in the past.

RP 492.

The court's response was to ignore the concerns regarding Mr. Bannister's competency altogether, instead simply asking for defense counsel's contact information for when the jury returned from deliberations. RP 492. The prosecution, however, asked the court to inquire further, arguing that, although Mr. Bannister had never expressed interest in a plea offer, "I do think there have been discussions that maybe should be talked about." RP 493-94. The court disagreed, noting that Mr. Bannister was previously found competent and that the jury was already in deliberations. RP 494. The court nonetheless asked defense counsel whether counsel believed it was necessary to address the issue of competency, an offer counsel declined, reiterating that "[t]here is a different bar for competency for entering pleas versus standing trial." RP 494. Immediately after asserting no evaluation was necessary, however, defense counsel further explained that "some of [Mr. Bannister's] behavior during trial – mostly when the jury wasn't in the room – seemed a little bit like he – bizarre to me. Some of our conversations – I'm not going to discuss the nature of those conversations – where we had some comprehension issues." RP 495.

Despite counsel's clear concerns, the court did not conduct an independent inquiry or otherwise question Mr. Bannister to assess his understanding of the proceedings. *See* RP 495. The court simply accepted counsel's representation of the law, making no findings on the issue of competency. *See* RP 495. The jury later delivered a verdict of guilty of possession of a methamphetamine. CP 89.

The Court of Appeals affirmed Mr. Bannister's conviction but remanded to the sentencing court to consider whether Mr. Bannister has a mental health condition that would require the court to determine whether he has the ability to pay the DNA fee. Appendix A.

D. ARGUMENT WHY REVIEW SHOULD BE GRANTED

1. The trial court's failure to determine Mr. Bannister's competency violates due process, warranting review under RAP 13.4(b)(3).

The trial court failed to fulfill its responsibility under RCW 10.77.060 when it declined to make a threshold inquiry of whether there was a reason to doubt Mr. Bannister's competency after defense counsel notified the court that he had renewed concerns about Mr. Bannister's competency and did not feel as though Mr. Bannister would be competent to enter a plea. An individual has a constitutional right "not to stand trial unless legally competent." *State v. Ortiz-Abrego*, 187 Wn.2d 394, 402, 387 P.3d 638 (2017); U.S. Const. amend. XIV; Const. art. I, § 3.

Competency requires that a defendant both be able to understand the nature of the proceedings as well as be able to assist in his or her own defense. RCW 10.77.010(15); *Dusky v. United States*, 362 U.S. 402, 80 S. Ct. 788, 4 L. Ed. 2d 824 (1960). Under RCW 10.77.050, the right not to be tried while incompetent is explicitly extended to conviction and sentencing. RCW 10.77.050. Overall, the procedural safeguards in RCW 10.77 make Washington's competency standard more protective than its federal counterpart. *Ortiz-Abrego*, 187 Wn.2d at 404. A court's failure to observe procedures designed to protect this fundamental right is a denial of due process requiring reversal. *State v. O'Neal*, 23 Wn. App. 899, 901, 600 P.2d 570 (1979) (citing *Drope v. Missouri*, 420 U.S. 162, 181, 95 S. Ct. 896, 43 L. Ed. 2d 103 (1975) and *Pate v. Robinson*, 383 U.S. 375, 86 S. Ct. 836, 15 L. Ed. 2d 815 (1966)).

RCW 10.77.060(1)(a) requires a trial court to order a competency evaluation whenever there is a reason to doubt competency. The question of whether there is reason to doubt competency is distinct from the ultimate question of whether a defendant is competent to stand trial. *City of Seattle v. Gordon*, 39 Wn. App. 437, 441 693 P.2d 741 (1985). In making this threshold determination, a court should consider (1) a defendant's apparent understanding of the charges and consequences of a conviction; (2) a defendant's apparent understanding of the facts giving

rise to the charge; and (3) a defendant's ability to relate the facts to his attorney in order to help prepare the defense. *Id.* at 441-42. Although not determinative, "the court should give considerable weight to the attorney's opinion regarding a client's competency and ability to assist in the defense." *State v. Crenshaw,* 27 Wn. App. 326, 331, 617 P.2d 1041 (1980).

