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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

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NO. 38156-7-II
Cowlitz Co. Cause NO. 06-1-00861-5

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

STATE OF WASHINGTON,

Respondent,

v.

THOMAS DECLUE,

Appellant.

BRIEF OF RESPONDENT

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I. IDENTITY OF THE MOVING PARTY

The State of Washington, by and through the Cowlitz County Prosecuting Attorney's Office, hereafter respondent, is the moving party in this matter.

II. STATEMENT OF RELIEF SOUGHT

The respondent seeks an order, pursuant to RAP 18.14(e)(1), affirming appellant's conviction and dismissing the appeal filed by appellate defense counsel Peter Tiller. The issues presented are factual and supported by the evidence, or controlled by settled case law, and the appellant's arguments to the contrary are without merit.

III. INTRODUCTION

The appellant seeks for a second time to withdraw his guilty plea to Manslaughter in the Second Degree and Unlawful Possession of a Firearm in the First Degree. The appellant argues the trial judge erred by failing to order a competency evaluation, and that his trial counsel was ineffective for failing to notice his alleged incompetency. However, other than self-serving statements after the fact, there is no reason to doubt the appellant's competency at the time of the plea. As such, the instant appeal is without merit, and should be dismissed by this Court.

IV. STATEMENT OF THE CASE

On the 1st of July, 2006, the defendant shot Richard Shelburg with a .22 caliber pistol, killing him. The defendant then fled to the state of Oregon, where he was subsequently apprehended and charged with Murder in the 1st Degree and Unlawful Possession of a Firearm in the 1st Degree. CP 1-3.

On the 3rd of July, 2006, the Department of Corrections filed a Notice of Violation with this Court, alleging the defendant had violated the conditions of his supervision in 94-1-00006-1 by: (1) Failing to be available for contact at his reported address since July 1, 2006; (2) Consuming methamphetamine on or about June 21, 2006; and (3) Failing to pay his legal financial obligations. Later, on August 10, 2006, the Department of Corrections indicated that a fourth violation should be added alleging the defendant left the state of Washington without permission. CP 57.

Mr. James K. Morgan was appointed to defend the defendant on the murder and firearm charges, and the probation violations in the earlier case. Mr. Toby Krauel represented the State in the prosecution of the murder case. On the eve of trial, the parties reached a plea bargain. The defendant was to plead guilty to Manslaughter in the 2nd Degree and

Unlawful Possession in the 1st degree, with an agreed exceptional sentence of 120 months. CP 51, 7.

On March 26, 2007, the defendant pled guilty to an amended information charging the crimes described above. At the time he entered the plea, the bargain between the parties was stated as being an “agreed exceptional sentence of 120 months.” At no time during the change of plea hearing did Mr. Morgan, Mr. Krauel, or the defendant state the probation violations were included in the plea agreement. Notably, the probation violations were not mentioned at all on March 26. Furthermore, the Statement of Defendant on Plea of Guilty indicates that the bargain was “both parties agree to an agreed exceptional sentence of 120 mos.” CP 51, 7. This document also contains no mention of the probation violations. This document was signed by Mr. Morgan, Mr. Krauel, and the defendant. Id.

On April 6, 2007, the defendant appeared in court for his sentencing, and was sentenced to 120 months. At the beginning of this hearing, the Honorable Judge Jill Johanson asked the parties what was occurring with the pending probation violations. After some discussion between the attorneys and the defendant, the probation violations were set for a hearing. At no time did either Mr. Morgan or the defendant indicate that the probation violations were included in the plea agreement, or had

been contemplated in the negotiations. RP (April 6, 2007) at 26-27. Instead, the record clearly indicated that the parties had overlooked the probation violations during the resolution of the far more serious murder case. Id.

Subsequently, the State pursued various probation violations against the appellant. CP 58. The appellant then claimed that these violations were part of the plea bargain, and that the State was in breach. After hearing argument and reviewing the record, the Honorable Judge Jill Johanson entered a finding of fact that the probation violations were not part of the plea bargain, and that the State had not breached the agreement. RP (May 24, 2007) at 14-28. This finding was upheld on appeal by this court. See State v. DeClue, 149 Wn.App. 1017 (2009).

On June 26, 2008, the appellant appeared again before the Honorable Judge Johanson for an evidentiary hearing on his second motion to withdraw his guilty plea. The appellant contended that he had been incompetent at the time of the plea as a result of medications prescribed to him while incarcerated pending trial. RP (June 26, 2008) 6.

At this hearing, appellant testified that he took a number of medications while incarcerated, including Vicodin, Seroquel, and Buspar. The appellant claimed that these medications reduced his cognitive level from eight to four on a ten point scale. RP (June 26, 2008) 16-17. He also

testified these drugs “possibly” affected his ability to interact with other people. RP (June 26, 2008) 17. When asked on direct examination if these medications created difficulties interacting with his defense attorney or processing information, the appellant response was “Yeah, I think maybe it would have.” Id. When the questions turned to whether or not the appellant had understood the nature of his guilty plea, he became much more specific, denying that he has understood what was going on. Id. at 18.

