

62044-4

62044-4

NO. 62044-4-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

SOLOMON GELETA,

Appellant.

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STATE OF WASHINGTON
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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE MICHAEL FOX
THE HONORABLE CATHERINE SHAFFER

BRIEF OF RESPONDENT

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A. ISSUE PRESENTED

A defendant has a fundamental right not to be tried while incompetent. A Washington defendant has a statutory right to an evaluation of competency performed by mental health professionals if the court finds a reason to doubt competency. The trial court found a reason to doubt competency and ordered a competency evaluation. After initially finding Geleta incompetent, and following a restoration period, the evaluator opined that Geleta was competent. Counsel agreed. Was the court's failure to sua sponte hold a full evidentiary hearing a violation of due process?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

By amended information, the State charged defendant Solomon Geleta with attempted rape in the first degree and, in the alternative, indecent liberties with forcible compulsion. CP 10-11.

On July 10, 2006, Geleta's first attorney, Anton Knappert, asked the trial court to order an evaluation of the defendant's competency to stand trial.¹ 7/10/06RP 3-4. The court ordered an

¹ Geleta was represented at trial by different counsel.

evaluation at Western State Hospital (WSH). 7/10/06RP 4; CP 128-31. After two evaluators at WSH found Geleta incompetent, the parties jointly asked the court to commit Geleta at WSH for competency restoration. 8/10/06RP 3; CP 141-42. The court found Geleta incompetent and committed him to WSH for 90 days for further evaluation and treatment. 8/10/06RP 3; CP 144-45.

Following the 90-day restoration period, a WSH evaluator opined that Geleta was competent to proceed. CP 156. On December 4, 2006, in reliance on the WSH report (dated November 14, 2006) and counsels' concurrence with the report, the court found Geleta competent. CP 5-6; Supp. CP __ (Sub no. 145, transcript of hearing), at 1.

Geleta was tried before the Honorable Catherine Shaffer. A jury found Geleta guilty of indecent liberties with forcible compulsion. CP 101; 6/13/08RP 3. The court imposed an indeterminate, standard-range sentence of 68 months. CP 106, 109.

Geleta timely appeals. CP 115.

2. SUBSTANTIVE FACTS

On April 6, 2006, the 59-year-old victim, S.L., lived in an apartment with her adult daughter. 4/17/08RP 15-16, 22, 35. S.L. used crack cocaine. 4/17/08RP 16.

On that day, Geleta came over to help someone who had been temporarily staying with S.L. move out. 4/17/08RP 23. Geleta, who was unknown to S.L., purchased \$20 of crack cocaine from S.L. 4/17/08RP 23-24. S.L. told Geleta that he could not smoke the crack at her house, so Geleta left. 4/17/08RP 24, 29.

Several hours later, while S.L. was home alone, Geleta returned. 4/17/08RP 30. S.L. was watching television; she was wearing only a bathrobe. 4/17/08RP 30, 33. Geleta knocked on the door. 4/17/08RP 30. S.L. could not see who was at the door so she opened it slightly. 4/17/08RP 35; 4/22/08RP 80.

Geleta attacked S.L. 4/17/08RP 35. He pushed his way into S.L.'s apartment and forced her to the couch. 4/22/08RP 80, 87. Despite the disparity between their respective sizes (S.L. stands 5'7" and weighed about 240 pounds at the time of the incident and Geleta is 5'5" and weighed about 110 pounds), Geleta was on S.L. "like glue." 4/17/08RP 39, 41, 97; 4/21/08RP 31. S.L. was surprised at Geleta's strength. 4/17/08RP 112-13. He tore off her

robe. 4/17/08RP 45; 4/21/08RP 36. He used force to control her. 4/17/08RP 112; 4/21/08RP 72. Geleta took off his own clothes. 4/17/08RP 37; 4/21/08 RP 37. S.L. tried to get away. 4/22/08RP 57.

