

COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON  
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NO. 37618-1-II

IN THE COURT OF APPEALS  
FOR THE STATE OF WASHINGTON  
DIVISION II

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STATE OF WASHINGTON

Respondent,

v.

THOMAS W. DeCLUE,

Appellant.

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ON APPEAL FROM THE  
SUPERIOR COURT OF COWLITZ COUNTY

Before the Honorable Jill M. Johanson, Judge

OPENING BRIEF OF APPELLANT

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**A. ASSIGNMENTS OF ERROR**

1. The court erred and abused its discretion in denying Appellant's motion to withdraw his *Alford*<sup>1</sup> pleas without first holding a competency hearing meeting all of the requirements of RCW Title 10.77, as required under *State v. Marshall*, 144 Wn.2d 266, 281-82, 27 P.3d 192 (2001).

2. The court failed to make a proper determination regarding appellant's competency.

3. The court erred in entering Finding of Fact 2:

At the time of the plea, the defendant's ability to understand the consequences of pleading guilty, were not impaired by drugs or medications. Clerk's Paper [CP] 157.

4. The court erred in entering Finding of Fact 3:

The defendant had been advised of his right to proceed to a jury trial, and was well aware of the potential defenses at trial. CP 157.

5. The court erred in entering Finding of Fact 4:

The defendant's trial counsel, James K. Morgan, had no difficulty communicating with the defendant, and Mr. Morgan believed the defendant was entering a guilty plea based on the defendant's analysis of the risks presented at trial. CP 157.

6. The trial court erred in entering Finding of Fact 5:

Based on the record of the plea hearing, and the testimony presented at the hearing on this motion, the defendant was rational,

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<sup>1</sup>*North Carolina v. Alford*, 400 U.S. 25, 91 S. Ct. 160, 27L. Ed. 2d 162 (1970).

lucid, and well-informed at the time of his guilty. [sic] CP 158.

7. The court erred in entering Finding of Fact 6:

The defendant knowingly, intelligently, and voluntarily entered pleas of guilty. CP 158.

8. The court erred in concluding that “[t]here is no basis to allow the defendant to withdraw his guilty plea.” CP at 158.

9. Appellant was denied his right to effective assistance of counsel under the Sixth Amendment to the United States Constitution and Const. art. 1, § 22 (amend. 10).

#### **B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Under *Marshall*, when a defendant moves to withdraw a plea on the basis that he was incompetent at the time the plea was entered, the trial court must either grant the motion or convene a formal competency hearing. In this case, the trial court received substantial evidence that appellant was incompetent when he entered the plea, but did not hold a competency hearing, but instead heard evidence and ruled on the motion to withdraw the plea. The court also did not appoint two experts as required under RCW 10.77.060. Did the trial court err in denying appellant's motion to withdraw his pleas without first ordering the mandatory competency hearing under RCW 10.77.060? Assignments of Error No. 1, 2, 3, 4, 5, 6, 7 and 8.

2. Before appellant entered the *Alford* plea, counsel was aware that appellant was receiving numerous medications in jail, including several anti-inflammatory and decongestant medications; Vicodin, a narcotic; Tremadol, a non-narcotic pain reliever; BuSpar, used to treat anxiety; Skelaxin or Robaxin, both muscle relaxers; and Seroquel, an antipsychotic medication used to treat bipolar disorder and schizophrenia. Did counsel render ineffective assistance by failing to further investigate and by failing to procure the necessary health evaluation and by failing to advise the court of appellant's competency issues before he entered the plea? Assignment of Error No. 9.

**C. STATEMENT OF THE CASE**

**1. The *Alford* plea hearing.**

Thomas DeClue was charged on July 11, 2006, with first degree murder and first degree unlawful possession of a firearm regarding the death of Richard Shelburg. On July 3 the Department of Corrections filed probation violations alleging that Mr. DeClue violated his probation from a 1994 conviction by allegedly failing to be available for contact at his reported address, using methamphetamine, and failing to pay his legal financial obligations. CP 57. *State v. DeClue*, 2009 WL 597276 (Wash.App. Div. 2), March 10, 2009 at \*1.

The State filed a second amended information on March 26, 2007, charging Mr. DeClue with second degree manslaughter and first degree unlawful possession of a firearm. CP 2-3. Mr. DeClue entered an *Alford* plea on the same day. CP 51-13. Under the terms of the plea agreement, the State recommended an exceptional sentence of 10 years. CP 7.

On April 6, 2007, the court sentenced Mr. DeClue to an agreed exceptional sentence of 120 months for second degree manslaughter and 54 months for first degree unlawful possession of a firearm, to be served concurrently. RP (April 6, 2007) at 26-27; CP at 14, 19.

The three alleged probation violations were set for a later hearing. RP (April 6, 2007) at 4-6. The State filed a supplemental notice of probation violation on April 25, 2007, alleging that Mr. DeClue left Washington without permission and that he possessed a firearm on July 1, 2006, the date of Mr. Shelburg's death. CP 58; *DeClue*, 2009 WL 597276 (Wash.App. Div. 2) at \*1.

**2. Motion to withdraw *Alford* pleas.**

Mr. DeClue moved to rescind or dismiss the plea agreement on May 10, 2007, on the basis that the violation arose from the same conduct as the offenses to which he entered the *Alford* pleas, and therefore the State breached its agreement by seeking to impose additional time for the

same offense. CP 28-30. The State dismissed the possession of a firearm allegation. RP (May 24, 2007) at 6; RP (June 4, 2007) at 9. The court heard the remaining alleged probation violations on May 24, 2007, (RP (May 24, 2007) at 29-95) as well as Mr. DeClue's motion to withdraw his *Alford* pleas. RP (May 24, 2007) at 14-28. The court ruled that the State did not breach its agreement and denied the motion to withdraw his pleas. RP (May 24, 2007 at 28).