Given the fluid nature of mental health symptoms, a determination of competency is not set in stone. *Drope*, 420 U.S. at 181 (a trial court "must always be alert" to circumstances suggesting a change in competency). Even where a defendant has previously been found competent, courts must revisit the issue of competency where "the court is provided with new information that indicates a significant change in the defendant's mental condition." *See State v. McCarthy*, __ P.3d ___, 2019 WL 3720899 at *5 (August 8, 2019).

In this case, it is undebatable that defense counsel's statements to the court indicated a significant change in Mr. Bannister's mental condition, thereby triggering the court's duty to inquire further under RCW 10.77. Counsel specifically informed the court that, (1) previous concerns regarding Mr. Bannister's competency were "becoming more and more clear" throughout the day; (2) Mr. Bannister was exhibiting bizarre behavior; (3) defense counsel believed Mr. Bannister had difficulty

comprehending attorney-client conversations; and (4) defense counsel did not believe Mr. Bannister likely had the capacity to enter a guilty plea as he would not be able to understand his legal rights. RP 492, 495. This new information was provided against the backdrop of Mr. Bannister's prior findings of incompetence in other criminal matters, his current diagnoses of unspecified schizophrenia, and the most recent evaluator's conclusion that Mr. Bannister would require ongoing support to understand the proceedings. CP 30, 34, 36. Counsel's statements were not simply in passing; they reflected a renewed concern that the court was required to address to protect Mr. Bannister's right to due process.

The trial court's failure to make the threshold determination of whether there was a reason to doubt Mr. Bannister's competency appears to be rooted in legal error: First, to the extent that the trial court even considered Mr. Bannister's competency, it seemingly relied on a prior finding of competency as conclusively resolving the issue of whether Mr. Bannister was competent at the conclusion of the trial. RP 494-95. While prior evaluations are certainly relevant to a consideration of Mr. Bannister's current competency, they are not binding, particularly given the fluctuating nature of his mental health symptoms.

Second, the trial court seemed to place undue import on the fact that the jury was already deliberating when defense counsel brought the issue to the court's attention:

> The defendant was found competent, right? We have now gone through trial. The jury has been sent out to deliberate, and we are making this record. ... What I want to know from [defense counsel] is what is the law then about raising competency when we have just sent the jury out to deliberate because he was found competent to stand trial? This was only just raised again just now after the jury was sent out to deliberate.
>
> * * * *
>
> I just want to clarify that [defense counsel] brought this up after we sent the jury out to deliberate.

RP 494-95. The court obviously considered the procedural posture of the case to be a critical factor in whether it was appropriate to address Mr. Bannister's competency. Timing is not, however, relevant as to whether courts should address concerns of a defendant's competency. *See Ortiz-Abrego*, 187 Wn.2d at 400-02 (defendant determined to be incompetent to stand trial at post-conviction competency hearing). The trial court should have addressed any competency issues regardless of the status of deliberations.

Finally, the trial court erred in relying on defense counsel's statement that Mr. Bannister was competent to stand trial. It was a misstatement of the law, applying a higher standard of competency for a

defendant to plead guilty than to stand trial. It is well settled that the, "competency standard for pleading guilty or waiving right to counsel is the same as the competency standard for standing trial." *In re Fleming*, 142 Wn.2d 853, 862, 16 P.3d 610 (2001) (citing *Godinez*, 509 U.S. at 399).[1]

This case is distinguishable from our Supreme Court's recent decision in *State v. McCarthy*, __ P.3d __, 2019 WL 3720899. Unlike McCarthy's defense counsel, Mr. Bannister's attorney unequivocally raised concerns about Mr. Bannister's competency; defense counsel's statement that he did not believe Mr. Bannister was competent to plead guilty because he would not understand the rights he was giving up was akin to disputing Mr. Bannister's ability to understand the nature of the proceedings against him. *See id.* at *7. This, in tandem with counsel's references to the reemergence of Mr. Bannister's prior behaviors, was