S.L. tried to call 911 but Geleta grabbed her and pulled her away from the phone. 4/17/08RP 46, 113; 4/22/08RP 84. Geleta threw S.L. to her knees. 4/17/08RP 120. Once Geleta had S.L. on the floor, he tried to penetrate her vaginally and anally. 4/17/08RP 46-47; 4/21/08RP 69-70. Geleta's penis was erect. 4/21/08RP 97. S.L. was in shock. 4/17/08RP 47; 4/21/08RP 78. She fought back and scratched Geleta's face. 4/17/08RP 40; 4/21/08RP 21-22; 4/23/08RP 130-31.

S.L. screamed. 4/17/08RP 43, 47. She was "screaming and screaming." 4/17/08RP 47. S.L. tried to scream loudly enough that her neighbors would hear. 4/17/08RP 43. The downstairs neighbors heard S.L. scream, "Help me, he's raping me." 4/17/08RP 50, 133, 135, 138; 4/21/08 54, 70, 103, 144.

The neighbors rushed upstairs to help S.L. 4/17/08RP 50, 138, 140; 4/21/08RP 69-72, 103-06, 145-46. One neighbor brought a baseball bat; they told Geleta to get off of S.L. 4/17/08RP 50, 138; 4/21/08RP 70, 80, 103, 106. The neighbors called 911.

4/17/08RP 140; 4/21/08RP 57. The police came right away.

4/17/08RP 50; 4/21/08RP 107; 4/22/08RP 46.

After the police came, S.L. identified Geleta as the man who forced her down and tried to rape her. 4/22/08RP 54-56. After the neighbors had come to S.L.'s rescue, S.L. thought about how blessed she was that she was not hurt and that Geleta did not rape her. 4/17/08RP 120.

Geleta's defense was diminished capacity. CP 21-25, 89-90; 4/23/08RP 18, 58-61. The defense expert, Dr. Delton Young, diagnosed Geleta as having a psychotic disorder, not otherwise specified.¹ 4/23/08RP 45, 58. In addition, Dr. Young diagnosed Geleta as cocaine dependent.² 4/23/08RP 71, 113.

Dr. Young opined that at the time of the incident, Geleta's capacity to form the intent to accomplish forced sexual assault was "substantially compromised." 4/23/08RP 58-61; 4/24/08RP 9-10. He stated that on the date of the incident, Geleta's capacity was not diminished before he smoked crack cocaine. 4/23/08RP 119, 122, 125-27; 4/24/08RP 23-26. Dr. Young said that when Geleta

¹ The State's expert concurred in this diagnosis. 4/24/08RP 65.

² The State's expert opined that Geleta was cocaine dependent and that he had cocaine induced psychotic disorder and major depressive disorder with psychotic features. 4/24/08RP 66.

returned to S.L.'s house, he could form intent; according to Geleta, Geleta's plan was to "buy crack and maybe have sex." 4/23/08RP 127, 130.

Both Dr. Young and the State's expert, Dr. Lori Thiemann, agreed that on the date of the incident, before, during, and after the incident, Geleta engaged in intentional, goal-directed behavior. 4/23/08RP 163-65; 4/24/08RP 29-30, 63, 97-98.

C. **ARGUMENT**

THE PROCEDURE USED TO DETERMINE THAT GELETA WAS COMPETENT TO STAND TRIAL DID NOT DEPRIVE GELETA OF DUE PROCESS.

Geleta claims that every time a judge finds a reason to doubt a defendant's competency, there must be a full evidentiary hearing, before a judge can enter findings on that issue.³ This claim is without merit. Due process mandates an evidentiary hearing only if a substantial doubt exists as to a defendant's competency. Any error in the procedure in this case was not preserved and is not reviewable for the first time on appeal where there is no allegation that Geleta was not competent.

³ This issue is before the Washington Supreme Court in State v. Steven Heddrick, No. 80841-4, argued January 20, 2009.