On June 21, 2007, Mr. DeClue filed notice of appeal from the court's May 24, 2007 ruling.<sup>2</sup> CP 51. The court entered Findings of Fact and Conclusions of Law from the May 24 hearing on July 26, 2007. CP 57-58. While the appeal was pending, Mr. DeClue filed notice of appeal on September 2, 2008, appealing the motion to withdraw his plea by way of findings and conclusions filed with the court on July 26, 2007. CP 151-53.

On September 18, 2008, a commissioner of this Court issued a ruling granting the State's motion on the merits and affirmed the sentence. *DeClue*, 2009 WL 597276 (Wash.App. Div. 2) at \*1. Following a motion to modify the Court Commissioner's ruling, this Court held on March 10, 2009, that the State did not breach its plea agreement by filing the April 25, 2007 probation violation, and that the court did not err in denying Mr.

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<sup>2</sup> Cause No. 36466-2-II, decided March 10, 2009 in an unpublished decision, 2009 WL 597276 (Wash.App. Div. 2).

DeClue's motion to withdraw his plea. *DeClue*, 2009 WL 597276 (Wash.App. Div. 2) at \*4. This Court remanded the matter to the trial court, however, for clarification of his sentence. *Id.*

**3. Appellant's CrR 4.2 and 7.8 motion to withdraw his *Alford* pleas.**

On March 21, 2008, Mr. DeClue, proceeding *pro se*, filed a motion to withdraw his pleas under CrR 4.2 and CrR 7.8. CP 61-112. Mr. DeClue moved to withdraw his pleas on the basis that (1) he was overcharged by the State in order to force him into accepting a plea bargain knowing that there were "clear elements of self-defense," and (2) that he was under the influence of a variety of medications while incarcerated in the Cowlitz County Jail, including Tremadol, Seroquel, BuSpar, Vicodin, and Skelaxin, that his competency was affected by the medications, and as such, he had not made a knowing, voluntary and intelligent waiver of his constitutional rights. CP 61-68.

The court heard the motion on May 8, 2008 and found that an evidentiary hearing was merited under CrR 7.8 regarding the issue of Mr. DeClue's competency at the time he entered his plea due to medications he was prescribed while in the jail. RP (May 8, 2008) at 12. The court appointed counsel to represent Mr. DeClue on the issue. RP (May 8, 2008) at 12. The court did not find that a CrR 7.8 evidentiary hearing was

warranted on the allegation of malicious prosecution. RP (May 8, 2008) at 11-12.

**4. The hearing on Mr. DeClue's motion to withdraw the pleas.**

The court heard Mr. DeClue's motion to withdraw the pleas on June 26, 2008. In support of the motion, Mr. DeClue submitted medical documentation regarding the nature and effects of Seroquel, BuSpar, Vicodin, Skelaxin, and the specific course of medications that he received in the Cowlitz County Jail. CP 73-112. Counsel did not file pleadings in addition to Mr. DeClue's original motion and attachments. The court heard testimony from eight witnesses, including Mr. DeClue.

Mr. DeClue was arrested in Oregon on July 3, 2006, and was transferred to the Cowlitz County Jail on July 7. RP (June 26, 2008 Motion Hearing) at 9. He entered *Alford* pleas to the second amended information on March 26, 2007. RP (Motion Hearing) at 9. CP 5-13. While at the Cowlitz County Jail he was prescribed numerous medications including a muscle relaxant, a narcotic pain reliever, a non-narcotic pain reliever, an anti-psychotic medication, an anti-anxiety medication, an anti-inflammatory, and decongestants. RP (Motion Hearing) at 9-10. He was prescribed Seroquel starting in January, 2007, and testified that Seroquel is prescribed for bipolar disorder and schizophrenia. RP (Motion Hearing) at

12. Sally Andrew, the supervising Registered Nurse at the Cowlitz County Jail, testified that Seroquel is an antipsychotic medication. RP (Motion Hearing) at 63. Mr. DeClue was prescribed Tramadol, a non-narcotic pain reliever, for back pain. RP (Motion Hearing) at 13, 65. He was prescribed five hundred milligrams of Vicodin, a narcotic pain reliever, to be taken three times daily. RP (Motion Hearing) at 13. He was prescribed 800 milligrams of Skelaxin, a muscle relaxer, to be taken three times daily. RP (Motion Hearing) at 13. He was given BuSpar for anxiety. RP (Motion Hearing) at 13. He was also prescribed Sudafed and anti-inflammatories including Methocarbamol, Etodolac, and Avelox. RP (Motion Hearing) at 15.

Ms. Andrew testified about the effects of the medications, which included drowsiness, and stated that when combined, the medications could exacerbate that effect. RP (Motion Hearing) at 63. She also stated that the medications could have varying effects, depending on the individual. RP (Motion Hearing) at 64.

Mr. DeClue stated that due to the effects of the medications, he had difficulty understanding his legal options, and that if he had been functioning on a normal level, he would not have entered into the plea agreement. RP (Motion Hearing) at 17. He also stated that his attorney James Morgan did not show him changes in the testimony of witnesses,

and that if had seen the changes in their anticipated testimony, he would not have pleaded guilty. RP (Motion Hearing) at 23-24.

Mr. Morgan, his attorney, said that he met with Mr. DeClue many times from July, 2006 to April, 2007, and that he did not appear to be drugged or incapable of understanding the proceedings or the offers by the State. RP (Motion Hearing) at 35, 36. Mr. Morgan stated that if he thought Mr. DeClue was having cognitive issues, he would have brought it to the court's attention. RP (Motion Hearing) at 47. He said that he did not see any cognitive issues, but that Mr. DeClue did make him aware "that he was having problems with pain management" and that "he was also having problems involving issues of depression." RP (Motion Hearing) at 47. He stated that he was aware that Mr. DeClue was taking a number of medications. RP (Motion Hearing) at 50.

