

61417-7

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NO. 61417-7-I

IN THE COURT OF APPEALS OF WASHINGTON
DIVISION ONE

REC'D

DEC 31 2009

13879 Clerk of Superior Court
Appellate Unit

STATE OF WASHINGTON,

Respondent,

v.

C.D.,

Appellant.

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

The Honorable LeRoy McCullough, Judge
The Honorable Michael Spearman, Judge

2009 DEC 31 PM 4: 23

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON

SUPPLEMENTAL BRIEF OF APPELLANT

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A. SUPPLEMENTAL STATEMENT OF THE CASE

On December 9, 2009, this Court directed supplemental briefing on the impact of State v. Heddrick, 166 Wn.2d 898, 215 P.3d 201 (2009).

B. ISSUE IN SUPPLEMENTAL BRIEF

In Heddrick, defense counsel formally withdrew a request for a competency determination. When no similar withdrawal occurred here, is Heddrick inapplicable?

C. SUPPLEMENTAL ARGUMENT

HEDDRICK HELD THE RIGHT TO AN EVIDENTIARY HEARING COULD BE WAIVED IF THE MOTION FOR A COMPETENCY DETERMINATION IS EXPRESSLY WITHDRAWN. WHERE NO SUCH WITHDRAWAL OCCURRED HERE, DUE PROCESS REQUIRED A HEARING.

In Heddrick, the court addressed factual circumstances that, at first glance, might appear similar to those present here. Heddrick's competency was at issue and Heddrick was committed to Western State Hospital (WSH) for restoration efforts. The court later found his competency had been restored. Heddrick, 166 Wn.2d at 901-02.

When new counsel was appointed, she had concerns about Heddrick's competency. She requested an evaluation from a defense expert, Dr. White. The court granted that request. The court also

directed the WSH staff psychologist to prepare a written report and circulate it to the parties. Heddrick, at 901-02.

Near the due date for the report, Dr. White informed defense counsel of his opinion that Heddrick was competent. Counsel in turn informed the court that she declined to ask Dr. White to produce a written report in order to avoid added expert fees. The WSH psychologist's report had been prepared, but was not entered into evidence. Heddrick, at 902 & n.1. At that point, "[c]ounsel thereby withdrew Heddrick's competency motion." Heddrick, at 902.

Counsel's express withdrawal of the competency motion provided the foundational support for the court's two holdings that counsel (1) waived the statutory competency procedures and (2) invited any error in the court's failure to comply with statutory requirements. Heddrick, 166 Wn.2d at 908 ("Heddrick effected a waiver at trial when his counsel . . . withdrew the challenge to competency"); at 909 (based on counsel's withdrawal of the competency challenge, "any putative error was invited").

Unlike Heddrick's counsel, C.D.'s attorneys did not withdraw the competency challenge. This distinction is important. If counsel formally withdraws the request to determine competency, the court

has no issue left to decide.¹ For that reason, the Heddrick court's analysis makes sense when counsel expressly withdraws a motion to determine competency. But that did not occur here.

In C.D.'s case there was a pending motion, coupled with an existing body of evidence including previous expert reports finding C.D. not competent, that had not been withdrawn.² Although the state was now asking the court to rely on a newer report from Dr. Gagliardi,³ and although defense counsel had no new evidence to add, counsel did not formally withdraw the request for a competency determination. The court therefore still had to determine competency. In order to satisfy due process obligations, that determination had to follow an evidentiary hearing. Brief of Appellant (BOA) at 9-14 (citing substantial authority). No such hearing was held, and no sworn

¹ See e.g., State v. Valladares, 99 Wn.2d 663, 672, 664 P.2d 508 (1983) (affirmative withdrawal of suppression motion waives or abandons constitutional right to have issue heard).

² See 2RP 10-11; 3RP 3-21; 4RP 5-7; CP 8-9, 44-47.

