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STATE OF WASHINGTON
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NO. 98888-9

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ANTHONY HAND
Petitioner.

PETITION FOR REVIEW OF THE COURT OF APPEALS
JULY 14, 2020 DECISION IN STATE V. HAND COA #53111-9-II

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A. IDENTITY OF MOVING PARTY

Petitioner Anthony Hand through his attorney, Lise Ellner, asks this court to accept review of the Court of Appeals decision designated in Part B of this petition.

B. COURT OF APPEALS DECISION

Anthony Hand requests review of the Court of Appeals July 14, 2020 ruling. A copy of the decision is attached (Appendix A).

C. ISSUE PRESENTED FOR REVIEW

1. Should this court accept review of Mr. Hand's case when the Court of Appeals erroneously held that he waived the right to appeal the denial of his motion to dismiss by pleading guilty when his due process claim concerns the circumstances under which his plea was made?

D. STATEMENT OF THE CASE

Anthony Hand is a 53-year-old homeless man with a long history of mental health and substance abuse issues. CP 126-27; 8/20/18 RP 6-7. Since 2004, Mr. Hand has been evaluated by Western State for competency five times. CP 19-21, 122-26. In 2015, Mr. Hand spent 45-days in Western State for a competency restoration. CP 126. Mr. Hand has also been treated for depression, anxiety, and Antisocial Personality Disorder during his lifetime. CP 126-27.

Police arrested Mr. Hand after he tripped the alarm entering

a window at the Spanaway Lutheran Church, in search of a restroom and toilet paper. CP 1. The state charged Mr. Hand with one count of Burglary in the Second Degree. CP 2. The trial court ordered Mr. Hand to undergo an in-custody competency evaluation and ordered that he be transported to Western State Hospital within seven days of the court's order. CP 33. The state did not transport Mr. Hand for his evaluation until 35 days after the court's deadline. 11/7/18 RP 1.

In exchange for a plea, the state amended the charge to Possession of Stolen Property in the Second Degree and recommended for a Drug Offender Sentencing Alternative (DOSA). CP 217; 12/21/18 RP 2-3. Mr. Hand pleaded guilty and the court imposed a 25-month DOSA sentence. 12/21/18 RP 7-8; CP 239-40. Mr. Hand filed a timely notice of appeal. CP 261-64.

The Court of Appeals affirmed Mr. Hand's conviction and held that he waived the ability to challenge the trial court's denial of his motion to dismiss when he pleaded guilty. Appendix A at 4.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. THIS COURT SHOULD ACCEPT REVIEW BECAUSE THE COURT OF APPEALS ERRED BY HOLDING THAT MR. HAND WAIVED THE RIGHT TO APPEAL THE DENIAL OF HIS MOTION TO DISMISS WHEN HE PLEADED GUILTY BECAUSE HIS CLAIM IS BASED ON THE CIRCUMSTANCES UNDER WHICH HE ENTERED HIS PLEA

The Court of Appeals declined to address the merits of Mr. Hand's argument because it held that he waived the right to challenge the denial of his motion to dismiss when he pleaded guilty. Appendix A at 4. A defendant who pleads guilty generally waives the right to appeal. *State v. Phelps*, 113 Wn. App. 347, 352, 57 P.3d 624 (2002) (citing *State v. Majors*, 94 Wn.2d 354, 356, 616 P.2d 1237 (1980)). However, a defendant does not waive his right to appeal based on collateral questions such as the circumstances under which his plea was made. *State v. Peltier*, 181 Wn.2d 290, 294-95, 332 P.3d 457 (2014) (citing *Phelps*, 113 Wn. App. at 352).

The record of Mr. Hand's case establishes that he decided to plead guilty after several weeks of unauthorized incarceration as he waited for a competency evaluation. Mr. Hand's guilty plea was the

product of the state refusing to transport him to Western State before the trial court's deadline. Mr. Hand's appeal is based on a substantive due process violation leading up to his plea. His claim concerns the circumstances under which his plea was made and therefore he did not waive the right to appeal that aspect of his case when he pleaded guilty. *Peltier*, 181 Wn.2d at 294-95 (citing *Phelps*, 113 Wn. App. at 352).

This court should grant review under RAP 13.4(b) (3) and (4):

(b) Considerations Governing Acceptance of Review. A petition for review will be accepted by the Supreme Court only:

...

(3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or

(4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

RAP 13.4(b). Mr. Hand's case involves important questions about the substantive due process rights of criminal defendants who are incarcerated while they wait for competency evaluations or restoration treatment. Mr. Hand's case exemplifies the disregard for

court orders and constitutional principles that cause many mentally ill defendants to remain incarcerated for far longer than the law authorizes contrary to their right to due process.

“Freedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that [the Due Process] Clause protects.” *United States v. Trueblood*, 822 F.3d 1037, 1042 (9th Cir. 2016) (quoting *Zadvydas v. Davis*, 533 U.S. 678, 690, 121 S.Ct. 2491, 150 L.Ed.2d 653 (2001) (setting presumptively reasonable time limits on immigration detention)).

“Constitutional questions pertaining to the pretrial confinement of incompetent criminal defendants are analyzed under the due process clause of the Fourteenth Amendment.” *State v. Hand*, 192 Wn.2d 289, 295, 429 P.3d 502 (2018) (citing *Jackson v. Indiana*, 406 U.S. 715, 731, 92 S.Ct. 1845, 32 L.Ed.2d 435 (1972)).

Detaining incapacitated defendants for “weeks or months” violates their substantive due process rights because “the nature and duration of their incarceration bear no reasonable relation to

the evaluative and restorative purposes for which courts commit those individuals.” *Hand*, 192 Wn.2d at 297 (citing *Or. Advocacy Ctr. v. Mink*, 322 F.3d 1101, 1122 (9th Cir. 2003)). Holding defendants in jail directly conflicts with the goal of competency restoration:

Each additional day of incarceration causes further deterioration of class members' mental health, increases the risks of suicide and of victimization by other inmates, and causes illness to become more habitual and harder to cure, resulting in longer restoration periods or in the inability to ever restore that person to competency.

Hand, 192 Wn.2d at 297-98 (quoting *Trueblood v. Dep't of Soc. & Health Servs.*, 101 F.Supp.3d 1010, 1022 (W.D. Wash. 2015) (overruled on other grounds by *Trueblood*, 822 F.3d 1037, 1042 (9th Cir. 2016)). Due to this concern, the *Trueblood* court entered a permanent injunction requiring that incompetent defendants in Washington be admitted for an evaluation within 7 days of the trial court's order. *Trueblood*, 101 F.Supp.3d at 1023-24.

Washington courts have upheld dismissals based on the state's inexcusable delay when that delay forces a defendant into a "Hobson's choice" between the right to trial and another one of his constitutional rights. See *State v. Michielli*, 132 Wn.2d 229, 245,

937 P.2d 587 (1997) (affirming dismissal when the state's delay in amending its information forced the defendant to waive his right to speedy trial to prepare a defense); *State v. Sherman*, 59 Wn. App. 763, 769, 801 P.2d 274 (1990) (affirming dismissal when the state failed to provide discovery necessary for preparing a defense before trial). Here, the state's inexcusable delay in admitting Mr. Hand for a competency evaluation forced him to choose between his right to trial and right to substantive due process.

Mr. Hand sought relief for the violation in the trial court, but the court only sanctioned Western State and denied his motion to dismiss based on government misconduct. CP 63. The trial court's sanctions on Western State provide Mr. Hand with no individualized relief for a violation of his constitutional rights. This court should accept review to determine whether a substantive due process violation warrants dismissal of criminal charges under CrR 8.3(b).

Division One of the Court of Appeals has affirmed a trial court's dismissal of criminal charges based on a failure to transport for a competency evaluation. *State v. Kidder*, 197 Wn. App. 292, 313-17, 389 P.3d 664 (2016). The court specifically cited a violation

of the defendant's right to due process as a lawful basis to dismiss criminal charges. *Kidder*, 197 Wn. App. at 317. *Kidder* is an example of a trial court tailoring a remedy to provide individualized relief to a defendant whose constitutional rights have been violated by the state. This remedy deters the state from perpetuating further violations by imposing real consequences on a criminal prosecution if the state's fails to meet its obligation to uphold the defendant's due process rights.

Imposing sanctions does not provide Mr. Hand with any relief. Despite the sanctions, Mr. Hand remained in jail for weeks longer than he should have and ultimately pleaded guilty to a felony in order to be released. This court should accept review to determine a more effective remedy for the indefinite detention of individuals waiting for competency evaluations or restoration treatment because this issue has become pervasive in Washington's criminal justice system and therefore is of substantial interest to the public. RAP 13.4(b)(4).

F. CONCLUSION

For the reasons stated herein and in the opening brief, this Court should accept review.

DATED THIS 11th day of August 2020.

Respectfully submitted,

LAW OFFICES OF LISE ELLNER



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I, Lise Ellner, a person over the age of 18 years of age, served the Pierce County Prosecutor's Office pcpatccf@co.pierce.wa.us and Anthony Hand, 22918 149th Ave S, Graham, WA 98338 on August 11, 2020. Service was made electronically to the prosecutor and to Anthony Hand by depositing in the mails of the United States of America, properly stamped and addressed.



Signature

APPENDIX A

July 14, 2020

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

ANTHONY GENE HAND,

Appellant.