Mr. DeClue's niece, Bonita Warden, testified that when she visited him in jail prior to changing his plea, he would forget what he was saying in midsentence, seemed tired all the time, and seemed to be in "a daze." RP (Motion Hearing) at 72-73. She said that he would sometimes have trouble tracking what she was saying. RP (Motion Hearing) at 73. She said that he told her it was caused by the medications. RP (Motion Hearing) at 73.

Kevin Robinson, who was in the Cowlitz County Jail with Mr. DeClue, testified that Mr. DeClue would “space out,” would forget what he was talking about, could not finish card games, and was “foggy.” RP (Motion Hearing) at 82.

Taylor Conley, who was also in the jail with Mr. DeClue, said that he slept a lot, would drift off during conversations, would forget what he was talking about, and had a short attention span. RP (Motion Hearing) at 92.

After hearing testimony, the court denied Mr. DeClue's motion to withdraw his pleas. RP (Motion Hearing) at 126.

Mr. DeClue filed notice of appeal of the court's denial of his motion on July 1, 2008. CP 139. Findings and conclusions were entered September 19, 2008. CP 157-58. Mr. DeClue filed a second notice of appeal on September 25, 2008, appealing from the findings and conclusions entered September 19 and was assigned a separate cause number.<sup>3</sup> CP 156. The cause numbers were consolidated in a letter dated October 14, 2008. This appeal follows.

#### **D. ARGUMENT**

##### **1. THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO WITHDRAW THE PLEAS WITHOUT FIRST ORDERING A**

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<sup>3</sup> Cause No. 38376-4-II.

**COMPETENCY HEARING WHICH  
COMPLIED WITH THE REQUIREMENTS  
OF RCW 10.77.060 AND STATE V.  
MARSHALL.**

Under both the state and federal due process clauses, an incompetent person may not be tried, convicted, or sentenced in a criminal case. See *In re Fleming*, 142 Wn.2d 853, 861, 16 P.3d 610 (2001); *Medina v. California*, 505 U.S. 437, 446, 112 S. Ct. 2572, 120 L. Ed. 2d 353 (1992); *Pate v. Robinson*, 383 U.S. 375, 378, 86 S. Ct. 836, 15 L. Ed. 2d 815 (1966); see RCW 10.77.050 (“[n]o incompetent person shall be tried, convicted, or sentenced for the commission of an offense so long as” their mental incapacity continues). The constitutional test for competency is whether the accused has “sufficient present ability to consult with his lawyer with a reasonable degree of understanding” and to assist in his defense with “a rational as well as factual understanding of the proceeding against him.” *Fleming*, 142 Wn.2d at 861-62 (citation omitted).

In Washington, the accused is afforded even greater protection by the competency statute, RCW 10.77. *Fleming*, 142 Wn.2d at 862. RCW 10.77.050 provides that “[n]o incompetent person may be tried, convicted, or sentenced for the commission of an offense so long as such incapacity continues.” The test for competency in Washington is whether the accused has the capacity to understand the nature of the charge and

proceedings against him and to assist in his defense. RCW 10.77.010(14); *State v. Marshall*, 144 Wn.2d 266, 279-81, 27 P.3d 192 (2001); *Fleming*, 142 Wn.2d at 862. The competency standard for pleading guilty is the same as the competency standard for standing trial. *Marshall*, 144 Wn.2d at 281; *Fleming*, 142 Wn.2d at 862.

In addition, a plea is only constitutionally valid if it is knowing, voluntary and intelligent. See *Boykin v. Alabama*, 395 U.S. 238, 243, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969), superseded in part by statute on other grounds as noted in *United States v. Gomez-Cuevas*, 917 F.2d 1521 (10 Cir. 1990); *Wood v. Morris*, 87 Wn.2d 501, 505, 554 P.2d 1032 (1976); see CrR 4.2 (requiring similar standard to be met before plea may be accepted). A defendant who is not competent cannot enter a valid plea, because any plea such a person enters is by definition not “voluntary.” *Marshall*, 144 Wn.2d at 281-82; see *State v. Osborne*, 102 Wn.2d 87, 98, 684 P.2d 683 (1984). Procedures under the competency statute are mandatory and not merely directory. *Marshall*, 144 Wn.2d at 279; *Fleming*, 142 Wn.2d at 863. When the accused is incompetent, the trial court's failure to observe these mandatory procedures constitutes a denial of due process. *Marshall*, 144 Wn.2d at 279; *Fleming*, 142 Wn.2d at 863. Thus, when there is reason to doubt the defendant's competency, the trial court must:

. . . on its own motion or on the motion of any party . . .  
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 . . .

RCW 10.77.060(1)(a); *Marshall*, 144 Wn.2d at 279.

Factors to consider in deciding whether to order a formal competency hearing include the "defendant's appearance, demeanor, conduct, personal and family history, past behavior, medical and psychiatric reports and the statements of counsel." *Fleming*, 142 Wn.2d at 863 (citation omitted). When any of these factors indicates that the defendant was incompetent at the time he entered a guilty plea, the trial court may not deny the defendant's subsequent motion to withdraw the plea without first convening the mandatory competency hearing under RCW 10.77.060. *Marshall*, 144 Wn.2d at 281.

In *Marshall, supra*, the Supreme Court addressed the requirements that apply when a defendant moves to withdraw a plea and presents evidence that he was incompetent when the plea was entered. 144 Wn.2d at 269. In that case, after initially pleading not guilty, the defendant entered a guilty plea to aggravated first-degree murder, contrary to the advice of counsel. *Id.* at 269. Prior to the entry of the plea, several people examined the defendant, including the jail's mental health professional and a doctor who was hired by the defense to examine the defendant's

