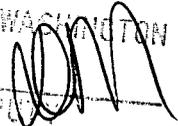


FILED  
COURT OF APPEALS  
DIVISION II

2017 MAY -9 AM 10:43

No. 49099-4-II

STATE OF WASHINGTON  
BY  DEPUTY

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

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STATE OF WASHINGTON,

Respondent,

v.

MICHAEL STEPHEN BOUGARD,

Appellant.

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

The Honorable Katherine M. Stolz

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REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY<sup>1</sup>

1. REVERSAL IS REQUIRED BECAUSE THE TRIAL COURT ABUSED ITS DISCRETION IN FAILING TO ORDER AN EVALUATION OF BOUGARD'S COMPETENCY TO STAND TRIAL IN VIOLATION OF HIS RIGHT TO DUE PROCESS.

First and foremost, a clarification is necessary because throughout its brief, the State refers to “the trial court” and “defense counsel” where there were three different judges and two different defense attorneys. Judge Jack Nevin held competency hearings on July 28, 2015 and December 2, 2015. 07/28/15 RP 2-3; 12/02/15 RP 4-6. Judge James Orlando held a pretrial hearing on April 13, 2016. 04/13/16 RP 2-12. Judge Katherine Stolz presided over the trial. RP 3. Defense attorney David Shaw represented Bougard at the competency hearings. 07/28/15 RP 2; 12/02/15 RP 5. Defense attorney Kent Underwood represented Bougard at the pretrial hearing and trial. 04/13/16 RP 1-2; RP 1, 3.

The State argues that the trial court reviewed the forensic mental health report and heard from defense counsel at the competency hearing in finding Bougard competent to proceed to trial and therefore “[i]t follows then, that the trial court considered this information in not ordering another competency evaluation during trial.” Brief of Respondent at 5. Judge Stolz

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<sup>1</sup> The verbatim report of proceedings are referred to by dates: 07/28/15 RP; 12/02/15 RP; 04/13/16 RP; and trial proceedings by RP and page number.

was not the judge and Underwood was not Bougard's attorney during the competency hearings. There is nothing in the record that reflects that Judge Stolz considered the forensic mental health reports in not ordering a competency evaluation during trial.

The State argues further that "[t]he information available to the trial court also indicated defendant possessed the ability to assist in his own defense, he simply chose not to," quoting Bougard's disparaging statements about his attorney in the forensic mental health report. Brief of Respondent at 6. The State's reliance on Bougard's comments in the report is misplaced because Underwood was not Bougard's attorney at the time of the evaluation. The State also relies on Bougard's statements at sentencing which clearly have no bearing on whether he was competent to stand trial. Brief of Respondent at 6, citing 6/24/16 RP 319, 323.

Without citing to the record, the State claims that "[d]efense counsel expressed to the trial court confidence in defendant's ability to assist in his own defense." Nothing in the record reflects that Shaw or Underwood expressed "confidence in [Bougard's] ability to assist in his own defense." The State argues that "[c]onsiderable weight should be given to defense counsel's opinion regarding his client's competency," citing *State v. Woods*, 143 Wn.2d 561, 605, 23 P.3d 1046 (2001). Brief of Respondent at 6-7. Accurately stated, the Court in *Woods* observed that although "considerable

weight” should be given to defense counsel’s opinion regarding his client’s competency, “that opinion is not necessarily dispositive.” *Woods*, 143 Wn.2d at 605. “Instead, the ultimate question for the trial court is whether there is a factual basis to doubt the defendant’s competence.” *Id.* Contrary to the State’s argument, the record substantiates that there was a factual basis to doubt Bougard’s competence. *See* Appellant’s Brief at 8-11.

The State incorrectly claims that appellant quoted a portion of defense counsel’s statements to the court “to further the argument that incompetency was apparent.” The State cites appellant’s brief at 5, which is appellant’s Statement of Facts, not argument. Brief of Respondent at 7. The State then quotes Underwood’s statements where he brought to the court’s attention that Bougard complained to a guard that he did not like Underwood putting his hand on his shoulder in front of the jury during voir dire. Underwood stated that shows Bougard “does have the ability to object and to voice his opinion and has done so.” RP 216-17. The State argues that the record supports an inference that there was no change in Bougard’s competency, as demonstrated by defense counsel’s statements. Brief of Respondent at 8. The State’s argument defies logic where no reasonable attorney or reasonable judge would be convinced that just because Bougard has the ability to object to being physically touched, he is mentally competent to stand trial. Bougard’s reaction to Underwood placing his

hands on him does not support a logical inference that he understood the nature of the proceedings against him and was capable of assisting in his defense. Notably, Underwood assigned error to the finding of competency in his Motion and Declaration for Order Authorizing Defendant to Seek Review at Public Expense. CP 200.

The State additionally argues that “[a] defendant may choose to dress in jail clothes as a trial tactic; it is not necessarily an indication of incompetence.” Brief of Respondent at 8, citing *State v. Caver*, 195 Wn. App. 774, 783, 381 P.3d 191 (2016) and *Felts v. Estelle*, 875 F.2d 785, 786 (9<sup>th</sup> Cir. 1989). Brief of Respondent at 8. The State mistakenly relies on *Caver* and *Felts*, which are distinguishable because those cases do not involve the issue of whether the defendant is competent to stand trial. However, the Court in *Caver* recognized that appearing for trial in prison clothes is “inherently prejudicial” and a trial court does not abuse its discretion in ordering a defendant to wear civilian clothes at trial. *Caver*, 195 Wn. App. 774, 780-83.

In light of Bougard’s irrational behavior of wearing jail clothes and not responding or assisting in his defense throughout the trial, reversal is required because the trial court abused its discretion in failing to order a competency evaluation in violation of Bougard’s right to due process.