No. 53111-9-II

UNPUBLISHED OPINION

GLASGOW, J.—Anthony Gene Hand broke into a church, and the State charged him with second degree burglary. Prior to trial, both the State and defense counsel questioned Hand’s competence, and the trial court ordered that Hand undergo inpatient evaluation at Western State Hospital within 7 days. Hand remained in jail for 35 days before being moved to the hospital, where he was ultimately determined to be competent. Hand filed a pretrial motion to dismiss due to the delay in transporting him for the evaluation. The trial court denied Hand’s motion, and Hand proceeded to plead guilty to a reduced charge.

Hand appeals arguing that the trial court erred by denying his motion to dismiss. Because Hand waived his right to challenge the denial of the motion when he pleaded guilty, we do not address the trial court’s denial of his pretrial motion to dismiss. We affirm his judgment and sentence.

FACTS

The State charged Hand with one count of second degree burglary after he entered a church through a window. The trial court ordered Hand to undergo an in-custody competency evaluation,

but Hand ended the evaluation after a few minutes. Despite the evaluation's brevity, the psychologist reported that Hand was competent to stand trial based primarily on a review of Hand's mental health records, police reports, and past competency records.

At an omnibus hearing on October 1, 2018, the State and defense counsel both raised concerns about Hand's competency. The trial court ordered a second competency evaluation. The order stated that Hand "shall be admitted to the hospital within 7 days of signing of this order for a period of commitment of up to 15 days from the time of admission." Clerk's Papers at 33. Hand was not transported to Western State Hospital until November 12, 2018—35 days after the trial court's deadline.

Hand filed a CrR 8.3(b) motion to dismiss based on the delay of his transport to the hospital for his second competency evaluation. At a hearing on the motion, the trial court found the Department of Social and Health Services in contempt for failing to timely transport Hand but denied Hand's motion to dismiss. The Department of Social and Health Services was required to pay sanctions under a preexisting federal court order for the delay in transporting Hand to the hospital.

The second competency evaluation resulted in a diagnosis of antisocial personality disorder, cannabis use disorder, and stimulant use disorder but found Hand competent to stand trial. Hand and the State proceeded to negotiate a plea, and Hand ultimately pleaded guilty to second degree possession of stolen property and was sentenced to a 25-month Drug Offender Sentencing Alternative, RCW.9.94A.660.

Hand's statement on his plea of guilty provided that, upon pleading guilty, he gave up the right to "appeal a finding of guilt after a trial." CP at 220. The statement did not say that Hand

stipulated only to certain facts or that he retained his right to appeal any ruling that occurred prior to his plea.

Hand appeals.

ANALYSIS

Hand argues that the trial court erred by denying his CrR 8.3 motion to dismiss based on his excessive incarceration before he received his second competency evaluation. The State argues that Hand waived his right to challenge the court's decision to deny his pretrial motion by pleading guilty. We agree with the State.

By pleading guilty, a defendant generally waives his right to appeal. *State v. Majors*, 94 Wn.2d 354, 356, 616 P.2d 1237 (1980). But the defendant preserves the right to challenge the judgment and sentence on collateral grounds such as the validity of a statute violated, sufficiency of the information, jurisdiction of the court, or the voluntariness of the plea. *In re Pers. Restraint of Schorr*, 191 Wn.2d 315, 322-23, 422 P.3d 451 (2018). A defendant may not otherwise appeal the denial of any pretrial motions. *State v. Olson*, 73 Wn. App. 348, 353, 869 P.2d 110 (1994). “[A] guilty plea waives or renders irrelevant all constitutional violations that occurred before the guilty plea, except those related to the circumstances of the plea or to the government’s legal power to prosecute regardless of factual guilt.” *State v. Brandenburg*, 153 Wn. App. 944, 948, 223 P.3d 1259 (2009) (internal quotation marks omitted) (quoting *State v. Amos*, 147 Wn. App. 217, 225-26, 195 P.3d 564 (2008)).

Here, Hand does not challenge his conviction based on the jurisdiction of the court, validity of the statute violated, sufficiency of the information, or the voluntariness of his plea. Instead, he challenges the denial of his pretrial motion to dismiss based on the alleged violation of his

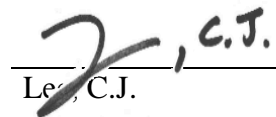
substantive due process rights when he was incarcerated for 35 days before his second competency evaluation. But by pleading guilty, Hand waived the right to challenge any constitutional violation that occurred before his guilty plea as a basis for reversing his conviction, and he is precluded from appealing the denial of this type of pretrial motion. Accordingly, because Hand waived his right to challenge the denial of the motion when he pleaded guilty, we do not address the trial court's denial of his pretrial motion to dismiss.

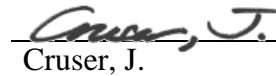
We affirm Hand's judgment and sentence.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.


Glasgow, J.

We concur:


Le, C.J.


Cruiser, J.

LAW OFFICES OF LISE ELLNER

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Transmittal Information

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