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COA # 63104-7

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

STATE OF WASHINGTON,
RESPONDENT,

V

IVAN FLUKER,
APPELLANT,

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

THE HONORABLE RICHARD MCDERMOTT
THE HONORABLE SHARON ARMSTRONG

STATEMENT OF ADDITIONAL GROUNDS
BRIEF SUBMITTED BY APPELLANT

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COURT OF APPEALS
DIVISION ONE

IVAN FLUKER, APPELLANT
1313 N 13th ave
WALLA, WALLA, WA. 99362

A. ASSIGNMENT OF ERROR

1. The trial court judge erred in deciding the appellant competency after being unable to determine evaluators diagnosis concerning the evaluation of Mr Fluker.

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

The sole purpose of sending Mr. Fluker for competence evaluation was to determine whether or not he was competent to enter into plea agreement entered into. Is Mr. Fluker entitled to withdraw his guilty plea where the trial judge determined that Mr. fluker was competent without the evaluator at western state making such determination ?

C. STATEMENT OF THE CASE REVELANT TO ISSUE

As counsel noted, with new counsel prior to sentencing Mr. Fluker subsequently moved to withdraw his guilty plea. New counsel presented information that gave rise to potential post traumatic stress disorder (PTSD) being suffered by Mr. Fluker, as a result of his experiences during the Iraq war which may have affected his ability to enter

Into a plea agreement knowingly, voluntarily, as well as intelligently. 12-16-08RP5-8

A judge not familiar with the case heard the motion to withdraw the guilty plea and subsequently denied the motion however, he was not sure whether or not there existed proof of the disorder nevertheless he did refer Mr. Fluker, to Western State Hospital for an evaluation in order to get an professional opinion from a qualified evaluator 12-16-08RP14. However, upon Mr. Fluker's return from Western State hospital the court apparently could not ascertain the results from the competency evaluation. 3-2-09RP5. and after reading the report three times the judge determined that Mr. Fluker was competent to plead guilty. 3-2-09RP5 the report from the evaluator at western state indicated that Mr. Fluker did in fact suffer from PTSD however, it is not clear whether the diagnosis indicated whether Mr. Fluker was competent or not competent, however instead of returning Mr. Fluker to Western State for re-evaluation or requesting verification of the diagnosis the judge made the determination that Mr. Fluker was competent.

D. ARGUMENT AND AUTHORITY

The Fourth Amendment due process clause prohibits the conviction of a person who is not competent to stand trial U.S.C.A Const. Amend. 14. Washington law affords greater protection by providing that [n]o incompetent person may be tried, convicted, or sentenced for the commission of an offense so long as such incapacity continues. RCW 10.77.050, requiring that a criminal defendant be competent to ensure that he has the capacity to understand the proceedings and to assist counsel. *Godinez v Morgan*, 509 U.S. 389, 402 113 S.ct. 2680, 125, L.Ed.2D 321 (1993) The competency standard for pleading guilty or waiving right to counsel is the same as the competency standard for standing trial. *Godinez*, 509 U.S. at 399 (332), 115 S.ct. 2680.

A defendant who stands trial is likely to be presented with coices that entails relinquishment of the same rights that are relinquished by a defendant who pleads quilty he will ordinarily have to decide another to waive his privege against compulsory self- incrimination. *Boylin v Alabama*, 395 U.S. 238, 343, 23 L.Ed 274, 89 S.ct 1709 (1969).if the option is avialable, he may have to decide whether to waive his right

by jury, ibd; and in consultation with counsel, he may have to decide whether to waive his right to confront his accuser. The determination of whether competency evaluation should be ordered rest generally within the discretion of the trial court. State v Thomas, 75 wn.2d 516,452 P.2d.256 (1969). The factors a trial court may consider in determining whether or not to order a formal inquiry into the competency of one accused include the " defendant's appearance, demeanor, conduct, personal and family history, past behavior, medical and psychiatrist reports and the statement of counsel " State v Dodd, 70 wn.2d 513, 514, 424 P.2d 302 (1967).

Procedures of competency statute (RCW 10.77) 060, are mandatory and not merely directory. State v Wicklund, 90 wn 2d 798, 805, 638 P.2d 1241 (1982). thus, although there is a reason to doubt a defendant's competency, the court must follow the statute to determine his or her competency to stand trial. see City of Seattle v Gordon, 39 wn.App. 431,441,693 P.2d 741 (1985). The failure of the trial court to observe procedures adequate to protect an accused's rights not to be tried while incompetent to stand trial is a denial of due process of law. State v O'niel, 23 wn. app. 899,901,600 P.2d 570,(1979)(citing Drope,420 U.S. 102,95 S.ct 896: Pate,383, U.S. 395,86 S.ct 836)

The court shall not accept a plea of guilty without first determining that it is made voluntarily, competently, and with the understanding of the nature of the charge and the consequences of the plea CrR 4.2(d) at the plea hearing Mr. Fluker clearly did not understand the nature of the charge nor the consequences of his plea. 8-4-09RP4-8. A determination that a criminal defendant is not competent to stand trial provides his effective entry of any plea or waiver of trial. see generally ortiz, 104 wn.2d at 483,706 P.2d 1069. RCW 10.77.050 which states that an incompetent person may not be tried, for a crime while his incapacity continues. moreover, Mr. Fluker's first counsel was ineffective because he presented no evidence of Mr. Fluker's PTSD or of any of the psychological evaluations were made available to the court of past evaluations, therefore since a plea of guilty must be entered into knowingly, intelligently and voluntarily there is reasonable probability that but for counsel failure to inform the court the plea of guilty would not have been accepted while Fluker was deemed incompetent to stand trial. One can then construe from this fact that counsel representation fell well below an objective standard of reasonableness based upon the consideration of all the circumstances.