After defense counsel Knappert stated that he had concerns about Geleta's competency, Geleta was evaluated by WSH. CP 128-31, 133-43; 7/10/06RP 3-4. Initially, Doctors Campbell and Kirkeby evaluated Geleta at WSH and, in a report dated August 4, 2006, opined that Geleta did not have sufficient capacity to understand the nature of the proceedings against him or to assist in his defense. CP 133, 139. By agreement of the parties, the presiding court ordered Geleta committed for a 90-day period of restoration and further evaluation. CP 144-46; 8/10/06RP 3. After this subsequent evaluation, defense counsel and the State agreed that Geleta was competent. 12/4/06RP 1.⁴

The court reviewed the report of WSH and found that Geleta was competent. CP 5-6, 148. That 10-page report stated the opinion of the evaluating psychologist that Geleta had the capacity to understand the proceedings and assist in his defense. CP 156. The report described the sources of information as including two interviews with Geleta, the previous forensic mental health report (dated August 4, 2006), and the police reports relating to the charge. CP 151-52. The report includes a detailed clinical history

⁴ The hearing was filed as an agreed report of proceedings pursuant to RAP 9.4. Supp. CP __ (Sub no. 145, transcript of hearing).

provided by Geleta, a summary of his behavior while hospitalized for the evaluation, a detailed description of a mental status examination, a thorough description of potential psychological diagnoses, and a description of the evaluator's reasons for concluding that Geleta was competent. CP 152-56.

Under the circumstances, the failure to conduct a full evidentiary hearing did not violate Geleta's right to due process.

a. Geleta Waived Any Procedural Error In The Determination Of Competency.

Geleta did not object to the procedure employed by the trial court in determining his competency. RAP 2.5(a) bars consideration of this issue. A claim of error may be raised for the first time on appeal only if it is a "manifest error affecting a constitutional right." RAP 2.5(a)(3); State v. McFarland, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995).

Not every constitutional error falls within this exception; the defendant must show that the error occurred and caused actual prejudice to the defendant's rights. Id. It is the showing of actual prejudice that makes the error manifest, allowing appellate review. State v. Kirkman, 159 Wn.2d 918, 926-27, 155 P.3d 125 (2007). If

the facts necessary to adjudicate the issue are not in the record, the error is not manifest. Kirkman, 159 Wn.2d at 935.

Geleta did not preserve any claimed error in following the statutory competency procedure. Even if there was a procedural constitutional error, it is not "manifest" because there is no indication that Geleta wanted a more extensive competency hearing, or that he would have been found incompetent if there had been testimony from the evaluator who had already determined that he was competent. Thus, appellate review is precluded.

b. Geleta's Procedural Due Process Rights Were Not Violated.

An accused in a criminal case has a fundamental right not to be tried while incompetent. Drope v. Missouri, 420 U.S. 162, 171-72, 95 S. Ct. 896, 43 L. Ed. 2d 103 (1975); State v. Eldridge, 17 Wn. App. 270, 279, 562 P.2d 276 (1977), rev. denied, 89 Wn.2d 1017 (1978). The failure to observe procedures adequate to protect this right is a denial of due process. State v. Marshall, 144 Wn.2d 266, 279, 27 P.3d 192 (2001). The concept of due process is flexible; its procedural protections are those that a given situation demands. Morris v. Blaker, 118 Wn.2d 133, 144, 821 P.2d 482 (1992).

In Washington, an incompetent person may not be tried, convicted, or sentenced for an offense so long as the incapacity continues. RCW 10.77.050. A defendant is incompetent if he or she "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." RCW 10.77.010(14); see also State v. Lord, 117 Wn.2d 829, 900, 822 P.2d 177 (1991), cert. denied, 506 U.S. 856 (1992).