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[1] The right not to be tried while incompetent cannot be waived by defense counsel. "It is axiomatic that a person incompetent to stand trial cannot affect a knowing or intelligent waiver." *State v. Heddrick*, 166 Wn.2d 898, 906, 215 P.3d 201 (2009) (citing *State v. Smith,* 88 Wn.2d 639, 642, 564 P.2d 1154 (1977), *overruled on other grounds by State v. Jones,* 99 Wn.2d 735, 744, 664 P.2d 1216 (1983)); *see also Fleming*, 142 Wn.2d at 866 ("This court has held that a defendant's counsel does not have the power to waive the defendant's right under RCW 10.77.050") (citing *State v. Coville,* 88 Wn.2d 43, 47, 558 P.2d 1346 (1977)). Allowing waiver in this case in particular – where defense counsel's statement that the court need not inquire into Mr. Bannister's competency was based on an error of law – would be contrary to caselaw and fundamentally unfair.

sufficient new information requiring the court to assess whether there was a doubt as to Mr. Bannister's competency.

Proper consideration would likely have led the court to conclude that there was a reason to doubt Mr. Bannister's competency to stand trial. In assessing competency, courts should look at several "competency factors," including the "defendant's appearance, demeanor, conduct, personal and family history, past behavior, medical and psychiatric reports and the statements of counsel." *Ortiz-Abrego*, 187 Wn.2d at 404 (quoting *State v. Dodd*, 70 Wn.2d 513, 514, 424 P.2d 302 (1967)). In this case, Mr. Bannister was found to be incompetent in two prior criminal cases, and was admitted for inpatient restoration at Western State Hospital in 2014. CP 30. He has a current DSM-5 diagnosis of unspecified schizophrenia and other psychotic disorder and a history of similar diagnoses. CP 30, 34.

Although the competency report from November 2017 concluded that Mr. Bannister was competent to stand trial in the current matter, the actual trial did not occur until several weeks after the evaluation. The evaluation report also reflected ongoing mental health concerns. Mr. Bannister reported that he would ideally like to sleep three hours per night but did not know how much he was sleeping. CP 31. At times he was able to express himself coherently and at other times "his statements demonstrated evidence of tangential, circumstantial, and fragmented

thought processes." CP 32. He believed the United States is "Judah's Land," and is therefore subject to "Judah's Law." CP 32. The evaluator noted that "[a]t the time of the interview for this evaluation, Mr. Bannister presented with what appeared to be disorganized thought processes and potential delusional beliefs." CP 34.

The evaluation report also reveals Mr. Bannister's inconsistent understanding of the law. The evaluator believed that, during the proceedings, Mr. Bannister "will likely require ongoing support to understand the legal proceedings, particularly related to more complex topics[.]" CP 36. Yet, there is no evidence that Mr. Bannister was provided with any specialized support during the trial. *Ortiz-Abrego*, 187 Wn.2d 405-06.

In affirming Mr. Bannister's conviction, the Court of Appeals conflated Mr. Bannister's argument regarding the trial court's duty to determine whether there was a reason to doubt competency with a subsequent finding of incompetency. *See* App. A at 7. Namely, the Court of Appeals concluded that, because counsel's statements did not give rise to a doubt about competency, the trial court was not required to determine whether Mr. Bannister was competent. *See* App. A at 7. While it is true that RCW 10.77.060 requires a doubt as to competency before ordering an evaluation, where counsel raises the issue of competency, the trial court is

obliged to further inquire into the facts in order to make the threshold determination of whether such doubt exists. *Gordon*, 39 Wn. App. at 441-42. That determination did not occur in Mr. Bannister's case.

Here, the evaluation evidenced someone who has serious ongoing mental health issues and, given the new information provided by defense counsel, the trial court was required to inquire further. *Id.* Failure to do so was a denial of due process, warranting review under RAP 13.4(b)(3).

2. Mr. Bannister was deprived of his constitutional right to effective assistance of counsel, warranting review under RAP 13.4(b)(3).

Defense counsel had serious misgivings about Mr. Bannister's competency, yet failed to ask the court for a competency evaluation based upon his misunderstanding of the law. Defendants in criminal proceedings have a constitutional right to effective assistance of counsel. *See* U.S. Const. amend. VI; Const. art. I, § 22. To establish a claim of ineffective assistance of counsel, a defendant must show that (1) "counsel's performance is deficient" and (2) "the deficient performance prejudiced the defense." *Strickland v. Washington,* 466 U.S. 668, 687, 104 S. Ct. 2052, L. Ed. 2d 674 (1984); *State v. Thomas,* 109 Wn.2d 222, 229, 743 P.2d 816 (1987). Mr. Bannister's case satisfies both prongs.