competency. *Id.* at 269. At the plea hearing, the trial court even asked the defendant about his competency, although most of the questions the court asked in the plea colloquy “could be answered yes or no.” *Id.* at 269. The trial court concluded that the defendant was competent, then allowed him to read a statement he had prepared in which he apologized to the victim’s families and the court, asked for their forgiveness, and said he wanted to plead guilty despite the advice of counsel. *Id.* at 269-70. The court accepted the plea and subsequently allowed appointed counsel to withdraw. *Id.* at 269-70. Nearly two years later, the defendant moved to withdraw his plea, claiming he was not mentally competent when the plea was entered. *Id.* at 270. The trial court heard a motion to withdraw the plea, at which three experts testified in support of the defense motion. *Id.* at 270. The former defense expert who had examined the defendant prior to the entry of the plea was allowed to testify for the state, over defense objection. *Id.* at 270. That expert said, *inter alia*, that while the defendant was “mildly depressed,” that was not unusual for someone in the defendant’s situation, facing serious charges. *Id.* at 272. The expert admitted he had not known that the defendant had been previously diagnosed with a major mental health issue (paranoid schizophrenia) or that he had been treated with antipsychotic and antidepressant drugs less than three months before the plea. *Id.* at 272. In denying the motion to

withdraw the plea, the trial court found it was clear that the defendant had “impairment” but relied on its interaction with the defendant at the plea hearing and his demeanor and responses at that time. *Id.* at 273. While accepting that the defendant had “serious brain damage,” the trial court said it was not clear the impairments the defendant suffered had “anything to do with whether his plea was competent or not competent.” *Id.* at 280. On appeal, the Supreme Court held that this was error. *Id.* at 280. The Court held that the requirements of RCW 10.77.060 regarding competency were mandatory and “controlling” whenever there was “reason to doubt a defendant’s competency.” *Marshall*, 144 Wn.2d at 278. Those requirements included ordering “at least two qualified experts or professional persons. . . to examine and report upon the mental condition of the defendant.” *Id.* at 278; RCW 10.77.060. Further, the trial court was required to hold a competency hearing based upon those reports. *Marshall*, 144 Wn.2d at 278-79. The procedures of the statute were not simply guidelines but were required, the Court held, and failure to follow procedures sufficient to protect the accused’s right not to be subjected to criminal proceedings was itself a violation of due process. *Id.* at 279 (quotations omitted). In reaching its conclusion, the Supreme Court recognized that the trial court’s decision on a defense motion to withdraw a guilty plea was usually reviewed under the forgiving standard of “abuse

of discretion.” *Id.* at 281. Nevertheless, the unanimous Court held, “where a defendant moves to withdraw [a] guilty plea with evidence the defendant was incompetent when the plea was made, the trial court must either grant the motion to withdraw the guilty plea or convene a formal competency hearing required by RCW 10.77.060.” *Marshall*, 144 Wn.2d at 281. By simply holding the hearing on the motion to withdraw rather than granting the motion or convening a formal competency hearing, the Court held, the trial court had erred and reversal was required. *Id.*

In this case, the trial court similarly failed in its duties regarding Mr. DeClue’s capacity and the constitutional prohibitions regarding criminal proceedings against incompetent persons. Just as in *Marshall*, the defendant moved to withdraw the pleas with evidence he was incompetent when the pleas were made. Like *Marshall*, Mr. DeClue had engaged in a summary colloquy with the court at his guilty plea hearing and had exhibited no behavior which would warrant the judge’s concern for his competency. RP (March 26, 2007) at 5-12. As was the case in *Marshall*, at the time Mr. DeClue moved to withdraw his pleas, the court received substantial evidence suggesting Mr. DeClue’s incompetence. Mr. DeClue was taking an astonishing variety of drugs, including the narcotic painkiller Vicodin and the non-narcotic pain reliever Tremadol. These were prescribed in the jail for pain that Mr. DeClue was suffering. This

was confirmed by Mr. Morgan, who testified that he was aware that his client was having trouble with pain management and depression. RP (Motion Hearing) at 50. Mr. Morgan was aware that his client was being prescribed a large amount of drugs. RP (Motion Hearing) at 50. In addition to Vicodin and Termadol, he was prescribed BuSpar to treat anxiety. He was also taking muscle relaxants. More alarmingly, he was prescribed Seroquel, an antipsychotic medication. His attorney was aware that he was taking an enormous number of drugs, but despite all the medications his client was given while at the jail, counsel did not investigate the reason for the medications or the effect that the drugs were having on his client before and during the entry of the guilty plea. When the accused is on medication, he is deemed competent only if that medication enables him to understand the proceedings and assist in his own defense. *Fleming*, 142 Wn.2d at 862. As argued *infra*, Mr. DeClue did not receive effective assistance of counsel, and had counsel provided adequate assistance, the court would have heard substantial evidence of Mr. DeClue's incompetence before he entered the *Alford* pleas. The court then would have been required to hold a competency hearing before it accepted Mr. DeClue's pleas. *See Section 2, infra*.

It was not established that in such an altered state, Mr. DeClue would have been able to understand and assist in his defense. Having

received such substantial evidence when he moved to withdraw his plea, the trial court was required to order a competency hearing before denying Mr. DeClue's motion. As a result, under *Marshall*, the court was required to either grant the motion to withdraw or convene a formal competency hearing. But it did neither. Just as in *Marshall*, the burden was placed on the defense to show a “manifest injustice” in order to allow withdrawal of the plea. And just as in *Marshall*, while the court heard evidence regarding competency, the hearing was a motion hearing, not a competency hearing. The court did not make any formal conclusion regarding Mr. DeClue’s competency, instead finding that he had the “ability to understand the consequences of pleading guilty,” that he was not impaired by drugs or medications, that he was aware of the potential defenses available at trial, and that he was “rational, lucid, and well-informed” at the time he entered his pleas. CP 157-58. The court made no conclusion regarding competency, and merely concluded that “[t]here is no basis to allow the defendant to withdraw his guilty plea.” CP 158. Just as in *Marshall*, in this case the court’s focus was on whether the defendant’s mental impairments proved “whether his plea was competent or not competent.” *Marshall*, 144 Wn.2d at 280. Just as in *Marshall*, that focus was error.