2. REVERSAL IS REQUIRED BECAUSE BOUGARD WAS DEPRIVED OF HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL WHERE DEFENSE COUNSEL FAILED TO SEEK A COMPETENCY EVALUATION IN VIOLATION OF HIS RIGHT TO DUE PROCESS.

First and foremost, the State's claim that appellant argues that defense counsel was ineffective because he failed to pursue a diminished capacity defense mischaracterizes appellant's argument. As clearly stated in appellant's brief, defense counsel's performance was deficient in failing to move for a competency evaluation and Bougard was prejudiced by counsel's deficient performance. *See* Brief of Appellant at 12-15. Consequently, the State's argument that defense counsel's decision not to pursue a diminished capacity defense was strategic and the record does not show that such a defense would have succeeded is irrelevant. Brief of Respondent at 12-16. In inventing an argument that appellant never advanced, the State misrepresents appellant's actual arguments. The State claims:

- a. Defendant suggests he was prejudiced by defense counsel's failure to move for another competency hearing, "regardless of the fact that the evaluation concluded Bougard was competent," because defendant was preventing counsel from pursuing a diminished capacity defense.

Brief of Respondent at 13, citing Brief of Appellant at 13-14.

Appellant actually argued that the record reflects that defense counsel was aware of past concerns about Bougard's mental condition and in light of Bougard's irrational behavior at trial, his representation was deficient in failing to bring Bougard's mental history to the court's attention and move for an evaluation of Bougard's present competency to stand trial. Brief of Appellant at 13-14.

- b. Defendant quotes defense counsel's statement to the court during trial that "there has been no expert who has evaluated him," in support of his argument that his lack of participation in evaluations precluded a diminished capacity defense. . . . The inference that defendant had not been evaluated, thereby precluded a diminished capacity defense, is misleading and inaccurate.

Brief of Respondent at 14-15, citing Brief of Appellant at 13.

A review of appellant's actual argument reveals that appellant never argued that he was prejudiced because he was precluded from raising a diminished capacity defense. Brief of Appellant at 13-15.

The State's remaining argument misstates the record. The State claims "defense counsel conveyed to the trial court confidence in defendant's competency during trial and lacked any professional opinion indicating defendant was incompetent." Brief of Respondent at 10, citing 12/2/15 RP 5; 5/24/16 RP 126-17. The record reflects that David Shaw, who was not Bougard's trial counsel, made the following statement at Bougard's competency hearing:

I received a copy today from Dr. Ray Hendrickson at Western State Hospital, and he has found that Mr. Bougard at this time is competent. I don't have any professional opinion to the contrary. I will, therefore, as I have signed off as to form, an order finding Mr. Bougard competent.

12/2/15 RP 5.

Shaw did not say he had "confidence" in Bougard's competency but stated that Bougard was found competent "at this time" and he had no opinion to the contrary. However, on December 29, 2015, Shaw obtained an order for an independent expert to examine Bougard's competency to stand trial but the record contains no report. CP 46-47.

The State argues further that the trial court had the forensic mental health report available and relied upon it and therefore "[d]efendant has failed to show how choosing not to reiterate information already known to the trial court was unreasonable." Brief of Respondent at 11-12. To the contrary, there is nothing in the record to substantiate that Judge Stolz relied upon or even reviewed the previous forensic mental health reports.

The State additionally argues that "[d]efense counsel is not obliged to raise every conceivable issue, however frivolous or inconsequential," citing *State v. Lottie*, Wn. App. 651, 644 P.2d 707 (1982). Brief of Respondent at 10-11. In *Lottie*, because there was no evidence to support an involuntary intoxication defense, the Court held that defense counsel acted reasonably in refusing to present a defense not warranted by

demonstrable facts. *Lottie*, Wn. App. at 654-55. Unlike in *Lottie*, the record establishes demonstrable facts that defense counsel's representation was ineffective in failing to move for a competency evaluation. Ensuring that Bougard is competent to stand trial, as due process requires, is not frivolous or inconsequential.

Reversal is required where there is no tactical or strategic reason for failing to seek a competency evaluation and consequently allowing Bougard to proceed in an unconstitutional trial. *Medina v. California*, 505 U.S 437, 439, 112 S. Ct. 2572, 120 L. Ed. 2d 353 (1992)(it is well established that due process prohibits the criminal prosecution of a person not competent to stand trial).

B. CONCLUSION

For the reasons stated here, and in appellant's opening brief, this Court should reverse Mr. Bougard's conviction.

Furthermore, in light of no evidence provided to this Court, and no findings by the trial court, that Mr. Bougard's financial condition has improved or is likely to improve, this Court should advise the commissioner not to award costs if the State substantially prevails on appeal pursuant to the recently amended provisions of RAP 14.2.

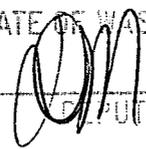
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DATED this 8<sup>th</sup> day of May, 2017.

STATE OF WASHINGTON

Respectfully submitted,

BY  DEPUTY

/s/ Valerie Marushige  
VALERIE MARUSHIGE  
WSBA No. 25851  
Attorney for Appellant, Michael Stephen Bougard

**DECLARATION OF SERVICE**

On this day, the undersigned sent by email, a copy of the document to which this declaration is attached to the Pierce County Prosecutor's Office at [pcpatcecf@co.pierce.wa.us](mailto:pcpatcecf@co.pierce.wa.us).

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

DATED this 8<sup>th</sup> day of May, 2017.

/s/ Valerie Marushige  
VALERIE MARUSHIGE  
Attorney at Law  
WSBA No. 25851