"Where an attorney unreasonably fails to research or apply relevant statutes without any tactical purpose, that attorney's performance

is constitutionally deficient." *State v. Kyllo,* 166 Wn.2d 856, 862-83, 215 P.3d 177 (2009); *see also Hinton v. Alabama,* 571 U.S. 263, 274, 134 S. Ct. 1081, 188 L. Ed. 2d 1 (2014) ("[a]n attorney's ignorance of a point of law that is fundamental to his case combined with his failure to perform basic research on that point is a quintessential example of unreasonable performance under *Strickland.").* In Mr. Bannister's case, counsel declined further inquiry into Mr. Bannister's competency because "as the court may know, the case law says that competency is different for giving up your right to trial versus going to trial." RP 492. This was not a tactical decision. Indeed, Washington courts have looked at this very issue and have determined that, where defense counsel has reason to know a defendant is incompetent, failure to raise competency is not "within the realm of reasonable professional judgment." *Fleming*, 142 Wn.2d at 866-67.

Moreover, counsel's failure to ask the court to determine whether there was a reason to doubt Mr. Bannister's competency was clearly prejudicial. To establish prejudice sufficient to satisfy the second *Strickland* prong, a defendant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Kyllo*, 166 Wn.2d at 862. "A reasonable probability is a probability sufficient to undermine confidence

in the outcome." *Strickland*, 466 U.S. at 694; *Fleming*, 142 Wn.2d at 866 (citing *State v. Carter,* 56 Wn. App. 217, 219, 783 P.2d 589 (1989)).

In this case, had the trial court applied the appropriate factors under *Gordon* and engaged in a colloquy with Mr. Bannister, it is highly likely that the court would have determined doubts existed as to Mr. Bannister's competency. The court would then be required to order a competency evaluation.

Contrary to the Court of Appeals' conclusion, Mr. Bannister's right to due process was violated when he did not receive effective assistance of counsel. Counsel's failure to fully argue the law relating to competency rested on the erroneous conclusion that Mr. Bannister did not meet an elevated standard of competency. This Court should accept review.

E. CONCLUSION

For the reasons set forth above Jimroy Bannister respectfully requests that this Court grant review.

DATED this 27th day of August, 2019.

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APPENDIX A

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IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. JIMROY MANUEL BANNISTER, Appellant.	No. 78079-4-I DIVISION ONE UNPUBLISHED OPINION FILED: August 5, 2019

LEACH, J. — Jimroy Bannister appeals his conviction for possession of methamphetamine. After Bannister had a pretrial competency evaluation, the trial court found him competent. He claims the trial court should have inquired further into his competency after his counsel raised the issue a second time at the end of closing arguments. He also contends his counsel provided him ineffective assistance by misstating the law about the competency standard. And he challenges the trial court's imposition of the $100 DNA (deoxyribonucleic acid) fee.

First, chapter 10.77 RCW does not require that a court inquire into a defendant's competency unless it has doubts about his competency. Here, Bannister's trial counsel again raised the issue of competency after the trial court's initial competency ruling but stated that he believed Bannister was competent. Bannister provides no other evidence to show that the trial court had

reason to doubt his competency. Second, because Bannister does not prove his trial counsel's mistaken assertion that different competency standards exist for standing trial and pleading guilty contributed to his counsel's belief that he was competent, he does not show that his counsel performed deficiently. Last, even though Bannister has a documented history of mental health issues, the trial court did not consider his ability to pay the $100 DNA fee like RCW 9.94A.777 requires when a defendant suffers from a mental health condition. We affirm in part and remand to the trial court for it to consider whether Bannister has a mental health condition that would require it to determine whether he has the ability to pay the DNA fee.

BACKGROUND

The State charged Bannister with possession of methamphetamine. In February 2017, at a pretrial hearing, his counsel asked the court for a competency evaluation of Bannister. The trial court ordered Bannister to complete an out-of-custody competency evaluation at Western State Hospital. Bannister did not attend the evaluation or his subsequent competency hearing. In November 2017, the court again ordered a competency evaluation.