The procedures set out in the competency statute (chapter 10.77 RCW) are mandatory and not merely directory. State v. Wicklund, 96 Wn.2d 798, 805, 638 P.2d 1241 (1982). However, the statutory scheme is not constitutionally mandated and may be waived. Id.; State v. O'Neal, 23 Wn. App. 899, 901-02, 600 P.2d 570, rev. denied, 93 Wn.2d 1002 (1979); State v. Israel, 19 Wn. App. 773, 777, 577 P.2d 631 (1978).

RCW 10.77.060 provides that if a court finds there is a "reason to doubt" a defendant's competency, the court shall have the defendant evaluated by professionals who will report on the

defendant's mental condition. RCW 10.77.060(1)(a).⁵ The trial court did order such an evaluation. RCW 10.77.060 does not specify the nature of the hearing that will occur after the evaluation is complete.

The terms of RCW 10.77.084 indicate that the court's initial finding of competency may be based simply on the reports of the professional evaluators. That statute provides in pertinent part:

(1)(a) If at any time during the pendency of an action and prior to judgment the court finds, following a report as provided in RCW 10.77.060, a defendant is incompetent, the court shall order the proceedings against the defendant be stayed except as provided in subsection (4) of this section.

....

(c) At the end of the mental health treatment and restoration period, or at any time a professional person determines competency has been, or is unlikely to be, restored, the defendant shall be returned to court for a hearing. If, after notice and hearing, competency has been restored, the stay entered under (a) of this subsection shall be lifted. If competency has not been restored, the proceedings shall be dismissed. If the court concludes that competency has not been restored, but that further treatment within the time limits established by RCW

⁵ In pertinent part, RCW 10.77.060(1)(a) provides:

Whenever a defendant has pleaded not guilty by reason of insanity, or there is reason to doubt his or her competency, the court on its own motion or on the motion of any party shall either appoint or request the secretary to designate at least two qualified experts or professional persons, one of whom shall be approved by the prosecuting attorney, to examine and report upon the mental condition of the defendant.

10.77.086 or 10.77.088 is likely to restore competency, the court may order that treatment for purposes of competency restoration be continued. Such treatment may not extend beyond the combination of time provided for in RCW 10.77.086 or 10.77.088.

(d) If at any time during the proceeding the court finds, following notice and hearing, a defendant is not likely to regain competency, the proceedings shall be dismissed and the defendant shall be evaluated for civil commitment proceedings.

RCW 10.77.084 (emphasis added). The statute refers in section (1) to an initial finding as to competency based on a report; in later sections, which apply after a defendant has been found incompetent, the statute provides for notice and a hearing before further findings are made.

Even if the provisions of the statute were violated, the violation of a statutory mandate does not constitute a denial of due process. Engle v. Isaac, 456 U.S. 107, 121 n.21, 102 S. Ct. 1558, 71 L. Ed. 2d 783 (1982). The due process clause safeguards not meticulous observance of state procedural requirements, but "the fundamental elements of fairness." Spencer v. Texas, 385 U.S. 554, 563-64, 87 S. Ct. 648, 17 L. Ed. 2d 606 (1967).

Due process may require a hearing on the initial determination of competency even if the Washington statute does not, but an evidentiary hearing is required only if there is a

substantial question as to competency. Due process requires either "further inquiry" or a hearing when there is sufficient doubt raised about a defendant's competency. Drope, 420 U.S. at 180. Whether a hearing is required must be based on the facts of a particular case. United States v. Renfro, 825 F.2d 763, 767 (3rd Cir. 1987).

Where the initial concern over competency is dissipated by the results of a competency examination, an evidentiary hearing may be a "superfluous formality." See United States v. Giron-Reyes, 234 F.3d 78, 81 (1st Cir. 2000). At least one federal circuit court has held that if a qualified mental health professional has determined that a defendant is competent, due process does not require a further evidentiary hearing, absent exceptional circumstances. United States v. Bruck, 152 F.3d 40, 46 (1st Cir. 1998).