In addition, even if the proceedings below could be deemed akin to

a competency hearing, reversal would still be required because the court failed to follow the mandatory requirements of RCW 10.77.060. The “[p]rocedures of the competency statute (chapter 10.77 RCW) are mandatory and not merely directory,” and the court is required to follow them. *Fleming*, 142 Wn.2d at 873, citing, *State v. Wicklund*, 96 Wn.2d 798, 805, 638 P.2d 1241 (1982). Under the statute, whenever there is a “reason to doubt” the defendant’s competency, the court is required to have the defendant examined by at least two experts, who must each prepare a report with particular information about the mental condition of the defendant. RCW 10.77.060(1) and (3); *Marshall*, 144 Wn.2d at 278-80.

The court did not follow the mandate that it must “appoint or request that the secretary appoint at least two qualified experts or professional persons. . . to examine and report upon the mental condition of the defendant.” RCW 10.7.060(1)(a) (emphasis added).

Because the court did not conduct a proper competency hearing as required under *Marshall* and because the mandates of RCW 10.77.060 were not followed, the court’s resulting determination that the motion to withdraw should be denied was improper. Because the court failed to do so, Mr. DeClue's pleas must be vacated and his case remanded for a competency hearing. *Marshall*, 144 Wn.2d at 281-82; cf. *Fleming*, 142

Wn.2d at 863 (the trial court did not observe or receive other evidence of Fleming's incompetence when he entered his guilty plea; nor did the court observe or receive such evidence when Fleming moved to withdraw his plea; accordingly, the court did not err in denying Fleming's motion).

Last, Mr. DeClue is entitled to the assistance of a court-appointed attorney in any proceedings initiated under the competency statute. RCW 10.77.020(1).

**2. APPELLANT WAS DENIED HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL WHEN COUNSEL DID NOT REQUEST A COMPETENCY HEARING PRIOR TO THE CHANGE OF PLEA.**

The Sixth Amendment to the United States Constitution and Const. art. 1, § 22 (amend. 10) guarantee the accused the right to effective assistance of counsel. *Kirby v. Illinois*, 406 U.S. 682, 688-89, 32 L. Ed. 2d 411, 92 S. Ct. 1877 (1972); *Heinemann v. Whitman Cy.*, 105 Wn.2d 796, 799-800, 718 P.2d 789 (1986). The accused has received ineffective assistance of counsel when "(1) counsel's performance was deficient' and (2) 'the deficient performance prejudiced the defense.'" *Fleming*, 142 Wn.2d at 865 (quoting *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). In the context of a guilty plea, counsel is ineffective when counsel fails to "actually and substantially [assist] his client in deciding whether to plead guilty, and that but for

counsel's failure to adequately advise him, he would not have pleaded guilty." *State v. Martinez-Lazo*, 100 Wn. App. 869, 876, 999 P.2d 1275 (2000).

The first prong of the ineffective assistance of counsel test requires a showing that "counsel's representation fell below an objective standard of reasonableness based on consideration of all of the circumstances." *Fleming*, 142 Wn.2d at 865-66 (quoting *State v. Thomas*, 109 Wn.2d 222, 226, 743 P.2d 816 (1987)). At a minimum, counsel must conduct a reasonable investigation that enables counsel to make an informed decision concerning the best interests of the client. *Fleming*, 142 Wn.2d at 866. The second prong of the test requires a showing that there is a "reasonable probability that, but for counsel's errors, the results of the proceeding would have been different." 142 Wn.2d at 866 (citations omitted).

As demonstrated by *Fleming*, counsel renders ineffective assistance by failing to advise the court, before the defendant enters a guilty plea, that the defendant's competency is seriously in question. Before *Fleming* entered a guilty plea, his attorneys had received two psychological evaluations suggesting *Fleming* was incompetent. *Fleming*, 142 Wn.2d at 858. One evaluation stated that *Fleming* was "psychotic at the time of" the crime, that he was "marginally incompetent" and "he was

unable to distinguish right from wrong and was incapable of appreciating the nature and quality of his conduct due to his paranoid and borderline personality characteristics, as well as his amphetamine psychosis." *Id.* at 858. The other evaluation stated that Fleming was "presently able to understand the nature and purpose of the proceedings taken against him, but [was] presently unable to cooperate in a rational manner with counsel in presenting a defense and [was] not able to prepare and conduct his own defense in a rational manner without counsel and therefore is judged presently mentally incompetent to stand trial." *Id.* at 858.

When Fleming entered his plea of guilty, defense counsel did not appraise the court of the foregoing evaluations. *Id.* at 866. Moreover, there was nothing about Fleming's behavior which would have warranted the court's concern for his competency. *Id.* at 867. Thus, the trial court accepted Fleming's guilty plea. *Id.* at 859, 863. Although subsequently, the court held a sentencing hearing and a hearing on Fleming's motion to withdraw the guilty plea, Fleming's attorneys never brought the psychological evaluations to the court's attention. *Id.* at 860, 866. It was not until Fleming filed a personal restraint petition that any court became aware of these. *Id.* at 861.

In granting Fleming's petition, the Washington Supreme Court held that "[w]hen defense counsel knows or has reason to know of a

defendant's incompetency, tactics cannot excuse the failure to raise competency at any time 'so long as such incapacity continues.' RCW 10.77.050." *Fleming*, 142 Wn.2d at 867. Accordingly, defense counsel's "failure to raise the issue of Fleming's competency was not within the realm of reasonable professional judgment." *Id.* at 866. The Supreme Court further held that counsel's performance had prejudiced Fleming because "there was a reasonable probability that but for counsel's failure to inform the court, the plea of guilty would not have been accepted while Fleming was deemed incompetent to stand trial." *Id.* at 866. Hence, the Supreme Court vacated Fleming's guilty plea and remanded his case for further proceedings. *Id.* at 867.