Dr. Cynthia Mundt, a licensed psychologist with the Office of Forensic and Mental Health Services, evaluated Bannister. Her evaluation report noted that Bannister had been assessed for competency to stand trial twice before and both assessments stated that he presented symptoms of psychosis and concluded that he did not have the requisite capacity. After one assessment, he

participated in inpatient competency restoration that restored him to competency. The evaluator at that time noted that Bannister's symptoms of psychosis were potentially substance induced. Mundt documented that Bannister had been involuntarily detained for inpatient treatment at least once for substance-induced symptoms. She diagnosed Bannister with unspecified schizophrenia and other psychotic disorder and unknown substance use disorder. She stated that although Bannister "required a great deal of education about typical legal proceedings" and presented "with some mild evidence of cognitive disorganization," he demonstrated a "reasonable understanding of his charge and the legal proceedings he was facing" and "was able to recall detailed information during the evaluation." She concluded, "[D]espite [Bannister's] current symptoms of mental illness, [he] has the current capacity to understand the nature of the proceedings against him and the capacity to assist in his defense."

The trial court found Bannister competent to stand trial. Bannister's trial started in late January 2018. Right after closing arguments, Bannister's counsel stated that he wanted "to put something on the record before we recess." He then stated his concerns about Bannister's competency:

> It is—it is awkward for me to say, but I believe that—I have had concerns about Mr. Bannister's competency. I do not believe that he was—would be found incompetent to stand trial either by a private expert or by Western State. It is an issue. I believe that I even have trouble—as the court may know, the case law says that competency is different for giving up your right to trial versus going to trial. I just wanted to express that to the court. Even if we were

> to come to an agreement at this point, I don't know if I would feel comfortable moving forward with a plea agreement with Mr. Bannister, that he would understand the rights he was giving up.
>
> I only wanted to put that on the record because—it was becoming more and more clear throughout today some of the concerns that I have had in the past.

The trial court responded,

> The defendant was found competent, right? We have now gone through trial. The jury has been sent out to deliberate, and now we are making this record.
>
> . . . .
>
> What I want to know from Mr. Repanich is what is the law then about raising competency when we have just sent the jury out to deliberate because he was found competent to stand trial? This was only just raised again just now after the jury was sent out to deliberate.
>
> Are you suggesting that we need to take up competency again concerning your client's ability to stand trial?

Bannister's trial counsel clarified, "I believe that Mr. Bannister would be found competent to stand trial." He explained that he was raising the issue to "preserve [it] for the record" because "some of [Bannister's] behavior during trial—mostly when the jury wasn't in the room—seemed a little bit like he—bizarre. [There were] some comprehension issues." The trial court clarified that counsel was not "asking [the court] to do anything. [He was] simply making a record." Counsel responded, "Correct."

The jury found Bannister guilty as charged. The trial court imposed a sentence of credit for time served. Bannister appeals.

ANALYSIS

Competency

First, Bannister contends that the trial court erred when it did not (1) inquire further about his competency and (2) order a new competency evaluation after his trial counsel raised the issue after closing arguments. We disagree.

The due process clause of the Fourteenth Amendment to the United States Constitution guarantees a criminal defendant the right not to be tried while incompetent.[1] If a court has reason to doubt a defendant's competency, it violates due process when it fails to observe the procedures chapter 10.77 RCW provides to determine competency.[2] "'Incompetency' means a person lacks the capacity to understand the nature of the proceedings against him or her or to assist in his or her own defense as a result of mental disease or defect."[3]

If a trial court has reason to doubt the defendant's competency, the statute requires that the court order an expert to "evaluate and report upon the mental condition of the defendant."[4] The court must give "considerable weight" to defense counsel's opinion regarding his client's competency and ability to assist the defense.[5] Once the court makes a competency determination, it need not revisit competency unless new information shows a change in the defendant's

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[1] State v. Heddrick, 166 Wn.2d 898, 903, 215 P.3d 201 (2009).
[2] Heddrick, 166 Wn.2d at 904.
[3] RCW 10.77.010(15).
[4] RCW 10.77.060(1)(a).
[5] State v. Lord, 117 Wn.2d 829, 901, 822 P.2d 177 (1991), overruled on other grounds by State v. Schierman, 192 Wn.2d 577, 438 P.3d 1063 (2018).