On cross-examination, the appellant admitted that he was able to file a number of grievances with jail staff while he was being medicated. Id. at 22. The appellant further admitted that he never advised the court, during the plea or at sentencing, that he was on medications or that he did not understand the proceedings. Id. at 25.

The appellant’s trial counsel, James K. Morgan, was then called as a witness. Mr. Morgan has practiced as a criminal defense attorney since 1986, and represented the appellant for approximately eight months in 2006 and 2007. Id. at 34, 48. Mr. Morgan testified that he met with the appellant on numerous occasions while the case was pending, and that the appellant did not appear to be drugged, incapable of understanding what was going on, or in any way incompetent. Id. at 36. In fact, Mr. Morgan described the appellant as a “fairly intelligent man” who was “very well

aware” of the court proceedings against him. Id. at 36-37. Specifically,

Mr. Morgan described the appellant as:

Thomas was always, whenever I had dealings with him, he was always very sharp. I mean, he was astute. He was paying very close attention to his case. He was a fairly intelligent individual who I had no problems communicating... He knew what the program was.

Id. at 39. Mr. Morgan further stated that the appellant was following his case closely, and picked up Mr. Morgan’s advice quickly without any communication problems. Id. at 44.

Mr. Morgan stated that he would have brought the issue of competency to the trial court’s attention had he felt it was warranted, but that he saw no issues at all in that regard. Id. at 47. Finally, Mr. Morgan testified that he had met again with the appellant about two weeks before the hearing, and that the appellant’s presentation and faculties were the same as at the time of the guilty plea. Id. at 48.

Sally Andrew, a nurse at the Cowlitz County Jail, also testified regarding the appellant’s medication regime. Notably, she had interacted with the appellant prior to the hearing and, as with Mr. Morgan, found his behavior to be the same as when he was incarcerated pending trial. Id. at 66-67.

The appellant also called his niece and three other inmates he had served time with to testify regarding his purported lack of competency.

Unsurprisingly, these witnesses all claimed that the appellant appeared drugged, groggy, or otherwise impaired prior to pleading guilty. Id. 71-104. The appellant having exhausted his stock of witnesses, the State then called Sergeant Frank Hauschildt of the Cowlitz County Jail. Id. 105. Sgt. Hauschildt testified that he responded to various grievances that the appellant had filed, and spoke with him on a number of occasions. Sgt. Hauschildt never noticed the appellant appear confused, drugged, or odd in anyway. Id. at 107-110.

After hearing this testimony, Judge Johanson denied the appellant's latest motion to withdraw his plea. Judge Johanson found that the appellant was competent at the time of his plea, finding no credible evidence otherwise. Significantly, Judge Johanson found that, in her estimation, the appellant's behavior during the hearing was exactly the same as his behavior at the time of the plea. Id. at 122-127. This ruling was subsequently formalized in written findings of fact and conclusions of law. CP 157.

V. ISSUES ASSERTED ON APPEAL

i. The Trial Court Did Not Err by Failing to Order a Competency Evaluation.

The appellant argues that the trial court erred by failing to order a formal competency hearing. As this claim is based primarily on State v. Marshall, 144 Wn.2d 266, 27 P.3d 192 (2001), a close examination of the facts of that case is necessary. Marshall involved a defendant who plead guilty, against the advice of counsel, and was subsequently sentenced to death. The undisputed evidence of incompetency was that the defendant “suffered from organic brain damage leading to long-standing brain dysfunction, with significant atrophy in the temporal and frontal lobes.” 144 Wn.2d at 279-280. At a motion hearing to withdraw his guilty plea, the defendant in Marshall presented medical evidence from a neurologist, a psychologist, and a neuropsychologist. Id. at 280. Indeed, the trial court, when ruling on a different issue, found that:

[the defendant] suffers from an organic brain disease, brain atrophy, and frontal lobe damage that affects his ability to plan ahead, conceptualize the future and make reasoned decisions and has a history of psychotic illness with suicidal ideation.

Id. at 276. Nonetheless, the trial court denied the motion to withdraw the guilty plea, without ordering an actual competency evaluation as required by statute. The Supreme Court found this to be error, as there was ample

reason to doubt the defendant's competency, thus triggering the requirement for a competency hearing under RCW 10.77.060. Id. at 281-282.

Unlike the court in Marshall, the trial court in this case was not presented with "undisputed evidence of incompetency." Instead, the trial court was presented with vague and self-serving statements from the appellant and a number of his criminal acquaintances. The appellant testified that his medications "possibly" affected him, while his fellow inmates merely stated that he would appear drowsy and out of sorts. This does not approach the sort of grievous evidence of incompetency presented in Marshall. The appellant argues at length that the number of medications prescribed to the appellant somehow automatically placed his competency at issue, but offers no authority, in law or medicine, for this claim.