Likewise, before Mr. DeClue pleaded guilty, defense counsel was aware of the number of drugs that his client was being prescribed, including an antipsychotic. Nevertheless, counsel failed to further investigate and secure the necessary mental health evaluation so that he could make an informed decision concerning Mr. DeClue's competency, nor did counsel inform the court of Mr. DeClue's probable incompetence before he entered the pleas. RP (March 26, 2007) at 3-5. Instead, counsel, who acknowledged that he has no training in pharmacology, simply assumed that because he thought that Mr. DeClue "was very-well aware of what was going on" that he was competent to enter a

plea. RP (June 26, 2008) at 37. Counsel determined, on his own and without training in the field of medicine, the effects of the medications, or the effects of combining the medications, that because his client appeared to be able to understand the evidence, that he was therefore competent to enter into the plea agreement. As such, counsel's performance fell below an objective standard of reasonableness.

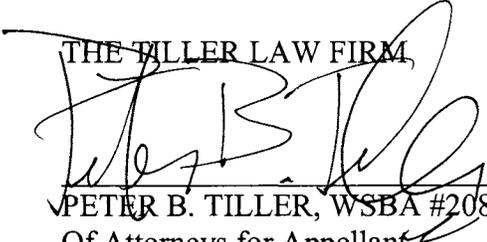
Counsel's deficient performance also prejudiced Mr. DeClue. Like Fleming, Mr. DeClue exhibited no behavior during the short colloquy at the guilty plea hearing which would have alerted the court *sua sponte* to Mr. DeClue's problems. Had defense counsel informed the court of Mr. DeClue's medication regimen, particularly the fact that he was taking a narcotic pain reliever, a non-narcotic pain reliever, and an antipsychotic drug used to treat bipolar disorder and schizophrenia, the court would have learned about the tremendous amount of medications he was being prescribed while in the jail in the months before he pleaded guilty. Having this substantial evidence, the court would have been required to order a competency hearing before accepting Mr. DeClue's guilty plea. But for counsel's error, then, the plea would not have been accepted. Consequently, Mr. DeClue's pleas must be vacated and his case remanded for a competency hearing. *Fleming*, 142 Wn.2d at 867.

**E. CONCLUSION**

For the reasons set forth above, appellant requests that this Court vacate his pleas and remand his case for a competency hearing with a court-appointed attorney.

DATED: April 17, 2009.

Respectfully submitted,

THE TILLER LAW FIRM  
  
PETER B. TILLER, WSBA #20835  
Of Attorneys for Appellant

APPENDIX  
STATUTES

***RCW 10.77.010***

**Definitions.**

As used in this chapter:

- (1) "Admission" means acceptance based on medical necessity, of a person as a patient.
- (2) "Commitment" means the determination by a court that a person should be detained for a period of either evaluation or treatment, or both, in an inpatient or a less-restrictive setting.
- (3) "Conditional release" means modification of a court-ordered commitment, which may be revoked upon violation of any of its terms.
- (4) A "criminally insane" person means any person who has been acquitted of a crime charged by reason of insanity, and thereupon found to be a substantial danger to other persons or to present a substantial likelihood of committing criminal acts jeopardizing public safety or security unless kept under further control by the court or other persons or institutions.
- (5) "Department" means the state department of social and health services.
- (6) "Designated mental health professional" has the same meaning as provided in RCW 71.05.020.
- (7) "Detention" or "detain" means the lawful confinement of a person, under the provisions of this chapter, pending evaluation.
- (8) "Developmental disabilities professional" means a person who has specialized training and three years of experience in directly treating or working with persons with developmental disabilities and is a psychiatrist or psychologist, or a social worker, and such other developmental

disabilities professionals as may be defined by rules adopted by the secretary.

(9) "Developmental disability" means the condition as defined in RCW 71A.10.020(3).

(10) "Discharge" means the termination of hospital medical authority. The commitment may remain in place, be terminated, or be amended by court order.

(11) "Furlough" means an authorized leave of absence for a resident of a state institution operated by the department designated for the custody, care, and treatment of the criminally insane, consistent with an order of conditional release from the court under this chapter, without any requirement that the resident be accompanied by, or be in the custody of, any law enforcement or institutional staff, while on such unescorted leave.

(12) "Habilitative services" means those services provided by program personnel to assist persons in acquiring and maintaining life skills and in raising their levels of physical, mental, social, and vocational functioning. Habilitative services include education, training for employment, and therapy. The habilitative process shall be undertaken with recognition of the risk to the public safety presented by the person being assisted as manifested by prior charged criminal conduct.

(13) "History of one or more violent acts" means violent acts committed during: (a) The ten-year period of time prior to the filing of criminal charges; plus (b) the amount of time equal to time spent during the ten-year period in a mental health facility or in confinement as a result of a criminal conviction.

(14) "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.

(15) "Indigent" means any person who is financially unable to obtain counsel or other necessary expert or professional services without causing substantial hardship to the person or his or her family.

(16) "Individualized service plan" means a plan prepared by a developmental disabilities professional with other professionals as a team,

for an individual with developmental disabilities, which shall state:

(a) The nature of the person's specific problems, prior charged criminal behavior, and habilitation needs;

(b) The conditions and strategies necessary to achieve the purposes of habilitation;

(c) The intermediate and long-range goals of the habilitation program, with a projected timetable for the attainment;

(d) The rationale for using this plan of habilitation to achieve those intermediate and long-range goals;

(e) The staff responsible for carrying out the plan;

(f) Where relevant in light of past criminal behavior and due consideration for public safety, the criteria for proposed movement to less-restrictive settings, criteria for proposed eventual release, and a projected possible date for release; and

(g) The type of residence immediately anticipated for the person and possible future types of residences.

(17) "Professional person" means:

(a) A psychiatrist licensed as a physician and surgeon in this state who has, in addition, completed three years of graduate training in psychiatry in a program approved by the American medical association or the American osteopathic association and is certified or eligible to be certified by the American board of psychiatry and neurology or the American osteopathic board of neurology and psychiatry;

(b) A psychologist licensed as a psychologist pursuant to chapter 18.83 RCW; or

(c) A social worker with a master's or further advanced degree from an accredited school of social work or a degree deemed equivalent under rules adopted by the secretary.