State v. Thomas, 109 wn.2d 810 (1987) It is well settled to provide constitutionally adequate assistance counsel must at a minimum conduct a reasonable investigation enabling counsel to make informed decision about how best to represent the client. Sanders v. ratille , 21 F.3d 1446, 1456 (9th cir 1994)(citing strickland 460, U.S. at 691, 104 S.ct 2052) counsel failure to raise the issue of Mr. fluker competency was not within the realm of reasonable professional judgment. Our Supreme court has held that a defendant counsel does not have the power to waive the defendats rights under RCW 10.77.050 see state v coville, 88 wn. 2d 43,47 P.2d 1346 (1977).

The record before us establishes (1) defende counsel new ther were an expert opinion that Mr. Fluker suffered from PTSD as a result of being in war (2) medical evidence was available at the time Fluker entered into the plea of guilty (3) defense counsel failed to raise competency during all proceedings (4) defense tactics were not shown during sentencing trial infact counsel withdrew from representing Fluker after influencing him into entering into plea agreement and (5) defense counsel professional performance was not reasonable under all the circustances of this case, therefore Fluker recieved ineffective assistance of counsel under strickland, 466, U.S. at 608, 104 S.Ct. 2052.

E. CONCLUSION

Mr. Fluker is entitled to withdraw his plea based on the ambiguity argued by counsel, the ineffectiveness of counsel at trial and the abuse of the trial courts discretion in determining Fluker to be competent contrary to evaluation reports.

dated this 27th day of January, 2010

Respectfully Submitted by,

Ivan B. Fluker

IVAN B FLUKER, SUI JURIS
1313 N 13th Ave
WALLA, WALLA, WA. 99362



STATE OF WASHINGTON
DEPARTMENT OF CORRECTIONS

CHEMICAL DEPENDENCY— CONSENT FOR THE RELEASE OF CONFIDENTIAL INFORMATION (CRIMINAL JUSTICE)

I, Fluker, Ivan, hereby consent to communication between the Department of Corrections, Chemical Dependency Treatment Program and:

- Department of Corrections Staff
- Department of Corrections Contract Providers
- The Indeterminate Sentence Review Board and other Criminal Justice partners including:
 - The Superior Courts of the state of Washington,
 - The Office of the Prosecuting Attorney noted on the offenders Judgment and Sentence and,
 - The counsel representing the offender.

The purpose of and need for the disclosure is to inform the criminal justice agencies and parties listed above of the results of my chemical dependency evaluation and subsequent progress in any treatment that may be recommended.

The extent of information to be disclosed is limited to my initial chemical dependency screening, assessment, diagnosis, information about my attendance at treatment sessions, my cooperation with the treatment program, prognosis, and any recommendations for additional treatment, drug testing results, summary of treatment plan, progress and discharge plan, and any other pertinent treatment information requested by the parties above.

I understand that information regarding my case may be entered into my electronic file and other management information systems and disclosed electronically or by other means only to the party (ies) noted above.

I understand that my records are protected under the federal regulations governing Confidentiality of Alcohol and Drug Abuse Patient Records, 42 CFR Part 2, and cannot be further disclosed without my written consent unless otherwise provided for in the regulations.

This consent may be revoked in writing at any time except to the extent that the Department of Corrections' Chemical Dependency Treatment Program has already taken action in reliance on it.

If I am subject to the jurisdiction of the Indeterminate Sentence Review Board, this consent will terminate upon the expiration of my maximum sentence or the granting of a final discharge. If I revoke this consent prior to the expiration of my maximum sentence or the granting of a final discharge, I understand the Indeterminate Sentence Review Board will obtain a court order requiring disclosure of all my chemical dependency records.

IF
Initials

If I am an SRA offender, this consent will terminate upon the expiration of my Prison sentence and any post-release supervision.

IF
Initials

For any offender, if this disclosure is for the purpose of reporting in accordance with a criminal justice system referral, consent may not be revoked until final disposition.

Dean Fluker
Signature of Offender

306517
DOC #

3/14/09
Date

[Signature]
Signature of Witness

CC
Position

3/16/09
Date

Distribution: **WHITE**-Central File **CANARY** -Treatment File **PINK**-Offender

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 of the document **Appellant's Pro Se Statement of Additional Grounds for Review** to which this declaration is affixed/attached, was filed in the **Court of Appeals – Division One** under **Case No. 63104-7-I** and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to each attorney or party or record for respondent **Ed Bales - King County Prosecuting Attorney**, appellant and/or other party, at the regular office or residence or drop-off box at the prosecutor's office.



MARIA ARRANZA RILEY, Legal Assistant
Washington Appellate Project

Date: March 12, 2010

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