³ That report was not offered into evidence. Although the state has moved to supplement the record with a report that has not been identified in the trial court, C.D. has opposed the motion. This Court has not ruled on the state's request to supplement the record. See Commissioner's Ruling dated December 31, 2008 (allowing the state to refer to the report in its brief, but reserving to a panel of judges the decision whether the state has met the stringent requirements necessary to supplement the record at this late date).

evidence was admitted. The court did not even engage C.D. in a colloquy. 4RP 3-12; BOA at 6 & n.3.

C.D.'s position is further supported by the Heddrick court's analysis of In re Fleming, 142 Wn.2d 853, 861-62, 16 P.3d 610 (2001). As C.D. argued in the opening brief, Fleming held "[f]ailure to observe procedures adequate to protect an accused's right not to be tried while incompetent to stand trial is a denial of due process." Fleming, 142 Wn.2d at 863; BOA at 8-9.

The Heddrick court did not overrule Fleming, it distinguished Fleming. The Fleming court made it clear that implied waivers would not be permitted; express waivers were required. Heddrick, at 908 (noting Fleming involved a question of implied waiver, not explicit withdrawal of the competency motion).

This case falls within Fleming, not Heddrick. There was no express withdrawal of the competency issue.

C.D.'s opening brief also relied on Pate v. Robinson, 383 U.S. 375, 378, 385, S. Ct. 836, 15 L. Ed.2d 815 (1966). In Pate, the Supreme Court held the trial court's failure to hold a hearing violated due process because the evidence before the trial judge was sufficient to raise a genuine doubt regarding competency. Id. at 385. The weight of authority continues to support the conclusion that counsel cannot

waive a competency hearing or stipulate to competency. See BOA at 12-17 (citing substantial state and federal authority on this question). See also, People v. Lucas, 47 Mich. App. 385, 388-89, 209 N.W.2d 436 (1973) ("A waiver is defined as the voluntary relinquishment of a known right or known advantage. [citations omitted] Defendant's ability to waive his right to a competency hearing depends entirely upon the coexistence of his ability to understand the nature of the rights, consequences of forfeiture, and voluntary nature of the choice. Simply stated, defendant must be competent to execute a voluntary waiver. Thus, the trial court's acceptance of defendant's waiver would require an assumption of competency, the very question which must be answered by the hearing which the trial judge must conduct. The protection afforded defendants by this statute cannot be subverted by assumptions which merely beg the question. In Pate v Robinson, 383 U.S. 375, 384; 86 S Ct 836, 841; 15 L. Ed. 2d 815, 821 (1966), the Court stated: 'But it is contradictory to argue that a defendant may be incompetent, and yet knowingly or intelligently 'waive' his right to have the court determine his capacity to stand trial.' This prohibition against defendant's waiver of a competency hearing, a right exclusively possessed by defendant, is no less applicable to defense counsel."); People v. Marks, 45 Cal. 3d 1335, 1340-41, 1343-44, 756

P.2d 260, 248 Cal. Rptr. 874 (Cal. 1988) (after trial court found reason to doubt competency, defense counsel indicated belief client was competent, which court likely construed as waiver of issue; reversal required because obligation and authority to determine defendant's competency belong to the trial court, not counsel; rejected state's argument that reason to doubt competency never existed because it would require appellate court to "second guess" the trial court's finding that a hearing was required: "once the hearing was ordered, it had to be held."); People v. Hale, 44 Cal. 3d 531, 541, 749 P.2d 769, 244 Cal. Rptr. 114 (Cal. 1988) (court found reason to doubt competency but failed to hold hearing; state insisted defense counsel abandoned the competency issue after determining pursuit of the issue would be fruitless: reversal required because defense counsel cannot waive hearing); People v. Westbrook, 62 Cal. 2d 197, 203, 397 P.2d 545, 41 Cal. Rptr. 809 (Cal. 1964) (regarding competency, "[t]he doubt is in the mind of the trial judge, and cannot be affected or waived by defendant or his counsel."); People v. Brandon, 162 Ill. 2d 450, 457, 643 N.E.2d 712 (Ill. 1994) ("Where a defendant's capacity is the issue in question, it is anomalous to even consider concepts of waiver. As the United States Supreme Court has recognized, 'it is contradictory to argue that a defendant may be incompetent, and yet