(18) "Registration records" include all the records of the department,

regional support networks, treatment facilities, and other persons providing services to the department, county departments, or facilities which identify persons who are receiving or who at any time have received services for mental illness.

(19) "Release" means legal termination of the court-ordered commitment under the provisions of this chapter.

(20) "Secretary" means the secretary of the department of social and health services or his or her designee.

(21) "Treatment" means any currently standardized medical or mental health procedure including medication.

(22) "Treatment records" include registration and all other records concerning persons who are receiving or who at any time have received services for mental illness, which are maintained by the department, by regional support networks and their staffs, and by treatment facilities. Treatment records do not include notes or records maintained for personal use by a person providing treatment services for the department, regional support networks, or a treatment facility if the notes or records are not available to others.

(23) "Violent act" means behavior that: (a)(i) Resulted in; (ii) if completed as intended would have resulted in; or (iii) was threatened to be carried out by a person who had the intent and opportunity to carry out the threat and would have resulted in, homicide, nonfatal injuries, or substantial damage to property; or (b) recklessly creates an immediate risk of serious physical injury to another person. As used in this subsection, "nonfatal injuries" means physical pain or injury, illness, or an impairment of physical condition. "Nonfatal injuries" shall be construed to be consistent with the definition of "bodily injury," as defined in RCW 9A.04.110.

[2005 c 504 § 106; 2004 c 157 § 2; 2000 c 94 § 12. Prior: 1999 c 143 § 49; 1999 c 13 § 2; 1998 c 297 § 29; 1993 c 31 § 4; 1989 c 420 § 3; 1983 c 122 § 1; 1974 ex.s. c 198 § 1; 1973 1st ex.s. c 117 § 1.]

***RCW 10.77.020***

**Rights of person under this chapter.**

(1) At any and all stages of the proceedings pursuant to this chapter, any person subject to the provisions of this chapter shall be entitled to the assistance of counsel, and if the person is indigent the court shall appoint counsel to assist him or her. A person may waive his or her right to counsel; but such waiver shall only be effective if a court makes a specific finding that he or she is or was competent to so waive. In making such findings, the court shall be guided but not limited by the following standards: Whether the person attempting to waive the assistance of counsel, does so understanding:

- (a) The nature of the charges;
- (b) The statutory offense included within them;
- (c) The range of allowable punishments thereunder;
- (d) Possible defenses to the charges and circumstances in mitigation thereof; and
- (e) All other facts essential to a broad understanding of the whole matter.

(2) Whenever any person is subjected to an examination pursuant to any provision of this chapter, he or she may retain an expert or professional person to perform an examination in his or her behalf. In the case of a person who is indigent, the court shall upon his or her request assist the person in obtaining an expert or professional person to perform an examination or participate in the hearing on his or her behalf. An expert or professional person obtained by an indigent person pursuant to the provisions of this chapter shall be compensated for his or her services out of funds of the department, in an amount determined by the secretary to be fair and reasonable.

(3) Any time the defendant is being examined by court appointed experts or professional persons pursuant to the provisions of this chapter, the defendant shall be entitled to have his or her attorney present.

(4) In a competency evaluation conducted under this chapter, the defendant may refuse to answer any question if he or she believes his or her answers may tend to incriminate him or her or form links leading to evidence of an incriminating nature.

(5) In a sanity evaluation conducted under this chapter, if a defendant refuses to answer questions or to participate in an examination conducted in response to the defendant's assertion of an insanity defense, the court shall exclude from evidence at trial any testimony or evidence from any expert or professional person obtained or retained by the defendant.

[2006 c 109 § 1; 1998 c 297 § 30; 1993 c 31 § 5; 1974 ex.s. c 198 § 2; 1973 1st ex.s. c 117 § 2.]

#### ***RCW 10.77.050***

#### **Mental incapacity as bar to proceedings.**

No incompetent person shall be tried, convicted, or sentenced for the commission of an offense so long as such incapacity continues.

[1974 ex.s. c 198 § 5; 1973 1st ex.s. c 117 § 5.]

#### ***RCW 10.77.060***

#### **Plea of not guilty due to insanity — Doubt as to competency — Examination — Bail — Report.**

(1)(a) 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. The signed order of the court shall serve as authority for the experts to be given access to all records held by any mental health, medical, educational, or correctional facility that relate to the present or past mental, emotional, or physical condition of the defendant. At least one of the experts or

professional persons appointed shall be a developmental disabilities professional if the court is advised by any party that the defendant may be developmentally disabled. Upon agreement of the parties, the court may designate one expert or professional person to conduct the examination and report on the mental condition of the defendant. For purposes of the examination, the court may order the defendant committed to a hospital or other suitably secure public or private mental health facility for a period of time necessary to complete the examination, but not to exceed fifteen days from the time of admission to the facility. If the defendant is being held in jail or other detention facility, upon agreement of the parties, the court may direct that the examination be conducted at the jail or other detention facility.

(b) When a defendant is ordered to be committed for inpatient examination under this subsection (1), the court may delay granting bail until the defendant has been evaluated for competency or sanity and appears before the court. Following the evaluation, in determining bail the court shall consider: (i) Recommendations of the expert or professional persons regarding the defendant's competency, sanity, or diminished capacity; (ii) whether the defendant has a recent history of one or more violent acts; (iii) whether the defendant has previously been acquitted by reason of insanity or found incompetent; (iv) whether it is reasonably likely the defendant will fail to appear for a future court hearing; and (v) whether the defendant is a threat to public safety.

(2) The court may direct that a qualified expert or professional person retained by or appointed for the defendant be permitted to witness the examination authorized by subsection (1) of this section, and that the defendant shall have access to all information obtained by the court appointed experts or professional persons. The defendant's expert or professional person shall have the right to file his or her own report following the guidelines of subsection (3) of this section. If the defendant is indigent, the court shall upon the request of the defendant assist him or her in obtaining an expert or professional person.