condition.[6] Reviewing courts defer to the trial court's judgment of a defendant's competency.[7] We will reverse a trial court's competency decision only upon finding an abuse of discretion.[8] A trial court abuses its discretion when no reasonable judge would have ruled the way that the trial judge did.[9]

Here, although after closing arguments Bannister's trial counsel stated that he "had concerns about Mr. Bannister's competency," he twice stated that he did not think Bannister was incompetent to stand trial. The sole reason that counsel provided for raising the issue was that Bannister's behavior seemed "bizarre" because Bannister was having comprehension issues. When the trial court expressly asked counsel whether he was asking it to do anything, counsel stated, "No"; he wanted only to preserve the issue on the record. Counsel provided no new information to suggest that Bannister's competency had changed since the court made its original competency determination.

Bannister contends the trial court erred when it failed to make "the threshold determination about whether a doubt exists sufficient to warrant an evaluation" because it (1) relied on its previous finding that he was competent, (2) placed "undue import" on the fact that the jury was already deliberating when his counsel raised the issue of competency, and (3) relied on a misstatement of law by accepting his counsel's assertion that different competency standards

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[6] State v. Ortiz, 119 Wn.2d 294, 301, 831 P.2d 1060 (1992), disapproved of on other grounds by State v. Condon, 182 Wn.2d 307, 343 P.3d 357 (2015).
[7] State v. Coley, 180 Wn.2d 543, 551, 326 P.3d 702 (2014).
[8] Coley, 180 Wn.2d at 551.
[9] State v. Arredondo, 188 Wn.2d 244, 256, 394 P.3d 348 (2017).

inform a defendant's ability to stand trial or to plead guilty. But Bannister cites no authority requiring the trial court to make a "threshold determination" about a defendant's competency without first having doubts about his competency. Bannister cites only City of Seattle v. Gordon,[10] in which this court differentiated between a determination of a reason to doubt competency and a determination of competency; we stated that a factual basis must support a motion to determine competency. For the reasons discussed below, Bannister's trial counsel did not provide a factual basis that would have supported that Bannister was incompetent.

Bannister asserts that the trial court had reason to doubt his competency because of the information documented in his evaluation report, including his history of being found incompetent, his diagnoses, and Mundt's notes about his disorganized thought processes and inconsistent understanding of the law. But Bannister does not challenge the trial court's initial finding of competency, and he does not explain why the same information the trial court considered before finding that he was competent should later cause the court to doubt his competency. Based on Bannister's trial counsel's representations, a reasonable trial judge could have had no doubts about his competency or not believed that it had a factual basis to inquire about it. So chapter 10.77 RCW did not require the trial court to make any further inquiry. The court did not abuse its discretion by

[10] 39 Wn. App. 437, 441-42, 693 P.2d 741 (1985).

not inquiring further into Bannister's competency or ordering a new competency evaluation.

Ineffective Assistance of Counsel

Next, Bannister contends that his trial counsel provided ineffective assistance because he did not ask the court to order a competency evaluation based on a misunderstanding of law. We disagree.

The Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution guarantee the right to effective assistance of counsel to help ensure a fair trial.[11] Claims of ineffective assistance present mixed questions of law and fact, which this court reviews de novo.[12]

We examine an ineffective assistance claim with a strong presumption that counsel's representation was effective.[13] To succeed on an ineffective assistance claim, the defendant must show that (1) his counsel's performance fell below an objective standard of reasonableness and (2) prejudiced him.[14] Counsel's performance is deficient if it was unreasonable under prevailing professional norms and was not sound trial strategy.[15] We evaluate the

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[11] See State v. Grier, 171 Wn.2d 17, 32, 246 P.3d 1260 (2011); see also State v. Coristine, 177 Wn.2d 370, 375, 300 P.3d 400 (2013).

[12] In re Pers. Restraint of Fleming, 142 Wn.2d 853, 865, 16 P.3d 610 (2001).

[13] In re Pers. Restraint of Davis, 152 Wn.2d 647, 673, 101 P.3d 1 (2004).