knowingly or intelligently 'waive' his right to have the court determine his capacity to stand trial.' Pate v. Robinson (1966), 383 U.S. 375, 384, 15 L. Ed. 2d 815, 821, 86 S. Ct. 836, 841."); overruled on other grounds, People v. Mitchell, 189 Ill. 2d 312, 333-34, 727 N.E.2d 254 (Ill. 2000); People v. Kinkead, 168 Ill. 2d 394, 406, 660 N.E.2d 852 (Ill. 1995) (trial counsel's failure to pursue defendant's right to request a competency hearing does not waive the issue); People v. Johnson, 15 Ill. App. 3d 680, 686, 304 N.E.2d 688 (Ill. App. Ct. 1973) (neither defendant nor trial counsel could waive defendant's right to jury trial in restoration hearing to determine the defendant's competency: "[T]o accept defendant's opinion, and that of his counsel by stipulation, that he was able to cooperate with counsel in his defense, when the purpose of a competency hearing in defendant's behalf was to determine that very fact, would be to make a sham out of the restoration hearing."); Thompson v. Commonwealth, 50 S.W.3d 204, 206 (Ky. 2001) ("the trial court's own order establishe[d] the sufficiency of the trial judge's level of doubt as to Thompson's competence to plead guilty" but defense counsel subsequently conceded competency; hearing required by statute and constitutional due process was mandatory and could not be waived); State v. Carney, 663 So. 2d 470, 473 (La. Ct. App. 1995) ("Due process and

our statutory law require that the issue of the defendant's mental capacity to proceed shall be determined by the court. [citation omitted] This cardinal principle . . . prohibits [the court] from committing the ultimate decision of competency to a physician or anyone else." [citation omitted] "Once a motion to appoint a sanity commission has been made, it takes on a life of its own as nothing further can happen without resolving the issue of the defendant's mental capacity. An attorney independently waiving or withdrawing the motion is an insufficient resolution of the issue. The trial court, not the defense attorney, is mandated to determine the defendant's mental capacity to proceed and rule on the motion."); Commonwealth v. Nelson, 489 Pa. 491, 494, 497, 414 A.2d 998 (Pa. 1980) (addressing claim that trial counsel was ineffective in failing to request a hearing on appellant's competency to stand trial; "we . . . will not permit the waiver of a claim of incompetency, so basic is it to our concepts of justice that a trial of an incompetent is no trial at all.").

As this authority shows, it is very debatable whether the Heddrick court misconstrued Pate in holding that waiver or invited error could ever occur in this context. Given this foundational weakness in the Heddrick reasoning, this Court should resist any

state argument to extend Heddrick to facts not involving an express withdrawal of a motion to determine competency.

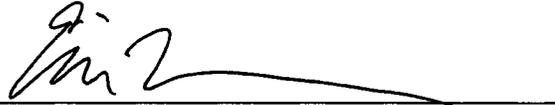
D. CONCLUSION

For the reasons stated herein, and in C.D.'s opening brief, this Court should reverse C.D.'s conviction.

DATED this 31st day of December, 2009.

Respectfully Submitted,

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ERIC BROMAN, WSBA 18487

OID No. 91051

Attorneys for Appellant

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	COA NO. 61417-7-I
)	
C.D.,)	
)	
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 31ST DAY OF DECEMBER, 2009, I CAUSED A TRUE AND CORRECT COPY OF THE **SUPPLEMENTAL BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] C.D.
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MERCER ISLAND, WA 98040

SIGNED IN SEATTLE WASHINGTON, THIS 31ST DAY OF DECEMBER, 2009.

x *Patrick Mayovsky*