The Washington Supreme Court rejected a claim of a due process violation in a case remarkably similar to the case at bar, State v. Johnston, 84 Wn.2d 572, 527 P.2d 1310 (1974). Johnston

had a substantial history of serious mental illness.⁶ An initial evaluation of his competency was ordered, and while Johnston was at Eastern State Hospital (ESH), he tried to kill another patient. Id. at 574. The ESH evaluator opined that Johnston could not adequately assist in his defense. Id. at 574-75. The court then appointed two additional psychiatrists to evaluate Johnston's competency. Id. at 575. Both of those psychiatrists examined Johnston and concluded that he was competent. Id. Counsel for the State and for the defendant both agreed that Johnston was competent. Id. at 576-77. No formal competency hearing was requested or held. Id. at 575. The Supreme Court concluded that there was no violation of due process, finding that the trial court had sufficient information to determine competency without an evidentiary hearing. Id. at 576-77.

The Court of Appeals followed Johnston, supra, in State v. Higa, 38 Wn. App. 522, 524, 685 P.2d 1117 (1984). In Higa, the circumstances of the offense were bizarre and Higa was agitated and assaultive in court. Id. at 523-24. The trial court ordered an

⁶ Johnston was discharged from the Air Force on grounds of mental instability. Johnston, 84 Wn.2d at 574. Months later he killed his father, was diagnosed as schizophrenic and at trial was found insane at the time of that killing. About seven years later he was charged with killing another man in the reported case. Id.

evaluation of Higa's competency to be performed by WSH, which concluded that Higa was competent. Id. at 525. No formal competency hearing was requested, and the Court of Appeals concluded that the failure to hold such a hearing was not error. Id.

Here, where the initial question as to Geleta's competency was answered by the results of the competency examination that followed a 90-day restoration period, and defense counsel agreed that Geleta was competent to proceed, an evidentiary hearing would have been a superfluous formality. The court's decision was informed by the WSH report and the representations of counsel. The finding of competency was not disputed by any evaluator or party.⁷

Geleta has not claimed a violation of his substantive due process rights. There is no evidence before this Court that Geleta was tried, convicted, or sentenced while not competent.

Even if this Court determines that the trial court erred by not holding a formal competency hearing, the remedy is a remand for a *nunc pro tunc* hearing. See Renfro, 825 F.2d at 767. "Such a

⁷ The court's findings indicate that it considered the report from WSH, which was uncontested. CP 5-6. Recitation of those undisputed facts in the court's findings is not necessary for appellate review of the finding of competency, and Geleta has not alleged that the court's legal conclusions were not supported by the facts in the record.

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); State v. Wright, 19 Wn. App. 381, 390-91, 575 P.2d 740 (1978) (substantial body of evidence of psychiatric data contemporaneous with sentencing hearing sufficient to allow a *nunc pro tunc* hearing).

Here, a meaningful hearing can be conducted because there is a substantial body of evidence available concerning Geleta's mental state at the relevant time: in addition to the WSH reports that evaluated Geleta for competency, Dr. Delton Young conducted a psychological evaluation of the defendant before trial, WSH conducted a third evaluation of the defendant that evaluated him for diminished capacity, the jail documented Geleta's mental health throughout his incarceration and Geleta's sister provided a family history. 4/23/08RP 18, 21-22, 150-52; 4/24/08RP 28-29, 35-36, 41, 57-62, 91, 116; Ex. 25, 28, 29, 31, 33-35, 37. The reports of four forensic evaluators plus the King County Jail staff psychologist (Dr. Waiblinger) will inform the court's retrospective determination of Geleta's competency because the evaluations were conducted contemporaneously with the proceedings in this case. If after such

a hearing the court concludes that Geleta was competent, the convictions should be affirmed. See Johns, 728 F.2d at 958.

D. CONCLUSION

For the reasons stated above, the State respectfully asks this Court to affirm Geleta's judgment and sentence.

DATED this 29 day of June, 2009.

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