[14] Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

[15] Davis, 152 Wn.2d at 673.

reasonableness of counsel's performance from "'counsel's perspective at the time of the alleged error and in light of all the circumstances.'"[16] A showing of prejudice requires that the defendant show a reasonable probability that the result of the trial would have been different without his counsel's deficient performance.[17] "A reasonable probability is a probability sufficient to undermine confidence in the outcome."[18]

Bannister claims that his trial counsel provided deficient performance because he stated that different competency standards applied to a defendant's ability to stand trial and his ability to plead guilty and did not raise competency when he had reason to know that Bannister was incompetent. The State does not dispute that the same standard of competency applies whether a defendant decides to go to trial or plead guilty. But Bannister does not show that his counsel applied the incorrect competency standard in his assessment that Bannister was competent after closing arguments. Although Bannister's counsel misstated that different competency standards exist, counsel neither misstated the standard nor discussed the law related to competency. Bannister does not show deficient performance.

Even if his counsel's performance was deficient, Bannister does not show prejudice. As discussed above, Bannister presented no evidence that his

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[16] Davis, 152 Wn.2d at 673 (quoting Kimmelman v. Morrison, 477 U.S. 365, 384, 106 S. Ct. 2574, 91 L. Ed. 2d 305 (1986)).
[17] Strickland, 466 U.S. at 694.
[18] Strickland, 466 U.S. at 694.

circumstances had changed or gave the trial court reason to doubt his competency. So he does not show a reasonable probability that the trial court would have found him incompetent. He does not overcome the strong presumption that his counsel's performance was effective.

Legal Financial Obligations

Last, Bannister asserts that because he suffers from a mental health condition, the trial court exceeded its authority by imposing the DNA fee without first determining whether he had the ability to pay as RCW 9.94A.777(1) requires. The State concedes that this issue requires remand. We agree.

We review the adequacy of the trial court's individualized inquiry into a defendant's ability to pay legal financial obligations (LFOs) de novo.[19]

In general, a court must impose mandatory LFOs regardless of the defendant's ability to pay.[20] However, RCW 9.94A.777 requires that if a defendant is unable to participate in gainful employment because of a mental disorder, the sentencing judge must determine if he has the ability to pay before imposing LFOs other than restitution or the victim penalty assessment (VPA):[21]

> (1) Before imposing any legal financial obligations upon a defendant who suffers from a mental health condition, other than restitution or the victim penalty assessment under RCW 7.68.035, a judge must first determine that the defendant, under the terms of this section, has the means to pay such additional sums.

[19] State v. Ramirez, 191 Wn.2d 732, 740, 426 P.3d 714 (2018).

[20] State v. Lundy, 176 Wn. App. 96, 102-03, 308 P.3d 755 (2013).

[21] Bannister also asserts that the trial court should reevaluate the VPA on remand. But RCW 9.94A.777(1) exempts the VPA from its requirements.

> (2) For the purposes of this section, a defendant suffers from a mental health condition when the defendant has been diagnosed with a mental disorder that prevents the defendant from participating in gainful employment, as evidenced by a determination of mental disability as the basis for the defendant's enrollment in a public assistance program, a record of involuntary hospitalization, or by competent expert evaluation.

Here, the trial court imposed only mandatory LFOs, which were the $500 VPA and the $100 DNA fee.[22] Bannister's competency evaluation report documented that he has a history of mental health issues, and Mundt diagnosed him with schizophrenia and other psychotic disorder and unknown substance use disorder. During the sentencing hearing, his trial counsel stated that he had been self-studying to become an auto mechanic and had "been supporting himself" while being homeless for a number of years. And the evaluation report states that while Bannister was in jail for the charge at issue here, he worked in the jail's kitchen performing janitorial services. The trial court did not inquire about whether any mental health condition prevents Bannister from participating in gainful employment. We remand for the trial court to do so as RCW 9.94A.777 requires. And if the court answers in the affirmative, it must also decide whether Bannister has the ability to pay the DNA fee.

[22] RCW 7.68.035(1)(a) (VPA); RCW 43.43.7541 (DNA fee); Lundy, 176 Wn. App. at 102 (defining the VPA and the DNA fee as mandatory).

CONCLUSION

We affirm in part and remand to the trial court for it to consider whether Bannister has a mental health condition that would require it to determine whether he has the ability to pay the DNA fee.

Leach, J.

WE CONCUR:

Chun, J.

Appelwick, CJ

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 78079-4-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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