(3) The report of the examination shall include the following:

(a) A description of the nature of the examination;

(b) A diagnosis of the mental condition of the defendant;

(c) If the defendant suffers from a mental disease or defect, or is developmentally disabled, an opinion as to competency;

(d) If the defendant has indicated his or her intention to rely on the defense of insanity pursuant to RCW 10.77.030, an opinion as to the defendant's sanity at the time of the act;

(e) When directed by the court, an opinion as to the capacity of the defendant to have a particular state of mind which is an element of the offense charged;

(f) An opinion as to whether the defendant should be evaluated by a \*county designated mental health professional under chapter 71.05 RCW, and an opinion as to whether the defendant is a substantial danger to other persons, or presents a substantial likelihood of committing criminal acts jeopardizing public safety or security, unless kept under further control by the court or other persons or institutions.

(4) The secretary may execute such agreements as appropriate and necessary to implement this section.

[2004 c 9 § 1; 2000 c 74 § 1; 1998 c 297 § 34; 1989 c 420 § 4; 1974 ex.s. c 198 § 6; 1973 1st ex.s. c 117 § 6.]

## COURT RULES

### **RULE CrR 4.2**

#### **PLEAS**

- (a) **Types.** A defendant may plead not guilty, not guilty by reason of insanity, or guilty.
- (b) **Multiple Offenses.** Where the indictment or information charges two or more offenses in separate counts, the defendant shall plead separately to each.
- (c) **Pleading Insanity.** Written notice of an intention to rely on the insanity defense, and/or a claim of present incompetency to stand

trial, must be filed at the time of arraignment or within 10 days thereafter, or at such later time as the court may for good cause permit. All procedures concerning the defense of insanity or the competence of the defendant to stand trial are governed by RCW 10.77.

- (d) Voluntariness. The court shall not accept a plea of guilty, without first determining that it is made voluntarily, competently and with an understanding of the nature of the charge and the consequences of the plea. The court shall not enter a judgment upon a plea of guilty unless it is satisfied that there is a factual basis for the plea.
- (e) Agreements. If the defendant intends to plead guilty pursuant to an agreement with the prosecuting attorney, both the defendant and the prosecuting attorney shall, before the plea is entered, file with the court their understanding of the defendant's criminal history, as defined in RCW 9.94A.030. The nature of the agreement and the reasons for the agreement shall be made a part of the record at the time the plea is entered. The validity of the agreement under RCW 9.94A.090 may be determined at the same hearing at which the plea is accepted.
- (f) Withdrawal of Plea. The court shall allow a defendant to withdraw the defendant's plea of guilty whenever it appears that the withdrawal is necessary to correct a manifest injustice. If the defendant pleads guilty pursuant to a plea agreement and the court determines under RCW 9.94A.090 that the agreement is not consistent with (1) the interests of justice or (2) the prosecuting standards set forth in RCW 9.94A.430-.460, the court shall inform the defendant that the guilty plea may be withdrawn and a plea of not guilty entered. If the motion for withdrawal is made after judgment, it shall be governed by CrR 7.8.

...

## **RULE CrR 7.8**

### **RELIEF FROM JUDGMENT OR ORDER**

- (a) Clerical Mistakes. Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission

may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. Such mistakes may be so corrected before review is accepted by an appellate court, and thereafter may be corrected pursuant to RAP 7.2(e).

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud; etc. On motion and upon such terms as are just, the court may relieve a party from a final judgment, order, or proceeding for the following reasons:

(1) Mistakes, inadvertence, surprise, excusable neglect or irregularity in obtaining a judgment or order;

(2) Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under rule 7.5;

(3) Fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;

(4) The judgment is void; or

(5) Any other reason justifying relief from the operation of the judgment.

The motion shall be made within a reasonable time and for reasons (1) and (2) not more than 1 year after the judgment, order, or proceeding was entered or taken, and is further subject to RCW 10.73.090, .100, .130, and .140. A motion under section (b) does not affect the finality of the judgment or suspend its operation.

(c) Procedure on Vacation of Judgment.

(1) Motion. Application shall be made by motion stating the grounds upon which relief is asked, and supported by affidavits setting forth a concise statement of the facts or errors upon which the motion is based.

(2) Transfer to Court of Appeals. The court shall transfer a motion filed by a defendant to the Court of Appeals for consideration as a personal

restraint petition unless the court determines that the motion is not barred by RCW 10.73.090 and either (i) the defendant has made a substantial showing that he or she is entitled to relief or (ii) resolution of the motion will require a factual hearing.

(3) Order to Show Cause. If the court does not transfer the motion to the Court of Appeals, it shall enter an order fixing a time and place for hearing and directing the adverse party to appear and show cause why the relief asked for should not be granted.

[Adopted effective September 1, 1986; amended effective September 1, 1991; June 24, 2003; September 1, 2007.]

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COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON

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DEPUTY

IN THE COURT OF APPEALS  
STATE OF WASHINGTON  
DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

THOMAS W. DECLUE,

Appellant.

COURT OF APPEALS NO.  
38156-7-II

COWLITZ COUNTY NO.  
06-1-00861-5

CERTIFICATE OF MAILING

The undersigned attorney for the Appellant hereby certifies that one original Brief of Appellant was mailed by first class mail to the Court of Appeals, Division 2, and copies were mailed to Thomas W. Declue, Appellant, and Susan Baur, Cowlitz County Deputy Prosecuting Attorney, by first class mail, postage pre-paid on April 20, 2009, at the Centralia, Washington post office addressed as follows:

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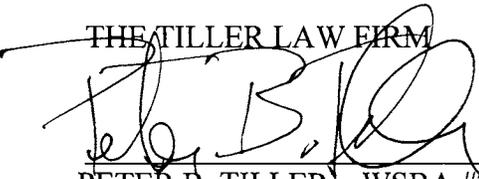
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2

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