In order to trigger the requirement to hold a competency hearing, the trial court must have "reason to doubt the defendant's competency." RCW 10.77.060(1)(a). The filing of a competency motion is not of itself sufficient to raise a doubt as to competency. State v. Lord, 117 Wn.2d 829, 901, 822 P.2d 177 (1991); see also United State v. McEachern, 465 F.2d 833, 837 (5th Cir. 1972). Instead, it is the defendant's burden to establish sufficient reasons to doubt his competency. Lord, 117 Wn.2d at 901-904.

Here, the appellant failed to establish any reason to doubt his competency sufficient to trigger the requirements of RCW 10.77.060, and instead offered only vague and conclusory testimony. As such, the trial court did not err but instead properly denied the appellant second attempt to withdraw his guilty plea.

ii. Trial Counsel Was Not Ineffective, as There Was Nothing to Indicate the Appellant was Incompetent.

The appellant argues that trial counsel's performance fell below the standard guaranteed by the constitutions of the United States and the State of Washington. To prove this claim, the appellant must show that (1) trial counsel's performance was deficient and (2) this deficiency prejudiced him. State v. Thomas, 109 Wn.2d 222, 225-226, 743 P.2d 816 (1987). Counsel's performance becomes deficient when it falls below an "objective standard of reasonableness." State v. Stenson, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997). There is a strong presumption that trial counsel's conduct fell within the wide range of reasonable professional assistance. In re Personal Restraint of Pirtle, 136 Wn.2d 467, 487, 965 P.2d 593 (1998).

Thus, to prevail on this claim, the appellant must show that he was indeed incompetent and that Mr. Morgan, his trial counsel, should have

noticed this and brought it to the court's attention. As discussed above, there has been absolutely no showing that the appellant was in fact incompetent. Furthermore, Mr. Morgan testified that, rather than appearing incompetent, the appellant actually presented being:

he was always very sharp. I mean, he was astute. He was paying very close attention to his case. He was a fairly intelligent individual who I had no problems communicating... He knew what the program was.

RP (June 26, 2008) at 39. The appellant claims that Mr. Morgan should have requested a competency evaluation simply due to the number and type of medications he was prescribed. However, as with the argument regarding competency, the appellant offers no authority to support to the claim that an attorney must demand a competency evaluation whenever his client is taking certain medications.

Instead, the record clearly shows that Mr. Morgan saw no reason to question the appellant's competency. This testimony strongly suggests that the appellant's claimed incompetency has been manufactured after the fact in order to escape the plea bargain he entered into. See Seattle v. Gordon, 39 Wn.App. 437, 442, 693 P.2d 741 (1985) (in determining whether to order an evaluation, considerable weight should be given to an attorney's opinion of his client's competency). Considering Mr. Morgan's testimony, there has been no showing that his performance was in any way deficient.

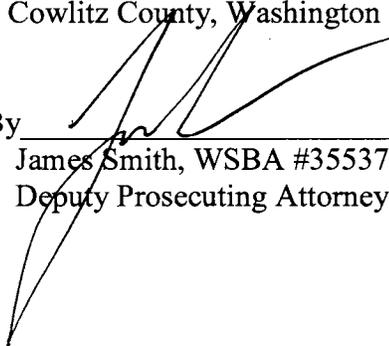
The appellant cites extensively to In re Fleming, 142 Wn.2d 853, 16 P.3d 610 (2001) in support of his argument. However, Fleming is immediately distinguishable, as the defendant in that case had been found incompetent by defense expert prior to pleading guilty. 142 Wn.2d at 863. Unsurprisingly, the Supreme Court found trial counsel was ineffective for failing to present this evidence to the trial court prior to the plea. Id. at 864. Here, the appellant was never found incompetent by any expert, and in fact appeared highly competent to Mr. Morgan. Given this record, the Court should reject the appellant's argument, as it is without merit.

VI. CONCLUSION

Based on the preceding argument, the appellant's alleged errors are without basis in fact or law. As these claims are without merit, the Court should dismiss this appeal pursuant to RAP 18.14(e)(1).

Respectfully submitted this 16th day of December, 2009.

Susan I. Baur
Prosecuting Attorney
Cowlitz County, Washington

By 
James Smith, WSBA #35537
Deputy Prosecuting Attorney

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DIVISION II

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CERTIFICATE OF
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DIVISION II

I, Michelle Sasser, certify and declare:

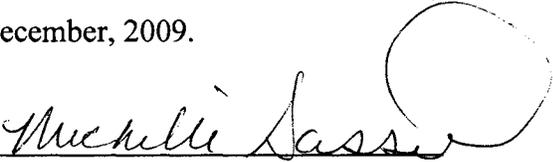
That on the 16th day of December, 2009, I deposited in the mails
of the United States Postal Service, first class mail, a properly stamped
and address envelope, containing Brief of Respondent addressed to the
following parties:

Mr. Peter Tiller
Attorney at Law
P.O. Box 58
Centralia, WA 98531-0058

Court of Appeals, Clerk
950 Broadway, Suite 300
Tacoma, WA 98402

I certify under penalty of perjury pursuant to the laws of the State
of Washington that the foregoing is true and correct.

Dated this 16th day of December, 2009.


Michelle Sasser